
(2017) 09 KAR CK 0047
In the Karnataka High Court
Case No : 60231-233 of 2016 (GM-KEB)

Star Metallica and Power Private Limited	APPELLANT
Vs	
State of Karnataka & Ors.	RESPONDENT

Date of Decision : 18-09-2017

Acts Referred:

Constitution of India, Article 226, Article 226, Article 227, Article 227 - Power of High Courts to Issue certain writs - Power of High Courts to Issu

Citation : (2017) 09 KAR CK 0047

Hon'ble Judges : Dr.Vineet Kothari

Bench : SINGLE BENCH

Advocate : Udaya Holla, Vivek Holla, A.M. Suresh Reddy, S.S. Naganand, S. Sriranga, T.S. Amar Kumar

Judgement

1. The petitioner, STAR METALLICS AND POWER PRIVATE LIMITED has filed these petitions under Articles 226 and 227 of the Constitution of India, seeking to quash the impugned order dated 18/08/2016 passed by the Respondent - Karnataka Electricity Regulatory Commission ("KEREC") by which the KEREC has fixed the rate at Rs. 4.67 per KWh. unit to be paid to the petitioner - Company, the Power Generating Company for the power supplied by them to the State Grid in pursuance of the Mandate Order passed by the Government of Karnataka on 16/09/2015 under Section 11 (1) of the Electricity Act, 2003 ("Act" for short) for the period between September 2015 and May 2016, as against the provisional rate of Rs. 5.08 per KWh.unit fixed by the State Government in the aforesaid order under Section 11 (1) of the Act dated 16/09/2015.
2. Mr. Udaya Holla, Senior Advocate appearing for the petitioner - Company has submitted that the impugned order passed by the KEREC on 18/08/2016 Annexure D on record on the Original Petitions filed by the various Electricity Supply Companies (ESCOMS) like BESCOM, CHESCOM, etc. had no jurisdiction to pass the said order and the said order without impleading the present petitioner

- Company and others who are generating Power in the State and without giving them an opportunity of hearing in the proceedings initiated by the ESCOMS before KERC, such order is not only unsustainable on facts and in law, but is also hit by the breach of the principles of natural justice and therefore the same deserves to be quashed and the petitioner - Company deserves to be compensated for the power supplied to the State Grid under compulsion of the order passed by the State Government under Section 11 (1) of the Act at the rate of Rs. 5.08 per KWh. fixed by the State Government.

3. Mr. Holla further submitted that the petitioner - Company was already supplying power generated by it in its Thermal Projects in the State to other Private Companies like M/s. Tata Power Trading Limited at the rate of Rs. 5.08 per KWhr. and all such Power Purchase Agreements (PPAs) were duly approved by the Respondent KERC itself and therefore no lower rates than Rs. 5.08 per KWh.unit could be fixed by the Respondent KERC in terms of Section 11 (2) of the Act.

4. Mr. Holla further submitted that the order passed by the Respondent KERC is a quasi-judicial order and not a legislative function of the said State Commission, KERC constituted under Section 86 of the Act, because Section 11 of the Act which operates in a different and special field, in the cases of emergencies and extraordinary circumstances, where the State Government can compel the Power generating companies to operate and maintain any Generating Station to its maximum capacity and supply the power exclusively to the State Grid only to meet such extraordinary contingencies and sub-Section (2) of Section 11 empowers the Respondent KERC to offset the adverse financial impact of such directions issued by the State under sub-Section (1) of Section 11 on any Generating Company, in such manner, as it considers appropriate.

5. Mr. Holla submitted that the assessment and computation of the adverse financial impact on the Power generating companies could not have been determined by the Respondent KERC without impleading them and giving an opportunity of hearing to the Power generating companies like the petitioner and therefore the impugned order admittedly passed

without giving any opportunity of hearing to the petitioner deserves to be quashed by this Court.

6. He relied upon certain case laws in support of his contentions which would be discussed hereinafter at an appropriate place.

7. On the other hand, the learned counsel for the Respondent KERC, Mr.T.S. Amar Kumar submitted that the impugned order passed by the Respondent KERC on 18/08/2016 is a legislative exercise under Section 62 of the Act and KERC is the sole Arbiter and Adjudicator to fix the Tariff rates for the power supply to be made in the State by all the Distribution Companies and the power generating companies cannot be heard to claim the compensation at any higher rate than the one fixed by the Respondent KERC.

He submitted that even the order passed in the present case under Section 11 (2) of the Act read with Section 62 of the Act is a similar legislative exercise and since the Respondent KERC has determined the tariff rate at Rs. 4.67 per KWh. unit based on the relevant evidence and consideration on the petitions filed by the Distribution Companies (ESCOs), therefore, the petitioner and other Power generating companies cannot have any grievance in the matter.

He submitted that a general Public Notice was also issued by the Respondent KERC before passing the said order on 18/08/2016 and 4 of the 62 Power generating companies in the State, even represented their cause before the Commission and produced the evidence and on the basis of the totality of the evidence only the Respondent KERC has determined the said rate of Rs. 4.67 per KWh. unit adding above the weighted average rate for the said period at Rs. 4.45 per KWh. unit further 5% over the weighted average of short term rate of 4.45 per KWh. unit ascertained on the basis of various bilateral

contracts for short period entered into by ESCOs with various other power generating companies for the said period.

He submitted that the principles of natural justice are not attracted in the legislative exercise of fixation of Tariff by the Respondent KERC and by Public Notice, the objections have been invited in accordance with the Regulations framed in this regard, namely, KERC (Tariff) Regulations, 2000, Annexure R3.

Therefore, there was sufficient compliance even with the principles of natural justice in this regard and if the petitioner - company did not choose to appear before the KERC and present its case and lead evidence before it, the impugned order of KERC cannot be quashed on that ground.

He further submitted that the General Conduct Regulations, namely, KERC (General and Conduct of Proceedings), Regulations, 2000 relied upon by the petitioner in this regard as contained in Notification dated 10/01/2000 providing for an opportunity of hearing in Regulation 24 thereof does not apply to the facts of the present case. He therefore submitted that the Respondent KERC not only has the exclusive jurisdiction to decide the Tariff under the Act of 2003 but the impugned order also suffers from no illegality.

8. Mr. Amar Kumar further submitted that the order issued by the State Government in the present case under Section 11 (1) of the Act on 16/09/2015 directing the power generating companies to produce Electricity at the maximum capacity to meet the acute shortage of Power Supply in the State and supply such Electricity only to the State Grid, stated that the rate of Rs. 5.08 per KWh. Unit fixed by the State Government is only provisional and the final rate in this regard would be fixed by the Respondent KERC only in terms of Section 11(2) read with Section 62 of the Act and therefore the impugned order cannot be assailed on the ground of lack of jurisdiction of KERC at all. He also submitted that a Review Petition was filed against the impugned order dated 18/08/2016 which too came to be dismissed by the Respondent - KERC on 10/08/2017 and

some of the Power generating companies have even filed Appeals before the Appellate Tribunal for Electricity (APTEL) which are said to be pending and therefore the present Writ Petitions also deserve to be dismissed on the ground of availability of alternative remedy to the petitioner under Section 111 of the Act. He also relied upon certain case laws in support of his contentions which will be discussed hereinafter at an appropriate place.

9. Mr. S.S. Naganand, Senior Advocate appearing for the ESCOMS who filed the Original Petitions before the Respondent KERC which culminated in the

impugned order dated 18/08/2016, also supported the arguments of Mr. Amar Kumar for KERC and urged that the ESCOMS were bound to pay the Tariff rates as fixed by the Respondent KERC only and they could not pay anything more than the rate fixed by the KERC and the rate in the present case fixed at Rs. 5.08 per KWh. on the date of issuance of order under Section 11(1) of the Act by the State Government was only provisional and since the final rate has been determined by KERC at Rs. 4.67 per unit only, the petitioner and other power generating companies have to make refund of the excess amount already paid to them as per the provisional rate of Rs. 5.08 per KWh.unit fixed in the order passed by the Respondent State.

10. I have heard the learned counsels at length and perused the record and the case laws cited at the Bar.

11. Section 11 of the Electricity Act, 2003, which calls for interpretation by this Court in the present case is quoted below for ready reference. Section 11. Directions to generating Companies - (1) The Appropriate Government may specify that a generating company shall, in extra ordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation - For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."

12. At the same time, a reference to Section 62 of the Act in part 7 of the Act provide for "Determination of the Tariff" also requires a mention and therefore the same is also quoted below for ready reference. "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 procedure 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."

13. In *PTC India Limited Vs. Central Electricity Regulatory Commission*, through Secretary [(2010)4 SCC 603], a Constitution Bench of the Hon"ble Supreme Court dealing with the Regulation making powers of the Central Electricity Regulatory Commission under Sections 61 to 63 of the Electricity Act, 2003, held that the CERC has wide powers conferred under Section 178 of the Act to frame Regulations of general application even overriding the existing Power Project Agreements (PPAs). In para 26 of the said judgment, the Hon"ble Apex Court held that the term "tariff" is not defined in the "2003 Act" and the term "tariff" includes within its ambit not only the fixation of rates but also the Rules and

Regulations relating to it and although the tariff fixation like price fixation is legislative in character, the same under the Act is made appealable under Section 111 of the Act and thus the provisions of Sections 61, 62 and 64 of the Act indicates dual nature of functions performed by the Regulatory Commissions, viz. the decision making and specifying the terms and conditions for tariff determination.

14. In para.49 and 50 of the said judgment, the Apex Court distinguished between administrative process resembling enactment of law by the legislature whereas a quasi-judicial order upon an adjudication, which is also a part of the administrative process resembling a judicial decision by a Court of law and quoting from the Wade's Administrative Law, the Court held that applying the said test, the price fixation exercise is legislative in character unless by the terms of a particular statute, it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the Act. The relevant paragraphs 26, 49 and 50 of the said judgment are quoted below for ready reference.

"26. The term "tariff" is not defined in the 2003 Act. 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 (quasi-judicial) and specifying terms (legislative) and conditions for tariff determination.

49. On the above analysis of various sections of the 2003 Act, we find that the decisionmaking and regulation-making functions are both assigned to CERC. Law comes into

existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. [See Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors. reported in (1990) 3 SCC 223].

50. Applying the above test, price fixation exercise is really legislative in

character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subjectmatter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

Thus, the Hon"ble Supreme Court held that price fixation or Tariff fixation is a quasi-judicial function of Commission whereas specifying terms etc. is a legislative function.

15. Subsequently in Transmission Corporation of Andhra Pradesh Limited and Another vs. Sai Renewable Power Private Limited and others [(2011)11 SCC 34], a Two Judges" Bench of the Hon"ble Apex Court held that the specialized purpose of functions of tariff fixation by

Regulatory Commission can hardly be assumed by any Authority particularly the Courts in exercise of their judicial discretion.

16. Delineating the scope of interference by Courts in the matter of tariff fixation, the Hon"ble Supreme Court held in paras 36, 38 and 40 of the judgment as under: "36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted

and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Section 11(1)(c)&(e) is expected to fix the tariff as well as the terms of licence.

38. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the Courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies. We would prefer to

leave this question open to be considered by the appropriate authority at the appropriate stage.

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra virus the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the Court making it necessary for the Court to intervene. Even in these cases the scope of jurisdiction is a very limited one."

17. The Division Bench of this Court in GMR Energy Limited, Bangalore and Another Vs. Government of Karnataka and others [(2010) 3 Kar.L.J. 432 (DB)] dealt with a case arising under Section 11 of the Act itself and by an elaborate judgment, the Division Bench of this Court held that Section 11 of the Act incorporates within its ambit and scope not only operation and maintaining a Generating Station at a particular level but it also encompasses the supply of such Electricity generated to the State Grid only. Dealing with the aspect of "Adverse Financial Impact" of the directions referred to in 11(1) of the Act, the Division Bench of this Court held that the interest of the Power generating companies is protected under the said provision and appropriate compensation as a consequence of non commercial supply, as is considered appropriate by the Commission should be given to such Power generating companies. Paras 83 and 84 of the said judgment are quoted below for ready reference. "83. The word "supply" of electricity is conspicuously missing in Section 11. The reason is not far to seek. If the word "supply" found in sub-Section (2) of Section 10 were to be introduced in Section 11 also, it means the electricity generated by virtue of the direction to operate and maintain is to be supplied to the licensee or customer of the generating company only. It serves no purpose. For that Government's intervention is not required. Therefore, the legislature advisedly has not used the word "supply" in Section 11. It is because when a generating station is operated and maintained properly it results in production of electricity. The electricity thus produced has to be transmitted by means of transmission lines to the grid. The extraordinary power cannot be exercised by the State Government or the Central Government only for the purpose of increasing generation, only for the purpose of operation and maintenance of a generating station. When de-licensing, liberalisation is the object of the Act, the private entrepreneurs who are operating and maintaining these generating stations do not need any direction from the Government. It is a commercial venture. If there is a demand in the market, they are bound to put these generating stations to the optimum use and scrupulously maintain the station so that any hurdle in

running of the generating station would cause financial loss to them. If no electricity is produced the question of supplying the electricity as per the direction of the Government would not arise. The condition precedent for supply of electricity as per the direction of the Government is electricity should be produced. For its production the generating station should be operated and maintained. In order to supply the electricity as per the direction, a further direction is issued to operate and maintain because if they do not operate and maintain a generating station properly they would not produce electricity. The Government has the power to issue direction to operate and maintain the generating station. Therefore, when the Government issues a direction to a generating company to operate and maintain a generating station and further states the electricity so produced shall be supplied to the State Grid only, it means the electricity supplied is regulated so that the entire electricity produced is available to the State for being distributed in order to meet a situation envisaged in Section 11 of the Act. In other words, right of producer of the electricity to supply to his customer or licensee is curtailed. In this context, the word "supply" used in the impugned order is a general word and not a word as defined under the Act. Therefore, when the word "supply" is conspicuously missing in Section 11 of the Act, the direction issued to a generating station to operate and maintain a generating station includes a direction to supply the electricity produced by such generation to the State Grid. This does not mean supply in a commercial sense as indicated in the definition of supply in Section 2(70) as contra distinguished by the meaning of supply in Section 2(29). Section 11 is not meant for supply of electricity to a licensee or a consumer. It is only when electricity is to be supplied to a person other than a licensee or a customer Section 11 is invoked.

84. This meaning is implied from the words used in sub-Section (2) of Section 11. It provides that the Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-Section (1) on any generating company in such manner as it considers appropriate. If the direction given by the Government is only to be understood as operate and maintain a generating station and not supply of electricity, the generating company cannot complain of any adverse financial impact, because the electricity so supplied is supplied to its customer or a licensee for the market price agreed to between the parties. Similarly, no such direction requires to be given by any Government if it is for commercial supply. Adverse financial impact means the electricity generated by virtue of the direction issued by the Government is not fetching the generating company the price which it would have fetched in the event of their supplying to the licensee or a customer, i.e., less than the same. It has adverse financial impact. Their interest is protected under the said provision. It implies if the electricity so produced is supplied to the Government at a price lesser than the commercial price, the said provision intends to protect the generating company from such adverse financial impact. The supply of electricity in pursuance of the direction by the Government could be clearly gathered from the aforesaid

provision. What is intended is appropriate compensation as a consequence of noncommercial supply as considered appropriate."

18. The other peripheral judgments cited at the Bar do not throw much light on the controversy involved in the present case.

19. In view of the aforesaid, this Court is of the clear opinion that Section 11 of the Act operates in a special field and in extra-ordinary circumstances and the State can mandate all the concerned Power generating companies in the State to not only operate and maintain any Generating Station at optimum or particular level but also to supply its entire Electricity produced to the State Grid to meet the extra-ordinary circumstances for serving the overriding cause of public and if because of such mandatory and overriding directions if the Generating Companies suffer any adverse financial impact, they may be compensated in the manner as the Regulatory Commission considers it appropriate.

20. The rate fixation in the present case in pursuance of the orders passed by the State Government under Section 11 (1) of the Act by KERC in sub-section (2) of the Act is not a legislative exercise as prescribed under Section 62 of the Act, which, in normal circumstances, the appropriate Commission being the sole and exclusive Authority to determine such tariffs for various ESCOMS undertakes and performs. The word "tariff" as already noticed, is not defined in the Act nor it is specifically even mentioned in Section 11 of the Act. Therefore, the rate fixed for compensation in the present case under Section 11 (2) of the Act by Respondent KERC is not the usual exercise of tariff determination undertaken by it under Section 62 of the Act on a periodical basis, which too is a quasi-judicial function of KERC, as it is appealable under Section 111 of the Act.

21. The order passed by the Respondent KERC under Section 11 (2) of the Act is nothing but a quasijudicial order and therefore it has to meet the requirements of law not only by compliance with the procedural laws but also the principles of natural justice have to be complied by it. The mere reference in the Original Petitions filed by the ESCOMs in the present case before KERC and in the impugned order itself to Section 62 of the Act does not convert the impugned order under Section 11 (2) of the Act as one under Section 62 of the Act.

22. The Hon"ble Supreme Court in PTC India Limited (supra) vide paras 49 and 50 quoted above clearly held that the price fixation exercise under Section 62 of the Act may be a legislative exercise but the fact that such an order or exercise is made appealable under Section 111 of the Act, such order would be a quasi-judicial order and therefore if the order under Section 62 of the Act also is appealable and is a quasi-judicial order, the order passed under Section 11(2) of the Act is more so and definitely a quasijudicial order.

23. In this view of the matter, the compliance with the procedural provisions on the part of the Respondent KERC of issuing only a Public Notice and inviting Objections and exercise meant to be undertaken only for the usual Tariff determination was not a sufficient compliance with the principles of natural

justice in the present case. The KERC (Tariff) Regulations, 2000 which provides for this procedure of Public Notice etc. is not in conflict with the KERC (General and Conduct of Proceedings) Regulations, 2000. The definition of "proceedings" under these General and Conduct of Proceedings Regulations, 2000 given in Regulation 2(1)(h) of the said Regulation clearly stipulates that "proceedings" shall include proceedings of all nature that the Commission may hold in the discharge of its functions under the Act and Regulation 24 of these Regulations provides for "Service of notices and processes issued by the Commission" by any of the modes including "by hand delivery/courier/Certificate of Posting/Registered Post Acknowledgement due/ Facsimile transmission/e-mail and or by a publication in Newspapers. The object of providing for these Regulations is clear, namely, to comply with the principles of natural justice and give an opportunity of hearing to the affected parties. Therefore in the present case, the Respondent KERC erred in not giving notice and opportunity of hearing to all the individually affected parties viz. power generating companies, like the present petitioner.

24. Moreover, the words "adverse financial impact" sought to be compensated by an appropriate order under Section 11(2) of the Act necessarily envisages an exercise of considering the facts and evidence for individual Generating Companies who were affected and governed by the order passed under Section 11(1) of the Act by the State Government. Such an adverse financial impact of the directions issued under sub-Section (1) of Section 11 on "any generating company" as specified in Section 11 (2) of the Act, definitely envisages a hearing of the concerned Generating Company itself, because, without hearing the concerned Generating Company itself, the adverse financial impact on each Generating Company cannot even be determined by the concerned appropriate Commission. The relevant individual facts to determine the extent of "Adverse Financial Impact" may be different for different Generating Companies and by leading evidence in the form of existing Power Purchase Agreements (PPAs), their cost of generating Electricity at full capacity as directed by the State, the present market conditions or rates etc. or peculiar adverse factors which may increase their cost of production in the given period are all relevant individual facts, which have to be brought on record of KERC and after due application of mind to the same only, the appropriate Commission can decide the "adverse financial impact", if any, on the Generating Companies and can pass appropriate orders for compensating the same.

25. The words "adverse financial impact" does not include within its ambit a further loss to be caused to such power generating companies by fixation of a still lower rate by the Respondent KERC. It will be adding insult to the injury, if the power generating companies are not only first mandatorily required to generate power at full capacity of their Plants and supply the same exclusively to the State Grid only to meet the public demand and emergent situations in the larger public interest and then later on to be paid even a lesser rate than the provisional rate agreed and assured to them by the State, in the Order passed under Section 11 (1) of the Act. Therefore, the orders under Section 11(2) of the

Act cannot be permitted to determine a negative or lower rate than the rate fixed and assured by the State, even though provisional in the orders passed under Section 11(1) of the Act. The terms to "offset adverse financial impact on the generating companies" cannot mean and include lowering down the rates further. On the other hand, it can only result in a positive figure of compensation to be paid to the generating companies. The question of recovery upon such fixation of rates under Section 11(2) of the Act from the generating Companies cannot arise.

26. The contention raised by the learned counsel for the Respondent KERC that the State had no jurisdiction to fix even the provisional rate of Rs. 5.08 per KWh.unit while passing the order under Section 11(1) of the Act on 16/09/2015, is not acceptable and deserves to be rejected.

27. The State had fixed this provisional rate of Rs. 5.08 per KWh.unit on the basis of the rate determined through bidding process and this was therefore appropriate market rate for supply of Electricity at that point of time, when the order under Section 11 (1) of the Act was issued by the State. Section 11 of the Act is not subservient or subordinate to Section 62 of the Act and the jurisdiction of the State to fix such provisional rate while issuing orders under Section 11 (1) of the Act is not divested to fix the provisional rates and Section 62 does not encroach upon the powers of the State Government to do so under Section 11 of the Act, when it exercises its overriding power under Section 11 (1) of the Act.

28. As a matter of fact, Section 11 (2) of the Act does not militate against Section 62 of the Act but has to be read in addition or in conjunction and harmoniously with Section 62 of the Act and since the power to determine the tariff is vested in KERC constituted under Section 86 of the Act and its powers under Section 62 of the Act to determine the tariffs, even for passing orders under Section 11(2) of the Act, which though can be passed even without reference to Section 62 of the Act by KERC, such a reference to Section 62 in the proceedings under Section 11 (2) of the Act does not entitle the Respondent KERC to question even the jurisdiction of the State Government itself to fix such rate provisionally leaving the final rate to be determined by the Respondent KERC to offset the adverse financial impact on the generating companies because of the order under Section 11 (1) of the Act.

29. The rate fixation under Section 11 (2) of the Act in peculiar circumstances is not the exercise of usual tariff determination as envisaged under Section 62 of the Act, but it is an independent quasi-judicial order envisaged under Section 11(2) of the Act for determination of the compensation to be given to the generating companies.

30. In the present case, even though the Distribution Companies, ESCOMS were required and were therefore justified in approaching the KERC in terms of the directions of the State Government, as per the order under Section 11 (1) of the Act for determination of the final rates under Section 11 (2) of the Act, consequent upon supply of Electricity generated by the petitioner and others like

Generating Companies in consequence of the mandate of State Government under Section 11 (1) of the Act, but it was incumbent upon the Respondent KERC to serve individual Notices on all the power generating companies who were governed and who implemented and complied with the orders of the State Government under Section 11 (1) of the Act and taking into account their relevant facts and evidence on record and objections in this regard, the Respondent KERC could have determined the final rates to be paid to such power generating companies to the extent of their "adverse financial impact" caused by the mandatory order under Section 11 (1) of the Act.

31. In the present case, the Respondent KERC has failed to do so and on a misconception of law that the orders under Section 11 (2) of the Act which also was nothing but the determination of tariff under Section 62 of the Act, it adopted the procedure prescribed under KERC (Tariff) Regulations, 2000, instead of procedure under KERC (General and Conduct of Proceedings) Regulations, 2000. The principles of natural justice were breached by the Respondent KERC in the present case. The relevant factors to be considered by it for determining the "adverse financial impact" on the power generating companies was also lost sight of while undertaking the task of fixation of the final rates under Section 11(2) of the Act and the Respondent KERC has proceeded to fix a lower rate of Rs. 4.67 per KWh.unit as against Rs. 5.08 per KWh. unit fixed by the State Government, contrary to the express provisions of Section 11(2) of the Act.

32. The impugned order dated 18/08/2016 passed by the Respondent KERC, therefore, cannot be sustained and the same deserves to be quashed. The writ petitions, therefore, deserve to be allowed and the same are accordingly allowed and the impugned order Annexure D dated 18/08/2016 passed by the Respondent KERC and consequential Recovery Notices/Orders issued by ESCOMS to the power generating companies are quashed and set aside and the matter is remanded back to the Respondent KERC to undertake fresh proceedings under Section 11 (2) of the Act in accordance with law and the observations made by this Court above.

33. The Respondent KERC is directed to serve individual Notices to all the Power generating companies affected by the order under Section 11(1) of the Act dated 16/09/2015 and also the respective Distribution Companies and then after hearing all the concerned parties may pass fresh orders under Section 11 (2) of the Act, either individually for each power generating company separately or by a common order dealing with the respective cases of power generating companies, as the case may be and such orders may be passed expeditiously, preferably within a period of one year from today. No order as to costs.