

SUPREME COURT OF INDIA

Reliance Infrastructure Limited

Vs.

State of Maharashtra

C.A.No.879 of 2019

(Dr.D.Y.Charndrachud and Hemant Gupta)

21.01.2019

JUDGMENT

Dr Dhananjaya Y.Chandrachud,J.,

SLP(Civil)No.15754 of 2016

1. Leave granted.

2. The validity of a tariff regulation framed by the Maharashtra Electricity Regulatory Commission (MERC) was questioned before the High Court of Judicature at Bombay. Bereft of jargon - both legal and scientific - the plea of the appellant is of discrimination. The discrimination, according to the appellant, lies in a statutory regulation determining the Station Heat Rate. According to the appellant, its thermal power station at Dahanu has been subjected to a more stringent norm than other comparable units. MERC, it is asserted, breached the National Tariff Policy 2006. The High Court held against the appellant both on the maintainability of its writ petition under Article 226 of the Constitution and on the merits of the challenge to the validity of the statutory regulation. The case has thus travelled to this Court.

3. The Electricity Act 2003 came into force on 10 June 2003. Electricity Regulatory Commissions constituted under Section 82 are empowered to frame regulations under Section 181, including the terms and conditions for determination of tariff under *Section 61*¹. The MERC framed the MERC (Terms and Conditions of Tariff) *Regulations 2005*² for a period of five years, upto financial year 2010-11. The regulations, in so far as the appellant is concerned were extended for a further period of one year upto financial year 2011 -12.

4. Regulation 33.1.3 prescribed the Station Heat Rate (SHR). The SHR is the heat energy required to generate one unit of electrical energy. The SHR is significant because it represents the ratio between heat input and the energy output. SHR has a co-relationship with efficiency: a higher SHR reflects comparative inefficiency while a reduction in the SHR is

associated with increasing levels of efficiency. In the Tariff Regulations 2005, the gross SHR was defined in the following terms:

"33.1.3. Gross station heat rate

(a) Gross station heat rate for coal-based generating stations

	200/210/250 MW sets	500 MW and above sets
During stabilization Period	2600 kCal/kWh	2550 kCal/kWh
Subsequent period	2500 kCal/kWh	2450 kCal/kWh

Note 1:

In respect of 500 MW and above units where the boiler feed pumps are electrically operated, the gross station heat rate shall be 40 kCal/kWh lower than the station heat rate indicated above.

Note 2:

For generating stations having combination of 200/210/250 MW seats and 500 MW and above sets, the normative gross station heat rate shall be the weighted average station heat rate."

In the above regulations, uniform norms were fixed for all coal based thermal generating stations, without any distinction between individual generating stations. The norm applicable to the Dahanu Thermal Power Station of the appellant was 2500 kCal/kWh. This norm also applied to other generating stations in the State of Maharashtra.

5. On 6 January 2006 the Union of India in the Ministry of Power notified the National Tariff Policy under Section 3 of the Electricity Act 2003. The policy, inter alia, spelt out the general approach to be followed for the purpose of determining tariffs including operating norms for generating stations. Clause 4 of the policy laid out its objectives in the following terms:

“(a) Ensure availability of electricity to consumers at reasonable and competitive rates;

(b) Ensure financial viability of the sector and attract investments;

(c) Promote transparency, consistency and predictability in regulatory approaches across jurisdictions and minimise perceptions of regulatory risks;

(d) Promote competition, efficiency in operation and improvement in quality of supply.”

Clause 5.0 spells out the “general approach to tariff”. Clause 5(f) stipulates operating norms:

“(f) Operating Norms Suitable performance norms of operations together with incentives and dis-incentives would need be evolved along with appropriate arrangement for sharing the gains of efficient operations with the consumers. Except for the cases referred to in para 5.3 (h) (2), the operating parameters in tariffs should be at “normative levels” only and not at “lower of normative and actuals”. This is essential to encourage better operating performance. The norms should be efficient, relatable to past performance, capable of achievement and progressively reflecting increased efficiencies and may also take into consideration the latest technological advancements, fuel, vintage of equipments, nature of operations, level of service to be provided to consumers etc. Continued and proven inefficiency must be controlled and penalized. The Central Commission would, in consultation with the Central Electricity Authority, notify operating norms from time to time for generation and transmission. The SERC would adopt these norms. In case where operations have been much below the norms for many previous years, the SERCs may fix relaxed norms suitably and draw a transition path over the time for achieving the norms notified by the Central Commission. Operating norms for distribution networks would be notified by the concerned SERCs. For uniformity of approach in determining such norms for distribution, the Forum of Regulators should evolve the approach including the guidelines for treatment of state specific distinctive features.”

Clause 5 (h) adverts to the Multi Year Tariff:

“(h) Multi Year Tariff

(1) Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for the determination of tariff, shall be guided inter-alia, by multi-year tariff principles. The MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The framework should feature a five-year control period. The initial control period may however be of 3 year duration for transmission and distribution if deemed necessary by the Regulatory Commission on account of data uncertainties and other practical considerations. In cases of lack of reliable data, the Appropriate Commission may state assumptions in MYT for first control period and a fresh control period may be started as and when more reliable data becomes available.

(2) In cases where operations have been much below the norms for many previous years, the initial starting point in determining the revenue requirement and the improvement trajectories should be recognised at “relaxed” levels and not the “desired” levels. Suitable benchmarking studies may be conducted to establish the “desired” performance standards. Separate studies may be required for each utility to assess the capital expenditure necessary to meet the minimum service standards...”

6 In August 2009, MERC published a ‘draft approach paper’ for the purpose of enacting multi year tariff regulations for financial years 2010-11 to 2014-15. On 23 October 2009, the appellant furnished its suggestions. In 2010, MERC commissioned a report from the Central Power Research Institute (CPRI) for ascertaining achievable performance parameters for thermal power plants in Maharashtra and to suggest improvements. CPRI carried out an independent assessment in respect of the plant of the appellant (DTPS), Tata Power (Generation) - TPCG, and Maharashtra State Power Generation Company Limited (MSPGCL). According to the appellant, no recommendation was made in respect of their plant since it was performing better than the prescribed SHR.

7. In July 2010, MERC published another draft approach paper in regard to the proposed multi year tariff regulations for financial years 2011-12 to 2015-16 together with draft regulations. On 26 October 2010, the appellant made submissions on the draft approach paper. On 4 February 2011, the *MERC (Multi Year Tariff) Regulations, 2011*³ were notified. Regulation 2(32) defines the Gross Station Heat Rate thus:

“(32) “Gross Station Heat Rate” means the heat energy input in kcal required to generate one kWh of electrical energy at generator terminals.”

Regulation 44 provides norms for the operation of thermal generating stations. Regulation 44.2 stipulates gross station heat rates for existing generating stations in the following terms:

"44.2 Gross Station Heat Rate - For existing Generating Stations:

a) Existing Coal-based Thermal Generating Stations, other than those covered under clauses (b), (c) and (d), below:

200/210/250 MW sets	500 MW and above sets
2450 kcal/kWh	2425 kcal/kWh

Note 1

In respect of 500 MW and above Units, where the boiler feed pumps are electrically operated, the gross Station Heat Rate shall be 40 kcal/kWh lower than the gross Station Heat Rate indicated above.

Note 2

For Generating Stations having combination of 200/210/250 MW sets and 500 MW and above sets, the normative gross Station Heat Rate shall be the weighted average station heat rate.

b) Thermal Generating Stations of Maharashtra State Power Generation Company Ltd. (MSPGCL):

Year	Koradi	Khaperkheda	K cal/kWh				
			<u>Chandrapur</u>	<u>Nasik</u>	<u>Bhusawal</u>	<u>Paras</u> excluding Unit No.3	<u>Parli</u> excluding Unit No.6
FY 2010-11	2965	2560	2617	2722	2734	3186	2745
FY 2011-12	2975	2568	2626	2731	2742	3199	2753
FY 2012-13	2985	2575	2635	2740	2751	3212	2762
FY 2013-14	2873	2424	2539	2664	2671	3225	2679
FY 2014-15	2881	2429	2544	2670	2677	3237	2684
FY 2015-16	2889	2433	2549	2677	2683	3250	2690

Provided that the Commission may revise the norms for heat rate for the above mentioned Generating Stations in case of Renovation & Modernisation undertaken for the Generating Station.

c) Thermal Generating Units of the Tata Power Company Ltd. Generation Business (TPC-G):

Year	Unit-4	Unit-5	<u>Unit-6</u> With Oil & Gas mix.in proportion of 50:50*
FY 2011-12	2570	2575	2519
FY 2012-13	2576	2583	2524
FY 2013-14	2581	2591	2529
FY 2014-15	2586	2573	2534
FY 2015-16	2591	2581	2539

In case variation in Oil and Gas mix is more than +/- 5%, the Heat Rate for Unit 6 shall be approved considering the actual Oil and Gas Mix.

d) Thermal Generating Station of Reliance Infrastructure Ltd.- Generation Business (RInfra-G):

Year	Dahanu TPS
FY 2011-12	2350
FY 2012-13	2355
FY 2013-14	2360
FY 2014-15	2365
FY 2015-16	2370

8. The above regulation indicates that save and except for the excluded categories set out in clauses (b), (c) and (d), the SHR for existing coal based thermal generating stations is pegged at a uniform level of 2450 kCal/kWh (for 200/210/250 MW sets) and 2425 kCal/kWh (for 500 MW sets and above). The excluded categories are the generating stations of (i) MSPGCL; (ii) TPC - G; and (iii) RInfra-G. As the table in clause (b) of Regulation 44.2 indicates, a relaxed standard for the SHR has been prescribed for the units of MSPGCL. However, there is an exclusion within the exclusion for Unit 3 at Paras and Unit 6 at Parli, since these units are governed by the uniform criterion prescribed in clause (a). The dispensation for Units 4, 5 and 6 of TPC-G is prescribed in clause (c). For Unit 8 of TPC-G, the applicable SHR is in terms of the uniform rate of 2450 kCal/kWh, since this unit is not specified in clause (c).

9. The grievance of the appellant arises from the fact that a tighter standard or norm has been prescribed for its Dahanu TPS. As opposed to the uniform criterion of 2450 kCal/kWh in Regulation 44.2(a), the SHR for the Dahanu TPS varies between 2350 in financial year 2011-12 to 2370 in financial year 2015-16. Essentially, it is this prescription of a more stringent SHR in the case of R-Infra's Dahanu TPS which forms the focus of dispute in the present case.

10. In order to buttress its grievance of discrimination, the appellant has relied upon the Multi Year Tariff regulations notified by MERC for the previous period (2005-10) and for the subsequent period (2016-21). The MERC (Multi Year Tariff) *Regulations 2015*⁴ which govern the period 1 April 2016 to 31 March 2020 place the Dahanu TPS of RInfra-G at par with other coal-based thermal generating stations. Regulation 44.4 is in the following terms:

"44.4 Gross Station Heat Rate for existing coal-based thermal Generating Stations, other than those covered under Regulation 44.5 and 44.6 shall be:

200/210/250 MW sets	300 MW sets	500 MW sets (sub-critical boilers)
2450 kcal/kWh	2400 kcal/kWh	2375 kcal/kWh

Note 1

In respect of 500 MW Units, where the boiler feed pumps are electrically operated, the Gross Station Heat Rate shall be 40 kcal/kWh lower than the gross Station Heat Rate specified above.

Note 2

For Generating Stations having combination of 200/210/250 MW sets and 300 MW and 500 MW sets, the normative gross Station Heat Rate shall be weighted average Station Heat Rate."

Regulation 44.5 contains the SHR for the coal based thermal generating stations of MSPGCL. Regulation 44.6 specifies the SHR for TPC-G. Regulations 44.5 and 44.6 are extracted below:

"44.5 Gross Station Heat Rate for existing coal-based thermal Generating Stations of Maharashtra State Power Generation Company Ltd. (MSPGCL) shall be:

Year	Koradi	Khaperkheda	Chandrapur	Nashik	Bhusawal	Parli
FY 2016-17	2864	2606	2688	2764	2761	2859
FY 2017-18	2874	2614	2697	2773	2770	2868
FY 2018-19	2884	2622	2706	2783	2779	2878
FY 2019-20	2893	2630	2715	2792	2787	2887

Provided that the Commission may revise the Gross Station Heat Rate norms for these Generating Stations in case any Renovation & Modernization is undertaken.

44.6 Gross Station Heat Rate for existing thermal Generating Stations of The Tata Power Company Ltd- Generation Business (TPC-G) shall be:

Year	Unit-5	Unit- 6		
		With 100 % Gas firing	With 100 % Oil firing	With Oil & Gas mix in proportion of 50:50*
FY 2016-17	2525	2666	2421	2544
FY 2017-18	2533	2671	2426	2549
FY 2018-19	2541	2676	2431	2554
FY 2019-20	2549	2681	2436	2559

*In case variation in Oil and Gas mix is more than +/- 5%, the Gross Station Heat Rate for Unit 6 shall be approved considering the actual Oil and Gas Mix."

In Regulation 44.5, Units 4 and 5 at Bhusawal and Units 6 and 7 at Parli have been excluded. Similarly, Unit 8 for TPC-G is excluded from the SHR in Regulation 44.6.

11. In order to complete the narration, it may be noted that on 2 September 2011, MERC passed an order on a petition filed by the appellant for deferring the implementation of the MYT regulations. On 5 May 2012, the appellant submitted a petition for approval of its business plan for financial years 2010-11 to 2015-16. The appellant requested that the norm

should be relaxed and brought in line with the normative SHR. On 25 October 2012, MERC passed an order on the MYT Business Plan for RInfra-G stating that it had considered the norms for SHR based on the MYT regulations. MERC held thus:

“Station heat rate 4.5.2

RInfra-G submitted that MYT Regulations, 2011 framed the norms for DTSPS based on the plant’s historical performance.

RInfra-G submitted that it believes that all operating parameters, “norms” including the secondary oil consumption, auxiliary energy consumption, station heat rate and transit loss should be specified to create a level playing field and bring discipline for regulated entities for the benefit of beneficiaries of the state. RInfra-G submitted that the essence of the norms should be to create benchmarks based on industry-wide performance and let the market to reward or penalize the performance of the utilities vis-a-vis those benchmarks. RInfra-G further submitted that such mechanism will not only force underperforming utilities to perform but also bring the competitive price of power in the market in overall benefit of consumers.

4.5.3

In its Petition under Case No.45 of 2011, RInfra-G had raised the issue of specifying separate norms for SHR of DTSPS in the MYT Regulations, 2011 and argued that any norm for generating stations should be made based on performance of the industry as a whole and should not be specific to a plant based on its historical performance.

4.5.4

RInfra-G submitted that specific relaxations from the norms can, however, be provided considering the specific issues of any given plant. In the said Petition, RInfra-G also highlighted the SHR norms adopted by other Regulatory Commissions to bring out its point that the SHR norms should be linked with unit size and ageing and not driven by the performance of the generating company. RInfra-G further added that the tightening of the norms for efficient generating plant is against the principle of equality and rewarding efficiency.

4.5.5

Accordingly, RInfra-G has requested the Commission not to tighten the norms for DTSPS and retain it at industrial normative level of 2450 kCal/kWh. RInfra-G submitted that the Commission, in its Order in Case No.45 of 2011 dated 2 September, 2011 on the said Petition did not provide any specific ruling on the said contention of RInfra-G; however stated that the Commission could invoke its powers alter the MYT norms for SHR and OEM cost, if required.

4.5.6

The Commission is of the view that norms can be fixed station wise based on the historical performance of the plant. The SHR of the plant is dependent on the age of the plant, the technology used, the capital expenditure incurred overhauling the plant, regular repair and maintenance expenditure incurred and various other factors. Hence, there could be wide variations on SHR across plants. Further, if the Commission derives the benchmark considering only the industry-wide performance capital and operating expenditures incurred, the generating company may not have sufficient motivation to continue to operate as efficiently as it had been in the past. Therefore, a balanced approach is to provide a target which will adequately motivate the generating plant to perform at existing levels or better and still have room for earning incentives. Moreover, the MYT Regulations, 2011 have been finalised after following appropriate regulatory process after considering and deliberating on the views of all stakeholders on various issue. Considering all the facts discussed above, the Commission does not find any merit in altering the MYT norms for SHR. Therefore, though RInfra-G has proposed a SHR of 2,450 kCal/kWh, the Commission has considered the SHR as per the MYT Regulations, 2011.

4.5.7

For FY 2011-12, the Commission has considered the SHR as approved in the ARR Order in Case No.163 of 2011. The SHR approved by the Commission for RInfra-G for the second control period is as below:

Station heat rate (kCal/kWh)	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
As submitted by RInfra-G	2500	2450	2450	2450	2450
As approved by the Commission	2500	2355	2360	2365	2370

Table 5: Approved station heat rate for the second control period Station heat rate (kCal/kWh)

12. On 7 December 2012, the appellant filed an appeal under Section 111 of the Electricity Act 2003 before the Appellate Tribunal for Electricity (APTEL) against the order dated 25 October 2012. The appellant submitted that the MERC ought to have exercised its power under Regulations 99 and 100 of the Tariff Regulations 2011 to amend and remove difficulties since the SHR which was prescribed for Dahanu TPS was not the same as for similarly situated generating units.

13. On 3 October 2013, the appellant instituted a writ petition under Article 226 of the Constitution before the Bombay High Court for the purpose of challenging Regulation

44.2(d) which specifies a separate SHR for the Dahanu TPS as compared to other generating stations in the State of Maharashtra. The appellant disclosed the pendency of the appeal before the Tribunal against MERC's order dated 25 October 2012 disallowing the prayer for relaxing the norms.

14. MERC opposed the writ petition. MERC submitted that the appellant had filed a substantive petition seeking approval of its business plan for the financial years 2010-11 to 2015-16 and an SHR of 2450 kCal/kWh for 2012-13 to 2015-16. MERC in the course of its adjudication on the business plan had adopted the same SHR as under the tariff regulations. MERC contended that since the appeal before the Tribunal was pending, the appellant was not entitled to pursue a remedy under Article 226 of the Constitution.

15. The Appellate Tribunal for Electricity disposed of the appeal on 8 April 2015, recording that it did not survive in view of the institution of the writ proceedings before the Bombay High Court. The appellant asserts that it drew the attention of the High Court, when the writ petition was being heard, to the fact that the appeal before the Tribunal was not pending and had been disposed of.

16. The High Court by its judgment dated 18 April 2016 dismissed the writ petition. In coming to the conclusion that the petition was lacking in merit, the High Court came to the following conclusions:

(i) MERC in framing statutory regulations in exercise of the power conferred by Section 181 had followed the procedure by granting an opportunity to stake holders including the appellant to make their suggestions on the draft approach paper which was published on the basis of the CPRI report;

(ii) CPRI was commissioned to undertake a study in order to fix norms for SHR for different power stations in the State of Maharashtra and it was only after the technical material collated by CPRI was considered and reviewed that the tariff regulations were notified prescribing SHR norms for various power stations;

(iii) MERC has applied the principles evolved in the tariff policy which stipulates that the operating norms should be "efficient, relatable to past performance, capable of achievement and progressively reflect increased efficiencies". The past performance of the Dahanu TPS of the appellant was also taken into consideration;

(iv) The submissions urged by the appellant was not accepted for two reasons which were formulated by the High Court as follows:

"Firstly, if this submission is accepted then the whole exercise of undertaking an expert analysis, the working of each of the thermal power station to determine the SHR by studying various factors including the past performance would be rendered nugatory. Secondly the tariff standards are required to be fixed on realistic data and its consideration, as public interest is directly involved in fixation of the electricity

tariff. The contention of the petitioner if accepted it would also result in a situation that the realistic standards are deviated to fix unrealistic or a camouflage norms. This is surely not permissible and is fundamentally against public interest being against the interest of the consumers of electricity. The submission of the petitioner is only from the sole consideration of profits of the petitioner, while disregarding the norms and standards required to be followed by the 2nd Respondent in determination of the electricity tariff.”

(v) In the exercise of its jurisdiction under Article 226 of the Constitution, the High Court cannot decide on technical parameters or come to the conclusion that the norms fixed by MERC are inappropriate;

(vi) The power to frame tariff regulations under Section 181 of the Electricity Act 2003 is of a legislative character. The regulations constitute subordinate legislation. Once MERC has followed appropriate procedures mandated by the Electricity Act, the Court will not interfere with the regulations merely on the ground that the SHR prescribed for the power station of the appellant was fixed at a rate below its peers;

(vii) Profitability of the producer is not the only consideration in determining the SHR. The regulations are also framed in the interest of the consumers of electricity; and

(viii) Having approached the Appellate Tribunal for Electricity, the appellant was not justified in moving the High Court under Article 226 “on the same issue” when the Tribunal was in a position to provide adequate relief. Entertaining a writ petition of this nature, when an alternate remedy is provided by the statute would render the statutory machinery under the Electricity Act nugatory. The petition under Article 226 was held to be an abuse of process. While dismissing the petition, the High Court imposed costs of Rs 1 lakh on the appellant.

17. While assailing the decision of the High Court, Mr P Chidambaram, learned Senior Counsel, urged that the High Court was not justified in coming to the conclusion that in view of the pendency of the appeal before APTEL, recourse to the jurisdiction under Article 226 constituted an abuse of process. Learned Senior Counsel submits that the pendency of the appeal before APTEL was disclosed in paragraph 27 of the writ petition before the High Court:

“27. As stated hereinabove, the Petitioners have preferred Appeal No.4 of 2013 before the Appellate Tribunal for Electricity challenging the Order dated 25th October 2012 insofar as Respondent No.1 disallows the Petitioners prayer for relaxation of the norms under Regulations 99 and 100 of the MYT Regulations. The present Petition challenges the vires, legality and validity of Regulation 44.2 (d) of the MYT Regulations that fixes SHR norms for the 1st Petitioners. Save as aforesaid, the Petitioners have not filed any other Petition in respect of the subject matter of the

present Petition either before this Hon'ble Court or any other High Court or the Supreme Court of India.”

In response to the objection raised by MERC, the following assertion was contained in the rejoinder filed by the appellant before the High Court:

“2.3. The Petitioners in the Petition have, inter alia, in paragraph 27 thereof disclosed to this Hon'ble Court that they have preferred Appeal No. 4 of 2013 before the Appellate Tribunal for Electricity challenging the order dated 25th October 2012 passed in Case No. 156 of 2011 which disallowed the Petitioners' prayer for relaxation of the norms under Regulations 99 and 100 of the MYT Regulations. It is settled law of the Hon'ble Supreme Court of India that the Appellate Tribunal for Electricity has no power, authority or jurisdiction to go into validity or legality of Regulations framed by a Regulatory Commission. Regulation 44.2 (d) has been challenged in the present Writ Petition and is not the subject matter of any other Petition or Appeal in any other Court as stated, inter alia, in paragraph 27 of the Petition. In fact, the Petitioners have enclosed at Exhibit-K to the Petition a copy of the Memorandum of Appeal without annexures. It is denied that there is any forum shopping. The said Appeal has since been heard by the Appellate Tribunal, in any event, was not pressed by the Petitioners at the final hearing of the Appeal. The grievance of Respondent No. 2, in any event, does not survive.”

The submission of the appellant on the maintainability of the proceedings under Article 226 is that the scope of the appeal before the Tribunal was entirely different from the ambit of the writ petition. The appellant moved the Tribunal against the order of MERC dated 25 October 2012 which disallowed the prayer for relaxation of the norms under Regulations 99 and 100 of the Tariff Regulations 2011. The petition challenged the vires of the regulations before the High Court and the remedy before the High Court was the only remedy available to challenge the validity of the regulations.

18. On the maintainability of the petition under Article 226, the High Court, in our view, has overlooked the position in law established by the judgment of a Constitution Bench of this Court in *PTC India Limited v Central Electricity Regulatory Commission*⁵. The Constitution Bench considered whether the Appellate Tribunal for Electricity has jurisdiction to decide upon the validity of the regulations framed by the Central Electricity Regulatory Commission. CERC has been entrusted with the power to frame regulations under Section 178 of the Electricity Act 2003. The Constitution Bench held that the validity of a regulation framed under Section 178 can be tested only before the court exercising judicial review. While the Tribunal may decide upon a dispute involving the interpretation of a regulation, for which an appeal under Section 111 would be maintainable, no appeal can lie before the Tribunal on the validity of a regulation. The summary of the findings in the judgment includes, inter alia, the following:

"(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review

proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer the power of judicial review on the Appellate Tribunal. The words “orders”, “instructions” or “directions” in Section 121 do not confer the power of judicial review in the Appellate Tribunal for Electricity.

In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.”

Hence the conclusion of the Court is in the following terms:

“The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.”

Though the above principles emerge in the context of regulations framed under Section 178 by the CERC, the logic of the judgment extends to the regulations framed under Section 181 by the State Electricity Regulatory Commissions. In view of the legal position settled by the Constitution Bench, we are of the clear view that the High Court was not justified in disparaging the appellant for taking recourse to a constitutional remedy under Article 226. Indeed, a challenge to the validity of the regulations framed by the MERC could only lie before the High Court. Hence, the imposition of costs for having adopted the remedy under Article 226 was unjustified. There was no suppression of fact on the part of the appellant which had indicated the recourse it had taken in the appeal before the Tribunal, arising from its prayer for relaxation of the SHR norms before MERC. The plea before the Appellate Tribunal was for relaxation of the SHR norms. The plea before the High Court was that the SHR fixed was discriminatory and ultra vires. Undoubtedly, if the appellant were to succeed before the Tribunal, it would perhaps obviate the challenge in the High Court. The appellant, as learned Senior Counsel informed the court, did not press ahead with its plea before the Tribunal. Hence, the writ petition could not have been held not to be maintainable.

19. The High Court has dealt with the merits of the challenge to the validity of the regulations. The constitutional validity of Regulation 44.2(d) of the Tariff Regulations 2011 is the subject of the challenge in these proceedings. The basic challenge which has been

addressed before the Court is founded on a plea of discrimination. Elaborating on this challenge, Mr P. Chidambaram, learned Senior Counsel urged the following submissions:

(i) Regulation 44.2(d) is contrary to the national tariff policy. While framing regulations under Section 181, MERC is required by Section 61 (i) to be guided by the “National Electricity Policy and tariff policy”. Clause 5.3(f) of the national tariff policy notified on 6 January 2006 by the Union Ministry of Power requires that operating parameters and tariffs should be at “normative levels” only and not at “lower of normative and actuals”. Regulation 44.2(d) lays down a more stringent SHR for the appellant, based on its energy efficient performance by disregarding the normative levels;

(ii) The CPRI report, which was commissioned by MERC contains the following conclusions on the comparability of RInfra’s Dahanu TPS with Paras Unit 3 and Parli Unit 6 (of MSPGCL) and TPC-G Unit 8:

“i. DTSPS units are identical to units installed at Parli Unit 6, Paras Unit 3 & Tata Trombay Unit 8. They are of the general or standard design of 250 MW duplicated by BHEL in nearly 25 units in India.

iii. Both DTSPS units have operating margins of 8% steam flow in the boiler side (BMCR flow), 5% power output on the turbine side (VWO flow) and 16% on the generator side (capability curve) and 23% on the generator transformer side. These margins are provided in all 250 BHEL supplied units, including those at Paras Unit 3, Parli Unit 6 and Tata Trombay Unit 8 as elaborated in the text.” Moreover, the CPRI report observes that:

“vii. Combining all the margins provided by the OEM, R-Infra has been able to load the unit to 268 MW against the design value of 250 MW. Maintaining this load is not harming the life of the unit as the DTSPS has ensured that all parameters are kept within OEM limits. High loadability is made possible by high energy efficiency or low unit heart rate of the unit. When the deviation of the unit heat rate from the design heart rate is low, heat generation in the equipment is low which enables the parameters not to exceed their limits. As many as 66 units in India have clocked average annual plant loading in excess of 100% UMCR in 2007-08.”

R Infra’s Dahanu TPS unit has been found to be identical to Parli Unit 6, Paras unit 3 (MSPGCL) and Trombay unit 8 (of Tata power). The units have the same design, standard and OEM. Therefore, merely because the appellant has performed better, this would not be a ground to subject it to more stringent norms;

(iii) In any event, for the next control period - 2016-20, the appellant has been equated with other thermal power stations. There exists no justifiable reason for making a distinction for the period 2011 -16 and for imposing more stringent norms for SHR in the case of DTSPS. In imposing more stringent norms on the appellant for

its DTPS unit for 2011-16, MERC has acted in an arbitrary exercise of power which violates Article 14 of the Constitution; and

(iv) As a matter of fact, CPRI did not furnish a “trajectory” for the appellant’s DTPS unit, as assumed by the High Court. A trajectory was furnished for less efficient plants.

20. On the other hand, contesting the submissions which were urged on behalf of the appellant, Mr SK Rungta, learned Senior Counsel for the respondents urged the following submissions:

(i) The SHR represents heat energy required to generate one unit of electrical energy. The norm determines the cost of coal and corresponding gas that will be allowed to be recovered. Fixation of the SHR has an important bearing on the cost of energy which will be recovered from the consumer;

(ii) There is a fundamental error in the submission that the CPRI report found an equivalence between the appellant’s Dahanu TPS with Parli Unit 3 and Paras Unit 6 (of MSPGCL) and Trombay Unit 8 (of Tata Power). CPRI found an equivalence of specifications and not of performance. The dates on which the above three units commenced operations were:

- Paras 3 31 March 2008;
- Parli 6 1 November 2007;
- TPC 8 31 March 2008. The appellant’s unit at Dahanu commenced operations in 1995. CPRI has not, as a matter of fact, come to the conclusion that the performance of DTPS was equivalent to Parli Unit 6, Paras Unit 3 and Trombay Unit 8;

(iii) The CPRI report has separately evaluated DTPS and the units of Tata Power and MSPGCL. It is factually incorrect to posit that the CPRI study was for Parli Unit 6, Paras Unit 3 and Trombay Unit 8;

(iv) After the enactment of the Electricity Act 2003, the first MYT regulations were promulgated in 2005. All units were placed at par in the absence of a base line study at that stage;

(v) Section 61 (i) requires that the appropriate commission “shall be guided by” the principles set out in the tariff policy. The tariff policy enunciates the factors which have to be taken into account while framing the tariff regulations;

(vi) In the MYT regulations which governed the period 2011-16, the sharing of gains occasioned by the SHR, between the producer and the consumer, was in the ratio of

2/3:1/3. In the 2015 regulations, the ratio of sharing has been altered and 2/3rd enures to the benefit of the consumer; and

(vii) The SHR delivered by the appellant for 2006-07 to 2009-10 would sufficiently explain the basis of fixation. The same principle has been applied in the case of Tata power;

(viii) Unless a subordinate legislation is found to suffer from manifest unreasonableness or from a breach of the principle of proportionality, it would not be regarded as ultra vires.

21. These submissions fall for our consideration.

22. The power to determine tariffs is of a legislative nature. Section 61 is borne in Part VII of the Electricity Act 2003 which deals with tariffs. Section 61 provides thus:

“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 consumer's interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

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

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

(i) the National Electricity Policy and tariff policy: Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the

Electricity Regulatory Commission 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.”

Section 61 provides that the appropriate commission shall, subject to the provisions of the Act, specify the terms and conditions for the determination of tariff. In doing so, it has to be guided by the considerations which are stipulated in clauses (a) to (i). Among them, in clause (i) is the national electricity policy and tariff policy.

23. Section 181 empowers the state commissions to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Among the matters for which the regulations may provide are “the terms and conditions for the determination of tariff under *Section 61*”⁶. In specifying the terms and conditions for the determination of tariff, the appropriate commission (as Section 61 provides) “shall be guided” by the factors which are set out in clauses (a) to (i). The expression “shall be guided” comprises of two elements: the ‘shall’ and, the ‘guidance’. Clauses (a) to (i) provide guidance to the commission in specifying the terms and conditions for the determination of tariff. The expression “shall” indicates that the factors which are specified in clauses (a) to (i) have to be borne in mind by the appropriate commission. As guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate commission.

24. The national tariff policy has multi-faceted objectives. Significant among them is the need to ensure to consumers the availability of electricity at reasonable and competitive rates. The policy also seeks to ensure the financial viability of the sector and underlines the need to attract investments. A financially sustainable electricity sector is an important facet of the overall regulatory framework. The objectives of the policy emphasise the need to promote transparency, consistency and predictability in regulatory approaches across jurisdictions. The policy emphasises the need to minimise perceptions of regulatory risk. Finally, the policy recognises the need to promote competition, efficiency in operations and improvements in the quality of supply. In designing and formulating the regulatory framework for tariffs, the delegate of the legislature has to bring about a balance between the competing goals which the tariff policy incorporates.

25. As part of the process, the delegate has to bear in mind the interests of diverse stake holders including consumers and producers. The process of framing tariffs is of equal significance, for it is through the procedural framework that norms of consistency, transparency and predictability can be enforced. Competition, efficiency and quality of supply are key components of the policy framework in designing tariffs. Clause 5.3(f) of the tariff policy speaks of the need to evolve performance norms which incorporate incentives and disincentives and provide an appropriate arrangement that fosters the sharing of gains of efficiency in operations with consumers. Operating parameters in tariffs are required to be pegged only on a “normative level” and not at the “lower of normative and actuals”, save and except in those cases referred to in paragraph 5.3(h)(2). Paragraph 5.3(h)(2) deals with those cases where operations have been much below the norm for several previous years. In those

cases, the initial starting point in determining the revenue requirement and the trajectories are fixed at a relaxed level and not at desired levels. Under clause 5.3(f), the operating norms must fulfil several parameters. They must be (i) efficient; (ii) relatable to past performance;

(iii) capable of achievement; and must progressively reflect increased efficiencies. They may also take into consideration latest technological advances, fuel, vintage of equipment, nature of operations, level of service to be provided to consumers, among other factors. Continuous and proven inefficiency has to be controlled and penalised. The operating norms must be designed to promote efficiency and to ensure that the gains which accrue on account of efficient operations are shared with the consumers of electricity. The operating norms will, therefore, have due regard to the performance in the past as well as capacities for future achievement. These must be dovetailed with all relevant considerations, bearing on the requirements of the policy.

26. The Tariff policy provides guidance to the appropriate commission when it frames regulations. The power to frame regulations is legislative in nature. It is conferred upon the appropriate commission. The commission weighs numerous factors. Its discretion in carrying out a complex exercise cannot be constrained. The delegate of the legislature is therefore under a mandate to bring about a fair and equitable balance between competing considerations. Standing at the forefront of those considerations is above all the need to ensure efficiency and to protect the interests of consumers. The submission which has been urged on behalf of the appellant would reduce tariff fixation to a rather simplistic process of bringing about equality between generating units which have the same design and manufacturing origin. Such an approach overlooks the complex factors which have to be borne in mind in the determination of tariffs. The submission which has been urged on behalf of the appellant is based on the hypothesis that the CPRI report underlined the similarity of Parli Unit 6, Paras Unit 3, Tata Trombay Unit 8 and the DTPS unit of the appellant. At the highest, the CPRI study would indicate a similarity of specifications but not a similarity of performance. Performance, as we have seen, is a critical element in designing an appropriate SHR. The SHR has an important co-relationship with efficiency. The CPRI report indicates a detailed analysis of RInfra's DTPS. Specifically, in the context of DTPS, it observed:

“vii. Combining all the margins provided by the OEM, R-Infra has been able to load the unit to 268 MW against the design value of 250 MW. Maintaining this load is not harming the life of the unit as the DTPS has ensured that all parameters are kept within OEM limits. High loadability is made possible by high energy efficiency or low unit heart rate of the unit. When the deviation of the unit heat rate from the design heart rate is low, heat generation in the equipment is low which enables the parameters not to exceed their limits. As many as 66 units in India have clocked an average annual plant loading in excess of 100% UMCR in 2007-08.”

The CPRI report similarly contained an analysis of Units 5 and 6 of TPC-G and of MSPGCL units. CPRI conducted studies on Units 1 and 2 of R Infra's DTPS. In its counter affidavit, MERC has tabulated the SHR achieved by DTPS for financial years 2006-07 to 2009-10 as follows:

"Table No: 2 SHR achieved by DTPS from FY 2006-07 to FY 2009-10 Year

Year	Station Heat Rate (SHR) (kcal /kWh)		
	RInfra's Submission in Petition	MERC Approved	DTPS Achieved
FY 2006-07	2315	2500	2278
FY 2007-08	2500	2500	2279
FY 2008-09	2500	2500	2300
FY 2009-10	2500	2500	2293

It has been explained that to anticipate the SHR for financial year 2011-12 till financial year 2015-16, the actual heat rate achieved during the previous years and predicted deviation due to factors such as reduction in boiler efficiency due to coal energy degradation and average annual ageing loss were considered. The anticipated SHR for DTPS for financial years 2011-12 to 2015-16 was computed in the following manner:

$$\text{“SHR} = 2292* + (\text{Reduction in Boiler Efficiency} + \text{Coal Quality Degradation} + \text{Annual Ageing Loss}) = 2350 \text{ kCal/kWh.} \text{”}$$

(* Station Heat Rate of 2292 kCal/kWh was taken from CPRI Test Reports of March, 2010.)”

On a similar basis, CPRI carried out technical studies for Units 5 and 6 of TPC-G. The SHR achieved by TPC-G Unit 5 (coal fired) from 2006-07 and 2008-09 was computed. On this basis, the SHR, projected as an achievable heat rate, was computed and an approved trajectory for Unit 5 for financial years 2011 -12 to 2015-16 was laid down. Similarly, in respect of Unit 6 of TPC-G, CPRI studies indicated the SHR achieved for financial years 2006-07 to 2009-10. CPRI projected a heat rate on the basis of fuel oil firing and fuel gas firing. On the basis of the CPRI report, MERC arrived at its findings for TPC-G Units 5 and 6. In this regard, it has been demonstrated in the counter affidavit that there was no discrimination in the methodology followed and the same principle was uniformly applied. 27 The attention of the Court has also been drawn to the fact that the Tariff Regulations 2011 contained a stipulation in clause 14 for the sharing of gains or losses on account of controllable factors. Clause 14 provides as follows:

“14 Mechanism for sharing of gains or losses on account of controllable factors:

14.1 The approved aggregate gain to the Generating Company or Transmission License or Distribution License on account of controllable factors shall be dealt with in the following manner:

(a) One-third of the amount of such gain shall be passed on as a rebate in tariff over such period as may be stipulated in the Order of the Commission under Regulation 11.6;

(b) The balance amount, which will amount to two-third of such gain, may be utilised at the discretion of the Generating Company or Transmission License or Distribution License.”

[The expression ‘controllable factors’ is explained in clause 12.2 of the regulations.]

28. Under the Tariff Regulations 2011, the approved aggregate gain to the generating company was to be shared: one-third was required to be passed on as a rebate in tariff while the balance of two-thirds would be utilised at the discretion of the generating company. On the other hand, in the Tariff Regulations 2015, Regulation 11 contains a corresponding mechanism for the sharing of gains on account of controllable factors. Regulation 11 is in the following terms:

“11 Mechanism for sharing of gains or losses on account of controllable factors:

11.1 The approved aggregate gain to the Generating Company or Licensee or MSLDC on account of controllable factors shall be dealt with in the following manner:

(a) Two-third of the amount of such gain shall be passed on as a rebate in Tariff over such period as may be stipulated in the Order of the Commission under Regulation 8.4;

(b) The balance amount of such gain shall be retained by the Generating Company or Licensee or MSLDC.”

While in the Regulations of 2011, one-third of the aggregate gain was to be passed on in the form of a rebate in tariff and the balance two-thirds was to be utilised by the generating company at its discretion, in the 2015 regulations, the proportion has been reversed. In the 2015 regulations, two-thirds of the amount of the gain is required to be passed on as a rebate in tariff while the balance shall be retained by the generating company. The interests of the consumer are required to be borne in mind under the terms of the tariff policy consistent with Section 61. In its expert judgment, the Commission, while formulating the 2015 regulations mandated that an enhanced ratio of the aggregate gain would be passed on in the form of a rebate on the tariff. This could have legitimately been borne in mind as a relevant consideration in evaluating what should be appropriately fixed as the SHR for the period in question.

29. The substratum of the case of the appellant is founded on a plea of discrimination. Simply put, the plea is founded on the hypothesis that the CPRI report regarded the units of DTPS as identical to Parli Unit 6 and Paras Unit 3 (of MSPGCL) and Trombay Unit 8 (of

TPC-G). The observations contained in the CPRI report must be read in their entirety. The fact that the manufacturing specifications of the units may be similar (assuming they are so) is only one aspect of the total range of considerations which are required to be borne in mind under the terms of the tariff policy. The tariff policy requires that the operating norms should be efficient, relatable to past performance, capable of achievement and progressively reflect increased efficiencies. They may also take into consideration technical advancements, fuel, vintage of equipment, nature of operations and the level of service among other factors. Mr Chidambaram laid emphasis on clause 5.3(f) of the tariff policy where it prescribes that the operating parameters and tariffs should be at “normative levels” only and not at the “lower of normative and actuals” except in the case of those units governed by para 5.3(h)(2). This submission will not, however, carry the case of the appellant any further. Normative levels are those which are fixed by the application of the standards guided by the terms of the tariff policy while actual levels are those which have been achieved as a matter of fact, in the past. The emphasis in the tariff policy is on creating incentives for achieving higher efficiency in order to enable the ultimate consumer to have the benefit of efficient operations.

30. Tariff fixation is a complex exercise involving a careful balance between numerous considerations. The “shall be guided” prescription under Section 61 requires the appropriate commission to bear those considerations in mind. Deducing past performance on the basis of historical data, balancing diverse policy objectives and evaluating the comparative weight to be ascribed to the interests of stakeholders is a scientific exercise which is carried out by the commission. The nature of judicial review that is exercisable in a given subject area depends in a significant measure on the nature of the area and the body which is entrusted with the task of framing subordinate legislation. In *Transmission Corporation of Andhra Pradesh Ltd. v Sai Renewable Power Pvt. Ltd.*³, a two judge Bench of this Court 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.”

MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. 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. In *Association of Industrial Electricity Users v State of Andhra Pradesh*, a three judge Bench of this Court dealt with the fixation of tariffs and held thus:

“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.”

31. We commenced our discussion by emphasising, in our prefatory observations, that the power to frame regulations is of a legislative nature. The CPRI report was an input before the MERC in carrying out that exercise. MERC followed the statutory procedures laid down for the determination of tariffs. It took into account factors which it is mandated by the statute to consider. The national tariff policy, suggestions of stakeholders as well as the assessment carried out by the CPRI were duly considered. Hence, the present case does not fall in the paradigm of manifest unreasonableness or arbitrariness to warrant the interference of this Court. It would be rather formulaic for the Court to accept that merely because DTSPS was placed at par in the immediately previous period (2006-07) and the period immediately succeeding (2016-20), that this must necessarily be extrapolated to the intervening period governed by the MYT Regulations 2011. A body which is entrusted with the task of framing subordinate legislation has a range of options including policy options. If on an appraisal of all the guiding principles, it has chosen a particular line of logic or rationale, this Court ought not to interfere.

32. For the reasons which we have recorded in this judgment, we have come to the conclusion that regulation 44.2(d) of the MERC (Multi Year Tariff) Regulations, 2011 does not suffer from any constitutional or statutory infirmity. We have, however, furnished reasons of our own for affirming the ultimate decision of the High Court to dismiss the writ petition. We have disapproved of the view of the High Court that the writ petition under Article 226 was not maintainable and accordingly set aside the direction on the imposition of costs. However, we hold that there is no infirmity in the impugned regulation and accordingly affirm the ultimate conclusion of the High Court to dismiss the writ petition under Article 226. The Civil Appeal is, accordingly, disposed of. There shall be no order as to costs.

Judgment Referred.

¹*Section 181(2)(zd)*

²*Tariff Regulations 2005*

³*Tariff Regulations 2011*

⁴*Tariff Regulations 2015*

⁵*(2010) 4 SCC 0603*

⁶*Section 181 (2)(zd)*

⁷*(2011) 11 SCC 0034*