2025 INSC 857

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 12883 OF 2024

THE STATE OF HIMACHAL PRADESH & ANR. ...APPELLANT(S)

VERSUS

JSW HYDRO ENERGY LIMITED & ORS. ...RESPONDENT(S)

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

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I. *Introduction:*

1. Respondent no. 1, a generating company, installed and commissioned a 1045MW hydroelectric power project pursuant to a grant followed by an Implementation Agreement with the appellant-State of Himachal Pradesh. Under this Agreement, respondent no. 1 undertook to supply as consideration 18% of net generation free of cost[1] to the appellant-State. At the commencement of the obligation to supply 18% free power, respondent no. 1 approached the High Court by way of a writ petition to align the Implementation Agreement with the CERC

[1] The obligation to supply free power is 12% of net generation from 12.09.2011 to 12.09.2023, and 18% thereafter till 12.09.2051.

(Terms and Conditions of Tariff) Regulations, 2019[2], which provide for a maximum of 13% free power to the State Government, on the ground that contractual agreements, to the extent that they are inconsistent with the applicable regulations, shall stand overridden by their operation. Accepting the argument, the High Court entertained the writ petition and directed that the Implementation Agreement stood modified.

2. We have allowed the appeal by the State of Himachal Pradesh by interpreting the provisions of the Electricity Act, 2003[3] and the CERC Regulations, 2019 in the context of the subsisting and continuing contractual relationship between the parties. We have held that the Central Electricity Regulatory Commission[4] shall give effect to the Regulations and provide a pass-through to the extent of 13% free power but the remaining part of the obligation is contractual in nature and will be governed by the provisions of the Implementation Agreement. On interpreting the cap under Note 3 of Regulation 55 of the CERC Regulations, 2019, we have held that it does not restrain or prohibit respondent no. 1 from supplying free power beyond 13% but it is only meant for the calculation and

[2] Hereinafter "CERC Regulations, 2019".
[3] Hereinafter "Electricity Act".
[4] Hereinafter "CERC".

fixation of tariff. Further, considering the expertise and specialisation of the CERC as a statutory regulator and the wide-ranging jurisdiction it exercises under the Electricity Act, as well as respondent no. 1's conduct in not seeking relief against the appellant before the CERC, we have held that the present writ petition was not maintainable before the High Court as the interpretation of the Regulations falls within the exclusive domain of the regulator.

II. *Facts:*

3. The facts, to the extent necessary are as follows. By a Memorandum of Understanding[5] dated 28.08.1993, the appellant-State allotted the Karcham Wangtoo Hydroelectric Project for an installed capacity of 900 MW to one Jaiprakash Industries Limited[6], which is a power generating company and the predecessor of respondent no. 1. Under Clause 6 of the MoU, JIL agreed to supply 12% of the power generated to the appellant-State free of cost.

3.1 Pursuant to the MoU, the appellant entered into an Implementation Agreement with JIL for an enhanced capacity of

[5] Hereinafter "MoU".
[6] Hereinafter "JIL".

1000 MW. The relevant clauses of the Implementation Agreement are as follows:

i. Article 1.2 is the definitions clause that defines "Law" as any Act, rule, regulation, notification, order, or instruction having the force of Law enacted or issued by any competent legislature, government, or statutory authority in India.

ii. Further, the Effective Date of the Agreement is defined as the date of signing, and the Scheduled Commercial Operation Date[7] is defined as 120 months from the Effective Date.

iii. Article 3.2 stipulates that the Implementation Agreement shall remain in force for a period of 40 years from the Commercial Operation Date[8] of the Project (Agreement Period), unless terminated earlier as per its provisions. It reads:

> "*3.2 Agreement Period*
> *a) This Agreement shall remain in force up to a period of forty (40) years from the Commercial Operation Date of the Project (Agreement Period), unless terminated earlier in accordance with the provisions of the Agreement.*"

[7] Hereinafter "SCOD".
[8] Hereinafter "COD".

iv. Article 4 delineates the obligations of the appellant-State under the Agreement, which include the grant of various consents and permissions to JIL to establish, operate, and maintain the Project; to acquire land and prepare a rehabilitation and resettlement plan for local residents; to enter into leases for government land required for the works; to upgrade roads and bridges for the Project; and to provide necessary assistance to JIL as per the Agreement.

v. Article 5 deals with the obligations of JIL, of which the most relevant is the supply of power to the appellant-State without any cost or charges under Article 5.1. Sub-clause (a) stipulates the quantum of such supply as 12% of the net generation for the first 12 years from the COD, and 18% of the net generation for the next 28 years. Further, sub-clause (b) stipulates that JIL shall ensure that any Power Purchase Agreement[9] entered into by it shall not be detrimental to the rights of the appellant-State envisaged in this clause. It reads:

> *"5.1 Government Supply*
> *(a) The Company shall supply to the Government or its Agent, during the Agreement Period, at the Interconnection*

[9] Hereinafter "PPA".

Point without any cost or charges to the Government, the quantum of electrical energy generated as specified below (Government Supply):

i) Commencing from the date of synchronisation of the first Unit and for the first twelve (12) years from Commercial Operation Date (COD)	*Twelve (12) percent of Net Generation*
ii) For the next twenty eight (28) years after expiry of the period specified in (i) above.	*Eighteen (18) percent of Net Generation*

This quantum of Government Supply is applicable in case the Project achieves Commercial operation on Scheduled Commercial Operation Date. In the event of early or delayed commissioning of the Project, the same shall be as per provision specified in Clause 5.19 and 5.20 respectively.

In case the Government levies any duty/tax on generation and supply of power, the same shall be borne by the Government in respect of Government Supply. Further modalities for providing the Government Supply shall be mutually agreed between the Company and the Board.

(b) The Company shall ensure that any Power Purchase Agreement entered into by it shall not be detrimental to the rights of the Government envisaged in this Clause."

vi. Article 9 provides that the rights and obligations under or pursuant to the Agreement shall be governed by and construed according to Law.

vii. Article 10 provides for dispute resolution through mutual discussions, and in case of failure of the same, arbitration.

3.2 By an addendum to the Implementation Agreement dated 24.05.2001, the time-period for commencing construction was extended from 36 to 48 months from the Effective Date, but the COD was unamended.

3.3 Subsequently, by a tripartite agreement dated 30.12.2002 between the appellant, JIL, and one Jaypee Karcham Hydro Corporation Limited[10] that was incorporated by JIL as per Clause 8 of the MoU, the rights and liabilities of the Project were transferred from JIL to JKHCL.

3.4 JKHCL entered into a PPA dated 21.03.2006 with respondent no. 4, i.e., PTC India Limited, which is an inter-state trading licensee, for sale of 704 MW of power. PTC then entered into Power Sale Agreements[11] with respondent nos. 5 to 10, which are distribution companies in the States of Punjab, Haryana, Uttar Pradesh and Rajasthan, to sell the power which it purchased from JKHCL. In the PPA as well as the PSAs, "free power" is defined in the same manner as Article 5.1 of the Implementation Agreement.

3.5 The appellant and JKHCL entered into a Second Supplementary Implementation Agreement on 20.12.2007 to extend the SCOD to 144 months from the Effective Date, i.e. 18.11.2011.

3.6 The Project achieved commercial operation on 12.09.2011, i.e., within the extended SCOD. It is relevant to note that this is the date from which JKHCL's obligation to supply free power to the

[10] Hereinafter "JKHCL".
[11] Hereinafter "PSAs".

appellant-State commenced as per Article 5.1 of the Implementation Agreement. For the first 12 years from 12.09.2011, the quantum of free power to be supplied is 12%, and 18% thereafter for the next 28 years.

3.7 By a tripartite agreement dated 29.08.2015, the rights and liabilities in the Project were transferred from JKHCL to Himachal Baspa Power Company Limited[12], which is the predecessor of respondent no. 1, with effect from 01.09.2015. As per clause 3 of this agreement, HBPCL agreed to be bound by and liable for the contractual undertakings as specified in the Implementation Agreement, Addendum, tripartite agreement dated 30.12.2002, and the Second Supplementary Implementation Agreement.

3.8 In 2018, HBPCL changed its name to JSW Hydro Energy Limited, which is the present respondent no. 1 company. The parties signed the Third Supplementary Implementation Agreement dated 21.10.2019 for effecting the change in name while also agreeing that the other contractual undertakings would remain unamended.

3.9 During this time, the CERC (Terms and Conditions of Tariff) Regulations, 2014 governed the field with respect to tariff

[12] Hereinafter "HBPCL".

determination of generating stations, including the specific provision with respect to free power supply under Note 3 of Regulation 42. This provided that "*FEHS = Free energy for home State, in percent and shall be taken as 13% or actual whichever is less.*" Respondent no. 1 sought for relaxation of this cap in its tariff petition for the 2014-2019 period. This was decided by the CERC's order dated 30.03.2017, wherein it did not consider this issue as the free power supply obligation during this period was only 12%, which is below the 13% cap prescribed in the CERC Regulations, 2014. However, respondent no. 1 was given liberty to claim this relief at an appropriate time.

3.10 In 2019, the CERC framed the CERC Regulations, 2019 determining tariffs for generating stations and transmission units from 01.04.2019 to 31.03.2024. At this stage, it is relevant to refer to Note 3 of Regulation 55 that provides that free energy to home State (FEHS) shall be taken as 13% or actual, whichever is lesser. Further, Regulation 44 deals with the computation and payment of capacity and energy charges for generating station, and Regulation 55(2) provides for billing and payments. The relevant portions of these provisions are extracted hereinbelow:

Regulation 44:

"*44. Computation and Payment of Capacity Charge and Energy Charge for Hydro Generating Stations: (1) The fixed cost of a hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and shall be recovered on monthly basis under capacity charge (inclusive of incentive) and energy charge, which shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station, i.e., in the capacity excluding the free power to the home State:…*

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(4) The energy charge shall be payable by every beneficiary for the total energy scheduled to be supplied to the beneficiary, excluding free energy, if any, during the calendar month, on ex-bus basis, at the computed energy charge rate. Total energy charge payable to the generating company for a month shall be:

Energy Charges = (Energy charge rate in Rs. / kWh) x {Scheduled energy (ex-bus) for the month in kWh} x (100 – FEHS) / 100

(5) Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis, for a hydro generating station, shall be determined up to three decimal places based on the following formula, subject to the provisions of clause (7) of this Regulation:

ECR = AFC X 0.5 x 10 / {DE x (100 – AUX) x (100 – FEHS)}

Where,

DE = Annual design energy specified for the hydro generating station, in MWh, subject to the provision in clause (6) below.

FEHS = Free energy for home State, in per cent, as mentioned in Note 3 under Regulation 55 of these regulations…"

Regulation 55:

"*55. Billing and Payment of charges:*

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(2) … Payment of capacity charge and energy charge for a hydro generating station shall be shared by the beneficiaries of the generating station in proportion to their shares (inclusive of any allocation out of the unallocated capacity) in the saleable capacity (to be determined after deducting the capacity corresponding to free energy to home State as per Note 3 herein.

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Note 3 FEHS= Free energy for home State, in percent and shall be taken as 13% or actual whichever is less…"

3.11 In 2019, respondent no. 1 filed a petition before the CERC for approval of its tariff between 2019-2024, as well as truing up

the tariff for 2014-2019 period. In the tariff petition, respondent no. 1 inter alia prayed for relaxation of the 13% cap on free power under Note 3 of Regulation 55 of the 2019 Regulations, since its free power obligation under the Implementation Agreement is 18% of net generation after the completion of 12 years from COD.

3.12 This was decided by the CERC's order dated 17.03.2022 wherein it rejected the prayer for relaxation of the 13% cap on free power supply. The CERC held that it was bound by the CERC Regulations, 2019 while determining the tariff and that the regulations will override inconsistent contractual provisions in the PPA and PSAs executed by respondent no. 1 in respect of free power to the appellant-State. We will be dealing with the findings of the CERC in more detail in our analysis.

3.13 In the meanwhile, the Central Electricity Authority approved an increase in the Project capacity from 1000MW to 1091MW in two stages by a letter dated 29.04.2021. Pursuant to this, the capacity of the Project was enhanced to 1045 MW by the Fourth Supplementary Implementation Agreement dated 08.07.2021. It was further agreed that respondent no. 1 would be required to supply an additional 3% free power to the appellant-State on the enhanced 45MW capacity.

3.14 In 2022, the present dispute arose between the parties as respondent no. 1 issued various letters to the appellant that Note 3 of Regulation 55 of the CERC Regulations, 2019 caps the free power supplied to the State at 13%. Further, that the CERC's order dated 17.03.2022 requires inconsistent contractual provisions to be aligned with the Regulations. Relying on these, respondent no. 1 requested the appellant to align the Implementation Agreement with the CERC Regulations, 2019 and the order dated 17.03.2022 such that its free power supply obligation is confined to 13%. On the other hand, the appellant-State replied that the quantum of free power must be determined as per the Implementation Agreement and the Supplementary Implementation Agreements, which comes to 18.46% commencing from 13.09.2023. The appellant also issued a notice to respondent no. 1 dated 13.09.2023 to adhere to the contractual terms, failing which consequential action would be initiated against it. It also issued a notice dated 16.09.2023 to the Northern Regional Load Dispatch Centre to schedule 18.46% free power to the appellant.

3.15 This led respondent no. 1 to file the present writ petition before the High Court to direct the appellant to align the provisions of the Implementation Agreement and Supplementary

Implementation Agreements on free power with the CERC Regulations, 2019 and the CERC's order dated 17.03.2022, as well as to quash the notices issued by the appellant.

III. *Impugned Order:*

4. By the order 28.05.2024, which is impugned before us, the High Court allowed the writ petition and directed the appellant to align the Implementation Agreement and Supplementary Implementation Agreements in respect of the quantum of free power with the provisions of the CERC Regulations, 2019 till they remain in force. Further, it directed that if respondent no. 1 supplied any free power above the maximum ceiling limit under the Regulations, the same shall be adjusted. For arriving at this conclusion, the High Court adopted the following reasoning:

4.1 First, it held that the writ petition is maintainable inspite of the arbitration clause in Article 10.1 of the Implementation Agreement as the issues of whether the CERC Regulations, 2019 will override the Implementation Agreement and whether the contractual provisions need to be aligned pertain to enforcement of statutory regulations. Hence, the arbitration clause does not stand in the way of invoking writ jurisdiction.

4.2 The High Court then took note of various provisions of the Electricity Act, the CERC Regulations, 2019, and the CERC's order dated 17.03.2022 and rejected the appellant's argument that these do not affect the obligations under the Implementation Agreement and held that the CERC's order has a direct bearing on the supply of free power by respondent no. 1 to the appellant. Noting that the appellant-State was a party before the CERC and did not contest respondent no. 1's prayer for relaxing the cap on free power, the Court held that such cap is not only to determine the tariff *but is relevant for every other incidental and connected purpose*.

4.3 While the CERC in its order dated 17.03.2022 held that inconsistent provisions in the PPA and PSAs stand overridden by the Regulations, the High Court observed that these provisions are the same as in the Implementation Agreement and Supplementary Implementation Agreements. In a composite scheme for generation and sale of electricity, it held that there cannot be any mismatch in respect of the quantum of supply of free electricity. Hence, the corollary of the CERC's order that the PPA and PSAs stand overridden is that the Implementation Agreement becomes unworkable and must be aligned with the CERC Regulations, 2019.

4.4 Further, since the appellant-State accepted the CERC's order, respondent no. 1 was within its right to seek alignment of the Implementation Agreement with the CERC Regulations, 2019 and the CERC's order.

4.5 The High Court also relied on this Court's decision in *PTC India Ltd. v. Central Electricity Regulatory Commission*[13] where it was held that statutory regulations under the Electricity Act will override existing contracts between regulated entities. On this basis, the High Court concluded that the CERC Regulations, 2019 will have supremacy over contractual undertakings and the provisions of the Implementation Agreement must be aligned accordingly.

IV. *Submissions:*

5. We have heard Mr. Kapil Sibal and Mr. Parag Tripathi, learned senior counsel for the appellant, and Mr. P. Chidambaram and Dr. A.M. Singhvi, learned senior counsel for respondent nos. 1 and 2. We also heard Mr. Nikhil Nayyar, learned senior counsel for respondent no. 11 (CERC), Ms. Preetika Dwivedi, learned counsel for respondent nos. 7-9 (distribution companies operating in the State of Rajasthan), and Mr. Gurminder Singh, learned

[13] (2010) 4 SCC 603.

senior counsel for respondent no. 10 (distribution company operating in the State of Punjab). Their submissions can be recapitulated as follows:

5.1 Mr. Tripathi and Mr. Sibal appearing for the appellant-State have broadly submitted that the quantum of free power to be supplied under the Implementation Agreement is not regulated or curtailed by the CERC Regulations, 2019 or the CERC's order dated 17.03.2022. While taking us through the sequence of events, the following submissions have been made:

i. Regulation 2 provides the scope and extent of application of the CERC Regulations, 2019, which is to determine the tariff for generating and transmission companies.

ii. The purport of Note 3 of Regulation 55, which stipulates the 13% cap on free power, is for calculating the bill amount that the generating company can recover from beneficiaries. It does not prohibit respondent no. 1 from supplying free power beyond this cap. The effect of the cap is that the CERC Regulations, 2019 provide a pass-through to the extent of 13% free power while determining the tariff. Any further supply of free power must be borne by the generating companies from their resources.

iii. Further, that the Regulations govern agreements between the generation and distribution companies but do not extend to the Implementation Agreement, which was executed even prior to the commencement of generation. In the written submissions, it is further submitted that the Implementation Agreement is a contract for natural resources, and not a tariff agreement. It hence falls outside the ambit of the CERC Regulations, 2019.

iv. In this vein, the learned senior counsel have also referred us to the relevant portions of the CERC's order dated 17.03.2022 wherein respondent no. 1 prayed for relaxation of the 13% cap while calculating tariff in view of its contractual obligations under the Implementation Agreement. This was rejected by the CERC and it held that the *PPA and PSAs executed by respondent no. 1 are overridden by the Regulations*. The learned senior counsel submit that respondent no. 1 did not appeal this order before the Appellate Tribunal for Electricity[14] and instead filed a writ petition in 2023 seeking amendment of the Implementation Agreement.

[14] Hereinafter "APTEL".

v. Coming to the impugned order of the High Court, they submit that the High Court has proceeded on the basis that the appellant-State is a regulated entity under the Electricity Act, and thereby relied on *PTC* (supra) where this Court held that contracts between regulated entities stand overridden by statutory regulations under the Electricity Act. They submitted that this is incorrect as the State Government is not a deemed licensee under the third proviso of Section 14 as it is not engaging in transmission, distribution, or trading of electricity.

vi. They also submitted that contractual terms could not have been amended in exercise of writ jurisdiction, and the only remedy available to respondent no. 1 was to challenge the validity of the Regulation itself, which it had not done. Regarding the exercise of writ jurisdiction to align the contractual terms with the Regulations, it is further contended in the written submissions that the High Court has rewritten the Implementation Agreement by relying on the PPA and PSAs being overridden as per the CERC's order dated 17.03.2022. However, the High Court ignored that these agreements are not on the same footing and

Article 5.1(b) of the Implementation Agreement provides that it shall not be affected by the PPA.

vii. In the written submissions, the appellant submitted that the quantum of free power was arrived after a series of negotiations with JIL, which was awarded the Project through the MoU route rather than through competitive bidding. In order to avoid competitive bidding, JIL agreed to supply 18% free power during a certain portion of the Agreement period.

viii. The learned senior counsel further submitted that despite a similar cap on free power in the Hydroelectric Policy, 1998 @ 12%, respondent no. 1 knowingly agreed to supply 18% free power in the Implementation Agreement that was executed in 1999. Further, this obligation has been reiterated in all the Supplementary Agreements. Moreover, the Fourth Supplementary Implementation Agreement was executed in 2021 for additional free power on the enhanced capacity, which was executed after the CERC Regulations, 2019 came into force. Hence, once respondent no. 1 consented to supplying free power @ 18%

despite a similar cap existing all through, the same cannot be avoided by filing a writ petition.

5.2 Mr. Chidambaram, learned senior counsel for respondent no. 1 submitted that the Implementation Agreement, which was negotiated prior to the CERC Regulations, 2019 stands overridden by the Regulations.

i. Referring to Article 9 of the Implementation Agreement, he submitted that the rights and obligations under the Agreement are subject to "Law", which has been widely defined as including regulations. The regulations in this case are framed under the Electricity Act, which was enacted in 2003, after the Implementation Agreement was executed. Prior to this, there was no law restricting the quantum of free power at the time of execution of the Implementation Agreement.

ii. The State Government is a regulated entity under the Electricity Act as it is a deemed licensee as per the third proviso of Section 14. He referred us to certain portions of the writ petition before the High Court, where respondent no. 1 contended that the appellant-State is a deemed licensee and the same was not denied by the appellant in

its reply. He also referred to Section 10(2) of the Electricity Act to submit that generating companies can supply electricity to licensees only. On this basis, he submitted that respondent no. 1 is supplying electricity to the appellant-State as a licensee, albeit free of cost.

iii. Relying on the decisions of this Court in *PTC* (supra) as well as *Transmission Corporation of A.P. Ltd. v. Rain Calcining Ltd.*[15], he submitted that even concluded contracts between regulated entities are overridden by regulations. Since the State Government is a licensee, the Implementation Agreement stands overridden by the Regulations. Further, he submitted that performance of a contract must be in conformity with the law in force at the time.[16]

iv. He then referred us to Regulation 30 of the CERC Regulations, 2019 that provides for Return on Equity[17] to hydro-electric generating companies @ 16.5%, which the generating company earns through tariff on saleable power. The tariff is calculated by considering the free

[15] (2021) 13 SCC 674.
[16] Relied on *Ganga Retreat and Towers Ltd. v. State of Rajasthan*, (2003) 12 SCC 91.
[17] Hereinafter "RoE".

power cap @ 13% as per Note 3 of Regulation 55. However, if the actual free power supply is 18% as per the Agreement, this will negatively impact the RoE. Further, to ensure that RoE is maintained, respondent no. 1 will be required to sell the remaining 82% of power at a higher rate to PTC and the distribution companies, which will ultimately be passed on to the consumers thereby affecting consumer interest. In the written submissions, respondent no. 1 also contended that the cost of generation and supply of electricity must be recovered through tariff as per Section 61 of the Electricity Act. However, if it is required to supply 18% free power despite the 13% cap in the Regulations, it will not recover revenue for 5% of the power it generates and supplies, and this will negatively impact its RoE.

5.3 Dr. Singhvi supplemented these submissions with the following arguments:

i. The consequence of a change in law (i.e., the cap on free power supply) must be borne by both parties, and cannot be unilaterally imposed on the generating company.

ii. The State Government is a regulated entity as per the third proviso to Section 14 as well as under Section 10(2) of the Electricity Act. Hence, the CERC Regulations, 2019 govern and override the contractual obligations under the Implementation Agreement.

iii. Since this is a composite scheme for generation and distribution of electricity, there can be no mismatch on the quantum of free power stipulated in the Implementation Agreement, which is an upstream agreement with the State Government, and the PPA and PSAs, which are downstream agreements with distribution companies.

5.4 We also heard Mr. Nikhil Nayyar for the CERC, who submitted the following:

i. The CERC Regulations, 2019 are only concerned with tariff fixation and neither deal with the Implementation Agreement nor impose restrictions on the quantum of free power supply to the appellant-State. The purport of the Regulations is to cap the free power that will be considered while fixing tariff and whose costs can be passed onto the distribution companies and consumers. Since the actual quantum of free power supply is determined by contract,

respondent no. 1 must use contractual remedies to challenge the same.

ii. Relying on *PTC* (supra), he submitted that the CERC is bound by its Regulations, including the cap on free power supply, while determining the tariff. Any further supply is to be met by the generating company from its own resources, which is also stipulated in the Hydro Power Policy, 2008 that forms the basis of the CERC Regulations, 2019.

iii. RoE for respondent no. 1 is stipulated as 16.5% under Regulation 30(2), which is arrived at after considering commercial principles and consumer interest, as per Section 61(b) and (d) of the Electricity Act. Referring to Regulations 14(4), 15, and 18 of the CERC Regulations, 2019, he submitted that the RoE is part of the Annual Fixed Cost, which is used to derive capacity charges that is in turn used to determine the tariff. Hence, RoE forms a part of the tariff itself and the tariff is structured on this basis. RoE is not the same as the net profit of respondent no. 1. In its written submissions, the CERC further submitted that RoE is calculated on the equity component

of the Project, which has been granted in full to respondent no. 1 for the 2014-19 and 2019-24 periods.

iv. The CERC's order dated 17.03.2022 only directs that the PPA and PSAs must be aligned with the Regulations. It does not deal with or decide on the Implementation Agreement. This order was not challenged by respondent no. 1 before the APTEL, and they instead relied on the same to file a writ petition before the High Court to seek the relief of aligning the Implementation Agreement. The filing of the writ petition is a way to avoid the CERC order dated 17.03.2022 and an attempt to achieve the same result through a different prayer.

5.5 Mr. Gurminder Singh, learned senior counsel submits that the State Government cannot be treated as a deemed licensee in the present case. Further, he submits that the CERC's role of tariff determination does not extend to allocating or apportioning the power supplied by the generating company to various entities. It only relates to fixation of tariff for such supply, after the generating company has decided the allocation.

5.6 Ms. Preetika Dwivedi submitted that *PTC* (supra) does not apply as tariff regulation is not concerned with a contract between

the State Government and a generating company. When respondent no. 1 consented to supply 18% free power, a similar cap of 12% with respect to free power supply was provided in the Hydroelectric Policy, 1998. Finally, that the burden of free power cannot be passed on to the distribution companies or consumers.

5.7 Finally, Mr. Sibal responded to the submissions made on behalf of respondent nos. 1 and 2. He disputed the status of the appellant-State as a deemed licensee by contending that there is no transmission, distribution, or trading of electricity in this case. Specifically referring to Section 2(71) of the Electricity Act which defines "trading" as purchase of electricity for resale, he submitted that the State Government is not purchasing any power as it is supplied free of cost. Since the State Government is not a deemed licensee, it does not fall under the CERC's jurisdiction and the terms and conditions of free power supply cannot be regulated under the Electricity Act. Second, he submitted that the tariff order dated 17.03.2022 provides for more than 16.5% RoE to respondent no. 1, and the only impact of free power supply beyond 13% is on the net profit, which is not guaranteed under the CERC Regulations, 2019. Finally, he submitted that the Implementation Agreement falls outside the jurisdiction of the Regulatory

Commissions constituted under the Electricity Act, which deal with tariff determination. Rather, this is a case of free supply of electricity to the State Government that it can dispose of in a manner it deems fit as per the Electricity [Removal of Difficulty] (Third) Order, 2005.

5.8 Mr. Tripathi also submitted that while RoE is guaranteed by the Regulations, net profit is not guaranteed. He submitted that this issue was raised by respondent no. 1 in its tariff petition and the prayer for relaxation of the cap on free power supply was rejected by the CERC, which was not subsequently challenged.

5.9 Regarding the status of the State Government as a deemed licensee, respondent no. 1 has submitted the following in its written submissions: *First*, although power is supplied free of monetary cost, there is purchase as there is non-monetary consideration for the power under the Implementation Agreement. *Second*, the State Government undertakes trading of such electricity through respondent no. 3, the Himachal Pradesh State Electricity Board, which is its agent/instrumentality. Considering these factors, the State Government is a regulated entity and is governed by the CERC Regulations, 2019. As per *PTC* (supra) as well as Article 9 of the Implementation Agreement, the contractual

rights and obligations relating to free power are subject to the CERC Regulations, 2019.

5.10 Further, in its written submissions, respondent no. 1 has also contended that the policies relied on by the appellant, including the Hydro Power Policy 2008, do not apply to it as the Project was awarded through MoU and not competitive bidding.

V. *Issue:*

6. Having considered the sequence of events and the subject-matter of the dispute, as well as the extensive oral and written submissions of the parties, we find that the primary issues arising for our consideration are: *first*, whether the CERC Regulations, 2019 bar respondent no. 1 from supplying free power to the appellant-State beyond 13%; and *second*, whether respondent no. 1 could have invoked the High Court's writ jurisdiction for aligning the Implementation Agreement with the CERC Regulations, 2019. In this context, we will also examine the scope and ambit of the Electricity Act and the rights and liabilities of the entities governed thereunder.

VI. *Analysis:*

7. The Electricity Act, 2003 is a complete and comprehensive code for regulating the generation, transmission, distribution,

trading and use of electricity. One of the core features of the Act is that it unbundles the functions of electricity generation, transmission, and distribution that were erstwhile performed by State Electricity Boards[18] into separate utilities, and provides for their regulation through independent Regulatory Commissions.[19]

8. The need for an independent and transparent regulatory mechanism was felt due to the regulatory failures under the erstwhile legal regime[20], wherein SEBs constituted by the State Governments were entrusted with regulation.[21] It was experienced that various problems plagued the power sector, including lack of rational retail tariffs, high level of cross-subsidies, poor planning and operation, inadequate capacity, neglect of consumer interest, and limited involvement of the private sector's skills and resources.[22] It is in this context that the Electricity Regulatory Commissions Act, 1998[23] was enacted to reform the governance of the sector *by establishing an independent and transparent regulatory mechanism.*[24]

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[18] Hereinafter "SEBs".
[19] *PTC* (supra), para 17.
[20] Electricity Act, 1910 (hereinafter "the 1910 Act"); the Electricity (Supply) Act, 1948 (hereinafter "the 1948 Act").
[21] *K.C. Ninan v. Kerala State Electricity Board*, (2023) 14 SCC 431, para 6.
[22] Statement of Objects and Reasons of the Electricity Regulatory Commissions Act, 1998.
[23] Hereinafter "the 1998 Act".
[24] *W.B. Electricity Regulatory Commission v. CESC Ltd.*, (2002) 8 SCC 715, para 52; *PTC* (supra), para 17; *Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission*, (2014) 8 SCC 444, para 22.

9. Within a few years thereafter, the Electricity Act, 2003 was enacted as a comprehensive legislation for regulating the sector and it replaced the 1910 Act, the 1948 Act, and the 1998 Act.[25] The following salient features emerge from the Preamble[26] of the Electricity Act:

9.1 The Act *consolidates laws*, and therefore comprehensively deals with all aspects of the electricity sector, from production to usage.

9.2 Electricity being a public good[27] and a basic amenity[28], it has been recognised as a part of the right to shelter and right to life[29]. In this light, the Act covers the entire process of production, transfer, and sale of electricity and also deals with the utilisation of electricity. These are covered under *generation, transmission, distribution, trading and use of electricity*.

9.3 The Act is also concerned with the development of the electricity sector so as to ensure that there is sufficient amount of

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[25] Section 185 of the Electricity Act.

[26] The Preamble of the Electricity Act reads:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*"

[27] See *K.C. Ninan* (supra), para 93.

[28] *Dilip v. Satish*, 2022 SCC OnLine SC 810, para 9.

[29] *Chameli Singh v. State of U.P.*, (1996) 2 SCC 549, para 8.

electricity available to all. In furtherance of this goal of enhancing the availability of electricity, the Act envisages private sector participation and promotion of competition.

9.4 These measures are ultimately intended to protect and subserve consumer interests by making electricity supply accessible at cheaper rates for those who cannot afford it, as well as making supply accessible in all areas and regions. In this vein, the Act provides for the need for transparent subsidy policies.

9.5 Taking the ecological impact of the electricity sector's activities, the Act provides for promotion of efficient and environmentally benign policies.

9.6 Finally, the Act provides for the constitution of permanent expert bodies, i.e., Central and State Electricity Regulatory Commissions, to regulate the production, transfer and use of electricity, as well as for the development of the sector through private sector participation and competitiveness to subserve consumer interests. Considering the specialised nature of functions performed by these bodies, the Act also provides for an appellate forum to challenge the Central and State Commissions' decisions, i.e., the APTEL, which can appreciate the technicalities and nuances of the sector.

10. Since the facts of this case relate to hydro-power generation, we will now examine the relevant statutory provisions for its regulation.

VII. *Regulation of Electricity Generation Under the Electricity Act*:

11. Part III of the Electricity Act deals with generation of electricity. Section 7 of the Electricity Act permits generating companies to establish, operate and maintain a generating station without obtaining a license under the Electricity Act.[30] However, in cases of hydro-electric generation, the concurrence of the Central Electricity Authority is required as per Section 8.[31]

12. Section 10 lays down the duties of generating companies. While sub-section (1) requires a generating company to establish, operate and maintain generating stations, sub-section (2) provides that a generating company may supply electricity to any licensee in accordance with the Act and rules and regulations made thereunder, and it may supply electricity to any consumer subject

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[30] Section 7 of the Electricity Act reads:

> "***Section 7. (Generating company and requirement for setting up of generating station):*** *Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.*"

[31] The relevant portion of Section 8 of the Electricity Act reads:

> "***Section 8. (Hydro-electric generation):*** *--- (1) Notwithstanding anything contained in section 7, any generating company intending to set-up a hydrogenerating station shall prepare and submit to the Authority for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification…*"

to the regulations under Section 42(2). Section 10 is extracted hereinbelow for ready reference:

> *"**Section 10. (Duties of generating companies):** --- (1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.*
> *(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.*
> *(3) Every generating company shall –*
> *(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority;*
> *(b) co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it."*

13. While the Electricity Act has done away with the licensing requirement for generating companies, it continues to regulate electricity generation as the tariff at which the generating company supplies electricity to a distribution licensee is determined by the Central or State Commission, as is appropriate, as per Section 62(1)(a) read with Section 79 and Section 86 of the Act.[32] We will further deal with the tariff determination function of the CERC at a later stage.

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[32] Section 62(1)(a) of the Electricity Act reads:

> "***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;…"*

14. At this juncture, it is also relevant to note this Court's decision in *Tata Power Co. Ltd. v. Reliance Energy Ltd.*[33]. It was observed that delicensing of generation under the Electricity Act, 2003 marks a shift from the position under the 1910 Act, the 1948 Act, and the 1998 Act.[34] The Court held that delicensing electricity generation is intended to encourage the setting up of generating stations and to promote competition among generating companies. Hence, courts must ensure that while interpreting the Electricity Act and the regulations made thereunder, they do not bring back licensing requirements through the backdoor.[35]

14.1 The primary issue before the Court was whether the State Commission could have directed a generating company to allot additional quantities of power to a particular distribution company based on its requirements and number of consumers. Answering the question in the negative, this Court held that generating companies have the *freedom to enter into agreements for the sale of generated electricity, including the freedom to allocate the quantum of electricity to be sold to each distribution company.*[36] However, such freedom is not entirely unregulated as the generating

[33] (2009) 16 SCC 659.
[34] ibid, paras 68-73.
[35] ibid, paras 83-84.
[36] ibid, paras 108-109.

company is subject to tariff determination by the appropriate Regulatory Commission, and its agreements with distribution companies are subject to the approval of State Commissions under Section 86(1)(b), who will examine whether the allocation of power and terms and conditions of the agreement are reasonable.[37]

VIII. *Legal Effect of Note 3 of Regulation 55:*

15. *Interpretation of the CERC Regulations, 2019*: It is a settled position of law that a regulation made by the CERC in exercise of its powers under Section 178 of the Act will override existing contracts between regulated entities. Contractual terms, insofar as where the regulation operates, must be aligned or modified such that they are in line with the regulation.[38] For example, a regulation for determining tariff will override inconsistent and

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[37] ibid, paras 77, 108, 110-113. This position has been reiterated in *Transmission Corporation of Andhra Pradesh Ltd. v. Sai Renewable Power (P) Ltd.*, (2011) 11 SCC 34, para 64.

[38] *PTC* (supra), paras 58 and 66. This has been consistently followed by the Court. See *Gujarat Urja Vikas Nigam Ltd. v. Renew Wind Energy (Rajkot) (P) Ltd.*, 2023 SCC OnLine SC 411, para 48; *Haryana Power Purchase Centre v. Sasan Power Ltd.*, (2024) 1 SCC 247, paras 110-111. The relevant portions from *PTC* (supra) are extracted hereinbelow for ready reference:

> "*58. … Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j).*
> *66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts…*"
>
> (emphasis supplied)

contrary provisions in an agreement to that extent. The crux of the dispute between the parties in the present case is whether Note 3 of Regulation 55 prohibits the generating company from supplying free power beyond 13% to the State, and consequently, whether it overrides the contractual obligation of respondent no. 1 under the Implementation Agreement.

16. The contractual obligation of respondent no. 1 to supply free power can be understood as a form of "royalty" payable to the State as compensation, in lieu of being allowed to utilise river water, which is a public and commons resource, for undertaking its commercial activity of power generation from which it derives benefits through sale of power.[39] Perusal of Article 4 of the Implementation Agreement also shows that the appellant-State fulfilled various other obligations like acquiring land, granting permissions, and executing leases in favour of respondent no. 1 to enable it to set up its hydropower generating station. In return, respondent no. 1 undertook various obligations provided in Article 5 of the Implementation Agreement, including supplying free power at a certain percentage. Therefore, it is clear that the free

[39] See *Indsil Hydro Power & Manganese Ltd. v. State of Kerala*, (2021) 10 SCC 165, paras 43-43.1; 56-57.

power supply is a part of the consideration by respondent no. 1 under the Implementation Agreement.

17. Now the question is whether such a consideration is impermissible or prohibited by virtue of the CERC Regulations, 2019. To answer the same, it is necessary to appreciate the context in which Note 3 of Regulation 55, which stipulates that FEHS shall be *taken as 13% or actual, whichever is less*, has been made. Regulation 55 deals with billing and payment of charges to generating companies. While sub-clause (1) deals with raising bills for capacity and energy charges and payment, sub-clause (2) is relevant for our purpose. It provides that payment of capacity and energy charges for a hydro-generating station shall be shared by its beneficiaries[40] in proportion to their shares in saleable capacity, *which is to be determined after deducting the capacity corresponding to FEHS as per Note 3*. Hence, Note 3 of Regulation 55 is relevant for the calculation of saleable power, which is in turn

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[40] "Beneficiary" has been defined in Regulation 3(8) of the CERC Regulations, 2019 as follows:

> "*3. Definitions. - In these regulations, unless the context otherwise requires:*
> ***
> *(8) 'Beneficiary' in relation to a generating station covered under clauses (a) or (b) of sub-section 1 of section 79 of the Act, means a distribution licensee who is purchasing electricity generated at such generating station by entering into a Power Purchase Agreement either directly or through a trading licensee on payment of capacity charges and energy charges;*
> *Provided that where the distribution licensee is procuring power through a trading licensee, the arrangement shall be secured by the trading licensee through back to back power purchase agreement and power sale agreement.*
> *Provided further that beneficiary shall also include any person who has been allocated capacity in any inter-State generating station by Government of India*"

relevant for the generating company to raise bills and for payments by beneficiaries.

18. Regulation 44, which deals with the computation and payment of capacity and energy charges for hydro-generating stations also defines FEHS similarly. Sub-clause (1) provides that the fixed cost of a hydro-generating station shall be recovered on a monthly basis under capacity and energy charges, which are payable by beneficiaries in proportion to their respective allocation in saleable capacity, i.e., capacity excluding FEHS. Further, the formula for calculating energy charges is provided in sub-clauses (4) and (5), which also relies on FEHS as defined in Note 3 of Regulation 55.

19. Therefore, the purpose and intendment of Note 3 of Regulation 55 is for the State Commission to determine tariff by assuming that FEHS is 13%, *whenever it is higher in actuality*, while calculating the energy and capacity charges. Neither the language of Note 3 nor the context in which it appears in the CERC Regulations, 2019 supports respondent no. 1's contention that the legal effect of this cap is to override its contractual obligations with the appellant-State. On the other hand, use of the term "*shall be taken as 13% or actual, whichever is less*" shows that the

Regulations cover a situation where the obligation to supply free power is higher than 13%, and in such an eventuality, allow only a certain portion of free supply to be considered for tariff determination and payments by beneficiaries for the saleable capacity.

20. Once the Regulation does not prohibit the supply of free power beyond 13%, respondent no. 1 cannot rely on it to wriggle out of its contractual obligations. Such an interpretation is necessary to recognise and enforce the generating company's freedom of contract, which includes its choice of business dealings. The Regulatory Commissions, APTEL, and the Courts must enforce these contractual obligations and ensure that their interpretation of regulations does not allow the party to circumvent and breach its contractual undertakings when the same is not intended by the regulation itself.

21. Further, the above interpretation of the regulation balances the social justice obligation of the Regulatory Commission to ensure that the tariff is not increased by allowing pass-through to the extent of only a certain portion of free supply while balancing the commercial viability and financial position of the generating company. Public interest is also subserved since the State can

utilise the free power for its own purposes. This interpretation balances the twin values of freedom of business choices and the social justice obligations of the State, which the Regulatory Commission channelises towards protecting consumer interests and maintaining the health of the sector.

22. *CERC's Order dated 17.03.2022*: The relief sought by respondent no. 1 in its tariff petition for 2019-2024 before the CERC is relevant as it shows that the initial position taken by it was not an attempt to wriggle out of the contract by seeking its modification. In contrast to claiming that the Implementation Agreement stands overridden and must be aligned with the 13% cap, as is the case before the High Court and in this appeal, respondent no. 1 sought relaxation of the cap itself. In other words, respondent no. 1 sought a pass-through for the full extent of 18% free power, rather than 13% as per the Regulations, in recognition of its contractual obligations under the Implementation Agreement.

23. In the tariff order dated 17.03.2022, the CERC rejected this prayer on the following basis. It took note of the free power supply obligation under Article 5.1 as being 12% of net generation for the first 12 years from the COD, and 18% of net generation for the next

28 years. It also noted that the PPA executed with respondent no. 4 defines free power in the same manner. Relying on this Court's decision in *PTC* (supra), it held that the provisions of the agreement must be aligned with the Regulations. Hence, the provisions of the *PPA and PSAs executed by respondent no. 1 in respect of free power are inconsistent and stand overridden by Note 3 of Regulation 55* such that FEHS is to be considered as 13% only. The relevant portions of the CERC's order are extracted below for ready reference:

> "*145. The main contention of the Petitioner is that since the quantum of free power to be supplied to the home State was based on the agreement between the parties, which were executed prior to coming into force of the Tariff Regulations notified by the Commission, the same may be considered by the Commission in exercise of the power to relax/power to remove difficulties. The Respondent HPPC has submitted that in terms of the judgment of the Hon'ble Supreme Court in PTC v CERC & ors. Tariff Regulations override existing contracts. Note 3 under Regulation 55 of the 2019 Tariff Regulations provides as under:*
>
> > *Note 3: FEHS = Free energy for home State, in percent and shall be taken as 13% or actual whichever is less.*
>
> *146. The Constitution Bench of the Hon'ble Supreme Court in PTC India Ltd Vs CERC & ors (2010 4 SCC 603) has laid down the principle of law, whereby any provision of an agreement, if it falls within the domain of the Regulations of subordinate legislation, has to be aligned with the Regulations. The relevant portion of the judgment is quoted below…*
>
> *147. Thus, the provisions of the PPA/PSAs executed by the Petitioner in respect of free power to the home State is inconsistent and shall accordingly stand overridden by Note 3 under Regulation 55 of the 2019 Tariff Regulations. We, therefore, find no reason to exercise the power to relax and grant relief, as prayed for by the Petitioner. Accordingly, the free energy to home state is to be considered as 13% in this case.*"

24. There are two aspects of the CERC's reasoning and decision that we must note: *first*, the CERC was made aware of the contractual obligation of respondent no. 1 under the Implementation Agreement, but it did not hold the same as being overridden by Note 3 of Regulation 55. This is in line with the interpretation of the cap that we have elaborated hereinabove, i.e., it does not prohibit or restrain respondent no. 1 from entering into or performing a contract for supplying a higher quantum of free power. *Second*, the CERC only held that the PPA and PSAs stand overridden to the extent that they are inconsistent with the Regulation. The effect of this is that only 13% of free power would be considered as a pass-through for tariff fixation and recovery of charges from the beneficiary distribution companies as per the Regulations. Since respondent no. 1 did not appeal this order before the APTEL under Section 111 of the Electricity Act, these findings are now final and binding on it.

25. We will now examine whether the High Court could have, in exercise of its writ jurisdiction, granted the relief of aligning the Implementation Agreement by relying on the CERC's order dated 17.03.2022.

IX. *Maintainability of the Writ Petition:*

26. *CERC as an Expert and Specialised Regulator, and Extent of Judicial Interference*: In order to appreciate the issue on maintainability of the writ petition, it is necessary to take note that postmodern legislation institutionalises governance through regulation. Under the Electricity Act, we see such a statutory incorporation of the regulators through the CERC and the State Commissions that are expert and specialised bodies to perform wide-ranging regulatory functions.[41]

27. The jurisprudence on regulation is that independent regulators, armed with statutory powers and duties, were established to reduce the government's control and interference with the market while safeguarding consumer interests, preventing abuse of monopoly, and enabling private participation in the sector. Therefore, the regulator has socio-economic obligations of ensuring accessibility of goods and services, as well as the duties towards the development of the industry by promoting efficiency and competition.[42] The nature of functions and the jurisdiction of these regulatory bodies are wide and

[41] See *PTC* (supra), para 17; *Sai Renewable* (supra), paras 36 and 38; *Reliance Infrastructure Ltd. v. State of Maharashtra*, (2019) 3 SCC 352, para 38.
[42] H.W.R. Wade and C.F. Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014), 116-117.

extensive as they perform a mix of legislative, executive and administrative, and judicial functions.[43] Concomitantly, they are sufficiently empowered under the statute, and legislative, executive and adjudicatory powers are telescoped into one institution. Regulators have the power to lay down rules and regulations; issue licenses; fix prices and scope and areas of operation; investigate and prosecute offences, and impose penalties; adjudicate disputes and interpret the law; implement and enforce the statute, the rules and regulations made thereunder, and their decisions; and exercise incidental and ancillary powers to deal with all aspects relating to the sector.[44]

28. Specifically, in the context of the CERC under the Electricity Act, Section 79 sets out its functions, including tariff determination. The relevant portion is extracted hereinbelow:

> "***Section 79. (Functions of Central Commission):*** *--- (1) The Central Commission shall discharge the following functions, namely:-*
> ***
> *(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…"*

29. "Tariff" has not been defined under the Electricity Act, but it has been interpreted by this Court on several occasions. This

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[43] ibid, 124.
[44] ibid; *Cellular Operators Assn. of India v. Union of India*, (2003) 3 SCC 186, para 33; *U.P. Power Corpn. Ltd. v. NTPC Ltd.*, (2009) 6 SCC 235, paras 4, 22, 48.

Court in *PTC* (supra) held that "tariff" does not only mean fixation of rates but also the rules and regulations relating to it[45]. Further, in *Transmission Corporation of Andhra Pradesh Ltd. v. Sai Renewable* (supra), this Court relied on the meaning of the term in general law or common parlance, and held its meaning to be as follows:

> "*62. Therefore, in the absence of any specific definition in any of these Acts we will have to depend upon the meaning attached to these expressions under the general law or in common parlance. The expression "tariff" has been explained in Law Lexicon With Legal Maxims, Latin Terms And Words & Phrases (2nd Edn., 1997) as*
>
> > *"determination, ascertainment, a table of rates of export and import duties, in which sense the word has been adopted in English and other European languages and as defined by the law dictionaries the word 'tariff' is a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by the authority or agreed between the several princes and States that hold commerce together."*
>
> *It has also been explained as a schedule, system, or scheme of duties imposed by the Government of a country upon goods imported or exported; published volume of rate schedules and general terms and conditions under which a product or service will be supplied; a document approved by the responsible regulatory agency listing the terms and conditions including a schedule of prices, under which utility services will be provided.*"[46]

30. Determination of tariff must be in accordance with Section 61 of the Electricity Act, which requires the CERC to specify the terms and conditions for the determination of tariff and stipulates

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[45] *PTC* (supra), para 26.
[46] A similar definition has been adopted by this Court in *BSES Ltd. v. Tata Power Co. Ltd.*, (2004) 1 SCC 195, para 16.

the principles that shall guide the CERC. These include commercial principles, competition, efficiency, economical use of resources, consumer interest, and cost-reflective tariffs. The relevant portion of Section 61 has been extracted hereinbelow:

> "***Section 61. (Tariff regulations):*** *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
> ***
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
> ***
> *(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;…"*

31. The CERC must weigh and balance these competing principles during tariff determination, such that interests of various stakeholders and the social justice obligation of the State to ensure access to electricity are fulfilled. The Act empowers the CERC to make regulations under Section 178, including on terms and conditions for the determination of tariff. The relevant portions of Section 178 of the Electricity Act read:

> "***Section 178. (Powers of Central Commission to make regulations):*** *--- (1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.*
> *(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of following matters, namely:-*
> ***

(s) the terms and conditions for the determination of tariff under section 61;…"

32. This Court has time and again emphasised that since tariff determination, including the power to make regulations for this purpose, has been entrusted to a specialised and expert regulator constituted under the statute itself, it would not be proper for constitutional courts to interfere and assume these functions, or to examine tariff fixation on its merits and substitute its own determination for the one made by the expert body after duly considering all material circumstances.[47] We are of the opinion that this is necessary not only to ensure that these specialised functions are performed by expert regulators but to also facilitate a systematic and consistent development of sectoral laws.

33. In this light, when a constitutional court is interpreting statutes, rules, or regulations that fall within the regulator's domain, it must bear in mind the need to enable the regulator to exercise comprehensive jurisdiction. Courts must not impair the functioning of the regulator by taking away certain aspects of the sector outside the regulator's scope, thereby fragmenting regulation and creating plurality of jurisdictions. It is in the

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[47] *Sai Renewable* (supra), paras 38, 40, 41; *Reliance Infrastructure Ltd* (supra), para 38; *Transmission Corpn. of A.P. Ltd. v. Rain Calcining Ltd.*, (2021) 13 SCC 674, para 66; *Maharashtra State Electricity Distribution Co. Ltd. v. Adani Power Maharashtra Ltd.*, (2023) 7 SCC 401, paras 118-121.

interest of good governance through regulation to ensure that there is no proliferation of remedies and there are no parallel, multiple remedial forums. Further, this also ensures that the sectoral law is developed in a coordinated and systematic fashion by the regulator that is equipped to deal with not only legal issues but also has specialised knowledge in other areas.

34. The above principles are also reflected in a recent decision of this Court in *Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd.*[48]. Here, the High Court exercised writ jurisdiction and directed distribution companies to procure power from bidders, who are generating companies, at the prices quoted in their bids till the requisite quantum of power was procured. Allowing the appeal of the distribution companies, this Court held that the High Court was not justified in entertaining the writ petition as the Electricity Act is an exhaustive code and all issues dealing with electricity must be considered by the expert bodies, i.e., the Regulatory Commissions constituted under the Act. The relevant portion is extracted hereinbelow:

> "*128. We find that the High Court was not justified in entertaining the petition. The Constitution Bench of this Court in PTC has held that the Electricity Act is an exhaustive code on all matters concerning electricity. Under the Electricity Act, all issues dealing with electricity have to be considered by the authorities constituted under the said*

[48] (2024) 8 SCC 513.

Act. As held by the Constitution Bench of this Court, the State Electricity Commission and the learned APTEL have ample powers to adjudicate in the matters with regard to electricity. Not only that, these Tribunals are tribunals consisting of experts having vast experience in the field of electricity. As such, we find that the High Court erred in directly entertaining the writ petition when Respondent 1 i.e. the writ petitioner before the High Court had an adequate alternate remedy of approaching the State Electricity Commission.

129. This Court in Reliance Infrastructure Ltd. v. State of Maharashtra has held that while exercising its power of judicial review, the Court can step in where a case of manifest unreasonableness or arbitrariness is made out.

130. In the present case, there is not even an allegation with regard to that effect. In such circumstances, recourse to a petition under Article 226 of the Constitution of India in the availability of efficacious alternate remedy under a statute, which is a complete code in itself, in our view, was not justified."

(emphasis supplied)

35. *Grant of Relief by the High Court*: Applying these legal principles, we will now analyse whether the High Court could have granted relief of aligning the Implementation Agreement with the CERC Regulations, 2019 by exercising writ jurisdiction. The High Court proceeded on the basis that: (i) the appellant-State is a deemed licensee; (ii) the CERC Regulations, 2019 are relevant not only for determination of tariff but also for other purposes and are binding on the appellant-State; and (iii) the 13% cap on free power supply under Note 3, Regulation 55 has the effect of overriding the free power supply clause in the Implementation Agreement since a similar clause in the PPA and PSAs stands overridden as per the CERC's order dated 17.03.2022.

36. On the first aspect of whether the appellant-State is a deemed licensee, it is clear from the impugned order that the High Court has only cited the statutory provisions on licensing but has neither delved into this issue nor arrived at any express conclusion regarding the same. This is perhaps because the parties did not raise or argue the issue before it. However, before us, respondent no. 1 strongly contends that the appellant-State is a deemed licensee, and the appellant has disputed the same.

37. We are of the opinion that this issue need not be determined on merits, but is relevant to show respondent no. 1's conduct in taking contrary positions by filing the writ petition. On the one hand, it is claiming that the appellant being a deemed licensee is a regulated entity under the Electricity Act. The sequitur of this would be that the appellant, and its contractual rights and liabilities, are subject to the CERC's regulatory jurisdiction. However, respondent no. 1 never sought relief against the appellant-State before the CERC, as we have indicated above, and instead filed a writ petition. Considering the contradictory positions of respondent no. 1, it cannot be allowed to approbate and reprobate, or blow hot and cold at the same time to secure relief under the law.

38. The second aspect pertains to the interpretation of CERC Regulations, 2019 by the High Court. We have already dealt with the interpretation of the Regulations hereinabove, and will presently deal with the same in the context of maintainability of the writ petition. Under the Electricity Act, the statutory regulator has been entrusted with discharging the function of tariff determination, including making regulations for the purpose and interpreting the same. Constitutional courts must enable the regulator to comprehensively regulate all aspects of the sector such that remedies are not fragmented and certain issues are not left outside the regulator's domain. The regulator has the expertise, specialisation, and institutional memory to conduct such an interpretative exercise to further the objective of the regulatory regime and systematically lay down legal principles. In this light, the High Court should not have entered into the domain of interpreting these Regulations which deal with tariff determination, as the same falls within the exclusive domain of the CERC. The Electricity Act itself provides the appellate mechanisms by establishing a specialised and permanent tribunal, namely the APTEL, and an appeal before this Court, against the CERC's orders. In view of the existence of a statutory regulatory forum, the

High Court should not have entertained the writ petition by interpreting the CERC Regulations, 2019.

39. Equally, we are of the opinion that the High Court incorrectly relied on the CERC's order dated 17.03.2022 to grant relief to respondent no. 1. As explained above, the CERC's order only deals with the PPA and PSAs despite taking note of Article 5.1 of the Implementation Agreement. Upon reading the order, it is clear that its effect is not that of restraining respondent no. 1 from supplying free power beyond 13%. Hence, it does not in any way adversely affect or prejudice the contractual rights of the appellant-State. Hence, the High Court could not have proceeded on the basis of this order to grant the relief of modifying the Implementation Agreement.

X. *Conclusion:*

40. In view of the above reasons, we hold that CERC Regulations, 2019 do not prohibit respondent no. 1 from supplying free power beyond 13% to the appellant-State, and the Implementation Agreement does not stand overridden by the operation of these Regulations. Further, a writ petition before the High Court for aligning the Implementation Agreement with the CERC Regulations, 2019 and the CERC's order dated 17.03.2022 is not

maintainable. Once respondent no. 1's prayer for relief was rejected by the CERC and it specifically held only the PPA and PSAs to stand overridden, which finding was not further appealed, it would not be open for respondent no. 1 to seek modification of the Implementation Agreement by way of a writ petition before the High Court.

41. For the reasons stated above, we allow Civil Appeal No. 12883/2024 and set aside the order and judgment of the High Court in CWP 7667/2023 dated 28.05.2024.

42. Pending applications, if any, stand disposed of.

43. No order as to costs.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

.....J.
[JOYMALYA BAGCHI]

NEW DELHI;
JULY 16, 2025