

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 82 of 2008

Dated: 06th February, 2012

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,
Hon'ble Mr. Justice P.S Datta, Judicial Member**

In The Matter Of
Bharat Coking Coal Ltd,
Koyla Bhavan, Koyla Nagar,
Dhandbad-826 006

... Appellant(s)

Versus

- 1. DLF Power Limited
DLF Galleria, 12th Floor,
DLF City, Phase-IV,
Gurgaon-122 002**
- 2. Jharkhand State Electricity Regulatory Commission,
2nd Floor, Rajendra Jawan Bhawan-cum-Sainik Bazar,
Main Road,
Ranchi-834 001**

....Respondent(s)

Counsel for Appellant(s): Mr. K K Rai, Sr Adv
Mr. A.B Singh
Mr. Anupam Lal Das
Mr. Arpit Gupta
Mr. Mohit Paul

Mr. Anip Sachthey,
Mr. Abnish Kumar,
Mr. Amit Sharma
Mr. S.C. Malik,
Mr. K.K.S Sinha, GM(E/M),
Mr. R K Munshi, Dy. CE (E/M),
Mr. B K Sahai, Dy CE (E/M)
Dr. H Kishore, HOD (Legal) for BCCL

Counsel for Respondent(s): Mr. Krishnan Venugopal, Sr Adv.
Mr. S Ganesh, Sr Adv
Mr. Kamal Budhiraja
Mr. Siddharth Singh
Mr. Siddharth Bawa,
Mr. Manu Seshadri
Mr. Kamal Budhiraja
Mr. Abir Phukan
Mr. Harpreet Singh
Mr. Nishant Menon
Mr. S Srivastava
Mr. A K Mehta
Mr. Harpreet S Popli,
Mr. Uday Rahotre,
Mr. R S Cheema, CEO
Mr. Vijay Sharma, GM (Legal)

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

1. **“Whether the Jharkhand State Commission has got the jurisdiction to entertain the dispute between the Generating Company and the Consumer and determine the Tariff in terms of the PPA entered into between them?**

2. This is the main question which has been raised and argued at length by the Appellant in this Appeal.
3. Bharat Coking Coal Ltd is the Appellant herein. DLF Power Limited is the 1st Respondent. Aggrieved by the Tariff order dated 28.3.2008 passed by the State Commission (R-2), the Appellant has filed this Appeal. The short facts are as under:
 - (a) Bharat Coking Coal Ltd (Appellant), the Consumer and DLF Power Ltd, the Generating Company (1st Respondent) entered into a Power Purchase Agreement on 11.1.1995 for setting up of 2 x 11 MW (Gross) Capacity Power Plant for supply of Power to the Appellant.
 - (b) In terms of the PPA, Bharat Coking Coal Ltd (Appellant), desired the DLF Power Company Limited (Respondent), to develop Coal Washery reject based power plant on "Build, Own and Operate" principle. Subsequently, the capacity of the Power Plant was reduced to 1 x 10 MW by the MoU dated 25.03.1997. In terms of Clause 1.6 of the Power Purchase Agreement, it shall be operative initially for a period of 30 years which may be subsequently renewed for a further period of 20 years on mutually agreed terms and conditions.

- (c) On 12.6.2005, the DLF Power Limited (R-1), the Generating Company approached the State Commission for fixation of the tariff payable by the Bharat Coking Coal Limited (Appellant) in terms of the PPA, starting from June, 2002.
- (d) The Appellant (the Consumer) also approached the State Commission on 16.9.2005 and prayed for fixation of the tariff.
- (e) While these proceedings were pending, similar dispute had arisen out of a similar contract between the Central Coalfields Limited (another subsidiary Company of Coal India Ltd) and the DLF Power (Respondent) regarding tariff fixation in respect of another plant.
- (f) In that case also both the parties requested the State Commission to fix the tariff.
- (g) In that case, the Tariff was determined by the State Commission. When this order was challenged by the Central Coalfields Limited in the Tribunal by way of an Appeal in Appeal No.166/2005 on merits, this Tribunal itself suo-moto raised the jurisdiction issue and gave a judgement dated 11.5.2006, holding that the State Commission did not have the jurisdiction to fix the tariff, over the dispute between Generating Company and the

Consumer, but the tariff order which had been passed by the State Commission could be construed to be an arbitral award. On that basis, the Appeal was dismissed as not maintainable.

- (h) This judgement was challenged before the Hon'ble Supreme Court by both the parties by filing two separate Appeals. After hearing the parties, the Hon'ble Supreme Court without going into the jurisdiction issue, passed the interim order appointing the cost accountant wing of Ernst and Young, Chartered Accountants ("E&Y") to determine the capital costs and directing them to report to the Jharkhand State Commission which in turn would fix the fresh tariff and send the report to the Supreme Court for passing final orders in those Appeals.
- (i) In that background, the State Commission, after obtaining the report from E&Y, passed the Tariff order dated 07.03.2008 and sent the Report along with Tariff Order to Hon'ble Supreme Court. The Hon'ble Supreme Court, without going into the merits, disposed of both the Appeals by directing the Central Coalfields Ltd to challenge the said Tariff order which was passed on the basis of the report of E&Y Chartered Accountant, before this Tribunal for considering the merits of the

matter. Accordingly, the Appellant (Central Coalfields Ltd) filed the Appeal No. 83/2009.

- (j) Then, this Tribunal heard both the parties in the said Appeal and rendered a judgement on 31.07.2009 upholding both the E&Y Report and the tariff order. The said judgement dated 31.07.2009 in the Appeal No.83 of 2009 has been challenged in the Hon'ble Supreme Court and the same is still pending. The above events had taken place during the proceedings in this matter before the State Commission and during the pendency of the present Appeal.
- (k) In the present case, arising out of the request made by both the parties on 12.6.2005 and 16.9.2005 praying for fixation of tariff, the State Commission by the order dated 21.8.2007 on the strength of the earlier order passed by the Hon'ble Supreme Court in the other Appeals, appointed E&Y to determine the actual capital cost of the Madhuband Power Plant in relation to the present dispute.
- (l) Accordingly, E&Y submitted its report on 07.03.2008 fixing the capital cost of the Power Plant at Rs.76.22 Crores. On the basis of the said report, the State Commission passed the impugned tariff order on 28.3.2008.

(m) Being aggrieved by this impugned tariff order dated 28.3.2008, the Bharat Coking Coal Limited (Appellant) has filed the present Appeal.

4. The Learned Senior Counsel for the Appellant assailing the impugned order , has urged the following contentions:

1. The State Commission has got the jurisdiction to adjudicate the dispute only between the licensee and the Generating Companies as per Section 86 (1) (f) of the Act. The present dispute is essentially a contractual dispute between the consumer and the Generating Company. Therefore, the State Commission has no jurisdiction and as such it cannot adjudicate the dispute relating to the grievance of the individual consumer as against the Generating Company.

2. In the matters relating to pecuniary jurisdiction and territorial jurisdiction, the objection to jurisdiction has to be taken at the earliest possible opportunity. But, this case relates to the jurisdiction over the subject matter. This is totally distinct and it stands on a different footing. As such, the question of jurisdiction can be raised even in the Appeal stage. When the Court has no jurisdiction to deal with the subject matter, the order passed by the Court or Tribunal over the subject

matter having no jurisdiction is nullity. Therefore, the Appellant is at liberty to raise the issue of jurisdiction in this Appeal, even though, the jurisdiction point had not been raised before the State Commission.

3. Merely because both the parties consented to the Commission for fixing the tariff, that by itself would not confer jurisdiction to the Commission.
4. While the State Commission appointed the E&Y to determine the capital cost by the order dated 7.3.2008, the Appellant was not informed by the Commission about the same. Thus, the said appointment had been made by the Commission behind the back of the Appellant.
5. Even after receiving the report of E&Y, the Commission did not invite any comments from the Appellant with reference to the Report. The Appellant received the report only 17.3.2008. Thus, the tariff order had been passed by the Commission on 28.3.2008 without giving an opportunity to the Respondent to respond to the said report.
6. The E&Y report cannot be acted upon in view of the fact that the said report had been prepared by E&Y without verification as per the components of formula given in

the PPA, although the mandate was to carry out exercise as per the PPA. The E&Y could have arrived at a correct conclusion only by involving the Appellant in the process of verification. However, the E&Y chose not to inform the Appellant during the said process.

7. As per Clause 1.18.2 of the PPA, the Respondent shall furnish documentary evidence in support of actual capital cost to be accepted by the Appellant after examining the reasonability of the requirements of the additional capital investments on the basis of the actual agreement. Despite repeated request of the Appellant for compliance of clause 1.18.2, the Commission after receipt of E&Y report had not given opportunity in violation of the said clause to the Appellant.
8. Though, the Appellant elaborately dealt with the issue as to how it is not responsible for any delay in execution of the project in its reply filed before the Commission dated 16.9.2005, there is absolutely no reference to it either in the report or in the order of the Commission.
9. Even assuming that the State Commission has got the jurisdiction, it did not deal with merits of the case in

the proper perspective. Hence, the impugned order is bad both on account of having been passed without jurisdiction in breach of principles of natural justice and on account of non application of mind to the merits of the case.

6. In reply to the above contentions, the Learned Senior Counsel appearing for the DLF Power Limited (Respondent) made the following submissions:

(a) Admittedly, both the Appellant namely Bharat Coking Coal Limited and the Respondent, DLF Power Limited jointly approached the State Commission to fix the tariff for the power projects at Giddi, Rajrappa and Madhuband, respectively. The Appellant never raised objection relating to the jurisdiction of the State Commission to fix the tariff in respect of the Madhuband power project.

(b) The present case does not involve a mere contractual dispute between the Generating Company and the Consumer as claimed by the Appellant. This arose out of the request made by both the parties for fixation of tariff. The DLF Power Limited filed a Petition on 12.6.2005 before the Commission to fix the tariff. Similarly, the Appellant made the request through a letter before the

Commission on 16.09.2005 to fix the tariff. Therefore, both the parties submitted to the jurisdiction of the Commission admitting that the Commission has got the jurisdiction to fix the tariff in this matter.

- (c) In respect of the other plants, the tariff order was fixed by the State Commission. This was challenged in Appeal No.166/2005 before this Tribunal. This Tribunal while confirming the said order held that even though the State Commission had no jurisdiction to fix the tariff, they have done so as an expert arbitral Tribunal on the basis of the request made by both the parties and as such the Appeal was not maintainable. This was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court appointed the E&Y, Chartered Accountant for determining the actual capital cost and sending a report to the State Commission which in turn shall determine the tariff and send the report to the Hon'ble Supreme Court for passing final order. The Hon'ble Supreme Court after getting the Tariff Order from the State Commission without going into the merits of the matter, directed both the parties to file an Appeal before the Tribunal. Accordingly, the Appeal was filed. From this, it is clear that the

Hon'ble Supreme Court has acknowledged the jurisdiction of the State Commission to determine the tariff for supply of electricity by a Generating Company to the consumers.

- (d) Even though Hon'ble Supreme Court cannot confer jurisdiction under Article 142 of the Constitution, it recognised the jurisdiction of this Tribunal to deal with the tariff order passed by the State Commission. The said recognition must be treated as law which is binding on the Courts and Tribunals.
- (e) Assuming that the State Commission did not have jurisdiction to fix the tariff, the Appellant cannot object to the State Commission's jurisdiction at the Appellate stage after having jointly approached and requested the State Commission to decide the dispute on the principle of *extra cursum curiae*. According to this principle, the parties to a dispute may request a court or Tribunal or the Authority to act as an arbitrator not by virtue of its role or function as a court or Tribunal or the authority but as an impartial and neutral expert, and such authority can entertain, hear and dispose of the said dispute. In such a case, the same shall be accepted by both the parties and the decision of the said Arbitrator

shall be final and the same is not appealable. Since the impugned order is in the nature of the arbitral award this Appeal is not maintainable.

- (f) The contention of the Appellant that the State Commission had deviated from its own mandate by resorting to some other procedure is wrong. The DLF Power Limited had furnished to the State Commission the audited accounts in relation to Madhuband Plant for the year 2000 to 2008. In addition to that, the DLF Power Limited further provided to the State Commission all the details, including details of the loan, project finance, interest during construction and chartered accountant's certificate. All the information sought by the State Commission was in relation to the calculation of the capital cost. Those particulars have been provided.
- (g) It is not correct to contend that the appointment of E&Y was not communicated to the Appellant. The order passed by the Commission on 21.8.2007 appointing E&Y was duly communicated to the Appellant through the letter dated 8.11.2007. There was no requirement for E&Y to invite comments from the Appellant as the determination of the capital cost is based upon the record of the expenditure

maintained by the DLF Power Limited in the ordinary course of its business. Therefore, E&Y need not invite comments from the Appellant as E&Y is not an adjudicating body.

- (h) In the present case, while passing the tariff order, the State Commission was expected to fix the capital cost as per the PPA which is arithmetic in nature. Therefore, there was no necessity for the State Commission to hear the Appellant before passing the tariff order. Further, no infirmities have been shown by the Appellant in the E&Y report. In fact, E&Y actually reduced the capital cost by about Rs.7.83 Crores from the interest during construction capitalised in the books of the accounts of the Respondent. This shows that the E&YT carried out verification of the assignment in a very professional, correct and unbiased manner. E&Y has correctly calculated the interest cost and this calculation is not contrary to the PPA.
- (i) Even on merits, there is no valid reason to assail the impugned order. The calculation of interest during construction by E&Y was done on the basis of the verification of the terms of the loan agreements and other documents and interest was determined

accordingly. In view of the above, there is no infirmity either in the E&Y Report or in the impugned order.

7. In the light of the rival contentions, the following issues arise for consideration:
 - (a) Whether the State Commission has got the jurisdiction to fix the tariff with respect to sale of power generated by the Respondent generator to the Appellant, the exclusive consumer of the Power supplied through their own dedicated line?
 - (b) If it is held that the Commission has no jurisdiction to decide the dispute between the generating Company and the Consumer, whether the tariff order passed by the State Commission adopting the principle of Extra Cursum Curiae could be construed to be an arbitral award?
 - (c) If it is construed to be an Arbitral award, whether the tariff fixed in the said arbitral award would be final and binding upon both the parties and as such the Appeal is not maintainable as against the said arbitral award?
 - (d) Even assuming that the State Commission has got the jurisdiction under Act,2003 whether the findings

given by the State Commission on merits are valid or not?.

8. **Let us discuss these issues one by one.**
9. The 1st **issue is relating to the jurisdiction of the State Commission.** According to the Appellant, the State Commission has got the jurisdiction to adjudicate the dispute only between the licensees and generating Companies as per Section 62 and 86 (1) (f) of the Act and since the present dispute is essentially a contractual dispute between the consumer and the generating Company, the State Commission has no jurisdiction to decide the same.
10. In order to substantiate this point, the Learned Counsel for the Appellant has cited following decisions:
 - (a) Maharashtra Electricity Regulatory Commission v. Reliance Energy & Ors (2007) 8 SCC 38
 - (b) Indian Drugs and Pharmaceuticals Ltd V. Workmen, Indian Drugs & Pharmaceuticals Ltd (2007) 1 SCC 408
 - (c) Delhi Administration (Now NCT of Delhi) V. Manohar Lal (2002) 7 SCC 222
 - (d) Municipal Corporation of Delhi V Gurnam Kaur (1989) 1 SCC 101

11. On the other hand, the Learned Counsel for the Respondent DLF Power Limited would submit that both the Appellant and Respondent in the present case have jointly approached the State Commission to fix the tariff for the power project of Madhuband and the instant case does not merely involve contractual dispute but this relates to dispute over the fixation of tariff and when the similar disputes had been raised between the said parties in respect of other projects, the State Commission on the basis of the request made by both the parties fixed the tariff and when these tariff orders were challenged by the parties in the Appeals, this Tribunal had held that even though the State Commission has no jurisdiction to fix the tariff it has done so as an expert arbitral Tribunal in view of the fact that both the parties approached the Commission to fix the tariff.
12. It is further contended by the Respondent that when this judgement in the Appeal was challenged before the Hon'ble Supreme Court, through the interim order dated 11.7.2007 and the final order dated 1.4.2009, the Hon'ble Supreme Court proceeded on the basis that both the State Commission and this Tribunal have got the jurisdiction to fix the tariff in terms of the PPA between the Generating Companies and the Consumers, as such, the jurisdiction of the Commission to decide the tariff was recognised by the Hon'ble Supreme Court

and consequently those orders passed by the Hon'ble Supreme Court are binding on all Courts and Tribunals and that therefore, the State Commission has got the jurisdiction to fix the tariff as fixed by the State Commission in other cases.

13. The Learned Senior Counsel for the Respondent cited two decisions reported in (2007) 10 SCC 588 and (2009) 6 SCC 258 in order to substantiate his plea that the Hon'ble Supreme Court has endorsed that the State Commission has got the jurisdiction to fix the tariff in term of the PPA entered into between the Generating Company and the consumers.
14. We have carefully considered the above submissions in respect of the **main issue i.e. the lack of jurisdiction**. Before dealing with this issue, we may refer to some detailed factual background since that would enable us to understand the core of the issue.
15. On 11.1.1995, a Power Purchase Agreement was entered into between the Appellant Coal India Limited and the DLF Power Limited (Respondent) for setting up of a Thermal Power Plant at Madhuband, Jharkhand. The DLF Power Limited name was subsequently changed into Eastern India Powertech Limited (EIPL). On 12.6.2005, the Respondent, DLF Power Limited being a Generating Company approached the State

Commission for fixation of tariff payable by the Coal India Limited through its subsidiary Bharat Coking Coal Limited in terms of the PPA. The Appellant Bharat Coking Coal Limited also on 16.9.2005, approached the State Commission requesting the Commission to fix the tariff in terms of the said Power Purchase Agreement. It was therefore, at the instance of both the Appellant and the Respondent, the Commission decided to go into the issue of tariff fixation.

16. During the course of the proceedings, the Chairman and Member (Technical) had different views in respect of the jurisdiction of the State Commission to decide the present dispute. However, in another case arising out of a similar contract between the Central Coalfields Limited, another subsidiary of Coal India Ltd and the DLF Power Limited (Respondent) a dispute had arisen regarding tariff fixation. In that case, the tariff was fixed on the request of both the parties. Challenging the same, the Central Coalfields Ltd, another subsidiary of Coal India Ltd filed the Appeal before this Tribunal in Appeal No.166 of 2005. The said Appeal was dismissed by this Tribunal by the judgement dated 11.5.2006 holding that even though the State Commission did not have the jurisdiction to fix the tariff, the State Commission's tariff order was in the nature of an arbitral award since both the parties had referred the dispute for adjudication and as such, the award was

binding on both the parties and consequently the Appeal was not maintainable. As against this judgement, the Appeals were filed by both the parties before the Hon'ble Supreme Court. Even though in the said Appeals a question was raised with reference to the jurisdiction of the State Commission, the Hon'ble Supreme Court, without going into the said issue, directed the State Commission to fix the fresh tariff after obtaining the report of the E&Y, Chartered Accountants. It was in that background, the State Commission passed the tariff order on 7.3.2008 and sent the same to the Hon'ble Supreme Court. On receipt of the same the Hon'ble Supreme Court on 1.4.2009 without going into the merits of the matter, disposed of the Appeals directing the Central Coal Fields to challenge the E&Y report as well as the tariff order by way of an Appeal before this Tribunal. Accordingly Appeal in Appeal No.83/2009 was filed. This Tribunal after hearing the Appeal, passed a final order dated 31.7.2009 on merits upholding both the E&Y Report and tariff order. Against the said judgement, the Appeal has been filed and the same is pending in the Hon'ble Supreme Court.

17. In the meantime, in the present case both the Appellant and the Respondent approached the State Commission on 12.6.2005 and 16.9.2005 respectively praying the State Commission to fix the tariff in terms of the PPA in respect of Madhuband Plant. Accordingly, the State Commission obtained the Chartered Accountant's report from E&Y and fixed the tariff through the impugned order dated 28.3.2008.
18. In these proceedings the Appellant had never raised the question of jurisdiction of the State Commission. Similarly, even in the other proceedings before the Commission as well as in the Appeal filed before the Tribunal in Appeal No.166 of 2005 the question of jurisdiction was never raised by the Appellant. On the other hand, the Tribunal itself suo-moto raised the question and heard the Counsel for the parties on this issue and decided that the State Commission had no jurisdiction but even then, the tariff order could be construed to be arbitral award passed by an expert arbitral tribunal as both the parties approached the Commission to decide the dispute.
19. As mentioned earlier, against this judgement both the parties approached the Hon'ble Supreme Court wherein one of the question was raised with regard to jurisdiction. However, this issue was not pursued by the Appellant. The Hon'ble Supreme Court passed an interim order on 11.7.2007 stating that "During the course of hearing the appeal, it appeared to us that there is

need for verification of the capitalisation of the cost incurred upto commissioning of the Appellant's Power Plants at Rajrappa and Giddi." On this basis, the Hon'ble Supreme Court directed that the costs account wing of M/s. Ernst and Young, Chartered Accountants should determine the actual capital costs based on the formula in the power purchase agreement and send a report to the State Commission which in turn should determine the tariff in terms of the PPA and to report the same to the Hon'ble Supreme Court for passing final orders in these Appeals. In the light of the said order dated 11.7.2007, passed by the Supreme Court, the State Commission appointed E&Y to submit the report on the actual capital cost of the Madhuband Power Plant and on receiving the said report, the State Commission fixed the tariff and reported the same to the Hon'ble Supreme Court. The Hon'ble Supreme Court on receipt of the report, without going into the merits of the matter directed the Appellant by the order dated 1.4.2009 to challenge the E&Y report and tariff order by way of Appeal before this Tribunal so that the Tribunal being the expert body would be able to assess the tariff order in the proper perspective as suggested by the Appellant itself. The relevant portion of the Hon'ble Supreme Court order dated 1.4.2009 is as follows:

“4. Learned Counsel for the Appellant CCL submitted that the basis of tariff fixation is erroneous and in any event a statutory forum is available to question correctness of the report, which can be availed.

5. On the other hand Learned Counsel for the DLF submitted that M/s.Ernst & Young are internationally reputed financial consultants. There is no substance in the objections raised by CCL.

6. We are inclined to accept the submissions of learned Counsel for the CCL that the complex process of evaluation is involved in fixing the tariff and it would be in the interest of parties challenge, if any, to the report is made before the prescribed authority. That being so, we dispose of the appeals with the direction that in case CCL files appeal within four weeks from today the same shall be considered by the Appellate Tribunal in accordance with law. The Appellate Tribunal is requested to dispose of the appeal on merits within a period of two months from the date of filing”.

20. In pursuance of this order, the Appellant has filed the Appeal. This Tribunal entertained the said Appeal in Appeal No.83 of 2009 filed by the Central Coal Field, another subsidiary Company of Coal India Ltd. This Appeal was heard at length by this Tribunal and ultimately by the order dated 31.7.2009; the Appeal was dismissed after considering the merits holding that there was no infirmity in the E&Y Report and the State Commission's tariff order. In this Appeal also no question was raised with regard to jurisdiction of the State Commission.

21. In the present case, the impugned tariff order was passed on 28.3.2008. The proceedings before the State Commission which resulted in the impugned order had started in 2005 itself. As mentioned earlier, in the instant case, on the strength of the earlier interim order dated 11.7.2007 passed by the Hon'ble Supreme Court the State Commission had through an order on 21.8.2007 appointed the E&Y to determine the actual capital cost of Madhuband Power Plant and send a report. Accordingly, E&Y submitted its report on 7.3.2008 fixing the capital cost of the Power Plant. Based on the report, the State Commission fixed the tariff through the impugned order dated 28.3.2008. During the said proceedings before the Commission, the Appellant did not raise any question regarding jurisdiction.

22. The Appellant being aggrieved by the impugned order, filed the present Appeal in Appeal No.82/2008 on 14.5.2008 mainly on the ground that the E&Y was appointed without the Appellant's knowledge and that the Appellant was not given opportunity by the Commission to object to the E&Y Report. Even in this Appeal, the Appellant has not chosen to raise the question of jurisdiction in this Appeal grounds. Only when this Appeal was taken up for final disposal, after completion of the pleadings, the Appellant filed an amendment Petition on 29.8.2009 i.e.

after more than 01 year and 03 months raising the ground of lack of jurisdiction of the State Commission.

23. In this context, we have to point out as indicated above that even before the Hon'ble Supreme Court when the other matter was taken up for final hearing after the receipt of the Report and Tariff Order from the State Commission, the Learned Counsel for the Appellant (M/s CCL) himself without raising the jurisdiction issue, suggested that it is desirable that the dispute arising due to the tariff fixation could be solved by the Appellate statutory forum which is an expert body instead of Supreme Court undertaking the process of evaluation of the technical matter. On that basis, the Hon'ble Supreme Court without going into the merits of the matter, as suggested by the Appellant (CCL) directed the Appellant (CCL) to file the Appeal before this Tribunal as against the tariff order passed by the State Commission and directed the Tribunal to decide the Appeal on merits. This order had been passed on 1.4.2009. Accordingly, the Appeal was filed. This Tribunal entertained the said Appeal in Appeal No.83 of 2009 and after hearing both the parties, dismissed the Appeal on 31.7.2009 on the ground that there were no merits. In this Appeal also, no question was raised regarding the jurisdiction.
24. So, it is clear that the Appellant Company or M/s CCL, another subsidiary Company of Coal India Limited never raised with

regard to the jurisdiction before any forum and never pursued this issue even before the Hon'ble Supreme Court. On the other hand, the Hon'ble Supreme Court directed the Appellant (CCL) to file the Appeal before the Tribunal ,the expert body, questioning the tariff order and E&Y Report and directed the Tribunal to hear the Appeal and pass a judgement on the merits of the matter.

25. From these factual events, it has become evident that the Hon'ble Supreme Court had proceeded on the basis that the State Commission has got the jurisdiction to fix the tariff between the generating Companies and the consumers. In other words, by virtue of the orders passed by the Hon'ble Supreme Court, by the interim order dated 11.7.2007 and the final order dated 1.4.2009, it had acknowledged and up-held the jurisdiction of the State Commission to determine the tariff for supply of electricity by the Generating Stations to the consumers.
26. As indicated above, the jurisdiction point has never been raised by the Appellant either before the State Commission in the present case nor before this Tribunal when the present Appeal was filed on 14.5.2008. Only after 01 year and 03 months, the Appellant thought it fit to raise the additional ground by way of an amendment application filed on 29.8.2009 alleging the lack of jurisdiction on the part of the State Commission.

27. As quoted earlier, it cannot be debated that the Appellant has never raised the question of jurisdiction earlier in any of the proceedings including the present proceedings before the State Commission. On the other hand, both the Appellant and Respondent in their separate applications on 12.6.2005 and 16.9.2005 approached the State Commission to fix the tariff in terms of the PPA.
28. In the above background, we have to bear in mind 3 aspects.
- (a) In the proceedings earlier held before the Commission, the jurisdiction issue was not raised. Even before the Supreme Court, this issue was not pursued. On remand when the Appeal was filed before the Tribunal, this point was not raised. There is no reason as to why the Appellant had not chosen to raise the jurisdiction point in any of these forums in which the proceedings in regard to tariff determination were held. (b) There is no reason as to why the Appellant has not raised the jurisdiction point when this Appeal was filed. In this Appeal, the impugned order was challenged on merits alone. (c) There is no reason as to why the Appellant has raised this issue belatedly before this Tribunal that too, after the pleadings were completed.
29. In the absence of the valid reasons, for not raising the justification issue in time, we are unable to hold that the

conduct of the Appellant in raising this issue belatedly before this Tribunal is bonafide.

30. Be that as it may, It cannot be disputed that the question of jurisdiction would go to the root of the matter. It is categorically held by the Hon'ble Supreme Court in various decisions as pointed out by the Learned Senior Counsel for the Appellant that when a court has no jurisdiction over the subject matter, the objection regarding the jurisdiction can be raised at any stage including in the Appellate stage. This is the settled law. Therefore, we are inclined to go into the said issue even though we are of the view that the conduct of the Appellant in not raising the point earlier in any of the Forums and in raising this issue belatedly in this Appeal, cannot be said to be bonafide. In that background, let us now deal with this issue.
31. According to the Appellant, the State Commission has no jurisdiction to adjudicate the dispute between a consumer and a generating Company as it is not provided under section 62 and 86 (1) (f) of the Act.
32. The Learned Counsel for the Appellant has quoted the judgement in Maharashtra Electricity Regulatory Commission v. Reliance Energy & Ors (2007) 8 SCC 38 in which it held as follows:

*“ 13. It may be noted from a perusal of Section 86 (1) (f) of the Act that the State Commission has only power to adjudicate upon disputes between licensees and generating companies. It follows that the Commission cannot adjudicate disputes relating to grievances of individual consumers. **The adjudicatory function of the Commission is thus limited to the matter prescribed in Section 86 (1) (f)**”.*

33. On the other hand, the Learned Counsel for the Respondent relied upon the two successive judgements in (2007) 10 SCC 588 & (2009) 6 SCC 258 in which the Hon'ble Supreme Court directed the State Commission to decide the tariff order in terms of the PPA between Generating Company and the Consumer on the basis of E&Y Report and directed this Tribunal to go into the merits of the tariff order passed by the State Commission and thus acknowledged and recognised the jurisdiction of the State Commission to determine the tariff for supply of electricity by a Generating Company to the consumers and as such the Commission has got the jurisdiction. .
34. Now the following question would arise: “whether these judgements referred to by the Respondent could be considered to be the definite pronouncement of the Hon'ble Supreme Court on the issue of the jurisdiction of the State Commission to decide the dispute in question?”

35. It is a settled law that mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Hon'ble Supreme Court lays down a principle of law, it will amount to a precedent. In other words, mere directions issued by the Hon'ble Supreme Court on the facts of the case without laying down any principle of law, cannot be said to be the precedent. This principle has been laid down by the Hon'ble Supreme court in the following judgements:

“ Indian Drugs and Pharmaceuticals Ltd. V. Workmen, Indian Drugs & Pharmaceuticals Ltd (2007) 1 SCC 408

41.It is well settled that mere direction of the Supreme Court without laying down any principle of law is not a precedent. *It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent..... In Divisional Controller, KSRTC v. Mahadeva Shetty this Court observed as follows: (SCC P 206, Para 23)*

*“The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. ... The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. **The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided”***

“42. In J&K Public Service Commission V Dr. Narinder Mohan this Court held that the directions issued by the

*Court from time to time for regularization of ad hoc appointments are not a ratio of this decision, **rather the aforesaid directions were to be treated under Article 142 of the Constitution of India.** This Court ultimately held that the High Court was not right in placing reliance on the judgement as a ratio to give the direction to the Public Service Commission to consider the cases of the respondents for regularisation.....”*

Delhi Administration (Now NCT of Delhi) v. Manohar Lal (2002) 7 SCC 222

*“5.Apparently, the learned Judge in the High Court was merely swayed by considerations of judicial comity and propriety and failed to see that **merely because of this Court has issued directions in some other cases, to deal with the fact situation in those other cases, in the purported exercise of its undoubted inherent and plenary powers to do complete justice, keeping aside even technicalities, the High Court, exercising statutory powers under the Criminal Laws of the land, could not afford to assume to itself the powers or jurisdiction to do the same or similar things. The High Court and all other Courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them”.***

36. In the light of the above laid down principles, if we look at the above two decisions cited by the Respondent, i.e. (2007) 10 SCC 588 & (2009) 6 SCC 258, it is noticed that the Hon'ble Supreme Court in those decisions through the interim order

dated 11.7.2007 merely directed the State Commission to pass the Tariff order on the basis of the Report of E&Y and through the final order dated 1.4.2009 directed the Tribunal to decide the Appeal on the merits of the tariff order respectively. So in this case, the question with regard to jurisdiction was never dealt with. On the other hand, the matter was proceeded on the assumption that the State Commission had the jurisdiction. As such this decision cannot be taken as a definite pronouncement of the Hon'ble Supreme Court on the jurisdiction of the State commission. In other words, the ratio regarding the jurisdiction was not decided in these cases. Therefore, we cannot decide the question of jurisdiction on the basis of these judgements of the Hon'ble Supreme Court.

37. However, in this context, it has to be pointed out as we have referred to earlier that very same question had been raised canvassed and decided by this Tribunal in the earlier Appeal. In that judgement, this Tribunal through the Division Bench decided that there is no jurisdiction for the State Commission to decide the dispute in question. Having decided that there is no jurisdiction, the Tribunal held that the said tariff order can be construed to be Arbitral Award. The said judgement in Appeal No.166 of 2005 was rendered by this Tribunal on 11.5.2006 reported in 2007 (ELR) APTEL 880. We feel that it is worthwhile to consider the said judgment delivered by the

Division Bench on this issue and to decide as to whether we, being the Full Bench could agree with the reasonings and findings given in the said judgment.

38. Let us now refer to the relevant issue that had been framed on this point in the said judgement. The same is as follows:

“10.

- (i) ***Whether the Regulatory Commission has the authority and jurisdiction to fix the tariff with respect to sale of power generated by the second Respondent generator to the Appellant, the exclusive consumer of power supplied through their own dedicated transmission line?***

39. While discussing this question, the Tribunal in the above judgement has made an elaborate analysis over the issue. It would be appropriate to refer to the said discussion made by this Tribunal. The relevant discussion is as follows:

“19. The Section 62 provides for determination of tariff with respect to supply of electricity by a generating company to a distribution licensee, transmission of electricity, wheeling of electricity and retail sale of electricity. There is no doubt that tariff is required to be fixed only when supply of electricity by a generating company to a distribution licensee takes place. In other words, it is a supply to a distribution licensee who has secured a license under Section 14 (c) of The Act. The transmission tariff or tariff for wheeling of electricity also is required to be fixed only in respect of transmission licensee who had secured

a license under Section 14. Hedged, in this context, it is obvious that tariff is to be fixed under Section 62(1) (d) if only the retail sale is by a distribution licensee who has secured a license under Section 14(b) of The Act and it is not as if tariff has to be fixed for generation of power or every sale or retail sale of electricity for which no license is required as seen from Section 10 of The Act. Where the sale or transmission of electricity is not regulated by the license/s granted under The Act, there is no requirement at all to fix the tariff by virtue of the provisions contained in Part VII of The Act. Neither Section 63 nor Section 64 are applicable with respect to sale of electricity by a generator through its exclusive or dedicated transmission lines to an individual consumer in terms of contractual obligations entered between them.

20. The learned senior counsel appearing for contesting Respondents as well as learned counsel appearing for Regulatory Commission sought to contend that sale between the Appellant and the second Respondent generator will fall within the ambit of 'retail sale' of electricity and therefore there could be a determination of tariff under Section 62 of The Act. Much reliance is placed upon Section 62 (1)(d). The learned Counsel also referred to "Law Lexicon" and "Law Dictionary" in support of his contentions that the sale of power generated by the second Respondent to the appellant will fall within the purview of Section 62(1)(d) of The Act.

21. Per contra, the learned counsel appearing for the appellant contended that the sale of power by the second Respondent generator being exclusively to the appellant in terms of PPA and by no stretch it could be treated or deemed or considered as a retail

sale. Though the contention of the learned counsel appearing for the second Respondent is attractive, we are not persuaded to accept the same as his contention basically overlooks the fact it is not a sale to a licensed trader / transmitter or distributor but it is a simple and direct sale between a generator and a sole purchaser in terms of a commercial agreement (PPA) entered between the parties.

22. The fixation of tariff by the Commission on the invitation of both parties in this case, if at all, could be only in terms of the agreement which the appellant and the second Respondent entered between themselves and not in terms of Part VII of The Electricity Act 2003. In fact, the parameters applied by the Regulatory Commission for tariff fixation is as contained in the agreement entered between the parties, namely, PPA.

23. Apart from the various provisions referred to by us we are fortified by the Statement of Objects and Reasons behind The Act. The salient features of the Bill as seen from the Statement of Objects and Reasons are as follows:-

“(i) Generation is being delicensed and captive generation being freely permitted. Hydro project would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issue of dam safety and optimal utilization of water resources.

- (ii) *******
- (iii) *******
- (iv) *******
- (v) *******
- (vi) *******

(vii) For rural and remote areas stand alone systems for generation and distribution would be permitted.

(viii) ****

ix) ****

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.

(xi) ****

(xii) ****

(xiii) **”**

24. In Kumar Jagdish Chandra Sinha v. Eileen K. Patricia D’Rozarie reported in 1995(1) SCC 164, the Hon’ble Supreme Court held thus:

“The Statement of Objects and Reasons accompanying a bill cannot be used to ascertain the true meaning and effect of the substantive provisions of the legislation, but it can certainly be pressed into service for the limited purpose of understanding the background, the antecedent state of affairs and the object the legislation sought to achieve.”

25. In Deepal Girishbhai Soni v. United India Insurance Co. Ltd. reported in 2004 (5) SCC 385, the Hon’ble Supreme Court held thus:

“It is now well settled that for the purpose of interpretation of a statute, the same is to be read in its entirety. The purport and object of the Act must be given its full effect by applying the principles of purposive construction.”

The object is clear and no provision is found in the enactment to cover the case on hand.

26. The learned counsel for the second Respondent placed reliance on the pronouncement of the Hon'ble Supreme Court in the BSES Ltd. v. Tata Power Co. Ltd. and Others reported in 2004 (1) SCC 195 and contended that it will be appropriate to interpret the Act in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned. The learned counsel relied upon the following passage:-

“The Electricity Regulatory Commissions Bill was thereafter introduced in Parliament. The Objects and Reasons of the Act show that the main functions of the State Electricity Regulatory Commission shall be: (i) to determine the tariff for electricity – wholesale, bulk, grid and retail; (ii) to determine the tariff payable for use of the transmission facilities; and (iii) to regulate power purchase and procurement process of the transmission utilities etc. The changed scenario may give rise to problems of highly complex and technical nature between the generator, supplier and distributor of energy, which can be better resolved by technically qualified people who may constitute the aforesaid Regulatory commission. They will have the additional advantage of taking assistance from consultants, experts and professional persons. Therefore, it will be proper to interpret the Act in a broad manner and not in a narrow or restrictive sense insofar as the jurisdiction of the Commission is concerned, so that the purpose for which the Act has been enacted may be achieved.”

27. With respect, we may point out that the generation and exclusive sale directly to Appellant in the present

case is not regulated nor it falls within the purview of the Act. Hence, it is clear that the Commission is not called upon to fix tariff as a Regulatory Commission exercising powers under The Electricity Act 2003. In fact, Section 73 of The Electricity Regulatory Commission Act 1998 provided for getting approval when an agreement is entered between a generator and purchaser of power for the tariff before entering into such contracts. Such a function does not find a place either under Section 86 which enumerates the functions of the State Commission or under Section 79 which enumerates the functions of the Central Commission. The enumeration of functions of State Commission is found in Section 86 of The Electricity Act relate to such functions of generation or supply or transmission or wheeling or wholesale or bulk or retail within the State which are being undertaken by the licensed transmitter or distributor and in terms of license granted or existing license and not otherwise and in terms of license granted or existing license and not otherwise. Section 42 of The Act provides for introduction of open access for the use of transmission lines or distribution system by any licensee or consumer or a person engaged in generation and with respect to open access the State Commission is required to determine only the wheeling charges and surcharge thereon, if any, for such category of consumers.

28. Section 86(i) (a) reads thus:-

“86 Functions of State Commission.- (1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers.”

29. These provisions referred to above do not require a license being secured by a generator be in CPP or IPP nor a license being prescribed by a purchaser arising out of commercial relationship between the consumer and generator nor there is any requirement to fix tariff for such commercial sale between two parties by the Regulatory Commission. Hence, in our considered view the determination of the tariff by the regulatory Commission is not in terms of provisions of The Electricity Act 2003 but it is by virtue of the provisions contained in the PPA entered between the parties and on the invitation of the parties.

41. In the result

On the first point, we hold that the Regulatory Commission has neither the authority nor jurisdiction in terms of The Electricity Act 2003 to fix a tariff between the appellant, a consumer and the second Respondent a generator being a commercial transaction pure and simple, which relationship is governed by an existing PPA.

40. The perusal of above judgement rendered by this Tribunal would indicate that ultimate conclusion was arrived at by this Tribunal is that the tariff could not be determined by the State

Commission in terms of the PPA entered into between the Generating Company and the Consumer under the provision of the Act, 2003 and as such, the State Commission has no jurisdiction. The gist of the above ratio is as follows:

- a. Section 62 of the Act provides for determination of tariff with respect to supply of electricity by a generating company to a distribution licensee, transmission of electricity, wheeling of electricity and retail sale of electricity. As such, the tariff is to be fixed only when the supply of electricity by a Generating Company to a Distribution Licensee takes place.
- b. The transmission tariff or tariff for wheeling of electricity is also required to fixed only in respect of transmission licensee who had secured a license. Thus, it is obvious that the tariff is to be fixed u/s 62 (1) (b) if only the retail sale is by a distribution licensee who has secured a license under the Act and it is not as if the tariff has to be fixed for generation of power or every sale or retail sale of electricity for which no license is required.
- c. Where the sale is not regulated by the licensee, there is no requirement at all to fix the tariff by virtue of the provisions of the Act. Neither Section 63 nor Section 64 are applicable with respect to sale of electricity by a

generator to only a consumer in terms of contractual obligations entered between them.

- d. The sale of power by the generator to the consumer in terms of the PPA cannot be treated as a retail sale. In other words, it is not a sale to a licensed trader / transmitter or distributor but it is a simple sale by the generator to the sole purchaser in terms of the PPA entered into between them.
- e. The statement of objects and reasons behind the Act can be considered for the purpose of understanding the background and the object of the legislation sought to be achieved. One of the objects contained in the bill is as follows: *“Where there is a direct commercial relationship between a consumer and a generating company or a trader, the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated”*.

In the light of the above objects, it can be observed that the generation and exclusive sale directly to the consumer is not regulated nor it falls within the purview of the Act. Thus, it is clear that the Commission is not called upon to fix the tariff as a regulatory Commission exercising power under the Electricity Act, 2003.

- f. In fact, Section 73 of the Electricity Regulatory Commission Act, 1998 provides for getting approval when an agreement is entered into between a generator and purchaser of power for the tariff to be entered into such contracts. Such a function does not find a place in the Act, 2003 either under Section 86 which confers the powers and enumerates the functions of the State Commission or Section 79 which confers and enumerates the functions of the Central Commission. Section 86 of the Electricity Act deals with the functions of the State Commission which relate to the generation or supply or transmission or wheeling or wholesale or bulk or retail within the State which are being undertaken by the licensed transmitter or distributor and in terms of license granted and not otherwise.
- g. Section 42 of the Act provides for introduction of open access for the use of transmission lines or distribution system by any licensee or consumer or a person engaged in generation with respect to open access, the State Commission is required to determine only the wheeling charges and surcharge only for such category of consumers.

h. Section 86 (i) (a) and Section 42 of the Act do not require a licensee being secured by a generator nor a license being prescribed by a purchaser arising out of commercial relationship between the consumer and generator nor there is any requirement to fix the tariff for such commercial sale between two parties by the Commission. Therefore, the determination of the tariff by the Regulatory Commission in the instant case is not in terms of the provisions of the Electricity Act, 2003 but it is by virtue of the provisions contained in the PPA and on the invitation of both the parties.

41. The perusal of above judgement rendered by this Tribunal would indicate that ultimate conclusion arrived at by this Tribunal on the basis of the various reasonings is that the tariff could not be determined by the State Commission in terms of the PPA entered into between the Generating Company and the Consumer under the provision of the Act, 2003. In our view, the analysis made and the conclusion arrived at in the above judgement is correct and we agree with the said analysis and conclusion. Though, the learned Senior Counsel for the Appellant requested this Full Bench to reconsider the decision taken by the Division Bench of this Tribunal in the above case, there is no valid reason to reconsider the same as in our view,

the ratio decided by the Division Bench of this Tribunal in the said Appeal is perfectly justified.

42. In view of above, we conclude that the State Commission has no jurisdiction to fix the tariff in terms of PPA entered into between the Generating Company and the consumer as the same is not provided in Section 62 and 86 (1) of the Act. The 1st issue is answered accordingly.
43. Let us now come to the **next issue** relating to the question of construing the **tariff order as an arbitral award** applying the principles of Extra Cursum Curiae.
44. The Learned Counsel for the Respondent while dealing with the next issue would submit that even assuming that the State Commission does not have jurisdiction to fix the tariff in terms of the PPA entered into between the Generators and the Consumers in accordance with provisions of the Act, 2003, the Appellant cannot question the State Commission's jurisdiction at this stage after having jointly approached the State Commission along with the Respondent to decide the dispute under the principle of 'Extra Cursum Curiae'.
45. While elaborating this argument, the Respondent has contended that having approached the Chairman of the Commission for fixing the tariff and having consented to the resolution of the dispute between the parties by him, the

Chairman of the State Commission has passed the tariff order as an arbitrator and as such the impugned order shall be considered to be in the nature of arbitral award.

46. The question which would now arise is this: “Whether the tariff order passed by the Commission without jurisdiction can be construed an arbitral award?” This question also has been framed and discussed by the Tribunal in Appeal No.166/2005 as under:

(i) Whether the Regulatory Commission has resolved and decided the dispute between the Appellant and the second Respondent in terms of the arbitral clause in the Agreement by invitation ?

(ii) Whether the order of the Regulatory Commission is by way of resolution of arbitral dispute between the parties in terms of the arbitral clause in the PPA entered between the Appellant and the Second Respondent? Whether such fixation is an arbitral award binding on the parties ?

47. Let us now refer to the discussion over these questions made by the Tribunal in the above judgement:

30. There is no controversy pursuant to the invitation made in writing by the appellant and the contesting Respondents alone as found in the order, the Commission has taken up on itself to resolve the dispute relating to tariff fixation in terms of PPA. The PPA contains an arbitration clause and both the parties approached the commission for resolution of the said dispute. In the light of the discussion, in the light of the stipulations contained

in the agreement as well as the manner in which the parties have participated with full knowledge and consent, as and by way of resolution of dispute in terms of arbitration clause in the PPA, we are well founded in holding that the Commission has just resolved the dispute between the parties in terms of the arbitration clause agreed to between them as an arbitral Tribunal on joint request or invitation or appointment. Therefore, the determination of tariff by the Regulatory Commission is by way of an arbitral award and it has to be given the same weight and effect as an arbitral award. We hasten to add that it is not a tariff determination in terms of the provisions of The Electricity Act 2003. In other words at the risk of repetition we hold that it is an award by the Regulatory Commission which it was invited to resolve as an expert body by both the parties in terms of the PPA and in terms of stipulations agreed to between themselves as well as MOM.

31 to 39.....

40. Once we come to the conclusion that the resolution of dispute by the Regulatory Commission is by way of Arbitration in terms of PPA and on joint invitation, the arbitral award passed by the Regulatory Commission as an expert body has all the force and adjunct of an award passed by an Arbitral Tribunal in terms of The Arbitration and Conciliation Act 1996.

48. The gist of the above discussions is as follows:

Pursuant to the request made by both, the Commission has taken up on itself to resolve the dispute relating to tariff fixation in terms of the PPA. The PPA contains an arbitration clause. In this case, both the parties approached the Commission for resolution of the said

dispute. Therefore, the Commission in the present case has just resolved the dispute between the parties in terms of the arbitration clause agreed to between them as an arbitral Tribunal or joint request or invitation or appointment made by both. Therefore, determination in the present case is by way of an arbitral award and it has to be given effect to by way of arbitral award. It is not a tariff determination in terms of the provisions of the Act, 2003 but is an arbitral award passed by the Commission which it was invited to resolve the dispute by both the parties as an expert body in terms of the PPA.

49. In the light of this discussion, the Tribunal has given the following findings:

- (1) ***“We hold that the Regulatory Commission as an expert Arbitral Tribunal has resolved the dispute as referred to it by parties to the dispute on invitation and it is an award in terms of the PPA entered between the parties and it is enforceable as it has all the force of an arbitral award passed by a validly constituted Arbitral Tribunal”.***
- (2) ***“We hold that the resolution of the dispute by the State Regulatory Commission is by way of an arbitral proceedings and it is an award which is binding on the parties”.***

50. Let us now refer to the **doctrine of Extra Cursum Curiae** referred to by the Respondent.
51. According to this doctrine, the parties to a dispute may request a Court or Tribunal or any authority to act as an arbitrator not by virtue of its role or function as Court or tribunal or authority but as an impartial and neutral expert and as the said request entertain and dispose of the dispute even though the said authority does not have jurisdiction to decide. In other words, the judge or member of a Tribunal takes off his robes as a judge or member of a Tribunal and acts as an arbitrator at the request of the parties. It is contended by the Respondent that in this case, the decision of the arbitrator will be final and not subject to appeal at all. In support of his plea, the learned Counsel has cited following judgements:

(i) *Burges v Morton (1896) A.C. 136 at pp.141 & 145*

When the case came before the Divisional Court it was immediately observed by the judges that this was not properly a special case, and neither by counsel nor judges was it treated as being left to the judges as a special case raising a question of law; but upon the invitation of counsel the learned judges agreed to hear it and decide it as a question of fact. After the judgement was given both the learned judges, upon an application to stay, interposed with the observation that it having been left to them to decide as a question of fact they could not see who there could be any appeal. Both judges were agreed that there was no point of law, and, indeed,

that has not been disputed before your Lordships. I am therefore, of opinion that there is no appeal. The learned judges were invited to sit practically as arbitrators, and their decision upon the only question in dispute, namely, the question of fact, I regard as final.

(ii) *DLF Power Ltd., & Rasu and Ors. V. The Special Deputy Collector (1984) 2 MLJ 1, Para 6*

In C.R.P No.1628 of 1981, the only contention urged by the learned Counsel for the Petitioner is that since there is no proper order of eviction against the petitioner, the execution of such an order is bad. It has earlier been pointed out how as a result of the joint endorsement, the petitioner had invited the Revenue Court to adopt a procedure different from the normal or usual practice and having so invited the Revenue Court to adopt a procedure extra cursum curiae it is not open to him to complain that the court had acted in the manner suggested by the Petitioner.

(iii) The Hon'ble Supreme Court in the case of Arati Paul v Registrar, Original Side, High Court, (1969) 2 SCC 756 has endorsed the view which was referred to in the "Law of Arbitration". The relevant portion of "Law of Arbitration" is as under:

"The subject matter of an action may be referred to a judge as arbitrator. The Judge in such a case will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge, and his award will not be subject to Appeal".

- (iv) In the said decision, the Hon'ble Supreme Court referred to the settled principles which has been laid down in the Bickett v Morris (1866) LR 1 HLSc 47 and White V Buccleuch (Duke) (1866) LR 1 HLSc 70 wherein the following principles have been laid down:

“When, with the consent of both parties, a judge deviates from the regular course of procedure of the court, he ceases to act judicially and becomes an arbitrator, whose decision is subject to no appeal”.

52. These decisions would indicate that the law has been settled by the Hon'ble Supreme Court that when a judge deviates from the regular course of procedure with the consent of both the parties, he ceases to act judicially and becomes an arbitrator and the decision of the said Arbitrator will be final and binding.
53. In view of the conclusion arrived at by the Tribunal in Appeal No.166 of 2005 with which we agree and also the decisions referred to above relating to the Extra Cursum Curiae, we hold that the tariff determination order has to be construed to be an arbitral award which is final and binding on the parties and not the tariff order under the Act, 2003. The second question is answered accordingly.
54. The **next question would be** whether the Appeal is maintainable u/s 111 of the Act, 2003 when the tariff order has

been held to be an arbitral award passed by the State Commission as an Arbitrator. This question also has been dealt by this Tribunal in Appeal No.166 of 2005. The relevant question in that case framed by the Tribunal is as follows:

“Whether as against the award of the Regulatory Commission resolving the dispute relating to tariff, in terms of arbitral clause in the Agreement and on invitation by parties and appeal is maintainable under Section 111 of the Electricity Act, 2003?”

55. While answering this point, the Tribunal has held that no Appeal is maintainable before the Appellate Tribunal as against the award of an Arbitral Tribunal which is binding upon both the parties and as such the Appellate Tribunal has no authority to interfere with the impugned tariff determination by way of arbitration. We will now refer to the relevant portion of the discussion made **by this Tribunal:**

38. *The jurisdiction of this Appellate Tribunal as seen from Section 111 and 121 is limited to the matters enumerated there in.*

Section 111 (i) reads thus:-

“Any person aggrieved by an order made by an adjudicating officer or an order of Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.”

Section 111(3) reads thus:-

“On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the

appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.”

Section 111 (6) reads thus:-

“The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order may be the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

The entirety of power as spelt out in Section 111 could be exercised by this Appellate Tribunal only as against an “order” passed by the Appropriate Commission or adjudicating officer. The word “order” as appearing in Section 111 definitely means a decision or adjudication on certain right or liability or claim or regulatory act or adjudication by the specified authority and only against such order an appeal is provided for in the Act.

- 39. In the light of the above discussions, we are of the considered view that as against the resolution of dispute between the appellant and the second Respondent pursuant to invitation in terms of arbitral clause, which is an award in terms of the PPA, no appeal is maintainable under Section 111 nor we have jurisdiction or authority to entertain an appeal under Section 111 or examine the issues on merits with respect to such resolution of dispute by an arbitral Tribunal or an expert forum. Not being an order falling under any of the provisions of The Electricity Act 2003, with respect to which alone an appeal is***

maintainable, we hold that the appeal is incompetent, not maintainable and deserves to be rejected”

56. This discussion would indicate that once it is concluded that it is an arbitral award, the decision of the said arbitrator will be final and not subject to Appeal under Section 111 of the Act,2003.

57. Let us now refer to the finding given by the Tribunal in Appeal No.166 of 2005 on this point:

“We hold that no appeal is maintainable before the Appellate Tribunal for Electricity and Appeal deserves to be rejected as not maintainable, as it is not in dispute that in law as against the award of any Arbitral Tribunal no appeal is maintainable before this Appellate Tribunal”.

58. So, we are in agreement with the above finding in view of the fact that the reasonings given by the Tribunal in the said judgement are perfectly valid. Accordingly, we decide that the present Appeal is not maintainable as against the Arbitral Award which has been passed by the State Commission determining the tariff between the generating Company and the Consumer in term of the PPA as it is final and is binding on both the parties. In the light of the above conclusion, we are not entering into the merits of the matter.

59. Before parting with this case, we would like to point out the reasons for the disposal of this Appeal in Feb, 2012 even though the Appeal had been filed in the year 2008. This delay

has been due to (i) adjournment sought by the parties in view of a similar matter being heard by the Hon'ble Supreme Court (ii) retirement of the judges on the bench, who have heard the matter earlier and (iii) adjournments given as requested by the learned Counsel for both the parties, in view of the settlement talks between the parties which eventually failed.

60. Summary of Our Findings

- 1. The State Commission does not have jurisdiction under the Electricity Act, 2003 for determination of tariff for supply of electricity by a generating Company to a consumer against the PPA entered into between them.**
- 2. The tariff determined by the State Commission for supply of electricity by the Respondent to the Appellant is construed as an Arbitral Award on the principles of Extra Cursum Curiae and is final and binding on the parties.**
- 3. The Appeal is not maintainable as against the Arbitral Award which has been passed by the State Commission determining the tariff for supply of electricity by the Respondent, a generating Company to the Appellant, a consumer, in terms of the PPA entered into between them.**
- 4. In the light of the above findings with regard to the maintainability of the Appeal, we feel that we need not go into merits of the matter.**

61. In view of the above summary our findings, the Appeal is dismissed as not maintainable. No order as to costs.

Pronounced in the Open Court on this 6th day of February, 2012.

(Justice P S Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson
Dated: 06th February, 2012

REPORTABLE/~~NOT REPORTABLE~~