

Power Grid Corporation of India Ltd. Vs. Madhya Pradesh Power Transmission Company Ltd. & Ors.

Civil Appeal No. 6847 of 2025 arising from SLP (C) No. 7605 of 2021 · Supreme Court of India · 2025-05-15 · J. B. Pardiwala · R. Mahadevan · F2J-C-1488

Full judgment text

Power Grid Corporation of India Ltd. Vs. Madhya Pradesh Power Transmission Company Ltd. & Ors.

[Civil Appeal No. 6847 of 2025 arising from SLP (C) No. 7605 of 2021]

[Civil Appeal No. 6848 of 2025 arising from SLP (C) No. 7607 of 2021]

J.B. Pardiwala, J.

For the convenience of exposition, this judgment is divided into the following parts:

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1. Leave granted.

2. Since the issues raised in both the captioned appeals are the same, those were taken up for hearing analogously and are being disposed by this common judgment and order.

3. These appeals arise from the Judgment and Order passed by the High Court of Madhya Pradesh, Indore Bench dated 25.02.2021, in Writ Petition No. 10845 of 2020 and Writ Petition No. 9136 of 2020 respectively, by which the High Court admitted the writ petitions filed by the Madhya Pradesh Power Transmission Company Limited ("MPPTCL") on the ground that the Central Electricity Regulatory Commission (the "CERC") had exercised powers beyond those vested in it as per the regulations under the Electricity Act, 2003 (the "Act, 2003") in passing the orders dated 21.01.2020 and 27.01.2020 in Petition No. 311/TT/2018 and Petition No. 266/TT/2018 respectively.

A. FACTUAL MATRIX

4. The appellant herein is a Government of India Undertaking constituted for the purpose of undertaking inter-state transmission of electricity. In other words, the scope of work of the appellant includes inter alia, establishing and operating transmission lines, sub-stations and other transmission assets associated with inter-State transmission of power. These include 'bays' and inter-connecting 'transformers' at sub-stations to provide inter-connection facilities. By virtue of being a central transmission utility, the appellant is a deemed transmission licensee in terms of Section 38 of the Act, 2003. The respondent no. 1 herein is the State Transmission Utility and intra-state transmission licensee in the State of Madhya Pradesh.

5. The case on hand pertains to a dispute between the appellant and respondent no. 1 in respect of the implementation of the "Western Region System Strengthening Scheme XIV (WRSS-XIV) and Western Region Strengthening Scheme XVI (WRSS-XVI)" respectively by the appellant. The transmission assets were implemented by the appellant at the Indore sub-station upon the specific request of the respondent no. 1. In this regard, the parties planned and approved the WRSS-XIV in its 37th Standing Committee Meeting on Power System Planning of Western Region held on 05.09.2014 and WRSS-XVI in the 38th Standing Committee Meeting for the Western Region on 17.07.2015.

6. According to the agreement between the parties, the respondent no. 1 was required to construct and commission the intra-state transmission line from Indore sub-station coinciding with the timeline of completion of works which were within the scope of the appellant. However, the construction and commissioning of the intra-state transmission line by respondent no. 1 was delayed. Such delay constrained the appellant to file Petition No. 311/TT/2018 and Petition No. 266/TT/2018 corresponding to WRSS-XIV and WRSS-XVI respectively, before the CERC for (i) approval of the Commercial Operation Date (the "COD") of its transmission system, under Regulation 4(3) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (the "2014 Tariff Regulations"), and (ii) determination of transmission charges and billing of the tariff for the transmission facilities established by it at the Indore sub-station.

7. The CERC vide its order dated 21.01.2020, observed, inter alia, that as per the investment approval accorded to the transmission scheme on 27.01.2016, the assets were scheduled to be commissioned within 30 months from the date of investment approval. Accordingly, the scheduled COD came to be 27.07.2018. However, the commissioning of such assets was delayed thereby compelling the appellant to file a petition for approval of COD under Regulation 4(3) of the 2014 Tariff Regulations. The details of the transmission assets are as follow:

Asset

Description

Scheduled COD

Proposed COD as per Regulation 4(3)(ii)

Date of active power flow

Timeoverrun / Delay

Asset-1 1 x 500 MVA, 400/220 kV ICT-2 along with associated transformer bays and 2 no. 220kV line bays at 400/220 kV Indore substation. 27.07.2018 02.09.2018 10.12.2018 37 days

Asset-2 2 no. 220 kV line bays at 400/220 kV Indore substation. 27.07.2018 02.09.2018 12.12.2018 37 days

Asset-3 1 x 500 MVA, 400/220 kV ICT-1 along with associated transformer bays at 400/220 kV Indore substation. 27.07.2018 14.10.2018 10.12.2018 79 days

Asset-4 1 no. 220 kV line bays at 400/220 kV Indore substation. 27.07.2018 14.10.2018 - 79 days

Asset-5 1 no. 220 kV line bay at 400/220 kV Indore substation. 27.07.2018 05.12.2018 - 131 days

8. As regards the specific issue of time-overrun, the order dated 21.01.2020 passed by the CERC noted that the appellant herein had attributed the entire time-overrun in case of the instant assets to the respondent no. 1 who delayed the commissioning of the downstream intra-state assets that were supposed to be operational at the same time as the transmission assets to be commissioned by the appellant.

Even though the CERC approved the COD proposed by the appellant under Regulation 4(3)(ii), yet it did not condone the time-overrun on account of matching the commissioning of the inter-state transmission assets in question with the downstream network of respondent no. 1, on the ground that it was the decision of the appellant to coordinate and match the commissioning dates of both categories of assets. However, the CERC allowed the appellant to claim compensation for the period prior to the COD as determined under Regulation 4(3)(ii), by way of liquidated damages, interest

during construction and incidental expenses incurred during construction.

It was held that the transmission charges in case of all the assets as enumerated above would be borne by the respondent no. 1 from the COD determined under Regulation 4(3)(ii) upto one day before actual charging of downstream system. It is pertinent to note that the CERC did not allow compensation from the Scheduled COD upto the newly determined COD as the delay in that case was not condoned.

9. Aggrieved by the aforesaid order of the CERC, the respondent no. 1 challenged the same by way of a writ petition before the High Court on the following grounds:

(i) There is no provision in the 2014 Tariff Regulations under which compensatory transmission charges could be levied on the respondent no. 1 by the CERC and therefore, the CERC fell into grave jurisdictional error by holding that the appellant could claim compensation from the respondent no. 1.

(ii) Further, the agreement between the parties was recorded in the minutes of the 37th and 38th meetings of the Standing Committee held on 05.09.2014 and 17.07.2015 respectively. Such agreement contains no terms and conditions as regards the recovery of compensation from the respondent no. 1. Therefore, the CERC, by granting liberty to the appellant to claim compensation from the respondent no. 1 has effectively re-written the terms and conditions of the agreement between the parties.

(iii) The bill dated 08.06.2020 raised by the appellant for the payment of Rs. 6.18 crore, in consequence of the order of the CERC dated 21.01.2020 and 27.01.2020 respectively, is illegal and not in accordance with either the 2014 Tariff Regulations or the terms of agreement between the parties.

10. On the other hand, the appellant claimed before the High Court that the issue raised by the respondent no. 1 by way of the writ petition was not that the CERC did not have jurisdiction at all. The challenge was to the exercise of jurisdiction by the CERC which was not permissible in light of the alternative remedy available to the respondent no. 1 in terms of Section 111 of the Act, 2003.

B. IMPUGNED ORDER

11. The High Court vide its judgment and order dated 25.02.2021, recorded the following submissions of the respondent no. 1:

i. The respondent no. 1 herein relied on this Court's decision in PTC India Limited v. Central Electricity Regulatory Commission reported in (2010) 4 SCC 603 to submit that the decision of the CERC must be in conformity with the Regulations enacted under Section 178 of the Act, 2003 wherever such regulations are applicable. Therefore, the measures taken by the CERC under Section 79(1) are required to be in conformity with the Regulations under Section 178.

ii. It was further submitted that a regulation under Section 178 is made under the authority of delegated legislation and consequently, its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity (the "APTEL") under Section 111 of the Act, 2003.

iii. It was submitted that the order of the CERC levying compensatory transmission charges on the respondent no. 1 was not in conformity with the 2014 Tariff Regulations enacted under Section 178 of the Act, 2003 and was beyond the scope of the said Regulations. Therefore, the said order was passed without any jurisdiction and hence, was being assailed before the High Court without availing the statutory alternative remedy.

iv. Further, the APTEL had already addressed a similar question in Nuclear Power Corporation of India Limited. v. Central Electricity Regulatory Commission & Ors. reported in 2019 SCC OnLine APTEL 83 wherein it was held as under:

"10.5 Accordingly, in absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory powers has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No.2 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order(s) the Central Commission has laid down the principles of payment of transmission charges in such an eventuality. However, it is felt that the Central Commission in the impugned Order has abruptly concluded the payment liability on the Appellant just

by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to clarify the same."

The respondent no. 1 submitted that the APTEL had taken a peculiar view of the matter. Although the CERC exercises twin powers of adjudication and regulation, yet the fact remains that the regulatory power cannot be exercised by way of a judicial order. Since APTEL took a contrary view on the issues at hand, the respondent no. 1 was of the view that no useful purpose would be served by filing an appeal under Section 111. v. Since the orders of the CERC were in the nature of regulations as per the averments of the appellant, the vires of the same could only be questioned before the High Court and not before the APTEL in terms of this Court's dictum in *Whirlpool Corporation v. Registrar of Trademarks* reported in (1998) 8 SCC 1 wherein it has been held that despite the availability of an alternative remedy, a writ petition can be entertained in the following cases:

- a) Where principles of natural justice are breached,
- b) Where fundamental rights are sought to be enforced or breach thereof is complained of,
- c) Where the impugned order is passed by an authority without jurisdiction,
- d) Where the constitutionality of any provision is called in question.

12. Having heard the parties, the High Court affirmed that despite the availability of an alternative remedy, a writ petition can be entertained if any of the factors mentioned in *Whirlpool* (supra) are satisfied. Since the respondent no. 1 had challenged the constitutionality of the orders of the CERC dated 21.01.2020 and 27.01.2020 respectively, on the grounds that the power exercised by the CERC was beyond the powers vested in it as per the relevant regulation and that the relief granted to the appellant was beyond the reliefs prayed for, the High Court was of the opinion that the principles of natural justice were breached. Therefore, despite the availability of an alternative remedy, the writ petition deserved to be entertained. Having held so, the High Court admitted the writ petition for hearing on merits. The relevant portion of the impugned order is reproduced below:

"[13] This is trite that despite availability of alternative remedy, a writ petition can be entertained if any of the factors mentioned in the judgment of *Whirlpool* (supra) are satisfied. In the instant case, the petitioner has challenged the constitutionality of the orders. Even if it is challenged by way of amendment, once amendment is allowed it will relate back to the original date of filing of writ petitions. Petitioner has also challenged the orders by contending that power exercised by the Commission was beyond the powers vested in it as per relevant regulation. The relief granted was beyond the relief prayed for. Hence, principles of natural justice were breached. In our view, in a case of this nature despite availability of alternative remedy, the writ petition can be entertained. [14] Resultantly, the objection regarding alternative remedy is over ruled. The petition is admitted for hearing."

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

13. Mr. M.G. Ramachandran, the learned senior counsel appearing on behalf of the appellant, submitted that the orders dated 21.01.2020 and 27.01.2020 respectively were passed by the CERC under Sections 62 and 79 of the Act, 2003 respectively. Section 111 of the Act, 2003 provides for regular first appeal on both questions of fact and law to the APTEL which is an expert body specially constituted as per the recommendations of this Court in *West Bengal Electricity Regulatory Commission v. CESC Limited* reported in (2002) 8 SCC 715. A second appeal to this Court is allowed under Section 125 of the Act, 2003 for the purpose of adjudication of substantial questions of law.

14. He submitted that the Act, 2003 is an exhaustive and self-contained complete code on all matters concerning electricity including generation, distribution, trading and transmission of electricity. The Act, 2003 provides for tariff fixation by the CERC under Section 62. Since determination of tariff is a quasijudicial function, the same has been made appealable to the APTEL. The learned counsel relied upon this Court's decision in *PTC India* (supra) to submit that the only exclusion to the scope of the appellate remedies provided under the Act, 2003 is that the statutory regulations notified by the CERC under Section 178 cannot be challenged in appeal before the APTEL. The APTEL, therefore, cannot rule on the vires of a regulation formulated by the CERC but there is no bar on it to interpret such regulations.

15. Therefore, a writ petition before the High Court cannot be maintained when an efficacious alternative remedy was available to the respondent. The learned counsel relied on this Court's

judgment in Jaipur Vidyut Vitran Nigam Limited v. MB Power (Madhya Pradesh) Limited reported in (2024) 8 SCC 513 and GRIDCO v. Western Electricity Supply Co. of Orissa Ltd. reported in (2024) 2 SCC 500 to fortify his submission in this regard. He also contended that as per this Court's dictum in Titaghur Paper Mills Co. Ltd. v. State of Orissa reported in (1983) 2 SCC 433, Nivedita Sharma v. Cellular Operators Association of India reported in (2011) 14 SCC 337 and U.P. Jal Nigam & Anr. v. Nareshwar Sahai Mathur & Anr. reported in (1995) 1 SCC 21, where statutory tribunal or statutory remedies are in place, a writ petition should not ordinarily be entertained at other fora.

16. It is the case of the appellant that the respondent has not challenged any regulation or provision of the Act, 2003 and has only challenged the orders dated 21.01.2020 and 27.01.2020 respectively passed by the CERC which in ordinary circumstances may be appealed under Section 111 of the Act, 2003.

17. In the case on hand, no issue of constitutionality of the order arises as the conditions prescribed in this Court's judgment in Whirlpool (supra), for exercise of writ jurisdiction are fulfilled. The learned counsel submitted that there is no violation of principles of natural justice as the respondent was duly served. Further, no issue as regards the defect in jurisdiction of the CERC was raised before that forum in the first instance.

18. Mr. Ramachandran submitted that it was not the case of the respondent that the CERC had acted wholly without jurisdiction. The respondent has admitted that in terms of Section 62 and Section 79(1)(c) and (d) of the Act, 2003, the CERC undoubtedly and undisputedly has the function and the jurisdiction to deal with inter-state transmission, determination of transmission charges and the sharing thereof. The orders dated 21.01.2020 and 27.01.2020 respectively passed by the CERC had been challenged by the respondent only on one consideration that is, the correctness of the decision holding the respondent liable for transmission charges. It is the case of the appellant that the APTEL is competent to decide such issues.

19. The learned counsel further submitted that the respondent had intentionally not approached the APTEL with a view to escape the decision rendered by it in a similar set of facts wherein the liability of payment of transmission charges was imposed on the generating company in the event of delay in commissioning of downstream assets by it. It was submitted that the writ petition was filed by the respondent to avoid the binding decision of the APTEL in Nuclear Power Corporation (supra).

20. Mr. Ramachandran also highlighted the consequences of entertaining writ petitions against the orders of the CERC. He submitted that there are multiple beneficiaries in an inter-state transmission system. Owing to the nature of electricity transmission systems that span across states, it is possible that an identical issue relating to the same transmission system may be challenged before multiple High Courts resulting in multiplicity of decisions as well as a higher chance of conflict between different decisions for the same transmission assets.

He brought to our notice that the respondent no. 4 herein that is, Maharashtra State Electricity Transmission Corporation Limited ("MSETCL"), who is one another beneficiary of the transmission system established by the appellant, has filed an appeal under Section 111 of the Act, 2003 before the APTEL bearing DFR No. 414 of 2024 challenging the order dated 27.01.2020 passed by the CERC, which is the very same order that has been challenged by the respondent no. 1 herein before the High Court of Madhya Pradesh by way of a writ petition.

21. The learned counsel submitted that the delay on the part of the respondent no. 1 in bringing up the intra-state system cannot lead to deprive the appellant of the charges for its inter-state system. We were informed that as on 23.11.2024, the principal amount due and outstanding was approximately Rs. 16.86 crore along with the late payment surcharge.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

22. Mr. Prashant Singh, the learned Advocate General of the State of Madhya Pradesh appearing on behalf of the respondent no. 1, submitted that the present appeal is directed against an interim order of admission of the writ petition passed by the High Court and the same does not warrant any interference by this Court.

23. The learned counsel submitted that the orders dated 21.01.2020 and 27.01.2020 respectively passed by the CERC, wherein the liability of payment of transmission charges from 11.01.2019 till the downstream transmission assets achieve their Commercial Operation Date, are beyond its jurisdiction

and violative of the rights of the respondents. It was submitted that no statutory authority or tribunal can assume jurisdiction in respect of a subject matter which the statute does not confer on such authority/tribunal. In the circumstance that a tribunal erroneously decides a fact in which the question of the jurisdiction depends, then in that case, the order passed thereby stands vitiated.

24. Mr. Singh further submitted that the powers of the High Court are wide and unlimited, therefore, the availability of an alternate remedy is not an absolute bar under Article 226. It is the case of the respondents that as per the dictum of this Court in *Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill* reported in (2012) 2 SCC 108, if the exercise of jurisdiction by a tribunal ex facie appears to be in futility, then the High Court would be justified to interfere with the order of the tribunal under Article 226. He also relied upon this Court's decision in *Maharashtra Chess Assn. v. Union of India* reported in (2020) 13 SCC 285, to submit that the availability of an alternative remedy does not alter the discretionary nature of the High Court under its writ jurisdiction.

25. The learned counsel submitted that the grounds set out in the writ petition before the High Court clearly meet the parameters laid down by this Court in *Whirlpool (supra)* and *The Assistant Commissioner of State Tax and Ors. v. M/s Commercial Steel Limited* reported in (2022) 16 SCC 447, which are as follow:

- (i) An excess of jurisdiction,
- (ii) A breach of fundamental rights,
- (iii) A violation of the principles of natural justice, and
- (iv) A challenge to the vires of the statute or delegated legislation.

It is the case of the respondent that no statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and an error of jurisdictional facts renders the order erroneous in law.

26. Mr. Singh submitted that the CERC exceeded its jurisdiction while ordering for recovery of transmission charges as the provisions for determination of tariff under the Act, 2003 do not confer power on the CERC to act arbitrarily and levy unilateral charges. He vehemently submitted that doing so is violative of the principles of natural justice. He argued that there is no provision either in the agreement between the parties or in the 2014 Tariff Regulations for claiming compensation or damages. He further submitted that the conditions governing the commissioning of the transmission assets in question were approved in the 38th Standing Committee meeting held on 17.07.2015 and the same include no provision as regards claiming of compensation or damages from the respondent.

27. The learned counsel brought to our notice the order dated 18.01.2019 passed by APTEL in *Nuclear Power Corporation (supra)* wherein, in a similar set of facts, the liability to pay compensation or damages was imposed on the generating entity for delaying the commissioning of transmission assets. It is the case of the respondent that since the APTEL has already passed an adverse order previously, the concerns of the respondent may not be addressed by filing an appeal under Section 111 of the Act, 2003.

28. Mr. Singh informed us that the transmission line is now functional and fully charged. The dispute regarding payment of compensation or damages is with respect to a limited period of time in which there was admittedly, a delay in commissioning the line due to force majeure.

29. It was submitted that no error or illegality could be said to have been committed by the High Court while exercising its discretion to entertain the writ petition and the impugned orders passed thereby are neither perverse nor contrary to law.

E. ISSUES FOR DETERMINATION

30. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

- i. Whether the CERC, while exercising its functions under Section 79(1) of the Act, 2003, is circumscribed by statutory regulations enacted under Section 178 of the Act, 2003?
- ii. Whether the CERC exercises regulatory or adjudicatory functions under Section 79 of the Act, 2003? In other words, what is the scope of the CERC's power to regulate inter-state transmission of electricity and determine tariff for the same under clauses (c) and (d) of Section 79(1)?

iii. Whether the grant of compensation by the CERC for the delay vide the orders dated 21.01.2020 and 27.01.2020 respectively, is a regulatory or adjudicatory function and to what extent are the principles of natural justice applicable to the exercise of such functions?

iv. Whether the High Court was justified in admitting the writ petition filed by the respondent no. 1 herein challenging the order dated 21.01.2020 of the CERC when there existed an alternative remedy under Section 111 of the Act, 2003?

F. ANALYSIS

i. Relevant Provisions of the Act, 2003 31. Section 61 reads thus:

"61. Tariff regulations.

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commission Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

32. Section 62 reads thus:

"62. Determination of tariff.

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

33. Section 64 reads thus:

"64. Procedure for tariff order.

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under subsection (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

34. Section 79 reads thus:

"79. Functions of Central Commission.

(1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

35. Section 111 reads thus:

"111. Appeal to Appellate Tribunal.

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under subsection (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit."

36. Section 178 reads thus:

"178. Powers of Central Commission to make regulations.

(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of following matters, namely:-

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of the application under subsection (1) of section 15;

(c) the manner and particulars of notice under subsection (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under subsection (4) of section 28;

(i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(j) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(l) payment of transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;

(m) reduction of surcharge and cross-subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

(n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(o) duties of electricity trader under sub-section (2) of section 52;

(p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;

(q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(r) the manner of reduction of cross-subsidies under clause (g) of section 61; (s) the terms and conditions for the determination of tariff under section 61;

(t) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

- (v) the manner of making an application before the Central Commission and the fee payable therefor under subsection (1) of section 64;
 - (w) the manner of publication of application under subsection (2) of section 64;
 - (x) issue of tariff order with modifications or conditions under sub-section (3) of section 64;
 - (y) the manner by which development of market in power including trading specified under section 66;
 - (z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;
 - (za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;
 - (zb) the rules of procedure for transaction of business under sub-section (1) of section 92;
 - (zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;
 - (zd) the manner of service and publication of notice under section 130;
 - (ze) any other matter which is to be, or may be, specified by regulations.
- (3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication."

ii. Relationship between Sections 79 and 178 of the Act, 2003 respectively

37. A perusal of the provisions laying down the functions of the CERC indicates that the statutory authority is enjoined with the task of regulation as well as adjudication of several aspects of the generation, transmission and distribution of electricity. Section 79 of the Act, 2003 enumerates the functions of the CERC which includes the dual functions of regulation and adjudication. Section 178, on the other hand, empowers the CERC to enact regulations by notification thereby delegating to the body, the power of legislating statutory regulations under the Act, 2003.

38. The aforesaid two provisions indicate that the CERC functions as both, decision-making and regulation-making authority under Sections 79 and 178 respectively. However, while the authority exercising both these functions is one and the same, it is a settled position of law that the functions by themselves are separate and distinct. The functions under Section 79 are administrative or adjudicatory whereas those under Section 178 are legislative.

39. This Court in PTC (supra) has succinctly explained that the powers under Section 79 of the Act, 2003 are supposed to be exercised in conformity with the statutory regulations under Section 178 wherever such regulations are applicable. However, there is no bar on the exercise of powers under Section 79 in a situation where a regulation under Section 178 has not been enacted in respect of a particular subject matter. The relevant portion of the judgment reads thus:

"53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories - mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions".

In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned

to, it under the Act.

On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act.

An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178."

(Emphasis supplied)

40. What is discernible from the aforesaid exposition of law is that there is a dichotomy between the power to make a regulation under Section 178 and the power to regulate or adjudicate on the various areas enumerated under Section 79(1). A regulation under Section 178 is of general application to the entirety of a particular subject matter as opposed to regulation on a case-to-case basis which may be done by the CERC under Section 79. Therefore, making of a regulation under Section 178 has the effect of interfering with and overriding existing contractual relationships between the regulated entities. On the other hand, the orders under Section 79 have to be confined to the existing statutory regulations and do not have the effect of altering the terms of contract between the specific parties before the CERC.

41. This Court in PTC (supra) also held that though the validity of a delegated legislation under Section 178 can be tested by way of judicial review of the courts and not by way of an appeal under Section 111, yet a dispute as regards the interpretation of a regulation enacted under Section 178 is entertainable before the APTEL by way of an appeal.

42. In *Energy Watchdog v. CERC*, reported in (2017) 14 SCC 80, this Court has further held that Section 79(1) is the repository of the regulatory powers of the CERC and such powers must be exercised in consonance with the guidelines or regulations under Section 178. However, if there are no such guidelines or regulations in place, it cannot be said that the hands of the CERC are tied when it encounters a regulatory lacuna. The relevant portion of the judgment reads thus:

"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the

aforesaid statutory provisions.

The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways - either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding.

In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff.

It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

(Emphasis supplied)

43. In the case on hand, the CERC vide its orders dated 21.01.2020 and 27.01.2020 respectively imposed the liability of payment of compensation for delay onto the respondent no. 1. It is the case of the respondent no. 1 that by doing so, the CERC did not act in conformity with the 2014 Tariff Regulations which do not provide for payment of transmission charges by a party to whom the delay is attributable. In our considered view, the said argument does not hold any water. This Court's dictum in PTC (supra) and Energy Watchdog (supra) respectively settles the law in this regard and the absence of a regulation under Section 178 does not preclude the CERC from exercising its powers under Section 79(1) to make specific regulations or pass orders between the parties before it.

iii. Regulatory and adjudicatory functions of the CERC under Section 79

44. The CERC vide its orders dated 21.01.2020 and 27.01.2020 respectively determined and approved the transmission tariff for the assets commissioned by the appellant at the Indore substation under Section 79 wherein the specific prayer for condonation of delay in commissioning of the said assets was taken by the appellant in terms of the Regulation 4(3)(ii) of 2014 Tariff Regulations.

"4. Date of Commercial Operation:

The date of commercial operation of a generating station or unit or block thereof or a transmission system or element thereof shall be determined as under:

(3) Date of commercial operation in relation to a transmission system shall mean the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end:

Provided that:

(i) where the transmission line or substation is dedicated for evacuation of power from a particular generating station, the generating company and transmission licensee shall endeavour to commission the generating station and the transmission system simultaneously as far as practicable and shall ensure the same through appropriate Implementation Agreement in accordance with Regulation 12(2) of these Regulations:

(ii) in case a transmission system or an element thereof is prevented from regular service for reasons not attributable to the transmission licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, the transmission licensee shall approach the Commission through

an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof."

(Emphasis supplied)

45. The appellant in its petition before the CERC had submitted that the delay was due to the delay in commissioning of the associated transmission lines which were in scope of the respondent no. 1 herein. It is in consequence to this prayer that the CERC, though did not condone the delay, yet granted the liberty to the appellant to claim compensation from the respondent no. 1.

46. It is the submission of the respondent no. 1 that the CERC does not possess any regulatory or legislative power while adjudicating a petition and it functions as a purely quasi-judicial body, therefore, it does not have the jurisdiction to impose a charge on the respondent no. 1. In our considered view, the said argument must fail for the reason that Section 79 of the Act, 2003 envisages dual function of regulation and adjudication to be performed by the CERC. The expressions "to regulate", "to determine" and "to adjudicate" are used for different purposes in the list of matters enumerated under Section 79(1) and cannot be incorporated within the umbrella term of "adjudication".

47. The exposition of law in PTC (supra) clarifies the scheme of regulatory powers and functions under the Act, 2003. It was held therein that Section 178 that deals with making of regulations by way of subordinate legislation by the CERC, is wider than Section 79(1) which enumerates specified areas where the CERC exercises regulatory functions to be discharged by orders or decisions. Therefore, unlike the regulations enacted under Section 178 that have a general application, the CERC, under Section 79, has both regulatory and adjudicatory functions which it exercises in respect of specific issues arising between specific parties. The relevant portion of the judgment reads thus:

"92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions)."

(Emphasis supplied)

48. The regulatory powers provided to the CERC under Section 79 are of ad hoc nature and are required to be exercised by the CERC in context of the specific circumstances of the parties before it. The rationale for provision of such ad hoc powers by the Act, 2003 is to ensure that regulatory gaps, if any, that may be discovered on a case-to-case basis, are filled or removed. Therefore, there is no doubt in our mind that the CERC is enabled to exercise its regulatory powers by way of orders under Section 79 and the purview of Section 79 is not limited to only adjudicatory orders but includes within its scope administrative functions as well.

iv. Grant of compensation for delay on the part of a party is a regulatory function

49. The respondent no. 1 would submit that the CERC exhibits the trappings of an adjudicatory authority when it determines tariff and therefore, was required to confine itself to the reliefs as prayed for by the appellant before the CERC. By providing the appellant with the liberty to claim compensation from the respondent no. 1, CERC could be said to have granted a relief that was not sought for and the proper opportunity to defend against such claims was not afforded to respondent no. 1. In order to address this submission, we must first look into the nature of the power exercised by the CERC while determining tariff under Section 79(1).

50. This Court in PTC (supra) has held that the determination of tariff under Section 79(1) is an adjudicatory function of the CERC for the following reasons:

(i) First, the actual determination/fixation of tariff is done by the appropriate commission between the parties before it under Section 62 of the Act, 2003. Although Section 61 is the enabling provision for framing of regulations while keeping in mind the generic propositions provided thereunder, yet the determination of tariff in respect of a specific generation unit, asset, transmission line, etc, is done by virtue of the power emanating from Section 62. Therefore, the determination of tariff is specific to an individual case and is not of general application under the Act, 2003. This is in consonance with the test laid down in *Sitaram Sugar Co. Ltd. v. Union of India*, reported in (1990) 3 SCC 223 wherein it was held that one of the factors to determine if an order was issued in exercise of an adjudicatory function, is to ascertain whether it was specific to an individual or of general application.

(ii) Secondly, even though determination of tariff like price fixation is a legislative act, yet such determination has been made appealable to the APTEL under Section 111. The terms of the Act, 2003, therefore, clearly indicate that determination of tariff is an adjudicatory function. The relevant observations of this Court in PTC (supra) are reproduced below:

"26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. (See *Shri Sitaram Sugar Co. Ltd. v. Union of India* [(1990) 3 SCC 223].)

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

(Emphasis supplied)

51. While we are in complete agreement with the observations in PTC (supra), we are of the opinion that the bench therein had no occasion to consider the issue of other kinds of reliefs that may be given by the CERC under Section 79(1) read with Section 61 of the Act, 2003.

52. The question that falls for our consideration is whether the grant of compensation by the CERC was a decision taken by the authority in its regulatory or adjudicatory capacity and whether it goes a step beyond the function of determination of tariff. To answer this question, we may refer to this Court's decision in *Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd.*, reported in 2024 SCC OnLine SC 2923 ("AERA") wherein one of us, J.B. Pardiwala, J., was a part of the bench. We may refer to the following observations in AERA (supra) with profit:

(i) First, it was observed that while the distinction between 'general' or 'specific' as laid down in *Sitaram Sugar* (supra) is a crucial test consistently applied by this Court for identifying adjudicatory functions, it cannot be the sole litmus test for distinguishing between regulatory and adjudicatory functions, especially where the statute in question does not draw a clear distinction between the adjudication and regulatory functions. A function, however specific, cannot be considered *de hors* the context in which it is being exercised.

(ii) Secondly, an examination of the broad factors that are required to be considered while exercising a function is important to ascertain the nature of such function. The relevant portion of the judgment reads thus:

57. It may be argued by relying on the judgment in PTC (supra) that the 2011 Guidelines issued in exercise of the power under Section 15 is a regulatory function while the determination of tariff under Section 13(1)(a) is adjudicatory by relying on the distinction between 'general' and 'specific' as

highlighted above. In PTC (supra), this Court drew a distinction between Section 61 of the Electricity Act which grants the Appropriate Commission the power to issue specific terms and conditions for determination of tariff and Section 62 which grants the power to determine tariff.

The crucial test that has been consistently applied by this Court in drawing the distinction is to determine if the function is discharged in the capacity of a regulator or an adjudicator. Now, it may be possible that certain statutes create a clear distinction between the regulatory and adjudicatory roles with respect to the same function. When such a distinction is created, the Authority does not put on the hat of a regulator while undertaking the adjudicatory function. On the other hand, certain other statutes may require the Authority to 'determine' something in its capacity as a regulator. In such cases, a clear distinction between the adjudication and regulatory functions cannot be drawn.

59. The respondents have relied on two clauses of Section 13 to argue that tariff determination is an adjudicatory function. The first is the proviso to Section 13(1)(a) which provides that different tariff structures may be determined for different airports. This, it is argued, is a specific/individualistic component which is an indicator of the adjudicatory function. It is true that this Court in Sitaram Sugar (supra) held that one of the factors to assess if a function is adjudicatory is by determining if it has a specific or a general application.

However, the observations cannot be interpreted to mean that it is an overarching consideration in the determination of whether the function is adjudicatory. Neither can it be interpreted to mean that the factor must be considered de hors the context. The consideration of the factors while exercising the function is equally and if not more important as a factor. As the judgment in Sitaram Sugar (supra) notes, "judicial decisions are made according to law while administrative decisions emanate from administrative policy."

As held above, the factors to be considered by AERA in terms of Section 13(1)(a) are purely 'policy' factors. Further, the function of AERA to determine tariff must be read in the context of the role of the Authority as a 'regulator' as has been highlighted above. Modern constitutional governance requires that legislation is not general but context specific. Overemphasising the distinction between general and specific provisions to determine if a function is regulatory or adjudicatory would be to completely ignore the jurisprudential developments governing both the regulatory domain and Article 14.

(Emphasis supplied)

53. A reading of the Act, 2003 would indicate that it makes no distinction between the regulatory and adjudicatory functions vested in and conferred upon the CERC, which is a quasi-judicial body enjoined to regulate and administer the subject of electricity generation, transmission and distribution. In such a situation, it becomes necessary for us to undertake a harmonious reading of Sections 61 and 79 respectively to determine whether the CERC granted the liberty to claim compensation in exercise of its regulatory or adjudicatory function.

54. Section 61 of the Act, 2003 lays down the guidelines that the CERC must adhere to while specifying the terms and conditions for determination of tariff, which inter alia includes that:

- (i) the generation, transmission, distribution and supply of electricity are to be conducted on commercial principles; and
- (ii) the consumers' interest is to be safeguarded while also recovering the cost of electricity in a reasonable manner.

55. This Court in Power Grid Corpn. of India Ltd. v. Punjab State Power Corpn. Ltd., reported in (2016) 4 SCC 797 ("Barh-Balia") has held that beneficiaries cannot be made liable to pay for the delay in any transmission element, which in turn prevents the entire transmission system from being operationalized. This is in consonance with the principle of safeguarding consumers' interest. We affirm that in a situation where transmission charges accrue before the assets are operationalized due to a non-condonable delay on part of one of the utilities in charge of putting the transmission element into use, the cost of transmission cannot be put on the beneficiaries or consumers through the Point of Connection (POC) mechanism. The relevant portion of the Barh-Balia judgment is reproduced below:

"10. In our opinion, Regulation 3(12) of the 2009 Regulations cannot be interpreted against the spirit of the definition of "transmission lines" given in the statute. It is evident from the record that it is not a disputed fact that switchgear at Barh end of Barh-Balia line for protection and metering were to be installed by NTPC and the same was not done by it when transmission line was completed by the

appellant. As such the appellant might have suffered due to delay on the part of NTPC in completing the transmission lines for some period. But beneficiaries, including Respondent 1, cannot be made liable to pay for this delay w.e.f. 1-7-2010 as the energy supply line had not started on the said date.

12. Since we are in agreement with the Tribunal that in the present case, Respondent 1 and the beneficiaries could not have been made liable to pay the tariff before transmission line was operational, we find no infirmity in the impugned order. Therefore, the appeals are liable to be dismissed. Accordingly, both the appeals are dismissed without prejudice to the right of the appellant, if any, available to it under law, against NTPC. There shall be no order as to costs."

(Emphasis supplied)

56. In the case on hand, there is no contractual clause between the parties for establishing the risks of delay in commissioning of a transmission asset. There is also no uniform settled position as regards the liability of transmission charges payable before a particular transmission element is put in operation, in the form of regulations under Section 178. These circumstances, considered together with the prohibition on imposing liability of delayed payments on beneficiaries, leave a regulatory gap. This lacuna was recognized by APTEL in Nuclear Power Corporation (supra) wherein the correctness of the CERC's order was questioned.

The CERC, therein, had imposed the liability of transmission charges on the defaulting party on account of a transmission element not having been put to use by it, in the absence of a contractual arrangement between the parties. It was held that in the absence of any specific provisions dealing with the situation in the 2014 Tariff Regulations or any other concurrent regulations under Section 178, the CERC has prescribed a principle that the party to which the delay is attributable would be responsible for payment of the transmission charges for the period of delay not condoned. The relevant portion of the order is reproduced below:

"10.2 Similarly, in the facts of the instant Appeal, there is no inter se contractual arrangement between the Respondent No. 2 and the defaulting party, i.e. the Appellant. However, similar to the factual situation in the case of the Patran Judgment, the Respondent No. 2 had entered into the TSA dated 24.07.2013 with the various LTTCs, who were the beneficiaries of the Project being established by it.

10.3 We further observe that these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. The importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015 and directed its staff for appropriate amendments in the Tariff Regulations, 2014. Till date no such modifications have been carried out by it in the Regulations. It is however, observed that there are many regulatory/judicial orders of the Central Commission to deal with the situations like in the present case.

10.5 Accordingly, in absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory powers has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 2 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order (s) the Central Commission has laid down the principles of payment of transmission charges in such an eventuality. However, it is felt that the Central Commission in the Impugned Order has abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to clarify the same."

(Emphasis supplied)

57. The respondent no. 1 has averred that the CERC cannot conflate its powers of regulation with its adjudicatory functions and a regulation cannot be brought into force by way of a judicial order. In the specific case of Nuclear Power Corporation (supra), we are inclined to agree with the submission of the respondent no. 1 to the extent that a regulation cannot be done through the process of adjudication. However, could it be said that there is a blanket ban on the CERC to exercise its regulatory functions by way of orders under Section 79(1)? In light of this Court's dictum in AERA (supra), our answer to this question must be an emphatic 'No'.

58. We are of the view that even though the orders under Section 79 may not always be limpid as regards the matters where CERC is exercising its regulatory functions yet this cannot be the reason to conclude that the CERC passes all orders in its capacity as an adjudicator. The nomenclature "judicial order(s)" as used in Nuclear Power Corporation (supra) does not change the nature of a specific order that the CERC gives in its capacity as a regulator and the courts must understand the true import of an order to determine the nature thereof.

59. The CERC granted liberty to the appellant herein to claim compensation from the respondent no. 1 to deal with a situation caused due to an unprecedented event not covered by any guidelines, regulations or contractual provisions between the parties. The dictum of this Court in paragraph 20 of Energy Watchdog (supra), indicates that in such a situation where there is an absence of regulations and guidelines, the Act, 2003 mandates the CERC to strike a judicious balance between the parties keeping in mind commercial principles and consumers' interest, in exercise of its general regulatory powers under Section 79(1).

60. The aforesaid leaves no manner of doubt in our mind that though the CERC's orders dated 21.01.2020 and 27.01.2020 respectively were for determination of tariff, yet the order granting liberty to the aggrieved appellant to claim compensation from the defaulting party is a consequence of a regulatory lacuna in the 2014 Tariff Regulations and therefore, is an instance of regulation of tariff between the parties.

61. Since the CERC was not adjudicating the issue of delay between the parties but was only regulating the consequences of the delay to the commissioning of the transmission elements, we are of the view that there was no requirement for a specific prayer in this regard. As a natural corollary, there was also no occasion for the respondent no. 1 to be afforded an opportunity to be heard at that stage. In our considered view, any dispute pertaining to the levy of transmission charges incurred before the concerned transmission assets were put to use, would arise only upon the appellant raising bills to the respondent no. 1 in this regard. In such a scenario, it cannot be said that there was a contravention of the principles of natural justice by the CERC.

62. As regards the contention of the respondent no. 1 that the validity of a regulation cannot be looked into by the statutory authorities under the Act, 2003, we are of the view that the said submission was made without considering the general regulatory power under Section 79(1). While we are in agreement with the submission of the respondent no. 1 that the vires of a regulation under Section 178 cannot be challenged before an authority that is the creation of the parent statute, the same cannot be said so for a specific regulation effected under Section 79(1).

63. It is apposite to mention that the sources of power for enactment of a regulation under Section 178 and regulatory order under Section 79(1) are different. The former emanates from the power of delegated legislation whereas the latter is an ad hoc power which is limited to the specific parties and situation in context of which the order is given. Since the regulatory powers under Section 79(1) are of an ad hoc nature and are not of general application, the orders thereunder are made appealable under Section 111.

64. In view of the aforesaid exposition of law, we find that this Court's observations in Whirlpool (supra) are of no avail to the respondent no. 1 as the present matter falls in none of the cases enumerated therein. Therefore, there was no occasion for the High Court to admit the writ petition of the respondent no. 1.

G. CONCLUSION

65. For all the foregoing reasons, we have reached the conclusion that the High Court committed an egregious error in passing the impugned judgment. We are left with no other option but to set aside the impugned judgment and order dated 25.02.2021 passed by the High Court and dismiss both the writ petitions. In the result, the appeals succeed and are hereby allowed.

66. Before we close this judgment, we must clarify something important with a view to obviate the possibility of any confusion. The matter before us pertained to the maintainability of the writ petitions filed by the respondent no. 1 on the grounds that CERC had no jurisdiction to grant liberty to the appellant herein to claim compensation. As already discussed by us in the foregoing paragraphs, the CERC is empowered to order for imposition of transmission charges on the party to whom delay is attributable.

We, however, have not considered the question whether such liability of payment of transmission charges could be imposed on the respondent no. 1 in the specific facts of the case on hand. We are of the opinion that APTEL is the appropriate authority to look into the merits of the matter should the respondent no. 1 choose to prefer an appeal before APTEL under Section 111 of the Act, 2003.

67. Pending application(s), if any, are disposed of.

68. We direct the Registry to circulate a copy of this judgment to all High Courts.

.....J. (J. B. Pardiwala)

.....J. (R. Mahadevan)

New Delhi.

May 15, 2025.

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