

(2013) 10 DEL CK 0395
In the Delhi High Court
Case No : Writ Petition (C) 2983 of 2013

Anil Soni

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 21-10-2013

Acts Referred:

Companies Act, 1956 — Section 4A
Constitution of India, 1950 — Article 136, 14, 15, 16, 226
Electricity Act, 2003 — Section 110, 112, 113, 2(4), 2(6)

Citation : (2013) 10 DEL CK 0395

Hon'ble Judges : V. Kameswar Rao, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : T.S. Doabla and Ms. Kiran Bhardwaj, in W.P. C 2983/2013 and Mr. Maninder Singh, Mr. Yashvardhan and Mr. Akshay Sapra, in W.P. C 4797/2013, for the Appellant; Rajeeve Mehra, ASG, Mr. Amrit Pal Singh, Ms. Shruti Aggarwal and Mr. Kartikey Mahajan, Advocates in W.P. (C) 2983 and 4797/2013, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Interpretation of sub-Section 2 of Section 77 of The Electricity Act, 2003, falls for consideration in the two captioned petitions. Two additional issues, the first pertaining to Dr. R.K. Pachauri, alleged to be the Chairman of Tata Energy & Research Institute, being nominated as a Member of the Selection Committee to recommend to the Central Government a Chairperson of the Central Electricity Regulatory Commission (for short "CERC"), the second: the effect of the Secretary-in-charge, Department of Legal Affairs and the Secretary Power being candidates for the post of Chairperson of CERC, also arises for consideration. The fact which gave birth to the two writ petitions is that on November 09, 2012, the Central Government issued a vacancy circular inviting applications to fill up the post of Chairperson of the Central Electricity Regulatory Commission which fell vacant due to the term of the existing incumbent expiring. Applications were invited from the persons in the field of

Economics, Commerce, Law or Management. As per the petitioners, only a sitting or a retired Judge of the Supreme Court or a Chief Justice (sitting or retired) of a High Court can be appointed to said post. Pertaining to Dr. R.K. Pachauri, it needs to be stated at the outset that he is not the Chairperson of the Tata Energy & Research Institute. He is the Chairperson of "The Energy & Resources Institute" (for short "TERI") which is an autonomous body having no concern with the well known business house of "TATA"; except perhaps receiving some grants from the Tata Trust.

2. The first issue requires an examination of the nature of the power exercised by CERC established under the provisions of The Electricity Act, 2003.

3. The introduction to the Statement of Objects and Reasons in the Indian Electricity Bill, 2001 highlights the reasons for enacting the Electricity Act, 2003, and it reads as under:-

In India the Electricity Supply Industry, at present, is being governed by the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. The Indian Electricity Act, 1910 created the basic framework for electric supply industry. The Act envisaged growth of the electricity industry through private licensees. It created the legal framework for laying down of wires and other works relating to the supply of electricity. The Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The State Electricity Board has the responsibility of arranging the supply of electricity in the State. Over a period of time, the performance of State Electricity Board had deteriorated on account of various factors. For instance, though power to fix tariffs vested with the State Electricity Board, they had generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice had been done by the State Governments. Cross-subsidies had reached unsustainable levels. To address this issue and to provide for distancing of governments from determination of tariffs, the Electricity Regulatory Commissions Act was enacted in 1998. It created the Central Electricity Commission and had an enabling provision through which State Governments could create a State Electricity Regulatory Commission. Sixteen States have so far notified/created State Electricity Regulatory Commission under the Central Act or under their own Reform Acts. With the policy of encouraging private sector participation in generation, transmission and distribution and the objectives of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1948 in a new self-contained comprehensive legislation arose. Accordingly after extensive discussions and consultation with the States and all other stake holders and experts the Electricity Bill was introduced in the Parliament.

4. The deteriorating performance of the State Electricity Boards and in particular the inability of the Boards to take decisions on tariffs in a professional and

independent manner necessitated a regulatory mechanism. The existing Electricity Regulatory Commissions Act were found wanting and hence the need for independent statutory regulations, is brought out by the introduction to the Statement of Objects and Reasons above noted.

5. Para 3 of the Statement of Objects and Reasons which accompanied The Electricity Bill 2001, highlights as under:-

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislations arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licences. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalized after extensive discussions and consultations with the States and all other stake holders and experts.

6. Part X of The Electricity Act, 2003, under the heading "Regulatory Commissions" has various provisions concerning the constitution, powers and functions of various bodies constituted under the said Act, and since we are concerned in the two writ petitions with the Central Electricity Regulatory Commission, we note the relevant Sections of the said Act.

7. As per sub-Section (1) of Section 76 there shall be a Commission, to be known as the Central Electricity Regulatory Commissions (CERC), which shall exercise the powers conferred on and discharge the functions assigned to it under the Act. The composition of the CERC, is as per sub-Section (5), which reads as under:-

(5) The Central Commission shall consist of the following Members namely:-

(a) a Chairperson and three other Members;

(b) the Chairperson of the Authority who shall be the member, ex officio.

(N.B. The "Authority" as per Section 2(6) of The Electricity Act, 2003 means the Central Electricity Authority referred to in sub-Section 1 of Section 70 of the Act).

8. Qualifications for appointment of Members of the Central Electricity Regulatory Commission are as per Section 77 of The Electricity Act, 2003, which reads as under:-

77. Qualifications for appointment of Members of Central Commission:-

(1) The Chairperson and the Members of the Central Commission shall be persons having adequate knowledge of, or experience in, or shown capacity in, dealing with, problems relating to engineering, law, economics, commerce, finance or, management and shall be appointed in the following manner, namely:-

(a) one person having qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;

(b) one person having qualifications and experience in the field of finance;

(c) two persons having qualifications and experience in the field of economics, commerce, law or management:

Provided that not more than one Member shall be appointed under the same category under clause (c).

(2) Notwithstanding anything contained in sub-section (1), the Central Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court:

Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of India.

(3) The Chairperson or any other Member of the Central Commission shall not hold any other office.

(4) The Chairperson shall be the Chief Executive of the Central Commission.

9. The appointment of the Chairperson and Members of the Central Electricity Regulatory Commission by the Central Government is envisaged to be on the recommendations of a Selection Committee as per Section 78 of The Electricity Act, 2003, which reads as under:-

78. Constitution of Selection Committee to recommend Members.-

(1) The Central Government shall, for the purposes of selecting the Members of the Appellate Tribunal and the Chairperson and Members of the Central Commission, constitute a Selection Committee consisting of -

(2) For the purposes of clause (d) of sub-section (1), the Central Government shall nominate from amongst persons holding the post of chairperson or managing director, by whatever name called, of any public financial institution specified in section 4A of the Companies Act, 1956.

(3) For the purposes of clause (e) of sub-section (1), the Central Government

shall, by notification, nominate from amongst persons holding the post of director or the head of the institution, by whatever name called, of any research, technical or management institution for this purpose.

(4) Secretary-in-charge of the Ministry of the Central Government dealing with Power shall be the Convenor of the Selection Committee.

(5) The Central Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of a Member of the Appellate Tribunal or the Chairperson or a Member of the Central Commission and six months before the superannuation or end of tenure of the Member of the Appellate Tribunal or Member of the Central Commission, make a reference to the Selection Committee for filling up of the vacancy.

(6) The Selection Committee shall finalise the selection of the Chairperson and Members referred to in sub-section (5) within three month from the date on which the reference is made to it.

(7) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.

(8) Before recommending any person for appointment as Member of the Appellate Tribunal or the Chairperson or other Member of the Central Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as the Chairperson or Member.

(9) No appointment of the Chairperson or other Member shall be invalid merely by reason of any vacancy in the Selection Committee:

Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson of the Central Commission where such person is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court.

10. The functions of the Central Electricity Regulatory Commission are enlisted in Section 79 of The Electricity Act, 2003 which reads as under:-

79. Functions of Central Commission:-

(1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
- (g) to levy fees for the purposes of this Act;
- (h) to specify Grid Code having regard to Grid Standards;
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
- (k) to discharge such other functions as may be assigned under this Act.

11. And now the argument advanced by the petitioners with reference to sub-Section 2 of Section 77 of The Electricity Act, 2003.

12. Relying upon the non-obstante clause: "Notwithstanding anything contained in sub-Section (1)" it was urged that notwithstanding sub-Section (1) of Section 77 permitting a person to be appointed as a Chairperson of the Central Commission who has adequate knowledge or experience in the subject of Engineering, Law, Economics, Commerce, Finance or Management, the mandate of sub-Section (2), because of the non-obstante clause, was that the Chairperson had to be a person who is or had been a Judge of the Supreme Court or the Chief Justice of a High Court. It was urged that of the many powers and functions of the Central Commission, one important power/function was to adjudicate disputes involving generating companies or transmission license(s) i.e. to settle a lis; and hence the positive mandate: that the Chairperson had to be a person with experience in settling a lis. It was urged that the word "may" in the phrase: "the Central Government may appoint any person ", had to be read as "shall" in view of the decision reported as Dinkar Anna Patil and Others Vs. State of Maharashtra and Others, where the word "may" was read as "shall ". Decision reported as Municipal Corporation, Indore and Others Vs. Smt. Ratnaprabha and Others, was also brought to aid. Taking the argument forward, a reference was made to the decisions reported as State of Uttar Pradesh Vs. Jogendra Singh, and Smt. Bachahan Devi and Another Vs. Nagar Nigam, Gorakhpur and Another, which held that the words "may" and "shall" do not necessarily mean that the two have to be always interpreted as denoting a discretion and a command respectively. The textual setting in the context imparts the meaning. Thus "may" can be read as "shall" and vice versa. Referring to the decision reported as U.P. Power Corporation Ltd. Vs. National Thermal Power Corporation Ltd. and Others, it was urged that as held therein (para 4), the powers of the Central Electricity

Regulatory Commission were extensive and embraced the power to adjudicate disputes and differences. Decision reported as PTC India Ltd. Vs. Central Electricity Regulatory Commission thr. Secy., was cited to urge that the powers of the Central Commission were both legislative and adjudicatory, as held therein. Lastly, the decision reported as Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, was cited to urge that the Constitution of India contemplates that judicial power must always be exercised by Courts; and pertaining to Tribunals, the contention advanced was that adjudicatory Tribunals established by the Central Government had to be headed by sitting or retired Judges appointed in consultation with the Chief Justice of India.

13. In Re. Issue No. 1: We have referred to in paras 4 and 6 above the Introduction and the Statement of Objects and Reasons of the Indian Electricity Bill, 2001, and would highlight that the twin have the underlying theme of the requirement of taking away the power of tariff fixation from the Electricity Boards and vest the same in a statutory regulatory body.

14. This then takes us to the legal character of such regulatory power, more particularly those arising out of the power to determine tariff u/s 62 of the Act. Such power of tariff fixation, often equated with the power of price fixation, has been the subject matter of judicial discussion and pronouncement for some time now. The nature of such power first arose in the celebrated Constitution Bench Judgment reported as Prag Ice and Oil Mills and Another Vs. Union of India (UOI), when Beg, C.J. speaking for the Constitution Bench held forth that any form of price fixation (tariff fixation in our case) is really legislative in character. This because, quite simply such tariff/price fixation satisfies the test of legislation. A legislative measure by its inherent nature does not concern itself with the facts of a particular case but is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind of class. His Lordship speaking for the Court in paragraph 37 held as under:-

37. We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character in the type of control order which is now before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class. In the case before us, the Control Order applies to sales of mustard oil anywhere in India by any dealer. Its validity does not depend on the observance of any procedure to be complied with or particular types of evidence to be taken on any specified matters as conditions precedent to its validity. The test of validity is constituted by the nexus shown between the order passed and the purposes for which it can be passed, or in other words by reasonableness judges by possible or probably consequences.

15. The Court was further fortified in its view by the dictum of the Supreme Court in the decision reported as Saraswati Industrial Syndicate Ltd. and Others

Vs. Union of India (UOI), , which when dealing with the Sugar Control Order, 1966 held as under:-

Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price. Nevertheless, the criterion adopted must be reasonable.

16. The next celebrated decision reported as Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., on the issue of price fixation, when the Court delved into, in great detail, the elements which characterize price fixation as a legislative action and thus quite different from a judicial function or a quasi-judicial function. While dealing with this aspect, as its third observation, the Court in Para 5 to 8 and 14 held:

5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate "legislation, it may happen that Parliament may itself provide for a notice and for a hearing-there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate-in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

xxx

7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is "difficult in theory and impossible in practice". Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as "one between the general and the particular". "A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a

particular case in accordance with the requirements of policy". "Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases." It has also been said "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge not more than the price fixed. Viewed from whatever angle, the angle of general application the prospectivity of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price-fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi judicial character. Otherwise, price fixation is generally a legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price-fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price-fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price-fixation is resorted to and any increase in price affects them as seriously as any decrease does a

manufacturer, if not more. The three observations made by us are well-settled and well founded on authority. The cases to which we shall now refer, will perhaps elucidate what we have tried, unfelicitously, to express.

17. The Court then specifically noted the ratio of the opinion in *Saraswati Industrial Syndicate Limited* and *Prag Ice & Oil Mills* referred to *supra* above, as under:-

14. We may refer at this juncture to some illuminating passages from Schwartz's book on "Administrative Law". 1976, pp. 143-44. He said:

If a particular function is termed "legislative" or "rule making" rather than "judicial" or "adjudication," it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to notice and hearing, unless a statute expressly requires them. If a hearing is held in accordance with a statutory requirement, it normally need not be a formal one, governed by the requirements discussed in Chapters 6 and 7. The characterization of an administrative act as legislative instead of judicial is thus of great significance.

As a federal court has recently pointed out, there is no "bright line" between rule-making and adjudication. The most famous pre-APA attempt to explain the difference between legislative and judicial functions was made by Justice Holmes in *Prentis v. Atlantic Coast Line Co.* "A judicial inquiry," said he, "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." The key factor in the Holmes analysis is time: a rule prescribes future patterns of conduct; a decision determines liabilities upon the basis of present or past facts.

The element of applicability has been emphasized by others as the key in differentiating legislative from judicial functions. According to Chief Justice Burger, "Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class." An adjudication, on the other hand, applies to specific individuals or situations. Rulemaking affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely affected; adjudication operates concretely upon individuals in their individual capacity.

18. With specific reference to electricity legislation, the Supreme Court in the decision reported as *Ashok Soap Factory and Another Vs. Municipal Corporation of Delhi and Others*, , while testing the resolution of the Municipal Corporation of Delhi to enhance minimum consumption guarantee charges, invoked the principle of tariff fixation being a legislative function to go so far as to hold that being a legislative function, challenge to such levy could be on the limited grounds of unreasonableness and arbitrariness (like a legislation) and not on the

demonstrative grounds such as absence of reasons. Para 29 of the Judgment reads as follows:-

29. Apart from that the fixation of tariff is a legislative function and the only challenge to the fixation of such levy can be on the ground of unreasonableness or arbitrariness and not on demonstrative grounds in the sense that the reasons for the levy of charge must be disclosed in the order imposing the levy or disclosed to the court, so long as it is based on objective criteria.

19. It may be true that as per clause (f) of sub-Section (1) of Section 79 of The Electricity Act, 2003, the power of the Central Electricity Regulatory Commission is to adjudicate upon disputes involving generating companies or transmission license(s), but the same is only in regard to matters connected with clauses (a) to (d), which powers are related to: (a) tariff of generating companies owned or controlled by the Central Government; (b) tariff of generating companies other than those owned or controlled by the Central Government; (c) tariff for inter-State transmission of electricity; and (d) regulate inter-State transmission of electricity. Thus, power to adjudicate u/s 79(1)(f) is conscribed by and limited to the regulatory functions contained in clauses (a) to (d). The decisions of the Supreme Court in Uttar Pradesh Power Corporation's case (supra) and PTC India Ltd.'s case (supra) have to be understood in said context; and not as laying down that the adjudicatory power is the sovereign power to decide disputes which as per the Constitution scheme is vested in Court alone; the separation of powers.

20. On the subject: when can the word "may " and the word "shall" be construed as conferring a discretion or a command, it is now well settled that it is the context of the text which determines the use and not the ordinary meaning of the two words. The first guiding star is that if the discretion conferred is coupled with an obligation, then alone is the word "may" to be construed as a command and vice versa if there is no obligation, the word "shall" has to be construed as "may". This is the law declared in the decisions in Jogender Singh's case (supra), Bachahan Devi's case (supra), Smt. Ratnaprabha's case (supra) and Dinkar Anna Patil's case (supra). The second guiding star is that when reading "may" as "may" would give an unbridled power resulting in arbitrary exercise of power, the word "may" has to be read as "shall", particularly when another legislative intent would be rendered nugatory if "may" is not read as "shall".

21. It was the second guiding star which navigated the decisions in Dinkar Anna Patil's case (supra) to construe the word "may" as "shall", in light of the non obstante clause in Rule 4-A of the Maharashtra Sales Tax Offices Class I (Recruitment) Rules 1982. The Rule read:

4 A-Notwithstanding anything contained in rule 4, if in the opinion of the State Government, the exigencies of service so require, the Government may, in consultation with the Maharashtra Public Service Commission, wherever

necessary, make appointments to the posts in relaxation of the percentage prescribed in rule 4 for appointment by promotion and nomination.

22. In para 26 of the opinion, the Supreme Court held:

26. Coming to the interpretation of rule 4-A, it is no doubt true that the language used therein indicates that the said rule is made applicable retrospectively from the date when the Rules were made applicable w.e.f. October 10, 1982 (sic 15-10-1982). Rule 4-A opens with non-obstante clause and provides that if in the opinion of the State Government, the exigencies of service so require, the government may in consultation with the MPSC wherever necessary make appointments to the post in relaxation of the percentage prescribed in rule 4 of the Rules by promotion and nomination. The Tribunal held that the word "may" used in this Rule is directory but in our considered view to give such a meaning would render the very object of consultation with the MPSC wherever necessary nugatory. It would give unbridled power to the government to dispense with the consultation with MPSC which may result into arbitrary exercise of the powers by the Authority. This could never be the object of rule 4A. In our considered view, the word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and MPSC. The Government of Maharashtra wanted to relax quota rule but MPSC was not agreeable and ultimately it relented to the request of the Government of Maharashtra and suggested amended rule 4A. This suggestion was accepted and accordingly the amendment was inserted in the Rules. We also find support to our view from the decision of this Court in Keshav Chandra Joshi and others etc. Vs. Union of India and others, . This Court was dealing with the interpretation of rule 27 of U.P. Forest Service Rules, 1952 and the said rule is similar to rule 4A. While construing the word "may" used in rule 27, this Court held that the word "may" has to be read as "shall" and, therefore, consultation is mandatory.

23. Thus the contention that wherever a statutory provision begins with a non-obstante clause, the word "may " used there must be always, as a matter of course, be interpreted to mean "shall" overlooks the fine distinction illuminated by the twin guiding stars noted by us in para 21 above.

24. What would be rendered nugatory in the instant case if the word "may" in sub-Section 2 of Section 77 of The Electricity Act, 2003 is read as may and not shall?

25. The Constitution scheme, it was argued, requires that adjudicatory functions have to be with courts and if vested in a Tribunal or any other body, the Chief Presiding Officer has to be appointed in consultation with the Chief Justice of India and has to be one who holds or has held a judicial post. And for which, the decision of the Supreme Court in R. Gandhi's case was relied upon.

26. The concept of the "Rule of Law" is the outcome of the legal and political experience of the people of a State. The Rule of Law embodies the hard fought gains in the common law traditions of England. It was the culmination of a long

and bitter struggle of the common lawyers against Royal Tyranny. As far back as in the 13th Century, Bracton maintained that even Kings were subject to law. He exhorted: "The King shall not be subject to man, but to God and the Law since law makes the King". James-I, who believed in the divine right of Kings, dictate that the King's will was supreme. He told the Judges not to interfere with his prerogative Courts, such as the Star Chamber. Chief Justice, Sir Edward Coke, repudiated the King's claim and declared that Judges would follow the Common Law and the King was under the Law. Indeed, the Judges won the struggle against the Royal claim to rule by prerogative.

27. The Parliament, with the aid of common lawyers, won the glorious bloodless revolution against the Kings. But, in the place of the King's supremacy, the supremacy of the Parliament came to be established. The supremacy of law, which Bracton and Coke had fought for and won, came to mean the supremacy of Parliament and its penchant for "elective dictatorship". Men realized that it would be a grave mistake to equate legitimacy with the sovereign will or majority rule alone to the exclusion of other constitutional values.

28. As Parliament legislated to control the rights of the citizens, the concern of the Rule of Law was to limit and discipline this sovereign power to legislate.

29. Three essential components of the concept of Rule of Law emerged. The first was that the law is supreme over the acts of both, the government and the citizens. The second was an independent judiciary to adjudicate claims between the government and the citizens and the third was the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and the citizen must be regulated only by law.

30. With reference to the second component of the concept of the Rule of Law, it needs to be noted that it highlights that laws, which ought to be equal, general and known, need to be administered by independent Judges and the three organs of the State: (i) legislature, (ii) executive, and (iii) judiciary, shall be separate.

31. The Indian Constitution rests on federalism, democracy, constitutionalism, respect for minority rights, fundamental rights of the individual and the Rule of Law. These defining principles function in symbiosis and no single principle can be defined in isolation from the others, nor does anyone principle trample upon or exclude the operation of the other.

32. The Constitutional Bench decision of the Supreme Court reported as *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, laid down the principle of the basic structure of the Constitution being inviolable, and we may hasten to add that though the Bench did not specifically hold that judicial review is a part of basic structure of the Constitution, but expressly held that Rule of Law is essentially a part of the basic structure. Judicial review was however held to be an integral part of the Constitution. We may also note that Justice Y.V. Chandrachud (as His Lordship then was), in the decision reported as *Smt. Indira*

Nehru Gandhi Vs. Shri Raj Narain and Another, held, in the context of elections to elect representatives to the Lok Sabha, that judicial review cannot be considered to be a part of the basic structure of the Constitution. However, a meaningful reading of the opinion of Y.V. Chandrachud (CJ) in the decision reported as *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, would reveal that His Lordship held that judicial review with respect to legislative actions was a part of the basic structure of the Constitution. The separate opinion of P.N. Bhagwati, J. (as His Lordship then was), also upheld judicial review, with respect to legislative actions, as a part of the basic structure of the Constitution, but His Lordship hedged the opinion with a caveat in the following words:-

Para 87...I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament.

(Underlined emphasized)

33. In his separate opinion in the decision reported as *Waman Rao and Ors Vs. Union of India (UOI) and Others*, , Bhagwati, J. (as His Lordship then was) in para 64 of the opinion reiterated that para 77 and paras 80 to 102 of his opinion in *Minerva Mills*" case (supra) be read as part of his opinion and thereby reiterated the view that notwithstanding judicial review being a feature basic to the Constitution, nothing prevented Parliament to enact a law having arrangements for judicial review through alternative institutional mechanisms.

34. The aforesaid line of reasoning adopted by Bhagwati, J. was applied in full vigour in the decision reported as *S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others*, in para 3 whereof it was observed that although power of judicial review is an integral part of our Constitutional system and without it there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality and thus judicial review cannot be altogether abrogated by Parliament, it can certainly, without in any way violating the basic structure doctrine, set up alternative institutional mechanisms or arrangements for judicial review. But, to our mind, His Lordship made a very broad and a sweeping statement in said para 3 by observing that this view was the majority view of the Judges who decided *Minerva Mills*" case (supra).

35. The majority opinion penned by Ranganatha Misra, J. (as his Lordship then was) held that effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament and as long as a Tribunal met the mandate of being a real substitute for the High Court, not only in form but even in content.

36. The concurring opinions of the Constitution Bench in *S.P. Sampath Kumar*'s case laid the foundation that the basic feature of the Constitution i.e. of judicial

review could be preserved through alternative dispute resolution mechanism as long as the same were a de jure and de facto substitute for High Courts.

37. Two decisions pronounced in the year 1993, incisively reviewed the legal position with reference to judicial review exercised by superior courts in the Indian context i.e. the High Courts exercising power under Article 226 and Article 227 of the Constitution of India. The first was a 3 Judge bench decision of the Supreme Court reported as R.K. Jain Vs. Union of India and Others, and the second being a full Bench decision of the Andhra Pradesh High Court reported as Sakinala Hari Nath and Others Vs. State of Andhra Pradesh and Others, The main opinion in R.K. Jain's case, penned by K. Ramaswamy, J. with which Ahmadi, J. and Punchhi, J. concurred, in paras 66, 67 and 76 observed as under:-

66. In S.P. Sampath Kumar Vs. Union of India this Court held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would predominantly be a matter fit to be decided by the judiciary, as judiciary alone would be possessed of expertise in this field and secondly the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. The Constitution has, therefore, created an independent machinery i.e. judiciary to resolve disputes, which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. It must, therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it, must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The tribunal set up under the Administrative Tribunals Act, 1985 was required to interpret and apply Articles 14, 15 and 16 and 311 in quite a large number of cases. Therefore, the personnel manning the administrative tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the

efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that an appropriate rule should be made to recruit the members; and consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by Judge of the Supreme Court to recruit the members for appointment. In *M.B. Majumdar Vs. Union of India* when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on a par with the judges but a separate mechanism created for their appointment pursuant to Article 323A of the Constitution. Therefore, what was meant by this Court in *Sampath Kumar* case ratio is that the tribunals when exercise the power and functions, the Act created institutional alternative mechanism or authority to adjudicate the service disputes. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. *J.P. Chopra Vs. Union of India* merely followed the ratio of *Sampath Kumar*.

67. The tribunals set up under Articles 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.

XXX

76. Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Article 136 to this Court also proves to be costly and probative and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this Court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of

injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would made an in-depth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Government of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory.

38. Suffice it to state that the observations of K. Ramaswamy, J. in R.K. Jain's case certainly struck a discordant note with respect to the view taken in S.P. Sampath Kumar's case (supra) and the observations in para 76 highlight judicial adjudication being a special process efficiency of which could be best maintained by advocate Judges as also remedy of appeal by Special Leave to the Supreme Court being cost prohibitive, compelling citizens from far-flung areas to approach the Supreme Court, and hence the desirability of a remedy before a Bench at the respective High Courts.

39. The latest pronouncement of the Supreme Court reported as Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, has very succinctly, in para 12 and 13 brought out the difference in the powers exercised by Courts and Tribunals, and briefly stated, reiterates the view that the sovereign power of the State to administer justice and in particular the power exercised by superior courts of that of judicial review can never be entrusted to Tribunals.

40. Our discussion in paragraphs 27 to 40 above analyze decisions on the subject of the power of Constitutional Court exercising power of judicial review, but bring home the point that the legislature may constitute adjudicatory Fora's but the decisions thereof cannot be granted finality, in that, the same would always be subject to a judicial review, and secondly that the legislative competence of the legislature to constitute Tribunals on subjects that are intrinsically judicial functions and have been traditionally performed by the Courts cannot be exercised outside the judiciary, meaning thereby, and we quote para 64 of the opinion in R. Gandhi's case:

64. Only if continued judicial independence is assured, tribunals can discharge judicial functions. In order to make such independence a reality, it is fundamental that the members of the tribunal shall be independent persons, not civil servants. They should resemble the courts and not bureaucratic Boards. Even the dependence of tribunals on the sponsoring or parent department for infrastructural facilities or personnel may undermine the independence of the tribunal (vide Wade & Forsyth: Administrative Law, 10th Edn., pp 774 and 777).

41. Having already held that the Central Electricity Regulatory Commission exercises legislative functions pertaining to tariff related matters and the

adjudicatory powers u/s 79(1)(f) is conscribed by and limited to the regulatory functions, contained in clauses (a) to (d) of Section 79(1), the said power is not to be confused with the sovereign power to adjudicate, vested in Courts alone (referred to in para 20 above); we conclude, that to interpret the word "may" in sub-Section (2) of Section 77 of The Electricity Act, 2003 would not render the Constitutional Scheme of separation of powers as nugatory. The power u/s 77(2) of The Electricity Act, 2003 is an additional power, apart from the power u/s 77(1), to appoint a Chairperson. Should the Central Government chose to exercise the same, a sitting or a retired Judge of the Supreme Court or a sitting or a retired Chief Justice of a High Court can be appointed as a Chairperson of the CERC in consultation with the Chief Justice of India.

42. Section 2(4) of the Electricity Act, 2003 defines the "Appropriate Commission" to mean:

2 (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

43. Section 110 of the Act reads:

110. Establishment of Appellate Tribunal-

The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Electricity to hear appeals against the orders of the adjudicating officer or the Appropriate Commission under this Act.

44. Section 112 of the Act lays down the composition of the Appellate Tribunal as under:-

112. Composition of Appellate Tribunal-

(1) The Appellate Tribunal shall consist of a Chairperson and three other Members.

(2) Subject to the provisions of this Act,-

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Appellate Tribunal with two or more Members of the Appellate Tribunal as the Chairperson of the Appellate Tribunal may deem fit:

Provided that every Bench constituted under this clause shall include at least one Judicial Member and one Technical Member;

(c) the Benches of the Appellate Tribunal shall ordinarily sit at Delhi and such other places as the Central Government may, in consultation with the Chairperson of the Appellate Tribunal, notify;

(d) the Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction.

(3) Notwithstanding anything contained in sub-section (2), the Chairperson of the Appellate Tribunal may transfer a Member of the Appellate Tribunal from one Bench to another Bench. Explanation.- For the purposes of this Chapter,-

(i) " Judicial Member" means a Member of the Appellate Tribunal appointed as such under sub-clause (i) of clause (b) of sub-section (1) of section 113, and includes the Chairperson of the Appellate Tribunal;

(ii) " Technical Member" means a Member of the Appellate Tribunal appointed as such under sub-clause (ii) or sub-clause (iii) of clause (b) of subsection (1) of section 113.

45. Section 113 lays down the qualification for appointment of Chairperson and Members of the Appellate Tribunal. It reads:

113. Qualifications for appointment of Chairperson and Member of the Appellate Tribunal.

(1) A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he-

(a) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a judge of the Supreme Court or the Chief Justice of a High Court; and

(b) in the case of a Member of the Appellate Tribunal,-

(i) is, or has been, or is qualified to be, a Judge of a High Court; or

(ii) is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or

(iii) is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the 55 matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.

(2) The Chairperson of the Appellate Tribunal shall be appointed by the Central Government after consultation with the Chief Justice of India.

(3) The Members of the Appellate Tribunal shall be appointed by the Central Government on the recommendation of the Selection Committee referred to in section 78.

(4) Before appointing any person for appointment as Chairperson or other Member of the Appellate Tribunal, the Central Government shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member.

46. Though not strictly relevant for our discussion, we have noted the legislative provisions above to highlight that the Act contains ample safeguards to maintain and secure the concern of the Rule of Law we have adverted to in paras 27 to 30 above.

47. We negate the first contention urged and hold that neither the scheme of the Electricity Act, 2003 nor the constitutional mandate warrants the word "may" in Section 77(2) of The Electricity Act, 2003 to be interpreted as "shall".

48. On the first of the two additional issues, we need to note that Section 78 of The Electricity Act, 2003 requires the Central Government to constitute a Selection Committee to recommend to the Central Government the names of the Members and the Chairperson of CERC. The Selection Committee has to consist of six members, comprising:

(i) Member of the Planning Commission incharge of the energy sector - (who acts as the Chairperson of the Selection Committee;

(ii) Secretary-in-charge of the Ministry of the Central Government dealing with the Department of Legal Affairs - (who acts as the Member of the Selection Committee)

(iii) Chairperson of the Public Enterprises Selection Board - (who acts as the Member of the Selection Committee)

(iv) a person to be nominated by the Central Government in accordance with sub-section (2) - (who acts as the Member of the Selection Committee)

(v) a person to be nominated by the Central Government in accordance with sub-section (3) - (who acts as the Member of the Selection Committee)

(vi). Secretary-in-charge of the Ministry of the Central Government dealing with power - (who acts as the Member of the Selection Committee). The person to be nominated as per clause (e) of Section 77(1) has to be in accordance with sub-Section (3) of Section 77 i.e. a person holding the post of Director or the Head of the Institution of any research, technical or management institute. Dr. R.K. Pachauri is the Chairperson of "The Energy & Resources Institute" (TERI) and not "The Tata Energy & Research Institute" as pleaded by the writ petitioners. He has no concern with the house of TATA, a player in the generation and distribution of electricity in India. We see no conflict of interest. The challenge to Dr. R.K. Pachauri being nominated on the Selection Committee is premised on a fundamentally wrong assumption and hence the challenge is rejected.

49. On the second of the two additional issues premised on the fact that Sh. P. Umashankar, the Secretary Power and Dr. Brahm A. Agarwal, Secretary Department of Legal Affairs offered their candidature for being appointed as Members of CERC and that as per clauses (b) and (f) of Section 78(1) the two are Members of the Selection Committee by virtue of the posts held by them and thus the maxim *Nemo debet esse iudex propria causa* is violated, we only have

to note the fact that the two gentlemen did not participate at the sittings of the Selection Committee i.e. recused themselves when the Selection Committee met. It is not that the two gentlemen recused when their candidatures were discussed but participated in the deliberations when other names were discussed. Thus, it cannot be said that the two became Judges of their own cause. The writ petitions are dismissed but without any order as to costs.