



2023:KER:52984

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE MURALI PURUSHOTHAMAN

THURSDAY, THE 7<sup>TH</sup> DAY OF SEPTEMBER 2023 / 16TH BHADRA, 1945

WP (C) NO. 19205 OF 2023

PETITIONERS:

- 1 THE KERALA HIGH TENSION AND EXTRA HIGH TENSION INDUSTRIAL ELECTRICITY CONSUMERS' ASSOCIATION, PRODUCTIVITY HOUSE, JAWAHARLAL NEHRU ROAD, KALAMASSERY - PIN - 683104  
COCHIN, KERALA,  
REPRESENTED BY ITS GENERAL SECRETARY PRADEEP. M,
- 2 M/S WESTERN INDIA PLYWOODS LTD.,  
MILL ROAD, BALIAPATAM, KANNUR- 670010  
REPRESENTED BY ITS MANAGING DIRECTOR -  
MR. MAYAN MOHAMED P.K.
- 3 MR. MAYAN MOHAMED P.K.,  
S/O MOHAMED P.K.  
MON REPOSE, MUZHATHADAM,  
THANA, KANNUR - 670012  
  
BY ADVS.  
ABRAHAM JOSEPH MARKOS  
ISAAC THOMAS  
P.G.CHANDAPILLAI ABRAHAM  
ALEXANDER JOSEPH MARKOS  
SHARAD JOSEPH KODANTHARA  
JOHN VITHAYATHIL  
AIBEL MATHEW SIBY

RESPONDENTS:

- 1 KERALA STATE ELECTRICITY REGULATORY COMMISSION,  
K.P.F.C. BHAVANAM, MR. C.V. RAMAN PILLAI ROAD,  
VELLAYAMBALAM,  
THIRUVANANTHAPURAM - PIN - 695010  
REPRESENTED BY ITS SECRETARY
- 2 KERALA STATE ELECTRICITY BOARD LIMITED,  
VYDYUTHIBHAVANAM, PATTOM,  
THIRUVANANTHAPURAM- PIN - 695004  
REPRESENTED BY ITS CHAIRMAN & MANAGING DIRECTOR,
- 3 THE CHIEF ENGINEER,  
COMMERCIAL AND TARIFF,



KERALA STATE ELECTRICITY BOARD LIMITED,  
VYDYUTHIBHAVANAM, PATTOM,  
THIRUVANANTHAPURAM, PIN - 695004

- 4 MINISTRY OF POWER,  
SHRAM SHAKTI BHAVAN, RAFI MARG,  
NEW DELHI- 110001  
REPRESENTED BY ITS SECRETARY
- 5 GOVERNMENT OF KERALA,  
POWER DEPARTMENT,  
GOVERNMENT SECRETARIAT ,  
THIRUVANANTHAPURAM PIN - 695001,  
REPRESENTED BY ITS SECRETARY - POWER,
- \* 6 K.S.E.BOARD PENSIONERS' ASSOCIATION  
KSEB PENSION BHAVAN, KARAMANA.P.O,  
THIRUVANANTHAPURAM- 695002  
REPRESENTED BY ITS GENERAL SECRETARY  
BALAKRISHNAN PILLAI.  
(\*ADDL R6 IMPEADED AS PER ORDER DATED 20/7/2023  
IN IA/1/23 IN WPC 19205/2023 )  
BY ADVS.  
SRI.VIPIN P.VARGHESE, SC, GCDA  
SRI.C.JOSEPH ANTONY  
SRI.R.V. Sreejith  
PUBLIC PROSECUTOR  
SRI.V.M.KRISHNAKUMAR  
SRI.ADARSH MATHEW  
SRI.MERLINE MATHEW  
SRI.CELINE JOHN  
SRI.MEHNAZ P. MOHAMMED  
SRI.ANIRUDH G. KAMATH  
SRI.RAJU JOSEPH (SR.) R2- R3  
SHRI.ASOK M.CHERIAN, ADDL. ADVOCATE GENERAL- R5  
SRI.T.S.SHYAM PRASANTH, GOVERNMENT PLEADER  
SRI.VIPIN P VARGHESE  
SRI.S.SREEKUMAR (SR.) (S-571) - R1  
SMT.P.R.REENA



2023:KER:52984

WP(C) NO. 19205 OF 2023 : 3 :

SRI.S.MANU, DSGI - R4

SRI.RENJITH THANPAN - R6

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR  
ADMISSION ON 07.09.2023, THE COURT ON THE SAME DAY  
DELIVERED THE FOLLOWING:



## JUDGMENT

The 1<sup>st</sup> petitioner, a registered Association of Industries, primarily of High Tension and Extra High Tension Industrial Consumers of Electricity in the State, has approached this Court along with one of its member industry and the Managing Director of the said member industry to (i) direct the 1<sup>st</sup> respondent, Kerala State Electricity Regulatory Commission (hereinafter referred to as the 'Regulatory Commission') to comply with the provisions of the Electricity Act 2003, in particular Sections 61<sup>1</sup> and 62<sup>2</sup> and

### 1 Section 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) multiyear 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, the Electricity Regulatory Commissions Act, 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.

### 2 Section 62 - Determination of tariff



Ext. P3 National Electricity Policy and Ext. P4 Tariff Policy issued by the Ministry of Power, Government of India as well as the directions of the Appellate Tribunal for Electricity (APTEL) and frame voltage wise cost of supply with intent to reduce cross subsidies and frame tariff for various voltage classes in accordance therewith; (ii) to declare that Ext. P21 (d) Tariff Regulation framed by the Regulatory Commission is illegal, *ultra vires* and to quash the same by

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(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.



a writ of *certiorari*; (iii) to declare that the Regulatory Commission cannot proceed to fix electricity tariff based on the equity of Rs.3499 crores claimed by the KSEBL and has to adopt the correct and cogent figure as directed by the APTEL in its Exhibit P21(f) order; (iv) stay all further proceedings before the Regulatory Commission pursuant to Ext.P22 Tariff Revision Petition in so far as the 1<sup>st</sup> petitioner Association and its members comprising HT & EHT Industrial consumers are concerned.

2. The members of the 1<sup>st</sup> petitioner Association are engaged in manufacturing and other industrial activities in the State and are High Tension (HT) and Extra High Tension (EHT) category consumers of Kerala State Electricity Board Limited (KSEBL) availing supply at 11KV, 66 KV, 110 KV and 220 KV. The 1<sup>st</sup> respondent Regulatory Commission is constituted under Section 82(1)<sup>3</sup> of the

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3 Section 82 - Constitution of State Commission

(1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

PROVIDED that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the



Electricity Act, 2003. The 2<sup>nd</sup> respondent KSEBL is a Distribution Licensee and a State Transmission Utility (STU) notified by the 5<sup>th</sup> respondent, Government of Kerala. The 3<sup>rd</sup> respondent is the Chief Engineer (Commercial and Tariff) of KSEBL and the 4<sup>th</sup> respondent is the Ministry of Power, Government of India.

3. Chapter VII of the Electricity Act, 2003 deals with tariff. Section 61 of the Electricity Act, 2003 deals with tariff regulations and it empowers the Regulatory Commission to specify the terms and conditions for the determination of tariff. Section 181<sup>4</sup> of the Electricity Act deals with the

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enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

PROVIDED FURTHER that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government.

4 Section 181 - Powers of State Commissions to make regulations

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

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

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

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

(c) the manner and particulars of application for license to be published under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

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

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



powers of the State Regulatory Commission to make regulations, *inter alia*, providing for the terms and conditions for determination of tariff under Section 61.

Section 62 deals with actual determination of tariff by the

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- (g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;
  - (h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;
  - (i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 39;
  - (j) reduction 1[\*\*\*] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;
  - (k) manner and utilization of payment and surcharge under the fourth proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;
  - (l) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;
  - (m) reduction 1[\*\*\*] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;
  - (n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;
  - (o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;
  - (p) reduction 1[\*\*\*] of surcharge and cross subsidies under the third proviso to sub-section (2) of section 42;
  - (q) payment of additional charges on charges of wheeling under sub-section (4) of section 42;
  - (r) guidelines under sub-section (5) of section 42;
  - (s) the time and manner for settlement of grievances under sub-section (7) of section 42;
  - (t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;
  - (u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;
  - (v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;
  - (w) payment of interest on security under sub-section (4) of section 47;
  - (x) electricity supply code under section 50;
  - (y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;
  - (z) duties of electricity trader under sub-section (2) of section 52;
  - (za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;
  - (zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;
  - 2[(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;]
  - (zd) the terms and conditions for determination of tariff under section 61;
  - (ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;
  - (zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;
  - (zg) the manner of making an application before the State Commission and the fee payable therefore under sub-section (1) of section 64;
  - (zh) issue of tariff order with modifications or conditions under sub-section (3) of section 64;
  - (zi) the manner by which development of market in power including trading specified under section 66;





Regulatory Commission for supply of electricity by a generating company to a distribution licensee and such determination will be at the point of generation, transmission and wheeling as well as retail sale to the consumers. Section 64<sup>5</sup> deals with the procedure for determination of tariff order and provides that such

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(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of and preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.

5 Section 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 therefore.

(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.



determination of tariff shall be on application made by the generating company or the distribution licensee. Section 111<sup>6</sup> of the Electricity Act provides for appellate and revisional powers to the APTEL against tariff order of the Regulatory Commission. Section 121<sup>7</sup> deals with the power of the APTEL to issue orders, instructions or directions, as it may deem fit, to the Appropriate Commission for the

6 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.

7 Section 121 - Power of Appellate Tribunal

The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act.



performance of its statutory functions under the Electricity Act, 2003. Section 125<sup>8</sup> provides that any person aggrieved by any decision of the APTEL may file an appeal to the Supreme Court.

4. The pleadings reveal that the previous tariff orders issued by the Regulatory Commission were tangled in litigations. The writ petitioners allege that, over a long period of time, the Regulatory Commission is flouting the provisions of the Electricity Act, Ext. P3 Electricity Policy and Ext. P4 Tariff Policy framed by the Ministry of Power and also the directions of APTEL in previous proceedings, while determining the tariff. Though the Electricity Act and the policies mandate fixing tariff based on actual cost of supply and reduction of cross subsidy, tariff orders are issued in breach thereof. It is contended that the

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8 Section 125 - Appeal to Supreme Court

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908:

PROVIDED that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.



Regulatory Commission has been blindly accepting the tariff proposals of the KSEBL unmindful of its statutory obligations.

5. Skipping over a few facts relating to earlier tariff orders and challenges thereto, I come to the Kerala State Electricity Regulatory Commission (Terms and conditions for determination of Tariff) Regulations, 2018, specifying the terms and conditions for the determination of tariff for the control period 2018-19 to 2021-22. Since the said Regulation was valid up to 31.03.2022 only, the Regulatory Commission, in exercise of its powers under Section 61 read with Section 181(1) of the Electricity Act, by Ext. P21 (c) notice dated 06.08.2021, notified the draft tariff regulations; namely, the Kerala State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2021 for the control period of five years commencing from 01.04.2022 and invited objections and suggestions from persons likely to be affected thereby. The



Regulatory Commission, after considering the objections and suggestions holding public hearing and laying the regulation before State Legislature, notified the final regulation on 16.11.2021 as per Ext. P21(d) and gazetted the same on 22.11.2021. Ext. P21(d) final tariff regulation, called as the Kerala State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2021 came into force from 01.04.2022 for a control period of five years.

6. Pursuant to the Tariff Regulations, 2021, the KSEBL on 31.01.2022 filed tariff petition OP No.11/2022 for tariff revision for the control period 2022-23 to 2026-27 before the Regulatory Commission. After causing the abstract of the petition to be published for the information of the public and after inviting objections and suggestions on the petition for determination of tariff and after public hearing, the Regulatory Commission passed Ext. P18 tariff order dated 25.06.2022. In Ext. P18, the Regulatory



Commission has, *inter alia*, increased the retail supply tariff at an average rate of 6.58% against the proposal of 14.58% by the KSEBL. In the case of 66 KV and 110 KV industrial consumers, the Regulatory Commission accepted the proposal of KSEBL by increasing the tariff by 10.42% for 66 KV and 10.51% for 110 KV consumers. In Ext. P18 tariff order, the Regulatory Commission fixed the tariff only up to the period 31.03.2023 (2022-2023).

7. The 1<sup>st</sup> petitioner Association who had submitted their objection to the tariff proposal, filed Ext. P19 Review Petition before the Regulatory Commission contending that there are errors apparent in Ext. P18 order. The Review petition was dismissed by the Regulatory Commission by Ext. P20 order.

8. Challenging Ext. P18 tariff order and Ext. P20 order in Review petition, the 1<sup>st</sup> petitioner Association filed Ext. P21 appeal (DFR 57 of 2023) before the APTEL under Section 111 of the Electricity Act, 2003. The said appeal is



pending before APTEL.

9. While so, the KSEBL submitted Ext. P22 tariff revision proposal (O.P. No.18/2023) for the control period 2023-24 to 2026-27 before the Regulatory Commission. The Regulatory Commission invited objections and suggestions to the proposal and the 1<sup>st</sup> petitioner Association has submitted their objection *vide* Ext. P23. This Court, by order dated 14.06.2023, directed the Regulatory Commission not to pass any tariff order during the pendency of this writ petition.

10. The grievances highlighted by the petitioner in this writ petition are three fold; (i) The Regulatory Commission is repeatedly fixing tariff, based on Average Cost of Supply violating the mandate of fixing tariff based on Actual Cost of Supply/Voltage Wise Cost of Supply and non reduction of cross subsidy contrary to the provisions of the Electricity Act, 2003, in particular Section 61 (g), the Tariff policies of the Government of India and the directions



of APTEL, (ii) Ext. P21 (c) draft tariff regulation provided that only the payment of interest on the bond issued to the Master Trust will be approved for computation of Aggregate Revenue Requirement (ARR) and the amount of repayment of such bonds shall not be reckoned for computation of ARR. However, Ext. P21(d) final tariff regulation provides that the amounts required for the payment of interest on the bonds issued to the Master Trust and for the principal repayment of such bonds shall be reckoned for computation of ARR and for truing up of accounts. The burden of repayment of principal amount on Master Trust Bonds passed on to the consumers, which is contrary to the draft tariff regulation is illegal and *ultra vires*.

(iii) Erroneous fixation of Return on Equity (RoE) (the amount of net income the government ploughs back into the KSEBL as a percentage of shareholders equity), contrary to the directions of APTEL.

11. Essentially, all the aforesaid issues of voltage wise





cost of supply, repayment under the Master Trust Bonds as well as return on equity are called in question before the APTEL in Ext. P21 appeal filed by the 1<sup>st</sup> petitioner Association. In Ext. P21 appeal, the following questions of law are raised.

A. Whether the State Commission is justified in determining the tariff based on the average cost of supply as against voltage wise cost of supply?

B. Whether the State Commission is justified in increasing the tariff of the HT and EHT industrial consumers in the impugned order?

C. Whether the State Commission is justified in approving the return on equity base as approved by KSEBL and not considering the equity base as per the consultant's report and in line with the directions of the Hon'ble Tribunal in the judgment dated 18.11.2015?

D. Whether the State Commission is justified in permitting the funding of the Master Trust from



the retail supply tariff and consequently placing the burden on the consumers?

E. Whether the State Commission is justifying in imposing power factor penalty between 0.95 and 0.9 power factor?

F. Whether the State Commission is justifying in retaining the cross-subsidy in the system and approving tariff for certain categories of consumers much lower than even the average cost of supply?

As stated, the issues raised by the 1<sup>st</sup> petitioner Association regarding voltage wise cost of supply, repayment under the Master Trust Bonds and return on equity are matters pending consideration before the APTEL. However, it is contended that the APTEL has jurisdiction only to go into the legality, propriety or correctness of the order made by the Appropriate Commission as an appellate authority and cannot go into the legality, propriety or correctness of the Tariff Regulation



made by the Appropriate Commission and Ext. P21(d) can only be challenged in writ petition under Article 226 of the Constitution. Therefore, the petitioners have, in this writ petition, *inter alia*, challenged Ext. P21(d) final Tariff Regulation as illegal and *ultra vires* contending that the same has been issued in total breach and contrary to Ext. P21 (c) draft regulation so far as it approved the repayment of principal amount on Master Trust Bonds passed on to the consumers contrary to the draft Regulation that only repayment of interest on Master Trust Bonds will be charged on to the ARR.

12. In Ext. P21 (c) draft tariff regulation, clause 34 read as follows:

**34. Principles for adoption of Transfer Scheme for KSEB under Section 131 of the Act.-**

The Commission may, for the purpose of approval of the Aggregate Revenue Requirements and determination of tariff, adopt the changes in the balance sheet, due to the re-organization of the erstwhile Kerala State Electricity Board, as per the provisions of the Transfer Scheme published by the Kerala State Government under Section 131 of the



Act, subject to the following principles:-

(i) Increase in the value of assets consequent to the revaluation of assets shall not qualify for computation of depreciation or for return on net fixed assets;

(ii) The equity of the Government of Kerala as per the above Transfer Scheme published vide Government Order No. GO(P) 46/2013/PD dated 31.10.2013 and GO(P) No. 3/2015/PD dated 28.01.2015 under *Section 131* of the Act will be considered for computation of return on equity;

(iii) The reduction of the contribution from consumers, grants and such other subventions for creation of assets, made as part of Transfer Scheme, shall not be considered while computing the depreciation;

(iv) Only the payment of interest on the bonds issued to the Master Trust will be approved for computation of Aggregate Revenue Requirement and the amount of repayment of such bonds shall not be reckoned for computation of Aggregate Revenue Requirement;

(v) The Commission may subject to the petition by KSEB Ltd may take appropriate decision on the other issues relating to the Transfer Scheme and its implementation, on case to case basis.

(underlining supplied)

However, the said clause in Ext. P21 (d) final tariff regulation reads as follows;

**34. Principles for adoption of Transfer Scheme for KSEB under Section 131 of the Act.-**



The Commission may, for the purpose of approval of the Aggregate Revenue Requirements and determination of tariff, adopt the changes in the balance sheet, due to the re-organization of the erstwhile Kerala State Electricity Board, as per the provisions of the Transfer Scheme published by the Kerala State Government under Section 131 of the Act, subject to the following principles:-

(i) Increase in the value of assets consequent to the revaluation of assets shall not qualify for computation of depreciation or for return on net fixed assets.

(ii) The equity of the Government of Kerala as per the above Transfer Scheme published vide Government Order No. GO(P) 46/2013/PD dated 31.10.2013 and GO(P) No. 3/2015/PD dated 28.01.2015 under *Section 131* of the Act will be considered for computation of return on equity;

(iii) The reduction of the contribution received from the consumers, grants and such other subventions for creation of assets, made as part of Transfer Scheme, shall not be considered while computing the depreciation;

(iv) The amounts required for the payment of interest on the bonds issued to the Master Trust and for the principal repayment of such bonds shall be reckoned for computation of Aggregate Revenue Requirement and for truing up of accounts;

(v) The Commission will subject to the petition by KSEB Ltd may take appropriate decision on the other issues relating to the Transfer Scheme and its implementation, on case to case basis.

(underlining supplied)



It is contended by the petitioners that the Regulatory Commission cannot act contrary to the draft Regulation thereby defeating the whole object of previous publication mandated under Section 181 (3) of the Electricity Act, 2003, which provides that all regulations made by the State Commission under the Act shall be subject to the condition of previous publication.

13. As part of reorganisation of KSE Board, the Government of Kerala has framed a transfer scheme in terms of Section 131 of the Electricity Act, 2003 and the scheme provided for constitution of Master Fund and the Government as per notifications dated 31.10.2013 and 28.01.2015, ordered creation of a Master Trust for meeting the unfunded liability of pension, gratuity and leave surrender as on 31.10.2013 in respect of the personnel transferred from erstwhile KSEB to KSEBL through issue of 2 series of Bonds and the interest shall be credited to the fund on a monthly basis. Only the payment of interest



on the bonds issued to the Master Trust was so far charged on to the ARR. The KSEBL had, then, committed that repayment of principal amount will not be charged on to the ARR and the Regulatory Commission had affirmed the same in 2014 and 2018 Tariff Regulations. According to the petitioners, neither the KSEBL nor the Government proposed the repayment of principal amount on the Master Trust Bonds to be charged on to the ARR. The same was also not included in Ext. P21 (c) draft Tariff Regulation, 2021. However, in Ext. P21(d) final tariff regulations, the burden of repayment of principal amount of Rs.407.2 Cr per annum for a period of 5 years of Master Trust Bonds Series 1 was allowed to pass through ARR of KSEBL, placing the burden on the consumers. It is contended that Ext. P21(d) final tariff regulations published is substantially different from Ext. P21(c) draft tariff regulations to the aforesaid extent and does not conform to the requirement of Section 181 (3) of the Electricity Act, 2003 and the



Electricity (Procedure for Previous Publication) Rules, 2005. Accordingly, the petitioners pray for declaration that Ext. P21(d) final Tariff Regulation is illegal and *ultra vires*. The petitioners relied on the Division Bench decision of the High Court of Bombay in **Avinash Ramakrishna Kashiwar v. State of Maharashtra** [2015 KHC 2312], **Indian Express Newspapers (Bombay) Pvt. Ltd v. Union of India** [(1985) 1 SCC 641: AIR 1986 SC 515: 1985 KHC 554] and Ext. P21(e) judgment of this Court, in support of their contentions.

14. A counter affidavit is filed on behalf of the Regulatory Commission questioning the maintainability of the writ petition. It is contended that the reliefs (i) and (iii) sought for in the writ petition are matters which are *sub judice* before the APTEL in Ext. P21 appeal wherein all the issues herein are raised and since the petitioners have invoked the alternative remedy, the writ petition is not maintainable. As regards relief No. (iv), it is stated that the





petitioners can prefer an appeal to APTEL against the tariff order after the same is passed and cannot seek stay of proceedings before the Regulatory Commission in the tariff proposal even before a decision is taken. Nevertheless, the contentions of the petitioners on merits are also answered in the counter affidavit. It is further stated that the challenge to Ext. P21 (d) is belated inasmuch as the same was issued on 21.11.2021 and pursuant thereto, Ext. P18 tariff order was also issued which is challenged by the 1<sup>st</sup> petitioner before the APTEL in Ext. P21 appeal. It is stated that Ext. P21 (d) regulations was notified after publishing draft regulations, public hearing on draft regulations and after placing before the State Legislature as contemplated under Section 182<sup>9</sup>. The final regulations is duly gazetted and acted upon. As regards the contention regarding the repayment of principal amount on the Master

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9 Section 182 - Rules and regulations to be laid before State Legislature

Every rule made by the State Government and every regulation made by the State Commission shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.



Trust Bonds to be charged on to the ARR, it is contended by the Regulatory Commission that there cannot be a judicial review of a subordinate legislation and that in view of clause 9 (e) of Ext. R1 (e) Kerala Electricity Transfer Scheme (Re-vesting), 2013, in addition to the interest on bonds and repayment of principal, KSEBL has to pay annual pension contribution based on the actuarial valuation of Master Trust and considering the huge unfunded liability, the Regulatory Commission vide Ext. P21 (d) decided that the amount required for interest on bonds issued for Master Trust and for principal repayment of such bonds shall be reckoned for computation of ARR and truing up of accounts.

15. In the counter affidavit filed on behalf of the KSEBL it is contended that the questions of law raised in the writ petition are the same as raised in Ext. P21 appeal before the APTEL and therefore this Court shall not interfere. It is stated that, if the apprehension raised by the



petitioners in the writ petition is not redressed in the forthcoming tariff order to be passed by the Regulatory Commission on Ext. P22 tariff revision proposal, they can very well challenge the same before the APTEL after the tariff order is passed. The KSEBL has taken efforts to support Ext. P21(d) tariff regulation as well as Ext. P18 tariff order on its merits as well. With regard to the contention of the petitioners that Ext. P21 (d) final tariff regulations was issued contrary to Ext. P21 (c) draft regulations inasmuch as it approved the repayment of principal amount on Master Trust Bonds passed on to the consumers, it is stated that the KSEBL while submitting its comments to Ext. P21(c) draft regulations requested the Regulatory Commission for grant of higher Return on Equity to ensure sufficient flow of honouring bond repayment obligation; the Regulatory Commission allowed the bond repayment as pass through in tariff. It is further stated that, as per the draft regulations (Regulation 34), only interest on the bonds was proposed



to be approved for computation of ARR. It is also stated that, as per the statutory transfer scheme notified by the Government, the repayment obligation of both principal and interest on the Master Trust Bonds rests with the KSEBL and the Regulatory Commission allowed the principal repayment in ARR after due consideration of the financial constraints of KSEBL.

16. The K.S.E. Board Pensioner's Association, the additional 6<sup>th</sup> respondent has filed counter affidavit contending that the Regulatory Commission constituted under Section 82 of the Electricity Act, 2003 being a quasi judicial authority, the reliefs prayed for in the writ petition are not maintainable and the remedy of the petitioners is to file an appeal against Ext. P21(d) before the APTEL. It is further contended that the issues raised in the writ petition are the same as those raised in Ext. P21 appeal before the APTEL. Since in Ext. P21(d) tariff regulations, the repayment of the two series of bonds including the principal



amount and interest amount is also taken into account while specifying the terms and conditions for the determination of tariff, if the challenge in the writ petition is upheld, that would affect the interests of the pensioners whom the 6<sup>th</sup> respondent association is representing. It is stated that the debt payment obligation of both principal and interest of first series of bonds is on KSEBL and the admissibility or otherwise of any expense in regulatory account is to be decided by the Regulatory Commission under Section 61. It is also contended that, the fact that in the earlier tariff regulations the Regulatory commission did not allow repayment of principal amount on Master Trust Bonds as an expense in ARR do not mean that the liability of the KSEBL is not in existence. It is further stated that tariff regulations, being a subordinate legislation, does not require inviting objection from any person and it is not necessary to follow the principles of natural justice.



17. Heard Sri. Joseph Kodianthara, the learned senior counsel for the petitioners, Sri. S. Sreekumar, the learned senior counsel for the 1<sup>st</sup> respondent, Sri. Raju Joseph, learned senior counsel for respondents 2 and 3, Sri. S. Manu, learned DSGI for the 4<sup>th</sup> respondent, Sri. Asok M. Cherian the learned Addl. Advocate General for the 5<sup>th</sup> respondent and Sri. Ranjith Thampan, the learned senior counsel for the addl. 6<sup>th</sup> respondent.

18. It is contended by the learned senior counsel for the respondents that the writ petition is not maintainable as the issues raised in the writ petition are *sub judice* before the APTEL and that the challenge to Ext. P21(d) regulations is belated and since there is no violation of any statutes, the regulation cannot be interfered with by this Court. It is also contended that since Ext. P21(d) is a subordinate legislation, principles of natural justice need not be followed and there cannot be a judicial review of Ext. P21(d). Since the respondents have raised the



question of maintainability of the writ petition, this Court has to first consider the same on the basis of the various decisions cited by both sides.

19. It is contended that the reliefs sought for in the writ petition, particularly, relief Nos. (i) and (ii) are matters which are *sub judice* before the APTEL in Ext. P21 appeal and since the petitioners have invoked the alternative remedy, the writ petition is not maintainable. The issues raised by the 1<sup>st</sup> petitioner Association regarding voltage wise cost of supply, repayment under the Master Trust Bonds and return on equity are admittedly matters pending consideration before the APTEL. The question whether the APTEL has jurisdiction under Section 111 of the Electricity Act, 2003 to examine the validity of a Regulation framed by the Central Electricity Regulatory Commission under Section 178<sup>10</sup> of the Electricity Act, 2003 (corresponding to

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10 Section 178 - Powers of Central Commission to make regulations

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

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

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



Section 181 of the Act which deals with powers of State Regulatory Commission to make Regulations) and whether Section 121 of the Act confers judicial review on the APTEL, came up for consideration before the Constitution

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- (b) the form and the manner of the application under sub-section (1) of section 15;
  - (c) the manner and particulars of notice under sub-section (2) of section 15;
  - (d) the conditions of licence under section 16;
  - (e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;
  - (f) publication of alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;
  - (g) Grid Code under sub-section (2) of section 28;
  - (h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;
  - (i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;
  - (j) payment of transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 38;
  - (k) reduction 1<sup>\*\*\*</sup> of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;
  - (l) payment of transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;
  - (m) reduction 1<sup>\*\*\*</sup> of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;
  - (n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;
  - (o) duties of electricity trader under sub-section (2) of section 52;
  - (p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;
  - (q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;
  - 2[(r) the manner for reduction of cross-subsidies under clause (g) of section 61;]
  - (s) the terms and conditions for the determination of tariff under section 61;
  - (t) details to be furnished by licensee or generating company under sub-section (2) of section 62;
  - (u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;
  - (v) the manner of making an application before the Central Commission and the fee payable therefore under sub-section (1) of section 64;
  - (w) the manner of publication of draft tariff order under sub-section (3) of section 64;
  - (x) issue of tariff order with modifications or conditions under sub-section (4) of section 64;
  - (y) the manner by which development of market in power including trading specified under section 66;
  - (z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;
  - (za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;
  - (zb) the rules of procedure for transaction of business under sub-section (1) of section 92;
  - (zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;
  - (zd) the manner of service and publication of notice under section 130;
  - (ze) any other matter which is to be, or may be specified by regulations.
- (3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.





Bench of the Hon'ble Supreme Court in **PTC India Ltd v. Central Electricity Regulatory Commission, thr. Secy** [2010 KHC 4155: 2010 (4) SCC 603: AIR 2010 SC 1338] and the Constitution Bench held that, a regulation under Section 178 is in the nature of subordinate legislation and consequently its validity can be tested only in judicial review under Article 226 of the Constitution and not by way of appeal before the APTEL under Section 111 of the Electricity Act. It was also held that Section 121<sup>11</sup> does not confer power of judicial review on the APTEL. Reiterating the view taken in **PTC India Ltd** (supra), the Supreme Court, in **Reliance Infrastructure Limited v. State of Maharashtra and others** [2019 KHC 6042: AIR 2019 SC 567: (2019) 3 SCC 352], held that the logic of the said judgment extends to the regulations framed under Section 181 by the State Electricity Regulatory Commissions. The

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11 Section 121 - Power of Appellate Tribunal

The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act.



APTEL has jurisdiction only to go into the legality, propriety or correctness of the order made by the Appropriate Commission. In **PTC India Ltd** (supra), the Supreme Court held that the word 'order' in Section 111 of the Electricity Act, 2003 cannot include regulations made by the Regulatory Commission. The petitioners cannot invoke the jurisdiction of this Court to challenge the tariff order which is pending before the APTEL in Ext. P21 appeal. Relief No. (ii) sought for by the petitioners is to declare Ext. P21 (d) Tariff Regulation framed by the Regulatory Commission as illegal and *ultra vires*. Since the petitioners have challenged the *vires*, legality and validity of Ext. P21 (d) Tariff Regulations, I hold that the writ petition is maintainable to the limited extent of considering the *vires*, legality and validity of Ext. P21 (d) Tariff Regulations.

20. Since it is now trite that tariff regulations are in the nature of subordinate legislation and its validity can be tested in judicial review under Article 226 of the



Constitution of India, the next question is, the grounds on which a subordinate legislation can be challenged. In **Indian Express Newspapers** (supra), the Hon'ble supreme Court held:

“73. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.”



In **Association of Industrial Electricity Users v State of Andhra Pradesh**, [(2002) 3 SCC 711], the Hon'ble Supreme Court, while dealing with the question of fixation of tariffs held:

“11. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an Appellate Authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law.”



In **PTC India Ltd.** (supra), the Supreme Court held that regulations can be framed by State Commissions so long as they satisfy two conditions; first, they must be consistent with the provisions of Act, and second, they must be made for carrying out the provisions of the Act. The Court held:

"28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under S.176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under S.180 to make rules. Secondly, under S.177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under S.178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under S.181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under S.179 and S.182. Parliament has the power to modify the rules / regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the



conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act."

The Hon'ble Supreme Court, in **Transmission Corporation of Andhra Pradesh Ltd. v Sai Renewable Power Pvt. Ltd.**, [2011 (11) SCC 34], while considering the nature of judicial review that is exercisable in tariff fixation /revision, held thus:

"17. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. The functions assigned to the Regulatory



Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the Courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies.

18. ...This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the purview of judicial intervention. The only



explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial 'conscience' of the Court making it necessary for the Court to intervene. Even in these cases the scope of jurisdiction is a very limited one."

In **Reliance Infrastructure Limited** (supra), the Supreme Court while considering the validity of Regulation framed by Maharashtra Electricity Regulatory Commission held as follows:

"The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is





mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.”

Recently, in **Ninan K.C. v. Kerala State Electricity Board** [2023 KHC 6598: LiveLaw (SC) 453], the Supreme Court, after referring to the Constitution Bench decision in **PTC India Ltd.** (supra), observed that the delegated authority has to act within the confines of the plenary legislation.

The Court held:

“82. The 2003 Act lays down the legislative framework for generation, transmission, distribution, trading, and use of electricity in India. In the process, the Parliament has also conferred discretion on the regulatory



authorities, particularly the Central Commission and State Commission, to work out further details within the framework of the legislative policy laid down in the legislation. While making subordinate legislation, the delegated authority has to act within the confines of the plenary legislation (JK Industries Ltd. v. Union of India, 2007 (13) SCC 673). The rules or regulations enacted by the Central Commission or State Commission cannot override the 2003 Act by stipulating inconsistent provisions or by supplanting the parent statute.”

The propositions that can be deduced from the law laid down and settled by the Apex Court in the above decisions are that;

- (i) The regulation framed by the Regulatory Commission like any subordinate legislation can be



questioned on any of the grounds on which plenary legislation is questioned.

(ii) The Regulatory Commission while framing regulations shall satisfy the twin conditions, that they are consistent with the Electricity Act, 2003 and that they are made for carrying out the provisions of the Act.

(iii) If the Regulatory Commission has failed to follow statutorily prescribed procedure or to take into account factors mandated by the statute, the Court, in exercise of its power of judicial review, can interfere.

21. The case of the petitioners is that Ext. P21(d) final Tariff Regulations has been issued in total breach of the provisions contained in Section 181 (3) of the Act which provides that all regulations made by the Regulatory Commission under the Act shall be subject to previous publication. It is contended that Ext. P21(d) final regulation was contrary to the draft regulation so far as it approved the



repayment of principal amount on Master Trust Bonds passed on to the consumers contrary to Ext. P21(c) draft Regulation that only repayment of interest on Master Trust Bonds will be charged on to the ARR. Section 181 of the Electricity Act, 2003 deals with the powers of the State Regulatory Commission to make regulations and sub-section (1) thereof provides that the State Commissions may, by notification, make regulations consistent with the Act and the Rules generally to carry out the provisions of the Act. Section 181 (2) (zd) provides that the regulations may provide *inter alia*, the terms and conditions for determination of tariff under Section 61. Sub-section (3) of Section 181 provides that, all regulations made by the State Commission under the Act shall be subject to the condition of previous publication. The Central Government, in exercise of powers conferred by sub-section (1) and clause (2) of sub-section (2) of Section 176 of the Electricity Act, 2003, have framed the Electricity (Procedure for Previous



Publication) Rules 2005 which provides for the procedure for previous publication of regulations under sub-section (3) of section 177, sub-section (3) of section 178 and sub-section (3) of section 181 of the Act. The Electricity (Procedure for Previous Publication) Rules 2005 reads as follows;

**“1. Short title and commencement-**

- (1) These rules shall be called the Electricity (Procedure for Previous Publication) Rules 2005,
- (2) These Rules shall come into force on the date of their publication in the Official Gazette.

**2 Definitions-**

In these rules, unless the context otherwise, requires,-

- (c) "Act" means the Electricity Act, 2003 (Act 36 of 2003);
- (d) the words and expressions used and not defined herein but defined in the Act shall have the meaning assigned to them in the Act.

**3. Procedure of Previous Publication - For the**



purpose of previous publication of regulations under sub-section (3) of section 177, sub-section (3) of section 178 and the sub-section (3) of section 181 of the Act, the following procedure shall apply:-

- (1) the Authority or the Appropriate Commission shall, before making regulations, publish a draft of the regulations for the information of persons likely to be affected thereby;
- (2) the publication shall be made in such manner as the Authority or the Appropriate Commission deems to be sufficient;
- (3) there shall be published with the draft regulations, a notice specifying a date on or after which the draft regulations will be taken into consideration;
- (4) the Authority or the Appropriate Commission having powers to make regulations shall consider any objection or suggestion which may be received by the Authority or the Appropriate



Commission from any person with respect to the draft before the date so specified.

4.The publication in the Official Gazette of the regulations made in exercise of a power to make regulations after previous publication shall be conclusive proof that the regulations have been duly made.

Section 181(3) provides that, all regulations made by the State Commission under the Act shall be subject to the condition of previous publication. The Electricity (Procedure for Previous Publication) Rules 2005 provides for publication of a draft of the regulation for the information of persons likely to be affected thereby. It also contemplates publication of a notice specifying a date on or after which the draft regulations will be taken into consideration. The Regulatory Commission shall consider any objection or suggestion which may be received by it from any person with respect to the draft, before the date specified. Thus, when the Act provides that all regulations made by the



State Commission under the Act shall be subject to the condition of previous publication and the Rules provide for the procedure for previous publication and the procedure so prescribed contemplates publication of a draft of the regulation for the information of persons likely to be affected, publication of notice specifying the date on or after which the draft regulations will be taken into consideration, consideration of objections and suggestions, the regulation would be bad in law if the aforesaid procedures are not followed before the publication of final regulations.

22. Since the Regulations are issued for a term of five years and will be in force for the control period up to 2027 and tariff revision proposals can be submitted by KSEBL during the said period in the light of Ext. P21 (d) regulations, I am not inclined to dismiss the challenge to Ext. P21(d) regulations as belated.

23. It is not in dispute that as per the draft regulations (Regulation 34), only interest on the bonds was proposed





to be approved for computation of ARR and the repayment of principal was not proposed to be reckoned for computation of ARR. The KSEBL did not propose the repayment of principal amount on the Master Trust Bonds to be charged on to the ARR. Ext. P21(d) final tariff regulations which approved the repayment of principal amount on Master Trust Bonds to be charged on to the ARR would, no doubt, create tariff shock for consumers. Ext. P21(d) final tariff regulations published is substantially different from Ext. P21(c) draft tariff regulations so far as it approved the repayment of principal amount on Master Trust Bonds to be charged on to the ARR, contrary to the draft Regulation that only repayment of interest on Master Trust Bonds will be charged on to the ARR. Ext. P21(d) regulations to the aforesaid extent do not conform to the requirement of Section 181 (3) of the Electricity Act, 2003 and the Electricity (Procedure for Previous Publication) Rules,



2005. When the draft regulations is published providing that only the payment of interest on the bonds issued to the Master Trust will be approved for computation of ARR and the amount of repayment of such bonds shall not be reckoned for computation of ARR, and when changes are made to the draft regulations providing that repayment of such bonds will be reckoned for computation of ARR, which proposal was not conceivable in the draft regulation, the Regulatory Commission ought to have followed the requirement of previous publication as contemplated under Section 181 (3) of the Electricity Act, 2003 and the Electricity (Procedure for Previous Publication) Rules, 2005. When changes are made to the draft regulations which are not incidental or ancillary to the draft regulations, but foreign to the draft, such changes should be notified/published for the information of persons likely to be affected and inviting their objections and suggestions thereto. Relying on the



decision in **Association of Residents of Mhow (ROM) and another v. Delimitation Commission of India** [(2009) 5 SCC 404], it was contended that every suggestion or objection cannot ultimately result in any fresh proposal and there cannot be fresh proposal depending upon every objection and suggestion as may be received in response to the proposal. Here, it is to be noted that the change to the draft proposal was not pursuant to any objection or suggestion received by the Regulatory Commission. Ext. P21(d) final tariff regulations notified the repayment of principal amount on Master Trust Bonds to be charged on to the ARR without calling for any objection or suggestion of persons likely to be affected. The same is impermissible and defeats the object of previous publication contemplated under the Electricity Act and Rules. The decision in **Association of Residents of Mhow** (supra) was rendered in the context of delimitation of constituencies and considering the



Constitutional mandate of conducting timely elections and in the light of bar of interference of Courts in the matter of delimitation of constituencies under Article 329 (a) of the Constitution. The changes to the draft regulations were not notified and no objections or suggestions were invited with respect to the changes made in the draft regulations as regards repayment of such bonds to be reckoned for computation of ARR. Ext. P21(d) final tariff regulations to the aforesaid extent does not conform to the requirement of Section 181 (3) of the Electricity Act, 2003 and the Electricity (Procedure for Previous Publication) Rules, 2005. Accordingly, Regulation 34 (iv) of Ext. P21(d) final Tariff Regulations to the extent it differs from Regulation 34 (iv) of Ext. P21(c) draft Tariff Regulations is declared as illegal and is, set aside. It will be open to the Regulatory Commission to specify the terms and conditions for the determination of tariff as regards repayment of principal amount on Master Trust Bonds



after complying with the requirement of Section 181 (3) of the Electricity Act, 2003 and the Electricity (Procedure for Previous Publication) Rules, 2005 and in accordance with law.

The writ petition is disposed of.

Sd/-

**MURALI PURUSHOTHAMAN  
JUDGE**

spc

APPENDIX

## PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE MEMORANDUM OF ASSOCIATION AND RULES AND REGULATIONS OF THE 1ST PETITIONER ASSOCIATION.
- Exhibit P2 TRUE COPY OF THE LIST OF MEMBERS OF THE 1ST PETITIONER ASSOCIATION
- Exhibit P3 TRUE COPY OF THE NATIONAL ELECTRICITY POLICY NOTIFIED ON 12.02.2005 BY THE 4TH RESPONDENT
- Exhibit P4 TRUE COPY OF THE TARIFF POLICY DATED 12.02.2005.
- Exhibit P5 TRUE COPY OF THE JUDGMENT DATED 14.08.2012 OF THIS HONOURABLE COURT IN W.P. (C) NO.16746/2012.
- Exhibit P6 TRUE COPY OF THE ROAD MAP FOR REDUCTION OF CROSS SUBSIDY ISSUED BY THE 1ST RESPONDENT ON 20.11.2012.
- Exhibit P7 TRUE COPY OF THE OBJECTIONS DATED 20.02.2013 FILED BY THE 1ST PETITIONER ASSOCIATION
- Exhibit P8 TRUE COPY OF THE TARIFF ORDER DATED 20.02.2013 FOR THE YEAR 2013-14 ISSUED BY THE 1ST RESPONDENT COMMISSION
- Exhibit P9 TRUE COPY OF THE ORDER DATED 31.05.2013 ISSUED BY THE APPELLATE TRIBUNAL FOR ELECTRICTIY IN APPEAL NO.179/2012
- Exhibit P10 TRUE COPY OF THE NOTICE NO.59/CT/KSERC/2013 DATED 30.01.2014 PUBLISHED BY THE 1ST RESPONDENT.
- Exhibit P11 TRUE COPY OF THE OBJECTIONS DATED 26.06.2014 FILED BY THE PETITIONER
- Exhibit P12 TRUE COPY OF THE TARIFF ORDER DATED 30.09.2014 OF THE 1ST RESPONDENT COMMISSION



- Exhibit P13 TRUE COPY OF THE OBJECTIONS DATED 17.01.2017  
FILED BY THE 1ST PETITIONER ASSOCIATION
- Exhibit P14 TRUE COPY OF THE ORDER DATED 19.12.2017  
ISSUED BY THE 1ST RESPONDENT COMMISSION
- Exhibit P15 TRUE COPY OF THE OBJECTIONS FILED BY THE 1ST  
PETITIONER ASSOCIATION ON 27.11.2018.
- Exhibit P16 TRUE COPY OF THE TARIFF ORDER DATED  
08.07.2019 ISSUED BY THE 1ST RESPONDENT  
COMMISSION FOR THE YEARS 2018-19 TO 2021-22.
- Exhibit P17 TRUE COPY OF THE OBJECTION DATED 13.04.2022  
FILED BY THE 1ST PETITIONER ASSOCIATION
- Exhibit P18 TRUE COPY OF THE ORDER DATED 25.06.2022  
ISSUED BY THE 1ST RESPONDENT COMMISSION
- Exhibit P19 TRUE COPY OF THE REVIEW PETITION DATED  
23.07.2022 FILED BY THE 1ST PETITIONER  
ASSOCIATION BEFORE THE 1ST RESPONDENT  
COMMISSION
- Exhibit P20 TRUE COPY OF THE ORDER DATED 19.09.2022  
ISSUED BY THE 1ST RESPONDENT COMMISSION
- Exhibit P21 TRUE COPY OF THE APPEAL DFR NO.57/2023 FILED  
BY THE 1ST PETITIONER ASSOCIATION BEFORE THE  
APPELLATE TRIBUNAL FOR ELECTRICITY, NEW  
DELHI
- Exhibit P21 TRUE COPY OF THE REGULATION OF 2014 OF THE  
(a) 1ST RESPONDENT COMMISSION.
- Exhibit P21 TRUE COPY OF THE REGULATION OF 2018 OF THE  
(b) 1ST RESPONDENT COMMISSION.
- Exhibit P21 TRUE COPY OF THE DRAFT REGULATION OF 2021 OF  
(c) THE 1ST RESPONDENT COMMISSION.
- Exhibit P21 TRUE COPY OF THE FINAL REGULATION OF 2021 OF  
(d) THE 1ST RESPONDENT COMMISSION
- Exhibit P21 TRUE COPY OF THE FINAL REGULATION OF 2021 OF  
(d) THE 1ST RESPONDENT COMMISSION (2)



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- Exhibit P21 (e) TRUE COPY OF THE JUDGMENT DATED 12.03.2008 PASSED BY THIS HONOURABLE COURT IN W.P. (C) NO. 4963 OF 2008
- Exhibit P21 (f) TRUE COPY OF THE ORDER DATED 18.11.2015 OF THE APPELLATE TRIBUNAL FOR ELECTRICITY, NEW DELHI IN APPEAL NO. 247 OF 2014 FILED BY THE 1ST PETITIONER ASSOCIATION
- Exhibit P22 TRUE COPY OF THE TARIFF REVISION PETITION DATED 07.02.2023 FILED BY THE 2ND RESPONDENT KSEBL BEFORE THE 1ST RESPONDENT COMMISSION.
- Exhibit P23 TRUE COPY OF THE OBJECTION FILED BY THE 1ST PETITIONER ASSOCIATION ON 10.05.2023.
- Exhibit P24 TRUE COPY OF THE JUDGMENT OF THE APPELLATE TRIBUNAL FOR ELECTRICITY IN ABHIJEET FERROTECH LIMITED V. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION DATED 18.02.2022.
- Exhibit P25 TRUE COPY OF THE JUDGMENT OF THE APPELLATE TRIBUNAL FOR ELECTRICITY IN MERINO INDUSTRIES LIMITED V. HARYANA ELECTRICITY REGULATORY COMMISSION & ORS DATED 25.11.2022
- Exhibit P26 TRUE COPY OF THE JUDGMENT OF THE APPELLATE TRIBUNAL FOR ELECTRICITY IN M/S MALANA POWER COMPANY LIMITED V. HIMACHAL PRADESH STATE ELECTRICITY BOARD LIMITED DATED 18.08.2022.
- Exhibit P27 TRUE COPY OF THE JUDGMENT OF THE HONOURABLE SUPREME COURT IN PUNJAB STATE POWER CORPN. LTD. V. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION - (2015) 7 SCC 387.

RESPONDENT EXHIBITS

- Exhibit-R2 (a) THE ORDER OF THE APEX COURT IN CIVIL APPEAL NO.2656/2022 DATED 09.09.2022
- Exhibit-R2 (b) TRUE COPY OF THE ORDER OF THE HON'BLE APERC IN O.P.NO.60 OF 2017 DATED 16.08.2022
- Exhibit-R2 (c) TRUE COPY OF THE GOVERNMENT ORDER G.O (P) NO





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46/2013/PD DATED 31.10.2013

Exhibit R2 (d) TRUE COPY OF THE GOVERNMENT ORDER G.O (P) NO  
3/2015/PD DATED 28.01.2015

Exhibit-R2 (e) TRUE COPY OF THE COMMENTS SUBMITTED BY KSEBL

Exhibit-R2 (f) TRUE COPY OF THE ORDER OF THE HONOURABLE  
SUPREME COURT OF INDIA IN CIVIL APPEAL  
9846/2016

EXHIBIT R1 (f) THE TRUE COPY OF THE ACTUARIAL VALUATION  
REPORT DATED 11.05.2023 ON GRATUITY  
BENEFITS.

Exhibit R1 (a) THE TRUE COPY OF THE RELEVANT PORTIONS OF  
THE SUO MOTU ORDER NO. 1007-F AND T-2016-  
KSERC DATED 17.04.2017.

Exhibit R1 (b) THE TRUE COPY OF THE RELEVANT PORTION OF  
ORDER OF THE COMMISSION DATED 08.07.2019 IN  
PETITION OA NO. 15-2018.

Exhibit R1 (c) THE TRUE COPY OF THE RELEVANT PORTION OF  
TARIFF ORDER OF THE COMMISSION DATED  
25.06.2022 IN PETITION OP NO. 11-2022.

EXHIBIT R1 (d) THE TRUE COPY OF THE ORDER OF THE APERC IN  
OP NO 60-2017 DATED 16.08.2022.

Exhibit R1 (e) THE TRUE COPY OF THE KERALA ELECTRICITY  
SECOND TRANSFER (AMENDMENT) SCHEME (RE-  
VESTING) 2013 DATED 28.01.2015 PUBLISHED IN  
GOVERNMENT GAZETTE.

Exhibit R1 (f) THE TRUE COPY OF THE ACTUARIAL VALUATION  
REPORT DATED 11.05.2023 ON GRATUITY BENEFITS

EXHIBIT R1 (g) THE TRUE COPY OF THE ACTUARIAL VALUATION  
REPORT DATED 11.05.2023 ON PENSION BENEFITS  
SCHEME.

EXHIBIT R1 (h) THE TRUE COPY OF THE ACTUARIAL VALUATION  
REPORT DATED 11.05.2023 ON PRIVILEGE LEAVE  
BENEFITS SCHEME.

EXHIBIT R1 (i) THE TRUE COPY OF GO (MS) NO. 17-2015-PD



DATED 13TH MAY 2015 IN THE MATTER OF 'RE-VESTING OF THE ASSETS AND LIABILITIES OF ERSTWHILE KSEB TO KSEB LTD- NETTING OFF OF DUES BETWEEN GOVERNMENT AND KSEB AS ON 31.10.2013.

EXHIBIT R1(j) THE TRUE COPY OF THE SHARE CERTIFICATE DATED 16.08.2014 ISSUED BY KSEB.

EXHIBIT R1(k) THE TRUE COPY OF THE INTERIM ORDER DATED 29.07.2016 PASSED BY THE HON'BLE SUPREME COURT IN CIVIL APPEAL NO 9846-2016.

Exhibit R1(l) THE TRUE COPY OF THE RELEVANT PORTION OF THE ORDER DATED 21.08.2018 PASSED IN OA NO 6-2018.

Exhibit R1(m) THE TRUE COPY OF THE RELEVANT PORTION OF THE ORDER DATED 14.09.2018 PASSED IN OA NO 12-2018.

Exhibit R1(n) THE TRUE COPY OF THE RELEVANT PORTION OF THE ORDER DATED 25.06.2021 PASSED IN OA NO 9-2020.

Exhibit R1(o) THE TRUE COPY OF THE RELEVANT PORTION OF THE ORDER DATED 14.06.2022 PASSED IN OA NO 13-2020.

Exhibit R1(p) THE TRUE COPY OF THE RELEVANT PORTION OF THE ORDER DATED 21.06.2022 PASSED IN OA NO 22-2022.