2023INSC872

Non-Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.414 OF 2007

GRIDCO Ltd. ... Appellant

versus

Western Electricity Supply Company of Orissa Ltd. & Ors. etc. ... Respondents

with

Civil Appeal Nos.417 of 2007 & 759 of 2007

Civil Appeal Nos. 463 & 572 of 2011

Civil Appeal Nos.2939-41, 2942-43 of 2011

Civil Appeal Nos.3595-97 of 2011

Civil Appeal No.2674 of 2013

Civil Appeal Nos.10251-63 of 2013

Civil Appeal Nos.2625-38 of 2014

Civil Appeal Nos.3858-60 of 2014

Civil Appeal Nos.1380-82 of 2015

Civil Appeal Nos.8037-39 of 2015

J U D G M E N T

ABHAY S. OKA, J.

INTRODUCTION

1. These appeals arise out of the decisions of the Appellate Tribunal for Electricity (for short, 'the Appellate Tribunal')

constituted under Section 110 of the Electricity Act, 2003 (for short, 'the Electricity Act'). The appeals before the Appellate Tribunal arose out of the orders fixing tariffs passed by the Orissa Electricity Regulatory Commission (for short, 'the Commission'), which is constituted in accordance with Section 82 of the Electricity Act. Under sub-section (1) of Section 62 of the Electricity Act, the Commission is under an obligation to determine the tariff for the supply of electricity by a generating company to a distribution licensee, tariff for transmission of electricity, tariff for wheeling of electricity and tariff for retail sale of electricity. For exercising powers under Section 62 of the Electricity Act, the Commission is required to pass orders determining the annual revenue requirements (ARR) of various licensees. In fact, under Section 26(4) of the Orissa State Electricity Reforms Act, 1995, every licensee is required to provide to the Commission, full details of calculations of aggregate revenue likely to be earned during the ensuing financial year. While deciding the tariff, the Commission has to seek guidance from the principles incorporated in Section 61 of the Electricity Act.

2. As per Section 12 of the Electricity Act, no person is entitled to transmit, distribute or undertake trading in electricity unless he is authorized to do so in accordance with a license issued under Section 14. A perusal of Section 14 shows that on an application made in accordance with Section 15, the Commission is empowered to grant licenses to (a) transmit electricity, (b) distribute electricity, and (c) undertake

trading in electricity. The persons to whom licenses of these three categories are issued, are known as transmission licensees, distribution licensees and electricity traders, respectively.

3. In the present case, we are concerned with different entities. The first is the GRIDCO Ltd. (for short, 'GRIDCO'), which is a Government of Orissa Undertaking. Prior to coming into force of the Electricity Act, GRIDCO carried on the business of transmission, bulk supply of electricity and other related activities. Under sub-section (1) of Section 39 of the Electricity Act, the State Government is empowered to notify the State Electricity Board constituted under sub-section (1) of Section 5 of the Electricity (Supply) Act, 1948 or a Government Company as the State Transmission Utility. The first proviso to sub-section (1) lays down that the State Transmission Utility shall not engage in the business of trading in electricity. Prior to the commencement of the Electricity Act, GRIDCO was a bulk supply transmission licensee. However, as per the first proviso to Section 39, GRIDCO was no longer entitled to carry on both the supply and transmission of electricity. After coming into force of the Electricity Act, the State Government, by exercising power under sub-section (4) of Section 131 of the Electricity Act, came out with a scheme known as the Orissa Electricity Reform (Transfer of Transmission and Related Activities) Scheme, 2005. Before coming into force of the said scheme, the Orissa Power Transmission Corporation Ltd., Bhubaneswar (OPTCL), was incorporated on 29th March 2004.

It is a State Government company established to carry on the business of transmission of electricity within the State of Orissa. As per the scheme, with effect from 1st April 2005, the erstwhile transmission business of GRIDCO with all the assets and liabilities was transferred to and vested with OPTCL. We may note here that on 10th June 2005, OPTCL was notified as the State Transmission Utility under Section 39 of the Electricity Act. By virtue of the second proviso to Section 14 of the Electricity Act, OPTCL became a deemed transmission licensee. The business of bulk supply of electricity continued to vest in GRIDCO, which became a deemed distribution licensee in accordance with provisions of the fifth proviso to sub-section (2) of Section 14 of the Electricity Act, being a Government company referred to in sub-section (2) of Section 131. In the State of Orissa, there are distribution companies known as DISCOMS, which are distribution licensees in accordance with Section 14(b) of the Electricity Act. DISCOMS with which we are concerned within the State of Orissa are:

a. Western Electricity Supply Company of Orissa Ltd. (WESCO);

b. North-Eastern Electricity Supply Company of Orissa Ltd. (NESCO);

c. Southern Electricity Supply Company of Orissa Ltd. (SESCO); and

d. Central Electricity Supply Company of Orissa Ltd. (CESCO).

FACTUAL DETAILS ABOUT THE APPEALS

4. In this group of appeals, Civil Appeal No.414 of 2007 has been preferred by GRIDCO for challenging the order dated 13th December 2006 of the Appellate Tribunal dealing with the order of the Commission dated 23rd March 2006 by which the annual revenue requirement (ARR) and bulk supply tariff (BST) for the financial year 2006-2007 of GRIDCO was finalised. The said order was passed on the application made by GRIDCO to the Commission.

5. GRIDCO has preferred Civil Appeal Nos. 463 and 572 of 2011 for challenging the order dated 9th November 2010 of the Appellate Tribunal on appeals preferred by DISCOMS arising out of the order dated 22nd March 2007 of the Commission dealing with ARR and BST of GRIDCO for the financial year 2007-2008. The order dated 22nd March 2007 was passed on the application made by GRIDCO to the Commission. These appeals are limited to only two issues: *locus-standi* of DISCOMS to challenge BST and non-inclusion of repayment of the principal loan amount in ARR.

6. Civil Appeal Nos.2942–2943 of 2011 have been preferred by WESCO and NESCO against the same order dated 9th November 2010 of the Appellate Tribunal, which is the subject matter of challenge in Civil Appeal Nos.463 and 572 of 2011. Civil Appeal Nos. 2942-43 of 2011 are cross-appeals on other issues which are not the subject matter of Civil Appeal Nos.463 and 572 of 2011.

7. Civil Appeal No.2674 of 2013 has been preferred by the Commission for challenging the order dated 29th November 2012 passed by the Appellate Tribunal regarding ARR and BST of GRIDCO fixed by the Commission for the financial year 2011-2012 under the order dated 18th March 2011 on the application made by GRIDCO. This appeal is confined only to issue no.4 regarding repayment of the principal loan amount.

8. The next category of appeals relates to ARR and Transmission Tariff orders (TT) for the financial years 2006-2007 and 2007-2008 in respect of OPTCL. Civil Appeal No.417 of 2007 has been preferred by OPTCL, where the challenge is to the order dated 13th December 2006 passed by the Appellate Tribunal arising out of the order dated 23rd March 2006 of the Commission for the financial year 2006-2007 in respect of ARR and TT of OPTCL. WESCO, NESCO and SESCO (DISCOMS) have preferred Civil Appeal Nos.2939-2941 of 2011 for challenging the order dated 8th November 2010 passed by the Appellate Tribunal concerning the order dated 22nd March 2007 of the Commission in respect of ARR and TT of OPTCL for the financial year 2007-2008.

9. The third category of appeals arises out of the determination of ARR and retail supply tariff orders (RST) of DISCOMS and true-up orders. Civil Appeal No.759 of 2007 has been filed by the Commission for challenging the order dated 13th December 2006 passed by the Appellate Tribunal arising out of the order dated 23rd March 2006 passed by the Commission in respect of ARR and RST of DISCOMS for the

financial year 2006-2007. Civil Appeal Nos.3595-3597 of 2011 are again preferred by the Commission for challenging the order dated 8th November 2010 passed by the Appellate Tribunal arising out of the order of the Commission dated 23rd March 2007 in respect of ARR and RST of DISCOMS for the financial year 2007-2008. The Commission passed the orders on the basis of the application made by DISCOMS.

10. Civil Appeal Nos.2625-2638 of 2014 are preferred by WESCO, NESCO and SESCO for challenging the order dated 3rd July 2013 passed by the Appellate Tribunal, which deals with several appeals. These appeals concern ARR and RST orders of the Commission for the financial years 2008-2009, 2010-2011, 2011-2012 and 2012-2013 passed on the applications made by DISCOMS (appellants in the appeals). These appeals also concern the true-up order dated 19th March 2012 of the Commission for DISCOMS for the financial years 2000-2001 to 2010-2011. The appeals also deal with the order on review petition passed by the Appellate Tribunal concerning the said true-up order. Civil Appeal Nos.10251-10263 of 2013 filed by the Commission impugns the same order dated 3rd July 2013 passed by the Appellate Tribunal in relation to ARR and RST of DISCOMS for the financial years 2008-2009, 2010-2011, 2011-2012 and 2012-2013 as well as truing-up order dated 19th March 2012.

11. The Commission has also filed Civil Appeal Nos.3858-3860 of 2014 in respect of the ARR and RST orders for DISCOMS for the financial year 2012-2013. The Commission

passed the order on 22nd March 2013 in respect of ARR and RST for the financial year 2013-2014. The Appeals preferred by DISCOMS against the said order were allowed by the impugned order dated 11th February 2014. The Appellate Tribunal passed an order of remand. While deciding the appeals, the Appellate Tribunal also dealt with non-compliance of its earlier orders by the Commission.

12. Civil Appeal Nos.1380-1382 of 2015 filed by the Commission arise out of the order dated 30th November 2014 passed by the Appellate Tribunal concerning ARR and RST order dated 22nd March 2014 of the Commission for the financial year 2014-2015. The Appellate Tribunal passed an order of remand on the grounds that the earlier orders of the Appellate Tribunal were not complied with by the Commission. Civil Appeal Nos.8037-8039 of 2015 have been preferred by GRIDCO against the same order dated 30th November 2014 passed by the Appellate Tribunal.

SUBMISSIONS

13. Now, we turn to the submissions canvassed across the bar. The learned counsel representing GRIDCO pointed out that Civil Appeal No.414 of 2007 and Civil Appeal Nos.417 and 759 of 2007 relate to the financial year 2006-2007, which arose out of the judgment and order dated 13th December 2006 passed by the Appellate Tribunal. During the pendency of the said appeals, the Commission passed a tariff order for the financial year 2007-2008. DISCOMS challenged the tariff order of the financial year 2007-2008 by filing appeals before the

Appellate Tribunal on similar grounds. Initially, the appeals in respect of financial year 2007-2008 were kept pending by the Appellate Tribunal awaiting the decision of this Court in Civil Appeal No.414 of 2007 and other connected cases. Subsequently, a full Bench of the Appellate Tribunal took up the appeals pertaining to tariff orders for the financial year 2007-2008 and disposed of the same by the judgments dated 8th November 2010/9th November 2010. On most of the issues, the Full Bench took a view which is different from the view taken by the Division Bench of the Appellate Tribunal. DISCOMS filed Civil Appeal nos.2942-2943 of 2011 for challenging the judgment dated 9th November 2010. Against the order dated 8th November 2010, Civil Appeal Nos.2939-2941 of 2011 have been preferred by DISCOMS. Against the order dated 9th November 2010, appeals were also preferred by GRIDCO, being Civil Appeal Nos.463 and 572 of 2011.

14. The learned counsel pointed out that BST is fixed based on the generation tariff order. However, a large gap is always kept in the ARR of GRIDCO, which can be breached by the revenue from trading. This is done with a view to keep the power tariff low. The BST and transmission charges are allowed as pass-through in full in RST orders for DISCOMS. In addition to BST, transmission charges and other expenses, return on equity is also allowed to DISCOMS in the RST order. However, DISCOMS are not affected in any manner by the BST and TT, and the orders passed on that behalf by the Commission. When the BST or TT is reduced, the RST is also

required to be correspondingly reduced. According to DISCOMS, as RST was not sufficient, they challenged the orders regarding RTS by filing appeals and were successful therein. The submission is that there is no *locus standi* for DISCOMS to challenge the BST and TT orders. He pointed out that until 2005-2006, DISCOMS never challenged the BST and TT, and it was only from 2006-2007 onwards that DISCOMS started challenging such orders. The learned counsel pointed out that GRIDCO, by purchasing power from various generators, supplies the same to the four DISCOMS. In fact, the ARR of GRIDCO is towards the power purchase cost. According to GRIDCO, the issues involved in financial years 2006-2007 and 2007-2008 have become academic as truing up has already been done up to 2010-11 on the basis of actuals in respect of most of the major items. It is pointed out that GRIDCO has never challenged the ARR and RST orders in relation to DISCOMS. The submission is that since the appeals by DISCOMS challenging the RST orders have been allowed, it is not open for DISCOMS to say that GRIDCO should not get its ARR.

15. The learned counsel pointed out that the finding of the Appellate Tribunal in the judgment dated 9th November 2010 that DISCOMS have *locus standi* to challenge the BST order is on the ground that though BST payable by DISCOMS to GRIDCO is being consistently increased, there is no corresponding increase in RST. The argument accepted by the Appellate Tribunal is that DISCOMS have the right to get the

BST reduced by challenging the BST order. He submitted that since RST appeals of DESCOMS have been allowed, they will get their ARR. But they cannot say that GRIDCO and OPTCL should not get their ARR. Our attention is invited to the subsequent order dated 19th March 2012 passed by the Commission in respect of truing-up. He pointed out that in the said order, it is found that in the case of WESCO and NESCO, there is a surplus of Rs.1223.39 crores and Rs.317.39 crores, respectively. A deficit of Rs.0.46 crores was found in the case of SESCO. A deficit of Rs.2266 crores was found in the case of GRIDCO. It is pointed out that an appeal filed by DISCOMS against the said order dated 19th March 2012 has been allowed by the Appellate Tribunal by the judgment dated 3rd July 2013.

16. The learned counsel pointed out that by the order dated 4th March 2015, the Commission revoked the retail supply licenses of the three DISCOMS, namely WESCO, NESCO and SESCO. It is pointed out that the said order has attained finality as the Appellate Tribunal and this Court have confirmed the same. It is, therefore, submitted that DISCOMS have no right to pursue the present appeals.

17. The learned counsel appearing for GRIDCO pointed out that DISCOMS have no *locus standi* to challenge the BST order as the BST is allowed as a pass-through in the RST. The full amount towards power purchase cost allowed in the BST was allowed as a pass-through to DISCOMS in the RST in the respective years. In fact, the remedy of DISCOMS is to challenge the RST orders, which was done by them, and their

appeals have been allowed. By virtue of that, DISCOMS will be able to make good the shortfall of revenue, if any. If any amount from BST is allowed to be appropriated, it will result in unjust enrichment of DISCOMS, which is against the regulatory scheme. It is pointed out that the advance depreciation is supposed to be utilised from the repayment of the principal loan amount by GRIDCO. It is the case made out that GRIDCO has no fixed assets, and therefore, there is no depreciation. Therefore, unless the amount is passed on in the tariff as a special appropriation, no amount will be available to GRIDCO to make repayment of the principal loan amount. In fact, repayment of the principal will reduce the interest burden on GRIDCO, which, in turn, will result in a reduction of BST in future years, and the benefit will be ultimately passed on to the consumers.

18. The submission of the learned counsel is that the Appellate Tribunal has erroneously held that the Commission had taken the cost of power into consideration. He submitted that the mandatory direction issued for taking Rs.943 crores as revenue earning of GRIDCO from trading is completely illegal as the figure of Rs.943 crores was given only in the written submission and not by way of any statement or oath. The learned counsel also invited our attention to the order dated 9th November 2010 for the financial year 2007-2008. He pointed out that the Commission has carried out truing-up exercise for the financial year 2007-2008, and while doing so, the Commission has taken into consideration the actual receipt

and expenditure of GRIDCO. In the said order, the State Commission has stated that the income from the export of power is accounted for in the truing-up exercise. It was found that the grievance of DISCOMS that the Commission has not considered revenue from trading, is not tenable.

19. In support of their appeals, the Commission pointed out that their appeals relate to RST issued for the financial year 2006-2007 to the financial year 2014-2015, except for the financial year 2009-2010. One of the said appeals arises out of the order of the Commission dated 23rd June 2006 in Case nos.44 to 47 of 2005. According to the submissions of the learned counsel appearing for the Commission, these appeals deserve to be allowed in view of the decision of this Court in Civil Appeal No.18500 of 2017. This appeal arose out of the order of the Commission of revoking the licenses granted to three DISCOMS, which the Appellate Tribunal confirmed. While dealing with the appeals challenging the order of revocation of licenses, the Appellate Tribunal held that DISCOMS failed to run the distribution business in a viable, efficient and commercially sustainable manner due to its inability to reduce distribution loss. It was also observed that DISCOMS were not billing all its consumers, and whatever bills were generated were not recovered in its entirety. That is how the three DISCOMS have lost extra revenue of more than Rs.300 crores.

20. The submission of the learned counsel relating to Civil Appeal No.759 of 2007 is that the distribution loss is

controllable in nature. His submission is that DISCOMS cannot be allowed to pass on their inefficiency to the consumers by increasing RST. He submitted that the order of the Appellate Tribunal dated 13th December 2006 is contrary to the order dated 21st August 2017 passed by the Appellate Tribunal in Appeal no. 64 of 2015. He submitted that the order of the Appellate Tribunal dated 13th December 2006 does not deal with the issue of the failure of DISCOMS to do an energy audit. His submission is that the losses DISCOMS wanted to be considered for fixing tariffs cannot be considered for fixing tariffs. Lastly, it is submitted that there will be adverse effects if the distribution losses, as claimed by DISCOMS, are considered.

21. The learned counsel appearing for DISCOMS submitted that no substantial question of law is involved in Civil Appeal No.759 of 2007 and other connected matters filed by the Commission. He relied upon a decision of this Court in the case of ***Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors.***[1] and various other decisions of this Court. He submitted that no substantial question of law is involved in Civil Appeal No.759 of 2007. He urged that the Appellate Tribunal has not finally decided the issues raised in the appeal filed by DISCOMS against the revocation of the license order as the said order is specifically made subject to the decision in present appeals, which are pending before this Court. He

[1] 2022 (4) SCC 657

pointed out that the Commission requested GRIDCO to take appropriate steps towards recovery of the outstanding dues.

22. He pointed out that in the appeals relating to RST, issues need to be considered by this Court. He submitted that high distribution losses suffered by DISCOMS are due to the errors committed in tariff determination by the Commission. He submitted that the Commission failed to reset the loss targets as mandated by the Appellate Tribunal. He pointed out that the ARR of DISCOMS was never based on the proposals submitted by DISCOMS. He submitted that the target of loss reduction must be realistic. While proposing the targets, DISCOMS expected that the order of the Appellate Tribunal would be implemented. He submitted that while making tariff determination, only after the ARR is computed on realistic loss levels that the gap can be ascertained, which could be breached by either an increase in RST or a decrease in BST. However, the Commission never quantified the amount of gap. He also submitted that no fault for not conducting the energy audit can be found. He submitted that for creating infrastructure for the energy audit, large capital is required. Though the expenses for this exercise were incorporated in the ARR of DISCOMS, the Commission never allowed the said expenses till the financial year 2014-2015. The learned counsel urged that the expenses proposed by DISCOMS towards execution of energy audit work, RTI expenses, spot billing, cess, etc., were never considered by the Commission while passing orders regarding ARR and tariff.

CONSIDERATION OF SUBMISSIONS

LIMITED SCOPE FOR INTERFERENCE

23. We may note here that these appeals are preferred invoking Section 125 of the Electricity Act, which provides for an appeal to this Court from a decision or order of the Appellate Tribunal. Section 125 expressly provides that an appeal to this Court will lie on the grounds set out under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC'). Thus, the scope of the present appeals is very limited. An appeal against an order or decision of the Appellate Tribunal will lie to this Court only on substantial questions of law. In the case of ***DSR Steel (Private) Limited v. State of Rajasthan & Ors.***[2]**,** this Court had an occasion to deal with the scope of appeal under Section 125 of the Electricity Act. In paragraph 14 of the said decision, this Court held thus:

> **"14.** An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 CPC in turn permits filing of an appeal only if the case involves a substantial question of law. **Findings of fact recorded by the courts below, which would in the present case, imply the Regulatory Commission as the court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be reopened before this Court in an appeal under Section 125 of the Electricity Act, 2003.** Just as the High Court cannot interfere with the concurrent findings of fact recorded by the courts below in a second

[2] (2012) 6 SCC 782

> appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loath to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to *Govindaraju* v. *Mariamman* [(2005) 2 SCC 500:AIR 2005 SC 1008], *Hari Singh* v. *Kanhaiya Lal* [(1999) 7 SCC 288: AIR 1999 SC 3325], *Ramaswamy Kalingaryar* v.*Mathayan Padayachi* [1992 Supp (1) SCC 712:AIR 1992 SC 115], *Kehar Singh* v. *Yash Pal* [AIR 1990 SC 2212] and *Bismillah Begum* v. *Rahmatullah Khan* [(1998) 2 SCC 226:AIR 1998 SC 970] should, however, suffice.**"**
>
> (Emphasis added)

We may also note here that while issuing notice/admitting these appeals, this Court had not framed any substantial questions of law. Nevertheless, we have heard these appeals on merits, while keeping in view the provisions of Section 125 of the Electricity Act. The reason is that these appeals are very old, starting from the appeal of the year 2007.

24. The Commission exercises the power to fix tariffs conferred by Section 62 of the Electricity Act. We will have to note the nature of power exercised by the Commission while fixing the tariff under Section 62 of the Electricity Act. A Constitution Bench of this Court dealt with this issue in the case of ***PTC India Ltd. v. Central Electricity Regulatory Commission***[3]. In paragraphs no.25 and 26, it is held thus:

[3] (2010) 4 SCC 603

"**25.** The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

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."

(Emphasis added)

However, in the same decision, in paragraph 50, the Constitution Bench held thus:

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

Thus, the function of the Commission of tariff fixation under Section 62 is quasi-judicial.

25. We may also note here that we are dealing with the decisions of the bodies of experts like the Commission and the Appellate Tribunal. The appointment of the members of the Commission is made by a committee constituted under Section 85 of the Electricity Act, which is headed by a Judge of the High

Court. Section 84 of the Electricity Act has laid down the qualifications for the posts of Chairperson and members. It reads thus:

> **"84. Qualifications for appointment of Chairperson and Members of State Commission.—**
> (1) **The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management.**
> (2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court: Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court."
>
> (Emphasis added)

Thus, the members of the Commission are experts in the field. As far as the Appellate Tribunal is concerned, it consists of the Chairperson and three other members. As provided in the proviso to clause (b) of sub-section (2) of Section 112 of the Electricity Act, every Bench of the Appellate Tribunal must have one judicial member and one technical member. The qualifications for the posts of Chairperson, judicial members and technical members have been laid down under sub-rule (13) of Rule 3 of the Tribunal (Conditions of Service) Rules, 2021 in view of Section 117A of the Electricity Act. Sub-rule (13) of Rule 3 reads thus:

"3. Qualifications:-

.. .. ..

(13) In case of Appellate Tribunal for Electricity under the Electricity Act, 2003 (36 of 2003), a person shall not be qualified for appointment as,-

(a) Chairperson, unless he, —

(i) is, or has been, a Judge of Supreme Court; or

(ii) is, or has been, Chief Justice of a High Court.

(b) Judicial Member, unless he,—

(i) is, or has been, a Judge of a High Court; or

(ii) has, for a combined period of ten years, been a District Judge and Additional District Judge; or

(iii) has been an advocate for ten years with substantial experience in litigation in matters relating to power sector before Central Electricity Regulatory Commission, State Electricity Regulatory Commission, Appellate Tribunal for Electricity, High Court or Supreme Court.

(c) **Technical Member unless he is a person of ability, integrity and standing having special knowledge of, and professional experience of, not less than twenty-five years in matters dealing with electricity generation, transmission, distribution, regulation, economics, business, commerce,**

law, finance, accountancy, management, industry, public affairs, administration or in any other matter which is useful to the Appellate Tribunal."

(Emphasis added)

Thus, as far as the technical members are concerned, he has to be an expert in the field having an experience of twenty-five years. Therefore, when we consider the challenge to the decisions of the Commission and the Appellate Tribunal, we must keep in mind that the decisions are of a body of experts. This limitation is apart from the constraints of Section 125 of the Electricity Act of entertaining an appeal only on a substantial question of law. Therefore, this Court will normally be slow in interfering with the factual findings recorded by the Commission and/or by the Appellate Tribunal.

26. There is one more aspect of the matter. As held by the Constitution Bench, under Section 62, the Commission exercises quasi-judicial powers. There are appeals preferred by the Commission against the orders of the Appellate Tribunal in appeals under Section 111 of the Electricity Act. The Appellate Tribunal in appeals has dealt with the legality and validity of the decisions of the Commission rendered in the exercise of quasi-judicial power. In short, the Appellate Tribunal has tested the correctness of the orders of the Commission. The Commission is bound by the orders of the Appellate Tribunal. Therefore, we have serious doubt about the propriety and legality of the act of the Commission of preferring appeals against the orders of the Appellate Tribunal in appeal by which

its own orders have been corrected. The Commission cannot be the aggrieved party except possibly in one appeal where the issue was about the non-compliance by the Commission of the orders of the Appellate Tribunal. If the Commission was exercising legislative functions, the position would have been different.

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27. In this appeal, one of the issues raised was of *locus standi* of DISCOMS to challenge BST orders. We fail to understand how the issue of *locus standi* arises. DISCOMS always have the locus to challenge the orders of the Commission, which affect them. Whether they are adversely affected by the fixation of ARR and BST of GRIDCO will depend on the facts of each case. The RST determination of DISCOMS depends on BST determination. Therefore, the DISCOMS can be aggrieved parties as regards the determination of BST. Therefore, the plea of absence of *locus standi* cannot be accepted. This appeal deals with the issue of the determination of ARR and BST of GRIDCO for the year 2006-2007. The Appellate Tribunal decided the appeals preferred by DISCOMS by the impugned order. There were eight questions framed by the Appellate Tribunal, which read thus:

> **"A.** Whether OERC acted illegally and with a mis-direction in allowing Rs.480 crores, being the principal loan amount to pass through in the BST tariff of the GRIDCO?
>
> **B.** Whether the export earnings of power by GRIDCO has been rightly assessed? Whether the exclusion of export earnings

from the Revenue of GRIDCO is illegal and consequently the annual revenue requirement and tariff determination are liable to be modified?

C. Whether the failure to undertake truing up exercise by Regulatory Commission for the previous years suffers with illegality and liable to be interfered and consequential direction requires to be issued?

D. Whether quantum of power procurement estimated by the GRIDCO and approved by the Regulator without reference to the actuals is liable to be interfered and modified?

E. Whether the cost of procurement as approved by the Regulatory Commission is liable to be interfered as excessive, arbitrary and suffers with errors?

F. Whether passing of higher interest burden to the Discoms is sustainable or liable to be interfered?

G.Whether the determination of simultaneous maximum demand (SMD) in MVA and the consequence of the demand and energy charged by OERC is sustainable or liable to be interfered?

H. Whether GRIDCO, the 1st respondent has a surplus of Rs.618 Crores as contended by the appellants? And whether the said amount should be directed to be utilized to reduce BST and reduce the gaps in ARR?"

28. On Question A regarding allowing Rs.480 crores, being the principal loan amount, to pass through in BST of GRIDCO, the Appellate Tribunal noted the contention that the loan had to be raised by GRIDCO as BST arrears have not been cleared

by the DISCOMS. It was also noted that GRIDCO has no fixed assets, and therefore, repayment of the loan cannot be made through depreciation. The Appellate Tribunal also noted the contention that a substantial portion of the loan was required to be raised due to non-payment of dues by DISCOMS. The Appellate Tribunal observed that the amount due and payable by DISCOMS to GRIDCO has to be recovered by GRIDCO in a manner known to law. GRIDCO claimed the amount of Rs.480.12 crores towards repayment of the principal loan amount and not the interest on the amount borrowed. The Appellate Tribunal rightly observed that the amount of Rs.480.12 crores has already been passed through the cost of energy supplied in the past to DISCOMS. The Appellate Tribunal, therefore, observed that the amount cannot be allowed to pass through twice through the tariff on the consumers as well as on the DISCOMS. The cost of energy supplied for the earlier period has already been passed through in BST which is recovered by DISCOMS through RST. The loan was allegedly taken by GRIDCO as the amounts due were not paid by DISCOMS. If the principal loan amount was again allowed to pass through, it will amount to passing through the same burden twice on the consumers. We find no error in the view taken by the Appellate Tribunal when it came to the conclusion that it is for GRIDCO to recover the said amount from DISCOMS in accordance with the law.

29. However, in subsequent orders for subsequent years, the Appellate Tribunal held that the interest payable on the loan,

being the cost, may be allowed to pass through. We have confirmed the view while dealing with the other impugned orders. The interest cannot be equated with the principal loan amount, as the interest will amount to the cost incurred by GRIDCO. However, the interest burden can be passed on to DISCOMS in proportion of their outstandings. Therefore, while passing a fresh order in terms of the final order, the Commission will have to allow the interest on the loan to pass through, as observed above, but the principal loan amount cannot be allowed to pass through.

30. On Question B, the Appellate Tribunal found that the revenue earned by GRIDCO from trading of surplus power outside the State cannot be excluded from the earnings of GRIDCO. The Appellate Tribunal held that when the entire purchase of power by GRIDCO was considered and allowed as expenditure, there was no reason to exclude the power which has been exported, on which GRIDCO has earned a substantial amount. The income received by GRIDCO by the export of power is revenue. It must be treated as receivable during the relevant year. In earlier years, this was the approach adopted by the Commission. The Appellate Tribunal found that GRIDCO had earned Rs.943 crores by export of power, which was an uncontroverted factual position. We cannot overturn this finding of fact. To that extent, the Appellate Tribunal is right. In fact, the Appellate Tribunal found that during the earlier years, the export earnings of GRIDCO were taken into consideration.

31. On the issue regarding Simultaneous Maximum Demand (SMD) in Question G, the Appellate Tribunal observed that while 11% increase in the purchase of power by DISCOMS in the financial year 2006-2007 has been approved as compared to the purchase approved for the financial year 2005-2006, the same has not been taken into consideration for determination of SMD. Therefore, a direction was issued to the Commission to increase in proportion to the increase in quantum of energy of 11 per cent, as this increase may yield an additional sum of Rs.43 crores annually to GRIDCO.

32. On Question C, the Appellate Tribunal rightly directed the Commission to undertake the truing-up exercise for the earlier two financial years.

33. Ultimately, the Appellate Tribunal directed *de novo* consideration of the determination of ARR and BST of GRIDCO for the financial year 2006-2007 in the light of the observations made in the impugned judgment.

34. We may note here that while passing an order pursuant to the order of remand, all the contentions based on the findings of the Appellate Tribunal and the Commission for subsequent years, as approved by this Court, must be taken into consideration by the Commission. If, in subsequent orders as approved by this Court, different criteria or different principle was applied, submissions based on the same can always be canvassed in the proceedings pursuant to the order of remand.

35. Therefore, as far as Civil Appeal No.414 of 2007 is concerned, we find no merit in the appeal except what is held in paragraph nos.29 and 34 above.

CIVIL APPEAL NOS.463 AND 572 OF 2011

36. These appeals arise out of the determination of ARR and BST of GRIDCO for the financial year 2007-2008. DISCOMS challenged the order of the Commission. On the issue of the locus of DISCOMS to challenge the ARR and BST of GRIDCO, the contention of DISCOMS was that though BST payable by DISCOMS was increasing every year, there was no corresponding increase in RST. In the facts of the case, in paragraphs 15 and 16, the Appellate Tribunal rightly held that DISCOMS had the locus to challenge the order of the Commission fixing BST and ARR of GRIDCO. The Appellate Tribunal rightly observed that there was an uncovered revenue gap in the ARR of DISCOMS. Therefore, if they succeed in getting BST reduced, they will have more financial cushion to absorb expenses.

37. As regards the Commission's action of allowing a sum of Rs.464.86 crores towards repayment of the principal loan, the Appellate Tribunal held against the appellant–GRIDCO. We have already approved the finding on the same issue for the earlier financial year 2006-2007. The Appellate Tribunal rightly observed that GRIDCO has to recover the outstanding amounts from DISCOMS by a method known to law. While recording the finding on the principal loan amount, the Appellate Tribunal rightly held that the interest will have to be

taken as the cost of the loan, which should be included in the ARR but not the principal loan amount. Therefore, we find no error at all in the view taken by the Appellate Tribunal.

CIVIL APPEAL NOS.2942-43 OF 2011

38. These appeals are in the nature of cross-appeals against the same impugned order, which is the subject matter of challenge in Civil Appeal nos.463 and 572 of 2011. These appeals are mainly on the issue of truing-up exercise. The contention of DISCOMS, which are the appellants in these appeals, was that they have taken over the business from 1st April 1999 and therefore, the period of 1996-1997 and 1997-1998 should not be taken into consideration by the Commission for truing-up exercise. The appellants have relied upon certain clauses of the transfer scheme. They have also relied upon the National Electric Policy, which provided that in case of privatisation, the successor entity should not be made to suffer liabilities in the past. A perusal of the order of the Appellate Authority shows that in one paragraph, this issue has been considered without referring to legal and factual contentions raised by DISCOMS, especially on the National Electric Policy and the effect of the scheme. However, we find that the order of revocation of the licenses granted to DISCOMS has been confirmed, and the Appellate Tribunal has observed that in the truing-up exercise, no liability is being imposed on the DISCOMS, and the ultimate benefit or burden of truing-up is passed on to the consumers as a part of the tariff. Hence, no interference can be made in these appeals.

CIVIL APPEAL NO.2674 OF 2013

39. Now, we turn to Civil Appeal No.2674 of 2013, wherein the challenge is to the order dated 29th November 2012 passed by the Appellate Tribunal. This is an appeal preferred by the Commission. The Appellate Tribunal partly allowed the appeal preferred by DISCOMS. The appeal arose out of the order dated 18th March 2011 passed by the Commission on an application made by GRIDCO for fixing BST for the financial year 2011-2012. By the said order, BST was substantially increased. The Appellate Tribunal, by the impugned order, rejected the contention of DISCOMS that the Commission had committed an error in estimating a lower quantum of power available to GRIDCO. However, on the issue of whether the Commission committed an error in not considering the sale of surplus power outside the State by GRIDCO, the Appellate Tribunal held in favour of DISCOMS on the basis of its earlier decision for the financial year 2009-2010 by the judgment dated 1st March 2012. The sale of surplus power will have to be treated as the revenue of GRIDCO. We have already approved this view in the earlier part of the judgment. Even on the issue of doing the truing-up exercise of GRIDCO provisionally, the Appellate Tribunal relied upon its earlier order dated 9th November 2010 and answered the issue in terms of the said decision. Incidentally, we have held by this judgment that the view taken by the Appellate Tribunal in Appeal nos.58 and 59 of 2007 was correct. Again, relying upon its judgment dated 9th November 2010, the Appellate Tribunal held that repayment of the principal amount of the loan could not be allowed to pass

through in the ARR of GRIDCO. We have already approved the said view. Moreover, the finding of the Commission on the issue of allowing excess payment by GRIDCO towards FPA for NTPC bonds was answered by the Appellate Tribunal against the appellant before it, thereby, confirming the view of the Commission. As in other cases, we are wondering how the Commission could challenge the order of the Appellate Tribunal, by which validity of its own order was tested. Therefore, we decline to entertain the appeal.

CIVIL APPEAL NO.417 OF 2007

40. This appeal is preferred by M/s. Orissa Power Transport Corporation Limited (OPTCL). The issue concerns TT and ARR of OPTCL for the financial year 2006-2007. The three DISCOMS challenged the order of the Commission. The first issue was regarding the Commission allowing the advance against depreciation. The Appellate Tribunal held that the National Tariff Policy published by the Government of India on 16th January 2006 under Section 3 of the Electricity Act does not permit allowing advance against depreciation. Under clause (i) of Section 61 of the Electricity Act, the Commission has to be guided by the National Tariff Policy. Therefore, the Appellate Tribunal rightly held that what is not permissible, per the National Tariff Policy, cannot be allowed by the Commission. However, the finding of the Appellate Tribunal on this issue for the subsequent financial year 2007-2008 is to the contrary, which we have approved while deciding Civil Appeal nos.2339-2341 of 2011. Hence, the said finding requires

interference. Hence, we restore the order of the Commission on this aspect.

41. As regards the repair and maintenance cost, the Appellate Tribunal observed that the amount allowed towards repair and maintenance cost will be subject to prudent check during the truing-up exercise. However, the Appellate Tribunal reduced the estimated claim of Rs.36 crores allowed by the Commission to Rs.15 crores on the basis of CERC (Central Electricity Regulatory Commission) norms by holding that as per the said norms, the amount will not exceed Rs.7.5 crores. Though the amount of Rs.7.5 crores was allowable as per the guidelines of CERC, the Appellate Tribunal allowed Rs.15 crores by taking a liberal view. There is no reason to interfere with this finding. The decision for the financial year 2007-2008 records that a sum of Rs.7 crores remained unspent during the financial year 2006-2007. To that extent, for the financial year 2007-2008, the cost was reduced by Rs.7 crores.

42. As regards the contingency reserves, the Appellate Tribunal rightly observed that if the amount allocated remains unspent, in the truing-up exercise, it will be reverted. Though the National Tariff Policy did not expressly allow contingency reserves, the Appellate Tribunal, for the reasons recorded, directed to allow the sum of Rs.5 crores under this head.

43. Regarding the interest on wheeling income, the Appellate Tribunal found that for the financial year 2005-2006, the Commission approved a sum of Rs.17.50 crores. The

Commission had approved a sum of Rs.5 crores. The Appellate Tribunal allowed the estimated income to be increased to Rs.17.50 crores consistent with what was allowed for the immediately earlier year.

44. As regards the transmission loss, the Appellate Tribunal rightly directed that the rejection of transmission loss could be finalised only at the stage of the truing-up exercise, and therefore, the said issue was left open.

45. Ultimately, a direction was issued to the Commission to rework TT in the light of the findings. The findings of the Appellate Tribunal are based on material on record, which do not call for interference except what is held in paragraph 40 above.

CIVIL APPEAL NO.2939-2941 OF 2011

46. Civil Appeal Nos.2939-2941 of 2011 have been preferred by WESCO, NESCO and SESCO against the impugned order dated 8th November 2010 passed by the Appellate Tribunal in Appeal Nos.55, 56 and 57 of 2007. These appeals relate to the Commission's order dated 22nd March 2007 determining the ARR and TT of OPTCL for the financial Year 2007-2008. There were four issues raised in the appeals, which read thus:

a. Advance against depreciation of Rs.31.22 crores allowed by the Commission;

b. Repair and maintenance expenses of Rs.47 crores;

c. Larger contingency reserves of Rs 10.49 crores allowed by the Commission; and

d. Capitalisation of interest cost.

We have perused the findings recorded by the Appellate Tribunal on the four points. While dealing with the first issue, the Appellate Tribunal has purported to explain its earlier judgment dated 13th December 2006. By relying upon the National Tariff Policy, the Appellate Tribunal held that under the said policy, there is no absolute prohibition on allowing the claim for an advance against depreciation. The policy provided that the CERC will notify the rates of depreciation so that there would be no need for any advance against depreciation. However, it was found that CERC has not notified the said rates. So long as such rates are not notified, there will not be any prohibition on allowing the advance against depreciation. The Appellate Tribunal recorded that the State Commission is empowered to allow the advance against depreciation to ensure the financial viability of OPTCL. There is nothing placed on record to show that CERC had notified the rates of depreciation. Hence, there is no illegality in this finding.

47. While dealing with the second issue regarding repair and maintenance cost, the Appellate Tribunal has recorded a finding of fact. The Appellate Tribunal examined the reasons given by the commission and came to the conclusion that, on facts, the reasons given for allowing the sum of Rs.47 crores towards repair and maintenance expenses was proper. The Commission had observed that during the public hearing, DISCOMS have not objected to the proposed expenditure of Rs.54 crores. However, a sum of Rs.7 crores, being unspent

amount for the earlier year, was deducted. A very detailed finding recorded by the Commission in paragraph 5.4.2 of its order, was approved by the Appellate Tribunal on facts.

48. While dealing with the issue of larger contingency reserves, the Appellate Tribunal concluded that in a State like Orissa, which is highly prone to natural calamities like floods, cyclones, etc., the provision of contingency reserves to meet such larger contingencies is desirable. Hence, the Appellate Tribunal confirmed the allowance of Rs.10.49 crores permitted by the Commission. Moreover, it was observed that the truing-up exercise has been done in the tariff order for the Financial Year 2010-2011 by the State Commission based on the audited accounts up to 2008-2009 and in such truing-up exercise, the receipts and expenditures under various heads of OPTCL have been duly taken into consideration.

49. As regards the capitalisation of interest cost, it was found that in the truing-up exercise undertaken by the Commission, the State Commission has adjusted the sum of Rs.2.86 crores and Rs.0.58 crores towards capitalisation in the financial year 2006-2007 and financial year 2007-2008 respectively. The Appellate Tribunal rightly rejected the contention of the appellants regarding failure of the Commission to capitalise the interest payable on the loans for ongoing project, which are yet to be completed.

50. Therefore, in our view, no substantial question of law arises in this appeal except on the first issue.

CIVIL APPEAL NO.759 OF 2007

51. Firstly, we deal with the order dated 13th December 2006 passed by the Appellate Tribunal wherein the challenge was to the order dated 23rd March 2006 of the Commission deciding the issue of ARR and RST of DISCOMS for the financial year 2006-2007. Civil Appeal no.759 of 2007 preferred by the Commission contains the challenge to the aforesaid order dated 13th December 2006, which is passed on three appeals preferred by NESCO, WESCO and SESCO (Appeal Nos.77, 78 & 79 of 2006) against the order of the Commission. The Appellate Authority, while passing the order impugned in appeal, dealt with the correctness of the order passed by the Commission. Now, the Commission itself is in appeal instead of any party aggrieved. This issue of the Commission filing appeals has already been discussed earlier. Only because some of the issues involved in this appeal arise in other appeals, we are dealing with the merits.

52. The Appellate Tribunal has formulated eight questions in paragraph 8 of the order dated 13th December 2006 passed by the Appellate Tribunal. We have carefully examined the findings recorded by the Appellate Tribunal on Questions A to H. The first question was regarding disallowing the entire interest paid to service NTPC bonds to pass through the tariff. DISCOMS had defaulted in payment of BST to GRIDCO. DISCOMS issued bonds in lieu of bulk supply outstanding in favour of GRIDCO. The bonds were transferred by GRIDCO to NTPC. GRIDCO was charging interest at the rate of 12.5% per

annum. After making detailed consideration, the Appellate Tribunal concluded that if the bonds are not serviced, and the instalments are not paid, DISCOMS will have to face consequences. For the earlier year, the Commission had allowed interest at the rate of 8.5%. As the interest was payable at 12.5% per annum, DISCOMS calculated interest impact at 12.5%. However, the Commission approved only 8.5%, though actual interest was 12.5%. It was held that DISCOMS would be in a position to pay interest only if they were allowed to pass through the tariffs. It was observed that the instalments for the bonds have already become payable during the financial years 2005-2006 and 2006-2007. These amounts are the liability of DISCOMS; therefore, there was no reason for the Commission not to allow the pass through such liability. We find that the said finding is based on the material on record. Consequently, the Appellate Tribunal issued a direction, directing the Commission to allow a difference of 4% interest payable for NTPC bonds till the tariff period as well as the instalments which had already accrued due during the financial years 2005-2006 to 2007-2008 and allow the same to pass through the tariff. Therefore, the Appellate Tribunal concluded that the ARR of the three DISCOMS computed by the Commission will have to be modified.

53. Question B was a general question whether the ARR of DISCOMS fixed by the Commission will require interference. The answer to this question depended on the answers to the other questions. While dealing with Question C regarding the

inclusion of GAPS allowed in the previous tariff orders to be included in ARR of DISCOMS, the Appellate Tribunal referred to and relied upon the National Tariff Policy. Therefore, consistent with the said policy, it was held that the Appellate Tribunal that the ARR should also include the gap in the previous tariff order.

54. As regards Question D regarding the computation of miscellaneous income in the RST order, the Appellate Tribunal, instead of deciding the said issue, directed the Commission to take it up at the time of the truing-up exercise and assess the miscellaneous income of the three DISCOMS and give consequential relief to them. 'Truing-up' is the adjustment of actual amounts incurred or spent by a licensee against the estimated ARR. As noted earlier, this exercise of truing-up was undertaken by the Commission later on.

55. Question E was whether the Commission has correctly estimated the Simultaneous Maximum Demand (SMD) and consequent determination of demand and energy charge. The Appellate Tribunal noted that the quantum of purchase of the power by GRIDCO for DISCOMS as approved by the Commission for 2006-2007 was 11% more than what was approved for the earlier year. The Tribunal accepted the contention of the DISCOMS that the increase of 11% has not been taken into consideration for the determination of SMD in terms of MVA. The Tribunal noted that the figures set out in paragraph 25 of its order were not disputed, and hence, the additional cost worked out to be Rs 42 Cr. The Appellate

Tribunal, instead of taking a final decision, directed the Commission to work out this action in the truing-up exercise.

56. As regards Question F on the distribution losses fixed by the Commission, a direction was issued to the Commission to look into the aspect by taking a practical view of the ground realities while doing truing-up exercise instead of proceeding on assumptions and surmises.

57. Question G was regarding the failure of the Commission to compute the revenue without reference to slab and category as prescribed in the approved tariff formats. About this aspect, in paragraph 28, the Appellate Tribunal held thus:

> "**28.** .. .. The approach of the Regulator in this respect definitely requires interference. The learned counsel appearing for the Regulatory Commission in this respect merely stated that when taking up the actuals, the same will be subjected to truing up. By such an approach, the projection will be rendered futile but reflects on the finance of DISCOMS and its retail tariff. The truing up at the end or after the year is of no value or effect. If it is allowed to await the truing up such an approach will seriously affect the estimates. This requires a re-look and we are confident that the Commission in the future years to come to assess the estimated sales at the slab or at least take the actuals of the previous tariff year as the base and proceed to assess. We direct the Regulatory Commission to take up truing up exercise at the earliest and complete the same at least, if necessary, on half yearly basis and such truing up is possible in these days when the

entire accounting is computerized. This point is answered accordingly."

58. As regards Question H, which was on the issue regarding the effect of failure to undertake the truing-up exercise for the earlier tariffs period, without deciding anything on merits, the Appellate Tribunal directed the Commission to undertake the truing-up exercise for the past three years, if not already undertaken. Ultimately, the Commission was directed to redo the exercise in terms of the findings recorded in appeals.

59. After carefully perusing the impugned order in Civil Appeal no. 759 of 2007, we find that the conclusions are based on factual aspects on record that do not give rise to any substantial question of law. Moreover, the appeal was filed by the Commission.

CIVIL APPEAL NO.3595-3597 OF 2011

60. The Commission has preferred Civil Appeal No.3595-3597 of 2011 against the order dated 8th November 2010 passed by the Appellate Tribunal in Appeal nos.52, 53 and 54 of 2007 preferred by DISCOMS. These appeals deal with the order dated 23rd March 2007 of the Commission disallowing some of the claims made by DISCOMS. The Commission was dealing with the determination of ARR and RST of DISCOMS for the financial year 2007-2008. The claims were regarding the actual interest @12.5% on NTPC bonds, unrealistic distribution of loss targets, revenue computation and miscellaneous income, and employees' cost and administrative

and general expenses. There was also an issue regarding the truing-up of regulatory assets.

61. The issue of interest on NTPC bonds was decided in favour of DISCOMS. As noted by the Appellate Tribunal, DISCOMS had defaulted in payment of BST. DISCOMS had issued bonds in lieu of bulk supply outstanding in favour of GRIDCO. Subsequently, GRIDCO transferred the bonds to NTPC. The Appellate Tribunal noticed that GRIDCO continued to charge interest @12.5%. Therefore, it was held that the interest cost should be allowed as a pass-through in the ARR. We have already upheld a similar finding.

62. It was held on the second issue that the Commission approved the loss reduction targets without considering the ground realities, and the same were unrealistic. The Appellate Tribunal held on facts that the Commission made the revenue computation in *ad hoc* manner. It was observed, as a matter of fact, that revenue figures ought to have been calculated for each slab of tariff.

63. The Appellate Tribunal, while dealing with miscellaneous income, rightly held that as the cost of meters was not allowed in ARR, meter rent cannot be included in the miscellaneous income. As the DISCOMS were not getting commission from the State Government for collection of electricity duty, it cannot form part of the miscellaneous income.

64. In fact, all the issues except the issue regarding the truing-up of the above transaction of regulatory assets were

decided in favour of DISCOMS. On the heading of Administrative and General expenses, the finding of fact rendered by the Appellate Tribunal is that the DISCOMS furnished all the details. Therefore, the said expenditure was rightly allowed by the impugned order. Similarly, expenditure on account of energy audit was rightly allowed. The Commission had disallowed even the cost on account of the payment of retiral dues of employees. The Appellate Tribunal has rightly corrected this error. The Commission had denied expenses on account of spot billing on the ground that the details were not furnished. The Appellate Tribunal found this finding to be factually incorrect. As regards the truing-up of regulatory assets, the Appellate Tribunal recorded the statements of DISCOMS that they have submitted the audit of past receivables to the Commission, and on that basis, the State Commission was directed to revisit the issue.

65. Therefore, there are findings of fact based on material on record. Moreover, this is an appeal by the Commission. Hence, we find that there is absolutely no merit even in this appeal.

CIVIL APPEAL NOS. 2625-2638 OF 2014 AND 10251-10263 OF 2013

66. Now, we turn to Civil Appeal Nos.2625-2638 of 2014, filed by DISCOMS and Civil Appeal Nos.10251-10263 of 2013, filed by the Commission. These appeals arise out of a common judgment dated 3rd July 2013 of the Appellate Tribunal. In these appeals, the challenge is to the ARR and RST orders of DISCOMS for the financial year 2008-2009 to 2012-2013

(except the financial year 2009-2010). In these appeals, there is also a challenge to the true-up order dated 19th March 2012, as confirmed by the Appellate Tribunal for the financial years 2000-2001 to 2010-2011. A review was sought by the DISCOMS of that part of the order of the Appellate Tribunal, which dealt with true-up orders. The review was rejected on 25th October 2013.

67. By the judgment dated 3rd July 2013, the appeals preferred by DISCOMS were partly allowed. The Appellate Tribunal held that the infusion of funds was required for the purposes of the desired reduction in distribution loss. It was further held that if the desired funds could not be made available to DISCOMS for reasons beyond their control, the loss trajectory has to be reset considering the ground realities.

68. However, the argument of DISCOMS that the loss levels will have to be adjusted as per the actuals was rejected. The reason given by the Appellate Tribunal is that the actual loss levels clearly indicate the large quantum of commercial losses. It was for DISCOMS to curb and reduce commercial losses.

69. A direction was issued that loss levels for the financial years 2006-2007 and 2007-2008 should be reset by the State Commission as per the findings of the Appellate Tribunal in Appeal No.77 of 2006 and Appeal No.52 of 2007 with other connected appeals. A direction was also issued that if the loss levels of the financial years 2006-2007 and 2007-2008 are

required to be changed, the loss levels for the financial years 2008-2009 to 2012-2013 shall be reset.

70. As regards the notional sales, the Appellate Tribunal directed that its judgment dated 4th December 2007 in Appeal no.100 of 2007 shall be followed. There is no material on record to show that the said decision was assailed. The Appellate Tribunal held that the power purchase cost admissible to the DISCOMS has to be determined on the basis of the estimated sales revenue and the targeted distribution loss.

71. By referring to the subsequent truing-up order dated 19th March 2012, the Appellate Tribunal observed that the issue regarding non-consideration of load regulation will not survive. The Appellate Tribunal held that in view of the action of the State Commission of truing-up the accounts till 2010-2011, the issue regarding computation of terminal benefits of the employees does not survive. However, the Appellate Tribunal did the balancing by observing that accretion to the fund has to be considered and payments from the fund should be taken into consideration for arriving at the actual availability of the fund. The claim of contingency reserves made by DISCOMS was rightly rejected as there was no claim made before the Commission in their application made to the Commission.

72. As regards the question relating to the employees' expenses, arrears of the 6th Pay Commission were allowed in the truing-up of the accounts. The Appellate Tribunal directed

the State Commission to expedite the report of the independent actuary or else rely upon the actuary appointed by DISCOMS subject to prudence check, and the Commission was directed to true-up the liabilities of the appellant for the financial year 2010-2011 to 2012-2013. Therefore, the appeals were allowed to the above extent.

73. In review, the argument was that one of the reasons for increasing distribution losses was the massive rural electrification programs. Due to the said programs, subsidised consumers were added. The Appellate Tribunal held that a direction has already been issued to the State Commission that the distribution loss trajectory has to be reduced gradually from 2006-2007 to 2012-2013, and it was also observed that the distribution loss trajectory should not increase. We have perused the reasons recorded by the Appellate Tribunal for coming to the conclusions noted above. The reasons are based on factual aspects which do not call for interference, as no substantial question of law arises.

74. Civil Appeal nos.10251-10263 of 2013 have been preferred by the Commission challenging the judgment of the Appellate Tribunal dated 3rd July 2013 dealing with ARR and RST of DISCOMS for the financial years 2008-2009, 2010-2011 and 2011-2012. Even the truing up order dated 19th March 2012 is the subject matter of these appeals. The Appellate Tribunal has dealt with the view taken by the Commission. Looking to the finding of fact recorded by the Appellate

Tribunal, there is no question of entertaining the challenge at the instance of the Commission.

CIVIL APPEAL NO.3858-3860 OF 2014

75. In Civil Appeal nos.3858-3860 of 2014, the Appellate Tribunal dealt with the appeals filed by DISCOMS against the order dated 20th March 2013 passed by the Commission, by which the ARR and RST for the financial year 2013-2014 was fixed. By allowing the appeals, the Appellate Tribunal directed the Commission to implement its earlier orders. However, the earlier orders will have to be implemented in terms of what is held in this judgment. We must record here that the direction to the Commission to obtain stay from this Court was uncalled for. For the reasons recorded earlier, we are not inclined to entertain these appeals as the same are preferred by the Commission.

CIVIL APPEAL NOS.1380-1382 OF 2015 AND 8037-8039 OF 2015

76. Now, we come to Civil Appeal Nos.1380-1382 of 2015, again preferred by the Commission against the order dated 30th November 2014. GRIDCO has filed Civil Appeal Nos.8037-8039 of 2015 to challenge the same judgment. What was before the Appellate Tribunal was the appeals preferred by DISCOMS challenging the order dated 26th April 2014 passed by the Commission. This order was passed by the Appellate Tribunal on Appeal nos.154, 156 and 157 of 2014. In the impugned judgment, it was observed that the judgments dated 13th December 2006, 8th November 2010, 3rd July 2013 and

21st February 2014 were not complied with by the Commission. The Appellate Tribunal directed the Commission to file an affidavit explaining non-compliance. The operative part of the impugned judgment contains a direction to implement the judgments of the Appellate Tribunal. Therefore, a direction was issued by setting aside the impugned order to the Commission to pass consequential orders. It is true that the Appellate Tribunal acting as an Appellate Authority ought not to have directed the Commission to file an affidavit. The Appellate Tribunal has no administrative control over the Commission. The Appellate Tribunal cannot exercise jurisdiction under Article 226 of the Constitution of India. At the same time, it is the duty of the Commission to implement the orders of the Appellate Tribunal as an Appellate Authority.

77. GRIDCO was not a party to the appeals before the Appellate Tribunal. The effect of the impugned order of the Appellate Tribunal was a remand to the Commission to decide the matters by implementing the earlier orders of the Commission. The orders will have to be implemented in the light of this decision. Hence, we decline to interfere with the impugned order of the Appellate Authority.

THE NET RESULT

78. There is a subsequent order of the Commission by which the licenses of DISCOMS were cancelled. The same will have no bearing on the tariff fixation of earlier years.

79. The net result of the aforesaid discussion is as under:

i. The order impugned in Civil Appeal no.414 of 2007 is modified as stated in paragraphs 29 and 34 above. This appeal, only to that extent, is partly allowed;

ii. The order impugned in Civil Appeal no.417 of 2007 is modified in terms of paragraph 40 above. This appeal is partly allowed only to the above extent;

iii. The rest of the appeals are dismissed;

iv. The Commission shall proceed to implement the impugned orders of the Appellate Tribunal as modified above; and

v. The Commission shall pass consequential and incidental orders in accordance with law.

80. There shall be no order as to costs.

.....J.
(Sanjay Kishan Kaul)

.....J.
(Abhay S. Oka)

New Delhi;
October 5, 2023.