* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: **8th March, 2011**

% Judgment Pronounced on: **23rd May, 2011**

\+ **W.P.(C) No. 4821/2010**

NAND KISHORE GARG ..... Petitioner

Through: Mr. Laliet Kumar and Mr.Deepak Vohra, Advs.

Versus

GOVT. OF NCT OF DELHI AND ORS. ..... Respondents

Through: Mr.Najmi Waziri, Standing Counsel along with Mr.Shoaib Haider, Adv. for Resp. 1/GNCTD.
Mr.Parag P. Tripathi, ASG with Mr. A.S. Chandhoke, Ms.Purnima and Ms.Pratima Gupta, Advs. for Resp. 2.
Mr.V.P. Singh and Mr.Aashish Gupta, Advs. for Resp. 3
Mr. Harish Salve, Sr.Advocate with Mr.Amit Kapur, Mr.Anupam Varma & Ms.Deepika Kalia, Advs. for Resp.4
Mr.Mukul Rohtagi and Dr.A.M. Singhvi, Sr.Advocates with Mr.Anuj Berry, Mr.Aashish Gupta and Mr.Dushyant Manocha, Advs. for Resp.5
Mr.Jayant Bhushan, Sr.Advocate with Ms.Pyoli, Adv. for Intervener.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers be allowed to see the judgment? **Yes**
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

DIPAK MISRA, CJ

The petitioners, as pro-bono publico, have preferred this writ petition under Article 226 of the Constitution of India for issue of a writ of mandamus commanding the Delhi Electricity Regulatory Commission (for short 'the Commission'), the respondent No.2 herein, to issue the tariff order approved by it on 28th/29th April, 2010 and pass such other order/orders as may be deemed fit in the facts and circumstances of the case.

2. It is profitable to note here that various assertions have been made with regard to the issues relating to the finalization of the tariff by the Commission under the provisions of the Electricity Act, 2003 (for brevity '2003 Act'), the illegality committed by the Government of National Capital Territory of Delhi (GNCTD) in asking the Commission not to issue the tariff and further how the consumers have been affected by the non-issuance of the tariff order. In the course of the pendency of the writ petition, there was impleadment of certain respondents, namely, BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd. and North Delhi Power Ltd. At the commencement of the hearing, the question that

crept up was whether the State Government could have interdicted in the affairs of the Commission in the manner it had done in exercise of the power under Section 108 of the 2003 Act. When the said debate was on, this Court sought the assistance of the learned Attorney General for India and the learned counsel for the parties acceded that the said issue should be decided first.

3. This Court, on 18th February, 2011, after referring to the various citations in the field, came to hold as follows: -

> "20. Regard being had to the aforesaid pronouncement of law in the field, the justifiability and the legal substantiality of the communication made by the State has to be tested. As is demonstrable the State is entitled to change or alter economic policies and the said decision has to be in public interest. In the case at hand, the nature of directions issued by the State Government has a different contour. To appreciate the controversy in proper perspective it is necessitous to reproduce the communication sent by the State Government to the Commission:
>
> > "The Secretary,
> > Delhi Electricity Regulatory Commission,
> > Viniyamak Bhawan,
> > Shivalik, Malviya Nagar,
> > New Delhi - 10 017
> >
> > Sir,
> >
> > Through separate representations to the Government, the three distribution companies, BRPL, NDPL and BYPL have raised the issue of

severe cash flow constraints affecting their ability to purchase power in 2010-11. A copy of this representation is enclosed. They have broadly drawn the attention of the Government on the following issues:

1. Ability to supply power contingent on Cost Reflective Tariff.
2. Precarious Financial Position on Discoms.
3. Accumulation of revenue gaps beyond sustainable levels.
4. Continuation of the practice of assuming higher surplus for tariff fixation.
5. Power purchase cost/quantum.
6. Continuous recourse to addition debt to finance operations, and
7. Critical need to additional financing.

The issues raised by the Discoms are very serious and needs to be examined thoroughly so that the sustainable model of tariff setting as prescribed under section 61 and 62 of the Electricity Act is not jeopardized. Further, the National Tariff Policy at clause No. 5.3(h)-4 has prescribed that uncontrollable costs should be recovered speedily to ensure that the future consumers are not burdened with the past costs. It is felt that non-true-up of the account of the year 2009-2010 where quantum of uncontrollable costs were very high, would mean that future consumers would be burdened with the interest cost of the year 2009- 2010 which goes against the above quoted clause of National Tariff Policy.

As the issues raised by the Distribution Companies as well as the issue of burdening future consumers with past liabilities are issues

which are very serious in nature, the Government in exercise of its power under section 86(2)(iv) directs the DERC to give statutory advise and clarification to the Government on the issue raised by the Distribution companies in the enclosed representations as well as on the issues covered under clause 5.3(h)-4 of the National Tariff Policy. The Government further directs under section 108 of the Electricity Act, 2003 that the Delhi Electricity Regulatory Commission will not issue the tariff order till the statutory advice given by the Commission as asked for, is thoroughly examined by the Government and the Government gives a go ahead for passing of tariff orders."

[emphasis supplied]

21. On a close scrutiny of the aforesaid directions, it is clear as noon day that there has been an order of prohibition to the Commission not to pass the tariff order. Mr. Dave, learned senior counsel for the respondent would contend that it was issued keeping in view the public interest. The same is not discernible. It is neither evident nor demonstrable. It was an unwarranted interdiction. It is understandable that the State Government could have suggested some kind of a matter relating to policy having nexus with public interest, but unfortunately that is not so. By the impugned communication contained in Annexure P-7, the State Government could not have prevented the Commission from exercising its statutory powers. In any event, under Section 108, the State Government could have only issued policy direction, not pre-emptory directions, like it did. As submitted by the learned Attorney General for the Union of India, the interpretations placed by the Apex Court on Section 78-A in the decisions which we have quoted in extenso would clearly convey that the State Government as well as the Board functions in different fields within the statutory limits. Any encroachment

> is not permissible. The case at hand projects that no iota of policy, any way, is discernible and the concept of public interest appears to be a subterfuge, in fact, totally divorced from the arena of public interest. Quite apart from that the communication is in the form of injunction, which we are absolutely indubitable, the State Government cannot issue. This interdiction is decidedly beyond the scope of language employed in Section 108 of the 2003 Act and, in fact, contrary to the legislative intent. Thus, we are disposed to think that the submissions canvassed by learned Attorney General deserve acceptation and, accordingly, we hold that the communication of the present nature made by the State Government is absolutely unjustified, unwarranted and untenable and, accordingly, the same stands quashed.
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> 22. We will be failing in our duty if we do not mention that Mr. Salve, learned senior counsel though had initially supported the order passed by the State, yet later on conceded to the proponement canvassed by the learned Attorney General for the Union of India.
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> 23. In view of our aforesaid analysis, the instruction given by the State vide Annexure-P7 is quashed."

4. In view of the aforesaid, two issues that remain alive for consideration are, namely, whether the Commission had taken a final decision with regard to the determination of tariff order and what remained was the ministerial act of communication, and further whether this Court can issue a writ of mandamus to the Commission to pronounce the order/determination (if it has been determined) vide perusal of the order sheets and notes on the file.

5. Be it noted, initially the file of the Commission was called for to peruse whether the Commission has actually determined the tariff, the manner in which the Commission has proceeded and at what stage the interdiction of the State Government came. At a later stage, the file from the GNCTD was called to understand the circumstances under which the State Government restrained the Commission to issue the tariff order and the said file was produced before this Court.

6. The aforesaid issues being really dependent on the notings, consultation and ordersheets of the files that has been produced before us, the pleadings and asseverations need not be referred to inasmuch as the pleadings basically pertain to the intervention of the State Government which has already been dwelled upon and decided by this Court on earlier occasion.

7. Before we proceed to deal with the factual matrix as is discernible from the file, it is apposite to refer to the provisions of the 2003 Act, how a determination of tariff is done and how a decision in that regard is arrived at. Part VI of the Act deals with distribution of electricity. Section 42 stipulates the duties of distribution licensees and open access. Section 43 deals with duty to supply on

request. Section 45 provides the power to recover charges. The said provision refers to fixation of tariff. It reads as follows:

> "45. **Power to recover charges**. – (1) Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 shall be in accordance with such tariffs fixed from time-to-time and conditions of his licence.
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> (2) The charges for electricity supplied by a distribution licensee shall be--
>
> (a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission;
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> (b) published in such manner so as to give adequate publicity for such charges and prices.
>
> (3) The charges for electricity supplied by a distribution licensee may include--
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> (a) a fixed charge in addition to the charge for the actual electricity supplied;
>
> (b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.
>
> (4) Subject to the provisions of section 62, in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons.
>
> (5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission."

Section 48 deals with additional terms of supply. It is as follows:

> "48. **Additional terms of supply. -** A distribution licensee may require any person who requires a supply of electricity in pursuance of section 43 to accept--
>
> (a) any restrictions which may be imposed for the purpose of enabling the distribution licensee to comply with the regulations made under section 53;
>
> (b) any terms restricting any liability of the distribution licensee for economic loss resulting from negligence of the person to whom the electricity is supplied."

8. Part VII of the Act deals with tariff. Section 61 lays the postulates by which the Appropriate Commission is to be guided. It is appropriate to reproduce the said provision:

> "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 Commissions 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."

9. Section 62 deals with determination of tariff. It is as under:

"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 the 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 procedure 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."

10. Section 64 stipulates the procedure for tariff order. It is as under:

"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 sub-section (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.
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> (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."
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> [Emphasis added]

11. The two questions, as has been indicated earlier, that arise for consideration are whether in accordance with the said provisions, the Commission had issued/made the tariff order and what remained is a ministerial act of communication/publication and further whether this Court can issue a writ of mandamus to the Commission to notify the decision already arrived by it. We have already reproduced the statutory provisions which deal with the functioning of the Commission and the manner in which a tariff order is determined. On a scrutiny of Section 64(3)(a), it is luculent that the Commission has the authority to accept the application for tariff fixation with or without modification or certain conditions. Section 64(4) lays a postulate that the Commission shall within seven days of the making of the order send a copy to the appropriate Government, authority, concerned licencee and to the person

concerned. On a keen scrutiny of the anatomy of Section 64(4), it is vivid that it stipulates a two stage process; the first stage where the order is made and the second one when the order is communicated to the persons mentioned in the said provision. On an holistic and purposive reading of sub-sections (3) and (4) to Section 64, it is clear as crystal that the order has to be first made by the Commission and then within a specific period, i.e., seven days of making of the order, the same is to be communicated.

12. In this context, we may refer with profit to Sections 92 of the 2003 Act which occurs in Part X of the Act that deals with regulatory commissions. The said provision is reproduced herein below:

> "92. **Proceedings of Appropriate Commission. -** (1) The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify.
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> (2) The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.
>
> (3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of

an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) Save as otherwise provided in sub-section (3), every Member shall have one vote.

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf."

13. On a perusal of sub-section (3) of Section 92, it is graphically clear that all issues coming up before any meeting of the Commission shall be decided by majority of votes and in case the votes are equally divided on any question, the Chairperson or in his absence the presiding person shall have the second or casting vote. In this context, we may usefully refer to the Rule/Regulation 22 reads as under:

"22. **Orders of the Commission –** (i) The Commission shall pass orders on the petition and the Chairman shall sign the orders.

(ii) The reasons given by the Commission in support of the orders, if any, shall form a part of the order and shall be available for inspection and supply of copies in accordance with these regulations.

(iii) All orders and decisions issued or communicated by the Commission shall be certified by the signature of the Secretary or an officer empowered in this behalf by the Chairman and bear the official seal of the Commission.

(iv) All final orders of the Commission shall be communicated to the parties to the proceedings under the signature of the Secretary or an officer empowered in this behalf by the Chairman or the Secretary."

[Emphasis supplied]

14. The aforesaid Regulation clearly states that any order passed by the Commission is required to be signed by the Chairman and reasons in support of the order shall form a part of the order and it has to be communicated to the party after being signed by the Secretary of the Commission or an officer empowered in this behalf by the Chairman. All orders which are to be issued and communicated shall bear the seal of the Commission. On a deeper scrutiny of the Regulation/Rule 22, it is perceptible that there is a clear distinction between "making of an order" and "communication of an order". The communication of an order requires the signature of the Secretary of the Commission or an officer empowered in this behalf by the Commission but the order should bear the seal of the Commission and the order is required to be signed by the Chairman. The communication need not be signed by the Commission. Be it noted, there are many statutes which make a distinction between making of an order and communication of an order. We need not deal with the facet where statute or the enactment is silent in this regard. This distinction has been clearly spelt out in ***CCE v. M.M. Rubber & Co.,*** **(1992) Suppl.**

1 SCC 471 and ***Municipal Corporation of Delhi v. Qimat Rai Gupta & Ors.,*** **(2007) 7 SCC 309**. In ***M.M. Rubber & Co.,*** (supra), it has been held in paragraphs 12 and 18 as under:

> "12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus paetentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.
>
> XXXX
>
> 18. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the

> government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

15. In ***Qimat Rai Gupta*** (supra) the question arose with regard to interpretation of Section 126(4) of the Delhi Municipal Act, 1957 which uses the word 'made' with reference to amendment of an assessment list. The question that emerged for consideration whether the amendment was made, when the order was signed or when it was communicated to the assessee. A distinction was drawn between the words 'made' and 'communication'. True it is, the same pertained to the issue of limitation, yet, the principles laid down therein in the context of "made" and "communication" are pertinent for our purpose. We may reproduce certain paragraphs with profit from the said decision:

> "19. The word "made" is past and past participle of the word 'make' which means "cause to exist or come about; bring about or perform" [See Concise Oxford English Dictionary, 10th Edition].
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> 20. In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, page 2822, it is stated:
>
> > "Made. - A receiving order or other order of Court is "made" on the day it is pronounced, not when it is drawn up. (Manning, In re. See also *Pancham v. Jhinguri*.)
>
> *** *** ***

> The word 'made' in this rule might refer to the proclamation of sale as well as the announcement of the sale, as it says that it shall be made and published in the manner provided by the Rule 54(1). The word 'made' cannot be taken to include the preparation of proclamation of sale. *Seshatiri Aiyar v. Valambal Ammal,* AIR at p.381. [Order 21 Rule 54(1) CPC (5 of 1908)]
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> *** *** ***
>
> An order by a Chancery judge in Chambers is "made" not when it is pronounced, but when it is signed and entered, or otherwise perfected (*Heatley v. Newton*)."

21. The meaning of a word, it is trite, would depend upon its text and context. It will also depend upon the purport and object it seeks to achieve. With a view to understand the proper meaning of the said word, we may notice the decisions cited at the Bar.

X X X X

26. A distinction, thus, exists in the construction of the word 'made' depending upon the question as to whether the power was required to be exercised within the period of limitation prescribed therefore or in order to provide the person aggrieved to avail remedies if he is aggrieved thereby or dissatisfied therewith. Ordinarily, the words 'given' and 'made' carries the same meaning.

27. An order passed by a competent authority dismissing a Government servant from services requires communication thereof as has been held in *State of Punjab v. Amar Singh Harika* but an order placing a Government servant on suspension does not require communication of that order. (See *State of Punjab v. Khemi Ram*). What is, therefore, necessary to be borne in mind is the knowledge leading to the making of the order. An order ordinarily would be presumed to have been made when it is signed. Once it is signed and an entry in that regard

> is made in the requisite register kept and maintained in terms of the provisions of a statute, the same cannot be changed or altered. It, subject to the other provisions contained in the Act, attains finality. Where, however, communication of an order is a necessary ingredient for bringing an end-result to a status or to provide a person an opportunity to take recourse of law if he is aggrieved thereby; the order is required to be communicated."

16. It may be stated here that a Himalayan complaint has been made by Mr.Laliet Kumar, learned counsel appearing for the petitioner that the order was made and the tariff was determined and what only remained to be done is the ministerial act of communication but because of the interdiction of the State Government at an unfortunate stage, the same could not be given effect to. Mr.Jayant Bhushan, learned senior counsel appearing for the intervener has also structured the edifice of his argument on the same foundation and seriously criticized the way the order of restraint was passed by the State Government scuttling the rights of the consumers which is likely to put a heavy burden on them to pay tariff at a capricious rate. Be it noted, learned senior counsel has so canvassed on the bedrock that at the instance of the distribution companies, the State Government had proceeded to pass the order of restraint. We shall advert to the same at a later stage but first we shall address ourselves to the issue whether there was an order made by the Commission as a regulatory body

under the statutory provisions as we have reproduced hereinbefore and that apart in common understanding of the law when an order is made and gets fructified.

17. In this context, we may note with profit it is appropriate to note here that photocopies of the file of the Commission which were called for pertaining to this proceeding have been circulated amongst all counsel by the learned Additional Solicitor General and, accordingly, the learned counsel for the parties have put forth their submissions.

18. At this stage, it is imperative on our part to note that there was a debate whether the tariff order had been made, this Court wanted to desire the view of the Commission to be put forth by way of an affidavit and accordingly on 9.9.2010, the following order was passed:

> "Thus, from the aforesaid, principally the following issues emerge for consideration:-
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> i) Whether the State Government has the uthority/jurisdiction to issue a direction of the present nature to the Commission and if so, to what extent and at what stage;
>
> ii) Whether the State Government is debarred in law to issue any kind of direction despite the postulate under Section 86(4) of the Act to adhere to a particular policy and whether the communication made by the State Government

would come within the ambit and sweep of the aforesaid provision; and

iii) Whether in the obtaining factual matrix, the Commission has, in actuality, passed a tariff order under the provisions of the Act.

Be it noted, we have stated the aforesaid issues, but it would not mean that the parties are restricted to address on the said issues only.

Pending adjudication of these issues and regard being had to the colossal complaint made by the petitioner and the gravity of the situation which has been galvanised by Mr. Salve and Mr. Kaul, we think it appropriate to issue the following directions as presently advised:-

a) The Commission shall convene a meeting within a week from today.

b) The Commission shall clearly state whether they had already taken a decision in respect of the tariff order under the Act.

c) The Commission shall apprise this Court about its response with regard to the communication made by the State Government. In case there is no consensus, the recording has to be at one go, regard being had to the basic concept of propriety."

19. In pursuance of the aforesaid order, an affidavit has been filed by the Commission. Before we dwell upon how the said affidavit proceeds and how the notings, the consultations and the manner in which the delineation was done by the Chairman and the members with regard to the fixation of tariff on the file,

we may usefully reproduce a passage from ***PTC India Limited v. Central Electricity Regulatory*, (2010) 4 SCC 603** wherein the Apex Court has held thus:

> "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."

We have referred to the aforesaid paragraph only to highlight the role of the regulatory commission which pertains to decision making and specifying the terms and conditions for tariff determination.

20. Presently, we shall proceed to deal with the aspect relating to what actually constitutes an 'order' in law. In ***Surendra Singh and others v. The State of Uttar Pradesh, AIR 1954 SC 194***, a three-judge Bench of the Apex Court was dealing with the facet of delivery date of the judgment. In the said case, a

Division Bench of the High Court of Allahabad, Lucknow Bench, had reserved the judgment and before the same was pronounced, one of the judges expired. After his death, the other judge delivered the judgment. The author of the judgment died on 24th December, 1952 before the date of delivery of the judgment. The author of the judgment had already signed the judgment and the learned Judge, who delivered the judgment, signed it at the time of delivery of the judgment. The question that arose before the Apex Court was whether the judgment was validly delivered after the death of one of the two judges who heard the appeal. Their Lordships, in that context, expressed the view as follows:

> "11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making

it the operative decision of the court. That is what constitutes the "judgment".

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of 'locus paenitentiae' and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alternation should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery.

But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten

> understanding that he is free to change his mind should fresh light drawn upon him before the delivery of judgment."

Eventually, their Lordships expressed that the judgment was not a valid one.

21. In ***Bachhittar Singh v. State of Punjab and another*, AIR 1963 SC 395**, the Constitution Bench has ruled thus:

> "9. …Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated…."

22. In ***State of Punjab v. Amar Singh Harika*, AIR 1966 SC 1313**, a contention was raised before the Apex Court that when an order of dismissal is first passed on the file, it comes into effect from that day. The Constitution Bench, repelling the said submission, ruled thus:

> "11. …It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to

modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that the mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismissal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power, would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it was communicated to him? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present case, the respondent had been suspended during the material period; but that does not change the position that if the officer concerned is not suspended during the period of enquiry, complications of the kind already indicated would definitely arise. We are, therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated to the officer concerned or is otherwise published…."

23. In ***M/s. Narinder Chand Hem Raj v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh,*** **1971 (2) SCC 747**, it has been opined that no court

can give a direction to a Government to refrain from enforcing a provision of law.

24. In ***State of Bihar v. Kripalu Shankar*, (1987) 3 SCC 34**, it has been held that notings in the office files do not constitute an order but are mere expressions of views preceding the order.

25. In ***Laxminarayan R. Bhattad and others v. State of Maharashtra and another*, (2003) 5 SCC 413**, it has been held thus:

> "52. The correspondences exchanged between the parties also do not show that the minutes drawn fructified in an order conferring any legal right upon the appellant. By reason of the endorsement in the note-sheet no policy decision had been taken. It is now well-known that a right created under an order of a statutory authority must be communicated so as to confer an enforceable right. (See *Bachhittar Singh v. State of Punjab* AIR 1963 SC 395)

26. In ***State Bank of India and others v. S.N. Goyal*, (2008) 8 SCC 92**, the question that arose was when does an appointing authority become functus officio. The Apex Court referred to various provisions of the Code of Civil Procedure and thereafter proceeded to deal with the role ascribed to quasi-judicial authorities. It is profitable to reproduce a passage from the said decision:

> "28. …The position is different with reference to quasi-judicial authorities. While some quasi-judicial tribunals fix a day for pronouncement and pronounce their orders on the day fixed, many quasi-judicial authorities do not pronounce their orders. Some publish or notify their orders. Some prepare and sign the orders and communicate the same to the party concerned. A quasi-judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. When an order is made in an office noting in a file but is not pronounced, published or communicated, nothing prevents the Authority from correcting it or altering it for valid reasons. But once the order is pronounced or published or notified or communicated, the Authority will become functus officio…."

27. In ***Sethi Auto Service Station v. Delhi Development Authority,*** **(2009) 1 SCC 180**, it has been held as follows:

> "14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is *communicated* to the person concerned."

After so stating, their Lordships referred to the decisions in ***Bachhittar Singh*** (supra) and ***Laxminarayan R. Bhattad*** (supra) and opined thus:

> "16. To the like effect are the observations of this Court in *Laxminarayan R. Bhattad v. State of Maharashtra*, (2003) 5 SCC 413, wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.
>
> 17. In view of the above legal position and in the light of the factual scenario as highlighted in the order of the learned Single Judge, we find it difficult to hold that the recommendation of the Technical Committee of DDA fructified into an order conferring legal right upon the appellants."

28. In ***Union of India v. Kartick Chandra Mondal*, (2010) 2 SCC 422**, the Apex Court, while dealing with the justifiability of an order passed by the High Court to absorb the respondents in any suitable post commensurate with their qualifications, has observed as follows:

> "17. The next issue that we are required to consider pertains to internal communications which are relied upon by the respondents and which were also referred to by the Tribunal as well as by the High Court. Ex facie, the aforesaid communications were exchanged between the officers at the level of board hierarchy only.
>
> 18. An order would be deemed to be a government order as and when it is issued and publicized. Internal communications while processing a matter cannot be said to

> be orders issued by the competent authority unless they are issued in accordance with law. In this regard, reliance may be placed on the decision of this Court in ***State of Bihar v. Kripalu Shankar*, (1987) 3 SCC 34**."

29. In ***Greater Mohali Area Development Authority and others v. Manju Jain and others*, (2010) 9 SCC 157**, a two-Judge Bench of the Apex Court, after referring to the decisions in ***DDA v. Pushpendra Kumar Jain*, AIR 1995 SC 1**, ***Bachhittar Singh*** (supra), ***Amar Singh Harika*** (supra), ***Union of India v. Dinanath Shantaram Karekar*, AIR 1998 SC 2722** and ***State of West Bengal v. M.R. Mondal*, (2001) 8 SCC 443**, expressed the view as follows:

> "23. In *Laxminarayan R. Bhattad. v. State of Maharashtra.*(2003) 5 SCC 413, this Court held that the order of the authority must be communicated for *conferring an enforceable right* and in case the order has been passed and not communicated, it does not create any legal right in favour of the party.
>
> 24. Thus, in view of the above, it can be held that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the court of law, as it does not become effective till it is communicated."

30. From the aforesaid authorities, it is absolutely clear that the notings in the office note or a tentative draft order cannot constitute an order and a quasi-judicial body or a tribunal does not become functus officio because of the notings

or even a view expressed on the file. In Black's Law Dictionary, the term 'functus officio' has been given the following meaning:

> "Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

31. In Law Lexicon, the term 'functus officio' has been given the following meaning:

> "A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus, when an agent has completed the business with which he was entrusted his agency is *functus officio*. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio* and cannot be further negotiated; when arbitrators cannot agree and choose an umpire they are said to be functus officio. Cye law Dic. 2 Bouv. Ins. Note 1382. Having discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus a judge, when he has decided a question brought before him, is *functus officio*, and cannot review his own decision. So is an arbiter, when he has issued his decree-arbitral.
>
> …
>
> One who has fulfilled his office or is out of office; and authority who has performed that act authorized so that the authority is exhausted."

32. In ***Deputy Director, Land Acquisition v. Malla Atchinaidu,*** **AIR 2007 SC 740**, the Apex Court, while dealing with the concept of functus officio, has stated thus:

> "47. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be...."

33. Regard being had what has been stated in the aforesaid enunciation of law in ***M.M. Rubber & Co.,*** (supra) and ***Qimat Rai Gupta*** (supra) and the decisions which we have referred to hereinabove which deal with the statutory requirement and the general principles in law, we shall proceed to deal with the affidavit filed by the Commission and the notings and consultations on the file to discern whether there has been in actuality an order. The affidavit filed by the Commission does not really deal with the questions raised by this Court. Annexure 'A' has been enclosed to the affidavit which shows certain office notings of the three members of the Commission. Mr. Subhash R. Sethi and Mr. Sham Wadera, members of the Commission have in their separate notes stated that the tariff order was not approved by them. Mr. Bajender Singh, Chairman has stated that the tariff order was approved by him and Mr. S.R. Sethi. Thus,

the version of the Chairman is to the contrary. At this stage, we may state that on 27.4.2010, a note was prepared by Mr.A.K. Singh, Director (Tariff) who has stated that six issues were raised and there were discussions and the decisions were arrived at in respect of the said issues. The notings of the said officer in paragraphs 2 and 3 at page 155 of the file reads as follows:

> "2. Meanwhile meetings have taken place with the Commission and several issues relating to Tariff Orders have been raised by the Members and discussed which include following among others:-
>
> a) Giving effect to the Appellate Tribunal Orders on the issues where we have gone to Supreme Court.
>
> b) Taking the variable cost up to January 2010.
>
> c) Voltage wise tariff.
>
> d) Giving detailed write-up in respect of technical validation for AT&C loss calculation.
>
> e) Giving appropriate write up in respect of FPA.
>
> f) Accounting procedure in respect of IT refunds / payments of the Discoms.
>
> 3. The Tariff order dated 9.4.2010 has under gone changes in the light of the above stated discussions and the decisions arrived at in respect of the above issues. After incorporating all the changes directed by the Commission, a final Order has been prepared in the case of M/s BRPL, BYPL and NDPL. This is being put up for approval so that based on this, final Order can be issued before the dead line of 5th May 2010."

After so stating, the concerned officer proceeds to state as follows:

"4. It may be noted that this final Tariff Order has been prepared after incorporating unanimous decisions of the Commission on key issues, as recorded in files. This order also reflects verbal orders/directions of the Commission which became available to the Consultants/ Staff during tariff related discussions in Commission's meetings. It may not be out of place to mention that this tariff order as well as earlier draft orders have been prepared by the Consultants after taking inputs from the Commission staff. The Commission staff has applied its mind at each stage of putting up draft orders before the Commission. The Consultants have prepared the order after due diligence and Tariff Division adopt and endorses the final order being put up now. Nothing further remains to be done at the level of consultants / staff.

The final order have been prepared after submission of three draft orders to the Commission. Now it is recommended that the Commission should sign this Order so that these are passed and issued before 5.5.2010, the Commission may like to avoid creating a public impression that it is dithering on the issue passing the tariff order only because this order is going to reduce / rationalize the tariff. After all the DERC comes within the purview of RTI Act, 2005. The Commission may like to seize this historic opportunity and pass the tariff order reducing / rationalizing the tariff which is going to be sustained in future also on account of more than comformable power availability scenario in future.

5. **Time-line to pass the Tariff Orders:**

In one of my earlier notings I had mentioned as under:

"It has been mentioned earlier that in terms of the provisions of the Electricity Act, 2003 the tariff orders are required to be issued within 120 days of the filing of the tariff petitions. Even if the period of 120 days is counted from the date of admission of the tariff petitions, the time barring date is 5th of May 2010. It is relevant to point out that this is the first time that the ARR has presented a situation where the Consultant has proposed

reduction in Tariff across all categories, which is beneficial to consumers. If the order is, for any reasons, not passed within 120 days and thereafter the order with reduction in tariff issued, there is a possibility that Discoms may challenge the order on the basis of treating the same as time-barred. In such a situation the Commission may be seen as doing something which is not in the interest of consumers because the possibility of getting the time-barred order declared as null and void by the Appellate Tribunal cannot be ruled out. We must avoid such a situation. Once again it is stressed even at the cost of being repetitive that an order reducing the electricity tariff issued after 5.5.2010 is likely to be declared null and void, on being challenged by the Discom."

34. Thereafter, he proceeds to state that it will be ideal to issue the order on 30.4.2010 so that the order becomes effective from 1.5.2010. The aforesaid is a note prepared by the Director but not by the Commission. The notings show and reflect that the Director has recorded certain pieces of advice in the form of recommendation to the Commission to adhere to the time limit.

35. It is noticeable that the aforesaid note is sent to one of the members, Sh. S.R. Sethi, Member (SRS), who then writes thus:

"i) Power purchase model vetting is yet to be received.

ii) Comments in ABR model were sent on 27.4.2010.

iii) Validation of 2.1A form of discoms was to be put by Staff.

Pl expedite inf"

36. Thereafter, the Director Mr.A.K. Singh proceeded to write the following note which is as follows:

> "Member (SRS) may kindly refer to the notings in para 4 of my notes on page-1. The write up in para 4 takes care of all the concerns issues raised by Member (SRS). After having mentioned everything categorically in para 4 that staff is satisfied with the working done by the Consultants in the tariff order, nothing more requires to be done. The results of prudence check done by the Commission staff is reflected in the Tariff Order. Member may please refer to the discussion about form 2.1(a) at appropriate place in the Tariff Order.
>
> Meanwhile, the Tariff Division is in receipt of Chairman's noting wherein he has conveyed his approval to the tariff orders which are under submission to the Commission through Member (SRS) vide my notings dt.27.04.2010. It may be recalled that in the original file submitted to Member (SRS) it was mentioned that photocopies of the note-sheet are being provided to Member (S) and the Chairman. The Chairman has conveyed his approval on the tariff order's copy provided to him.
>
> The Members may also like to convey their approval so that the Tariff Order are passed in time i.e. before 5th May, 2010.
>
> The Chairman's notes are addressed to the Member (S) and Member (SRS). A copy marked to Director (T) is being placed in this file."

37. The note of the Chairman on 28.4.2010 at page 152 of the file is as follows:

> "Since, the draft orders has been prepared in accordance with the consensus in the Commission till the forenoon of 27.04.2010, it has my approval. Members may also please approve and give it to Tariff Division. The order needs to be passed by 05.05.10. Order passed beyond that date moved not

be legal and may be struck down by appellate authorities, depriving the consumers of the benefit of tariff reduction. The draft orders approved be me are returned to Tariff Division for necessary action."

38. To the aforesaid, a note has been given by Mr.S.R. Sethi, which is as under:

"i) If Tariff goes up carrying cost is be given,

ii) If Tariff is reduced, Discom has no grouse.

iii) Every penny would be accounted in True up."

The said note is dated 3.5.2010.

39. On 29.4.2010, the departmental note refers to the earlier response of Member (SRS) on 28.4.2010 which states that the power purchase model vetting had not been received. The departmental note concludes at page 158 which reads as follows:

"It is clear from the above notings that the note dated 23.04.2010 was clarified to Member (SRS) on the same date and he is aware of that. After the note dated 27.04.2010 was received, the issue was rechecked and Consultant's approach was found to be in order. While putting up the final order, it has been specifically certified that the Tariff Division has analyzed the orders prepared by the Consultant and has endorsed fully. Member (SRS) is also aware that Chairman has approved the order and we are awaiting the approval of Member (SRS) and Member (S) after which the order will be issued. The same may please be expedited so that the tariff order is issued well before 5th May, 2010."

40. As is evident, there is a noting by the Chairman on 28.4.2010 that he has approved the tariff. He has further stated that the tariff order was approved by Mr.S.R. Sethi on 29.4.2010 and his approval was unambiguous and unconditional. A perusal of the original file Volume-I, File No. F.3(266)/tariff/DERC/2009-10, Tariff Division, shows it has notings dated 30th April, 2010. At page 144, Mr.Berjinder Singh, Chairman has recorded "meeting held today and all issues resolved". Mr. S.R. Sethi has signed the said file after it was circulated to him. Similarly, at page 148 of the file it is recorded as under:

> "I have already approved the tariff order. The issues were discussed today as under:
>
> Para-1: As regards – 'A' on page-1, I have already expressed my views in para-1 on page-3. However, it is seen that both Members are of the view that 'A' on page-1 needs to be incorporated in the tariff order. Secretary may get this done.
>
> Para-2: It was decided not to make any change.
>
> Para-3: The statement at 'B' on page-3 **in** correct, though it includes power purchase and other items of expenditures also. It has no implication on tariff order.
>
> Para-4: The issue regarding revenue model and ABR has been explained by the Consultant today to Member(S).
>
> Para-5: As regards para-3.95 to 3.99 of BRPL draft order in respect of finding on Form-2.1(a) – as per decision taken in other file.

Sd/-
30.04.10
CHAIRMAN

Sd/- 1/5
MEMBER(S)

Sd/- 3/5
MEMBER (SRS)

Sd/- 3/5
Secretary

Sd/- 3/5
J.D(TF)/Dir (T)"

41. We also have a detailed note of the Chairman Brijender Singh, dated 30th April, 2010 at page 153, which is as under:

> "I have already approved the tariff order. The issues were discussed today as under:
>
> Para-1: As regards – 'A' on page-1, I have already expressed my views in para-1 on page-3. However, it is seen that both Members are of the view that 'A' on page-1 needs to be incorporated in the tariff order. Secretary may get this done.
>
> Para-2: It was decided not to make any change.
>
> Para-3: The statement at 'B' on page-3 **in** correct, though it includes power purchase and other items of expenditures also. It has no implication on tariff order.

Para-4: The issue regarding revenue model and ABR has been explained by the Consultant today to Member(S).

Para-5: As regards para-3.95 to 3.99 of BRPL draft order in respect of finding on Form-2.1(a) – as per decision taken in other file.

Sd/-
30.04.10
CHAIRMAN

Sd/- 1/5
MEMBER(S)

Sd/- 3/5
MEMBER (SRS) Separate copy sent

Sd/- 3/5
Secretary

Sd/- 3/5
J.D(TF)/Dir (T)"

42. At page 158-159, there is another note sheet, which reads as under:

"The notings on N.P.182 may please be referred to. The main file for approval of tariff orders was submitted to M(SRS) and separate copies were sent to M(S) and Chairman.

2. The Chairman has approved the tariff orders and returned the same.

3. This is the main file and M(SRS) has now approved. This file may be forwarded to M(S) for his approval also, after which the order will be issued.

A K Singh
29/4/10

Sd/-
29/4/10
Secretary

Sd/-
30/4/2010
M(SRS)

I have flagged a number of issues for discussion.

Sd/-
30/4
M(S)

Sd/-
M(SRS)

All issues have been discussed.

Sd/-
3.05
Chairman

Sd/-
3/05/10
Sec

Sd/-
3/5/10
Dir(T)"

43. On a perusal of the notes, it transpires that the Director (Tariff) has written report notes with regard to all the discussions by the Commission and the aspect of unanimity but the movement of file and the notings by Member (SRS) go contrary to the notings of the Director. The notes of the Director have not been signed by the Chairman or the members. It is also not clear whether the notings of Member(SRS) were sent to the Chairman and to the Member(S). On 5.5.2010, there is a noting that "this file may please be sent to Member(S) for recording his views". Thereafter, the Chairman has written the following note on 5.5.2010:

> "Since both members are of the view that we have to comply with the direction u/s 108, it constitutes a majority view and will prevail. Statutory advise may please be put up early."

44. On 11.5.2010, the Chairman has made a note to the following effect:

> "A&B may be relevant only when the tariff order is to be passed."

45. On 20.5.2010, Sh.S.R. Sethi writes thus:

> "(b) It is factually incorrect that one Member and the Chairman had signed the Tariff Order. At least the undersigned has not signed the Tariff order at any stage."
>
> "(e) Number of notes on the subject of tariff have been issued which are yet to be responded. Copies of the notes are

placed on the "C" side. It would be appropriate to deal all the issues on the main Tariff Order file instead of creating number of part files."

46. On 24.5.2010, Sh. S.R. Sethi writes the following note:

"6. Approval of the Tariff Order is to be considered when the draft Order is initialed. So far it has not been done by Member (SRS)."

47. On 25.5.2010, the Chairman made a note to the following effect:

"Members are not allowing the passing of the order for true up for 2008-09 and tariff for 2010-11 in spite of opinion of the Solicitor General that the order should be passed and have now started raising the issue of true up for 2009-10. The draft tariff order for the true up of 2008-09 and tariff for 2010-11 shows a surplus of about Rs.3500 crore and if passed would result in a substantial reduction in tariff. The true up for 2009-10, if done without passing the order for true up of 2008-09 and tariff order for 2010-11, may result in some increase in the existing tariff which would be most unfair to consumers when in fact there should be a substantial reduction. The Commission is not existing to only benefit the private DISCOMS."

48. On 28.5.2010, the Chairman has recorded his views as follows:

"We must pass the tariff order immediately. I do not see a problem as the tariff order stands approved on file by me and M(SRS)." …

> "On another file (C-2446) where members had not agreed to the passing of the tariff order and M(SRS) had written that we should file a writ in the High Court to get the direction under Section 108 quashed, I have agreed with M(SRS). This is the least we must do. However, the best would be to go ahead and pass the tariff order as advised by the Solicitor General."

49. On 10.8.2010, the Chairman has recorded as follows:

> "As regards 'C' on page – 4, it is obvious that the Tariff Orders have not been issued so far despite several reminders to Members and even the files on the Statutory Advice with all relevant notings are not being sent so that the meeting can be arranged and Advice can be finalized."

50. From the aforesaid notings, it is clearly noticeable that the Chairman and the members have made their individual notings on many an issue and there is no determination or passing of the tariff order. It is submitted by Mr. Laliet Kumar, learned counsel for the petitioner, and Mr. Jayant Bhushan, learned senior counsel for the intervener, that the majority view is clear to the effect that the tariff order was ready and what only remained was the communication. Mr.Parag Tripathi, learned Additional Solicitor General appearing for the Commission, would contend that there has been no determination and signing of the order. What is perceptible is that there is movement of file from one to the other with notes of disagreement and lengthy noting by the Director(Staff) and

hence, it is quite clear that the tariff was not determined. Mr. Harish Salve and Dr. Singhvi have also echoed similar proponements. The learned senior counsel would also contend that the Commission which is a regulatory body conferred with the power of determination of tariff and framing up of regulations has not acted as a body and, in fact, the notings do clearly reveal that there is a pendulum - like movement of the file. It is also urged that this Court should refrain from issuing a writ of mandamus to the Commission to issue the tariff order on the basis of notings as such a direction is impermissible.

51. On a perusal of the aforesaid notings and the consultation process and the manner in which the file has moved, we have no ounce of doubt the tariff order was not signed and, hence, no order was made and further the Commission had not become functus officio. Approval by one Member or the other on the file does not result in making of the tariff order. What was required was a meeting under Section 92(3) and deliberations with voting and signing of the order in terms of Regulation 22.

52. The petitioner may be correct that had there been no interjection by the Government of Delhi, which has been already adversely commented upon, the tariff order may have been made or issued. This is different from stating that the

tariff order was made or issued. Probably, the tariff order may have been signed and thereafter issued but in fact it did not happen. The interdiction is wrong at the behest of the discoms but this by itself does not compel us to treat and hold that the tariff order had been made or issued, as the statutory requirements were not satisfied.

53. Presently, we shall proceed to deal with the issue whether the court can issue a writ of mandamus to the Commission to pronounce an order on the basis of the notings on the file of the Commission. We may hasten to clarify that though we have already opined that there is no tariff order as regards the determination of tariff, yet, as there was erroneous interdiction, the question arises whether a writ of mandamus can be issued to pronounce the "tariff order". In this context, we may refer with profit to certain authorities in the field.

54. In ***State of U.P. and others v. Harish Chandra and others,*** **(1996) 9 SCC 309**, the Apex Court has expressed thus:

> "10. …Under the Constitution a mandamus can be issued by the Court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the

> Government to refrain from enforcing the provisions of law or to do something which is contrary to law…."

55. In ***Union of India and others v. S.K. Saigal and others*, (2007) 14 SCC 556**, it has been ruled that no mandamus can be issued which would be contrary to the Act and the Rules.

56. In ***Himachal Pradesh Public Service Commission v. Mukesh Thakur and another*, (2010) 6 SCC 759**, the Court ruled thus:

> "16. It is a settled legal proposition that the court cannot take upon itself the task of the statutory authorities."

57. In ***Director of Settlements, A.P. v. M.R. Apparao*, (2002) 4 SCC 638**, in the context of the power of the High Court under Article 226 of the Constitution of India for the purpose of mandamus, it has been held thus:

> "17. …The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Court must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ

> of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right *must be subsisting on the date of the petition (Kalyan Singh v. State of U.P,* AIR1962 SC 1183). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law…."

58. In ***Oriental Bank of Commerce v. Sunder Lal Jain*, (2008) 2 SCC 280**, their Lordships referred to certain passages on writ of mandamus from *The Law of Extraordinary Legal Remedies* by F.G. Ferris and F.G. Ferris, Jr. and to the other decisions in the field and opined thus:

> "…in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities…."

59. In ***Bihar Eastern Gangetic Fishermen Coop. Society Ltd. v. Sipahi Singh,*** **AIR 1977 SC 2149**, the Apex Court has ruled thus:

> "[A] writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

60. In ***Secretary to Government, T.N. & Anr. v. K. VInayagamurth,*** **(2002) 7 SCC 104**, the Apex Court opined that once the Court comes to the conclusion that certain provisions of the Act or the Government order are arbitrary, then the Court would strike down the same leaving it for the appropriate authority under the statute to deal with the cases of the applicant.

61. In ***State of Bihar & Ors. v. Amrendra Kumar Mishra,*** **(2006) 12 SCC 561**, the Apex Court has stated that it is well settled that in the absence of any legal right, the Court should not issue a writ or direction in the nature of mandamus.

62. From the aforesaid enunciation of law, it is clear that the existence of a legal right of a citizen and the performance of any corresponding legal duty by the State or any public authority could be enforced by issuance of a writ of mandamus as it basically means a command. In order to obtain a writ or order in the nature of mandamus, a person is required to satisfy the court that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought. That apart, such a right has to subsist on the date the relief is sought in the court. In the absence of establishing a legal right, a writ of mandamus is not to be issued to a public authority. The court ordinarily does not exercise the power of the statutory authorities and direct the statutory authority to perform their function. In this context, we may refer with profit to the decision rendered in ***Union of India and another v. S.B. Vohra and others*, JT 2004 (1) SC 38**, whereinit has been held thus:

> "12. A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The writ of mandamus is a most extensive remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted."

63. Applying the aforesaid principle of law to the obtaining factual matrix, we are of the considered opinion that a writ of mandamus which is basically a command cannot be issued to the Commission to pronounce/make its order on the basis of the notings or the consultation made on the file. We may repeat at the cost of repetition that we have already held that there has been no determination of tariff by the Commission and it is also difficult to infer the same from the file as we do not perceive any order/decision in accordance with the statutory provisions was made. The procedure adopted by the Commission while baffles one also clearly conveys that no effort has been made to follow a specified procedure from which it could be discernible that there have been sittings, deliberations and consultations. That apart, till there has been determination or passing of an order in accordance with the provisions of the Act and making/issue of the order, the Commission has the authority to change its opinion.

64. Mr. Jayant Bhushan, learned counsel for the intervener, would contend that the Commission can change the opinion but only for 'valid reasons' as has been held by the Apex Court in the case of ***S.N. Goyal*** (supra) but in the present case, there is no such valid reason. The said submission leaves us unimpressed

as we do not find any determination. As the notings would reveal, the file has only moved, sometimes with the speed of a tortoise and sometimes in a reptile manner and, hence, the question of change for a valid reason does not arise. Once the said submission is repelled, the question of issuing a mandamus under Article 226 of the Constitution of India to the statutory regulatory body to pass an order in a particular manner also does not arise. A regulatory body is required to function according to the parameters of the statute and the regulations in the field. Once there is no order relating to determination, no right has accrued in favour of any consumer and, therefore, a mandamus cannot be issued to give effect to the same. If a direction is passed to pronounce the order of determination on the basis of the notings on the file, even if it is assumed to be correct, it will be a direction contrary to the Act which is not permissible in law. The only direction, as advised at present, this Court can issue is that the Commission shall determine the tariff after taking recourse to the due process of law under the 2003 Act as that has become the warrant since in the meantime the term of the Chairman and one of the members is over. That is the limited mandamus this Court can issue.

65. At this juncture, we must deal with one of the submissions of Mr. Jayant Bhushan, learned senior counsel appearing for the intervener. In view of our

aforesaid analysis, though it is unnecessary to deal with such a submission, yet for the sake of completeness, we proceed to advert to the same. It is submitted by him that had the State Government not interdicted, the tariff order could have been issued. It is urged by him that because of the order of restraint erroneously passed by the State Government, the tariff order could not be issued as a consequence of which the consumers have suffered. Once this Court has declared that such an interdiction or injunction was invalid in law, the consequential benefit should flow in favour of the consumers. To bolster the said submission, he has referred to the decision in ***Badrinath v. Government of Tamil Nadu & Ors.*, AIR 2010 SC 3242** wherein the Apex Court had observed that once the basis of a proceeding is gone, all consequential acts, actions and orders would fall to the ground automatically and the principle of consequential order which is applicable to judicial and quasi judicial proceedings is equally applicable to administrative orders. It is urged by Mr. Jayant Bhushan and Mr. Laliet Kumar that when the Commission was ready to pronounce its tariff order, the same having been crystallized and determined, it should be pronounced as it is a consequential act. In this connection, the learned counsel have placed reliance on ***Kalabharti Advertising v. Hemant Vimalnath Narichania & Ors.*, AIR 2010 SC 3745**. The learned counsel have also placed reliance on ***South Eastern Coalfields***

***Ltd. v. State of MP & Ors.*, AIR 2003 SC 4482** wherein it has been held as follows:

> "In Badrinath v. State of Tamil Nadu & Ors., AIR 2000 SC 3243, this Court observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi judicial proceedings is equally applicable to administrative orders."

This being the legal position, in all possibility, there could have been a direction for grant of some kind of relief but because of our findings recorded above on the issue when and how a tariff order is made or communicated, the submission, though may be valid under certain circumstances, cannot be applied to the factual matrix of the present case.

66. Presently, we shall proceed to state the role of the court as regards the tariff determination and the remedy provided under the 2003 Act. In ***Shri Sitaram Sugar Company Ltd. v. Union of India*, (1990) 3 SCC 223**, the Apex Court has held thus:

> "56. The Court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The Court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. In the words of Justice Frankfurter of

the U.S. Supreme Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Company*, 311 US 570, 575:

> "Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen State authorities.... When we consider the limiting conditions of litigation - the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers - it is clear that the Due Process Clause does not require the feel of the expert to the supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses".

This observation is of even greater significance in the absence of a Due Process Clause.

57. Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works,* 1987 Supp SCC 476, 481 (SCC p.479, para 4)

> "…the court does not act like a chartered accountant nor acts like an income tax officer. The court is not

> concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

> 58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company v. United States of America*, 292 US 282, 286-87: 78 L ed 1260, 1265:

> > "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

67. We have referred to the aforesaid decision only to point out the limited role of the court.

68. It is apposite to note here that under Section 111 of the 2003 Act, an appeal is provided to the appellate tribunal. The said provision reads as follows:

> "Section 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 sub-section (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."

69. The appellate tribunal has been constituted to scrutinize the tariff order and tariff fixation under Section 62 which is appealable as has been held in ***PTC India Limited*** (supra). Thus, the parties have a forum to agitate their grievances.

70. We will be failing in our duty if we do not refer to the manner in which the Commission has proceeded. It is not only baffling but also perplexing. It is shocking to the basic concept of prudence. The legislature has conferred regulatory power on a regulatory body. It has a sacrosanct purpose. The Chairman and the members are required to act within the parameters of the statute following the paradigm of a regulatory body. A regulatory body is not expected to create confusion. We have said so as we are reminded of saying "in this entire scenario one thing is singularly clear that there is enormous chaos and

confusion". A Commission of this nature is expected to avoid confusion as it has the effect potentiality to lead to economic anarchy. When there is anarchy in the field of economy, there is a dent in the spine of the nation. A regulatory body has no right to do so by its own functioning. The members of the Commission should bear in mind that they have been conferred with immense responsibility. The 2003 Act requires that Commission should act in a particular manner. That is the intention of the legislature and the intention is of an imperative character. The Commission cannot give an indecent burial to the imperative mandate of the statute, corrode the integral scheme engrafted under it and defeat the legislative intendment. There may be a perceptual error by any adjudicating or regulating authority but there cannot be a functioning which would lead to a volcanic eruption by violation of the statute.

71. In this regard, we may fruitfully refer to what has been stated in ***PTC India Limited*** (supra):

> "17. The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the

establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.

18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as Tariff Policy for development of the power system based on optimum utilization of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as the regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the Tariff Policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) of the 2003 Act (see also Section 66).

19. In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote trading in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the Regulatory

Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

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29. On the scheme of the 2003 Act it was submitted by Shri Harish N. Salve, learned senior counsel, that, under the said Act the Central Commission and SERCs have to frame regulations as well as pass statutory orders. The Act uses the expression "fixed" in Sections 8, 19, 45 & 79; it uses the expression "determined" in the proviso to Section 9(2), Sections 20, 42, 47, 57, 61 and 67(2) and the word "specified" (i.e. by way of regulations) in Sections 13, 14, 15, 16, 17, 18(2), 28(4), 34, 36, 38, 41, 42, 45, 51, 52, 53, 57, 61 and 67(2) of the 2003 Act. Under the 2003 Act, according to the learned counsel, there are a series of provisions which expressly require the Commission to frame regulations on specific aspects. According to learned counsel, each of the said three expressions have to be interpreted by the terms and in the context of the scheme of the 2003 Act and not by a priori notions of administrative law. For example, Section 61 posits the framing of regulations by the Commission, which will subject to the provisions of the 2003 Act, specify the terms and conditions for the determination of tariff. It is possible that such regulations may be licensee - specific or generic. At the same time, under Section 62 read with Section 64 refers to determination of tariff in accordance with the provisions of the Act for supply of electricity by Gencoms, transmission of electricity, wheeling and trading of electricity. Applying the *Cynamide (*1987) 2 SCC 720 *principle* of administrative law, such tariff order would be characterized as delegated legislation yet under Section 111 of the 2003 Act it is made appealable to the Appellate Tribunal.

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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 subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow.

51. In *Narinder Chand Hem Raj v. Lt. Governor, H.P.* (1971) 2 SCC 747 this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if courts cannot so direct, much less the tribunal, unless power to annul or modify is expressly given to it.

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78. One more aspect needs to be mentioned. The judgment of this Court in *Shri Sitaram Sugar Co. Ltd. v. Union of India* (1990) 3 SCC 223 has laid down various tests to distinguish legislative from administrative functions. It further held that

> price fixation is a legislative function unless the statute provides otherwise. It also laid down the scope of judicial review in such cases."

72. We have reproduced paragraphs from the aforesaid decision in extenso only to highlight the role ascribed to the Commission under the Act and the interpretation placed by their Lordships of the Apex Court on various provisions. Keeping the statutory role ascribed to it and the jurisdiction determined by the Apex Court, the Commission has to function with responsibility, intellectual integrity, consistent objectivity and transparent functionalism appreciating the essential nature of the regulatory body. We emphasize on intellectual integrity and transparent functionalism as we are totally dissatisfied with the way the Commission has proceeded with the manner of determination. We may also note here that if a state of chaos and anarchy has ushered-in in the Commission the State Government is also responsible by unjustifiably intruding and encroaching on the functions of the Commission by interdicting. We have already held that the State Government has no power to restrain the Commission in the manner it has done. This is not in the fitness of things. This Court hopes and trusts that the Commission and the State shall remain within their boundaries and function within the statutory parameters.

73. We will be failing in our duty if we do not express our views on the conduct of the distribution companies. A distribution company is not an illiterate litigant who seeks redressal of his grievances at any stage and before whichever forum. They are guided by their law officers and are expected to know how to conduct themselves. The manner in which they submitted the representation to the State Government requiring its interference at a stage when the regulatory body was proceeding with the determination was totally unwarranted. They should have been well advised not to curb the determination process by the regulatory Commission. They should have understood the status of the regulatory commission in proper perspective. The State Government, as we have already held, and repeat at the cost of repetition, had traveled beyond its power by issuing a direction purported to have been so done in exercise of power under Section 108 of the 2003 Act. The State Government totally misdirected itself at the instance of the distribution companies. The distribution companies can very well contend that they can afford to make an erroneous representation or bring something which is not within the parameters of the statute to the State Government, yet, it is obligatory on the part of the State Government to look into the parameters of law and pass appropriate directions. But, a pregnant one, we can well appreciate if a layman

takes such a path but the companies which are run by people who are qualified and educated and assisted by their own legal officers should not have taken recourse to such a path. It is nothing but subterfuge. It is against the national interest. The prudence does not countenance it. The law does not give sanction to it. It is, in a way, an innovative game play with the law. We are inclined to think that the companies harboured the notion they are children who can approach the Government like going to a laboratory to play a game of minor experimental science. It is absolutely impermissible and we, without any reservation, express our displeasure. We hope and trust that the distribution companies shall behave with responsibility, maturity and intellectual honesty keeping in mind the interest of the citizens and not to be obsessed with their own interest in singularity ostracizing statutory paradigms of law. This is a caution for the future. We expect more sensibility from them, as they cannot afford to suffer from intellectual paraplegia.

74. In view of our aforesaid analysis, we proceed to record our conclusions and directions in seriatum:

(a) As held by us vide order dated 18.2.2011 the State Government could not have interdicted in the manner it has done in exercise of power under Section 108 of the 2003 Act.

(b) The notings on the files by the Commission do not constitute an "Order" under the 2003 Act.

(c) A writ court cannot issue a writ of mandamus or command or direction in the nature of mandamus directing the Commission to pronounce the verdict as regards the tariff on the basis of the notings on the file.

(d) A writ of mandamus can only be issued to the Commission to proceed afresh and determine the tariff as per the provisions under the 2003 Act.

(e) The Commission shall be alive to the role conferred on it by the 2003 Act and also bear in mind the principles laid down by the Apex Court in ***PTC India Limited*** (supra).

(f) The Commission under the 2003 Act is required to deal with the aspect of tariff determination with intellectual integrity, transparent functionalism and normative objectivity and not act in a manner by which its functioning invite doubt with regard to its credibility.

(g) The question of restitution as a consequential act does not arise in the case at hand since there is no order which can be given effect to.

(h) The Commission shall proceed afresh by following the due procedure and do the needful and not afford any kind of opportunity for criticism and determine the tariff.

(i) The tariff order is appealable under Section 111 of the 2003 Act.

(j) The distribution companies are expected to behave with more responsibility, sensibility and in consonance with the statutory provisions and only not think of their own Everestian interest of profit burying larger collective interest.

75. The writ petition is accordingly disposed of without any order as to costs.

CHIEF JUSTICE

MAY 23, 2011 **SANJIV KHANNA, J**
Kapil/dk