2019 INSC 616

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.415 OF 2007

TATA POWER COMPANY LTD. …APPELLANT(S)

VERSUS

ADANI ELECTRICITY MUMBAI LTD.
& ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 3229 OF 2007

J U D G M E N T

Arun Mishra, J.

1. The appellant – Tata Power Company (in short 'the TPC') is a distribution licensee supplying electricity to the entire city of Mumbai, whereas BSES/Reliance Energy Limited (in short 'REL') is a distribution licensee supplying electricity only in the suburbs of Mumbai. Prior to 1998, the TPC was the only generator of the electricity supplying electricity to BSES for further supply to BSES customers. The TPC had 108 customers in the entire city of Mumbai. The tariff payable by BSES to TPC included a component of standby charge. The entire standby charges paid by TPC to Maharashtra State Electricity Board (for short 'the MSEB') were being recovered by TPC

from its customers through its tariff. Due to change in shareholding pattern, the BSES was changed to Reliance Energy Limited on 24.2.2004.

2. The brief facts indicate that TPC and MSEB met on 12.3.1985 to finalise the interconnection between representatives of TPC and MSEB with respect to demand charges. Following decision was arrived at:

> "***A) Demand Charges:***
> Effective 1-2-84 a monthly firmed demand of 300 MVA would be billed by MSEB. This would increase by 50 MVA each year effective 1-4-1985 to take care of TEC's own load growth annually. This is irrespective of TEC's actual net off-take recorded at the 4 interconnecting points of supply and also irrespective of MSEB's total off-take from TEC system"

3. Prior to 1985, the TPC was supplying entire electricity generated by it to the distributors of electricity in Mumbai. Since the quantity generated by TPC was not sufficient to meet the entire demand, TPC used to buy electricity from MSEB. BSES/REL was purchasing its entire requirement of electricity from TPC in bulk to supply to its customers in suburban Mumbai.

4. With effect from 1985, TPC wanted to increase its generating capacity thereby reducing its offtake of electricity from MSEB to zero thereby causing loss of revenue to MSEB. In order to compensate MSEB for loss of revenue caused as a result of stoppage of purchase of electricity by TPC from MSEB, the TPC and MSEB entered into aforesaid arrangement whereby TPC was required to pay to MSEB

standby facility initially for 300 MVA to be increased by 50 MVA every year, charges to be paid at the rate fixed by MSEB. The quantum of standby increased from 300 MVA to 550 MVA by the year 1990, whereafter the MSEB and the TPC agreed not to increase the said standby beyond 550 MVA. The standby facility was meant to enable TPC to draw upon the energy generated by MSEB in the event there was outage/failure of power in TPC's generation capacity of 1777 MW consisting of multiple units of different sizes i.e., 500 MW, 180 MW, 150 MW, 72 MW, 75 MW and 300 MW, which is supplied to BSES/REL along with its own consumers and BEST, another distribution licensee in Mumbai. The standby facilities charges paid by TPC to MSEB were factored into tariff charged by TPC from its customers including BSES/REL. The BSES/REL was a purchaser of electricity from TPC to the extent of TPC's generation between 29% to 37% from 1998 to 2006, thus the standby charges to the extent of aforesaid varying percentages for the respective years were borne by BSES/REL which in turn were factored into tariff and charged by BSES/REL to its retail customers.

5. Initially, BSES was permitted to set up its generating plant at Dahanu to generate 500 MW (550 MVA approximately). There was a condition that it would achieve interconnection with the supply of TPC

at a point known as Borivali Interconnection Point in case there was any outage of BSES generation. It could draw upon the power supplied by the TPC. The charges for such interconnections were to be determined. On 30.5.1992, a notification was issued amending the BSES license. A new clause 7B was introduced for providing aforesaid interconnectivity. Provisions of clause 13A were also amended to authorise the State Government in the event of a dispute to decide the same. On 29.6.1992, a meeting was held between TPC and BSES and it was agreed that interconnection would be provided at Borivali GIS switching station to take care of emergencies in BSES 220 KV system. The TPC already have arrangements with MSEB wherein standby capacity is provided by MSEB to TPC in case of emergencies in TPC system. Standby capacity to BSES may be provided from the standby capacity reserved by TPC with MSEB and appropriate sharing of charges by BSES could be worked out as provided in clause 12.0. The BSES prior to September 1995 was purchasing its entire requirement of power from TPC and distributing it within its licensed area as TPC distributing licensee. After its two Dahanu generating units were commissioned in January/March 1995, BSES started bringing the power generated by Dahanu to supply to its consumers after September 1995 in the suburbs of Mumbai city. As supply was

started from the Dahanu, TPC surplus capacity began to increase. The TPC after 1995 required only 275 MVA standby facility against the standby capacity of 550 MVA.

6. The MSEB issued notice on 28.6.1996 revising its tariff to TPC effective from 1.10.1996. The MSEB raised its maximum demand charges per month with respect of standby facility/supply from Rs.190/- per KVA to Rs.450/- per KVA. Consequently, MSEB gave notice to TPC, *inter alia*, revising its standby charges with effect from 1.10.1996 recoverable from TPC to Rs.24.75 crores per month i.e., Rs.297 crores per year.

7. TPC had issued a notice on 30.7.1996 to the Government of Maharashtra and MSEB under Schedule VI to the Electricity (Supply) Act, 1948, showing its intention to enhance tariff charges with effect from 1.10.1996 which included maximum demand charges and energy charges to various consumers. It also provided for payment of maximum demand charges and energy charges by BSES for standby facility. With effect from 1.1.1997, TPC revised its tariff *inter alia* to BSES, thereby factoring in the monthly demand charges of Rs.24.75 crores payable by TPC to MSEB for standby supply. In order to resolve the issue of quantum of standby charges to be paid by BSES to TPC, the Government of Maharashtra appointed a Committee and an

order dated 19.1.1998 was passed whereby the Government of Maharashtra, based on the recommendation of the Committee, stipulated that a sum of Rs.3.5 crores per month should be paid by BSES/REL to TPC by way of standby facility for the period 1998-1999. This sum of Rs.3.5 crores per month i.e., Rs.42 crores per annum was over and above the sum Rs.24.75 crores per month i.e., Rs.297 crores per annum which TPC used to recover in the form of its tariff from its customer. In fixing the aforesaid amount, the following factors were taken into consideration by the said Committee:

> "(i) the generation of TPC and MSEB;
> (ii) the electricity supplied by TPC on BSES/ REL as a consumer.
> (iii) TPC's standby supply from MSEB;
> (iv) Charges paid thereof by TPC;
> (v) TPC's and BSES/REL's financial position;
> (vi) That standby was being supplied for the stability of the Greater Mumbai Grid."

8. On 17.12.1997, TPC contended that it was fully capable and willing to supply standby to BSES for its Dahanu plant and TPC should, therefore, be billed only for 275 MVA standby facility for their consumers other than BSES. The Government of Maharashtra issued an order on 19.1.1998, following is the relevant portion of the said order:

> "it has come to the notice of the Government that due to dispute on commercial terms between BSES and TEC, interconnection is not established at Borivali even though technical arrangements are ready. Similarly, additional electricity generated at Dahanu is being sold to the Western Regional Grid through MSEB's Biosar Interconnection. As a result, the government's main objective that electricity generated at Dahanu should be used within the BSES area of

supply has not been met and BSES license conditions are violated. For this Government had appointed a Committee under the Chairmanship of the Principal Secretary, Energy. In this committee, representatives of MSEB, TEC, and BSES were members. This Committee has examined the total situation and has submitted its report to the Government.

GOM thereafter ordered as follows:

"Taking into account the recommendations of the Committee, following are orders of the Government.

BSES should complete interconnection at Borivli by January 26, 1998.

BSES should take 275 MVA standby power supply from TEC for Dahanu generating station.

For taking above standby supply, BSES should pay standby charges to TEC.

After the interconnection is commissioned, BSES should stop selling electricity through MSEB's Boisar sub-station to Western Regional Grid.

TEC may charge stand-by charges for 275 MVA supply to BSES.

Whenever required during an emergency, additional electricity may be taken for areas outside Mumbai region through MSEB's Boisar sub-station. For this purpose, MSEB should take proper arrangements.

As per Committee's recommendations and taking into account, TEC's electricity supply to BSES, TEC's standby supply from MSEB, charges thereof and TEC's and BSES's financial conditions, BSES should make a payment of Rs.3.5 crores every month for standby supply. On this basis, the rate per KVA should be fixed and commercial arrangement finalized.

The above standby charges are passed on TEC's & BSES's existing electricity supply tariff. The standby charges may be reviewed during tariff revision in the future."

9. Since the agreement was to be finalised as per the Government's order, the Government had no power to give directions to generators and distributors, TPC and BSES had entered into Principles of Agreement on 30.1.1998, the clauses 2 to 9 are extracted hereunder:

"(2) <u>BSES shall pay to TEC for the 220 KV interconnection at Borivali Rs.3.5 crores per month as standby charges for 275 MVA as per Government orders.</u>

(3) BSES offtake of energy at 220 KV Borivli interconnection will be billed at Rs.2.09 per kWh plus F.A.C. (which is presently at Rs.0.45) as applicable from time to time at other points of

> supply. This average energy charge is based on an estimated annual flow of 250 million units of energy through Borivli interconnection.
> (5) As soon as the interconnection between TEC and BSES at 220 KV Borivli is established.
> (6) The interconnection between MSEB and BSES at Boisar will be opened out.
> (7) BSES shall use this interconnection at Borivali fully for the standby type of service.
> (8) Both the parties have agreed to cooperate in order to ensure that the orders of the Government dated 19-01-1998 are implemented in the spirit of it.
> (9) A detailed Power Supply Agreement on a mutually agreed basis incorporating the above will be executed by 21st of April, 1998."
>
> (emphasis supplied)

Though the aforesaid principles of the agreement were entered into between the parties, for one reason or the other, no agreement has been executed between them.

10. The TPC under the Principles of Agreement dated 31.1.1998 was bound to supply standby power as and when required by BSES/REL. Whether the TPC was drawing from MSEB or not is immaterial. The agreement of BSES was with TPC, not with MSEB. The agreement between TPC and BSES was independent than the agreement between TPC and MSEB.

11. Even after providing the standby facility of 275 MVA to BSES/REL, TPC still enjoyed the standby facility of 550 MVA from MSEB. The TPC entitlement to avail 550 MVA standby facility from MSEB did not change.

12. The standby facility that has been availed of by BSES/REL

through TPC since then it actually drew on about 119 occasions till May 2004, of which 57 occasions in excess of 275 MVA. It has been observed by the Appellate Tribunal for Electricity (in short 'the APTEL') that TPC in 90 percent of the above occurrences has supplied standby powers from its own generation and never drawn back the power from MSEB. The TPC has actually drawn standby from MSEB on a large number of occasions and on several occasions far in excess of 275 MVA. The standby drawn by TPC from MSEB is as under:

> "439 MVA highest in 1998-1999
> 271 MVA highest in 1999-2000
> 358 MVA highest in 2000-2001
> 325 MVA highest in 2002-2003
> 415 MVA highest in 2002-2003
> 763 MW highest in 2004"

13. It is also pertinent to mention that even after BSES/REL started drawing power from its Dahanu generation station, BSES/REL continued to purchase approximately 35 percent of TPC's generation from TPC to supply energy to BSES/REL consumers. With effect from 1.2.1998, the BSES/REL paid a sum of Rs.3.5 crores per month to TPC as charges for standby. The TPC objected and sought the revision of standby charges, which was fixed at Rs.3.5 crores per month, by writing a letter to the Government of Maharashtra on 8.7.1998. With effect from 1.12.1998, the MSEB revised its tariff by issuing a notice under the agreement between the MSEB and TPC. The charges for

standby facility were also increased from Rs.450 KVA per month to Rs.550 KVA per month i.e., Rs.363 crores per annum equal to Rs.30.250 crores per month. These standby charges enhanced from Rs.24.75 crore per month to Rs.30.25 crores per month with effect from 1.12.1998 i.e., from Rs.297 crores to Rs.363 crores annually. The TPC instead of requiring a pro-rata share of the incremental standby charges from BSES/REL purported to divide the amount of Rs.30.25 crores in the ratio of 50:50 and demanded a sum of Rs.15.125 crores per month i.e., Rs.181.5 crores per annum by way of standby charges from BSES/REL. The TPC was already recovering Rs.24.75 crores per month through its tariff as said amount was factored in tariff from its customers and additional recovery of Rs.3.5 crores was also being made from BSES/REL under the Principles of Agreement. Thus, the total recovery of Rs.28.25 crores per month by way of standby charge was already made by TPC from its customers as on September 1998. By demanding a sum of Rs.15.125 crores per month from BSES/REL, TPC was attempting to demand an additional sum of approximately Rs.11.625 crores per month from BSES/REL under the guise of standby charges instead of demanding a pro-rata amount of the incremental standby charges of Rs.2 crores.

14. TPC issued notice dated 30.9.1998 under Schedule VI to the

Electricity (Supply) Act, 1948 to the Government of Maharashtra proposing revision of its tariff and other matters. It was indicated in the notice that it would pay only Rs.181.5 crores per annum and remaining should be the liability of BSES/REL. It has also been contended on behalf of TPC that other revision in tariff had not been proposed by TPC which would otherwise have needed an increase of 6 percent on all consumers in Mumbai. It served a notice on BSES/REL demanding the aforesaid charges of 35 percent of the component which was purchased by BSES/REL as a consumer. The standby charges used to be paid and otherwise included in the tariff. BSES/REL has received 35 percent of the energy supplied from TPC as a consumer and for the same, TPC was recovering an amount of Rs.24.75 crores per month and an additional sum of Rs.3.5 crores per month. This Court in *BSES Ltd. v. Tata Power Co. Ltd.,* (2004) 1 SCC 195 has observed that tariff notice as being illegal. Since the dispute between the TPC and BSES/REL could not be sorted out, an order dated 22.3.2000 was passed by the Government of Maharashtra endorsing the Committee's Report. Vide aforesaid order, BSES/REL was directed to pay Rs.9 crores as observed in *BSES Ltd. v. Tata Power Co. Ltd.* (supra) by this Court.

15. The Electricity Regulatory Commission Act, 1998 (in short 'the

Act of 1998') came to be promulgated which conferred jurisdiction on Maharashtra Electricity Regulatory Commission (in short 'the MERC') to determine the tariff of supply of electricity and later on to adjudicate the dispute between the parties. The dispute came to be referred to MERC by the parties. The order dated 22.3.2000 passed by the State Government has been set aside by the High Court, which decision has been affirmed by this Court in *BSES Ltd. v. Tata Power Co. Ltd.* (supra).

16. The MERC passed an order on 7.12.2001 directing BSES/REL to bear 25 percent of the standby charges. This order was challenged by both the parties before the High Court. The High Court remitted the matter back to MERC and directed BSES/REL to deposit 50 percent of the standby amount as an interim arrangement. The matter had further travelled to this Court in the aforesaid decision namely *BSES Ltd. v. Tata Power Co. Ltd.* (supra).

17. After the matter was remitted, MERC after hearing the parties passed an order dated 31.5.2004 and directed the BSES/REL to bear approximately 23 percent of the total standby charges incurred by TPC qua MSEB. While noticing that TPC has already recovered a sum of Rs.24.75 crores per month through its tariff and an additional sum of Rs.3.5 crores per month as per the Principles of Agreement, it was

found that large part of standby charges has already been recovered by TPC through tariffs and otherwise. Against the demand made on 31.5.2004, both the parties filed an appeal before the APTEL. It was heard by a Bench consisting of Chairman and Technical Member. They delivered separate judgments, both of them rejected the contentions of TPC claiming standby charges in the ratio of 50:50. The Chairman opined that standby charges should be shared in the proportion of 2:1 i.e., TPC paying 2/3rd and BSES/REL paying 1/3rd, while Technical Member held BSES/REL should bear 23 percent while TPC should bear approximately 77 percent.

18. In view of the divergence of opinion, the matter was referred to the third Member being Judicial Member, who agreed with the conclusion of the Technical Member that BSES/REL should bear 23 percent of the standby charges. In view of the majority judgment, the APTEL passed an order dated 20.12.2006, acknowledging the majority view of the Judicial Member and the Technical Member and directed that 23 percent of the standby charges for the period in question should be borne by BSES/REL and balance should be borne by TPC and further directed refund of the excess amount that was deposited by BSES/REL pursuant to the interim orders passed. The MERC in the appeal has acknowledged that TPC has withdrawn a sum of

Rs.24.75 crores from its customers through electricity tariff and an additional sum of Rs.3.5 crores per month by way of standby charges from BSES/REL did not give credit for the said sum in the computation of standby charges to the extent of 23 percent held to be payable by BSES/REL. The appeal of BSES/REL in respect of the aforesaid was rejected by the APTEL vide judgment and order dated 20.4.2007. TPC filed Civil Appeal No.415 of 2007 before this Court. BSES/REL has also filed Civil Appeal No.3229 of 2007 aggrieved by the judgment and order dated 20.4.2007 of APTEL.

19. Shri Gopal Jain learned senior counsel appearing on behalf of TPC has contended that TPC has not recovered standby charges from its customers for the facility in excess of 275 MVA out of 550 MVA standby facility for the period April 1999 to March 2004 provided by MSEB. Thereafter as provided by tariff order dated 11.6.2004, TPC has recovered from its customers to the extent of 78 percent of the standby charges. This Court has granted interim stay on 7.2.2007 and required the appellant to furnish bank guarantee in the sum of Rs.227 crores and in addition, deposit a sum of Rs.227 crores with the Registrar General of this Court, which may be withdrawn by respondent no.1 subject to their furnishing an undertaking to this Court that in the event of this appeal being decided against them, the

amount as may be found refundable by them shall be refunded without demur with interest as may be determined by this Court. The TPC has complied with these conditions and it is not correct to say that all concerned have complied with the impugned order dated 20.12.2006. The amount of Rs.3.5 crores per month was only for the year 1997-1998, though the actual liability came to be Rs.8.25 crores per month, Rs.3.5 crores were fixed so as to avoid disturbance in the tariff in the current year. The MSEB is not providing standby facility of 1777 MW (TPC's total installed capacity) nor is REL provided standby facility of 550 MVA by TPC. Therefore, the standby charges cannot be apportioned in the ratio of the total installed capacity of TPC and REL. The obligation to pay to MSEB for the standby facility is independent. If the generator for some reason is not able to recover from its customers, it will not be absolved of its obligation to pay the standby charges to MSEB. The liability of the BSES/REL to pay for standby charges in 50:50 ratio is absolute and cannot be linked with the means of recovery. It would result in disturbing and distorting level playing field conditions which are a facet of Article 14 of the Constitution and also distort competition. It is also urged by learned senior counsel that it would run contrary to the objects of the Act of 1998, in particular, the mandate of Section 29(3) which is extracted

hereunder:

> "**29. Determination of Tariff by State Commission.**
> (3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy 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."

20. It was further urged that the prayer was made by BSES/REL before the MERC to fix the standby charges payable by BSES/REL (complainant) to the TPC (respondents). Its liability would be more than Rs.3.5 crores per month. TPC is paying Rs.363 crores as standby charges to MSEB. On principles of parity and proportionality, the BSES/REL should pay for 275 MVA as the quantum of 275 MVA standby is out of the same block of 550 MVA standby facility given by MSEB. The TPC and BSES/REL should share in the ratio of 50:50. The APTEL has not followed the decision of this Court in *BSES Ltd. v. Tata Power Co. Ltd.* (supra). This Court in the aforesaid decision has observed as under:

> "16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution, and supply in the State. "Utility" has been defined in Section 2(l) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that

the terms and conditions for fixation of the tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (*a*) to (*g*) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff.

*** *** ***

"18. Electricity is not a commodity which may be stored or kept in reserve. It has to be continuously generated and it is so continuously generated electricity which is made available to consumers. Any generator of electricity has to have some alternate arrangement to fall back upon in the event of its generating machinery coming to a halt. The standby arrangement for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of a guarantee and availability of power, TPC had to pay charges for the same to MSEB. This payment was in addition to the charges or price which TPC had to pay to MSEB for the actual draw of electrical energy. The same is the case with BSES qua TPC. The charges paid for this kind of an arrangement whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES at their desire, is bound to constitute a component of the price which they (BSES and TPC) would be charging from their consumers towards the cost of the electrical energy actually consumed by them. The determination or quantification of the amount which is payable for this kind of standby arrangement made in favour of TPC and BSES would, in reality, mean determination of the price or charges for wholesale or bulk supply of electricity. It will, therefore, clearly fall within the expression "determine the tariff for electricity, wholesale, bulk, grid or retail" as used in clause (*a*) of sub-section (1) of Section 22 and also in the expression "regulate power purchase … including the price at which the power shall be procured from the generating companies …" as used in clause (*c*) of sub-section (1) of Section 22. Therefore, the determination or quantification of the amount which BSES has to pay to TPC falls within the jurisdiction of the State Commission under Section 22 of the Act. This legal position is also reflected by Section 29 of the Act which

confers an overriding power and clearly lays down that notwithstanding anything contained in any other law the tariff for supply of electricity — wholesale, bulk or retail — shall be subject to the provisions of the Act and shall be determined by the State Commission. This clearly ousts the jurisdiction of any other authority to determine the tariff. It may be noted here that the Act came into force on 25-4-1998 and the Maharashtra Electricity Regulatory Commission was formed on 5-8-1999. Therefore, it is not possible to accept the contention of Shri Nariman that the State Government had the authority or jurisdiction on 22-3-2000 to determine or quantify the charges which BSES had to pay to TPC under the terms of the licence granted to the former as this was subsequent to the formation of the Maharashtra Electricity Regulatory Commission."

19. Shri Nariman has submitted that TPC gave a notice on 30-9-1998 of their intention to enhance the charges of standby facility provided to BSES from Rs 3.5 crores to Rs 15.125 crores per month and this notice having been given under the Sixth Schedule (para I, third proviso) of the Electricity (Supply) Act, 1948, the enhanced charges became effective and operative after the expiry of 60 days of notice i.e. with effect from 1-2-1998. The submission is that by operation of law the charges for standby facility stood revised and enhanced with effect from 1-12-1998. In our opinion, the contention raised has no substance. The legal position has undergone a complete change with the enforcement of the Electricity Regulatory Commissions Act, 1998. In view of Section 29 of the Act, the tariff for intra-State transmission of electricity and tariff for supply of electricity in wholesale, bulk or retail has to be determined by the Electricity Regulatory Commission of the State and a licensee cannot by its unilateral action enhance the charges. The provisions of the Act have an overriding effect by virtue of Section 52 of the Act and, therefore, any provisions of the Electricity (Supply) Act, 1948, which are inconsistent with the Act would cease to apply and consequently, the provisions of the Sixth Schedule of the said Act can have no application now. The Sixth Schedule has been made by virtue of Sections 57 and 57-A of the Electricity (Supply) Act, 1948 and Section 57-A contemplates constitution of a Rating Committee by the State Government to examine the licensee's charges for the supply of electricity. Section 29(6) of the Act specifically lays down that notwithstanding anything contained in Sections 57-A and 57-B of the Electricity (Supply) Act, 1948, no Rating Committee shall be constituted after the date of the commencement of the Act. The effect of Section 29 and the Regulations framed thereunder is that it is no longer open to a licensee or utility to unilaterally increase the tariff. The tariff can be enhanced only after approval of the Commission and charging of an enhanced tariff which has not been approved by the Commission will

amount to commission of an offence. Therefore, the notice to enhance the charges given by TPC, which was subsequent to the enforcement of the Act, can have no legal effect.

20. Shri Nariman has also submitted that even assuming that the standby charges are a matter relating to tariff as the same is passed on to the consumers, but the sharing of standby charges between TPC and BSES is not a matter relating to determination of tariff and, therefore, the Commission can have no jurisdiction to enter into such an exercise under Section 22 of the Act. The submission proceeds on an assumption that the dispute relates to the sharing of standby charges. In fact, the whole case of BSES is that they are under no obligation to share the charges which are being paid by TPC to MSEB for providing them with standby facility. It may be noted that the standby facility of 300 MVA was provided to TPC in the year 1985 which gradually rose to 550 MVA in the year 1990. The licence of BSES was amended in 1992, whereunder for the first time, it was provided that they should interlink with the system of TPC and ultimately, their systems were interlinked on 14-2-1998 in pursuance of the order passed by the Government of Maharashtra on 19-1-1998. The question of payment of standby charges by BSES to TPC has, therefore, arisen for the first time in 1998 which is almost 13 years after TPC started paying standby charges to MSEB. In substance, the dispute is what should be paid by BSES to TPC for the standby facility provided by it. The strict and narrow interpretation sought to be placed by the learned counsel so as to oust the jurisdiction of the Commission cannot be accepted as it will defeat the very object of enacting the Electricity Regulatory Commissions Act.

*** *** ***

26. An interim arrangement is normally made on a prima facie consideration of the matter and on broad principles without examining the matter in depth. The matter has been remitted to the Commission by the High Court by the judgment and order dated 3-6-2003 and a period of nearly three-and-a-half months has already elapsed. Regulation 101 of the Central Electricity Regulatory Commission provides that the Commission may normally dispose of the petitions finally within six months of admission. The State Commissions are also expected to follow this time-limit for disposal of petitions. Since the order made by the High Court is only by way of interim arrangement and the Commission is expected to decide the disputes finally within a short period, we do not consider it proper to interfere with the order made by the High Court in this regard. After the decision of the Commission, the equities can be adjusted and the excess amount paid by any party can be refunded to it along with appropriate interest or can be adjusted in future bills."

(emphasis supplied)

21. Learned senior counsel has also urged that actual supply of electricity and charges paid for actual supply are completely different from the guarantee and charges payable for providing such a guarantee/arrangement. It is further urged that generating capacity comes at a cost. The Technical Member therefore wrongly assigns Zero cost for this generating capacity. This is an error apparent in the impugned order where the spinning reserve has been treated as zero cost.

22. Learned senior counsel has relied on the decision in *Binani Zinc Ltd. v. Kerala State Electricity Board,* (2009) 11 SCC 244, to contend that notice dated 30.9.1998 was legal and valid. The relevant portion of the aforesaid decision is extracted hereunder:

> "28. Thus, it would be one thing to say that upon coming into force of the 1998 Act the provisions contained in the 1948 Act which are found to be inconsistent with the former shall give way thereto but it is another thing to say that although no Commission is constituted, the Board would have no jurisdiction at all to frame a tariff.
>
> *** *** ***
>
> 33. It is of some significance to note that the Commission in terms of clauses (*a*) and (*b*) of sub-section (2) of Section 29 of the 1998 Act are required to follow the principles provided for under Sections 46, 56 and 57-A of the 1948 Act as also the Sixth Schedule appended thereto. The 1998 Act, therefore, recognises the principles contained in the 1948 Act also.
>
> *** *** ***
>
> 41. We have, however, no hesitation in finding that the State Electricity Board had the requisite jurisdiction to revise a tariff till such time as the Commission was constituted and the purposes of the 1998 Act could be achieved through it. Till the time the Regulatory Commission was not constituted by the State of Kerala, the power to determine tariff remained with the Board under the Electricity (Supply) Act, 1948 as it was not repealed by the Electricity Regulatory Commissions Act, 1998. Parliament could not have intended to bring about a situation where no authority would be empowered to determine the tariff between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the tariff."

No case for interference in Civil Appeal No. 3229 of 20017 is made out which is barred by limitation.

23. Shri J.J. Bhatt learned senior counsel appearing on behalf of BSES/REL has contended that TPC and MSEB entered into an arrangement on 12.3.1985. There was an independent agreement between TPC and BSES/REL entered into on 31.1.1998 and it has no connection with the agreement between the TPC and MSEB. Notwithstanding the fact that MSEB supplied TPC with standby power or not, TPC was bound to supply BSES/REL from its own generation standby power. On approximately 90 percent of the occasions, BSES/REL has utilised standby power of TPC. It has exceeded on some occasions more than 275 MVA and has gone up to above 400 MVA, whereas TPC has drawn standby from MSEB. The Government passed an order on 19.1.1998, considering several factors and determined Rs.3.5 crores per month as standby charges. The payment of standby charges by BSES/REL to TPC was independent of the charges to be paid by TPC to MESB. The determination has been made on the basis of various factors. Basis of 50:50 sharing has been rightly rejected by the MERC as well as by the APTEL. The decision of spinning reserve by the Technical and Judicial Members at zero levels is justified in the facts of the case. The submission made on the basis

of *Binani Zinc Ltd. v. Kerala State Electricity Board (supra)* is not tenable. The total generating capacity of TPC was 1777 MW, whereas that of BSES/REL is 500 MW. It is incorrect that TPC has recovered only 50 percent of standby charges payable to MSEB. The standby charges of Rs.24.75 crores per month i.e., Rs.297 crores per annum were factored into TPC tariff in addition to the amount of Rs.3.5 crores per month was paid by BSES/REL. It wanted to realise 75 percent of the charges from BSES/REL by claiming a 50:50 ratio sharing. The TPC has spinning reserve surplus of 317 MVA with regard to its total capacity of 1777 MW. It was not MSEB but TPC which has provided standby support to BSES/REL on 90 percent occasions. It is further contended that the appeal filed by BSES/REL should be allowed and the excess amount has been worked out by the APTEL. The same may be suitably reduced.

24. The period in dispute is 1.4.1999 to 30.9.2004. It is apparent that TPC has an agreement with MSEB for standby supply of 550 MVA. Initially, in 1985, TPC has increased its generating capacity whereby reducing the off-take of electricity from MSEB to zero. In order to compensate MSEB for loss of revenue caused as a result of the stoppage of purchase of electricity, the MSEB entered into an arrangement with TPC whereby TPC was required to pay to MSEB

initially for 300 MVA standby to be increased by 50 MVA every year. The standby was freeze in the year 1990 when the parties agreed not to increase the standby beyond 550 MVA.

25. The standby facility was made available to TPC in the event there was a failure of power in TPC's generation of 1777 MW. BSES/REL used to purchase electricity from TPC between 29 percent to 37 percent from 1998 to 2006. The standby charges for aforesaid purchase were factored into the tariff charged from its retail customers. The standby charges to the extent of supply were borne by BSES/REL for optimum supply from TPC when interconnectivity was provided at Borivali point as per the Government order. The dispute arose between TPC and BSES/REL as to whether BSES/REL entitlement to draw 275 MVA from TPC in the case of outage and failure of electricity supply, the charges which were required to be paid were over and above the charges that would be paid for energy actually drawn. At the relevant time, TPC was paying an amount of Rs.24.75 crores per month i.e., Rs.297 crores per annum to MSEB by way of standby charges which was built into the tariff. The said amount was recovered by TPC from its customers who in turn recovered it from their retail consumers.

26. The Government of Maharashtra formed a Committee to resolve the issue of quantum of standby charges required to be paid by BSES/REL to TPC. The Government of Maharashtra passed an order dated 19.1.1998 whereby stipulating a sum of Rs.3.5 crores per month should be paid by BSES/REL to TPC by way of standby charges. The decision was taken by the Committee *inter alia* considering the generation by TPC and MSEB. The order was based upon six factors - generation of TPC and MSEB; electricity supplied by TPC to BSES/REL as a consumer; TPC's standby supply from MSEB; charges paid for said sub-standby supply by TPC to MSEB; the financial position of TPC and BSES/REL; and stability of better Mumbai grid.

27. The main principles on the basis of which Agreement was to be reached between TPC and BSES/REL were settled. As per clause 2 of the Principles of Agreement, BSES/REL had to pay to TPC for 220 KV interconnection at Borivali at Rs.3.5 crores per month. The parties had agreed to cooperate in order to ensure that Government order dated 19.1.1998 is implemented in the spirit of it. A detailed power supply agreement was to be entered into by 21.4.1998. The agreement could not be executed as consensus with respect to several

aspects could not be reached. The order dated 22.3.2000 has been set aside by the High Court, which order was not interfered with by this Court and the case was remitted for the decision to MERC, which is an expert body. The power was conferred upon the MERC vide notification dated 27.10.2000 under the provision of Section 22(2)(n) of Electricity Regulatory Commission Act, 1998, to adjudicate upon the disputes and differences between licensees and utilities. On 4.12.2000, BSES/REL had filed an application to MERC in respect of sharing of standby charges between BSES/REL and TPC. The prayers were made to regulate action and standby charges levied by them and to fix and determine the standby charges payable by them.

28. Ultimately, the APTEL by the impugned orders has decided the matter. The Chairman has held that liability to be in proportion of 2:1 tariff, whereas Judicial Member has concurred with the Technical Member when Technical Member differed with the opinion of Chairman, but the fact remains that MERC, as well as the APTEL, concurrently have not accepted the case of the TPC that standby charges should be borne in ratio of 50:50. The decisions of MERC, as well as the Technical and Judicial Members, are found to be correct while terming ratio as 23:77 with respect to BSES/REL and TPC respectively.

29. In view of the aforesaid facts and circumstances of the case and, in particular, several factors were required to be taken into consideration, on that basis aforesaid figure has been worked out. It has also been considered that electricity used to be purchased by BSES/REL from TPC to the aforesaid extent and the standby charges used to be realised which were factored in the tariff, which liability was ultimately passed on to the retail consumers. Even when the Principles of Agreement have been reached as to standby charges though it was subject to revision basis was fixed which could not have been departed from, it was on consideration of several aspects. The ratio had been appropriately worked out in the most equitable manner by applying the level playing field. Considering the standby charges of Rs.24.75 crores recovered by MSEB from TPC with effect from 1.10.1996 and as per the Government order and Principles of Agreement Rs.3.5 crores was additionally being available and a difference of standby which was made to increase the liability Rs.24.75 crore per month to Rs.30.25 crores per month. Thus, the decision of the Technical and Judicial Members is found to be appropriate and reasonable while working out the percentage of the

standby charges to be paid by BSES/REL to TPC for the period in question.

30. This Court in *BSES Ltd. v. Tata Power Co. Ltd.* (supra) held that the tariff notice dated 30.9.1998 to be illegal and had no legal effect. It was held that the charges paid for this kind of arrangement, whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES/REL at their desire, is bound to constitute a component of the price which they (BSES and TPC) would be charging from their consumers towards the cost of the electrical energy actually consumed by them. This Court also held that the State Government had no authority or jurisdiction on 22.3.2000 to determine or quantify the charges which BSES had to pay to TPC under the terms of the license granted to the former. It was further observed that Commission to decide the dispute early. A clarificatory order was passed by this Court on 9.1.2004 considering the decision in *Binani Zinc Limited (supra)*. The petition was filed by TPC for review. On the basis of the decision in *Binani Zinc Limited (supra)*, the same was dismissed. The MERC has passed the order on 31.5.2004, the following observations were made by MERC:

> "94. In this context, the Commission is also of the view that, since the standby facility ensures the reliability of the Mumbai system and thus benefits all the consumers in the Mumbai area, they have to contribute towards the cost of standby through the mechanism designed by the Commission. TPC has been

recovering the cost of standby that was applicable in January 1998 i.e., Rs.24.75 crore per month, from its consumers through its tariff, viz. fixed charges and energy charges. This aspect has been dealt with in detail subsequently in this Order. Now, depending on the ratio of sharing of the standby cost determined by the Commission, the consumers of TPC and BSES will have to pay the cost applicable to their respective licensees, in the manner decided by the Commission.

*** *** ***

225. The Commission is, however, of the view that the issue of whether the ratio should be applicable on the entire standby component or only on the incremental portion above Rs.24.75 crore, and the recovery of the same from the consumers, is a matter of tariff, which is within the Commission's jurisdiction as held by several Courts, including the High Court judgment on the appeal filed by TPC and BSES on the Commission's Order in the matter of sharing of standby charges.

*** *** ***

237. While determining the Annual Revenue Requirement (ARR) of TPC in the separate case before it, the Commission is considering all the payments to be made to or by the respective Parties and the interest and delayed payment charges, and is restating the Clear Profit of BSES and TPC to reflect the true picture, in line with the Commission's decision on the issue of sharing of standby charges. This is being done from FY 1998-99, as the dispute arose during that year. The Commission has drawn from the available reserves and surpluses, wherever required, to ensure that TPC and BSES get their due Reasonable Return on a year-on-year basis, in line with the provisions of Schedule VI. Having ensured that the Clear Profit matches the Reasonable Return on a year-on-year basis, there is no requirement for any additional recovery of any amount from the Parties. The Utilities have to draw from their reserves, as would be elaborated by the Commission, to make the payments as directed by it.

*** *** ***

239. Para 26 of the Supreme Court ruling states, inter alia, that "After the decision of the Commission, the equities can be adjusted and the excess amount paid by any party can be refunded to it along with appropriate interest or can be adjusted in future bills.

240. The Commission is of the view that interest should be recovered from all parties to the dispute for the amounts paid short vis-à-vis the actual payments due from each party, in accordance with the Commission's computations. The Commission believes that this approach is equitable to all the Parties concerned, and is appropriate in the light of the issues and circumstances of this matter which has been under dispute for such a long time. Hence, the Commission has computed the interest payable by BSES to TPC for delayed payments in FY

> 1998-99 and FY 1999-00, and the interest payable by TPC to BSES on the excess amounts deposited by BSES with TPC for onward payment to MSEB. The Commission has considered the fact that the interest rate on delayed payments to MSEB is 18% for overdue over 6 months. However, in this instance, the payment liabilities as between TPC and BSES have been crystallized only now through this Order of the Commission. Moreover, the deposits made by BSES earlier were consequent to Court Orders and were not regular payments. Hence, taking into account the prevailing market interest rates (SBI PLR) in each of these years, the net (simple) interest payable by BSES works out to Rs.8.37 crore, as shown in the table below, which can be adjusted against the refund due to BSES from TPC."

31. The MERC directed sharing of standby charges payable to MSEB between TPC and BSES/REL on the basis of their respective peak load requirements and directed TPC to pay to BSES/REL a sum of Rs.315.30 crores within 15 days. It was also observed that the quantum of standby capacity is related to the larger unit size of the generation in either system. We have no hesitation to accept the majority opinion that standby facility provided by TPC was out of its own generating capacity and 90 percent of the times energy has been drawn by BSES/REL from TPC. Thus, there is no justification for TPC to claim 50:50 percent sharing of the standby charges in the facts of this case on consideration of various factors the decision has been reached.

32. It appears that there was no stay on the order passed by the APTEL by this Court. The plea of non-implementation of the order taken by TPC is not understandable. It was only the bank guarantee

which was submitted by TPC, in addition, to deposit of a sum of Rs.227 crores with the Registrar General of this Court. The implementation of the order of the APTEL would mean that the determination made by it has been acted upon and corresponding liability factored into tariff has been passed on the customers and actual consumers and realised from them since there was no such interim stay on implementation of the order. We find force in the submission raised on behalf of BSES/REL that order of APTEL has already been worked out even otherwise it is found to be just and equitable. No case for interference with the same is made out.

33. There is no question of applicability of Article 14 of the Constitution. As a matter of fact, what was agreed in the Principles of Agreement more amount than that has been ordered to be paid on the basis of principles of business equilibrium and other factors as noted above.

34. It may be relevant to mention here that I.A. No.59365 of 2019 and I.A. No. 59356 of 2019 have been filed for substitution of name of Reliance Energy Limited with the agreement of learned counsel for the parties, the name of Adani Electricity Mumbai Limited is substituted as respondent and as appellant in C.A. No. 415/2007 and C.A. No.3229/2007 respectively.

35. Resultantly, we find there is no case made out for interference in either of the appeals filed by TPC and BSES/REL. The order passed by Technical and Judicial Members of APTEL is hereby upheld. The amount which is payable to Reliance Energy Limited, deposited or secured by way of bank guarantee by TPC as per order dated 07.02.2007 along with interest lying with the Registrar of this Court as per agreement of the Counsel for Reliance Energy Limited and Adani Electricity Mumbai Limited be paid to Adani Electricity Mumbai Limited. The appeals being devoid of merits are hereby dismissed. Consequently, IA Nos.59365/2019 & 59374/2019 in CA No.415/2007 and IA Nos.59356/2019 & 59380/2019 in CA No.3229/2007 are disposed of. Any other IA, if any, also stands disposed of. No costs.

.....J.
(Arun Mishra)

.....J.
(S. Abdul Nazeer)

New Delhi;
May 02, 2019