IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 77 OF 2018 &
IA NOs. 318 OF 2018 & 125 OF 2019

Dated: 27th April 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Maharashtra State Electricity Distribution Co. Ltd.
5th Floor, Prakashgad
Bandra (East)
Mumbai 400 051 …. Appellant

Versus

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

2. **M/s Adani Power Maharashtra Ltd.**
   Achalraj, Opp. Mayor Bungalow, Law Garden
   Ahmedabad 380 006, Gujarat
   Through its Director

3. **M/s JSW Energy Ltd.**
   Village Nandiwade,
   Post Jaigad, Tal. & Dist. Ratanagiri 415 614
   Through its Director

4. **M/s Rattan India Power Ltd.**
   Plot No. D2 & D2 (Part),
   At Additional Industrial Area
   Nandganpeth, Amravati 444 901

Through its Director

5. **M/s GMR Warora Energy Ltd.**
701/704, 7th Floor,
Naman Centre, A-Wing
BKC, Bandra, Mumbai 400 051
Through its Director … Respondents

Counsel for the Appellant (s): **Mr. G. Umapathy**
Mr. Aman Malik

Counsel for the Respondent (s): **Mr. S. Venkatesh** for R-2

Mr. Aman Anand
Mr. Aman Dixit for R-3

Mr. Vishrov Mukherjee
Mr. Yashaswi Kant for R-4

Mr. Alok Shankar for R-5

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This appeal was filed by Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "MSEDCL" or "the appellant" or "the Procurer") assailing the Order dated 16.11.2017 passed by the first respondent Maharashtra State Electricity Regulatory Commission (hereinafter referred to as "MERC" or "the State Commission" or "the Commission") in Case No. 24 of 2017 rejecting the contention of the appellant that introduction of the *Base Rate system* and the *Marginal Cost of funds-based Lending Rate System* ("MCLR") by Reserve Bank of India (RBI) does not constitute a *Change in Law* ("CIL") event within the meaning of the

expression used and contingency provided for to incorporate restitutionary principle in the Power Purchase Agreements (PPAs) which are subject-matter here so as to amend the rate at which *Late Payment Surcharge* ("LPS") is payable by the procurer to the sellers – the generators which are arrayed as the second to fifth respondents herein (hereinafter "the generators"). Pertinent to add, the Commission also found the notices of CIL to be belated and further observed that in absence of amendment of the PPAs, the claim for reduced liability on account of LPS is not admissible.

2. It is common ground that the power projects established by the generators and the long term PPAs entered into by the parties are governed by Section 63 Electricity Act, 2003, the bid price discovered through the process under applicable guidelines having been duly adopted. The first PPA was executed on 14.08.2008 while the last of several others signed during the period was entered upon on 22.04.2010.

3. Some of the terms of the PPAs need to be borne in mind and may be extracted (the language employed in different contracts being similar):

> *"Article 1: Definitions and Interpretation*
> *Change in Law - shall have the meaning ascribed thereto in Article 13.1.1 of this agreement*

Indian Governmental instrumentality – means the GoI, Government of Maharashtra and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GoI or Government of States where the procurer and project are located and includes the CERC and MERC

Late Payment Surcharge – shall have the meaning ascribed there to in Article 11.3.4

Law - means, In relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC

SBAR- means the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.

Article 11: Billing and Payment

11.3.4 In the event of delay in payment of a monthly bill by the procurer beyond its due date month billing, a Late Payment Surcharge shall be payable by the procurer to the seller at the rate of two (2) percent in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay….

Article 13: Change in Law

13.1 Definitions

In this Article 13, the following terms shall have the following meanings

13.1.1 —Change in Law means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal or any law or

(ii) a change in interpretation of any law by a competent court of law, tribunal or Indian governmental instrumentality provided such court of law, tribunal or

Indian governmental instrumentality is final authority under law for such interpretation but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) Change in respect of UI charges or frequency intervals by an Appropriate Commission.

13.2 Application and principal for computing impact of Change in Law <u>While determining the consequence of Change in Law under this Article 13, the parties shall have due regard to the principle that the purpose compensating the party affected by such Change in Law, is to restore through monthly tariff payments to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred</u>.

b) Operation Period-

As a result of Change in Law, the compensation for any increase / decrease in revenues or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the parties, subject to right of appeal provided under applicable law and effective from the date specified in 13.4.1

13.3 <u>Notification of Change in Law</u>:

13.3.1 If the seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article

13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, <u>the Procurer shall have the right to issue such notice to the seller</u>.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

a) The Change in Law; and

b) The effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff adjustment payment on account of Change in Law

13.4.1 subject to Article 13.2, the adjustment in monthly tariff payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law, or

(ii) the date of order/ judgment of the competent court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of law."

(emphasis supplied)

4. The case of the appellant has been that though the *Late Payment Surcharge* ("LPS") for delay in payment of bills is stipulated to be computed on the basis of the applicable SBAR (i.e., Prime Lending Rate fixed by SBI) as per Article 8.3.5 read with definition of SBAR under the PPA, it cannot be ignored that the RBI replaced the 'Prime Lending Rate' ("PLR") method of interest fixation with the Base Rate Method in 2010 and the Marginal Cost of Lending Rate ("MCLR") method in 2016.

5. The appellant submits that RBI had introduced BPLR system in 2003 for charging interest on loan with the objective of bringing transparency in the lending rate. By notification dated 01st July, 2010 it introduced "*Base Rate system*", replacing erstwhile BPLR system, with immediate effect. Subsequently, by further notification dated 03rd March, 2016 RBI introduced "MCLR system", replacing Base

rate system, effective from 01st April, 2016. It is pointed out that as per the notifications, the BPLR system was replaced with Base rate system because it fell short on concerns of transparency in lending rates and, therefore, the Banks were advised to switch over to the system of Base Rate w.e.f. 1st July, 2010 and further, to MCLR system from Base rate w.e.f. 1st April, 2016.

6. It is submitted that RBI qualifies as an Indian Governmental Instrumentality, it being vested with the authority and statutory powers for regulation of the Banking business in the country, reference being made to Section 21 of Banking Regulations Act, 1949. It is argued that the notifications, guidelines or circulars issued by RBI qualify as Change in Law, the State Bank of India (SBI) being bound by the same. The contention is that introduction of Base Rate Method and MCLR amount to a Change in Law under the PPAs. It is pointed out that there is disparity in the rates under PLR and Base Rate or MCLR System, the application of the latter two resulting in LPS being charged at lower rate. The appellant argues that enforcement of LPS at the PLR rate has been resulting in unjust enrichment of the generating companies.

7. The Commission rejected the case of appellant observing as under:

> "*11. Thus, the PPAs provide for LPS at a rate which is 2% above the SBAR. The SBAR is defined as the SBI PLR for one-year loans. MSEDCL has stated that, as against the*

BPLR system in vogue from 2003 on which the SBAR was based, the RBI first introduced the Base Rate system from July, 2010, and thereafter replaced it with the MCLR system from April, 2016. MSEDCL contends that

a) *these revisions constitute Change in Law events in terms of the PPAs; and that*
b) *the LPS be chargeable accordingly at 2% above the Base Rate from July, 2010 and 2% above the MCLR from April, 2016 onwards, instead of the current PPA provision.*

The consequence would also be that, for any LPS that has been paid by MSEDCL since that date, if the LPS based on the SBAR is higher than that based on the subsequent revisions in reference rates by RBL, the amount of difference would have to be refunded by the Sellers to MSEDCL. Any LPS unpaid would also be governed by the rates based on the RBI revisions.

12. It is evident from the PPA provisions quoted above that not all changes in legal dispensations by a Governmental Instrumentality such as RBI amount to Change in Law events for the purposes of compensating the affected party in terms of the PPAs. For this purpose,

a) *The Change in Law must result in additional recurring/non-recurring expenditure by the Seller or any income to the Seller;*
b) *The compensation is for restoring, through monthly tariff payments, the affected party to the same economic position as if such Change in Law had not occurred*
c) *Any change in the Tariff by reason of Change in Law is to be reflected in the Monthly Bills raised by the Seller.*

However, the LPS provision in attracted only when payments are not made by MSEDCL against the Monthly Bills of the Seller within the time stipulated in the PPAs. Any changes in the basis of the LPS rates consequent to revisions by the RBI do not affect in any manner the rates at which power was agreed to be sold and purchased under the PPAs and in the consequent financial implications for either Party resulting in a liability to compensate the affected Party. The LPS is essentially compensatory in character (as

pointed out by the Supreme Court in several Judgments), in terms of the effect on the Seller on account of delay by MSEDCL (as the Procurer in this case) in making due payments. The additional liability of LPS on MSEDCL would also be expected to encourage timely payment and deter delay. Thus, the LPS is also entirely avoidable. The issue would not arise at all if MSEDCL pays its dues in time.

13. Moreover, while introducing the Base Rate system in 2010 and the MCLR system in 2016, the RBI has provided for the continuation of the earlier BPLR dispensation for existing loans. Consequently, the SBAR referred to in the LPS provision, which is the SBI PLR for loans with maturity of one year, remains in vogue and its value continues to be declared by SBI from time to time. Thus, in effect, no change has taken place that would affect the basis of the rate underlying the LPS.

14. In view of the foregoing, the question of the RBI revisions amounting to Change in Law events in terms of the PPAs, or of any compensation on account of such purported Change in Law events in this regard, does not arise.

15. The PPAs provide that notices of Change in Law events are to be issued along with their precise effect by the Seller, failing which MSEDCL may do so. While the changes cited by MSEDCL were effected by RBI from July, 2010 and April, 2016 and notified in advance, MSEDCL issued Notices of Change in Law to the Respondents only in September, 2016, i.e. more than 6 years after RBI introduced the Base Rate system in place of the BPLR system. The Respondents have contended that the claim is barred by limitation. The Commission notes that the PPAs require that such claims be raised.

> *"As soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law."*

MSEDCL could not have been unaware of the revision effected by the RBI at that time, nor has it explained this inordinate delay in raising its claim.

16. The Commission also notes that the PPAs with APML were signed in August, 2010 and February, 2013, after the RBI had introduced the Base Rate system. Nevertheless, MSEDCL chose to enter into these PPAs with the LPS provisions based on the SBI PLR.

17. In the guise of Change in Law events, MSEDCL is in effect seeking that the LPS provisions for delayed payments in the PPAs be modified or read as based on the one-year SBI PLR from July, 2010, and on the one-year SBI MCLR from April, 2016 (which is lower than the SBAR referred to in the PPAs). In this context, the Commission notes that, since the SBI continues to notify the SBAR which determines the LPS rate, recourse cannot be had to the provision in the PPAs that

> *"In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the Parties;...."*

Moreover, the Case 1 Stage 2 PPAs provide that

> *"15.3 This Agreement may only be amended or supplemented by a written agreement between the Parties and after obtaining the approval of the Appropriate Commission, where necessary."*

Article 18.1 of the other PPAs has a similar provision. However, none of the Respondents have agreed to the change in the LPS provision sought by MSEDCL.

18. The Commission also notes that the Respondent GMR is in fact inter-State Generators.

The Petition of Maharashtra State Electricity Distribution Co. Ltd in Case No. 24 of 2017 stands disposed of accordingly."

8. Having heard the learned counsel for all parties, we find that the view taken by the Commission is correct and appropriate, calling for no interference. We elaborate our reasons hereinafter.

9. The clauses in PPAs on the subject of LPS read thus:

> "*In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum …*"
>
> (emphasis supplied)

10. The expression "SBAR", quoted earlier, refers to the prime lending rate notified by SBI "*from time to time*", it being the "*rate per annum applicable for loans with one (1) year maturity*" advanced by the Bank. The obligation to pay LPS at such rate is the agreed term of the contract voluntarily entered into by the parties. The alternative course wherein the LPS could be made payable by putting in position "*any other arrangement*" as substitution is available only in the eventuality of there being "*absence of such rate* (SBAR)", it however being contingent upon the parties having "*mutually agreed*" in such regard.

11. It is trite that LPS is a provision for interest by way of compensation for delayed payment. Reference may be made, if so required, to *Adoni Ginning Factory vs. Secretary, Andhra Pradesh Electricity Board & Ors.*, AIR 1979 SC 1511 and *Tapan Kumar Sinha vs. West Bengal State Electricity Board,* 1997 SCC Online Cal 13.

12. The methodology for determining the quantum of LPS at the rate of 2% in excess of the applicable SBAR per annum payable by MSEDCL has been agreed to under the PPAs, without reference to

any specific Circular or Guidelines issued by RBI. It is instead linked to the rate notified by SBI. It is fairly conceded that SBI continues to issue the PLR rates till date. Therefore, notwithstanding introduction of Base Rate and MCLR system, MSEDCL is obliged to pay LPS on the basis of PLR and is bound by the provisions of the PPA. A view to the contrary would amount to rewriting the contract by us which is not permissible.

13. The liability towards LPS is a matter within the control of the Procurer (appellant) since it is called upon to pay LPS only when it delays in payment of monthly or supplementary bills beyond the due date. It is a penalty it voluntarily agreed to be visited with, the invocation of the clause on LPS being not on account of CIL event. On the contrary, there is a conscious exclusion regarding any *suo motu* change in the rate to be applied while calculating LPS, it being incorrect to argue on the assumption that the contract permits automatic change in system.

14. In terms of the relevant clauses in PPA on the subject of *Change in Law*, as quoted earlier, the pre-requisites are that the event in question must be one that is covered by Article 10.1.1 (broadly speaking, a new enactment, or amendment of existing legislation, or new interpretation by a competent court), the event must have occurred after the Cut-off Date (for present case,

concededly 31.07.2009, it being seven days prior to the Bid Deadline i.e. 07.08.2009); and such event must have resulted in additional recurring or non-recurring expenditure or income for the Seller. The appellant fails to meet the first and third of these conditions. As said before, the LPS Rate under PPA is not linked to RBI circulars or guidelines. The RBI notifications referred to are not shown to have resulted in any additional income or expenditure for the generating companies.

15. Indisputably, LPS is in the nature of interest or disincentive imposed to ensure that there is no default or delay in payment by the procurer. Evidently, LPS is neither income nor expenditure; neither a one-time event nor recurring in nature, it being predicated upon the default in making timely payments. It is in the nature of a contingent liability incurred by the Procurer for failing to adhere to its obligations under the PPA.

16. Having regard to the terms of the contract (PPA) as a whole, there is no doubt that provision for compensation to the affected party for a Change in Law event is essential with regard to tariff only. The rate of LPS has no bearing or impact on tariff. Any possible changes in the basis of the LPS rates consequent to revisions by the RBI, or for that matter, SBI would not affect the rate at which power was agreed to be sold and purchased under the PPAs and

consequently there is no financial implications on expenditure or income for either Party. The LPS only recompenses what was lost in terms of real value of money due to delay in payment.

17. The appellant argues that in order to make up for the loss suffered due to late payment by the Procurer, the generators raise finance from Banks at lower rates while they insist on the Procurer to pay LPS at higher PLR of SBI, the difference representing profits earned at the cost of procurers and amounting to *unjust enrichment*.

18. We may rather quote verbatim from the written submissions of the appellant:

> "*The LPS clause in the PPAs was incorporated with a view to mitigate the loss caused to the Generators due to delay in making payment by the MSEDCL, however, the loss of revenue till receipt of payment from MSEDCL against the bills is mitigated by Gencos by availing loans in the form of additional working capital at floating rates of interest which is much lower than the BPLR or the rate at which appellant is currently forced to pay LPS despite replacement of the same by Base rate and MCLR. Hence, excess recovery of LPS vis-à-vis actual rate of interest on loans becomes additional income of Gencos. It is submitted that the excess recovery should be clawed back towards rationalization of Tariff which benefit end consumers at large by calculating the LPS at Base rate and MCLR for their respective enforcement periods.*"
>
> (emphasis supplied)

19. The argument is shorn of logic and wholly misplaced.

20. The Black's Law Dictionary, 8th Edition (Bryan A. Garner) defines '*unjust enrichment*' to mean "*a benefit obtained from*

another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense". In *Indian Council for Enviro-Legal Action v Union of India*, (2011) 8 SCC 161, after quoting the said definition, the Supreme Court held thus:

> *"152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."*

21. In order to be so termed as unjust enrichment, benefit gained by a party must be such as to have been retained having no legal foundation. The purpose of LPS primarily being to compensate the generators for losses incurred on account of delay in payment, it cannot be said that recovery thereof results in the generators being thereby unjustly enriched. The payment of LPS, along with interest calculated on the prime lending rate, has authorisation in the express terms of the PPAs. The amount claimed as LPS does not represent any benefit accruing to the respondent generating companies but is compensatory in nature. LPS is not economic restitution but is a disincentive. It is wrong to equate LPS with carrying cost or actual cost incurred. The interest paid for finances raised cannot have any nexus with levy of LPS. The payment of LPS

is not same as loan advanced but is a penalty suffered on account of default.

22. There is nothing gained by the appellant by reference to the MERC MYT Regulations 2015, MERC MYT Regulations 2019 or regulations framed by the Gujarat Electricity Regulatory Commission. The PPAs in question are under Section 63 of the Electricity Act. The MYT Regulations do not apply to these PPAs entered into between the parties pursuant to the competitive bidding process initiated by MSEDCL. Therefore, the LPS rate as per the PPAs will only apply. It cannot be ignored that provision for LPS is part of the payment security mechanism. It is well settled that once parties arrive at a mutually agreeable payment security mechanism, it is not open for them to seek amendment of the same. The payment security mechanism governs the commercial interest relationship between parties [*see BSES Rajdhani Power Limited vs. CERC & Ors* Appeals No. 82 of 2012 and 90 of 2012 decided on 24.01.2013].

23. Indeed, the claim of CIL, even if assumed to be meritorious (which we conclude it is not), suffers from laches and inadmissible because it was not raised within time stipulated under PPA. The RBI Circulars or Guidelines vis-a-vis the Base Rate System (as opposed to PLR) have been in existence since 2010. The appellant

(MSEDCL) entered into several PPAs, assumably with open eyes, subsequent to the notification of the Base Rate System by RBI. The CIL notice was issued on 23.09.2016. The time gap of six years can hardly be said to be in accord with the agreed stipulation for such claim to be raised "*as soon as reasonably practicable after becoming aware* (of change in law)". We endorse the submission of the generators that the Procurer cannot be permitted to renege from its obligation under the contract.

24. It is submitted by the contesting respondents (generators) that LPS liability of the appellant on account of defaults in timely payments for the period between 01.07.2010 and 31.03.2017 had crystallised and the dispute as to rate of LPS was raised to vex it further. It is not denied that the appellant had not disputed any of the Monthly Bills or Supplementary Bills as per the procedure prescribed under the PPA. This rendered the demands to have become final and conclusive. The notice based on plea of CIL was issued in 2016, the issue having remained pending for five years depriving the generators of the recompense for the loss suffered. Payment of LPS is triggered only when there is a default by MSEDCL. LPS is levied under the PPAs which were duly executed by MSEDCL. In these circumstances, it is inappropriate to project the outstanding liability towards LPS as an additional burden being

placed upon MSEDCL. Since the generators were within their rights under contractual terms to demand LPS and raised invoices accordingly, there having been inordinate delays in payments - for which defaults there is no explanation offered, we cannot give credence to the plea that the discharge of this obligation might erode the return on equity, it not being allowable as *pass through* for the Procurer, the appellant itself being responsible for the situation it finds itself placed in.

25. For foregoing reasons, the appeal is found devoid of any substance and, thus, liable to be dismissed.

26. The contesting respondents, however, submitted that mere disposal of such appeals as at hand either way does not suffice, it being necessary to issue directions for the matter to be taken to logical end expeditiously lest the dispute continues to fester in indefinite wait for issuance of consequential orders by the regulatory authority (Commission) embroiling the parties in yet another round of proceedings at that level or while fondly hoping voluntary discharge of the obligation by the opposite party which had all along unjustifiably resisted the claim of the party that succeeds in appeal eventually requiring steps to be taken for enforcement.

27. It has been submitted by the respondent generators that in a large number of cases, this tribunal decides matters on principle question

of law, leaving the compliance to be made by the Regulatory Commission. In most of such cases, the implementation of judgments gets delayed for several reasons like absence of timelines for compliance, the amounts liable to be paid by one party to the other not having been quantified, not even by the Regulatory Commission in the original round of adjudicatory process, it being left for determination after the claim (for example, compensation on account of *change in law,* as in matter at hand) is accepted *in principle*. This, it is submitted, not only impacts the generating companies but also leads to additional burden in terms of LPS/carrying cost accumulation. The respondents seek to illustrate this deficiency in present practices of the adjudicatory process in the jurisdiction under Electricity Act by referring to the case of dispute between PSPCL and Nabha Power Limited - reported as (2018) 11 SCC 508 - wherein Hon'ble Supreme Court had directed coal charges to be paid by PSPCL. It is submitted that there was non-payment/non-compliance by PSPCL on quantification of the claim which ultimately resulted in contempt petitions being filed against the Government of Punjab and PSPCL, the Supreme Court having eventually in C.P (Civil) No. 1766-1767 of 2018 in C.A No. 10525-10526 of 2017 vide Order dated 07.08.2019 directed payment within eight weeks.

28. We may add here the example of a case (Appeal no. 97 of 2020) wherein we had found the conduct of the regulatory authority to be recalcitrant and not conducive to hierarchical judicial discipline, it having kept a licensee deprived of the fruits of judicial process in spite of being successful in at least three rounds of appellate scrutiny in relation to its claim for *pass through* for *carrying cost*, the claim put forward in 2002 having attained closure only when this tribunal was constrained, by judgment dated 05.10.2020, to put the Commission on notice for contempt action.

29. The respondents have urged that this tribunal may consider, for matters involving monetary claims, issuance at the stage of final decision on appeal, a time bound direction for compliance by the parties. It is submitted that in such cases the parties may be encouraged to file their respective claims and the same may be recorded in the Judgment which would facilitate narrowing the dispute between the parties and ensure quicker resolution at stage of execution.

30. It is the submission of the respondents that since the regulatory commissions under the Electricity Act are forums having "*trappings of a civil court*" while discharging the function and role of adjudication [*Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.* (2008) 4 SCC 755; *Tamil Nadu Generation & Distribution*

Corporation Ltd. vs. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53; *Andhra Pradesh Power Coordination Committee & Drs.* v. *Lanco Kondapalli Power Ltd & Ors.,*(2016) 3 SCC 468] and since Courts have always been considered possessing the power to execute their own orders [*State of Karnataka vs. Vishwabharathi House Building Cooperative Society,* (2003) 2 SCC 412], the Electricity Act, 2003 may be interpreted to include and incorporate the power vesting in the regulatory authorities to execute by steps such as attachment of accounts, suspension/revocation of license, particularly because the Regulatory Commissions have an overarching regulatory power over licensees, such role impelling them to exercise continuous regulatory supervision over the parties (licensees) especially over tariff. Reliance is also placed on ruling in *All India Power Engineering Federation & Ors. vs. Sasan Power Limited & Ors.* (2017) 1 SCC 487.

31. The upshot of the above-noted submissions is that, notwithstanding absence of a specific provision on execution, the Regulatory Commissions must be expected to execute and enforce their orders through their regulatory powers.

32. We agree that the extant practice of decision-making primarily on principles of law concerning claims is not helping in securing timely relief for the parties. It unnecessarily drags them into fresh round of

proceedings before the Commission where, as experience shows – ready illustration would be Appeal no. 97 of 2020 decided by us on 05.10.2020 (supra), the party resisting the claim (unjustly) puts forward new arguments so as to distract and dilate, taking it forward by another round of appeal making it a never-ending process. This - and there can be no dispute in such regard - is neither conducive for the financial health of the sector nor in public interest in as much as the burden when it comes will, more often than not, bring along baggage in the form of *carrying cost*, an element that will unfortunately be met by the consumer at the end of the supply chain.

33. But, if reforms in such regard as above are to be attempted, they have to be comprehensive and must also cover the adjudicatory process from the level of forum of first instance. If the orders of this tribunal (dealing with appeals) are "*executable … as a decree of civil court*" [Section 120(3)], there is no reason why similar provision ought not exist on the statute book vis-à-vis the orders passed by the regulatory commission in exercise of its adjudicatory power under the same enactment. It is, however, for the legislature to consider if the regulatory commissions, having "*trappings of court*", in exercising the adjudicatory process can be expressly conferred with the powers of execution of their own adjudicatory orders, beyond the power to punish for non-compliance under Section 142.

34. There is a need for all concerned to do a re-think on the propriety of the procedure adopted under the existing legal framework. Speaking only of a dispute involving claim for recovery of money, there is nothing stopping the party approaching the regulatory commission to not only quantify its claim but also support it not only by the principle on which it is founded but also by furnishing all necessary details and evidence so that the correctness is tested in the same adjudicatory process. If detailed averments are made in the petition, the law on pleadings would compel the opposite party to respond not only on justification but also, should the claim be found justified, on the arithmetic involved. It is natural that from such pleadings issues of fact would arise for determination. The Regulatory Commissions would be obliged in law, in such a scenario, to answer all issues, not only on principle of law but also the claim on facts which are established. An effective assistance from the learned counsel for the parties would keep the Commission informed of its duty (reference to the spirit of Rule 2 of Order XIV of Code of Civil Procedure, 1908) to adjudicate on all issues in one go, rather than only on questions of law. Insistence on a comprehensive adjudicatory process before the Commissions will ensure its views on the quantification of the claim (which was rejected on principle of law) are available when denial of relief is challenged by appeal

before this tribunal. Needless to add, if the appellant in such situation were to succeed on issue of law, the findings on facts can also be subjected to simultaneous appellate scrutiny by this tribunal so that the decision rendered in appeal is comprehensive and ready for execution subject, of course, to remedy of second statutory appeal before the Supreme Court. There would, in such sequence, hardly be scope for indulgence in multiplicity of proceedings respecting same dispute.

35. In present case, we do find that the issue involved in the dispute was of rate at which LPS is payable. There has been no denial at any stage by the appellant that it had committed series of defaults in timely payments. This indisputably rendered it liable to pay LPS. In the name of having the determination of rate, it statedly has not paid LPS even at the rate its pleadings would admit it to be liable for. The initial orders on this appeal would show that it engaged the respondent suppliers in negotiations. It is not explained as to what was the result of, or stalemate in, such negotiations. Be that as it may, the failure of the appellant to account for its liability under LPS clause is something that does not behove its status as a licensee operating in the State. The least that we would expect it to do now is to pay the liability on account of LPS to the contesting

respondents forthwith, not later than four weeks from the date of this judgment. We order accordingly.

36. The Maharashtra State Electricity Regulatory Commission is directed to take up the matter after four weeks to ascertain if the appellant has discharged its liability towards LPS unto the second to fifth respondents for the period in question in compliance with above directions, pass all necessary orders in such regard and make a report to this tribunal within three months. Needless to add, if the amount payable requires to be quantified, the Commission shall take out appropriate proceedings and determine the liability in accordance with law expeditiously so as to conclude not later than two months from now.

37. The appeal and the pending applications are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 27th DAY OF APRIL, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member