COMPETITION APPELLATE TRIBUNAL

Appeal No. 33/2016

(Under Section 53B of the Competition Act, 2002 against the order dated 10.02.2016 passed by the Competition Commission of India in Case No. 01/2016)

CORAM

Hon'ble Shri Rajeev Kher
Member

Hon'ble Smt. Anita Kapur
Member

IN THE MATTER OF

Anand Parkash Agarwal,
S/o Late Lakshmi Narain,
3183, sector-23,
Gurgaon – 122 017 ....Appellant

Vs

1. Dakshin Haryana Bijli Vitran Nigam,
Through its Principal Officer,
Vidyut Sadan, Vidyut Nagar,
Hissar – 125 005.

2. Haryana Electricity Regulatory Commission,
Through its Secretary,
Bay 33-36, Sector 4, Panchkula – 134 112

3. State of Haryana,
Through Additional Chief Secretary,
Power Department, Government of Haryana,
Sector – 1, Chandigarh

4. Competition Commission of India,
Through its Secretary,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110 001. ...Respondents

Appearance: Shri Rajat Agarwal, Advocate for the Appellant

Shri Varun Pathak, Ms. Himangini Mehta and Ms. Pooja Nawal, Advocates for the Respondent No. 1

ORDER

This appeal is directed against the order dated 10.02.2016 passed by the Competition Commission of India (hereinafter referred to as 'the Commission') under Section 26(2) of the Competition Act, 2002 (for short, 'the Act') holding that no case of contravention of the provisions of Section 4 of the Act has been made out and, therefore, the matter be closed.

2. The Appellant, Shri Anand Prakash Agarwal, is a consumer of electricity supplied to his residence at Gurgaon by Respondent No. 1 i.e Dakshin Haryana Bijli Vitran Nigam (DHBVN) . DHBVN is a licensed supplier of electricity in the State of Haryana to the consumers within its area of operation. Haryana Electricity Regulatory Commission (HERC), an independent statutory body corporate, performing functions as an autonomous authority responsible for regulation of the power sector in Haryana in terms of the Electricity Act 2003 (henceforth, "the Electricity Act") and Haryana Electricity Reform Act, 1997, has been arrayed as Respondent No. 2. The State of Haryana, through its Additional Chief Secretary, Power Department has been arrayed as Respondent No. 3. The Appellant had filed an

application for impleading the Commission as respondent, which was allowed, vide our Order dated 6.9.2016 and in the amended Memo of Parties, the Commission figures as Respondent No. 4.

3. The facts of the case are that, the Appellant filed information in terms of Section 19(1)(a) of the Act with the Commission in December, 2015. In the information filed, it was claimed that DHBVN, which was the sole supplier of electricity in the area of residence of the informant, was charging Fuel and Power Purchase Cost Surcharge Adjustment (**FSA**), which was in the nature of cost pass through, for the uncontrollable cost incurred in the supply chain on account of variations in the input cost prices of fuel, as one of the components of the price of electricity supplied. It was contended that, DHBVN was charging higher FSA from the consumers whose consumption of electricity was higher and thereby directly imposing an unfair and discriminatory price upon consumers and cross subsidizing the FSA cost. Another argument was that, FSA had been steadily increased post 2008 with the approval of HERC, while the fuel costs had steadily declined thereafter, which was not only unfair but it also meant cross subsidization on account of lower consumption of electricity during various seasons which were either not extremely hot or cold, which is in contravention of mandated uniform FSA. The FSA, stated to be unrelated to the economic value of the supplied electricity, was claimed to be demonstrating exploitative conduct of DHBVN and

constituted abuse of dominance in contravention of Section 4 of the Act.

4. The Appellant further alleged that, HERC had been approving the FSA charge exceeding the mandated ceiling prescribed under the Regulations framed by the HERC and was permitting inclusion of the holding/interest costs in the FSA charge on account of unrecovered FSA charges, in contravention of its own Regulations for the charge of the FSA.

5. The Appellant, therefore sought the following reliefs from the Commission:

1. Order that DHBVN shall cease and desist its abusive conduct of imposing upon the consumer excessive, exploitative, unfair and discriminatory prices in the form or nature of, or as any component consisting in or as any portion of the Fuel Surcharge Adjustment.
2. Order that DHBN shall henceforth charge the Fuel Surcharge Adjustment only on the basis of the actual uncontrollable costs related to the variations in the fuel prices of the power generating company.
3. Pass an order that has a deterrent effect on the opposite parties for acting in contravention of law.

4. Any other order deemed fit in the circumstances of the information to achieve the object and purposes of the Competition Act, 2002.

6. The Commission on examination of the information determined that the relevant market in the present case was the market for distribution of electricity in the licensed area of DHBVN in the State of Haryana. The Commission also observed that, DHBVN appeared to enjoy the dominant position in the relevant market in view of the exclusive license granted to it, and the presence of regulatory restrictions for any other player to enter into the relevant market. The Commission noted that, the relevant market was a regulated one and the degree of commercial freedom enjoyed by DHBVN, might be subject to limitation in matters such as tariff, area of distribution. The Commission further observed that, DHBVN being a state owned entity was not functioning on profit motive alone as it had social obligations.

7. The Commission, while agreeing with the Appellant about dominance of DHBVN in the relevant market, did not agree that differential pricing in this case constituted abuse of dominance in terms of Section 4 of the Act. The Commission was of the view that, classification of consumers and corresponding FSA charged followed a rationale whereby domestic consumers was charged less than the non-domestic consumers and different FSA was levied for different categories of consumers depending upon the socio-economic

conditions of the respective class of consumers. The conclusion of the Commission was that, the classification appeared to have economic justification based on market segmentation and did not amount to discriminatory conduct.

8. In regard to Appellant's claim that FSA had been increasing disproportionately, the Commission found it difficult to construe any unfairness regarding the quantum of FSA levied, as the Appellant had failed to provide the facts or figures to substantiate the purported decline in the price of fuel used for power generation, leading to a decline in the cost of power generation.

9. The Commission further held that, the case essentially related to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission in respect of fixation of FSA and no competition issue was discernible from the facts presented in the information. The Commission was of the view that, FSA was computed and levied as per the Regulations framed by HERC and any issue regarding violation of the Regulations was, therefore, to be dealt with by HERC and anyone aggrieved by the decision of HERC could go in appeal to the Appellate Authority under the Electricity Act. The Commission accordingly closed the matter in terms of Section 26(2) of the Act, vide the impugned Order dated 10/2/2016.

10. The Appellant filed a Writ Petition challenging the order of the Commission. The Hon'ble High Court accepted the contention of the Commission that, the impugned order was appealable under Section 53A of the Act before this Tribunal and dismissed the Writ Petition vide its order dated April 6, 2016, giving liberty to the Appellant to file an appeal against the impugned order. The Appellant has thereafter filed the present appeal.

11. We have heard Shri Rajat Agarwal, Advocate for the Appellant and Shri Varun Pathak, Advocate for Respondent No. 1 i.e DHBVN. None appeared for Respondents Nos. 2, 3 and 4.

12. In the course of hearing, the Advocates for the Appellant and DHBVN made a request for permission to place additional documents on record, which was accepted vide our Order dated November 16, 2016. DHBVN filed additional documents with I.A. No. 01 of 2017 seeking condonation of delay in filing of these documents. We found the explanation offered for the delay in filing valid, and the delay was condoned. The Appellant stated that, he did not want to file any additional documents, which was recorded in our Order dated 05.01.2017.

13. The counsel for the Appellant made the following arguments to seek setting aside of the impugned order :

(i) The Commission should have followed the principles of natural justice as mandated under Section 36 of the Act,

at every stage of proceedings and should have given a hearing to the Appellant before passing the final order under Section 26(2) of the Act. The impugned order was prejudicial to the Appellant and Supreme Court had, in the case of Competition Commission of India versus Steel Authority of India Ltd and Another in Civil Appel No 7779 of 2010 [(2010)10SCC 744)] , affirmed that closure of a case under Section 26(2) of the Act caused determination of rights and affected a party.

(ii) If the Commission, which was discharging adjudicatory functions, needed more information regarding the price movement of the fuel, it should have given a pre-decisional hearing or sought more information from the Appellant. The mere requirement of more information was sufficient to warrant an investigation by the Director General. Besides, the information was only in the nature of allegation under the Act and the Commission could have called upon experts in terms of Section 36(3) of the Act, if it needed more information.

(iii) Conclusion of the Commission that, the State owned entity had social obligation was an unwarranted assumption as the Central Government had not declared

DHBVN as exempted from the provisions of the Act under Section 54 of the Act.

(iv) The Commission failed to look into the relevant material in the National Tariff Policy formulated under Section 3 of the Electricity Act, providing that the uncontrollable cost should be recovered as soon as possible so that the future consumers were not burdened with the cost incurred in the past for other consumers. Such a policy direction implied that the FSA, an uncontrollable cost, was a pure cost pass through and was to be allocated equally to every consumer and no consumer could be made to pay for the other consumer in the fairness of the market behavior of the enterprise. Thus there was no possibility of a classification and, therefore, the question of the valid classification did not even arise.

(v) The function of the electricity regulator i.e HERC was *ex ante* while the function of the Commission was *ex post* and therefore both had the exclusive and independent jurisdiction and ,the Commission ought to have looked into the market behavior of DHBVN to determine if the behavior was in contravention of the provisions of the Act. It was not within the scope of powers of the Commission to consider whether an appeal would lie with the Appellate

Tribunal for Electricity. The preamble to the Act mandated the Commission to protect the interests of consumers. Under Section 19 of the Act, the Commission was required to inquire into alleged abuse of dominant position by the Respondent No 1. Existence of the remedy under the Electricity Act, taken as a ground in the impugned order for closing the case, does not take away the jurisdiction of the Commission and the Act had an overriding effect over other laws as per Section 60 of the Act and as per Section 62 of the Act , the provisions of the Act were in addition to and not in derogation of the Electricity Act.

(vi) The FSA with effect from January, 2013 was covered by Regulation 66 of the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution and Retail Supply under Multi Year Tariff Framework) Regulations, 2012. Regulation 66.6 of the said Regulations provided that "the amount of FSA shall be recovered by each distribution licensee by charging a uniform FSA (per kWh) across all consumer categories in his area of license**".** The FSA levied on the basis of newly created slabs of domestic category in terms of

DHBVN Sales Circular No. D-37/2015, providing the following segmentation was in contravention of the said Regulation 66.6 (ibid) :

FSA as per new Slab (Rs. Per Unit)		
Category of consumers	*Amount to be levied w.e.f. 01.04.2015*	*Amount to be levied w.e.f. 01.07.2015*
Domestic Supply		
Category – I (Total consumption upto 100 units)		
0-50 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 50 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 50 units*
51-100	*Rs.1.43*	*Rs.1.46*
Category – II (Total and upto 800 units) consumption more than 100 units		
0-150 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 150 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 150 units*
151-250 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 250 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 250 units*
251-500 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 250 units and Rs. 1.52 above 250 units and upto 500 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 250 units and Rs. 1.55 above 250 units and upto 500 units*

501-800 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 250 units and Rs. 1.52 above 250 units and upto 500 units and Rs. 1.64 above 500 units and upto 800 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 250 units and Rs. 1.55 above 250 units and upto 500 units and Rs. 1.67 above 500 units and upto 800 units*
Category-III (Total consumption more than 800 units)		
Above 800 units	*Rs. 1.14 upto 40 units & Rs. 1.43 above 40 units & upto 250 units and Rs. 1.52 above 250 units and upto 500 units and Rs. 1.64 above 500 units*	*Rs. 1.17 upto 40 units & Rs. 1.46 above 40 units & upto 250 units and Rs. 1.55 above 250 units and upto 500 units and Rs. 1.67 above 500 units*

(vii) Further, HERC was in conspiracy with the Appellant in approving FSA which was more than 10%, in contravention of its own regulations. Besides, the Tariff Policy notified on 06.01.2006 in compliance with Section 3 of the Electricity Act, in continuation of National Electricity Policy notified on 12.02.2005, provided in paragraph 1.4(h)(4) that uncontrollable costs were to be recovered speedily to ensure that future consumers were not burdened with past costs . FSA was for recovery of uncontrollable cost and by necessary implication was to be allocated uniformly.

(viii) Judgement of the Supreme Court in the case of Hiral P. Harsora and Ors. vs. Kusum Narottamdas Harsora and Ors. affirmed that, existence of rationale nexus of the differentia on which a classification is based, has to be established with reference to the true purposes or object of an act while considering the validity of a classification in terms of Article 14 of the Constitution. The classification of domestic consumers based on the consumption was arbitrary and not based on differences pertinent to the subject in respect of and the purpose for which Electricity Act, was enacted. True object and purpose of the Electricity Act was that, everybody should get electricity and the State provided subsidy for poor and for industrial subscribers. The FSA, an uncontrollable cost was a cost pass through and should be borne equally and having different slabs was discriminatory as the domestic consumers formed a homogeneous class and arbitrarily fixing rates on different slabs was not founded on any rationale purpose and had no just and reasonable relation to the object of the Electricity Act and the Tariff Policy and the National Electricity Policy notified in terms of the said Act.

(ix) The Supreme Court had, vide its judgment dated July 5, 2016 in the case of Sai Bhaskar Iron Ltd. vs. A.P. Electricity Regulatory

Commission & Ors. held that, FSA was different from tariff by referring to the following findings of the Supreme Court in the case of Bihar State Electricity Board v. Pulak Enterprises & Ors. (2009) 5 SCC 641 :

"34**.** *In a sense, fixing rate of fuel surcharge under Clause 16.10 of the tariff notification is different from fixing the tariff under Section 49 of the Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge, etc. and fixing rates of fuel surcharge do not stand on a par. Though rates of consumption charges, etc. are based on objective materials, there is enough scope for flexibility in fixing the rates. It also involves policy to fix different rates for different categories of consumers. Such is not the position with the fuel surcharge."*

14. The counsel for Respondent No. 1 i.e DHBVN made the following arguments to justify the closure of the case by the Commission:

(i) . It was an admitted fact that FSA was being charged by Respondent No. 1 under the provisions of the Electricity Act and it was also an admitted fact that HERC was exercising its functions as a State Electricity Regulatory

Commission in the State of Haryana. In the information filed, the Appellant has, in paragraphs 4 and 9 of Part G, admitted that HERC in its role as regulator was responsible for putting in place proper checks and balances to protect the consumer interest so that the Respondent did not act in an arbitrary and illegal manner and that it was required to determine the tariff of electricity at various points of supply generally being guided by the National Electricity Plan, National Electricity Policy and National Tariff Policy In paragraph 11 of Part G of the information, it was admitted by the Appellant that, FSA had been increased with the approval of HERC. On these facts, the Commission was *coram non judice* to entertain the proceedings against the Respondent and HERC on the issue of FSA. The Electricity Act, was a complete self-contained comprehensive code and all remedies with respect to electricity and the tariff determined, were to be exercised within the framework of the Electricity Act itself. Statement of Objects and Reasons for the Electricity Act, particularly paragraphs 3 and 4 thereof, and Supreme Court judgment in the case of PTC India Ltd. vs. Central Electricity Regulatory Commission - 2010 (4) SCC 603, supported this argument.

(ii) HERC in exercise of its jurisdiction under Section 181 of the Electricity Act had framed the HERC (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail supply under Multi Year Tariff Framework) Regulations, 2012 (hereinafter referred to as '2012 Regulations'). The 2012 Regulations in terms of the provisions of the Electricity Act and the PTC Case (supra) were delegated legislation having the force of law. FSA was a component of tariff under Section 62(4) of the Electricity Act. The Hon'ble Apex Court had examined the provisions regarding FSA and the scheme thereof under the Electricity Act in its judgment in Civil Appeal No. 5542 of 2016, Sai Bhaskar Iron Ltd. v. A.P. Electricity Regulatory Commission (2016 SCC Online SC 664) and affirmed the proposition of FSA being part of tariff and mechanic of price fixation being the forte of the regulator and not the court.

(iii) FSA was determined by HERC under Regulation 66 of the 2012 Regulations. In case the FSA was wrongly collected by Respondent No. 1, then the remedy had been provided under Regulation 82 of the 2012 Regulations itself. Even otherwise the remedies under Sections 142 and 146 of the Electricity Act, which are penal in nature, are available

to the Appellant in case of non-compliance of any of the provisions of the Electricity Act or the regulations framed thereunder by HERC. Further, in case DHBVN was recovering excessive FSA, then the Appellant was entitled to refund with interest under Section 62(6) of the Electricity Act.

(iv) Section 174 of the Electricity Act, provides for a non-obstante clause which gives it priority over other legislation. Further, the Electricity Act being a special law dealing with electricity will prevail over the Competition Act in light of the legal principle *generalia specialibus non derogant*. This proposition has been upheld by the Hon'ble Apex Court in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.

(v) That even if it were assumed that, both the Electricity Act and the Competition Act were special laws, then the principle of *leges posteriores priores contrarias abrogant* will be applicable as both the Acts, i.e. Electricity Act and Competition Act, were passed by the Union Parliament under Article 246 List III of the Schedule 7 of the Constitution. As the Electricity Act was later in date, therefore, it would prevail over the Competition Act. The judgments of the Hon'ble Apex Court in the cases of

Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. – 2001 (3) SCC 71 and Ashoka Marketing Ltd. and Anr. v. Punjab National Bank and Ors. – 1990 (4) SCC 406, support this point. Accordingly, the issues pertaining to competition in the electricity sector could only be examined under the mechanism provided under the Electricity Act and not under the Competition Act.

(vi). Under Section 86 read with Section 62(1)(d) of the Electricity Act, HERC was empowered to determine the tariff for retail sale of electricity, and in terms of Section 62 (4) of the Electricity Act, there was a power to charge FSA . Section 62(3) of the Electricity Act, permitted HERC while determining tariff to differentiate according to consumption of electricity etc. The tariff order was made after open hearing as provided under Section 64 of the Electricity Act, where public could give suggestions and objections. The process followed for determination of tariff was clear from the various orders of HERC, particularly HERC Order dated August 1, 2016 which showed FSA being factored in while considering aggregate revenue requirement and the objections being raised regarding FSA by the stakeholders and addressed by HERC. Further, as was evident from an order of HERC dated July

21, 2014, even industry associations sometimes sought clarifications on quantification and recovery of FSA, which were given by the HERC. All enquiries, investigations and adjudications in regard to Regulations were to be carried out by HERC as stipulated in Regulation 82 of the 2012 Regulations. Orders of HERC were appealable to the Appellate Tribunal for Electricity set up under Section 110 of the Electricity Act. The powers of the said Tribunal were delineated under Section 121 of the Electricity Act and its decisions were appealable to the Supreme Court. Besides, any aggrieved consumer could file grievance with the forum established by the Respondent in terms of Section 42 (5) of the Electricity Act.

(vii). Section 181 of the Electricity Act vested HERC with the power to make regulations which were in terms of Section 182 of the said Act laid before each house of the State Legislature. The Commission could not sit in judgment over the sector regulator, i.e. HERC. FSA was quantified in terms of the regulation and if the Appellant had a grievance in regard to the regulations which were in the nature of delegated legislation, it could go in Writ but no relief was available either from the Commission or from this Tribunal. The issue of violation of the principles of

natural justice on account of informant not being afforded an opportunity before closing the case, was not material. Such an opportunity would have been merely an empty formality as the Commission did not have jurisdiction to entertain a petition against a statutory regulator formed under the aegis of a central enactment. The principles of natural justice were flexible in nature and the Tribunal should decide the issue of jurisdiction without remanding the matter for fresh consideration of the Commission, even if it were to come to a conclusion that the impugned order was passed in violation of the principles of natural justice. Judgements of the Hon'ble Supreme Court in the cases of Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati and Ors. – 2015 (8) SCC 519 and Kanwar Singh Saini v. High Court of Delhi – 2012 (4) SCC 307, were relevant in this regard. Principles of natural justice were not applicable where facts were admitted as affirmed by the Hon'ble Supreme Court in the case of Viveka Nand Sethi v. Chairman, J & K Bank Ltd. and Ors. – 2005 (5) SCC.

(viii) The issue of violation of principals of natural justice on account of informant not being afforded an opportunity before closing the case, was not material. Such an

opportunity would have been merely an empty formality as the Commission did not have jurisdiction to entertain a petition against a statutory regulator formed under the aegis of a central enactment. The principles of natural justice were flexible in nature and the Tribunal should decide the issue of jurisdiction without remanding the matter for fresh consideration of the Commission, even if it were to come to a conclusion that the impugned order was passed in violation of the principles of natural justice. Judgements of the Hon'ble Supreme Court in Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, and Ors. – 2015 (8) SCC 519 and Kanwar Singh Saini v. High Court of Delhi – 2012 (4) SCC 307, were relevant in this regard. Principles of natural justice were not applicable where facts were admitted as affirmed by the Hon'ble Supreme Court in the case of Viveka Nand Sethi v. Chairman, J & K Bank Ltd. and Ors. – 2005 (5) SCC 337.

15. We have considered the submissions made by the learned counsels appearing for the parties and perused the Electricity Act, the Competition Act, the Regulations made in exercise of powers vested under the aforesaid Acts, and the relevant judicial pronouncements. It is an admitted position that DHBVN enjoyed dominant position in

the market for distribution of electricity in its licensed area. The following issues arise for determination:

1. Whether the impugned order suffers from the fatal flaw of contravention of principles of natural justice as the Commission did not give an opportunity of hearing to the Appellant while passing the impugned order, which was prejudicial to the appellant, under Section 26(2) of the Act.
2. Whether the Commission had the jurisdiction in the matter of alleged abuse of dominance arising from computation and levy of FSA which, as admitted by the Appellant in information filed with the Commission, was approved by the HERC i.e. the State Electricity Regulatory Commission.
3. Whether any competition law issue of unfair and discriminatory price in contravention of Section 4 of the Act, while computing or charging FSA, has been made out.

16. The issues framed above are adjudicated in seriatim in the following paragraphs.

17. The first issue pertains to the applicability of principles of natural justice in closing the matter under Section 26(2) of the Act. The Appellant had filed an information alleging contravention of the provisions of Section 4 of the Act by DHBVN and, it was claimed that though FSA was cost pass through and should have been borne equally by all consumers, charging of FSA based on consumption of

electricity was discriminatory and further that the increase in FSA despite decrease in fuel cost was unfair. The Appellant is aggrieved that the Commission passed the closure order, which was prejudicial to him, without even hearing him. Further, in the impugned order, the Commission has, *inter alia*, dismissed the allegation of unfairness by holding that, the facts and figures to substantiate the purported decline in the price of fuel used for power generation leading to a decline in the cost of power generation were not provided. The claim of the Appellant is that, the Commission should have heard him following the principles of natural justice i.e. audi *alteram partem*, particularly since the Commission found itself constrained on account of lack of information to establish decline in the price of fuel and cost of power generation, and could have also invited Experts to assist it in exercise of the power under Section 36 of the Act.

17.1 Section 26(2) of the Act and the Competition Commission of India (General) Regulations, 2009 (henceforth, "the General Regulations"), are germane to address this issue. Section 26(2) of the Act reads as follows:

> *"(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass*

such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be." (emphasis supplied)

17.2 The General Regulations prescribe the process to be followed on receipt of information and in forming the opinion of existence or non-existence of the *prima facie* case. Regulations 16, 17, 18 and 19 are relevant in this context and are extracted below :

> ***"16. Opinion on existence of prima facie case.*** *– (1) The Secretary, after scrutiny and removal of defects, if any, in an information or reference, as the case may be, shall place the same before the Commission to form its opinion on existence of a prima facie case.*
>
> *(2) In cases of alleged anti-competitive agreements and/or abuse of dominant position, the Commission shall, as far as possible, record its opinion on existence of a prima facie case within sixty days.*
>
> *(3) The Commission shall, as far as possible, hold its first ordinary meeting to consider whether prima facie case exists, within fifteen days of the date of placement of the matter by the Secretary under sub -regulation (1).*

17. Preliminary conference. *– (1) The Commission may, if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists.*

(2) The Commission may invite the information provider and such other person as is necessary for the preliminary conference.

(3) A preliminary conference need not follow formal rules of procedure.

18. Issue of direction to cause investigation on prima facie case*. – (1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the Commission within seven days to the Director General to investigate the matter.*

(2) A direction of investigation to the Director General shall be deemed to be the commencement of an inquiry under section 26 of the Act.

19. Communication of order when no prima facie case found. *– If the Commission is of the opinion that there exists no prima facie case, the Secretary shall send a copy of the order of the Commission regarding closure of the matter forthwith to the Central Government or the State Government or the Statutory Authority or the parties*

concerned, as the case may be, as provided in sub-section (2) of section 26 of the Act."

17.3 The General Regulations have been framed by the Commission in exercise of its power under Section 64 of the Act. These Regulations had to be placed before the Parliament and the Parliament had the power to make any modification in the aforesaid Regulations. The General Regulations are in the nature of subordinate legislation and do not make it obligatory upon the Commission to hear the informant and then form an opinion as to the existence of a *prima facie* case. Further, neither Section 4 of the Act, which prohibits abuse of dominant position, nor Section 19 of the Act, which vests the Commission with the power to inquire into alleged contravention of Section 4 of the Act, contain any requirement of inviting the informant to assist the Commission before forming an opinion in terms of Section 26(2) of the Act. Regulation 17 of the General Regulations, extracted above, does give the Commission a discretion to invite the information provider or such other person as it considers necessary, for a preliminary conference but the discretion is with the Commission, as is evident from the specific words used in Regulation 17(1) of the General Regulations, i.e. "the Commission may, if it deems necessary" call for a preliminary conference and may invite the information provider. These Regulations, when juxtaposed with Regulation 21 of the General Regulations clarify the position

further. Regulation 21 of the General Regulations specifically provides for issue of notice to the parties concerned inviting objections/suggestions on the report of the Director General. Similarly, Regulation 48 of the General Regulations, prescribing the procedure for imposition of penalty, mandates issue of show cause notice and affording of reasonable opportunity of representation. Issue of notice at the stage of *prima facie* opinion is also not necessary considering that the obligation of the Commission is to form an opinion about existence or non-existence of a *prima facie* case. If the Commission does not feel satisfied that the material placed before it gives a *prima facie* indication of violation of the Act, in this case abuse of dominance, the Commission can close the case and the Commission is not required to make adjudication on violation of Section 4 of the Act or to evaluate the evidence or invite experts to assist in its decision making. The experts are to assist the Commission in terms of Section 36(3) of the Act in the "conduct of any inquiry". In terms of Section 26(2) of the Act, no inquiry is conducted. The stage of inquiry is only after the Commission forms an opinion about the existence of a *prima facie* case and directs the DG to cause an investigation. In this regard, the following observations of the Supreme Court in the SAIL case (supra) are relevant:

> *"The first and the foremost question that falls for consideration is, what is 'inquiry'? The word 'inquiry'*

has not been defined in the Act, however, Regulation 18(2) explains what is 'inquiry'. 'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained 'inquiry' it will not be permissible to give meaning to this expression contrary to the statutory explanation".

17.4 It is, therefore, clear that the right of hearing is not specifically provided in the Act or the General Regulations and the discretion to invite the informant is exclusively of the Commission, and further no inquiry is made by the Commission while forming a prima facie opinion. Thus, if the Regulations vest the discretion with the Commission to invite or not to invite the informant, then this statutory discretion cannot be questioned on the basis of the principles of natural justice because the Regulations have a force of law being in the nature of delegated legislation and can only be challenged in judicial review. In the case of Dharampal Satyapal Ltd. vs. CCE – (2015) 8 SCC 519, the Supreme Court has recognized that where a statute is silent with no positive words in the Act or Rules spelling out need to hear the party whose rights or interests are likely to be

affected, requirement to follow fair procedure before taking a decision must be read into the statute, unless the statute provides otherwise. In this case the Regulations, which are statutory in nature, provide for hearing at the discretion of the Commission. Accordingly, right to mandatory hearing gets excluded.

17.5 The Supreme Court in the case of SAIL (supra), has explained as to what is required to be done by the Commission while forming a *prima facie* opinion and the relevant extract is as follows:

> *"The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative*

nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties

concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously." (emphasis supplied)

17.6 The Appellant has been given full opportunity of hearing before this Tribunal and asking the Commission to issue a notice would be a mere formality because the decision will not change on merits in this case, because in later part of this Order, we have agreed with the view of the Commission that the issues of levy of tariff and fixation of tariff are to be dealt with by HERC . In the case of Dharampal Satyapal Ltd. (supra), the Supreme Court acknowledged that, there may be a situation where a hearing would not change the ultimate conclusion reached by the decision maker and, therefore, there may not be a legal duty to afford a hearing.

17.7 We have also in our Order in Appeal No 3 of 2016 in the case of Gujarat Industries Power Company Limited vs. CCI explained the nature of exercise required to be undertaken under Section 26(1) and 26(2) of the Act in the following words:

"22. To put it differently, the exercise required to be undertaken by the Commission for forming an opinion whether or not there exists a prima facie case which requires investigation, the Commission is required to take cognizance of the averments contained in the reference or an information and the documents supplied with the reference or information. In an appropriate case, the Commission may also hold preliminary conference and ask the informant or the person against whom allegation of anti-competitive conduct has been levelled to produce the relevant documents. In a given case, the Commission may, after examining the contents of the reference or information and/or holding preliminary conference, opine that there exists a prima facie case for investigation. In that event, the Commission is required to pass an order under Section 26(1) of the Act. In another case, the Commission may, after undertaking the exercise of examining the contents of the reference or the information and holding preliminary conference, if any, opine that no prima facie case has been made out warranting an investigation. In that event, the Commission may pass an order under Section 26(2) and close the case. However, in either case the Commission cannot make detailed examination of the allegations

contained in the information or reference, evaluate / analyse the evidence produced with the reference or information in the form of documents and record its findings on the merits of the issue relating to violation of Section 3 and/or 4 of the Act because that exercise can be done only after receiving the investigation report. If the reference or the information contains an allegation relating to violation of the provisions of Section 3 and the Commission does not feel satisfied that the material placed before it gives a prima facie indication of violation of that provision then it may close the case under Section 26(2). Likewise, if the reference or information contains an allegation of abuse of dominant position within the meaning of Section 4(2) and its various clauses and the Commission finds that the material produced with the reference or information does not prima facie show the dominance of the person against whom allegation of abuse of dominance has been levelled, then too it may close the case under Section 26(2) of the Act. However, as mentioned above, the Commission cannot make an adjudication on violation of Section 3 and/or 4 of the Act."

17.8 Thus, we are of the view that considering the Act read with the General Regulations, there was, on the facts of this case, no requirement to hear the Appellant, while passing the impugned Order.

18. The second issue is as to whether the Commission had the jurisdiction to entertain an information containing allegations in relation to FSA. For this purpose, it is necessary to examine the scheme of the Electricity Act and the Competition Act. The provisions of the Electricity Act, 2003 which are relevant for adjudicating this issue, are extracted below:

The Electricity Act, 2003

Section 2. (Definitions): *--- In this Act, unless the context otherwise requires,--*

(4) "Appropriate Commission" means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be ;

(64) "State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of section 82 and includes a Joint Commission constituted under sub-section (1) of section 83;

Section 14. (Grant of licence):

The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person-

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the

Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

Section 19. (Revocation of licence): *--- (1) If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -*

(a) where the licensee, in the opinion of the Appropriate Commission, makes willful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;

(b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;

(c) where the licensee fails, within the period fixed in this behalf by his licence, or any longer period which the Appropriate Commission may have granted therefor –

(i) to show, to the satisfaction of the Appropriate Commission, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence; or

(ii) to make the deposit or furnish the security, or pay the fees or other charges required by his licence;

(d) where in the opinion of the Appropriate Commission the financial position of the licensee is such that he is unable fully and efficiently to discharge the duties and obligations imposed on him by his licence.

***Section 60. (Market domination)**:*

The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.

Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

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

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

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

***Section 62 (Determination of tariff)**:---(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any

area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(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.

Section 64. (Procedure for tariff order): *--- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in*

such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter- State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

Section 111. (Appeal to Appellate Tribunal): *--- (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:*

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty- five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form,

verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

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

Section 121. (Power of Appellate Tribunal):

The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act.

Section 142. (Punishment for non-compliance of directions by Appropriate Commission):

In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

Section 146. (Punishment for non-compliance of orders or directions):

Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention

of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence:

Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121.

Section 173. (Inconsistency in laws):

Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.

Section 174. (Act to have overriding effect):

Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 175. (Provisions of this Act to be in addition to and not in derogation of other laws)*:*

The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.

Section 181. (Powers of State Commissions to make regulations): *--- (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.*

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

(a) period to be specified under the first proviso of section 14;

(b) *the form and the manner of application under sub-section (1) of section 15;*

(c) *the manner and particulars of application for licence to be published under sub-section (2) of section 15;*

(d) *the conditions of licence section 16;*

(e) *the manner and particulars of notice under clause(a) of sub- section (2) of section 18;*

(f) *publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;*

(g) *levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;*

(h) *rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;*

(i) *payment of the transmission charges and a surcharge under sub- clause (ii) of clause(d) of sub-section (2) of section 39;*

(j) *reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;*

(k) *manner and utilisation of payment and surcharge under the fourth proviso to sub-clause(ii) of clause (d) of sub-section (2) of section 39;*

(l) *payment of the transmission charges and a surcharge under sub- clause(ii) of clause (c) of section 40;*

(m) *reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;*

(n) *reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;*

(o) *proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;*

(p) *reduction 2[***] of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;*

(q) payment of additional charges on charges of wheeling under sub- section (4) of section 42;

(r) payment of additional charges on charges of wheeling under sub- section (4) of section 42;

(s) the time and manner for settlement of grievances under sub-section (7) of section 42;

(t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;

(u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;

(v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;

(w) payment of interest on security under sub-section(4) of section 47;

(x) electricity supply code under section 50;

(y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;

(z) duties of electricity trader under sub-section (2) of section 52;

(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;

(zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;]

(zd) the terms and conditions for the determination of tariff under section 61;

(ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under sub- section(3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.

18.1 The Electricity Act consolidates the law relating to generation, transmission, distribution, trading and use of electricity. The Preamble to this legislation*, inter-alia* , states that this Act is for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

18.2 Power to grant license to distribute electricity is vested with the Appropriate Commission under Section 14 of the Electricity Act. The Appropriate Commission has been defined under Section 2(4) of the Electricity Act to mean the Central Regulatory Commission or the State Regulatory Commission or the Joint Commission, which in this case would be HERC. Section 19 of the said Act gives HERC power to revoke license, if the licensee defaults in meeting his obligations under the said Act or rules or regulations made thereunder. Section 61 of the Electricity Act with the title Tariff

Regulations is the enabling provision for framing of regulations and specifies the principles which would guide the terms and conditions for the determination of tariff. Section 62 of the Electricity Act deals with actual tariff determination. The term 'tariff' is not defined in the Electricity Act but the scope of this term has been clarified by the Hon'ble Supreme Court in the case of PTC India Limited vs. Central Electricity Regulatory Commission – (2010) 4 SCC 603. The said judgment also interprets the powers and functions of the State Regulatory Commissions like HERC and following extract from the said judgment is relevant in this regard :

> ***"26.*** *…….. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature*

of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

27. *Section 66 confers substantial powers on the appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the appropriate Commission for the performance of statutory functions under the 2003 Act.*

28. *The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with*

the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Sections 179 and 182. Parliament has the power to modify the rules/regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act."

18.3 The language of Section 62(4) of the Electricity Act makes it sufficiently clear that, fuel surcharge is part of tariff as it states that, tariff cannot be varied except once in a year but carves out an exception for variation under the terms of a fuel surcharge formula. As argued by the counsel for DHBVN , the Supreme Court in the case of Bihar State Electricity Board vs. Pulak Enterprise and others – (2009) 5 SCC 641, considered the question levy of fuel surcharge and held that fuel surcharge was undoubtedly a part of tariff.

18.4 The power to make regulation for determining FSA is also derived from Section 62(4) of the Electricity Act. In terms of this section, the State Commission is to specify fuel surcharge formula

and HERC has prescribed the formula through the 2012 Regulations. And paragraph 66 of the said Regulations gives the detailed basis of calculation as also the reporting requirements to HERC. Further, Section 62(3) of the Electricity Act allows segmentation of consumers for determining tariff, which includes FSA, according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. Thus, the differential levy of tariff has a statutory sanction. Further, as affirmed by the Supreme Court, in the case of PTC India Ltd.(supra), fixation of tariff is legislative in character and protective discrimination through differential tariff is permissible. In the case of Rohtas Industries Ltd. and Ors. vs. Chairman Bihar State Electricity Board and Ors. [(1984) Suppl. SCC.161] also the Court held that, classification which was legally valid and permissible for grant of concession in the basic rates will equally hold good for the purpose of subsequent scheme of distribution of burden in the form of fuel surcharge. The Court had dismissed the contention of classification of consumers being violative of Article 14 of the Constitution.

18.5 It is an admitted position that FSA levied by DHBVN was approved by HERC. The counsel for DHBVN has drawn our attention to various orders of HERC dealing with levy of FSA, wherein

complaints of consumers in respect of levy of FSA have been considered. We also note that, HERC in its order of August 1, 2016 has directed that, recovery of FSA pertaining to 2014-2015 shall be stopped forthwith. Thus, the sectoral regulator has been exercising its powers under the 2012 Regulations.

18.6 The Electricity Act has its own system of addressing the issues of abuse of dominance and other grievances that a consumer may have. In terms of Section 60 of the Electricity Act extracted above, HERC is authorized to issue such direction as it considers appropriate to a licensee, if it abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry and contravention of directions of HERC is liable for punishment under Section 146 of the Act. Therefore, HERC can address the issue of abuse of dominance. Besides, HERC under Section 142 of the Electricity Act, on a complaint being filed, and on being satisfied that contravention of regulations in computing or charging of FSA has been made, can impose monetary penalty. As held by the Hon'ble Supreme Court in the case of Kanwar Singh Saini vs. High Court of Delhi – (2012) 4 SCC 307, when a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought under the provisions of that Act. Accordingly, the disputes arising in regard to interpretation of a regulation made under Section 181 of the Electricity Act can be

taken in appeal to the Appellate Tribunal under Section 111 of the Electricity Act. If the Appellant is aggrieved by the Regulations itself, then as held by the Supreme Court in the case of PTC India Ltd., the validity of the Regulations made under the authority of delegated legislation, can be tested only in judicial review proceedings before the courts.

18.7 Sections 173 and 174 of the Electricity Act provide that, the provisions of the Electricity Act have an overriding effect except that such provisions or any rule or regulation made thereunder shall not have any effect insofar as these are inconsistent with the provisions of the Consumer Protection Act, 1986 or Atomic Energy Act, 1962 or the Railways Act, 1989. The legislature has not put the Competition Act amongst the Acts whose provisions were to prevail over the provisions of the Electricity Act. The counsel for the Appellant has laid great emphasis on Section 175 of the Electricity Act which provides that, the provisions of the said Act are in addition to and not in derogation of any other law for the time being in force, to urge that the Commission had jurisdiction and an obligation to adjudicate on the matters of abuse of dominance.

18.8 We are not convinced. The interplay between Sections 174 and 175 of the Electricity Act was explained by the Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. in the following manner :

"51. In our opinion the gunapradhan axiom applies to this case. Section 174 is the pradhan whereas Section 175 is the guna (or subordinate). If we read Section 175 in isolation then of course we would have to agree to Mr. Nariman's submission that Section 11 of the Arbitration and Conciliation Act, 1996 applies. But we cannot read Section 175 in isolation, we have to read it along with Section 174, and reading them together, we have to adjust Section 175 (the guna or subordinate) to make it in accordance with Section 174 (the pradhan or principal). For doing so we will have to add the following words at the end of Section 175 "except where there is a conflict, express or implied, between a provision in this Act and any other law, in which case the former will prevail".

18.9 Thus, in the case of a conflict between the provisions of the Electricity Act and the Competition Act, the former will override because Section 174 of the Electricity Act would get attracted and section 175 of the Electricity Act will have to yield. The contention of the Appellant, that the Competition Act also has a non-obstante clause in Section 60 of the Act giving it an overriding effect, does not assist his case because the Electricity Act, 2003 is admittedly a later

special statute and in the event of irreconcilable inconsistency between the Electricity Act and the Competition Act, the former would override even though the Competition Act contained the non-obstante clause in Section 60 of the Act. We agree with the counsel of DHBVN that the principle of *leges posteriores priores contrarias abrogant* upheld by the Supreme Court in the case of Solidaire India Ltd. vs. Fair Growth Financial Service Ltd. – (2001) 3 SCC 71, will be applicable and the Electricity Act would prevail.

18.10 The legal position, therefore is that the Electricity Act is a self-contained, comprehensive legislation vesting the Appropriate Commission, in this case HERC, power to fix tariff, which includes FSA and an aggrieved consumer has been provided with legal remedies under the Act itself. A complete regulatory framework for electricity sector has been created through the Electricity Act and when the legislature through Section 60 of that Act specifically made the Appropriate Commission responsible to address the matter of dominance of abuse in a language almost similar to the language used in the already existing Competition Act, it implicitly endorsed deference to the Electricity Act to address allegations of such anti-competitive behavior. A conflict between the two Acts was explicitly also sought to be avoided through Section 174 of the Electricity Act extracted in the earlier part of this order. The Supreme Court of United States has, in cases of incompatibility between regulatory

statutes and antitrust laws, consistently held that, the former implicitly preclude the application of the latter. The considerations weighing with them, which are equally valid for us were the risk of conflicting guidance or standards of conduct, difficulty for the antitrust courts to evaluate highly technical issues which are in the purview of the sector regulators etc. Reference in this context may be made to the cases of Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP, 540 US 398 (2004) ;Credit Suisse Securities (USA) LLC v. Billing, 551 US 264 (2007) and Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 US 438 (2009)

18.11 We are of the view that, there is an implied immunity from the Competition law in matters of electricity tariff approved by the Appropriate Commission in terms of the Electricity Act, 2003 and therefore, the Appellant cannot seek any relief under the Competition Act.

19. The third issue is as to whether the Appellant was able to establish a *prima facie* case of unfair and discriminatory price in levy and computation of FSA contravening Section 4 of the Act, is only academic in view of our finding that the Commission lacked jurisdiction in this case. However, even if lack of jurisdiction of the Commission were not an issue, we do not agree with the Appellant that the Commission erred in closing the case under Section 26(2) of the Act. We agree with the Commission that, the Appellant had failed

to establish a *prima facie* case of contravention of Section 4 of the Act, extracted below:

> *"4. (1) No enterprise or group shall abuse its dominant position.]*
>
> *(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group],---*
>
> *(a) directly or indirectly, imposes unfair or discriminatory-*
>
> *(i) condition in purchase or sale of goods or service; or*
>
> *(ii) price in purchase or sale (including predatory price) of goods or service.*
>
> *Explanation.--For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or*
>
> *(b) limits or restricts--*
>
> *(i) production of goods or provision of services or market therefore; or*

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.--For the purposes of this section, the expression--

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to--

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."

19.1 A plain reading of this section shows that, if a dominant enterprise imposes unfair or discriminatory price, an intent to reduce competition or eliminate the competitors is not required to be established, except in the case of predatory pricing. Predatory price has been defined in clause (b) of Explanation to Section 4(2) of the Act, as pricing goods below cost with a view to reduce competition or eliminate the competitors. However, price discrimination on the part of a dominant firm is not *per se* unlawful. If there is any objective justification or a 'redeeming virtue' for different prices being charged from different consumers, it may not amount to discriminatory pricing in terms of Section 4(2)(a) of the Act. For DHBVN, to charge differential rate depending upon consumption of electricity which actually translates into a higher rate for higher consumption is

justified, on the objective criteria of consumption. Such variance in pricing is authorized by virtue of Section 62(4) of the Electricity Act. This is an objective and transparent classification supported by economic and social justification for segmented tariff. Consumption is an objective criterion, comfort level of recovery anchored on capacity to pay, for which consumption would be a proxy, is a valid economic argument and social welfare is implicit in lower charges for lower consumption which would support energy conservation and give a preferential rate to relatively less well off.

19.2 We are of the view that, the FSA charged at different rates based on the consumption of electricity is not unfair or discriminatory and cannot be construed as abuse of dominant position under Section 4 of the Act.

20. In view of the above discussion, the Appeal is dismissed.

(Anita Kapur)
Member

(Rajeev Kher)
Member

16th February, 2017