

**SUPREME COURT OF INDIA**

U.P. Power Corporation Ltd.

Vs.

National Thermal Power Corporation Ltd.

C.A.NO. 1110 OF 2007

(S.B. Sinha, Lokeshwar Singh Panta and B. Sudershan Reddy)

03/03/2009

**JUDGMENT**

**S.B. SINHA, J :**

1. These appeals involving similar questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.
2. We may, however, notice the fact of the matter from Civil Appeal No.1110 of 2007.
3. The question which arises for consideration herein is as to whether the amount required to be paid by the first respondent National Thermal Power Corporation (for short 'the Corporation') towards revision of scales of pay of its employees in terms of the recommendations made by the High Level Committee constituted under the Chairmanship of Justice S. Mohan with retrospective effect from 1st January, 1997 can be a subject matter of revision in tariff for the tariff years 1997-1998 ; 1998 -

1999 and 1999 - 2000.

4. The Parliament with a view to provide for establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto, enacted the Electricity Regulation Commissions Act, 1998 (for short 'the 1998 Act'). It came into force with effect from 9th June, 1998. Pursuant to or in furtherance of the provisions thereof the Central Electricity Regulatory Commission (in short the Central Commission) was established in terms of sub-section (1) of Section 3 of the 1998 Act. Indisputably the powers and functions of the Commission are extensive being contained in Section 13 of 1998 Act i.e. : "(a) to regulate the tariff of generating companies owned or controlled by the Central Government; (b) to regulate the tariff of generating companies, other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; (c) to regulate the inter-State transmission of energy including tariff of the transmission utilities; (d) to promote competition, efficiency and economy in the activities of the electricity industry; (e) to aid and advise the Central Government in the formulation of tariff policy which shall be-- (i) fair to the consumers; and (ii) facilitate mobilisation of adequate resources for the power sector; (f) to associate with the environmental regulatory agencies to develop appropriate policies and procedures for environmental regulation of the power sector; 4 (g) to frame guidelines in matters relating to electricity tariff; (h) to arbitrate or adjudicate upon disputes involving generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) above; (i) to aid and advise the Central Government on any other matter referred to the Central Commission by that Government."

5. A regulatory Commission not only makes Regulations but in view of its extensive powers BUT ALSO in-charge of implementation thereof. It furthermore in the event of any dispute or difference arising between several players involved in the framing of tariff for the consumers of electrical energy has also an adjudicatory role to play.

6. We are in this batch of appeals are concerned with the power of the Central Commission to make tariff and to revise the same at the instance of a generating company. Before, however, advertng to the said questions, we may notice certain undisputed facts.

7. National Thermal Power Corporation Ltd. is a public sector undertaking employed in generation of electrical energy at different parts of India. It has a Thermal Power Station at Korba in the State of Chhatisgarh and Gas Power Station in Dadri in the State of Uttar Pradesh.

8. U.P. Power Corporation Ltd. is also a public sector undertaking constituted upon bifurcation of U.P. Electricity Board in terms of the provisions of the U.P. Electricity Regulatory Commission Act,

1998.

9. Indisputably the Central Commission only had, at the relevant time, jurisdiction to make tariff for the generating companies.

10. The matter relating to generation, transmission, supply and distribution of electrical energy in different States used to be governed by the Electricity (Supply) Act, 1948. With a view to bring reforms in the power sector and to meet shortages in the power supply, the Central Government as also the various State Governments, adopted liberalisation policies for industrial economy so as to enable them to attract investment from various parts of the country as also from abroad.

11. The Parliament, with a view to give effect to the aforesaid policy decision, as noticed hereinabove, enacted 1998 Act. Parliament, we may place on record, with a view to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies, regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commission and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto, enacted the Electricity Act, 2003. It came into force with effect from 10th June, 2003.

12. On or about 25th September, 1999 the Government of India issued guidelines for revision of salary to the employees of the Public Sector Undertakings with effect from 1st July, 1997, wherefor, as noticed earlier, a High Powered Committee headed by Justice Mohan was constituted.

13. It is stated that the Corporation made provisions in its budget for the relevant years and paid arrears of revised salary with effect from 1st January, 1997 to the Executive in July, 2000 and to the Supervisor and Workmen from April, 2001 and March, 2001 respectively.

14. The Corporation had asked the Central Commission to frame tariff in respect of the electricity generated by it wherefor it filed Petition Nos.30/2001 and 44/2001 for determination of tariff for its stations at Korba and Dadri. The Central Commission, upon consideration of the factors placed before it and upon hearing all concerned, including the parties hereto, determined the operational and financial norms applicable, inter alia, for the generating stations of the NTPC which was inclusive of employee's costs. In the said order the Central Regulatory Commission dealt with all aspects of the operation and maintenance expenses after setting up the norms for such determination.

15. As stated earlier the revision of salary of NTPC employees was revised in terms of the recommendations of the High Level Committee. The said revision was given effect to on and from w.e.f. 1st January, 1997 but was implemented during the period 2000-2001.

16. The tariff order was made by Central Regulatory Commission for Korba and Dadri on 6th August, 2003 wherefor the data provided by NTPC were taken into consideration in terms of Regulation 2.7(d)(i) including the provisions made during three years 1997-1998 to 1999-2000 towards anticipated revised costs therefor.

17. Indisputably alongwith the said data, datas for the year 2000-2001 were also produced.

18. It filed a review petition before the Central Regulatory Commission during various periods in respect of its Korba and Dadra projects on 1st October, 2003. However, it did not lay any claim in respect of actual revised costs for the years 1997-1998, 1998-1999 and 1999-2000.

19. Central Regulatory Commission in exercise of its suo motu jurisdiction passed an order in proceeding being No.196 of 20045 to inquire into the actual escalation factor which was found to be less than 6%. Before the Commission certain other issues were also raised. However, on or about 25th April, 2005 and 26th July, 2005 revision applications were filed in respect of Korba and Dadri Power Stations claiming allowance of actual revised costs incurred by the Corporation on account of arrears of paid in 2000-2001.

21. The Commission dismissed the said applications by orders dated 11th August 2005 and 19th October, 2005 inter alia, opining : (i) "It needs to be noted that in terms of the Commission's order dated 21.12.2000 fresh revision of O&M base charges after determination of tariff is not warranted based on the actual expenses". (ii) "From the details extracted at Para 10 above, it can be seen that revision of salary of the employee, executives, supervisors and other workmen was notified during July 2000 to April 2001 and the arrears on that account were also paid during the same period. Therefore, the complete employee cost data on account of revision of pay and allowances was available with the petitioner during April, 2001. When the application for determination of tariff were filed on 8.6.2001, the data in this regard could be placed before the Commission by the petitioner. Further, the petitioner had filed amended petitions during January/ February 2002 in all these cases. The Petitioner did not incorporate the actual data of employee cost in the amended petitions as well". (iii) "Under Order 2 Rule 2 of the Code of Civil Procedure (the Code) every suit is to include the whole of the claim to which the party is entitled to make in respect of the cause of action but a party may relinquish any portion of his claim. However, where the party omits to sue in respect of any claim or intentionally relinquishes any portion of his claim, he cannot afterwards sue in respect of the portion so omitted

or relinquished". (iv) "After deciding the tariff, the Commission cannot revisit the matter covered in the tariff orders, which have acquired finality". (v) "...On consideration of this, the employee cost indicated by the petitioner for the years 1997-98 and 1998-99 (excluding incentive and ex-gratia), even though beyond the admissible limit of 20% was considered for normalization..." (vi) "...the question of exclusion of these expenses cannot be re-agitated in the present proceedings as they are barred by the principle of res-judicata...". (vii) "...the tariff approved is the complete package."

22. It, however, appears that an application of the electricity generating station of the Corporation at Rihand was filed for revision of the tariff being Petition No. 38 of 2001 in respect of the tariff period 2001-2004 having regard to the fact that further amount was to be paid by the NTPC to its employees for the purpose of implementation of the recommendations of Justice Mohan Committee, relying on or on the basis of the leave granted, the Corporation filed I.A. No. 9 of 2006 to place on record the impact of revision of wages w.e.f. 1st January, 1997 on the employee costs for the generating station and the Corporate office expenses for the years 1995- 1996 to 2000-2001, which was allowed.

23. Appellant before us contends that Rihand decision is not applicable in the instant case as therein the original tariff order was yet to come into force. And the said application was filed for revision of tariff and considered in view of the statements made by the Corporation itself in the earlier round of the proceeding. .

24. The Corporation aggrieved by and dissatisfied with the orders of the Commission dated 11th August, 2005 and 19th October, 2005 filed appeals before the Appellate Tribunal. By reason of the impugned judgment and order dated 7th September, 2006 the said appeals have been allowed, directing :- "amounts of arrears paid by the appellant in the year 2000-2001 on account of employees cost, incurred in the respective years, be considered in the tariff fixation for reimbursement, as admissible by the Regulations in the forthcoming tariff period in a manner that tariff shock, if any, to the respondents is minimized."

25. Appellant is, thus, before us.

26. Mr. Sunil Gupta, learned senior counsel appearing on behalf of the appellant would urge :- (i) The Central Regulatory Commission had no jurisdiction in terms of 1998 Act or 2003 Act or the Regulations made thereunder to entertain and carry out revision in the tariff order on the basis of purported subsequent events or otherwise. (ii) In view of 2001 Regulations framed under Section 28 of 1998 Act even while undertaking the original tariff determination proceedings the Commissioner had no jurisdiction to consider any data of 2000-2001 for narrative operation and maintenance expenses beyond the statutorily stipulated 5 years, viz., 1995- 1996 to 1999-2000. (iii) Keeping in view the fact that the Corporation were supposed to have filed all materials in respect of its case for framing tariff and failure, if any, on its part to bring some materials showing the financial impact

arising out of the implementation of the 6th Pay Commission vis-à-vis the recommendation of the High Powered Committee could not have been the basis for a review, particularly, having regard to the fact that the claim was barred by limitation. (iv) The operational and financial norms fixed in terms of circular dated 21st December, 2000 are not relevant or enforceable in the wake of enforcement of the statutory Regulations, 2001 framed under Section 28 of the Act which had come into force on 26th March, 2001. (v) Assuming the Central Regulatory Commission's order dated 21st December, 2008 i.e. the Operational & Financial Norms, to be relevant and enforceable, as thereby the said order permitted that 'more than normal' Operational and Maintenance expenses should be sought as compensation on a case by case basis by means of a separate petition and hearing of all concerned, without reflecting it in the norms founded on the five years, 1995-1996 to 1999-2000, the impugned judgment cannot be sustained. Such petition/plea could be filed before the Tariff order could be issued. The permission would not mean that separate petition could be filed after the passing of the Tariff Order. (vi) In any event the delay caused in filing the application should have been taken into consideration by the Tribunal for the purpose of exercising its discretionary jurisdiction. (vii) Provisional expenses having already been considered by the Central Commission while framing tariff, no actual expenses for the year 2000-2001 could have been taken into consideration as thereby a duplication would be caused, which is not contemplated in law. (viii) The Tariff Order being a complete package and which having not been challenged or appealed against, any application for review or revision was not maintainable. (ix) The Appellate Tribunal had committed a serious error in so far as it took into consideration the Rihand case where Interlocutory Application was entertained in a case of Original Tariff Order itself and thus could not have been relied upon. (x) The Tribunal's order providing for relief by way of reimbursement in the forthcoming tariff period is contrary to the scheme of the Act. (xi) The Appellate Tribunal although has wide jurisdiction but it, without sufficient or cogent reasons, should not have interfered with the order of the Central Regulatory Commission.

27. Mr. Ramachandran, learned counsel appearing on behalf of respondent No.2, on the other hand, urged : (i) Central Regulatory Commission had the requisite jurisdiction to review the tariff, having regard to the powers contained in the Regulations. (ii) Sufficient and cogent reasons for revision of the costs in the first instance, having been assigned and all material facts having been taken into consideration by the Appellate Tribunal, no exception can be taken to the impugned judgment. (iii) It is incorrect to contend that the Appellate Authority had made inconsistent observations in the impugned order. (iv) As in the case of Rihand the actual costs paid by respondent No.1 for meeting its obligations was granted, there was no reason as to why the same principle should not have been applied in the case of Korba and Dadri, particularly when it was not denied or disputed that the Corporation had to incur a sum of Rs.55 crores towards arrears of salary. (v) Some delay might have been caused in filing the application but the same by itself should not have been a ground for rejecting the application in toto as the Tribunal had not granted any interest on the actual amount and merely granted the carrying costs.

28. Power and/ or jurisdiction of the Central Commission to frame tariff and/ or carry out revision thereof is not in dispute. It is in fact a well-settled that the Central Commission has the exclusive jurisdiction to frame not only tariff but also any amendment, alterations and additions in regard thereto.

29. The Central Commission in terms of the 1998 Act as also the Regulations framed thereunder exercise diverse powers. It exercises legislative power, power of enforcement of the Regulations as also the adjudicatory power. Each of its functions although are separate and distinct but may be overlapping. The power of the Central Commission is extensive.

30. The Central Commission in exercise of its jurisdiction under Section 55 of the 1998 Act framed regulations known as the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (for short "the 1999 Regulations"). Chapter V of the 1999 Regulations deals with tariff regulations. Regulations 92, 93, 94 read as under: "92. The Commission on its own on being satisfied that there is need to review the tariff of any utility shall initiate the process of revision in accordance with the procedure as may be prescribed. The proceedings for suo moto review of the tariff shall be the same as set out in Chapter II of these Regulations. 93. Review of orders of the Commission on tariff will be entertained strictly in accordance with the relevant regulations governing review as contained in the relevant regulation herein. 94. The utilities shall submit periodic returns as may be prescribed containing operational and cost data to enable the Commission to monitor the implementation of its order and reassess the bases on which Tariff was approved." Chapter VII of the 1999 Regulations deals with Miscellaneous Matters. The 1999 Regulations expressly confer a power of review on the Central Commission in terms of Regulation 103 thereof. For the aforementioned purpose, the Central Commission may not only exercise its jurisdiction suo motu but it may review a decision even if an application is filed within a period of sixty days of making of any decision, direction or order. Regulation 110 empowers the Central Commission to issue orders and practice directions in regard to the implementation of the Regulations and procedure to be followed and various matters which the Commission has been empowered by these regulations to specify or direct. Regulations 111 and 112 read as under: "111. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission. 112. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act., a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters."

31. The Central Commission also in exercise of its power conferred upon it by Section 28 of the 1998 Act framed regulations known as the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (for short "the 2001 Regulations"). The 2001 Regulations came into force with effect from 1.04.2001. It was to remain in force for a period of three years, unless reviewed or extended by the Central Commission. Regulation 1.11 of the 2001 Regulations was framed for removal of doubts. It was clarified that the norms prescribed therein were the ceiling norms only and the same shall not preclude the generating company and other beneficiaries from agreeing to improved norms. Regulation 1.4 of the 2001 Regulations reads as under: "1.4 The generation tariff under these Regulations shall be determined station-wise and transmission tariff shall be determined line-wise, sub-station-wise, as the case may be, and aggregated to regional tariff. Provided that a utility may file a petition for fixation of tariff in respect of the completed

units/systems." Chapter II of the 2001 Regulations provides for thermal power generating stations. "Operation and Maintenance Expenses" has been defined as under: " `Operation and Maintenance Expenses' or `O&M' - In relation to a period means the expenditure incurred in operation and maintenance of the generating station including manpower, spares, consumables, insurance and overheads." Regulation 2.4 of the 2001 Regulations provides for the norms of operation. Regulation 2.4(viii) provides for the period of stabilization and explanations in the following terms: "(viii) Stabilization period Stabilization period commencing from the date of commercial operation shall be reckoned as follows : (a) Thermal (coal/lignite) station - 180 days. (b) Open cycle gas and Naphtha based station - 90 days. (c) Combined cycle gas and Naphtha based station - 90 days Explanations:- 1. For the purpose of calculating the tariff, the operating parameters, i.e. `Station Heat Rate', `Secondary Fuel Oil Consumption' and `Auxiliary Consumption' shall be determined on the basis of actuals or norms, whichever is lower." Regulation 2.7 of the 2001 Regulations provides for payment of capacity (fixed) charges; Clause (c) whereof deals with return on equity in the following terms: "(c) Return on Equity : Return on equity shall be computed on the paid up and subscribed capital and shall be 16 per cent of such capital. Explanation:- Premium raised by the Generating Company while issuing share capital and investment or internal resources created out of free reserve of the existing utility, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing the return on equity, provided such premium amount and internal resources are actually utilized for meeting the capital expenditure of the generating station and forms part of the approved financial package as set out in the techno-economic clearance accorded by the Authority or approved by an appropriate independent agency, as the case may be." "Operation and Maintenance expenses including insurance" is dealt with in Clause (d) of Regulation 2,7 of the 2001 Regulations; Clauses (i) and (iv) whereof reads as under: (d) Operation and Maintenance expenses including insurance (i) Operation and Maintenance expenses including insurance (hereinafter referred to as O&M expenses) for the existing stations of NTPC and NLC which have been in operation for 5 years or more in the base year of 1999-2000, shall be derived on the basis of actual O & M expenses, excluding abnormal O&M expenses, if any, for the years 1995-96 to 1999-2000 duly certified by the statutory auditors. The average of actual O&M expenses for the year 1995-96 to 1999-2000 considered as O&M expenses for the base year 1997-98 shall be escalated twice at the rate of 10 percent per annum to arrive at O&M expenses for the base year 1999-2000i as given below:  $BO\&Mi_{2000i} = AVO\&M \times (1.10)^2$  Where  $BO\&Mi_{2000} =$  Base level O&M expenses for 1999-2000 for ith generating station. The Base O&M expenses for the year 1999- 2000 shall be further escalated at the rate of 6 per cent per annum to arrive at permissible O&M expenses for the relevant year. XXX XXX XXX (iv) The escalation factor of 6 per cent per annum shall be used to revise the base figure of O&M expenses. A deviation of the escalation factor computed from the actual inflation data that lies within 20 per cent of the above notified escalation factor of 6 per cent (which works out to be 1.2 percentage points on either side of 6 per cent) shall be absorbed by the utilities/beneficiaries. In other words if the escalation factor computed from the observed data lies in the range of 4.8 to 7.2 per cent, this variation should be absorbed by the utilities. Any deviations beyond this limit shall be adjusted on the basis of the actual escalation factor arrived at by applying a weighted price index of CPI for industrial workers (CPI\_IW) and an index of select components of WPI (WPIOM) as per formula given in note below clause (v) herein below, for which the utility shall approach the Commission with a petition."

32. While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission *stricto sensu* does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof. Its jurisdiction, in that sense, as submitted by Mr.

Gupta, for the aforementioned purposes would not be barred in terms of Order II, Rule 2 of the Code of Civil Procedure or the principles analogous thereto.

33. Revision of a tariff must be distinguished from a review of a tariff order. Whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it.

33. Having regard to the nature of jurisdiction of the Central Commission in a case of this nature, we are of the opinion that even principles of res judicata will have no application.

34. There cannot be any doubt whatsoever that while a tribunal or a court exercises adjudicatory power, although provisions of Section 11 of the Code of Civil Procedure are not applicable but the general principles of res judicata may be applicable as has been held by this Court in a consolidation matter in *Sri Bhavanarayanawamivari Temple v. Vadapalli Venkata Bhavanarayana Charyulu* [(1970) 1 SCC 673, para 8], in a labour matter in *Bharat Barrel and Drum Manufacturing Co. Pvt. Ltd. v. Bharat Barrel Employees Union* [(1987) 2 SCC 591, paras 9 to 11], in a rent control matter in *Vijayabai and Others v. Shriram Tukaram and Others* [(1999) 1 SCC 693, para 14], in a writ petition in *Forward Construction Co. and Others v. Prabhat Mandal (Regd.), Andheri and Others* [(1986) 1 SCC 100, para 20], and in an arbitration proceeding in *K.V. George v. Secretary to Government, Water and Power Department, Trivandrum and Another* (1989) 4 SCC 595, para 16], whereupon strong reliance has been placed by Mr. Gupta, but such a question does not arise herein. Moreover, such a point having never been raised before the Central Commission or the appellate tribunal, we are of the opinion that even otherwise the said argument should not be permitted to be raised before us for the first time.

35. The Central Commission, as indicated hereinbefore, has a plenary power. Its inherent jurisdiction is saved. Having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction. It is empowered to lay down its own procedure.

36. Regulations 92, 94, 103 and 110 of the 1999 Regulations confer a wide power upon the Central Commission. They are to be exercised in different circumstances. Whereas Regulations 92 and 94 are to be exercised in regard to Chapter V, Regulations 103 and 110 apply in regard to cases where Regulations 92 and 94 would not have any application. Regulations 92 and 94, in our opinion, do not restrict the power of the Central Commission to make additions or alterations in the tariff. Making of a tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor. The said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion.

37. Assuming that Regulation 103 of the 1999 Regulations would be applicable in a case of this nature, the same also confers a wide jurisdiction. The Commission, apart from entertaining an application for review on an application filed by a party, may exercise its suo motu jurisdiction. While the Central Commission exercises a suo motu jurisdiction, the period of limitation prescribed in Regulation 103 shall not apply. There cannot, however, by any doubt whatsoever that while exercising such jurisdiction, the Central Commission must act within a reasonable time. Furthermore, the statute does not provide for the manner in which a petition is to be filed before the Central Commission or the manner in which the tariff order is to be passed or revision or non-revision thereof.

38. Section 28 of the 1998 Act empowers the Central Commission to determine the terms and conditions for fixation of tariff.

39. We are unable to accept the contention of Mr. Gupta that the operational and financial norms dated 21.12.2000 were not relevant. The Central Government itself recognized the need to adjust the Operation and Maintenance Expenses based on normative expenses after the actual are available in its order dated 21.12.2000 which was the principal order laying down norms therefor holding inter alia as under: "4.3.6 The Commission is convinced that linking the base level O&M expenses to the capital cost is not appropriate as there are unresolved issues of measurement of the capital cost itself. Thus, the efficacy of the base on the basis of capital cost is questionable. The approach adopted in this order is based on following tenets : 7 The base level of O&M should not be computed as a given proportion of capital cost but should be derived on the basis of actual O&M expenses in the last five years after ironing out the spikes and abnormalities in the yearwise data. 7 Any abnormal expenses incurred by utilities in operating and maintaining their plants should not get reflected in the norms but should be dealt with separately on a case by case basis through separate petitions. This will provide an opportunity to all the stakeholders to assess the merit of claims on the basis of these expenses in a transparent way." Thereafter, in para 4.3.12 of the aforesaid order, the Central Commission held as under: "The regulated entities shall include in their Tariff petition details of yearwise actual O&M cost data for the last five years duly certified by Statutory Auditors." Both the aforementioned provisions must be read together and not in isolation.

40. The order dated 21.12.2000 passed by the Central Commission formed the basis of the 2001 Regulations, which is clear from the following observations made in the said order:

"1.1.2 As per Section 28 of the ERC Act the Commission is required to determine by regulations the terms and conditions for fixation of tariff under clauses (a), (b) and (c) of Section 13. Section 37 of the ERC Act stipulates that the Commission shall ensure transparency while exercising its powers and discharging its functions. XXX XXX XXX 1.1.3 The Commission assumed the jurisdiction under Section 13(a) and (b) as referred to above w.e.f. 15th May, 1999. This was the date from which, as per the provisions of Section 51 of the ERC Act, the Central Government notified the

deletion of Section 43A(2) of the Electricity (Supply) Act, 1948 (ES Act), in respect of tariff of companies falling under Sections 13(as) and (b) of the ERC Act. Section 43A(2) which deals with the terms and conditions for sale of power by generating companies to State Electricity Boards was in force until that date. Consequent to the deletion of Section 43A(2) new sets of terms and conditions were required to be notified under the provisions of Section 28 of the ERC Act, as they now fall under the tariff jurisdiction of the Commission. XXX XXX XXX 1.4 Applicability and effective date : 1.4.1 The terms and conditions as will be notified, shall, apply to all utilities covered under Section 13(a) (b) and (c) of the ERC Act unless specifically stated otherwise..... XXX XXX XXX 10.2 This order has to be read along with our orders on petitions 85/2000 and 86/2000 on operational norms for hydro power stations and for inter state transmission respectively. This order along with the order dated 4th January, 2000 on Availability Based Tariff read with our order on review petition No.13/2000 on availability based tariff will constitute the frame work for notifications on terms and conditions of tariff to be regulated under Section 13(a)(b) and (c) of the ERC Act. Separate notifications shall be issued by the Commission incorporating the findings in accordance with section 28 of the ERC Act, 1998."

41. It was contended by Mr. Ramachandran that actual expenses for 2001-2002 were not available and the normative expenses for the last five years were only available and there was an unexpected abnormal increase. There was, thus, in our opinion, enough justification for filing the application for review of the tariff.

42. While considering the question of jurisdiction vis-à-vis the applicability of the operational and financial norms, it is not for us to consider as to whether such separate petition should have been filed. We would, however, consider the question as to whether such an application for permission should have been filed within a reasonable time or not a little later.

43. The concept of regulatory jurisdiction provides for revisit of the tariff. It is now a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such.

44. There cannot be any doubt whatsoever that the word 'regulation' in some quarters is considered to be unruly horse. In *Bank of New South Wales v. Commonwealth* [(1948) 76 CLR 1] Dixon, J. observed that the word "control" is an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than "restraint", something equivalent to "regulation".

45. But, indisputably, the regulatory provisions are required to be applied having regard to the nature, textual context and situational context of each statute and case concerned. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed

necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted. [See *Deepak Theatre v. State of Punjab* 1992 Supp (1) SCC 684 at 687]. Even otherwise the power of regulation conferred upon an authority with the obligations and functions that go with it and are incidental to it are not spent or exhausted with the grant of permission. [See *State of U.P. v. Maharaja Dharmander Prasad Singh* (1989) 2 SCC 505] In that sense, the power of Central Commission *stricto sensu* is not a judicial power. This Court in *V.S. Rice and Oil Mills v. State of A.P.* [(1964) 7 SCR 456] held: "Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices..." Recently, this Court in *T.N. State Electricity Board v. Central Electricity Regulatory Commission and Others* [(2007) 7 SCC 636], whereupon counsels for both the parties relied upon, upon consideration of the provisions of Section 28 of the 1998 Act, opined as under: "...A bare glance of the above quoted section suggests that CERC would formulate regulations for providing terms and conditions for fixation of tariff under Clauses (a), (b) and (c) of Section 13. The power for making the regulations is to be found in Section 55 of the 1998 Act. Accordingly, CERC has formulated the Regulations which are called the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999..." It was furthermore held: "12. The appellate authority has clearly erred in giving a literal interpretation to the said provision, namely, Clause 2.7(d)(iv). Learned counsel urged that the appellate authority was bound to discern the true intendment of the provision and should have given it a meaningful interpretation, in that, the escalation factor should have been calculated keeping 6% as the base and it should not have been limited to the difference alone. Learned counsel Shri Sunil Gupta further argued that the rule was manifestly neutral rule founded on purely neutral considerations and while interpreting the same, the appellate court has divested itself with the logic thereof. Learned counsel buttressed his arguments by suggesting that the rule was meant for the convenience of all concerned which included both administrative as well as financial convenience. According to both the counsel the intention behind the rule was that CERC should not be exposed to the tedious exercise of review and readjustment of tariff already fixed so long as the deviation was within 20% which was perceived to be the reasonable tolerance limit and that being the only objective behind the peculiar language of the rule, by adopting the literal interpretation, the utilities could not have been deprived of the full benefits if the O&M factor went below 20% of the escalation factor of 6%. Learned counsel very fairly submitted that in case the O&M factor went beyond the 20% by way of an upswing then the generating unit like NTPC was always justified to charge on the basis of the full difference between the actual upswing point and the 6%. According to the learned counsel this was the only intendment of the rule." In *Hotel & Restaurant Assn. and Another v. Star India (P) Ltd. and Others* [(2006) 13 SCC 753], in regard to the role of TRAI as a regulator, this Court said: "55. TRAI exercises a broad jurisdiction. Its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. *Prima facie*, it can fix norms and the mode and manner in which a consumer would get the services.

56. The role of a regulator may be varied. A regulation may provide for cost, supply of service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for a level playing field, protection of consumers' interest, prevention of monopoly. The

services to be provided for through the cable operators are also recognised. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind." In *K. Ramanathan v. State of Tamil Nadu* [(1985) 2 SCC 116], this Court held:

"18. The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in *Corpus Juris Secundum*, Vol. 76 at p. 611: " `Regulate' is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations. `Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict." See also: *Webster's Third New International Dictionary*, Vol. II, p. 1913 and *Shorter Oxford Dictionary*, Vol. II, 3rd Edn., p. 1784." In *Central Power Distribution Co. and Others v. Central Electricity Regulatory Commission* [(2007) 8 SCC 197], this Court held: "22.3. As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce..." In *U.P. State Electricity Board, Lucknow v. City Board, Mussoorie and Others* [(1985) 2 SCC 16], this Court held: "

...It only provides that the Grid Tariff shall be in accordance with any regulations made in this behalf. That means that if there were any regulations, the Grid Tariff should be fixed in accordance with such regulations and nothing more. We are of the view that the framing of regulations under Section 79 (h) of the Act cannot be a condition precedent for fixing the Grid Tariff..." The 2001 Regulations, however, show that it had a limited duration, viz., three years.

46. The Government of India issued guidelines for revision for the employees of the Central Public Sector undertakings as far back on 25.09.1999 with effect from 1.04.1997. It has not been denied or disputed that the respondent No. 1 implemented the revision and paid arrears of salaries with effect from 1.04.1997 to executives, workmen and supervisors, respectively during the years 2000-2001 by orders dated 6.07.2000, 2.03.2000 and 19.04.2001, respectively. They were already aware of the impending revision of scale of pay and had implemented in part, albeit, on a provisional basis. We fail to understand as to why it had filed applications for tariff determination for its generating stations at Korba and Dadri on 28.05.2001 and 8.06.2001, respectively. Not only that the amended applications did not contain the details of the prescribed data, a sheet with data of year 2000-2001, which was not a part of Form 16, was inserted at a later stage. Amended applications were filed only on 30.01.2002 and 7.02.2002. The year 2000- 01 was not the relevant year for the aforementioned purpose.

47. There cannot be any doubt whatsoever that for the purpose of making tariff the actual costs required for payment to the employees being a part of the operation and maintenance cost including a sum of Rs. 55 crores, which were to be paid by way of extra amount, could fall for determination by the Central Commission. But, such an application ordinarily could have been filed within the period during which the tariff order was in force.

48. It is difficult to agree with the opinion of the appellate tribunal that increase in the salary with retrospective effect could have been a subject matter for determination of tariff in another period. In a fact situation obtaining herein, we are of the opinion that the claim of the respondent - corporation was not justified as the Central Commission should not have been asked to revisit the tariff after five years and when everybody had arranged its affairs.

49. Regulation 2.7 (d)(iv) of the 2001 Regulations clearly provides that applications must be entertained only in the event any situation arose within the purview thereof and not at any point of time. If the respondent No. 1 was aware that they were to incur an additional expenditure of Rs. 55/- crores, they could have preferred an appeal before the Central Commission. We have been informed at the bar that the appeals were preferred on other issues but not on this one.

50. Framing of tariff is made in several stages. The generating companies get enough opportunity not only at the stage of making of tariff but may be at a later stage also to put forth its case including the amount it has to spend on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion, be permitted to re-agitate the said question after passing of many stages. Furthermore, the direction of the tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh regulations and not the old regulations.

51. We are not oblivious of the fact that in the Rihand Case, the Central Commission allowed the application of the respondent, but, therein a provision was made therefor in the original tariff order itself. Respondent No. 1 had filed a separate I.A. claiming the impact of arrears paid by it in 2000-2001 towards the years 1997-1998 to 1999-2000.

52. We, therefore, on the aforementioned ground alone are of the opinion that it was not a fit case where the appellate tribunal should have interfered with the order of the Central Commission.

53. Although on the question of jurisdiction the Central Commission might not have been correct, before parting with this case, we may, however, also notice a submission of Mr. Gupta that the appellate tribunal should not ordinarily interfere with an order of the Central Commission. We do not agree. The jurisdiction of the appellate tribunal is wide. It is also an expert tribunal and, thus, it can interfere with the finding of the Central Commission both on fact as also on law. Both the Central Commission as also the appellate tribunal being expert, we do not see how the decisions of this Court in *Union of India and Another v. Cynamide India Ltd. and Another* [(1987) 2 SCC 720] and *Shri Sitaram Sugar Company Limited and Another v. Union of India and Others* [(1990) 3 SCC 223] would be applicable. In *Cellular Operators Association of India and Others v. Union of India and Others* [(2004) 8 SCC 524], this Court held: "TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law."

54. For the reasons aforementioned, the appeals are allowed with costs. Counsel's fee assessed at Rs. 50,000/- in each case.