Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.175 of 2012

Dated: 14th Nov, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER

In the Matter of:

TATA Power Company Limited.,
Bombay House,
24, Homi Mody Street,
Mumbai-400 001

…Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre No.1,
   13th Floor, Cuffe Parade,
   Colaba, Mumbai-400 001

2. **Maharashtra State Load Dispatch Centre**
   (Maharashtra State Electricity Transmission Co Ltd)
   Office of the Chief Engineer
   State Load Dispatch Centre,
   Thane-Belapur Road,
   PO-Airoli, Navi Mumbai-400 708

3. **Maharashtra State Electricity Transmission Co. Ltd.,**
   C-19, E Block, Prakashganga
   Bandra Kurla Complex, Barora,
   East Mumbai-400 051

4. **Reliance Infrastructure Limited**
   Reliance Energy Centre
   Santa Crux (East)
   Mumbai

…… Respondent(s)

Counsel for the Appellant(s) : Mr. Krishanan Venugopal,Sr.Adv
Mr. Sitesh Mukherjee
Mr. Sakya S Chaudhuri
Mr. Anand Kumar Shrivastava
Ms. Mandakini Ghosh
Mr. Avijeet Kumar Lala
Ms. Anusha Nagarajan

Counsel for the Respondent(s): Mr. M Y Deshmukh
Mr. Yatin Jagtap
Mr. B C Gujarathi
Mr. Shrikant R Deshmukh for R 2 & 3
Mr. J J Bhatt, Sr Adv
Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. SaswatPatnaik for R-4

J U D G M E NT

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

1. Tata Power Company is the Appellant herein.

2. The Appellant filed a Petition before the Maharashtra State Commission praying for the compensation to be paid by the State Load Despatch Centre to the Appellant for the losses suffered by it on account of failure on the part of the State Load Despatch Centre to schedule the power generated between 1.2.2011 and 31.3.2011 for the Appellant's

generation facility to its distribution facility. However, the State Commission dismissed the said Petition by the impugned order dated 18.7.2012. Hence, this Appeal.

3. The short facts are as follows:

(a) The Appellant is a Generating Company having a total generation capacity of about 2027 MW. The Appellant is also involved in the distribution of electricity in the city of Mumbai.

(b) State Commission is the 1st Respondent. Maharashtra State Load Despatch Centre is the Second Respondent. It is a Statutory Authority under the Act which has been vested with the functions of carrying out optimum scheduling and despatch of electricity within the State in accordance with the contract entered into by Licensees and Generating Companies within the State. The power from the Appellant's Generating Station was required to be scheduled to its Distribution Business for onward supply to the Appellant's Consumers.

(c) The Reliance Infrastructure Limited is the 4th Respondent.

(d) At the instance of the Reliance Infrastructure Limited (the 4th Respondent) the Government of Maharashtra issued a Memorandum dated 7.5.2010

advising the Appellant to supply to Reliance Infrastructure (R-4) 360 MW of power till 30.6.2010 and thereafter, 200 MW of power. The State Government also issued another Memorandum dated 19.5.2010 directing the State Transmission Company to maintain status-quo.

(e) This power was being sought to be scheduled by the Appellant to its Distribution Business through Open Access. Hence, the Appellant approached the State Dispatch Centre for scheduling.

(f) In spite of several requests made by the Appellant to the State Load Despatch Centre (R-2) on various occasions, it refused to schedule the power from the Appellant's Generating Stations on the ground that it had been advised by the Senior Authorities to maintain the status-quo till further instructions from the State Government or the State Commission, were received.

(g) The Appellant had challenged the said decision of the State Load Despatch Centre of its refusal in scheduling of power by filing a Petition in case No.37 of 2010 before the State Commission. The Appellant had also sought for compensation and penalty from the State Load Despatch Centre in the same proceeding.

However, the State Commission by the order dated 29.9.2010 dismissed the said Petition and up-held such refusal of scheduling of Appellant's power by the State Load Despatch Centre.

(h) Aggrieved by this, the Appellant filed an Appeal before this Tribunal in Appeal No.32 of 2010 challenging the order of the State Commission dated 29.9.2010.

(i) In the meantime, the Appellant also filed a Writ Petition for quashing the Memorandum dated 7.5.2010 and 19.5.2010 issued by the State Government.

(j) Ultimately on 18.1.2011, the Bombay High Court quashed both the Memorandums dated 7.5.2010 and 19.5.2010. On the basis of this order, the Appellant again requested the State Load Despatch Centre to carry out scheduling of power with effect from 1.2.2011 as per the schedule set-out by the Appellant in the letter. The State Load Despatch Centre sent a reply on 29.1.2011 informing the Appellant that the Bombay High Court had quashed only the Government Memorandums dated 7.5.2010 and 19.5.2010 but had not quashed the Order dated 29.9.2010 passed by the State Commission. It was further indicated in the letter that it would maintain the status-quo in respect of

scheduling of 200 MW of power to the Maharashtra State Electricity Transmission Company (3rd Respondent) till further directives were received from the State Commission.

(k) Aggrieved by the refusal of the State Load Despatch Centre to schedule power despite the High Court's Order dated 18.1.2011 quashing the Memorandums dated 7.5.2010 and 19.5.2010, the Appellant filed a Petition in Petition No.22 of 2011 before the State Commission for quashing the letter dated 29.1.2011 sent by the State Load Despatch Centre(R2) and for consequential directions to schedule the power as per instructions issued by the Appellant. Besides this, the Appellant also claimed compensation against the State Load Despatch Centre and sought imposition of penalty on State Load Despatch Centre for contravening the provisions of the Act.

(l) In the meantime, the Appeal No.32 of 2011 which was filed by the Appellant before this Tribunal was taken-up and heard.

(m) Ultimately, on 30.5.2010, this Tribunal allowed the said Appeal in Appeal No.32 of 2011 and set-aside the order of the State Commission dated 29.9.2010

holding that the State Load Despatch Centre having full knowledge that the Memorandum issued by the Government was not binding on them, yet they wrongly denied the scheduling of power to the Appellant to regulate the allocation of generation Company of the Appellant.

(n) However, this Tribunal by the judgment dated 30.5.2012 did not incline to grant any compensation to the Appellant since at the time when the Order was passed by the State Commission on 29.9.2010, the Memorandums dated 7.5.2010 and 19.5.2010 were in existence which in fact influenced the decision of the State Load Despatch Centre to deny the scheduling at that stage which may be bona-fide.

(o) Thereafter, the Petition which was filed by the Appellant before the State Commission in Petition No. 22 of 2011 seeking to set-aside the letter dated 29.1.2011 issued by the State Load Despatch Centre and also claiming compensation was taken-up for hearing. Ultimately, on 18.7.2012, the State Commission disposed of the said Petition on the basis of the judgement of Tribunal in Appeal No.32 of 2011, and set-aside the letter dated 29.1.2011 issued by State Load Despatch Centre by holding that it was unjustifiable. However, it declined to grant the

Appellant any compensation for the losses suffered by the Appellant due to the refusal of the State Load Despatch Centre to schedule 200 MW of power from 1.2.2011 to 31.3.2011.

(p) The Appellant, having aggrieved over the portion of the Impugned Order dated 18.7.2012, declining to grant compensation even though it set- aside the letter dated 29.1.2011 issued by the State Load Despatch Centre, has presented this Appeal.

4. The learned Senior Counsel for the Appellant has made the following submissions:

i) The State Load Despatch Centre was not justified in refusing the scheduling of the power to the extent of 200 MW to the Appellant, which was being scheduled to R-Infra pursuant to Government Memorandums dated 7.5.2010 and 19.5.2010 even though the Bombay High Court quashed those Government memorandums by the order dated 18.1.2011.

ii) The State Load Despatch Centre denied Appellant's request for scheduling power on considerations that are totally extraneous to statute namely the State Load Despatch Centre was bound to

follow the State Government's dictates, even if they conflicted with its statutory obligations.

iii) Admittedly, the Government Memorandums dated 7.5.2010 and 19.5.2010 had been quashed by the Bombay High Court through the order dated 18.1.2011. This order had not been challenged. Not having done so, the State Load Despatch Centre can not be allowed to rely upon the Government Memorandums just to justify its refusal to schedule power. This is more so, when in its letter dated 29.1.2011, the State Load Despatch Centre stated in so many words that even when the Government Memorandums had been quashed, the State Commission's order dated 29.9.2010 had not been quashed by the High Court and therefore they would maintain status quo. This reasoning is totally misconceived.

iv) The order of the State Commission dated 29.9.2010 which had upheld the refusal of the scheduling of power by the State Load Despatch Centre earlier during the subsistence of the Government Memorandums was not of any consequence after the Government Memorandum was quashed. Hence, the same could not be relied upon by the State Load Despatch Centre after 18.1.2011, on

which the Government Memorandums were quashed by the High Court.

v) In any event, the State Commission's order dated 29.9.2010 was the subject matter of challenge by the Appellant before this Tribunal in Appeal No.32 of 2011. The letters of State Load Despatch Centre were finally quashed by this Tribunal by its order dated 30.5.2012. In that order the Tribunal has observed that the State Load Despatch Centre was an independent statutory body under the Act and that despite being aware of the non-binding nature of the Government Memorandums, it continued to refuse scheduling Appellant's generation capacity to its distribution business. In these circumstances, the State Load Despatch Centre could not rely upon the State Commission's order dated 29.9.2010 which has already been quashed by the Tribunal. The State Commission also passed the impugned order in the same line.

vi) The State Commission has wrongly concluded that it was mandatory for the Appellant to demonstrate malice in fact or factual mala-fides to hold the State Load Despatch Centre, guilty of the failure to schedule or misfeasance and liable to compensate the Appellant for the losses suffered by it.

vii) To establish misfeasance on the part of the State Load Despatch Centre, it is enough for the Appellant to show that the State Load Despatch Centre is guilty of legal mala-fides by knowingly breaching its statutory duty and with the knowledge that its actions were likely to cause losses to the Appellant. Though this aspect has been established by the Appellant in this case, the State Commission has overlooked this.

5. In order to elaborate these issues, learned Senior Counsel for the Appellant has cited various authorities of the High Court which we shall see later.

6. In reply to the above submissions, the learned Counsel for the State Load Despatch Centre, Respondent-2, made the following submissions in support of the impugned order:-

i) This Appeal preferred by the Appellant is not maintainable. It was the Tata Power Trading Company Ltd., who had availed the Open Access. The said Company was the petitioner before the State Commission. Therefore, the Appellant being the generating company had no cause of action and as such, it cannot be considered to be the aggrieved party in terms of Section 111 of the Act, 2003.

ii) The prayers for penalty and compensation made by the Appellant in the present Appeal are hit by

Section 11 of the Code of Civil Procedure, because, the said prayer had already been rejected by the State Commission in its order dated 3.8.2010 passed in the case No.16 of 2010 which had already attained finality. Thus, the Appellant cannot re-open the claim for compensation.

iii) The State Load Despatch Centre is neither an independent authority nor an independent system operator nor an autonomous body. Admittedly, the State Load Despatch Centre has not been notified by the Government under Section 31(2) of the Act, 2003. Under Section 31(2) of the Act, 2003, the State Government is required to establish or constitute a State Load Despatch Centre and the said establishment has to be notified by the State Government. In the present case, there is no such notification in respect of Maharashtra State Load Despatch Centre. Therefore, the State Load Despatch Centre on the instructions of the senior authority had to wait till further instructions for the same and consequently, the Open Access was deferred by the State Load Despatch Centre.

iv) The Government Memorandum dated 19.5.2010 issued by the Maharashtra was a clear direction to the State Load Despatch Centre to maintain the status

quo in respect of the scheduling of the power till further directions were received from the State Government or State Commission. The State Load Despatch Centre, being institution subordinate to the Government was required to act in accordance with the two Memorandums which were legally binding on it.

v) The findings recorded by this Tribunal in its earlier order in Appeal No.32 of 2011 dated 30.5.2010 to the effect that the State Load Despatch Centre is an autonomous body and as such the Government Memorandums are not binding on them, is totally erroneous.

vi) The said findings have been recorded by this Tribunal without considering the fact that there is no notification by the State Government under Section 31(2) of the Act notifying State Load Despatch Centre as an independent system operator. Thus, when the State Load Despatch Centre is not an autonomous body and it is working under the control of Maharashtra Government, it had to obey and execute the instructions issued by the Government by virtue of two Memorandums dated 7.5.2010 and 19.5.2010. Therefore, the question of compensation or penalty would not arise.

vii) That apart, the findings recorded by this Tribunal in Appeal No.32 of 2011 have not achieved finality as State Load Despatch Centre and Transmission Company have already filed civil Appeal D.No.12471 of 2013 before the Hon'ble Supreme Court of India. Therefore, reliance cannot be placed by the Appellant on the findings rendered by this Tribunal in Appeal No.32 of 2011.

viii) In the present case, the act of State Load Despatch Centre cannot be actuated by malice, misfeasance or mala-fide motive. As such, the Doctrine of Misfeasance cannot be invoked to award compensation to the Appellant. The element of malice or bad faith on the part of the State Load Despatch Centre is clearly missing. Misfeasance necessarily imports intention, knowledge and malice. This is not available in the present case as rightly pointed out by the State Commission in the impugned order. In the light of the Memorandums issued by the State Government, the State Load Despatch Centre had to abide by the directions issued by the Government and therefore, it had to defer its decision regarding scheduling of generating capacity as sought for by the Appellant.

7. To substantiate this plea the learned Counsel for Respondent State Load Despatch Centre also has cited some authorities. We will consider those authorities at later point of time.

8. In the light of the rival contention urged by both the parties the following questions of law may arise for consideration.

(a) Whether State Load Despatch Centre (R-2) was justified in refusing to schedule 200 MW of power generated by the Appellant relying on the Memoranda dated 7.5.2010 and 19.5.2010 (the **"Government Memoranda**") issued by the Government of Maharashtra after the Hon'ble High Court of Bombay had quashed the Government Memoranda by its order dated 18.01.2011 in Writ Petition (L) No.1224 of 2010 filed by the Appellant?

(b) Whether the earlier order passed by the State Commission dated 29.9.2010, which had upheld the refusal of scheduling of power by Respondent No.2 based on the Government Memorandums not having been set aside be relied upon by State Load Despatch Centre(R2) in the present case especially when the High Court by the order dated 18.1.2011 quashed the Government memorandums dated 07.5.2010 and 19.5.2010?

(c) Whether the State Commission was correct in concluding that unless Appellant could demonstrate malice in fact or factual mala fides on the part of State Load Despatch Centre (R2), Appellant was not entitled to any compensation for misfeasance committed by the State Load Despatch Centre(R2)?

9. All these three questions invoke a common issue which is as follows:-

"Whether the Appellant is entitled to the grant of compensation due to the default or misfeasance committed by the State Load Despatch Centre by illegally refusing to schedule power to the Appellant in the facts and circumstances of the case?

10. Before dealing with this issue, it would be better to recall the factual background of this case to understand the core of the issue in the proper perspective. Those detailed facts are summarised as follows:-

i) There are three distribution licensees operating in Mumbai city. They are BEST, R-Infra and TPCTL(TATA). They were procuring power from Tata Power Generation Company. BEST had been procuring power through agreements with Tata Power Generation. However, R-Infra refrained from signing

any PPA with Tata Power Generation for procurement of supply. In the meantime, BEST and Tata Power Distribution approached the State Commission for approval on their power purchase agreement with Tata Power Generation. This was challenged by R-Infra on the ground that it was entitled to majority of the power generated by Tata Power Generation. Consequently, R-Infra prayed to State Commission to issue directions to Tata Power Generation to supply about 760 MW of power to R-Infra. This matter finally went up to the Hon'ble Supreme Court.

ii) The Hon'ble Supreme Court by the judgement dated 6.5.2009 rejected the contention of R-Infra and held that the Generating Companies have freedom to enter into a contract with any party to sell the power generated by it and they cannot be directed to sell the power to a particular party in the absence of any agreement.

iii) In pursuance of this judgement, the Tata Power Generation sent a letter to R-Infra on 25.6.2009 about their decision to discontinue supply of such power to R-Infra which was supplied on ad-hoc with effect from 01.4.2010.

iv) In view of the above developments the Government of Maharashtra issued two Memorandums one on 7.5.2010 and the other on 19.5.2010.

v) The Memorandum dated 7.5.2010 issued by the Government of Maharashtra gave direction to the State Commission in relation to the generation assets of the Appellant. In the same Memorandum, the State Commission advised the Appellant to supply 360 MW power to R-Infra on 30.6.2010 and thereafter 200 MW to R-Infra on 31.3.2011.

vi) After the issuance of the Memorandums, the Appellant addressed various letters dated 13.5.2010, 15.5.2010 and 16.5.2010 requesting the State Load Despatch Centre to schedule 100 MW of power to BEST and 160 MW of power to its Distribution business with effect from 17.5.2010. However, the State Load Despatch Centre through its letters dated 16.5.2010 and 18.5.2010 refused scheduling of the Appellant's generating capacity on the ground that the State Load Despatch Centre had received instructions from the senior authority to await further instructions as the matter had been referred by the State Government to the State Commission.

vii) At that stage, on 19.5.2010, the Appellant approached the Bombay High Court by way of writ petition assailing the Memorandum dated 7.5.2010 issued by the State Government and also prayed to restrain the Government from giving any effect to the said Memorandum.

viii) In the meantime another Memorandum had been issued by the State Government dated 19.5.2010 directing the State Load Despatch Centre to maintain the status-quo regarding the scheduling of the Appellant's power.

ix) The State Load Despatch Centre after receipt of this direction issued a letter to the Appellant dated 20.5.2010 informing that it would maintain status quo regarding the scheduling of power in the light of the above Memorandum.

x) On the same day, the Appellant challenged the letters dated 16.5.2010 and 18.5.2010 issued by the State Load Despatch Centre before the State Commission in case No.16 of 2010. At that stage, the writ petition was taken up for hearing with regard to interim relief on 11.6.2010 before the High Court.

xi) While hearing the interim petition, the Advocate General appearing for the Government clarified to the

Bombay High Court that the Government of Mahararashtra had not passed any directions under Section 11 and 37 of the Act, 2003 and the Government Memorandums was only the suggestion of a pro-tem order between the parties till the directions were carried out by the State Commission. Such a submission of the Advocate General on behalf of the Government of Maharashtra was duly recorded by the High Court and thereby felt no interim order was necessary. This order was passed on 11.6.2010.

xii) In the light of the order of the Bombay High Court on 11.6.2010, the Appellant sent another letter calling upon the State Load Despatch Centre to maintain the schedule with effect from 14.6.2010 for the power contracted by the Appellant. However, the State Load Despatch Centre sent a reply on 12.6.2010 insisting that it would continue to maintain status quo with respect to the scheduling till it receives further instructions from the State Commission or from the Government of Maharashtra. This refusal was in spite of the fact that the Government of Maharashtra clarified before the High Court that it had not issued those Government Memorandums giving directions under Section 11and 37 of Act, 2003. At that stage, the Appellant on 23.6.2010 filed a petition for

maintaining of Writ petition to implead State Load Despatch Centre and the State Commission and also to include additional prayers on account of repeated refusal of the State Load Despatch Centre to schedule the power as requested by the Appellant. The impleading petition was allowed.

xiii) Thereafter, on 26.6.2010, the Appellant made a representation before the State Load Despatch Centre requesting the scheduling of 100 MW generation capacity of the Appellant to Tata Power Distribution for the period from 1.7.2010 to 31.7.2010.

xiv) Rejecting the said request, the State Load Despatch Centre informed the Appellant by recording in the said representation that the application can not be considered at that stage and the same shall be considered only after disposal of the petition pending before the State Commission.

xv) Thereupon, the State Commission by the order dated 3.8.2010 dismissed the case No.16 of 2011 filed by the Appellant before the State Commission challenging the letters of State Load Despatch Centre dated 16.5.2010 and 18.5.2010 for refusing to schedule, in view of the fact that the issue of relief

claimed in the said petition was pending before the High Court.

xvi) When this was reported to the High Court on 9.8.2010, the High Court granted leave to the Appellant to approach the State Commission to challenge all the letters of State Load Despatch Centre 16.5.2010, 18.5.2010, 12.6.2010 and 30.6.2010 by which State Load Despatch Centre refused scheduling of the Appellant.

xvii) The High Court further clarified in the order directing State Commission to entertain the petition to be filed by the Appellant notwithstanding the dismissal of case No.16 of 2010 on the basis of withdrawal.

xviii) In pursuance of the above order of High Court dated 9.8.2010, the Appellant filed case No.37 of 2010 before the State Commission challenging those letters by which the State Load Despatch Centre refused to schedule the power. The State Commission dismissed the case No.37 of 2010 by the order dated 29.9.2010 holding that the refusal to schedule of power by State Load Despatch Centre cannot questioned since the action of SDLC could not be faulted due to the Memorandums issued by the Government.

xix) Aggrieved by this order passed by the State Commission, the Appellant filed another writ petition to challenge the order dated 29.9.2010 passed by the State Commission before the High Court.

xx) However, High Court dismissed the writ petition by granting liberty to the Appellant to file statutory Appeal to challenge the order of the State Commission dated 29.9.2010 before this Tribunal.

xxi) In the meantime, on 18.1.2011, the High Court of Bombay took up the writ petition challenging the Government Memorandum and allowed the writ petition setting aside the same by declaring that those Memorandums are ultra-vires of the Act.

xxii) At this stage, the Appellant filed the Appeal No.32 of 2011 challenging the order passed by the State Commission dated 29.9.2010.

xxiii) Meanwhile, the Appellant in the light of the fact that the Government Memorandums were quashed by the Bombay High Court by the order dated 18.1.2011, sent another letter dated 25.1.2011 to the State Load Despatch Centre requesting them to schedule their generation capacity intimating about the quashing of the Government Memorandums. This request for scheduling was once again refused by the State Load

Despatch Centre on 29.1.2011 on the ground that only those Government Memorandums were quashed by the High Court, but the order passed by the State Commission dated 29.9.2010 had not been quashed by the High Court and therefore, State Load Despatch Centre would maintain the status quo in respect of scheduling 220 MW to R-Infra till further directions are received from the State Commission.

xxiv) Aggrieved over this letter dated 29.1.2011, the Appellant filed a petition in the month of Feb, 2011 before the State Commission in case No.22 of 2011 seeking for quashing the said letter dated 29.1.2011 issued by State Load Despatch Centre and also sought for compensation for the procurement from other sources.

xxv) At this stage, the Tribunal took up the hearing in Appeal No.32 of 2011 which was already filed as against the order dated 29.9.2010 passed by the Ste Commission for final disposal.

xxvi) Ultimately this Tribunal by the judgement dated 30.5.2012 in Appeal No.32 of 2010 allowed the Appeal and set-aside the letters of State Load Despatch Centre dated 16.5.2010, 18.5.2010, 12.6.2010 and 30.62010.

xxvii) In the said judgement, the Tribunal specifically held that there is no legal justification on the part of the State Load Despatch Centre to decide not to schedule power according to the instructions of the Appellant. However, the Tribunal concluded that the act of State Load Despatch Centre in refusing to schedule in favour of the Appellant was not actuated by the malice and therefore the Appellant is not entitled for compensation as prayed for by the Appellant.

xxviii) At that stage, the State Commission heard the parties in petition No.22 of 2011 and passed the order on 18.7.2012 by setting aside the letter of State Load Despatch Centre dated 29.1.2011 but refused to grant the Appellant any compensation for the loss suffered by the Appellant due to the default of the State Load Despatch Centre to schedule power.

xxix) On being aggrieved over the portion of the order with regard to the refusal of the grant of compensation the Appellant has filed this Appeal No.175 of 2012 before this Tribunal.

11. In the light of above factual background we shall now deal with the issues raised in this Appeal. While dealing with the issues, it will become necessary to quote the reasonings

given in the impugned order refusing to give compensation even after having held that the action of the State Load Despatch Centre to refuse scheduling of power was totally unfair and erroneous.

12. Let us refer to the findings contained in the impugned order:-

> "*20. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the main basis on which the Respondent No.1 has tried to justify its action of refusing to schedule 200 MW of power w.e.f. 1 February 2011 is that it was to comply with the directions of the Government of Maharashtra vide Memorandum dated 19 May,2010 to maintain status quo till further directives are received from this Commission or till further orders/directions in this behalf are issued by GOM. Respondent No;1 has also tried to justify its action on the ground that although the Hon'ble Bombay high Court had vide Judgement dated 18 January,2011 set aside the GOM memoranda dated 7 May,2010 and 19 May,2010, the Hon'ble High Court has not set aside this Commission's Order dated 29 September,2010. According to the Respondent No.1 there is no change in this circumstances whereby this Commission's Order dated 29 September, 2010 requires to be reviewed. During the proceedings, the Respondent No.1 has stated that the Petitioner has by filing an interim application before the Hon'ble ATE in Appeal No.32 of 2011 raised the same issues as have been raised before this Commission. The Commission is of the view that although the periods in question and the quantum of power for scheduling involved in the present petition are different from the ones underlying Appeal No.32 of 2011, the legal*

issues are similar. The Hon'ble ATE delivered Judgement dated 30 May, 2010 in Appal No.32 of 2011 setting aside this Commission's Order dated 29 September,2010, Hence, this Commission has taken some time to dispose of this present Petition.

21. The Hon'ble ATE has held that MSLDC (Respondent No.1 herein) could not have acted on Government instructions contained in the aforementioned Memoranda and refuse to schedule power as requested by TPC because the Hon'ble Bombay High Court in Writ Petition of 71 of 2011 held in its Judgment that the GOM swore an affidavit on 11 June,2010 to the effect that the Government did not exercise its power under Section 11 or Section 37 of the EA 2003 and that the aforementioned Memoranda are merely advisory in nature. The learned Advocate General of Maharashtra made a submission before the Hon'ble Bombay High Court that the Memorandum was only a request to this Commission and not a statutory directive, and it was recorded in the Hon'ble High Court's orders dated 11 June,2010 and 16 June 2010. The Hon'ble ATE has also held that after the aforesaid developments MSLDC could not have been said to be in a state of flux.

22. In view of the above, the Commission holds that the action of Respondent No.1 to refuse scheduling of power undoubtedly needs to be deprecated. The action of Respondent No.1 can only restrict the scheduling if there are technical constraints or other reasons contemplated in the statute but should not have refused to schedule power by mechanically referring to the Commission's order dated 29 September,2010. The Hon'ble ATE has held in its aforesaid Judgment that MSLDC is undoubtedly a statutory body designed to ensure integrated operation of power system and it acts in terms of Section 33 of the EA 2003. It was not the case of

MSLDC that there was network constraint or congestion and lack of required metering infrastructure. The grounds of refusal must be within the parameters of the law and any action which is not within the domain of the Authority would be without jurisdiction. The Commission agrees with the said view and reiterates the same.

23. Hence, the action of Respondent in refusing the scheduling of 200 MW power for the petitioner cannot be sustained. Accordingly, letter dated 29 January, 2011 issued by the Respondent No.1 is hereby set aside. The question of compensation and damages on account of unlawful action on part of MSLDC also arose in Appeal No.32 of 2011. The Hon'ble ATE held that such a claim was a far fetched one. As the Respondent No.1is a statutory body, an award of damage can only be made if it can be said that the actions are actuated by malice, misfeasance, malafide motive and negligent discharge of duties. The Commission is not able to attribute these conducts to Respondent No.1 or Respondent No.2. These can not be attributed without proper evidence and nothing of the sort has been placed in proof against Respondents. Hence, the Commission cannot accede to the prayer claiming compensation from Respondent No.1 and/or Respondent No.2".

13. The gist of the discussion and finding by the State Commission in the impugned order is extracted which is as follows:-

i) The main basis on which State Load Despatch Centre tried to justify its action for refusing to schedule the power is that it was to obey the directions of the Government of Marharashtra to maintain the status

quo till further directions were received. It is also contended by the State Load Despatch Centre that although Bombay High Court set aside the Government Memorandums dated 7.5.2010 and 19.5.2010 through its order dated 18.1.2011 the High Court has not set aside the State Commission's earlier order dated 29.9.2010 and therefore State Load Despatch Centre is not bound to schedule the power as per the instructions of the Appellant. This contention of the State Load Despatch Centre is totally misconceived.

ii) The Tribunal in Appeal No.32 of 2011 in the order dated 30.5.2012 set aside the State Commission's order dated 29.9.2010. In that order, the Tribunal held that the State Load Despatch Centre could not act on Government instructions contained in the Memorandums and could not refuse to schedule the power as requested by the Tata Power Company because the Bombay High Court recorded the statement of Advocate General that the Memorandums were not in the nature of directions under Section 11 and 37 of the Act, 2003 and they are merely advisory in nature. In the light of this representation by the Government through Advocate General, the Tribunal held that the State Load

Despatch Centre could not act upon those Memorandums. The State Commission agrees with the said findings of the Tribunal and reiterates the same by holding that action of the State Load Despatch Centre to refuse scheduling of power is totally erroneous.

iii) Consequently, the action of State Load Despatch Centre to refuse scheduling of power for the Tata Power Company can not be sustained. Accordingly, the letter dated 29.1.2011 issued by the State Load Despatch Centre refusing to schedule power is set aside.

iv) However, the question of compensation can not arise in this case on account of unlawful action on the part of the State Load Despatch Centre as held by the Tribunal in Appeal No.32 of 2011. In the decision, the Tribunal held that State Load Despatch Centre being the statutory body, cannot be directed to pay compensation unless actions of the State statutory body are actuated by malice, misfeasance, mala-fide motive and negligence in discharge of duties. The State Commission is not able to attribute this conduct to State Load Despatch Centre especially when no proper evidence has been placed by the Tata Power Company before the State Commission.

v) The perusal of the impugned order would show that the above conclusion was arrived at by the State Commission quashing the letter of State Load Despatch Centre and declining the grant of compensation was purely on the basis of the judgement given by this Tribunal in Appeal No.32 of 2011 on 30.5.2012.

14. In this context, we have to consider the question as to whether the finding with reference to the compensation rendered by this Tribunal, would apply to the present case in the light of the present facts and circumstances of the case.

15. Before considering the question, it would be appropriate to deal with the preliminary objections which have been raised by the learned Counsel for the State Load Despatch Centre with reference to the maintainability of the Appeal as well as the status of the State Load Despatch Centre.

16. The learned Counsel for the State Load Despatch Centre (R2) has contended that the Appeal is not maintainable in view of the fact that the petition filed before the State Commission by the Tata Power Generating Company who has actually suffered no loss due to the action of State Load Despatch Centre but the loss, if any, has been suffered by Tata Power Distribution Company, which it was

not a party before the State Commission and therefore the Appeal is not maintainable. This contention urged by the learned Counsel for the Respondent is totally misplaced. Tata Power Company is not merely a generating company but it is a company engaged in the business of generation, transmission and distribution of electricity. Tata Power Distribution Company is a division of Tata Power Company (TPCL), involved in distribution of electricity in the city of Mumbai. As such, it is the licensee of the State Commission under 2003 Act. Thus, loss to Distribution business is a loss to Tata Power Company Limited.

17. The main contention of the State Load Despatch Centre in this present Appeal is that it is not an independent autonomous body created under the Act especially when Government of Maharashtra has not issued any notification for its creation and it is only an approved Maharashtra State Transmission Company which functions under the control of State Government and therefore it had to obey the direction of the Government. The very same contention has been urged by the State Load Despatch Centre even in the earlier Appeal before the Tribunal. On consideration of this contention, the Tribunal in Appeal No.32 of 2011 has rejected this contention and categorically held that State Load Despatch Centre is an independent autonomous body.

18. It is quite unfortunate on the part of the learned Counsel appearing for State Load Despatch Centre to address the argument before this Tribunal to the effect that this Tribunal committed a wrong in making such an observation in Appeal No.32 of 2011. This contention was urged bythe learned Counsel for the SLDC without understanding the basis legal jurisprudence. So long as the ratio decided by the Tribunal in Appeal No.32 of 2011 is intact which has not been disturbed by the Hon'ble Supreme Court, the law on the ratio has to be followed, which is a settled law. Despite this, the learned Counsel for the Respondent (State Load Despatch Centre) has the audacity to raise the same point before the Tribunal even though this point had already been answered by this Tribunal in Appeal No.32 of 2011 as against the State Load Despatch Centre further contending that the said conclusion by the Tribunal in the earlier Appeal was erroneous. This conduct of the learned Counsel for the Appellant criticising the judgement of this Tribunal earlier rendered, before this Tribunal itself is highly unwarranted.

19. Let us now quote the relevant portion of judgment of this Tribunal. The same is as follows:-

> *"60. The very thesis of the MSLDC which has been subscribed to by the Commission that the MSLDC is subordinate to Government or that it is an organ of the Government and it is obliged to act as a subordinate*

authority is unknown to the law. The scheme of the Act does nowhere provide that the Legislature intended that the SLDC or RLDC would be acting not independently, not as an autonomous statutory body but as being a subordinate department of the Government. ... The stand of the MSLDC is stultifying in this that if it was the consistent stand of the MSLDC that it was a subordinate organ of the Government and is designed to serve the Government, then it does not lie in their mouth to say even on 12.6.2010 after the Government has made it clear before the High Court that the two memoranda were not issued under section 11 or 37 of the Act that it would still await further order of the Government, and again say in this Appeal that the Government stand made through the learned Advocate General before the High Court does not bind the MSLDC and all their letters in question even after such stand of the Government was made known to the MSLDC were issued under section 33 of the Act which as we have seen above does not authorize the MSLDC to do so. This speaks in volume the conduct of the statutory body and it is not difficult to decipher that all its actions after the High Court's first order clearly indicating the position of the Government were unlawful."

20. Despite this ratio decided by the Tribunal, the learned Counsel for LSDC has ventured to reiterate his original stand to the effect that it is not an autonomous body in the absence of notification under Section 31 of the Act.

21. Let us now refer to Section 31 of the Act, which is reproduced below:-

> ***"31. Constitution of State Load Despatch Centres.—***
>
> *(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.*
>
> *(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:*
>
> *Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:*
>
> *Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.*

22. The perusal of Section 31 would reveal that that the State Government would establish State Load Despatch Centre to be operated by a Government Company or any other authority or corporation. Establishment of SLDC would not require any government notification. It is the Government Company or 'any other authority' or 'corporation', which would operate the SLDC is required to be established under the State Act and notified by the State Government. Section further provides that till such Government Company etc are notified, SLDC established under sub-section 1 of Section 31 would be operated by State Transmission Utility. Section 39 of the Act requires State Government to establish and notify a State Transmission Utility. Maharashtra Government has already notified

MSETCL as STU. Thus, SLDC operated by the State Transmission Utility is not required to be notified separately.

23. The argument of the SLDC that in the absence of notification under Section 31(2) of the Act, it is a subordinate body to the Government of Maharashtra and is bound to follow its orders is highly misplaced. No doubt, at present, SLDC is operated by the Transmission Utility duly notified by the State Government. Since the Transmission Company has been notified as a State Transmission Utility, it is expected to act independently in accordance with the provisions of the Act. Since the Transmission Company is also operating SLDC, it is expected to perform functions of the SLDC under Section 33 of the Act independently. Therefore, it can not be construed to be independent but subordinate to the State Government. Therefore, the argument advanced by the learned Counsel for SLDC is totally misconceived and the conduct of the learned Counsel for the SLDC also in criticising our earlier order is highly condemnable and despicable.

24. One more contention of the SLDC (R2) urged is regarding the so-called concession given by the learned Advocate General before the High Court. According to the learned Counsel for SLDC, the Memorandums dated 7.5.2010 and 19.5.2010 read together would make it clear that the State

Government in exercise of its powers under Section 37 of the Act, in fact gave directions and as such, the representation made by the Advocate General as a Counsel for the Government was only a concession of a Counsel and it can not over-ride mandatory statutory provision and as such the concession given by the Counsel to the Court would not change the status of memorandums issued by the Government and therefore said concession have got to be ignored. This submission which is very unfortunate deserves outright rejection for two reasons- firstly, the Advocate General appearing for the State can not be considered to be mere Counsel to the party. Advocate General is a Constitutional body established under Article 165 of the Constitution. The Advocate General is appointed by the Governor of the State under Article 165 of the Constitution. The Advocate General is a person who can participate in the Cabinet proceedings as well as in the Assembly proceedings as he has got a special status. He has got a duty to advise the State Government upon legal matters. Advocate General represents the entire State Government in the Courts and his stature is higher than any Counsel and his statement in the Court could not be treated as mere concession, in fact, accepting the interpretation made by the Advocate General that it was not direction either under Section 11 of the Act and 37 of the Act, the High Court recorded the said

statement in its order. Due to this statement, the High Court felt it unnecessary for giving interim relief as sought for in the writ petition. Secondly, the very same argument had been advanced by the SLDC in the earlier Appeal No.32 of 2011 which had been rejected by this Tribunal. The relevant portion of the finding of the Tribunal in Appeal No.32 of 2011 is quoted as below:-

> *"But, before this Tribunal the MSLDC maintained a stand that it was an organ of the Government with no notification having been issued by the Government to be an independent statutory authority. Together with this the MSLDC put forth in writing that the submission of the learned Advocate General was a mere concession of what has not been authorized by the law. It further maintained before this Tribunal that the two Government Memoranda were in fact directions under section 37 of the Act.*
>
> *Again, the position maintained by the MSLDC in this Appeal that the statement of the learned Advocate General who represented the Government was a mere concession and does not bind the MSLDC is thoroughly unacceptable.*
>
> *This is begging the question, for on 11.6.2010, it was made clear to the MSLDC that the Government made its position clear that despite the languages employed therein the two Memoranda of the Government were not issued under section 11 or 37 of the Act. Nor was it the case of the Government at any point of time that they were to be treated as directions under section 108 of the Act. Then, in such circumstances, after 11.6.2010, there was no justification on the part of the MSLDC to say that it should treat the two Memoranda as directions and still go on refusing scheduling.*

In the face of the submission of the Learned Advocate General of Govt of Maharashtra, the High Court did not upon recording of such submission think it necessary to give any interim order on the application of the appellant. If the MSLDC was of the opinion that it was not an independent organ but was a department of the Govt. then it does not lie in the mouth of the MSLDC to say that what the learned Advocate General had submitted before the Bombay High Court does not bind the MSLDC. The MSLDC cannot blow hot and cold at one and the same time. It cannot approbate and reprobate.

As already stated, the Govt. of Maharashtra in affidavit before the Bombay High Court on 11.6.2010 clarified that the Memorandum dated 7.5.2010 was not any statutory directive but constituted only a request to the Commission. The High Court recorded in the order dated 11.6.2010 that the Govt. did not exercise any power under Section 11 or Section 37 of the Act.

It cannot be said that the learned Advocate General made such submission without being instructed by the Govt. Therefore, by no stretch of imagination, it can be said that the submission of the Learned Advocate General was simply a concession against the law and that what the MSLDC or the State Commission would say would be the law for all time to come.

The moment the Govt. took the stand before the High Court through the Learned Advocate General that the two Govt. memoranda were simply request or suggestions the very thesis that public interest was of so paramount in nature that deferment of scheduling was a necessity lost its force.

The MSLDC or the Commission has not been briefed by the Govt. of Maharashtra to plead in this appeal that the two Govt. Memoranda contrary to the submission of the Learned Advocate General were

orders/directions upon the Commission or the MSLDC. The Govt. of Maharashtra is also a party respondent in this Appeal but it did not enter appearance to plead contrary to the submission of the learned Advocate General in the Bombay High Court. ...”

25. The crux of the findings as rendered to above is as follows:-

i) The SLDC maintained a stand that it was a subordinate authority of the Government and the submission of the Advocate General that it was not a direction, but it is only a suggestion was merely a concession and the same has been authorised by the law. Therefore, the concession given by the Advocate General as a Counsel would not bind the SLDC. This stand taken by the SLDC is thoroughly against law and thoroughly unacceptable.

ii) When the Government through the Advocate General made its position clear that it was not direction and when the stand of the Government was recorded by the High Court in the order passed on 11.6.2010 there was no justification on the part of the SLDC to say that the said directions and the Government Memorandums should be treated as directions and as such they would go on refusing scheduling.

iii) In the light of the submission of the Advocate General appearing on behalf of the State Government that too through affidavit filed by the Government, the High Court did not think it fit to give any interim order on the petition of the Appellant. The very same thing was recorded in its order dated 11.6.2010 to the effect that the Government did not exercise its power under Section 11 and 37 of the Act. Therefore, it can not be said that the Advocate General made such submission without being instructed by the Government nor contended that the submission of the Advocate General was simply a concession against the law.

iv) Once the Government took a stand before the High Court that the Government's two memorandums were simply suggestions, the deferment of scheduling the power was a necessity, lost its force.

v) Even before this Tribunal SLDC which claims itself as subordinate authority to the Government has not been supported by the State Government in this Appeal even though the State Government is party Respondent in this Appeal.

26. The above findings are very clear to the effect that the plea of the SLDC that it is subordinate authority of the

Government and the Advocate General submission before the High Court was only a concession has been out-rightly rejected. Despite such findings in the earlier Appeal, the SLDC (R2) has repeated the same plea before this Tribunal. This finding is binding on SLDC so long as it is not disturbed by the Appellant Forum. This settled law has not been properly understood not only by the SLDC but also by learned Counsel appearing for the SLDC.

27. Let us now consider the each of the grounds urged by the Appellant in this present Appeal.

28. First submission made by the Appellant is as follows:-

> "SLDC(R2) was not justified in refusing scheduling of power to the extent of 200 MW to the Appellant, which was being scheduled to R-Infra pursuant to the Government memorandums dated 7.5.2010 and 19.5.2010 which were ultimately quashed by the Bombay High Court through order dated 18.1.2011."

29. Let us now discuss this issue. The State Load Despatch Centre (R2) is constituted under Section 31(1) of the Act as an independent body which was responsibly for carrying out optimal scheduling and despatch of electricity within the State. SLDC while despatching its statutory function is covered by the provisions under Section 33(1) of the Act. Under Section 33(1) of the Act, SLDC has to decide the

request for scheduling made by the Appellant only in accordance with the parameters prescribed under the Act. Thus, SLDC is required to take into account only issues relating to transmission and the transmission network when deciding any request for scheduling of power.

30. The consistent stand taken by the SLDC before this Tribunal that since SLDC is the part of the State Transmission Company which in turn is an arm of Government of Maharashtra, it was bound to obey the directions given by the State Government in the memorandums dated 7.5.2010 and 19.5.2010. This stand taken by the SLDC even after those Memorandums had been quashed by the High Court orders dated 18.1.2011. Not only that the SLDC continued to take the very same stand even after this Tribunal quashed the refusal letter issued by SLDC and held in Appeal No.32 of 2011 dated 30.5.2011 that SLDC is an independent autonomous body.

31. It is therefore clear that the SLDC denied the Appellant's request for scheduling of power on considerations that are totally extraneous to the statute.

32. In fact, during the pendency of writ petition against the Government filed by the Appellant in WP No.1224 of 2011, the Appellant impleaded SLDC as a party Respondent in the writ petition. Therefore, the finding rendered by the

High Court in the order dated 18.1.2011 is not only binding on the Government but also on the SLDC especially when it claimed that it is part of the organ of the Government. If SLDC was aggrieved by the High Court order dated 18.1.2011 quashing those Government Memorandums on which SLDC placed reliance, SLDC could have challenged the said order of the High Court before the Hon'ble Supreme Court of India. That has not been done admittedly. Having not done so, SLDC cannot be now allowed to rely upon the Government Memorandums to justify its refusal to schedule power. This is more so, when its letter dated 29.1.2011 stated that even if the Government Memorandums had been quashed by the High Court, the State Commission's order dated 29.9.2010 was still subsisting as the Appellant's earlier Appeal No.32 of 2011 had not been decided at that stage. This stand is quite contrary to the earlier stand taken with regard to the validity of the memorandums issued on 7.5.2010 and 19.5.2010.

33. From this, it is so evident that the State Commission in the impugned order has not taken into consideration about nature of the order of the High Court quashing the Government Memorandums to answer the question whether SLDC was justified in refusing scheduling of power

on the strength of the said Memorandums. So, this point is answered accordingly in favour of the Appellant.

34. The second submission made by the Appellant is as follows:-

> "The order of the State Commission dated 29.9.2010 (earlier order) which had upheld refusal of scheduling of power by SLDC during the subsistence of the Government Memorandums was not of any consequence after the Government Memorandum were quashed by the High Court and therefore, the said order dated 29.9.2010 could not be relied upon by the SLDC after 18.1.2011 i.e. the date of order of the High Court. SLDC, after the Government Memorandums have been quashed by the High Court was approached by the Appellant for scheduling of power. Even then, SLDC again refused to schedule the power through its letter dated 29.1.2011 stating that even though the Government Memorandums have been quashed by the High Court, the earlier order passed by the State Commission in case No.37 of 2010 dated 29.9.2010 had not been quashed at the relevant time. This is clearly unjustified justification for the reasons mentioned in the Appeal".

35. The earlier order passed by the State Commission dated 29.9.2010 relates to the proceedings in case No.37 of 2010 filed by the Appellant before the State Commission. In this proceeding, the Appellant challenged the letters dated 16.5.2010, 18.5.2010, 12.6.2010 and 30.6.2010 by which SLDC refused to schedule power. In those letters, SLDC refused to schedule power at Appellant's request at the time when the Memorandums were subsisting and had not been quashed by the Bombay Hight Court. On that reason the State Commission in its earlier order dated 29.9.2010 only held that although SLDC refused to schedule power was contrary to the provisions of the Act, SLDC could not be faulted for refusing to schedule power in view of the "state of flux created by the Government Memorandums dated 7.5.2010 and 19.5.2010. So, this justification as referred to in the order dated 29.9.2010 would not apply to the present proceedings because these proceedings would relate to the refusal letter dated 29.1.2011 after the Government memorandums have been quashed by the High Court. In short, the SLDC's justification in its letter dated 29.1.2011 that even though the Government Memorandums have been quashed, the earlier order passed by the State Commission dated 29.9.2010 had not been quashed would amount to taking the stand again that it was bound by the directions given in the Government

Memorandums even though they had been quashed by the order dated 18.1.2011.

36. In any event, the earlier order passed by the State Commission dated 29.9.2010 was a subject matter of the challenge by the Appellant before this Tribunal in Appeal No.32 of 2011. In that Appeal, the letters of refusal by SLDC were finally quashed by this Tribunal in its judgment dated 30.5.2012. While quashing those letters of refusal this Tribunal has given a categorical finding that the SLDC was an independent statutory authority under the Act and that despite being aware of the non-binding nature of the Government Memorandums, the SLDC continued to refuse scheduling of power to the Appellant. Even though the Tribunal did not incline to award any damages in view of the fact that at the relevant point of time, the Government Memorandums have not been quashed. The Tribunal specifically held that subsequent to quashing of the Government memorandums on 18.1.2011, the SLDC would not claim that it was bound by the directions of the Government and on that ground it could not continue to refuse scheduling of power. The relevant portions of the judgment in Appeal No.32 of 2011 passed by this Tribunal dated 30.5.2012 are as follows:-

> ***"Neither of the two sections referred to above confers any power either upon the SLDC or the***

State Commissionor the Government to negate scheduling power at the request of a generating company for distribution through open access. Nor these provisions restrict and control the ambit and scope of section 42. Scheduling through open access cannot be said to be dehors the public interest."

" 60. ***The very thesis of the MSLDC which has been subscribed to by the State Commissionthat the MSLDC is subordinate to Government or that it is an organ of the Government and it is obliged to act as a subordinate authority is unknown to the law.***

" …. Then, in such circumstances, after 11.6.2010, there was no justification on the part of the MSLDC to say that it should treat the two Memoranda as directions and still go on refusing scheduling. ***The conduct subsequent to the High Court's Order dated 18.1.2011 cannot, however, be kept out of context, and the State Commissionwill deal with petition, if filed ,subsequent to the High Court's final order dated 18.1.2011 according to the law****."*

"… ***The MSLDC, it cannot be questioned, is an independent statutory authority constituted under Section 31 of the Act and is responsible for carrying out optimal scheduling and despatch of electricity within the State.***

The decision of the MSLDC to defer scheduling the appellant's generation capacity allegedly in the public interest is clearly contrary to the provision of Section 33 of the Act. It is important to remember that the State Commissionin the impugned order has made it clear that the letters

issued by the MSLDC were beyond the scope and ambit of Section 32 and Section 33 of the Act."

" 64. It is not that the MSLDC was unaware of all these legal provisions. In fact, it allowed open access to the appellant in the matter of scheduling the appellant's generation capacity in favour of TPC-D. ***Therefore, the arguments advanced to the effect that MSLDC is a subordinate organ of the Govt. with no independence is not acceptable****. …"*

On close reading of the Counter-Affidavit of the MSLDC, it would appear that it is taking contradictory stand in the sense that once it says that it acted at the behest of the Govt. orders as it is subordinate to the Govt. and at the same time, it submits that all its actions including the four letters in question were in exercise of power under Section 33 of the Act. Section 33 does not have any connection with the deferring of Scheduling of generation capacity of the appellant and the State Commissionobserved that the letters issued by the MSLDC were not under the ambit of Section 32 or Section 33 of the Act. When on 11.6.2010, the appellant communicated to MSLDC about the High Court's order wherein the submission of the learned Advocate was recorded, there was no legal justification on the part the MSLDC to say that it would still continue to maintain status quo till it received further instruction, either from the State Commissionor from the Government*.***

The MSLDC is undoubtedly a statutory body designed to ensure integrated operation of power system and it acts in terms of Section 33 of the Act. It was not the case of the MSLDC that there was network constraint or congestion and lack of required metering infrastructure. The grounds of refusal must be within the parameters of the law and any action which is not within the domain of the authority would be without jurisdiction. The Act does not contemplate that in the matter of scheduling power any statutory authority other than the transmission utility can interfere with the jurisdiction and authority of that authority which is entrusted under the law with the task of scheduling of power.

The MSLDC had full knowledge that the Government memorandum were not binding on them but still it went on refusing to schedule generation of appellant's power. It has been rightly submitted that the two Govt. memoranda were in violation of the regulatory reforms introduced by the Hon'ble Supreme Court in the decision in Tata Power Company Ltd. Vs. M.E.R.C. & Ors.. Ultimately, the two Govt. memoranda were by order dated 18.1.2011 declared ultra vires. The MSLDC contrary to the Spirit of Law and the decision of the Hon'ble Supreme Court attempted to regulate in the guise of public interest the allocation of the generation capacity of the appellant by directing it to supply its capacity to a particular licensee. The Govt. closed the issue by

saying before the High Court that the two Memoranda were not directions but the MSLDC was so deliberate in refusing to schedule the generation capacity of the appellant that it deliberately chose not to read the writing of the wall. Thus, unreasonableness which is repugnant to the rule of law was manifest in the conduct of the MSLDC. What is more shocking is that the Hon'ble High Court by order date d 18.1.2011 quashed the two Govt. Memoranda to be ultra vires but still the MSLDC by the letter dated 29.1.2011 continued to refuse scheduling the generation capacity of the appellant. This letter has been produced before this Tribunal and there is no valid answer to the issuance of the letter*."***

… *An act does not make a person guilty unless mind is guilty. Malafide conduct, malice and misfeasance arise out of guilty mind. In the circumstances, the prayer for compensation is difficult to accept.* ***While saying so, we have no manner of doubt that after the High Court quashed the two Memoranda, there was hardly any scope on the part of the MSLDC to defer scheduling appellant's Generation Capacity in favour of the TPC-D****".*

37. The above findings would make it clear that the Tribunal has decided 3 aspects – 1) the refusal made by the SLDC to schedule power at the request of the Appellant was not in accordance with the law especially when the Government Memorandums which were mere suggestions were not binding on the SLDC, which is an independent

body and therefore the refusal is not in accordance with law. 2) Till the date on which the Government Memorandum had been quashed by the High Court, the refusal even though the same is not in accordance with law can not be said to be mala-fide in view of the fact that during that period the Government memorandums were in subsistence. 3) However, SLDC can not refuse to schedule power after the order passed by the High Court quashing those Government memorandums. Hence, there can not be any scope on the part of SLDC to defer scheduling of power after the said date after the High Court of Bombay quashed the Government memorandums by the order dated 18.1.2011

38. In this context, it is submitted by the Appellant that the SLDC's action to rely upon the State Commission's order dated 29.9.2010 even after the High Court order quashing the Government memorandums dated 18.1.2011 is nothing but a colourable exercise of power with extraneous motive to refuse to schedule power thereby continuing to implement the directions contained in the Government memorandums. This submission has got some force.

39. That apart, the stand of the SLDC in its letter dated 29.1.2011 that it would maintain the status quo with regard to scheduling of 200 MW power to Appellant's Distribution division due to the subsistence of State Commission's

order dated 29.9.2010 even after the High Court's order can not be considered to be a genuine refusal. On the other hand, it is clear that the SLDC only wanted to implement the Government directions contained in the Government Memorandums that it should maintain the status quo.

40. To put in a nut-shell, the present dispute deals with the period subsequent to the High Court's order quashing of the Government memorandums. Therefore, the Government Memorandums can no longer be relied upon by the SLDC to justify its non-scheduling of Appellant's power. In all its pleadings before this Tribunal, the SLDC in order to justify its non-scheduling, continued to rely upon the Government memorandums even though there are nonest in the eye of law after the order of High Court dated 18.1.2011.

41. As indicated above, SLDC was impleaded as one of the party Respondents in the Writ Petition. Even then, the order dated 18.1.2011 passed by the High Court had not been challenged by the SLDC and as such it has attained finality.

42. In fact, SLDC has not provided any valid justification for issuing its letter dated 29.2.2011 in which it sought to rely upon the order of the State Commission dated 29.9.2010

which in turn, proceeded solely on the basis that the Government Memorandums were in existence at the relevant time. Therefore, it has to be construed that SLDC's reliance on the State Commission's order dated 29.9.2010 was just a ploy to divert the attention from the real reason. As a mater of fact, it has to be observed that SLDC was fully aware that 1) while writing refusal letter dated 29.1.2011 the Government memorandums had no existence in the eye of law, after the Bombay High Court quashed them on 18.1.2011; 2) SLDC was doing so in violation of the statutory obligations as per the State Commission's order dated 29.9.2010. Accordingly, this issue is also decided as against the SLDC.

43. The only remaining issue before this Tribunal is relating to the claim of compensation for the loss suffered by the Appellant. On this point the learned Counsel for the Appellant has made the following submissions:

> "The State Commission has gone wrong in concluding that it was necessary for the Appellant to demonstrate malice in fact or factual mala-fides to hold SLDC (R2) guilty of misfeasance and liable to compensate Appellant for the losses suffered by it. However, to establish misfeasance on the part of the SLDC, it is enough for the Appellant to show that SLDC is guilty of legal mala-fides by knowingly breaching its

statutory duty and with the knowledge that its actions were likely to cause losses to the Appellant. This aspect has been established which the State Commission omitted to consider in the impugned order"

44. On the other hand, it was contented by the SLDC in justification of the impugned order that in the present case, SLDC can not be said to have been actuated by malice, misfeasance or mala-fide motive and as such the Doctrine of Misfeasance, cannot be invoked to award damages to the Appellant since the element of malice or bad faith on the part of SLDC is clearly missing as correctly pointed by the State Commission in the impugned order.

45. Before dealing with the present facts of the case in order to find out whether the Appellant is entitled to the compensation from SLDC or not , it would be worthwhile to deal with the legal question as to when a person is entitled to claim compensation from the other party. On this point, both the parties have cited various decisions. Those decisions are as follows. Let us first see the authorities cited by the Appellant:-

i) 1999(6) SCC 667 in Common Cause, A Registered Society Vs. Union of India.

ii) 1994(1) SCC 243 in Lucknow Development Authority Vs. M.K. Gupta

iii) 1973 (1) SCC 788 in Lala Bishambar Nath and Ors. Vs. The Agra Nagar Mahapalika, Agra and Anr.,

iv) 2009 (13) SCC 758 in Swaran singh Chand Vs. Punjab State electricity Board & Anr.

46. Let us look into these cases one by one:

"In Case No.1999(6) SCC 667 in Common Cause, A Registered Society Vs. Union of India, the Hon'ble Supreme Court has held that the tort of "misfeasance in public office" is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public offer and the purpose of the tort was to provide compensation to those who suffered loss as a result of improper abuse of power. In this judgement it has further been held that so far as the malice is concerned, while actual malice, if proved, would render Respondent's action ultra vires and tortious and it would not be necessary to establish actual malice in every claim for misfeasance in public office. This judgement was rendered by Hon'ble Supreme Court on the basis of the various English cases. The relevant extract of the judgement is as follows:-

(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act.

98. So far as malice is concerned, while actual malice, if proved, would render the defendant's action bom ultra vires and tortious, it would not be necessary to establish actual malice in every claim for misfeasance in public office. In Bourgoin SA v. Ministry of Agriculture, Fisheries and Food (1985) 3 All ER 585 to which a reference has already been made above, the plaintiffs were French turkey farmers who had been banned by the Ministry from exporting turkeys to England on the ground that they would spread disease. The Ministry, however, subsequently conceded that the true ground was to protect British turkey farmers and that they had committed breach of Article 30 of the EEC Treaty which prohibited unjustifiable import restrictions. The defendants denied their liability for misfeasance claiming that they were not actuated by any intent to injure the plaintiff but by a need to protect British interest. It was held by Mann, J., which was upheld by the Court of Appeal, that proof

> *of actual malice, ill-will or specific intent to injure is not essential to the tort. It was enough if the plaintiff established that the defendant acted unlawfully in a manner foreseeable injurious to the plaintiff. In another decision in Bennett v. Commr. of Police of the Metropolis (1995)2 All ER 1, which was considered in Three Rivers's case 1996 (3) All ER 558 (supra), it was held that the tort of misfeasance in public office required express intent to injure.*"

47. The proposition which would emerge from the judgement in Common Cause is that to maintain an action for misfeasance in public office at common law, the party should establish the following ingredients of the tort for claiming compensation:-

i) It must be established that the defendant was a public officer or public entity and that the plaintiff's loss was caused by the wrongful act;

ii) It must be established that the defendant intended to injure the plaintiff or the defendant had the knowledge that he had no power to do what he did and due to the said act, the plaintiff would probably suffer loss or damage.

iii) The plaintiff has suffered loss as a result of the action of the defendant.

48. In Case No. 1994(1) SCC 243 in Lucknow Development Authority Vs. M.K. Gupta, the relevant observations made in the judgement are as follows:-

> "*8. … **The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English courts that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees**. In State of Gujarat v. Memon Mahomed Haji Hasam, AIR (1961) SC 1885 the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's, 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it to return it in same condition in which it was seized' and also because the government was, 'bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to bonafide action of the authorities if it was contrary to law in Lala Bishambar Nath v. The Agra Nagar Mahapalika, Agra, : [1973]3SCR777 . It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bonafide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The first Law State Commissionconstituted after coming into*

force of the Constitution on liability of the State in Tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State.

…

49. In the above case, the Hon'ble Supreme Court has held that the officers of Lucknow Development Authority were not immuned from tortuous liability. It also proceeded to hold that the National Consumer Dispute Redressal State Commission was not only entitled to pass the award the value of the goods but also to compensate the consumer for the injustice suffered by the consumer on the ground that the actions of Lucknow Development Authority would amount to harassment, mental torture and agony of the party.

50. In Case No. 1973 (1) SCC 788 in Lala Bishambar Nath and Ors. Vs. The Agra Nagar Mahapalika, Agra and Anr., it is held by the Hon'ble Supreme Court that it is immaterial whether the Respondent acted in a bona-fide manner or in the interests of the preservation of the public health but if the orders of the Administrative Body are illegal, the Administrative Body would be liable for any loss caused to person by its actions. The relevant extract of the order is as follows:-

"*12. It is immaterial that the respondents had acted bona fide and in the interest of preservation of public*

health. There motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action."

51. Next decision is in Case No. 2009 (13) SCC 758 in Swaran Singh Chand Vs. Punjab State electricity Board & Anr. In this judgement, it has been held by the Hon'ble Supreme Court that when an order suffers from malice in law, neither any averment as such is required to be made not strict proof is insisted upon. When such an order being illegal would be held as wholly unsustainable. The relevant extract is as follows:

"*18. In a case of this nature the appellant has not alleged malice of fact. The requirements to comply with the directions contained in the said circular letter dated 14.08.1981 were necessary to be complied with in a case of this nature. Non-compliance whereof would amount to malice in law. [See Managaer, Government Branch Press and Anr. v. D.B. Belliappa (1979)ILLJ156SC , Smt. S.R. Venkataraman v. Union of India and Anr. (1979)ILLJ25SC and P. Mohanan Pillai v. State of Kerala and Ors. AIR2007SC2840]. Thus, when an order suffers from malice in law, neither any averment as such is required to be made nor strict proof thereof is insisted upon. Such an order being illegal would be wholly unsustainable."*

52. Let us now refer to the authorities cited by the Respondent.

i) 1994 (4) SCC 1 in Jay Laxmi Salt Woprks(P) td., Vs. State of Gujarat

ii) AIR 2006 SC 1438:2006) 3 SCC 736 in Punjab Stae Civil Supplies Corpn. Ltd., Vs. Sikander Singh.

iii) AIR 2001 SC 343:2001) 2 SCC 330

53. The relevant observations in the judgement rendered in Case No. 1994 (4) SCC 1 in Jay Laxmi Salt Works(P) Ltd., Vs. State of Gujarat are as follows:-

> "*Malfeasance and misfeasance necessarily import intention, knowledge and malice, therefore, they may not be available in every tortious liability arising out of violations of public duty. Evil doing or ill conduct postulates something more than mere omission or commission. Misfeasance is now recognised as imputable to discharge of duty arbitrarily. In Calveley V. Chief Constable of the Merseyside Police,(1989) 1 All ER 1025 it was held that for the tort of misfeasance it was held that for the tort of misfeasance it was necessary that the public officer must have acted maliciously or with bad faith. In Dunlop v. Woollahra Municipal Council,(1981) 1 All ER 1202:1982) AC 158 it was held that without malice the claim for misfeasance could not be accepted. Non-feasance on the other hand is omission to discharge duty. But the omission to give rise to action in torts must be impressed with some characteristic, namely, malice or bad faith. The expressions 'malfeasance', 'misfeasance' and 'non-feasance' would, therefore, apply in those limited case where the State or its officers are liable not only for breach of care and duty but it must be activated(sic actuated) with malice or bad faith."*

54. The above view has been reiterated in the decisions given in Case No. AIR 2006 SC 1438:2006) 3 SCC 736 in

Punjab State Civil Supplies Corpn. Ltd., Vs. Sikander Singh.

55. The relevant observations made in the judgement rendered in Case No.AIR 2001 SC 343:(2001)2 SCC 330 in State of Punjab V. V.K. Khanna are as follows:-

> "*One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice."*

56. On the basis of these judgements, it is contended by the Respondent that since the components of the misfeasance are not in the instant case, the question of compensation would not arise. It is also pointed that in the impugned order the State Commission has correctly held that in the absence of the materials to prove malice and misfeasance with intention and knowledge, compensation cannot be awarded and this finding by the State Commission was in line with the view expressed by this Tribunal in the earlier judgement in Appeal No.32 of 2011 dated 30.5.2012.

57. In the light of the above principles laid down by Hon'ble Supreme Court, let us now see as to whether a case has been made out in the present case for awarding compensation.

58. At the outset, it shall be stated that for deciding this question we are to take note of the important fact that the point on compensation was decided by this Tribunal in earlier Appeal No.32 of 2001 as against the Appellant. While the Tribunal was dealing with the period during which the Government Memorandums were subsisting and had not yet been quashed by the High Court of Bombay.

59. But in the present case, it is noticed that the refusal by SLDC to schedule power in its letter dated 29.1.2011 related to the period, after the Government memorandums had already been quashed as ultra vires by the High Court by the order dated 18.1.2011. This relevant point was not taken note of by the State Commission in the impugned order.

60. One more aspect which has been omitted to be considered by the State Commission is that the Tribunal has given categorical finding in the earlier judgement in Appeal No.32 of 2011 dated 30.5.2011 that the question of compensation could not be considered during the period in which the Government Memorandums were subsisting but after the quashing of two Government Memorandums, if there was a refusal on the part of SLDC to schedule power to the Appellant, then the question of compensation would certainly be considered. The non consideration of this

relevant and important aspect by the State Commission, would go to the root of the matter.

61. In the light of above aspect, we shall now consider the materials available on record to find out whether there was a misfeasance on the part of SLDC subsequent to the quashing of the Government memorandums by the High Court which resulted in the loss to the Appellant.

62. As held by the Hon'ble Supreme Court to establish misfeasance on the part of SLDC, it is enough to show that SLDC is guilty of legal mala-fide by knowingly breaching its statutory duty and with knowledge that its action is likely to cause losses to the Appellant.

63. The Appellant admittedly has challenged the refusal letter dated 29.1.2011 issued by SLDC before the State Commission in Petition No.22 of 2011 and in the said Petition the Appellant through affidavit dated 16.8.2011 had claimed damages to the extent of Rs.23 Crores on account of non-scheduling of power during Feb-Mar-2011, despite the Government Memorandums had been quashed by the Bombay High Court through order dated 18.1.2011. Admittedly, the request of the Appellant to schedule power after the Government Memorandums had been quashed. Despite that, this was refused by the SLDC through the letter dated 29.1.2011.

64. As indicated above, this Tribunal in the judgment dated 30.5.2012 in Appeal No.32 of 2011 had mandated that the State Commission would deal with the claim petition filed by the Appellant in relation to the period after the quashing order dated 18.1.2011 passed by Bombay High Court. The State Commission did not take note of the said direction but simply refused the claim for compensation without going into the question as whether the period was prior to the quashing of memorandum or subsequent to quashing the memorandum. This is purely non application of mind.

65. Instead of understanding meaning of the observations and directions with reference to subsequent period after quashing in the judgement of Tribunal dated 30.5.2012 and adjudicating the matter independently on merits, the State Commission has simply repeated in the impugned order dated 29.9.2010 and blindly following the reasoning given by the Tribunal and refused to grant Appellant any compensation without taking note of the changed circumstances surrounding refusal of SLDC to schedule power in its letter dated 29.1.2011.

66. At the risk of repetition, it has to be stated that the State Commission failed to take into account that this Tribunal in the judgment dated 30.5.2012 in Appeal No.32 of 2011 was dealing with the period during which the Government

Memorandums were subsisting and had not yet been quashed by the High Court of Bombay.

67. But in the present case, SLDC's refusal to schedule power in its letter dated 29.1.2011 related to the period after the Memorandums had already been quashed and declared ultra-vires by the Bombay High Court by the order dated 18.1.2011. Thus, it is clear that the State Commission has failed to take into account in the impugned order the implications of the order dated 18.1.2011 passed by the Bombay High Court.

68. As indicated earlier, the State Commission has also not taken note of findings of this Tribunal in the judgement dated 30.5.2012 in Appeal No.32 of 2011 that there was no scope on the part of the SLDC to have refused to schedule power to the Appellant after the quashing of the Government Memorandums.

69. The State Commission has simply glossed over the manner in which the State Commission continued to deny scheduling of power, even after the date of quashing the Government Memorandums, and after knowing that such a refusal was contrary to law and would cause serious losses to the Appellant.

70. In other words, it has to be held that the conduct of SLDC by continuing to act illegally in furtherance of terms of the

Government Memorandums dated 7.5.2010 and 19.5.2010 even after they had been quashed by the High Court of Bombay on 18.1.2011 is most unfair.

71. There is obligation cast on the State Commission to apply its mind and exercise its jurisdiction after taking into account all relevant factors. It cannot mechanically act on the basis of the earlier judgement of this Tribunal refusing compensation without giving any thought to the fresh issue raised in the present case.

72. The relevant portion of the Judgement in Appeal No.32 of 2011 for disallowing the claim of compensation for the period prior to the quashing of Government Memorandums and also for the period subsequent to the quashing of the Government Memorandums is reproduced below:-

> ***"In view of this finding of the High Court doctrine of malice, malafide, and misfeasance cannot be invoked to award damage although, the MSLDC's claim that it was not an autonomous and independent body is summarily liable to rejection. An act does not make a person guilty unless mind is guilty. Malafide conduct, malice and misfeasance arise out of guilty mind. In the circumstances, the prayer for compensation is difficult to accept.*** *While saying so, we have no manner of doubt that after the High Court quashed the two Memoranda, there was hardly any scope on the*

part of the MSLDC to defer scheduling appellant's Generation Capacity in favour of the TPC-D.

The Commission shall pass necessary consequential order and also dispose of any petition, if pending, before it subsequent to the passing of the impugned order in the light of this decision, and in the event of refusal to comply with directive of the Commission it shall proceed against the respondent no 2 according to the law".

73. Despite the clear findings and directions given in Appeal No.32 of 201 directing the State Commission to consider the question of compensation in respect of the subsequent period i.e. after quashing the Government memorandums, the State Commission unfortunately has not understood the said directions and passed the impugned order as if it followed the said direction.

74. Similarly, SLDC also, even though it was informed that those Government memorandums have been quashed, had again refused to schedule power by merely stating that the earlier order passed by the State Commission on 29.9.2010 had not been quashed and therefore the request was refused to schedule the power. The stand now taken by SLDC both in the earlier Appeal No.32 of 2011 and in the present Appeal No.175 of 2012 that they are bound by the Government memorandums shows that SLDC for the reasons best known to it, has taken a different stand going hot and cold.

75. This conduct on the part of the State Load Despatch Centre which is public office can not be said to be bona-fide and genuine. When SLDC has got the knowledge that they can not rely upon the Government memorandums on the basis of which the earlier order passed by the State Commission on 29.9.2010 after they were quashed, even then they refused to schedule power to the Appellant as requested by the Appellant, would show the malafide attitude of SLDC and due to that the Appellant suffered a loss.

76. Therefore, we are of the view that since misfeasance has been established with the knowledge of SLDC, the Appellant is entitled to claim for compensation from SLDC.

77. <u>Summary of the findings</u>:-

1. The consistent stand taken by the SLDC before this Tribunal that since SLDC is the part of the State Transmission Company which in turn is an arm of Government of Maharashtra, it was bound to obey the directions given by the State Government in the memorandums dated 7.5.2010 and 19.5.2010 even after those Memorandums had been quashed by the High Court orders dated 18.1.2011. The SLDC continued to take the very same stand even after this Tribunal quashed the refusal letter issued by SLDC and held in Appeal

No.32 of 2011 dated 30.5.2011 that SLDC is an independent autonomous body. It is therefore clear that the SLDC denied the Appellant's request for scheduling of power on considerations that are totally extraneous to the statute.

2. **The present dispute deals with the period subsequent to the High Court's order quashing of the Government memorandums. Therefore, the Government Memorandums can no longer be relied upon by the SLDC to justify its non-scheduling of Appellant's power. In all its pleadings before this Tribunal, the SLDC in order to justify its non-scheduling, continued to rely upon the Government memorandums even though there are nonest in the eye of law after the order of High Court dated 18.1.2011.**

3. **This conduct on the part of the State Load Despatch Centre which is public office cannot be said to be bona-fide and genuine. When SLDC has got the knowledge that they cannot rely upon the Government memorandums on the basis of which the earlier order passed by the State Commission on 29.9.2010 after they were quashed, even then they refused to schedule power to the Appellant as requested by the Appellant, would show the**

malafide attitude of SLDC and due to that the Appellant suffered a loss. Therefore, we are of the view that since misfeasance by the SLDC with its knowledge has been established, the Appellant is entitled to claim for compensation from SLDC.

78. In view of our above findings, the Impugned order is set aside and the State Commission is directed to pass consequential order fixing the amount of compensation payable by the SLDC to the Appellant.

79. Since the stand taken by the SLDC that they are entitled to refuse to schedule, ever after quashing of the Government memorandums by the High Court and its attitude of criticising and finding fault with the finding given by this Tribunal, in the earlier Appeal, which is most unfair, we deem it fit to impose cost on SLDC, the Respondent. Accordingly, the SLDC is directed to pay the cost of Rs.1 lakh as donation to the charitable organisation i.e. **TAMANA, C-10/8, Vasant Vihar, New Delhi-110057** within one month from the date of this order and intimate to the Registry of the same.

80. Thus, the Appeal is allowed.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 14th Nov, 2013
√REPORTABLE/~~NON-REPORTABALE~~