APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 329 OF 2019 &
IA NO. 1640 OF 2019 & IA NO. 828 OF 2020

Dated : 14th July, 2021

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

IN THE MATTER OF :

M/s Alps Industries Limited,
57/2, Industrial Area
Sahibabad, Ghaziabad - 201010 .... **APPELLANT**

Versus

1. **Uttarakhand Electricity Regulatory Commission**,
Through its Secretary
Vidyut Niyamak Bhawan,
Near I.S.B.T., P.O. Majra,
Dehradun – 248171
Uttarakhand.

2. **Uttarakhand Power Company Limited,**
Through its Chairman & Managing Director,
Victoria Cross Vijeyta Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
Dehradun – 248001, Uttarakhand. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Adishree Chakraborty
Mr. Damodar Solanki

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn
Mr. Raunak Jain **for R-1**

Mr. Pradeep Misra **for R-2**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 (for short **"the** Act") against Order dated 05.08.2019 passed by the Uttarakhand Electricity Regulatory Commission (for short "**UERC/State Commission**") in Petition No. 16 of 2019 whereby the State Commission has rejected the petition filed by the Appellant seeking refund of additional surcharge levied and recovered by Respondent No. 2 (distribution licensee) – **Uttarakhand Power Company Limited** (for short **"UPCL"**).

2. The facts that led to filing of this Appeal, in brief, are as under:

3. The Appellant - Alps Industries Limited is a company existing under the provisions of the Companies Act, 2013 having its registered office at 57/2, Industrial Area, Sahibabad, Ghaziabad – 201010. The Appellant is engaged in the business of textiles and has established two spinning mills at Haridwar in the State of Uttarakhand. The Appellant has two separate electricity connections with the Respondent No. 2 - distribution licensee and has taken the benefit of continuous power supply, in addition to procuring power under open access from the Indian Energy Exchange since June, 2013.

4. The Respondent No. 2 is the distribution licensee in the State of Uttarakhand and came into existence upon the division of the undivided State of Uttar Pradesh and creation of the State of Uttarakhand. The Respondent No. 2 - UPCL is responsible for distribution of electricity in the State of Uttarakhand and was also responsible for maintaining the transmission system of the state till the formation of the state transmission utility – Power Transmission Corporation of Uttarakhand Limited.

5. On 18.08.2011, the State Commission determined the levy of 15% surcharge on the applicable 'Time of the Date' energy charges, as

additional surcharge under Section 42 (4) of the Electricity Act (for short **"the Act"**) for Open Access transaction and also determined the additional surcharge for the year 2011-12 (till 31.03.2012) based on the data for the year 2010-11.

6. On 23.05.2017, the State Commission initiated suo-moto Petition No.23 of 2017 wherein the State Commission held that the additional surcharge was allowed only for a limited period till 31.03.2012.

7. In March 2019, the Appellant preferred a separate petition No. 16 of 2019 before the State Commission seeking refund of the additional surcharge collected by Respondent No.2.

8. On 14.05.2019, the Appellant filed a note of arguments and on 15.06.2019, Respondent No.2 file reply wherein it was stated that the Petition was beyond the jurisdiction of the State Commission, the petition was barred by limitation and also that the charges were as approved by the State Commission. On 21.06.2019, the Appellant filed rejoinder to the reply.

9. On 05.08.2019, UERC passed the impugned order.

10. According to Appellant, the State Commission has grossly erred in proceeding on irrelevant basis of the nature of adjustment of amounts recovered, when the recovery itself has been held to be illegal. Further, the Commission has erred in rejecting the petition of the Appellant for refund of additional surcharge wrongly levied by UPCL for the period from June 2013 till March 2017. The State Commission has failed to appreciate that the said additional surcharge was levied and recovered by UPCL contrary to the tariff determined by the State Commission and therefore, was liable to be refunded to the consumers.

11. According to Appellant, for procurement of power through open access, the Appellant is required to pay charges for the use of network as well as the cross-subsidy surcharge and additional surcharge as determined by the State Commission. Under the provisions of the Electricity Act, all charges levied by the Respondent No. 2 are to be determined by the State Commission while the Respondent No. 2 has no unilateral power to levy any charge without the determination and approval of the State Commission.

12. Appellant further contends that 15% surcharge as additional surcharge by order dated 18.08.2011 was determined for compensating

the stranded capacity of the Respondent No. 2 for open access transactions. The said Order determined the additional surcharge for the year 2011-12, which was based on the data on power purchase cost for the year 2010-11. This is in line with Regulation 24(3) of the Open Access Regulations, which provide that the distribution licensee shall submit to the State Commission detailed calculation of fixed cost incurred towards its obligation of supply, on six monthly basis for the State Commission to determine the additional surcharge. This provision, together with the National Tariff Policy has been specifically recorded in the above Order dated 18.08.2011.

13. Appellant further contends that the above Order was valid for the year 2011-12 as determined by the State Commission. However for the period beyond 31.03.2012, there was no petition filed seeking determination of additional surcharge in terms of Section 42(4) of the Act read with Regulations 24(3) of the Open Access Regulations. Consequently, there was also in no Order passed by the State Commission determining or approving additional surcharge for the period beyond 31.03.2012.

14. Appellant further contends that however, despite the above position, Respondent No. 2 - UPCL continued to levy additional surcharge even for the period from 01.04.2012. The Appellant has been taking open access from 17.06.2013 and has been un-authorisedly levied with additional surcharge on the open access supply taken by the Appellant. This was in gross violation of the provisions of the Act and the Orders passed by the State Commission. This aspect was no longer res integra and already stood decided by the decision of the State Commission by Order dated 23.05.2017 passed in Petition No. 23 of 2017. Various consumers including the Appellant had complained to the State Commission of the unauthorized levy by the Respondent No. 2, pursuant to which the State Commission initiated suo-moto proceedings.

15. According to Appellant, the above-said Order being final and conclusive, the Appellant should have been refunded the amount wrongly collected after 01.04.2012, and it was the obligation and duty of the Respondent No. 2 to have effected the refund with interest thereon in terms of section 62(6) of the Act. In fact, by the Order dated 23.05.2017 passed in Petition No. 23 of 2017, the State Commission has already held that the Respondent No. 2 did not file any petition for determination of

additional surcharge and continued to levy thereof for the subsequent financial years after the Order dated 18.08.2011 of the State Commission.

16. Appellant further contends that in terms of the above Order, the State Commission had already held that without the specific approval of the State Commission for subsequent financial years, the Respondent No. 2 incorrectly continued to levy additional surcharge on open access supply. The above petition was taken up on suo-moto basis, for the Respondent No. 2 to cease the levy of additional surcharge from 2017-18. The question of refund of amounts wrongfully collected does not arise in such suo-moto proceedings, as the quantum of refund has to be examined in individual cases.

17. According to Appellant, based on the above Order passed by the State Commission deciding on the principle of incorrect levy of additional surcharge by the Respondent No. 2, the Appellant preferred a separate Petition being No. 16 of 2019 before the State Commission seeking refund of the additional surcharge illegally collected by the Respondent No. 2 from the Appellant for the period from 17.06.2013 to 31.03.2017 together with interest thereon. A reply was filed by Respondent No.2, wherein it was stated that the Petition was beyond the jurisdiction of the State

Commission, the petition was barred by limitation so also the charges were as approved by the State Commission in the Order dated 18.08.2011, which continued even beyond 31.03.2012.

18. By the impugned Order, the Commission rejected the petition of the Appellant so also the claim for refund on the ground that the Appellant would have passed on the cost to its consumers and also that the Respondent No. 2 has accounted for the amounts recovered in its Annual Revenue Requirements.

19. Being aggrieved by the impugned Order dated 05.08.2019 passed by the UERC in Petition No. 16/2019, the Appellant has filed this appeal seeking the following reliefs:

(A) Allow the Appeal and set aside the Order dated 05.08.2019 passed by the State Commission in Petition No. 16 of 2019 to the extent challenged in the present appeal.

(B) Direct the Respondent No. 2 to refund the additional surcharge collected for the period from June, 2013 to March, 2017 together with interest as claimed before the State Commission;

(C) Pass such other Order(s) and this Tribunal may deem just and proper.

20. Based on the above pleadings, the following questions of law arise according to Appellant:

A. Whether the State Commission is justified in law in rejecting the claim of refund of additional surcharge illegally collected by the Respondent No. 2?

B. Whether the principle of unjust enrichment has any applicability to the present case of levy of charges for use of network and for stranded capacity?

C. Whether the State Commission is justified in rejecting the claim of the Appellant on the ground that the Respondent No. 2 has utilized the amounts illegally recovered to meet its revenue requirements?

D. Whether the State Commission is justified in rejecting the claim of the Appellant on the ground that the Appellant would have passed on the cost paid to its customers?

E. Whether the State Commission was justified in making observations that the Appellant agitated the issue in a belated manner?

21. *Per contra,* the 1st Respondent-UERC filed reply, in brief, as under:

22. According to 1st Respondent, this reply is limited to the purpose of assisting the Tribunal in the matter, since the subject matter of the appeal is not limited to the present Appellant alone but also involves the correctness and implications of a suo-moto proceedings undertaken by the Commission in its capacity as a Regulator of the sector.

23. Respondent No.1 submits that by Tariff Order dated 29.03.2017 for FY 2017-18, the State Commission abolished the 'continuous supply surcharge' with effect from 01.04.2017 and further by Order dated 23.05.2017 in Petition No. 23 of 2017 (Suo-Motu) the State Commission restrained UPCL from recovery of 'additional surcharge' from its open

access consumers from 2017 till State Commission determines the additional surcharge on a petition filed by the UPCL as per applicable OA Regulations. However, the State Commission by Tariff Order dated 29.03.2017 as well as Order dated 23.05.2017 did not hold the recovery of 15% surcharge as per se illegal from the open access consumers by UPCL, but only that since UPCL had not got the detailed computations etc. approved by the Commission, they could not continue to charge additional surcharge. The direction in the Order dated 23.05.2017 was to stop levy of additional surcharge from 2017 onwards and had not held the levy of additional surcharge till 2017 as per se illegal. Further, it cannot be denied that UPCL's power had become stranded due to energy procured by the open access consumers from sources other than UPCL. In this regard, the Judgment passed by Hon'ble Supreme Court on 25.04.2017, Para 25, in case of ***M/S Sesa Sterlite Ltd vs Orissa Electricity Regulatory*** *[(2014) 8 SCC 444],* is relevant on the applicability of additional surcharge as a mechanism to compensate the Distribution Licensee for the exit of a consumer.

24. Therefore, in the light of the above Judgment passed by Hon'ble Supreme Court, it is submitted that the 'additional surcharge' is a statutory

mechanism to compensate the Distribution licensee due to exit of a consumer. However, the said levy has only been stopped by the State Commission vide Order dated 23.05.2017 by the State Commission with a direction to recover the same only upon proper determination and upon filing of petition for such determination before the State Commission by UPCL. Hence, in the present case, since Respondent No.2 had not filed a petition for determination of 'additional surcharge', the State Commission vide Order dated 23.05.2017 directed UPCL to stop the recovery of said surcharge till the same is determined by the State Commission. The above contention is further fortified by admission made by the Appellant itself in Para 8 of the petition filed by it before the State Commission, wherein the Appellant himself states that, "… *in absence of any approved additional surcharge with effect from 01.04.2017, the licensee is not entitled to levy the surcharge from Open Access consumers as also decided vide Commission's Tariff Order dated 29.03.2017*…"

25. UERC further submits that the State Commission, thus in the Order dated 23.05.2017 did not declare the recovery of 'additional surcharge' for the period till 2017 as per se illegal nor did it pass any consequential directions for refund of the same. Rather it merely stopped the levy of

'additional surcharge' from 2017 till the State Commission determined the same on the petition filed by the Respondent No. 2 as provided under the OA Regulations. Hence, it is submitted that stopping/ discontinuing the levy of 'additional surcharge' by the State Commission is quite different from illegal levy of 'additional surcharge' as claimed by Appellant in the present Appeal.

26. It is further submitted that the State Commission by Order dated 23.05.2017 consciously did not pass any directions for refund of 'additional surcharge' even though the same was specifically claimed by the Appellant in the representation made by it to the State Commission as well as other stakeholders who also prayed for similar relief upon which the suo-motu proceedings were initiated by the State Commission. The claim of the Appellant even earlier was for refund of additional surcharge with effect from FY 2011-12. It is important to mention here that the State Commission by Order dated 23.05.2017, despite considering the entire issue, did not pass any directions with regard to refund of the 'additional surcharge' already levied and recovered by UPCL from the Appellant. Hence, by the present proceedings, the Appellant is, in fact seeking to challenge the earlier Order dated 23.05.2017 of the Commission.

27. According to Respondent No.1, the contention raised by the Appellant that State Commission has wrongly rejected the claim of refund of additional surcharge illegally collected by the Respondent No.2 is wrong as State Commission by impugned Order, on examining the petition of the Appellant and on detailed examination of the submissions made by the parties, concluded that the claim of the Appellant for refund of additional surcharge is not justified. A very elaborate reasoning has been given by the State Commission in the impugned Order wherein it is amply clear that the view taken by the State Commission is well reasoned and justified and does not suffer from any infirmity.

28. The Respondent Commission further submits that the contention raised by the Appellant regarding unjust enrichment is wrong for the reason that UPCL has not taken any benefit from the additional charges recovered from Open Access consumers. The same has been explained by the State Commission in the impugned Order. Since, the additional charges recovered by UPCL have not been retained by it and have been adjusted in the overall Annual Revenue Requirement of UPCL thereby contributing to lower tariff rates charged from consumers of electricity in the State including Open Access consumers, the contention of unjust

enrichment is liable to be rejected by this Tribunal.

29. Against the contention of the Appellant that whether the State Commission is justified in rejecting the claim of the Appellant on the ground that the Appellant would have passed on the cost paid to its customers, it is submitted that the State Commission is justified in rejecting the claim of the Appellant as it is a prudent understanding that while running a business, all the costs that are incurred in the business are factored in the cost of service/product it sells to the consumers. The same analogy has also been adopted by the State Commission in the impugned order.

30. The Respondent Commission further submits that the contention of the Appellant that the State Commission, vide the impugned order, has made erroneous observation by holding that Appellant agitated the issue in a belated manner, is wrong and not tenable. The State Commission did not strike off the claim of the Appellant only on the reason of it being a belated matter, rather, there are several other reasons specified in the impugned order where the State Commission elaborated its view for rejecting the claim of the Appellant. One of which is the fact that the Appellant was aware of the charges being recovered from it by UPCL and

for all the four years it remained silent on the issue which adds up to its own carelessness towards its claim. The State Commission in the impugned order has taken a note of the same and has given its view accordingly.

31. The Respondent Commission further submits that the prayer of the Appellant in the original matter was to allow him the refund of the additional surcharge recovered by UPCL during the period 17.06.2013 to 31.03.2017 was rejected by the State Commission vide the impugned Order. The purpose behind filing the petition before the State Commission in the original matter by the Appellant was to claim refund of the Additional Surcharge and was not limited to declaration of the Additional Surcharge recovered from 17.06.2013 to 31.03.2017 as illegitimate, as the two are different issues. The State Commission in the impugned Order although declared the recovery of Additional Surcharge for the aforesaid period as not in accordance with the provisions of State Commission's Regulations, but made it amply clear that refund of the amount taken as additional surcharge is also not legitimate. Therefore, the contention of the Appellant that the State Commission erroneously proceeded on the basis that the additional surcharge recovered from the Appellant was considered as a

part of the non-tariff income of UPCL and also that the additional surcharge paid by the Appellant would have been factored as a cost of production and recovered from its purchasers is not tenable.

32. According to UERC, the contention raised by the Appellant that the State Commission has failed to appreciate that the issue whether UPCL had authority of law and could legally recover the additional surcharge from the Appellant is wrong**.** It is submitted that UPCL has been charging the Additional Surcharge since 2013 until 2017 and since then the Appellant never agitated the issue. The Appellant has only in the year 2019, approached the State Commission seeking refund, which is already adjusted in the tariff of UPCL and may have been factored in by the Appellant in its accounts.

33. The Respondent Commission further submits that the State Commission by Order dated 29.03.2017 has discontinued the recovery of the additional surcharge. Now, looking back into the matter, it is observed that both the parties i.e. UPCL as well as the Appellant were not comfortable with this financial arrangement/exchange. Where UPCL has not gained any financial profit out of this recovery of surcharge and also

the Appellant has also not suffered any loss whatsoever. The State Commission in the impugned Order has observed that revisiting the accounts is a complex exercise and will yield nothing as the parties have already settled the amounts in their accounts also. Further, as far as the question of justification of recovery of additional surcharge is concerned, the State Commission has discontinued such recovery, however, this does not mean that the Appellant has become entitled for refund. Therefore, the contention of the Appellant that State Commission has failed to appreciate that UPCL is a regulated entity and its income and expenses are regulated by the State Commission as a part of its Annual Revenue Requirements is not tenable.

34. The Respondent Commission further submits that the State Commission under the four corners of law entertains every matter which falls under its jurisdiction. The State Commission has never restricted any person including the Appellant to agitate any issue before it which it believes holds any merit for the purpose of adjudication. The State Commission has duly heard the Appellant in the original matter and issued a reasoned order for not finding favor with the claim of the Appellant for refund of additional surcharge. Therefore, the contention of the Appellant

that the State Commission has failed to appreciate that the process of retail supply tariff determination and approval of the annual revenue requirements of UPCL does not in any manner affect the rights of any person to agitate on illegal recoveries made by UPCL or otherwise seek refund of such amounts illegally recovered by UPCL is liable to be rejected.

35. According to UERC, the contention of the Appellant that the State Commission has failed to appreciate that the tariff for electricity is consideration for goods that have been procured by the Appellant is not tenable**.** The Appellant is trying to mix up cost of raw material with cost of finished product of the Appellant. The State Commission has taken view on the product cost which includes *inter-alia,* cost of electricity. When this cost of electricity gets reduced on account of adjustment of additional surcharge in the process of determination of ARR/Tariff of the licensee, the product cost is bound to reduce. The contention of the Appellant with regard to consideration for goods procured by the Appellant is baseless and imaginary and has no relevance in the context.

36. UERC further submits that the contention of the Appellant that the

State Commission has failed to appreciate that the concept of unjust enrichment has no obligation for procurement of goods and availing services is wrong. It is submitted that the scope of unjust enrichment cannot be limited to what has been relied upon by the Appellant in the above submission. It has to be understood in a broader perspective. In this light, it is to reiterate that an amount that has already been added by the Appellant in the pricing of its product and is levied on the customers, thereafter, is already settled. The Appellant claiming the refund/amount which has been already incorporated in pricing of its product since the additional surcharge recovered by UPCL get adjusted in the net ARR of the licensee result in reduced retail tariffs for the Appellant.

37. The State Commission - UERC further submits that the contention of the Appellant that the State Commission has failed to appreciate that the Appellant being a commercial entity and competing in the global market is neither protected from losses being incurred or otherwise restricted from earning profits is not tenable as electricity being one of the major components for pricing of any product of a manufacturing industry, therefore, any substantial change in the same is bound to alter the final pricing of the Appellants' product pricing.

38. The Respondent Commission further submits that the contention of the Appellant that the State Commission has erred in holding that it would be a very complex exercise to work out the power that remain stranded for the years 2012-13 to 2016-17 and based on it to work out the additional surcharge for the said period, is wrong. The State Commission after much contemplation came to the conclusion that the cost which was being recovered by UPCL as additional surcharge and was never agitated by the Appellant before the State Commission until 2017, has been adjusted in the accounts of the parties and passed on to the consumers and therefore, reopening the accounts etc. is a tedious exercise. Further, the State Commission in the impugned order observed that the Appellant may have also factored in the lower cost of electricity on account of lower tariffs in the pricing of its product. Furthermore, the Commission had observed that there was no retention of the amount by UPCL, the amount recovered by it was further adjusted in the tariff of electricity thereby making the tariff lower which was enjoyed by the consumer including the Appellant.

39. According to UERC, the contention of the Appellant that State Commission has failed to appreciate that even assuming any delay in filing of the petition, the only consequence can be in the form of lower interest in

the refund of amounts to the Appellant is not tenable, since the matter before the State Commission was to examine whether the refund of the amount claimed by the petitioner was justified or not. The State Commission rejected the claim by giving a detailed explanation. When the principle claim itself not held justified, the question of interest becomes irrelevant.

40. The Appellant filed rejoinder also to the reply of Respondent No.1 - UERC.

41. **Respondent No.2 - Uttarakhand Power Company Limited (UPCL) filed written submission, in brief, as under:**

42. According to Respondent No. 2 - UPCL, the Appellant is an embedded consumer of the replying Respondent and has no right to approach UERC for resolution of its grievances as a consumer, has to go before Consumer Grievance Redressal Forums and not before UERC. The Act u/s 42(4) mandates that open access consumer shall pay additional surcharge to the distribution licensee to meet the fixed cost liability of distribution licensee arose out of his obligation to supply, so any open access user who is also the continuous supply embedded consumer

of distribution licensee of the area cannot escape to pay additional surcharge out of any ground whatsoever.

43. Respondent No.2 further contends that Clause 8.5.4 of the Tariff Policy dated 28.01.2016 also provides for levy of additional surcharge. The Tariff policy provides that additional surcharge should become applicable only if it is conclusively demonstrated that obligation of licensee has been stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. So for allowance of additional surcharge either a conclusive demonstration by a Distribution Licensee is required or the knowledge about unavoidable obligation is known to the State Commission. In the present matter, UERC vide its order dated 18.08.2011 had relied upon the second part i.e., had allowed additional surcharge due to unavoidable obligation to pay fix charges out of the PPAs.

44. UPCL further contends that the Commission under Regulation 24 of UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010 (OA Regulations 2010) & Regulation 23 of UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015 (OA

Regulations 2015) [Para 1, 2 & 3] has specified the procedure for the distribution licensee, i.e. UPCL, to levy Additional Surcharge to the Open Access Consumer. The provisions of the Regulation reiterated the statements given in the Electricity Act and Tariff Policies issued from time to time. The provisions clearly mandate for recovery of additional surcharge and distribution licensee needs to provide statement of fixed costs on six monthly basis and accordingly UPCL is continuously providing and had in the past provided the power purchase details to UERC on quarterly basis and subsequently Regulation carves duty on Commission to scrutinize the same and decide upon additional surcharge and since Commission vide its order dated 18.08.2011 had determined the additional surcharge on generic basis i.e., in terms of percentage on prevalent tariff and it remained the same till the Commission again re-assessed the situation and disallowed the same vide tariff order for FY 2017-18.

45. According to UPCL, It is pertinent to mention here that neither the Act nor the Tariff Policy or Regulation mandates UPCL to separately file a petition for additional surcharge on annual basis as based upon the power purchase data, it is the responsibility of UERC to reassess/ modify/ deviate from the already allowed/ in force generic additional surcharge. However

UPCL thereafter had filed a separate petition for redetermination of additional surcharge as per the directions issued in the tariff order and it is here to emphasize that the same was filed upon directions of the Commission and for the period prior to such discontinuation order, the additional surcharge remained in force as per earlier order dated 18.08.2011.

46. According to UPCL, further, UERC vide its order dated 18.08.2011 (Para 5, 6, 11, 12 & 13) had determined additional surcharge on generic basis i.e. in terms of percentage on prevalent tariff and it remained the same till the Commission again reassess the situation. Para 16 of the Order is relevant for operative portion.

47. UPCL further contends that on receipt of various representations from the stakeholders, the UERC vide tariff order dated 29.03.2017 abolished the applicability of continuous supply surcharge on power purchase through open access under collective or bilateral transactions. Thereafter, representations have been moved by various stakeholders and UERC has started suo motu proceedings being Petition No. 23 of 2017 (Suo Motu) and after hearing the stakeholders passed order dated 23.05.2017, vide Para 2.3, 2.4, 2.5 & 3.

48. UPCL further contends that the Order clearly suggested that the additional surcharge was disallowed/ abolished with effect from 01.04.2017 meaning thereby that the same remained applicable for the past period i.e., up to 31.03.2017. None of the stake holders had challenged the tariff order but later as an afterthought petitioner had filed a petition for recovery of additional surcharge for the past period but the same was disallowed by the Commission, vide his order dated 05.08.2019. The Commission in its order had commented that UPCL had to submit detailed calculations of fixed cost but forgot that UPCL actually is and always were submitting the same on quarterly basis and after that it is the Commission that had to determine the additional surcharge and earlier Commission vide their order dated 18.08.2011 had correctly fixed the generic percentage-wise additional surcharge on prevalent tariff but the present Commission failed to realize that the thinking of the then Commission was correct and UPCL was allowed additional surcharge based upon their unavoidable obligation to arrange power for supply to continuous consumers and for the purpose have to bear the fixed costs of the long term PPAs and the same needs to be compensated.

49. The Commission and all the stake holders are very well aware of the facts that UPCL arrange most of the power requirement through long term power purchase agreement against which UPCL has to pay hefty fixed charges/cost irrespective of actual withdrawal of power. UPCL in its ARRs/True ups always transparently disclose the recovery from additional surcharge and the same was accordingly adjusted in the tariff of prospective year. The situation with regard to the long term agreements remained mostly same as it was in year 2010-11 and the Commission at that time was well aware about facts mentioned above had rightly allowed additional surcharge on generic basis in percentage terms for prospective period till the same will be required to be re-assessed based upon petition for additional requirement by UPCL or suo moto assessment by UERC.

50. UPCL further contends that on 21.06.2019 the Appellant filed Petition No. 16 of 2019 for refund of Additional Surcharge paid to Uttarakhand Power Corporation Ltd. on power purchased through open access during June 2013 to March 2017. The replying Respondent contested the said Petition and filed reply. The UERC framed certain issues for determination, which are - (i) whether the Commission has jurisdiction to hear the Petition filed in a dispute between the distribution

company and an individual consumer. (ii) Whether the Petition is time barred under the Limitation Act 1963 (Limitation Act) and whether the same is applicable in the present proceedings. (iii) Whether the levy of 15% Additional Surcharge, on the Petitioner, by the licensee, during the period 17.06.203 to 31.03.2017, when the Petitioner was purchasing power under Open Access through IEX, is legally tenable and whether the Petitioner is entitled for refund of such Additional Surcharge. By the above said order, the UERC decided Issue No. 1 against the replying Respondent at Para 4.9 and issue No. 2 at Paras 4.10 and 4.11.

51. On merits, the Commission rejected the claim of Appellant vide order dated 05.08.2019, Para 4.15 & 4.16. Against this order, the Appellant has filed the present Appeal.

52. UPCL further submits that, UPCL throughout the period acted transparently and all the recoveries were considered as part of income and adjusted in the prospective tariff. Petitioner citing some discussion/mention by Commission is wrongly claiming them as findings and trying to recover the rightful charges paid by them in contravention of the provisions of the Electricity Act, Tariff Policy and Regulation. Further, UERC in its order at several places had discussed/commented on requirement of filing the

petition, providing the detailed computation etc. but while mentioning the same they had never sought clarification/reasons from UPCL. Moreover they failed to appreciate the vision and logic of the previous Commission who found the recovery of additional surcharge as justified vide their order dated 18.8.2011.

53. UPCL further contends that since the Commission in its findings had upheld the legality and applicability of additional surcharge during the concerned past period, UPCL in spite of not agreeing with the several comments of Commission in the order had not appealed against the same but now it is not justified that petitioner, quoting certain comments in the order as findings in their favour, be allowed to file an appeal against the rightful finding of Commission. Further to emphasize that Hon'ble Supreme Court of India has laid down law in series of decisions to the effect that Respondent can support the judgment on the grounds which were decided against them without preferring an appeal. The relevant observations of Hon'ble Supreme Court are at Para 35 of the Judgment in the case of ***Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai & Anr.*** [2004 (3) SCC 214].

54. Similar view was taken by the Hon'ble Supreme Court at Para 22 of the Judgment in ***State of WB Vs. Ashish Kumar Roy & Ors***. (2005) 10 SCC 110. The Hon'ble Supreme Court in the case of ***Jagdish Kumar & Ors. Vs. State of H.P. & Ors.*** [(2005) 13 SCC 606] at Paras 7 to 11 reiterated the same principle.

55. Respondent No. 2 further contends that in view of above facts and submissions above –

(a) The claim of Appellant is time barred, hence the Petition filed by the Appellant before UERC was not maintainable. Hon'ble Supreme Court in (2016) 3 SCC 468 ***Andhra Pradesh Power Coordination Committee & Ors. Vs. Lanco Kondapalli Power Limited & Ors***. at Para 30 has held that Limitation Act would be applicable to the adjudicatory functions of the Commission. Further, in view of the fact that Appellant was paying the Additional Surcharge till it was abolished vide order dated 29.03.2017 with effect from 01.04.2017. Hence, the claim for refund is time barred and thus the Petition No. 16 of 2019 filed by the Appellant was rightly dismissed by UERC.

(b) UERC has no jurisdiction to entertain Petition No. 16 of 2019 as the same was a consumer dispute. The claim of Appellant was for refund of the amount paid towards additional surcharge. The Appellant is an embedded open access consumer of the replying Respondent, hence the dispute raised by Appellant was pure and simple consumer dispute and ought to have been raised before CGRF.

Respondent No. 2 further contends that for adjudication of the claim of refund made by the Appellant, no complicated question of law was involved, hence the Appellant ought to have approached the CGRF and Petition No. 16 of 2019 was not maintainable before UERC in view of decision of Hon'ble Supreme Court at Para 33 of the Judgment in ***Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. & Ors***. reported in 2007 (8) SCC 381.

(c) On merits, the Hon'ble Supreme Court in the matter of ***M/s. Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory*** [(2014) 8 SCC 444] has held at Para 33.

56. Respondent No. 2 further contends that the levy of additional surcharge on open access consumer was never held to be illegal by UERC, hence the question of refund does not arise. Further, the electricity charges towards additional surcharge has been levied and paid by the Appellant and the same must have been passed through in the sale of final product by the Appellant to the consumers of that product. Hence, the refund cannot be granted.

57. Hence, Respondent No.2 contends that in view the aforesaid facts and circumstances, the Appeal is liable to be dismissed.

58. **The Appellant filed written submission also, in brief, as under:**

59. Appellant contends that one of the primary features and provisions of the Electricity Act, 2003 is the concept of open access. Open access is the right available to the consumer to source electricity from third parties, apart from the distribution licensee which operates in the area of supply. The only charges that can be levied on open access consumers, apart from the network cost, is cross-subsidy surcharge under Proviso to Section 42(2) and Additional Surcharge under Section 42(4). The powers with the distribution licensees under these sections are not absolute, and both

these charges have to be authorised and determined by the State Commission. The surcharge under Section 42(4) is only for the purpose of meeting the fixed cost of the distribution licensee on account of its obligation to supply.

60. Appellant further contends that under the Act, all charges levied by a distribution licensee are to be determined by the State Commission, and a distribution licensee has no unilateral power to levy any charge without determination and approval of the State Commission. For the purpose of determination of Additional Surcharge under Section 42(4) of the Act, provision at Clause 8.5 of the National Tariff Policy is relevant. In accordance with the Act and the Tariff Policy, the provisions for determination and levy of Additional Surcharge have also been incorporated by the State Commission in the UERC (Terms and Conditions of Intra-state Open Access) Regulations, 2010. The same provisions at Clause 23 have also been provided in the existing UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015.

61. As stated above, the provisions of the Act, National Tariff Policy and the Regulations framed by the State Commission provide that a distribution licensee may levy Additional Surcharge on the open access

consumers in the State, however, before levying the same, submission of detailed calculations and relevant statement of fixed cost by the distribution licensee, which it is incurring towards his obligation to supply, is a pre-requisite. The Additional Surcharge is only payable to compensate for any stranded capacity of the distribution licensee on account of the consumers taking supply of power through open access. Accordingly, for the FY 2011-12, upon a petition being filed by UPCL, the State Commission, vide its order dated 18.08.2011 determined the levy of 15% surcharge for Open Access transactions on the applicable 'Time of the Day' energy charges as Additional Surcharge under Section 42(4) of the Act. The said determination was based on the data for the FY 2010-11 and was determined for compensating the stranded capacity of the distribution licensee on account of the open access transactions. The order was applicable only for the year 2011-12, namely, from 01.04.2011 to 31.03.2012.

62. Appellant further contends that by way of the impugned order dated 05.08.2019, the State Commission dismissed the Appellant's petition, despite observing in favour of the Appellant.

Utilisation of the monies illegally collected by UPCL:

63. According to Appellant, the State Commission failed to appreciate that the only issue was whether there was any authority of law for UPCL to levy and recover the Additional Surcharge for the period from 17.06.2013 to 31.03.2017 from the Appellant.

64. Once the levy is illegal and has also been so held, the manner of utilisation of the amounts recovered by UPCL has no relevance whatsoever. Neither the fact that UPCL has used the recovery amount to lower its Annual Revenue Requirements and treated the recovery of Additional Surcharge as non-tariff income, nor the process of retail supply tariff determination and approval of the Annual Revenue Requirements of UPCL, cannot in any manner prejudice the rights of the Appellant to seek refund of the amounts un-authorizedly and illegally recovered from it.

Erroneous application of the principle of 'unjust enrichment':

65. According to Appellant, the State Commission has erroneously proceeded on the basis of 'unjust enrichment', by holding that the Appellant being an industry would have already factored in the cost of power, including the Additional Surcharge, as a cost of production and

appropriately priced its final product, as a justification for non-refund of Additional Surcharge illegally recovered from the Appellant.

66. Appellant further contends that the principle of unjust enrichment is based on a legal principle in cases of indirect taxation, and has been wrongly applied by the State Commission in the present case. In cases pertaining to indirect taxation, the law provides for passing on the burden to the consumers and since the refund cannot go to the consumers, the principle was evolved. However, the present case is not of taxation, but of consideration of goods and services. It is also relevant to note that the principle of unjust enrichment was not even pleaded by UPCL before the State Commission. In this regard, the Appellant relies on the decisions of the Hon'ble Supreme Court in the cases of ***Kasturi vs. State of Haryana (Para 18)*** [(2003) 1 SCC 354 at page 363], and ***Eastern Coalfields Ltd. vs. Tetulia Coke Plant (P) Ltd. (Para 12 & 13)*** [(2011) 14 SCC 624 at page 628].

PETITION FILED IS AN AFTER-THOUGHT:

67. According to Appellant, the Appellant was exercising its statutory right for refund of charges wrongfully collected, and the question of the

petition being an after-thought does not arise. The Appellant was agitating the issue with UPCL and also before the State Commission earlier. The State Commission had in fact initiated suo-moto proceedings against UPCL in 2017, which led to passing of the order dated 23.05.2017. However, since the order was suo-moto, the individual facts of each case were not examined and the State Commission directed UPCL not to collect additional surcharge. But the quantum collected from each consumer was not examined, which could be examined only in the petitions of individual consumers. Therefore, the Appellant filed the petition before the State Commission, seeking refund of the amounts illegally collected by UPCL. The petition was held not to be barred by limitation. There was no question of the petition being an after-thought. Further, it is submitted that delay and laches cannot be held in an abstract manner. The test for non-suiting a party on account of delay and laches is that parallel rights ought not to be created. It is not mere running of time. In this regard, the Appellant crave leave to the decision of the Hon'ble Supreme Court in the case of ***Dehri Rohtas Light Rly. Co. Ltd. vs. District Board, Bhojpur,*** **Para-13** [(1992) 2 SCC 598 at page 602-603].

68. In terms of the Order of this Tribunal dated 22.02.2021, Adv. Buddy A. Ranganadhan, as Amicus Curiae submitted the following:

"1. The present submissions are being made for the kind consideration of this Hon'ble Tribunal in terms of Order dated 22-2-2021 of this Hon'ble Tribunal.

2. The present submissions are limited to the question of the jurisdiction of this Hon'ble Tribunal as a Court of first Appeal in considering the scope and width of the submissions that a Respondent may be permitted to make in an appeal before this Hon'ble Tribunal.

3. As a preliminary submission, it is submitted for the kind consideration of this Hon'ble Tribunal that as a Court of First Appeal, the width of his Hon'ble Tribunal's jurisdiction and the range of subjects that it may consider is co-extensive with that of the original forum, i.e. the ERC. It is settled law that a first appeal is a full re-hearing of the original proceeding and the Appellate Court has all the powers, jurisdiction and authority of the original forum[1].

4. Section 120(1) of the Electricity Act provides that this Hon'ble Tribunal shall have the power to regulate its own procedure.

[1](Ref: *The Commissioner of Income Tax v. S ChinappaMudaliar, Madurai* 1969(1) SCC 591 para 6 and 7, *Santosh Hazari v. Purushottam Tiwari* (2001) 3 SCC 179 para 15, *Jagannath v. Arulappa and Anr.* (2005) 12 SCC 303 and *UP Power Corp. Ltd. v. NTPCL and Others and Batch* (2009) 6 SCC 235 para 66

(a) In exercise of its powers, this Hon'ble Tribunal has framed the APTEL (Procedure, Form, Fee and Record of Proceedings) Rules 2007. Relevant portions of some of the provisions are extracted below:

"17 Procedure for proceedings.

(3) Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

…

42 Contents of main file…. The main file shall be kept in the following order and it shall be maintained as permanent record till ordered to be destroyed under the rules:-

…..

(e) Counter or reply or objection (if any);

….

53. Filing of objection by respondent, form and consequences:- (1) The respondent, if so directed, shall file objections or counter within the time allowed by the Tribunal. The objections or counter shall be verified as an appeal or petition and wherever new facts are sought to be introduced with the leave of the Tribunal for the first time, the same shall be affirmed by a supporting affidavit.

(2) The respondent, if permitted to file objections or counter in any proceeding shall also file three copies thereof after serving copies of the same on the appellant or petitioner or their Counsel on record or authorized representative, as the case may be.

…

107. Removal of difficulties and issue of directions: Notwithstanding anything contained in the rules, wherever the rules are silent or no provision is made, the Chairperson may issue appropriate directions to remove difficulties and issue such orders or circulars to govern the situation or contingency that may arise in the working of the Tribunal."

(b) The above quoted provisions would show that:-

(i) There is no provision of the Electricity Act or Rules thereunder that is contrary to Order XLI Rule 22 or Rule 33 of the Code of Civil Procedure 1908;

(ii) Wide powers are vested with this Hon'ble Tribunal to pass appropriate order to govern the situation or contingency that may arise in the working of this Hon'ble Tribunal.

5. No provision of the Electricity Act, preclude, prevent or prohibit the Tribunal from invoking the provisions of the CPC. This Hon'ble Tribunal has the power to regulate its own procedure, and can even travel beyond the provisions of the Code of Civil Procedure to meet the ends of justice. In this context, kind reference may be had to the following judgments:-

(i) **"New Bombay Ispat Udyog Ltd Vs Maharashtra State Electricity Distribution Co. Ltd &Anr." reported as 2010 ELR (APTEL) 0653.**

(ii) '**M/s DLF Utilities Limited Vs Haryana Electricity Regulatory Commission' reported as MANU/ET/0152/2012**.

(iii) **A.A HajaMuniuddian Vs Indian Railways while reported as (1992) 4 SCC 736.**

6. It is submitted that the Hon'ble Supreme Court has laid down that a partially successful party may not file an Appeal against the impugned Order with an intention of giving a quietus to the litigation. However, when such party finds out that the other party is not interested in burying the hatchet and is interested in keeping the lis alive, the partially successful party may file Cross Objection challenging the findings of impugned Order by which it is aggrieved. Evidently, partially successful party can challenge the findings of the impugned Order by two modes, viz:-

(a) By filing an Appeal against the Impugned Order; or

(b) By preferring Cross Objection in the Appeal filed by the other side.

7. It is submitted that filing of an Appeal or a Cross Objection is only a matter of form and procedure, while the substantive right exercised in both the modes is the right to Appeal. Therefore, if the statute confers a right to Appeal, then there is no requirement of conferring a right to file Cross

Objection separately. The right to file Cross Objection flows from the right to file an Appeal only. It is settled position of law that right to prefer Cross Objection partakes of the right to prefer an Appeal. In this connection reference may be had to the Judgment of the Hon'ble Supreme Court (Three Judge Bench) in "**Municipal Corporation of Delhi Vs International Securities and Intelligence Agency Ltd" reported as (2004) 3 SCC 250 (paras 15, 18-20)[2].**

8. It is submitted that this Hon'ble Tribunal exercising the first Appellate Jurisdiction have wide powers to determine any issue arising out of the impugned Order. This Hon'ble Tribunal may pass any decree or order as the case may require to meet the ends of justice. In this context, the following provisions are noteworthy:-

(a) Code of Civil Procedure, 1908

*"**107. Powers of Appellate Court**.*

...

13. Subject to the caution sounded by the Supreme Court in *Vijay KishanUniyal (supra)* a bare perusal of Section 111(3) of the Electricity Act, 2003 shows that this Hon'ble Tribunal has the power to modify the orders appealed against. Therefore, this Hon'ble Tribunal, under Section 111 (3) of the Electricity Act read with Order XLI Rule 33 of the Code of Civil Procedure, has power to modify the findings in the Impugned Order

(a) Mahant Dhangir&Anr. Vs Madan Mohan reported as 1987 (supp) SCC 528:-

[2]This Judgment was approved and followed in a recent Judgment of Urmila Devi Vs National Insurance Co [2020] 11 SCC 316

15. Basically, the first question raised in the Cross Objection relates to the right of Madan Mohan to retain the property under the sale deed. The appellants are the second purchasers. The Math, therefore, could urge the objection that the appellants and Madan Mohan have no right to retain the property after the sale deed was declared null and void. But then the considerations as to the lease deed is quite different. The validity of the lease deed and the possession of the land thereof has to be determined only against Madan Mohan. It is not intermixed with the right of the appellants. It has no relevance to the question raised in the Appeal. The High Court was therefore, right in holding that the Cross Objection as to the lease was not maintainable against Madan Mohan.

16. But that does not mean, that the Math should be left without remedy against the judgment of learned single judge. If the Cross Objection filed under Rule 22 of Order 41 CPC was not maintainable against the co-respondent, the Court could consider it under Rule 33 of Order 41 CPC. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The Appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to

determine any question not only between the appellant and respondent, but also between respondent and co-respondent. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constant? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these. That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power to the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.

(b) K.MuthuswamiGounder Vs N.PalaniappaGounder reported as (1998) 7 SCC 327.

"12. Order XLI Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such

further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises one of the judgment of the lower court and in that event the appellate court could consider any objection to any part of the order or decree of the court and set it right."

(c) Chaya Vs Bopusaheb reported as (1994) 2 SCC 41:

"13. As regards the question as to whether the High Court could have extended the operation of the decree to the entire suit property instead of restricting it only to R.S. No.975/1, we are afraid that the High Court has not noticed the true effect of Order 41, Rule 33 of the Code of Civil Procedure.

14. This provision is based on a salutory principle that the appellate court should have the power to do complete justice between the parties. The object of the rule is also to avoid contradictory and inconsistent decisions on the same questions in the same suits. For this purpose, the rule confers a wide discretionary power on the appellate court to pass such decree or orders as ought to have been passed or as the nature of the case may require, notwithstanding the fact that the appeal is only with regard to a part of the decree or that the party in whose favour the power is proposed to be exercised has not filed any appeal or cross objection. It is also true that in an

appropriate case, the appellate court should not hesitate to exercise the discretion conferred by the said rule."

(d) Banarsi & Ors Vs Ram Phal reported as (2003) 9 SCC 606:

"9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of the defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection. A right to file cross-objection is the exercise of right to appeal though in a different form. It was observed in SahaduGangaramBhagade v. Special Dy. Collector, Ahmednagar [(1970) 1 SCC 685 : (1971) 1 SCR 146] that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved

thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection — both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.
(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-

amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

..

"15. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court….. The overriding consideration is achieving the ends of justice."

(e) Bihar Supply Syndicate v. Asiatic Navigation reported as (1993) 2 SCC 639.

"28. Order 41 Rule 33 of the Code of Civil Procedure reads as under:…..

29. Really speaking the Rule is in three ports. The first part confers on the appellate court very wide powers to pass such orders in appeal as the case may require. The second part contemplates that this wide power will be exercise by the appellate court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross suits or where two or more decrees are passed in one suit, this

power is directed to be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees…."

(f) State of Punjab &Ors Vs Bakshish Singh: (1998) 8 SCC 222

"10. The powers of the appellate court are also indicated in Section 107 of the CPC which provides that the appellate court shall have the same powers as are conferred on the original court. If the trial court could dispose of a case finally, the appellate court could also, by virtue of Clause (a) of Sub section (1) of Section 107, determine a case finally. In R.S.Lala Praduman Kumar v. Virendra Goyal and Ors, MANU/SC/0616/1969: (1969)3SCR950, it was held that the appellate court could even relieve against forfeiture in a case under the Transfer of Property Act. This too was based on the principle that the power which was available to the original court could be exercised by the appellate court also."

(g) Cellular Operators Association of India &Ors Vs Union of India (2003) 3 SCC 186.

"25. It did not follow the said guidelines. Even as an appellate authority the TDSAT was required to comply with the principles of or analogous to the provisions of Order 41 Rule 33 of the Code of Civil Procedure. See Rattan Dev v. Pasam Devi MANU /SC/0807

/2002:/2002/ SUPP2SCR394 and B.S.Sharma v State of Haryana and Anr. MANU/SC/0709/2000: (2001) LLJ15C".

14. Closer home, this precise question was argued at great length and considered by this Hon'ble Tribunal and the Hon'ble Supreme Court in the *Compensatory Tariff* batch of matters. Ultimately, the Hon'ble Supreme Court in **Energy Watchdog v. CERC, (2017) 14 SCC 80** :

"..31. In order to appreciate this contention, it is first necessary to set out the relevant portion of this judgment. By the judgment dated 31-3-2015 [Adani Power Ltd. v. CERC, (2015) 12 SCC 216] , this Court held: (Adani Power Ltd. case [Adani Power Ltd. v. CERC, (2015) 12 SCC 216] , SCC pp. 219-20, paras 13-19)

"13. By order dated 1-8-2014 [Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC, 2014 SCC OnLineAptel 170] , the Appellate Tribunal dismissed the cross-objections of the appellant herein as not maintainable. On 16-9-2014, the appellant preferred Appeal No. DFR No. 2355 of 2014 before the Appellate Tribunal against that part of the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] which went against the appellant. Obviously, there was a delay in preferring that appeal. Therefore, the appellant filed an application bearing IA No. 380 of 2014 seeking condonation of delay in preferring the appeal which was rejected by the impugned order [Adani Power Ltd. v. CERC, 2014 SCC OnLineAptel 191] . Hence, the instant appeal.

14. The issue before this Court is limited. It is the correctness of the decision of the Appellate Tribunal in declining to condone the delay in preferring the appeal against the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] of the Central Commission.

15. However, elaborate submissions were made regarding the scope of Order 41 Rule 22 of the Code of Civil Procedure, 1908 (for short "CPC"), and its applicability to an appeal under Section 111 of the Act by the appellant relying upon earlier decisions of this Court. The respondents submitted that such an enquiry is wholly uncalled for as the cross-objections of the appellant in Appeal No. 100 of 2013 stood rejected and became final.

16. Lastly, the learned counsel for the appellant submitted that even if this Court comes to the conclusion that the appellant has not made out a case for condonation of delay in preferring an appeal against the order dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] of the Central Commission, the appellant is entitled to argue in the pending Appeals Nos. 98 and 116 of 2014 both the grounds of "force majeure" and "change of law" not for the purpose of seeking the relief of a declaration of the frustration of the contracts between the appellants and the respondents, thereby relieving the appellant of his obligations arising out of the contracts, but only for the purpose of seeking the alternative relief of compensatory tariff. In other words, the appellant's submission is that the facts which formed the basis of the submission of the frustration of contracts are also relevant for

supporting the conclusion of the National Commission that the appellant is entitled for the relief of compensatory tariff.

17. We agree with the respondents that we are not required to go into the question of the applicability of Order 41 Rule 22 in the instant appeal as the decision of the Appellate Tribunal to reject the cross-objections of the appellant by its order dated 1-8-2014 [Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC, 2014 SCC OnLineAptel 170] has become final and no appeal against the said order is pending before us.

18. We are also not required to go into the question whether the order of the Central Commission dated 2-4-2013 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2013 SCC OnLine CERC 180] by which it declined to grant a declaration of frustration of the contracts either on the ground of "force majeure" or on the ground of "change of law" is independently appealable, since no such appeal even if maintainable, is preferred by the appellant.

19. The question whether the appellant made out a case for condonation of delay in preferring the appeal before the Appellate Tribunal, in our opinion, need not also be examined by us in view of the last submission made by the appellant. If the appellant is not desirous of seeking a declaration that the appellant is relieved of the obligation to perform the contracts in question, the correctness of the decision of the Appellate Tribunal in rejecting the application to condone the delay in preferring the appeal would become purely academic. We are of the opinion that so long as the appellant does not seek a declaration, such as the one mentioned above, the

appellant is entitled to argue any proposition of law, be it "force majeure" or "change of law" in support of the order dated 21-2-2014 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2014 SCC OnLine CERC 25] quantifying the compensatory tariff, the correctness of which is under challenge before the Appellate Tribunal in Appeal No. 98 of 2014 and Appeal No. 116 of 2014 preferred by the respondents, so long as such an argument is based on the facts which are already pleaded before the Central Commission."

(emphasis in original)….

"33. As has been stated by this Court, the issue before the Court was limited. This Court held that the appellant is entitled to argue force majeure and change in law in pending Appeals Nos. 98 and 116 of 2014. This was because what was concluded by the Central Commission was force majeure and change of law for the purpose of seeking the relief of declaration of frustration of the contract between the appellant and the respondents, thereby relieving the appellant of its obligations arising out of the contract. Since the appellant was not desirous of seeking a declaration that the appellant is relieved of the obligation of performing the contract in question, the appellant is entitled to argue force majeure or change of law in support of the Commission's order of 21-2-2014 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2014 SCC OnLine CERC 25] , which quantified compensatory tariff, the correctness of which is under challenge in Appeals Nos. 98 and 116 of 2014. This being the case, it is clear that this Court did not give any truncated right to

argue force majeure or change of law. This Court explicitly stated that both force majeure and change of law can be argued in all its plenitude to support an order quantifying compensatory tariff so long as the appellants do not claim that they are relieved of performance of the PPAs altogether. This being the case, we are of the view that the preliminary submission of the appellant before us is without any force. Accordingly, the Appellate Tribunal rightly went into force majeure and change of law…"

15. It is submitted that the present submissions are placed for the kind consideration of this Hon'ble Tribunal on the position in law as regard the scope, width and right of a Respondent in an appeal to plead its case. These submissions are not on the facts of the present case since the Appellant and the Respondent licensee are contesting the merits and the Commission is appearing before this Hon'ble Tribunal only to assist this Hon'ble Tribunal on a matter on which this Hon'ble Tribunal is pleased to require."

69. In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

70. "Whether the impugned order deserves to be interfered with? If so, what order?"

ANALYSIS & CONCLUSION:

71. Apparently, the Appellant is an embedded consumer of the 2nd Respondent. According to 2nd Respondent, the Respondent Commission has no jurisdiction to entertain the Petition filed by a consumer for resolution of its grievance as a consumer. According to them, it ought to have approached Consumer Grievance Redressal Forums alone.

72. The 2nd Respondent-UPCL further contends that in terms of Section 42(4) of the Electricity Act, 2003, the consumer who seeks open access has to pay additional surcharge to the distribution licensee to meet the fixed cost liability of distribution licensee which arises on account of his obligation to supply. Therefore, according to UPCL, the Appellant ought not to have approached the Respondent Commission. They further contend that the claim of the Appellant is barred by limitation, hence the Petition itself filed by the Appellant before UERC was not maintainable. The 2nd Respondent further contends that the Limitation Act would be applicable to the adjudicatory functions of the Commission.

73. According to the Appellant, there was no justification for the Respondent Commission to reject the Petition filed by the Appellant seeking refund of additional surcharge, which was illegally levied and collected by the 2nd Respondent Commission. They further contend that

the Respondent Commission having opined that it can entertain the Petition and further opining that Limitation Act will not apply to the case of the Appellant, ought not to have rejected the claim of the Appellant i.e., refund of additional surcharge collected from the Appellant between 17.06.2013 to 31.03.2017.

74. Open access is a right available to the consumer to source electricity from third parties and this concept of open access was introduced in the Electricity Act, 2003. This means that there is no compulsion for the consumer to secure supply of power only from the distribution licensee within which their area the consumer is situated. The entitlement of the distribution licensee if a consumer chooses to go out of the network of the distribution licensee of set area, then the consumer has to pay apart from the network cost, cross subsidy surcharge in terms of Proviso to Section 42 (2) and Section 42 (4) respectively. This entitlement of the distribution licensee is not absolute, since both these charges have to be authorized and determined by the State Commission.

75. We are concerned with additional surcharge as dealt under Section 42 (4) which reads as under:

"Section 42. (Duties of distribution licensee and open access):

……

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

76. From the above provision, it is clear that for the purpose of meeting the fixed cost of the distribution licensee on account of its obligation to supply, additional surcharge can be collected from the consumer who seeks open access. Apparently, the distribution licensee has no unilateral power to levy any charge without determination and approval of the State Commission.

77. The determination of additional surcharge is with reference to National Tariff Policy. Clause 8.5 of the Policy refers to cross subsidy surcharge and additional surcharge for open access, which reads as under:

"8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

……

8.5.4. The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."

78. The existing UERC (Terms and Conditions of Intra-state Open Access) Regulations, 2015 also has the following provision:

*"**23. Additional Surcharge***

……

(3) The distribution licensee shall submit to the Commission, on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.

The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:

Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access consumers."

79. So far as the controversy in question, it is seen that at the instance of UPCL in a petition filed before the State Commission, for the Financial Year 2011-12, the State Commission by its Order dated 18.08.2011 determined the levy of 15% surcharge for open access transaction on the applicable 'Time of the Day' energy charges as additional surcharge under Section 42(4) of the Electricity Act. This was based on the stranded capacity of the distribution licensee on account of open access transactions. The Order dated 18.08.2011 was apparently applicable till 31.03.2012. The said Order reads as under:

"9. Before estimating as to what should be the additional surcharge to be levied for the current year 2011-12, it is pertinent to refer to UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010 wherein it has provided that open access charges applicable for the financial year shall be based on

the ARR of the preceding year. Accordingly, in Order to analyse the issue of additional surcharge, it is relevant to ascertain the first instance the fixed cost component of power purchase of UPCL for the FY 2010-11. Based on the Tariff Order dated 10.04.2010 for FY 2010-11, power purchase fixed cost of UPCL for FY 2010-11 has been presented in Table 1 below:

Table 1: Power Purchase Fixed cost of UPCL for FY 2010-11

Description	***MU***	***Crores***	***Rs./ unit***
Sales	*6280.11*		
Sales with Eff improvement	*6384.16*		
(A) Other Fixed cost of UPCL (wheeling charges)		*418.81*	*0.66*
(B) Total Power Purchase Costs		*1720.49*	*2.69*
(i) Variable Cost		*1116.83*	*1.75*
(ii) Fixed Cost		*603.66*	*0.95*

……

12. Based on the above and considering the uncertain scenario of power purchase cost on a day to day basis, it has been considered that, since, embedded consumers of licensee, availing continuous supply option, are liable to pay the open access charges namely wheeling charges, transmission charges, cross-subsidy charges etc. except continuous supply surcharge of 15% while availing

> *open access, a normative additional surcharge of 15% on prevalent energy charges as per Tariff Order, may be levied on energy drawn through open access by these embedded consumers availing continuous supply option and seeking to draw part or full of its demand through open access."*

80. It is seen that subsequent to 31.03.2012, the Respondent UPCL never sought determination of additional surcharge as contemplated under Section 42(4) of the Act. Therefore, it is crystal clear that beyond 31.03.2012 in the absence of the State Commission determining or approving any additional surcharge, the UPCL could not have levied such additional surcharge on the consumers. However, UPCL continued to levy additional surcharge on all the open access consumers beyond 31.03.2012.

81. The Appellant started procuring power through open access from 17.06.2013 onwards. The Appellant has paid additional surcharge levied by the Respondent UPCL. It is not in dispute that the Appellant and other open access consumers complained to the State Commission about the unauthorized levy of additional surcharge by UPCL. At this juncture, the State Commission initiated suo motu proceedings in Petition No. 23 of

2017. By Order dated 23.05.2017, the State Commission disposed of the suo motu Petition opining that additional surcharge was recovered by distribution licensee contrary to the procedure. Therefore, it was unauthorized, since the distribution licensee did not file any Petition for determination of additional surcharge subsequent to 31.03.2012. The view of the Commission on this is as under:

> ***"2. Commission's views and decision***
>
> *……*
>
> *2.2 Based on the above provisions of the Act, Policy and Regulations similar views had also been taken by the Commission on UPCL's Petition seeking determination of Additional Surcharge to meet the fixed cost arising out of obligation to supply continuous power. Accordingly, the Commission had vide its Order dated 18.08.2011 determined the continuous supply surcharge for FY 2011-12. Vide the said Order, the Commission decided to allow normative additional surcharge of 15% on prevalent energy charges as per Tariff Order. Relevant extract of the Para 12 of the Order dated 11.08.2011 is as follows:*
>
> > *"12 Based on the above and considering the uncertain scenario of power purchase cost on a day to day basis, it has been considered that, since, embedded consumers of licensee, availing continuous supply option, are liable to pay the open access charges namely wheeling charges,*

transmission charges, cross-subsidy charges etc. except continuous supply surcharge of 15% while availing open access, a normative additional surcharge of 15% on prevalent energy charges as per Tariff Order, may be levied on energy drawn through open access by these embedded consumers availing continuous supply option and seeking to draw part or full of its demand through open access."

……

"16 In the light of the above, the Commission Orders that:

(i) The licensee shall charge Additional Surcharge only from those embedded consumers who avail the continuous supply option and draw power through open Access for meeting their part/full load requirements.

(ii) The Additional Surcharge shall be levied on the energy drawn through open access @ 15% of the applicable ToD rate of energy charge on the basis of prevalent Tariff Order.

(iii) If UPCL feels that the above normative additional surcharge determined above in not adequate and does not cover the entire power purchase fixed costs of the licensee, UPCL may submit a proposal giving a detailed calculation statement for recovery of the any such shortfall in accordance with provisions of UERC (Terms and Conditions

of Intra-State Open Access) Regulations, 2010 and Tariff policy. "

However, for subsequent financial years, UPCL did not file any petition in accordance with the prevalent Open Access Regulations and continued levying the additional surcharge*. …"*

82. It is relevant to mention the observation of the State Commission in its Order dated 23.05.2017. Para 2.4 and 2.5 of the Order are relevant which read as under:

"2.4 The Open Access Regulations clearly provide that the licensee has to establish, by way of filing a petition before the Commission, that the power remained stranded on account of increase in capacities than what was envisaged, for procuring power through open access. Further, on six monthly basis licensee has to mandatorily submit detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply power. Moreover, UPCL has not demonstrated that due to procurement of power through open access by such consumers, the power arranged through long-term contracts remained stranded. In the absence of any approved additional surcharges w.e.f. 01.04.2017, the licensee is not entitled to levy the same

from open access consumers as also decided vide the Commission's Tariff Order dated 29.03.2017.

2.5 For the purpose of claiming additional surcharge from such stakeholders UPCL may file a petition as provided in the Regulations. Till determination of such charges by the Commission UPCL is directed to stop levying the same with immediate effect in accordance with the directions provided in the Tariff Order dated 29.03.2017.

3. Ordered accordingly."

83. According to Appellant, since it was a suo motu Petition taken up by the Commission, it did not refer to facts of any individual or particular consumer. Therefore, question of refund of the past recoveries illegally collected by UPCL from the Appellant did not arise. Even otherwise, quantum of refund cannot be decided in suo motu petition, since it requires consideration of individual case to case basis.

84. The Appellant preferred a separate Petition No. 16/2019 seeking refund of additional surcharge collected by UPCL alleging that it was illegal. They also sought for interest.

85. Though issues of jurisdiction and limitation were held in favour of the Appellant, the State Commission rejected the Appellant's claim on the following grounds:

(i) UPCL has accounted for the amounts recovered by way of Additional Surcharge in its Annual Revenue Requirements and the benefit was passed on to the consumers.

(ii) The Appellant would have passed on the cost, factoring the levy of Additional Surcharge, to its consumers and therefore would amount to unjust enrichment.

(iii) That the Appellant's claim for refund is an afterthought for deriving additional benefits since the issue was never agitated nor any clarification was sought by the Appellant as to whether the order dated 18.08.2011 was applicable for FY 2011-12 only or was it applicable for the ensuing years as well, till it was discontinued by the State Commission.

(iv) It would be a very complex exercise to work out the power that remained stranded from FY 2012-13 to FY 2016-17 & based on it to work out the Additional Surcharge for that period and to give effect to

the same in the previous tariff orders and also to effect revision of consumer tariffs with effect from the FY 2012-13.

86. The Respondent Commission framed three issues which read as under:

"(i) Whether the Commission has jurisdiction to hear the Petition filed in a dispute between the distribution company and an individual consumer.

(ii) Whether the Petition is time barred under the Limitation Act 1963 (Limitation Act) and whether the same is applicable in the present proceedings.

(iii) Whether the levy of 15% Additional Surcharge, on the Petitioner, by the licensee, during the period 17.06.2013 to 31.03.2017, when the Petitioner was purchasing power under Open Access through IEX, is legally tenable and whether the Petitioner is entitled for refund of such Additional Surcharge."

87. After referring to contentions of both the parties, the State Commission opined at Para 4.8 and 4.9 which reads as under, that it has jurisdiction to entertain the Petition.

> *"4.8. The conjoint reading of all the judgments stated above would provide sufficient powers to the State Commission to give suitable directions as may be necessary to prevent the abuse of process or to meet the end of justice. It is amply clear that the Commission has full power to pull up the licensee where there is violation of the provisions of the Act/Rules/Regulations or the Orders/directions of the Commission which shall inter alia include the dispute of the open access consumer with the licensee arising out of the said violations.*
>
> *4.9. Considering the above w.r.t. the present matter, the Petitioner has pointed out that the Petitioner is a consumer of UPCL and has complained on the levy of tariff by UPCL without authority of law and contrary to the tariff orders passed the Commission and since the issue entails interpretation of the order and compliance of the Regulations of the Commission, is of the exclusive jurisdiction of the Commission. Hence, the question raised by Respondent (UPCL) over jurisdiction of the Commission is hereby declined."*

88. We find no good ground to defer from the said opinion of the Commission.

89. Pertaining to the second issue of the claim being barred by limitation, the impugned order at Para 4.10 & 4.11 says as under:

> *"4.10. With regard to the second issue raised by UPCL regarding the Petition being time barred under the Limitation Act, the Petitioner has relied upon the judgment of the Hon'ble Supreme Court* ***(Supra)*** **[i.e. AP Power Coordination Committee v. Lanco Kondapalli Power Limited & Ors. (2016) 3 SCC 468]** *stating that limitation is not applicable to the proceedings under the Electricity Act, 2003 except for the adjudicatory functions of the Commission under section 86(1)(f) and that the present proceedings are not under section 86(1)(f). In this regard it is relevant to quote the said judgment of the Hon'ble Court,*
>
> > *"(i) A plain reading of this section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have overriding effect as per Section 174, the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force.*

(ii) In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Section 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence or limitation, we are persuaded to hold that in the light nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation.

(iii) In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86 (1)(f) also appears to be for speedy resolution so that a vital developmental factor – electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. ***Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory."***

[Emphasis added]

> *"4.11. From the above judgment of the Hon'ble Court it is clear that the limitation bar only applies to the proceedings initiated under section 86(1)(f) of the Act invoking only judicial powers of the Commission. Since, the instant matter propels to invoke the regulatory powers of the Commission and is not an adjudication matter under section 86(1)(f), therefore, the question of applicability of Limitation Act does not arise."*

90. According to learned counsel for the Respondent-UPCL, though they have not filed Appeal challenging the opinion of the Commission pertaining to jurisdiction and limitation issues, they can still agitate the said issues to support the final order passed in their favour. For this proposition, the 2nd Respondent has referred to various Judgments which are noted in the pleadings of the parties.

91. Then **coming to the issue of limitation**, it is noticed that in a suo motu petition, a generic order was passed by the Respondent Commission that the UPCL was not authorised to levy additional surcharge beyond 31.03.2012, since there was no such determination by the State Commission and UPCL never asked for that.

92. As regards the levy of additional surcharge at 15% by the licensee for the period between 17.06.2013 to 31.03.2017, the Appellant, during

this period was purchasing power through open access through IEX. The question whether the Appellant is entitled for refund of such additional surcharge and whether the opinion of the Respondent Commission that the said claim of the Petitioner deserves to be rejected on account of delay and laches on the part of the Appellant is correct.

93. We have to consider whether application of principle of unjust enrichment as stated in the impugned is just and proper. We also have to consider whether the Respondent Commission was justified in opining that the Petition was an afterthought as stated in the impugned order.

Section 42(4) of the Electricity Act of 2003 stipulates as under:

"(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

94. Clause 8.5.4 of the Tariff Policy dated 28.01.2016 also provides for levy of additional surcharge as under:

"8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively

demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."

95. The provisions for charging additional surcharge have been specified in UERC (Terms and Conditions of Intra-State Open Access) Regulations 2010. The same have been continued in Regulations, 2015. The relevant Regulation 23 of Regulations 2015 reads as under:

"(1) Any consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Act.

(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

(3) The distribution licensee shall submit to the Commission, on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.

The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge. Provided that any additional surcharge so determined by the Commission shall be applicable on prospective basis on all open access consumers."

96. The State Commission refers to order of the Commission dated 23.05.2017 pertaining to open access Regulations and whether the distribution licensee has complied with the said Regulation. Apparently, the UPCL was required to submit detailed calculation of fixed cost incurred by it towards its obligation to supply. This has to be submitted to the State Commission and in the absence of such compliance till determination of such additional charge by the Commission, UPCL was not entitled to recover additional surcharge. If it has recovered, it is nothing but levy of addition surcharge without an authority of law or without there being a determination by the State Commission as required under the relevant Regulations.

97. Apart from the ground of delay and laches, the State Commission further opines that since the additional surcharge recovered from the open access consumers is being treated as part of non-tariff income which gets adjusted in the overall Annual Revenue Requirement of UPCL, thereby giving benefit of lower tariff to its consumers for supply of electricity in the State. This lower tariff benefit might have been extended to industrial consumers also; but can this be a relevant ground for putting a seal of approval for the illegitimate or illegal action of UPCL in collecting additional surcharge without the same being determined by the State Commission for the above said period?

98. Section 62 (6) of the Act reads as under:

> *"(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."*

99. When UPCL levied additional surcharge, it was not authorized under any law as stated above. In fact, this is the opinion of the Tribunal pertaining to refund of amounts, as stated above, as any person recovers a price or charge exceeding the tariff determined by the Commission, such

excess amount is recoverable by the person who has paid such price or charge with interest also equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

100. The subject matter before the Commission was claim of refund of additional surcharge which was unauthorizedly recovered by the UPCL. In terms of Section 62 (6) of the Act, it is very clear that irrespective of other liability incurred by the licensee, if the licensee has recovered unauthorizedly any amount, the manner of utilization of such unauthorized amount recovered by UPCL has nothing to do with the entitlement of the Appellant. Once the Appellant is entitled for refund of such amount, how UPCL has used the said amount to lower its annual requirement and how it treated the said amount or how process of retail supply tariff determination was done, should not come in the way of right, interest, and privilege of the Appellant who seeks refund of the amounts unauthorizedly and illegally recovered from it.

101. According to 2nd Respondent, the cost of electricity must have been factored into the price of goods sold by the Appellant to his customers. Without any material to come to such conclusion, the Respondent

Commission was not justified to opine so. That apart, the goods of the Appellant are sold in the open market which is competitive market. He might quote a lesser price for his goods to have enhanced sales. Therefore, we are of the opinion that the State Commission went in wrong to conclude as stated above.

102. Distribution licensees are commercial entities which charge prices for the goods supplied and services rendered. Based on unjust enrichment, no case can be decided by the State Commission or the Tribunal whenever illegal recoveries of moneys are made by the distribution licensees. We totally agree with this argument of the Appellant.

103. The principle of unjust enrichment normally is seen in the case of indirect taxation. However, the State Commission has applied the said principle in an erroneous manner as contended by the Appellant.

104. Regarding statutory right for refund of charges wrongfully collected by the UPCL, the issue of wrongful levy of additional surcharge was being taken up with UPCL and also before the State Commission not for the first time after the decision on 23.05.2017. No doubt, the State Commission

initiated suo motu proceedings against the UPCL in 2017, but much prior to the said date, the Appellant and also similarly placed open access consumers were agitating before the State Commission and the UPCL. Therefore, we are of the opinion that the Appellant has not suddenly come up with the allegation of illegal levy of addition surcharge after 23.05.2017. Since it was a suo motu order by the State Commission, individual facts could not be agitated or examined. The State Commission in fact directed UPCL not to collect the additional surcharge. The claim of the open access consumers till then which was in the form of representation or complaint got fructified when the State Commission passed a generic order dated 23.05.2017 opining that the UPCL not to collect additional surcharge.

105. Only after this opinion of the State Commission in black and white, the Appellant gets a right to claim refund and the amounts recovered from him as additional surcharge unauthorizedly collected by the UPCL. Though the Respondent Commission was justified in opining that the Petition was not barred by limitation, however, proceeded to opine that there is delay and laches on the part of the Appellant. We are of the opinion that there is no question of delay and laches on the part of the

Appellant, since the Petition is not an afterthought and the same is not barred by limitation.

106. In addition to the above discussion, what we notice is that every month or every time when the Respondent UPCL levies additional surcharge, it leads to right of cause of action. Such right was continued as long as there is unauthorized levy of additional surcharge on the consumers. The said right got fructified by suo motu order dated 23.05.2017. Therefore, we are of the opinion that the question of delay and laches as opined by the Respondent Commission was not justified. The Appellant has rightly referred to the following decision of the Hon'ble Supreme Court in the case of ***Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur [****(1992) 2 SCC 598 at page 602-603]* on the issue of delay and laches when the test of non-suiting a party on account of delay and laches is pressed into service:

> *"13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is*

denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilokchand case [(1969) 1 SCC 110] relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that the suit has been rightly dismissed."

107. In light of the above discussion and reasoning, we are of the opinion that the impugned order dated 05.08.2019 of the Respondent Commission is liable to be set aside. The Appellant is entitled to refund of the additional surcharge which was wrongfully collected

from it between 17.06.2013 to 31.03.2017 along with bank interest applicable in terms of Section 62 (6) of the Electricity Act. Accordingly, the Appeal is allowed.

108. We place on record our appreciation for the assistance rendered by Advocate Shri Buddy Ranganadhan.

109. IAs which are pending, if any are disposed of accordingly.

110. No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the **14th day of July, 2021**.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓

REPORTABLE / ~~NON-REPORTABLE~~

tpd