APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL No. 267 OF 2019

Dated: 5th December, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

PTC INDIA LIMITED
2nd Floor, NBCC Tower,
Bhikaji Cama Place,
New Delhi – 110016. …Appellant

VERSUS

1. **PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**
   Through its Secretary
   SCO 220-221, Sector 34A,
   Chandigarh – 160022.
   … Respondent No.1
2. **PUNJAB STATE POWER CORPORATION LIMITED**
   Chief Engineer/ARR & TR
   The Mall, PSEB Head Office, Baradari
   Patiala – 147001, Punjab. … Respondent No.2
3. **EVEREST POWER PRIVATE LIMITED**
   Through its Chairman & Managing Director
   1st Floor, Plot No. 143-144,
   Udyog Vihar, Phase-IV
   Gurgaon – 122015, Haryana. … Respondent No.3

Counsel for the Appellant(s) : Mr. Amit Kapur
Akshat Jain
Avdesh Mandloi
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Shikhar Verma
Rishabh Bhardwaj

Sayan Ghosh

Counsel for the Respondent(s) : Gargi Kumar for Res.1

Anand G. Ganesan
Swapna Seshadri
Amal Nair
Ashwin Ramanathan for Res.2

Parinay Deep Shah
Kartik Sharma Ritika Singh for Res.3

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

1. Seldom are we confronted with an Appeal such as the present. Having invoked the jurisdiction of the Punjab State Electricity Regulatory Commission ("PSERC" for short), by filing Petition No. 71 of 2015 and praying for their trading margin to be fixed, the Appellant herein, midway through the said proceedings, took a complete u-turn and questioned the very jurisdiction of the PSERC to adjudicate their claim for determination of the trading margin payable to them and, on the PSERC rejecting their challenge to its jurisdiction and in holding that the Appellant could not approbate and reprobate, have thereafter invoked the appellate jurisdiction of this Tribunal. Stranger still is that the challenge mounted by the Appellant, to the impugned Orders whereby their trading margin was determined, is not on merits but on the ground of inherent lack of jurisdiction of the PSERC to determine their trading margin, since the transaction was an inter-state trading transaction.

2. Further, by way of a sidewind and contending that consent does not confer jurisdiction, the appellant seeks to have the order of the PSERC in

Petition No.55 of 2012 dated 06.11.2012, and the Tripartite Agreement dated 03.01.2013, set aside though no challenge was mounted thereto either before the PSERC or even in the present appeal. On the contrary, the Appellant had, in Petition No.71 of 2015 filed by them before the PSERC, sought fixation of their Trading margin, under Section 62 of the Electricity Act, 2003 for the period 01.04.2014 to 31.03.2015 in terms of (a) Power Purchase Agreement dated 25.07.2005; (b) Power Sale Agreement dated 23.03.2006; (c) Tri-partite Agreement between Everest Power Private Limited, PSPCL and PTC India Limited dated 03.01.2013 etc.

3. The Appellant-PTC, an inter-state trading licensee holding a Category F inter-state trading licence granted by the Central Electricity Regulatory Commission on 30.06.2004, had contracted to:- (a) purchase the entire saleable power, from the 100 MW Malana II Hydro Electric Project in Kullu, Himachal Pradesh of the 3rd Respondent-Everest Power, at the 220/400 kV Parbati Pooling sub-station of the Central Transmission Utility at Panarsa in Himachal Pradesh in terms of the Power Purchase Agreement dated 25.07.2005executed by it with the 3rd Respondent-Everest Power; (b) supply power from the Delivery Point in Himachal Pradesh to PSPCL at the Drawal Point in Punjab, through the CTU network under long term open access, in terms of the Power Sale Agreement dated 23.03.2006 executed by it with PSPCL.

4. By way of the present appeal, the Appellant-PTC India Limited seeks to challenge the Order passed by the Punjab State Electricity Regulatory Commission in Petition No. 71 of 2015 dated 11.02.2019, as well as the Orders passed in Petition Nos. 48 and 49 dated 13.02.2019. Both Petition Nos. 48 and 49 of 2016 were disposed of, by the PSERC by its order dated 13.02.2019, in terms of the earlier Order passed by it in Petition No. 71 of 2015 dated 11.02.2019. As noted hereinabove, the

Orders, impugned in this Appeal, were passed by the PSERC in the Petitions filed before it by PTC wherein their sole prayer was for determination of their trading margin.

5. In its Order in Petition No. 71 of 2015 dated 11.02.2019, the PSERC observed that: (a) the trading margin payable by the 2nd Respondent-Punjab State Power Corporation Ltd to the appellant-PTC, for facilitating supply of 100 MW power from Malana II Hydro Electric Project owned and operated by Everest Power Pvt. Ltd, should be Rs. 0.01 per kWh from FY 2014-15 till the end of the 12th tariff year i.e., 31.03.2024 for the entire billable energy; (b) the 2nd Respondent PSPCL shall recover/adjust the amount of excess trading margin already paid to the appellant PTC beyond 31.03.2014; and (c) for fixing the trading margin from the 13th tariff year i.e., from FY 2024-25 onwards (from 01.04.2024), the appellant-PTC shall approach the PSERC at the appropriate time.

6. For a better understanding of this peculiar case, we may need to note certain events leading upto the filing of the present appeal. A Power Purchase Agreement ("PPA" for short) was executed between the Appellant and the 3rd Respondent on 25.07.2005 whereby the Appellant agreed to purchase the saleable power, generated by the 3rd Respondent from its 100 MW Malana-II Hydro Electric Power in District Kullu, Himachal Pradesh, at the 220/ 400 kV Parbati Pooling Station (Central Transmission Utility) at Banala in Himachal Pradesh (delivery point). Thereafter, a Power Sale Agreement ("PSA" for short) was executed by the Appellant with the Punjab State Electricity Board (the predecessor of the 2nd Respondent) on 23.03.2006. Article 10.1 of the said PSA provided for the applicable tariff of the generator which was capped at Rs.2.64 per unit. Article 10.1 also provided for a trading margin at Rs.0.05 per Kwh for the first 12 years and Rs.0.10 per Kwh thereafter.

7. The PSEB (predecessor of the 2nd Respondent) filed Petition No. 11 of 2006 before the PSERC on 10.05.2006 seeking approval of the PSA dated 23.03.2006 signed by it with the Appellant for purchase of power from Malana-II Hydro Electric Power project and determination of tariff and related matters. In its order, in Petition No. 11 of 2006 dated 24.01.2007, the PSERC noted that the project, for which the PSA had been signed, was a run of the river project with limited pondage; in terms of the PPA signed between PTC and the Developer on 25.07.2005, the Developer had to supply 12% of the energy output for the first twelve years from the Commercial Operation Date (COD), and 18% of the energy output from the start of the thirteenth year till the end of the term of the agreement, free of cost to the State of Himachal Pradesh; the final PSA between the appellant PTC and PSEB, for sale of power from the project, had been filed before the Commission by 30.09 2006; the said PSA was accompanied by a copy of the PPA signed between PTC and the 3rd Respondent; and, taking note of the clarifications issued by Ministry of Power, the PSA signed between PTC and PSEB, for sale of power from this Project, was covered under the provisions of the Tariff Policy regarding procurement of power. In Para 3.6.2 of its order, the PSERC noted that the PSA specified a capped tariff for purchase of power by PTC and the trading margin to be charged by PTC. The Appellant's trading margin for Tariff Years 1-12 was noted as Rs.0.05 per unit and for the Tariff Years 13-40 as Rs.0.10 per unit.

8. The PSERC thereafter noted in Para 3.7, of its order in Petition No. 11 of 2006 dated 24.01.2007 with respect to Trading Margin, that Clause 10.1 of the PSA stipulated that the trading margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in the PSA, as may be laid down by the CERC from time to time. The PSERC agreed with this stipulation and observed that

sale of electricity by PTC, from this Project located in Himachal Pradesh, to PSEB was “inter-state trading of electricity”; as per Section 79 (1)(j) of the Electricity Act, 2003, the CERC shall fix the trading margin in the inter-state trading of electricity, if considered necessary; in light of the above, the applicable trading margin shall be as fixed by CERC from time to time; and, in the eventuality of CERC not fixing the trading margin for any particular period, it shall be such margin last fixed by CERC.

9. The PSERC concluded holding that, subject to PSEB complying with the directions given by it in the order, approval was granted to the electricity purchase and procurement process of PSEB including the capped tariff at which the electricity should be procured through the PSA between PSEB and PTC for supply of power from the 100 MW Malana-II Hydro Electric Project in District Kullu in the State of Himachal Pradesh being developed by the 3rd Respondent. The PSERC further held that, as and when tariff was determined by it, such tariff or capped tariff whichever was lower, shall be applicable; and, any changes if required to be made at a later stage in respect of the approval granted by the Commission in this Order, shall be subject to prior approval of the Commission.

10. Petition No. 34 of 2011 was filed before the PSERC by the Appellant herein praying, among others, to permit the 2nd Respondent herein to purchase electricity from them as per this Petition, and at a tariff calculated in accordance with the applicable provisions/ norms in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 and as per the revised inter-connection and delivery point directed by the Central Government in order to balance the risks amongst the stakeholders; and allow the Petitioner (Appellant herein) to recover its trading margin as per the PSA.

11. With respect to the Trading Margin payable to the Appellant/ Petitioner at Rs.0.05/ kWh for the first 12 years and Rs.0.10/ kWh from the 13th year onwards as provided in the PSA, the Commission, in its order in Petition No. 34 of 2011 dated 17.08.2012, noted that Clause 10.1 of the PSA stated that the trading margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in the PSA, as may be laid down by the Central Electricity Regulatory Commission (CERC) from time to time; sale of electricity by the Appellant from this Project located in Himachal Pradesh to the 2nd Respondent was "inter-state trading of electricity" and, as per Section 79(1)(j) of the Electricity Act, the CERC was to fix the trading margin in such cases; the Commission had, therefore, decided that the applicable trading margin shall be as fixed by the CERC from time to time; and, in the eventuality of CERC not fixing the trading margin for any particular period, it shall be such margin last fixed by the CERC.

12. The PSERC then noted the submission, urged on behalf of the Appellant, that it was not a party to Petition No. 11 of 2006 filed by the 2nd Respondent seeking approval of the PSA; they were not even aware of the order as they were not intimated by the 2nd Respondent even after more than five years; the directions issued by the PSERC in its order dated 24.01.2007, for amending the PSA dated 23.03.2006, were not formal amendments, but affected the commercial bargain agreed for the sale of power; and these amendment were specifically being rejected by the 3rd Respondent which also affected the rights of the Appellant under the PPA/ PSA; and, therefore, the present Petition had been filed by them.

13. The PSERC then observed that it had passed Orders, in Petition No. 11 of 2006 dated 24.01.2007, granting approval to the PSA subject to carrying out amendments to certain clauses of the PSA; it was clear that

the Commission had modified the terms of the PSA; the Commission had exercised jurisdiction vested in it under the statute while issuing the Order dated 24.01.2007; as the Order dated 24.01.2007 was valid and subsisting, it was necessary for the parties to ensure that the said Order was complied with, the inter-se agreement was suitably amended, and the directions issued by the Commission, in the Order dated 24.01.2007, was incorporated; the Commission had granted approval for electricity purchase and procurement process under the PSA subject to the 2nd Respondent complying with the directions of the Commission in its Order dated 24.01.2007; the 2nd Respondent was required to execute the amendments in the original PSA and get it signed from the Appellant; the 2nd Respondent had failed to get these amendments executed from the Petitioner (Appellant herein), and jointly sign them along with these amendments in the original PSA, despite passage of a period of five years; and, in view of the above findings and decisions of the Commission, both the 2nd Respondent and the Appellant were required to get the PSA suitably amended and incorporate the directions of the Commission in its Order dated 24.01.2007 and, thereafter, the Petition may be filed, along with audited accounts of the project cost and other relevant documents, before the Commission for determination of the tariff under the relevant provisions of the Electricity Act and the Regulations. Petition No. 34 of 2011 was disposed of accordingly.

14. Thereafter, the Appellant herein filed Petition No. 55 of 2012 before the PSERC seeking review of the order passed by the PSERC in Petition No. 34 of 2011 dated 17.08.2012. In the written submissions jointly filed by them before the Commission, all the parties stated that they had agreed to all the amendments except the amendments relating to tariff; the parties had agreed that, in respect of condition No. 10.1 relating to tariff of electricity generated by the 100 MW Malana-II HEP of the 3rd

Respondent, the amended provision be incorporated in the PSA; and the Commission may, therefore, substitute the last para of the Order dated 17.08.2012.

15. Consequently, the PSERC, in its order in Petition No. 55 of 2012 dated 06.11.2012, held that, in view of the agreed written submissions dated 06.11.2012 filed jointly by the Appellant, the 2nd and the 3rd Respondents, the last Para of the order dated 17.08.2012 was being modified as under:

> *"In view of the above findings and decisions of the Commission, Respondent No. 1 (the 2nd Respondent herein) and the Petitioner (the Appellant herein) need to get PSA suitably amended and incorporate the directions of the Commission issued vide its Order dated 24.01.2007 except in respect of the condition No.10.1 related to tariff of the electricity generated by 100 MW Malana-II, HEP of EPPL which shall be now amended to incorporate in the Power Sale Agreement as under:-*
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> *"The Tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission."*

16. The Commission concluded holding that a petition may be filed, along with audited accounts of the project cost and other relevant documents for determination of tariff under the relevant provisions of the Electricity Act and the Regulations. The review petition was disposed of accordingly.

17. A tripartite agreement was, thereafter, executed by the Appellant with the 2nd and 3rd Respondents on 03.01.2013 amending the PSA entered into between the parties earlier. By the tripartite agreement, Articles 3.1 and 10.1 of the original PSA were substituted. In terms of the amended Article 3.1, the parties agreed that the PSERC shall determine

the tariff for the sale of the contracted capacity by the Appellant to the 2nd Respondent and, consequently, the tariff for the sale of the contracted capacity by the 3rd Respondent to the Appellant in terms of the Regulations of the Commission and as per the earlier orders passed by the Commission on 17.08.2012 and 06.11.2012 in Petition Nos. 34 of 2011 and 55 of 2012. The parties also agreed that the PSERC shall be the appropriate Commission for adjudication of all disputes arising both under the PPA and the PSA.

18. The 3rd Respondent herein filed Petition No. 54 of 2012 before the PSERC under Section 62 of the Electricity Act seeking determination of the tariff, for the electricity supplied from its 100 MW Malana-II Hydro Electric Project to PSPCL, the successor of PSEB. An Interim Order was passed therein, by the PSERC on 17.01.2013, fixing the provisional tariff at Rs. 3.58 per unit.

19. Thereafter, by its order in Petition No. 54 of 2012 dated 27.11.2013, the PSERC determined the tariff for supply of electricity by the 3rd Respondent, through the Appellant, to the 2nd Respondent, and also the applicable trading margin for the Appellant for the years 2012-13 and 2013-14. By the said Order dated 27.11.2013, the PSERC confirmed the tariff payable by PSPCL to PTC, and clarified that the capped fixed tariff in the PSA was inapplicable. The tariff was held payable by the 2nd Respondent to the Appellant, and comprised of the total amount payable including the trading margin of the Appellant.

20. In the afore-said order dated 27.11.2013, the PSERC took note of the Tripartite Agreement executed by the Appellant, the 2nd Respondent and the 3rd Respondent on 03.01.2013 pursuant to the disposal of Review Petition No. 55 of 2012 dated 06.11.2012. On the issue of trading margin, the PSERC observed that, as the CERC had not fixed

the trading margin for long term buy-long term sell contracts, the Commission considered it appropriate to fix trading margin for FY 2012-13 and FY 2013-14 in line with the original provision in the PSA dated 23.03.2006 as Rs.0.05 per kWh for the billable energy supplied/ to be supplied during this period by the Appellant to the 2nd Respondent from Malana-II HEP; and the trading margin beyond this period shall be fixed by the Commission on filing of an application by the Appellant, along with the tariff application to be filed by the generating company for determination of tariff as per the applicable tariff regulations.

21. Aggrieved by the order passed by the PSERC, in Petition No. 54 of 2012 dated 27.11.2013, the 3rd Respondent herein filed Appeal No. 30 of 2014 and the 2nd Respondent filed Appeal No. 35 of 2014 before this Tribunal. By its Order dated 12.11.2014, this Tribunal upheld the tariff determined by PSERC, and expressly rejected the 2nd Respondent's contention that the capped tariff remained valid. The PSERC issued a consequential order on 04.12.2014, amending the Tariff Order for FY 2012-13 and FY 2013-14 in Petition No. 54 of 2012. It is relevant to note that, in Appeal Nos. 35 and 30 of 2014 filed by them before this Tribunal challenging the order of the PSERC in Petition No. 54 of 2012 dated 27.11.2013, neither the 2nd nor the 3rd Respondent questioned the jurisdiction of the PSERC, and the challenge to the said order was on merits.

22. The 2nd Respondent, subsequently, challenged both the Tribunal's judgment dated 12.11.2014, and the Consequential Order dated 04.12.2014, by filing Civil Appeals No. 3346-3347 of 2015 on 12.01.2015. The Supreme Court, by its Order dated 24.04.2015, upheld this Tribunal's judgement and dismissed the 2nd Respondent's Civil Appeals. As a result, the tariff for the 3rd Respondent as determined by

PSERC, as confirmed by this Tribunal, and upheld by the Supreme Court, has attained finality.

23. Petition No. 37 of 2014 was filed by the 3rd Respondent herein seeking approval of the PSERC towards Annual Fixed Cost of the 100 MW Malana-II HEP for the period 01.04.2014 to 31.03.2015, and truing up of expenses for FY 2012-13 and FY 2013-14, under Section 62 of the Electricity Act, 2003 read with Regulation 56(2), (3) and (4) of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005. In this Petition, the Appellant herein filed Application No. 8 of 2015 requesting the PSERC to fix their trading margin for sale of electricity to PSPCL from the 100 MW Malana-II Hydro Electric Power project of M/s Everest Power Private Limited.

24. In its order, in Petition No. 37 of 2014 dated 31.08.2015, the PSERC held that a separate petition was required to be filed by the Appellant for determination of trading margin for FY 2014-15 for decision by the Commission on merits after due process. The Appellant was directed to file a petition for determination of trading margin for FY 2014-15 by the Commission.

25. The Appellant filed Petition No. 71 of 2015 under Section 62 of the Electricity Act, before the PSERC for their Trading margin to be fixed for the period 01.04.2014 to 31.03.2015. During the course of hearing of the said Petition, the PSERC had, vide its order dated 10.05.2016, directed the Appellant to submit detailed calculations justifying the trading margin for prudence check. It had also directed the 2nd Respondent to give justification for releasing payment after 01.04.2014 for the trading margin at the rate of Rs.0.05 per kWh. It is in their reply to the afore-said order dated 10.05.2016, that the Appellant contended, for the first time, that the PSERC did not have jurisdiction to determine the trading margin in

the manner it sought to, in terms of the order dated 10.05.2016, as the power to fix trading margin for inter-state trading of electricity lay with the CERC.

26. In the impugned order, in Petition No.71 of 2015 dated 11.02.2019, the PSERC observed that in the Tripartite Agreement, signed on 03.01.2013 between PSPCL, PTC and EPPL, it had been provided that the trading margin and other charges payable additionally to PTC shall be as per the decision and approval of the Commission; in the instant case, the trading margin was not fixed by CERC, rather it was provided in the PSA; and, as such, the issue of trading margin had originated from the provision in the PSA.

27. The PSERC observed that its earlier Order in Petition No. 54 of 2012 dated 27.11.2013, and its Order in Petition No. 37 of 2014 dated 31.08.2015 qua trading margin, were never challenged by PTC and had attained finality; subsequently, PTC had filed this petition for determination of trading margin for FY 2014-15 and two other petitions for the same for FY 2015-16 & FY 2016-17; PTC had accepted the trading margin paid by PSPCL up to April, 2016 i.e. even beyond the period for which the trading margin was approved by the Commission; it was not open to PTC to approbate and reprobate the issue of determination/fixing of trading margin by the Commission; they did not find any substance in PTC's contention that the Commission had no jurisdiction in determining/fixing the trading margin; and the plea of PTC in this regard was rejected.

28. The PSERC found it just and fair, in the present scenario of declining trading margins, to fix the PTC's trading margin as Rs.0.01 per kWh from FY 2014-15 onwards which shall be payable by PSPCL for the entire billable energy. PSPCL was directed to recover/adjust the amount

of excess trading margin already paid by it to PTC beyond 31.03.2014, upto which the Commission had allowed the trading margin to be paid in its Order dated 27.11.2013 in Petition No. 54 of 2012. The Commission found it prudent to hold that this trading margin of Rs. 0.01 per kWh shall be applicable upto the end of the 12th tariff year; and for fixing the trading margin, from the 13th tariff year onwards, the appellant-PTC shall approach the Commission at the appropriate time.

II. RIVAL SUBMISSIONS:

29. Elaborate submissions, both oral and written, were made by Sri Amit Kapur, learned Counsel for the appellant, Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent, and Sri Pranay Deep Shaw, Learned Counsel for the 3rd Respondent. It is convenient to examine the rival contentions under different heads. Before doing so, it is useful to note the contents of the impugned order passed by the PSERC, albeit in brief.

III. CONTENTS OF THE IMPUGNED ORDERS IN BRIEF:

30. Petition No. 71 of 2015 was filed by the Appellant before the Punjab State Electricity Regulatory Commission ("PSERC" for short) for their Trading margin to be fixed, under Section 62 of the Electricity Act, 2003 for the period 01.04.2014 to 31.03.2015, with respect to the sale of 100 MW power from Malana II Hydro Electric Project to Punjab State Power Corporation Limited through PTC (India) Limited in terms of (a) Power Purchase Agreement between PTC India Limited and Everest Power Private Limited dated 25.07.2005; (b) Power Sale Agreement between PTC India Limited and PSPCL dated 23.03.2006; (c) Tri-partite Agreement between Everest Power Private Limited, PSPCL and PTC India Limited dated 03.01.2013; and (d) Orders dated 27.11.2013 passed in Petition No. 54 of 2012 and 31.08.2015 in Petition No. 37 of 2014 passed by the Commission.

31. In the impugned order dated 11.02.2019, the PSERC noted that it had earlier, vide Order dated 10.05.2016, directed PTC to submit detailed calculations justifying the Trading Margin for prudence check, and had directed PSPCL to file the statement of the bills (copies of the bills has to be annexed with the statement) paid to PTC showing that payments of interest or rebate as the case be, had been actually made / claimed by PSPCL; PSPCL was also directed to give justification for the payment released after 01.04.2014 for the Trading Margin at the rate of Rs.0.05 per kWh; in reply thereto, PSPCL had submitted that it had availed rebate whenever advanced payments were made; in reply to the query raised by the Commission, vide Order dated 10.05.2016, PTC had submitted that the Commission, in the present petition, did not have jurisdiction to determine the Trading Margin, in the manner it sought to, in terms of the Order dated 10.05.2016; and that, in terms of Section 79(1)(j) of the Electricity Act, 2003, the CERC had the power to fix the trading margin (if considered necessary) in inter-state trading of electricity; in terms of Section 86(1)(j) of the Electricity Act, 2003 also, the appropriate state commission had the power to fix the trading margin in intra-state trading of electricity; the present case involved inter-state trading of electricity, wherein the Commission did not have the jurisdiction to fix the Trading Margin; parties could confer jurisdiction to one of several judicial or *quasi- judicial* bodies but could not confer jurisdiction on a forum which had not been bestowed with it; the said position has been upheld by the Supreme Court in **AVM Sales Corporation vs. Anuradha Chemicals: (2012) 2 SCC 315;** the issue of jurisdiction of a court can be raised by any party at any stage of the proceedings (refer: **Sarwan Kumar vs. Madan Lal: (2003) 4 SCC 147** and **Jagmittar Sain Bhagat vs. Health Services, Haryana:** (2013) 10 SCC 136); the reason for raising the issue of jurisdiction, presently, was because the Commission did not have jurisdiction to get into an exercise

of determination of trading margin; in the past, the Commission had approved the trading margin of Rs. 0.05/kWh, without going into a process of determination, as the Commission sought to do, by the Order dated 10.05.2016; the issue of jurisdiction can be raised at any stage of proceedings; even if it is assumed that the Commission has jurisdiction to determine the trading margin of the Petitioner, the same would be limited to prudence check based on market forces for the trading margin, being sought by the Petitioner; however the information sought for, vide Order dated 10.05.2016, would tantamount to going into a process of determination of trading margin, for which the Commission does not have jurisdiction; the Commission has already conducted a prudence check for the trading margin being claimed by the Petitioner (which had been deliberated and agreed to between the Parties) at the time of approval of the power procurement documents, specifically the terms of the PSA; and subjecting the Trading Margin, which had already been approved, to year on year review/ fixing would not only hit the interest of PTC under the PPA/PSA, but would also be contrary to the scheme of the Act.

32. The PSERC, thereafter, recorded its findings and decisions. It observed that PTC had entered into a PPA with EPPL on 25.07.2005 for the purchase of the entire capacity and electricity generated from the Malana-II HEP, and had further signed a back to back PSA with the erstwhile PSEB (now PSPCL) on 23.03.2006 for sale of power to be supplied by EPPL. After noting the original Clause 10.1 of the PSA regarding trading margin, the PSERC observed that the said clause 10.1 of the PSA, along with other clauses, was amended vide Tripartite Agreement dated 03.01.2013 signed between PSPCL, PTC and EPPL; the Commission, vide Order dated 27.11.2013 in Petition No. 54 of 2012, filed by EPPL for determination of tariff, had fixed the trading

margin for FY 2012-13 and FY 2013-14 in line with the original provision in the PSA dated 23.03.2006 as five paise per kWh for the billable energy supplied / to be supplied during this period by PTC to PSPCL from Malana-II HEP; it was decided that trading margin beyond this period shall be fixed by the Commission on filing of an application by PTC along with the tariff application to be filed by the generating company for determination of tariff as per the applicable tariff regulations; EPPL had filed Petition No. 37 of 2014 on 10.02.2015 for approval of annual fixed cost of the 100 MW Malana II Hydro-Electric Project for the period from 01.04.2014 to 31.03.2015, and truing up of expenses for FY 2012-13 and FY 2013-14; PSPCL had raised objections regarding fixation of trading margin during the course of proceedings of the aforesaid petition; thereafter, PTC had filed Application No. 8 of 2015 on 17.08.2015 seeking fixation of trading margin belatedly at the closing stage of the petition; PSPCL had also opposed the submissions of PTC for payment of trading margin; in view of the same, the Commission had opined that, in the interest of justice, the matter needed to be examined in detail; the Commission had therefore decided, in its Order in Petition No.37 of 2014 dated 31.08.2015, that a separate petition was required to be filed by PTC for determination of trading margin for FY 2014-15 for decision by the Commission on merits after due process; accordingly, PTC had filed the instant petition, and had prayed to fix the Trading Margin at Rs. 0.05/kWh for the period from 01.04.2014 to 31.03.2015, with respect to sale of 100 MW power from Malana-II Hydro Electric Project to PSPCL in terms of the PSA read with the PPA, Tripartite Agreement and Orders dated 27.11.2013 & 31.08.2015 in Petition Nos. 54 of 2012 & 37 of 2014 respectively passed by the Commission.

33. The PSERC then noted that PTC had challenged the jurisdiction of the Commission in the instant petition stating that the jurisdiction for

fixing the trading margin, for an inter-State project like Malana-II, lay with CERC under Section 79(1))(j) of the Electricity Act, 2003 whereas the jurisdiction of the Commission for fixing trading margin under Section 86(1)(j) was limited to intra-State trading of electricity; and, therefore clause 10.1 of the PSA as modified in the Tripartite Agreement was void *ab initio*; parties could confer jurisdiction to one of the several judicial or quasi-judicial bodies, but could not confer jurisdiction on a forum which had not been bestowed with it; and they had placed reliance on **AVM Sales Corporation Vs. Anuradha Chemicals: (2012) 2 SCC 315, Sarwan Kumar Vs. Madan Lal: (2003) 4 SCC 147,** and **Jagmittar Sain Bhagat Vs. Health Services, Haryana: (2013) 10 SCC 136.**

34. The PSERC observed that the entire electricity generated from the Malana-II HEP was being supplied to PSPCL in terms of the PPA/PSA; in the Tripartite Agreement, signed on 03.01.2013 between PSPCL, PTC and EPPL, it had been provided that the tariff for the contracted capacity payable by PSPCL to PTC including all aspects of tariff element would be determined by the Commission, and trading margin and other charges payable additionally to PTC shall be as per the decision and approval of the Commission; it was also provided in the Tripartite Agreement that the parties had agreed that PSERC shall be the Appropriate Commission in regard to adjudication of all disputes on the sale of the contracted capacity by EPPL to PTC, and by PTC to PSPCL, and the PPA & PSA are to be read with the above modifications; in the instant case, the trading margin was not fixed by CERC, rather it was provided in the PSA; and, as such, the issue of trading margin had originated from the provision in the PSA.

35. After extracting its earlier Order in Petition No. 54 of 2012 dated 27.11.2013, and its Order in Petition No. 37 of 2014 dated 31.08.2015 qua trading margin, the PSERC observed that these Orders were never

challenged by PTC and had attained finality; subsequently, PTC had filed this petition for determination of trading margin for FY 2014-15 and two other petitions for the same for FY 2015-16 & FY 2016-17; PTC had accepted the trading margin paid by PSPCL upto April, 2016 i.e. even beyond the period for which the trading margin was approved by the Commission; PTC itself had pleaded that CERC had still not fixed the trading margin for long-term contracts for inter-State trading of electricity; PTC, while challenging the jurisdiction of the Commission for fixing trading margin, had however submitted that the jurisdiction of the Commission would be limited to prudence check based on market forces for the trading margin sought by it; it was not open to PTC to approbate and reprobate the issue of determination/fixing of trading margin by the Commission; under these circumstances, the case law submitted by PTC would not be applicable; considering the above, the PSERC did not find any substance in PTC's contention that this Commission had no jurisdiction in determining/fixing the trading margin; and the plea of PTC in this regard was rejected.

36. On the issue of Trading Margin, the PSERC observed that PTC had submitted that, in terms of PPA and PSA, it had incurred the costs for opening and maintaining a letter of credit (LC), operational/control room expenses for scheduling of power and real time revisions in schedule, obtaining long term open access from the Central Transmission Utility (CTU) on behalf of PSPCL for adequate transmission capacity and provision of payment security mechanism to the CTU, obtaining and maintaining the Trading Licence, increased net-worth requirements by CERC & return on net worth and administrative & legal expenses; these costs had to be necessarily apportioned/ recovered from all the transactions being undertaken by PTC; it had released advance payments to EPPL for meeting statutory obligations, and did not charge

interest on the same; the major risks undertaken by PTC pertained to contract dishonour, late payment and non-payment by the purchaser; though PSPCL was making payment for long-term open access charges, all the obligations and risks under the Bulk Power Transmission Agreement signed with PGCIL lay with PTC.

37. The PSERC thereafter noted that EPPL, supporting PTC"s claim for trading margin, had submitted that PSERC, vide Notification No. PSERC/Secy/29 dated 18.05.2007, *inter- alia* held that the maximum intra-state trading margin shall not exceed 6 paise/KWH including all charges except the charges for scheduling energy and open access; based on this, PTC was entitled to trading margin, and such trading margin could be fixed upto 6.0 paise/ kWh; prior to CERC (Fixation of Trading Margin) Regulations 2010, CERC had fixed the trading margin based on the earlier regulations i.e. CERC (Fixation of Trading Margin) Regulations, 2005; such Regulations did not differentiate between long-term and short-term trading of electricity and trading margin was capped at 4.0 paise per kWh; and, as per the provisions of the PSA, PTC was eligible for trading margin.

38. The PSERC then noted the submission of PSPCL that the PPA and PSA were back to back contracts and there was no role/responsibility of PTC; trading was a licensed activity under the Electricity Act, 2003; irrespective of whether the present sale and purchase takes place, PTC had to maintain its trading licence; any late payment attracted interest and any non-payment was to the risk of PSPCL and not of PTC; the late payment surcharge was billed in the subsequent invoice(s) and paid by PSPCL as and when the bill for the same was raised by PTC; PTC had not raised any bill for late payment surcharge/interest; PSPCL continued to pay the trading margin after 01.04.2014 as provisional/adhoc payment to avoid any default on the part of PSCPL; the trading margin had been

paid by PSPCL till 31.03.2016 on adhoc basis to PTC subject to determination by the Commission; PTC was not incurring any of the risks mentioned in the Statement of Reasons issued by CERC while framing the CERC (Fixation of Trading Margin) Regulations, 2010 i.e. default risk, late payment risk, contract dishonour risk and inflationary risk; in West Bengal, PTC was being paid trading margin of 4.0 paise for power procured from sources outside India which involved substantial risk in the form of re-sale, dealing with sovereign States and payment in foreign exchange etc; NVVN was selling bundled power from various sources of unallocated quota of NTPC for selling to distribution utilities which entailed substantial risk in this process; such transactions involved co-ordination with many States incurring all the risks and the relevant open access charges; similarly, SECI was also a govt. enterprise set up by MNRE to facilitate multiple inter-State sale and purchase of solar power; SECI floated tenders for competitive bidding, invited generators to participate in the bidding processes of various States and coordinated the inter-State procurement by establishing payment security mechanism and transmission charges etc which involved substantial risks; in the Karcham Wangtoo project, sale was being made to four States and PTC had undertaken all the risks associated with the sale of power in multiple States; in the instant case, PTC was not rendering any valuable service; and there was no effective role of PTC warranting any trading margin to be paid.

39. The PSERC observed that CERC did not fix the trading margin for long-term transactions, and had left it to market forces; in the Statement of Reasons of the CERC (Fixation of Trading Margin) Regulations, 2010, it was stated that traders were required to be compensated for the risks inherent in the trading business i.e. Default risk, Late payment risk, Contract dishonor risk and Inflationary risk; however, CERC had

expressed the view that, where traders enter into long-term power purchase agreements of a duration exceeding a year, the risks cannot be completely mitigated through a trading margin; since the long-term power procurement market was witnessing competitive forces at work, determination of an appropriate trading margin be best left to the market forces; accordingly, in order to determine the trading margin in the instant petition, PTC was directed to clarify the basis on which it was demanding the trading margin of Rs. 0.05 per kWh, submit detailed calculations justifying the same and the information regarding trading margins which the petitioner was getting from power utilities in other States pertaining to long term PSAs; and, despite repeated requests by the Commission, PTC did not furnish the requisite information as sought for by the Commission.

40. The PSERC then noted that PTC had mentioned three major risks being under taken by it i.e. contract dishonour, late payment and non-payment by PSPCL; the Commission found that these were fully taken care of in various clauses of the contract documents; as regards various expenses enumerated by PTC, the Commission found that these were apportioned to all transactions done by PTC; and, as such, PTC was not incurring any substantial expenditure specific to this project.

41. The Commission also noted that PTC had not been involved in various legal cases related to the transactions between EPPL and PSPCL; the petition for determination of AFC was filed by EPPL and defended by PSPCL; also, in the proceedings against AD Hydro Power Ltd. in the Supreme Court, EPPL had directly impleaded PSPCL for payment of transmissions charges, and not PTC as an intermediary; further, the Commission was not convinced of the submissions of PTC with regard to trading margin being paid to it in various other transactions in the range of Rs. 0.05 per kWh; in one case, it was an international

transaction, in the second, power was being supplied to multiple States, and in other cases, it was bundling of renewable power with conventional power or exclusively renewable power and therefore bore no similarity to the case on hand.

42. In view of the above and considering the submissions and contentions of the parties, the Commission noted that PTC did not furnish the requisite information as sought by the Commission to facilitate fixing of the trading margin for PTC. The Commission was of the considered opinion that, in the instant case, PTC's role was limited and risks were marginal as all the risks were sufficiently covered in the contract documents, and a secure payment mechanism was provided in the PSA ensuring payment to PTC by PSPCL. Accordingly, the Commission found it just and fair, in the present scenario of declining trading margins, to fix the PTC's trading margin as Rs.0.01 per kWh from FY 2014-15 onwards which shall be payable by PSPCL for the entire billable Energy; however, PSPCL shall recover/adjust the amount of excess trading margin already paid by it to PTC beyond 31.03.2014, upto which the Commission had allowed the trading margin to be paid in its Order dated 27.11.2013 in Petition No. 54 of 2012. The Commission found it prudent to hold that this trading margin of Rs. 0.01 per kWh shall be applicable upto the end of the 12th tariff year; and for fixing the trading margin, from the 13th tariff year onwards, PTC shall approach the Commission at the appropriate time.

43. Petition No. 48 of 2016 was filed for fixing the Trading Margin of PTC India Limited under Section 62 read with Section 86 (1) (b) of the Electricity Act, 2003 for the period 01.04.2015- 31.03.2016 with respect to sale of 100 MW power from Malana II Hydro Electric Project to Punjab State Power Corporation Limited through PTC (India) Limited in terms of (a) Power Purchase Agreement between PTC India Limited and Everest

Power Private Limited dated 25.07.2005; (b) Power Sale Agreement between PTC India Limited and PSPCL dated 23.03.2006 (c) Tripartite Agreement between Everest Power Private Limited, PSPCL and PTC India Limited dated 03.01.2013, and (d) Order dated 27.11.2013 passed in Petition No. 54 of 2012.

44. In its order dated 13.02.2019, the PSERC observed that the present petition, being similar to Petition No. 71 of 2015 filed by PTC for fixing the trading margin for the period 01.04.2014 to 31.03.2015 for the sale of 100 MW power from Malana II Hydro Electric Project ("Project") of Everest Power Private Limited (EPPL), was heard along with Petition No. 71 of 2015, wherein the Commission had held that the trading margin of Rs. 0.01 per kWh shall be applicable upto the end of the 12th tariff year; therefore, the trading margin for the period 01.04.2015 to 31.03.2016, involved in the present petition, had already been fixed vide Order dated 11.02.2019 passed in Petition No. 71 of 2015; and, accordingly, the present petition was disposed of in terms of the Order dated 11.02.2019 passed in Petition No. 71 of 2015.

45. Petition No. 49 of 2016 was filed for fixing the Trading Margin of PTC India Limited under Section 62 read with Section 86 (1) (b) of the Electricity Act, 2003 for the period 01.04.2016 – 31.03.2017 with respect to sale of 100 MW power from Malana II Hydro Electric Project to Punjab State Power Corporation Limited through PTC (India) Limited in terms of (a) Power Purchase Agreement between PTC India Limited and Everest Power Private Limited dated 25.07.2005; (b) Power Sale Agreement between PTC India Limited and PSPCL dated 23.03.2006; (c) Tripartite Agreement between Everest Power Private Limited, PSPCL and PTC India Limited dated 03.01.2013; and (d) Order dated 27.11.2013 passed in Petition No. 54 of 2012.

46. In its order dated 13.02.2019, the PSERC observed that the present petition, being similar to Petition No.71 of 2015 filed by PTC for fixing the trading margin for the period 01.04.2014 to 31.03.2015 for the sale of 100 MW power from Malana II Hydro Electric Project ("Project") of Everest Power Private Limited (EPPL), was heard along with Petition No. 71 of 2015, wherein the Commission had held that the trading margin of Rs. 0.01 per kWh shall be applicable upto the end of the 12th tariff year; therefore, the trading margin for the period 01.04.2016 to 31.03.2017 involved in the present petition had already been fixed vide Order dated 11.02.2019 passed in Petition No. 71 of 2015; and, accordingly, the present petition was disposed of in terms of the Order dated 11.02.2019 passed in Petition No. 71 of 2015.

IV. RELEVANT REGULATIONS RELATING TO TRADING MARGIN:

i. 2006 TRADING MARGIN REGULATIONS:

46. In the exercise of the power conferred under Section 178 of the Electricity Act, 2003, the CERC made the Central Electricity Regulatory Commission (CERC) (Fixation of Trading Margin) Regulations, 2005 which came into force on its notification in the official gazette on 23.01.2006. Regulation 2 of the 2005 Regulations related to trading margin and, thereunder, the licensee shall not charge the trading margin exceeding Four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and charges for open access including the transmission charge, operating charge and the application. Under the Explanation thereto, the charges for open access include the transmission charge, operating charge and the application fee.

47. The Statement of Reasons dated 23.01.2006, accompanying the 2006 Regulations, recorded that the Central Commission established under the Electricity Act had been authorised to fix trading margins, if considered necessary under Section 79(1)(j) of the Act; under the Act no person can undertake inter-State trading of electricity unless authorised to do so by a licence issued by the Central Commission; and the Act also authorises the Central Commission to make regulations consistent with the Act and the rules framed by the Central Government to carry out the provisions of this Act.

48. Para 2 of the Statement of Reasons stated that, under the regulations, the licensee has been, *inter alia*, mandated to charge trading margin for inter-State trading as fixed by the Commission from time to time; further, in terms of the regulations, the licensee was required to furnish information prescribed periodically to enable the Commission to monitor its performance to ensure compliance by them of the terms and conditions of the licence, and other legislative or regulatory requirement; the periodical statement submitted by the licensees showed that, for 89.05% of the total electricity traded during 2004-05, the trading margin was Rs.0.05 per unit or less, and the trading margin charged by them was recorded in the form of a table.

49. The Statement of Reasons, thereafter, noted that, in some cases, trading margin was charged upto 30 paise/kWh, and for some other transactions as 36 paise/kWh. On consideration, the Commission had proposed to fix trading margin not exceeding 2 paise/kWh including charges for scheduled energy and open access, and had therefore furnished the draft regulations. After taking note of the objections received, the CERC observed that the traders had generally felt that the trading margin of 2 paise/kWh was not adequate, and did not cover the actual cost. The CERC was satisfied that it would be reasonable to limit

trading margin to 4 paise/kWh, including all charges except charges for scheduled energy and open access. It is in such circumstances that the 2006 Regulations stipulated that the trading margin shall not exceed 4 paise/kWh.

ii. 2010 TRADING MARGIN REGULATIONS:

50. In the exercise of the power conferred by Section 178 of the Electricity Act, the CERC made the CERC (fixation of trading margin) Regulations, 2010 which were to apply to short-term sell contracts for inter-state trading in electricity undertaken by a licensee. The proviso to Regulation 2 made it clear that the Regulations shall not apply to Intra-State trading in electricity undertaken by the licensee by virtue of the provisions of Rule 9 of the Electricity Rules, 2005, on the basis of the Inter-State trading license granted by the Commission. Regulation 3(1)(d) defined *"Short Term Buy- Short Term Sell contract"* to mean a contract where the duration of the power purchase agreement and the power sale agreement is less than one year. While Regulation 4 related to Trading Margin, the said Regulation itself has no application, since it only related to Short Term Buy- Short Term Sell Contracts for inter-State trading in electricity undertaken by a licensee. By Regulation 5(1), the CERC (Fixation of Trading Margin) Regulations, 2006, stood repealed from the date of commencement of the 2010 Regulations. Regulation 5(2), however, stipulated that, notwithstanding such repeal, anything done or purported to have been done under the repealed regulations shall be deemed to have been done or purported to have been done under the 2010 Regulations.

51. The Statement of Reasons, for the 2010 Regulations, dated 11.01.2010 records the CERC having considered that traders were required to be compensated for the following risks inherent in the trading

business:- (1) default risk, (2) late payment risk, (3) contract dishonor risk, and, (4) inflationary risk. Accordingly, the CERC had evolved a proposal for revision of the trading margin in the form of draft regulations and, through public notice dated 12.10.2009, had invited suggestions and comments on the draft regulations on Fixation of Trading Margin for inter-State trading in Electricity. After extracting the gist of suggestions and objections received from the stakeholders, the CERC observed that the traders were providing different types of products by entering into contracts on long-term, medium-term and short-term basis; the risk profile of each of these contracts was different; the CERC was, accordingly, of the view that, where traders entered into long term power purchase agreements of duration exceeding a year, the risks cannot be completely mitigated through a trading margin; also, since the long term power procurement market was witnessing competitive forces at work, the Commission felt that determination of an appropriate trading margin be best left to the market forces.

52. The CERC further observed that, regarding short-term buy and short term sell contracts i.e. contracts where the duration of the power purchase agreement and power sale agreement was less than one year, they were convinced that the market prices were currently governed to a large extent by the demand-supply gap prevalent in the country; in such a scenario, there was a high likelihood of deficient utilities buying power at higher than justified rates to prevent excessive load shedding; and, with a view to balancing the interests of buyers as well as traders, it had been decided to prescribe a trading margin cap.

iii. 2020 TRADING REGULATIONS:

53. Regulations 7 of the CERC (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020

('2020 Regulations' for short) relates to Applicability of Trading Margin, and stipulates that the Trading margin shall be applicable to the following transactions undertaken by the Trading Licensee: (b) transactions under long term contracts (where period of the contract of the Trading Licensee with either the seller or the buyer or both is more than one year); and (d) Transactions under Back to Back contracts, irrespective of duration of the contract.

54. Regulation 8 of the 2020 Regulations relates to Trading Margin**.** Regulation 8(1) stipulates that the Trading Licensee shall comply with the trading margin as given below: (d) For transactions under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller.

V. DOES THE STATE COMMISSION HAVE JURISDICTION TO FIX TRADING MARGIN FOR INTER-STATE TRADING IN ELECTRICITY:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

55. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, in terms of Section 79(1)(j) of the Electricity Act, the CERC has the power to fix the trading margin, if considered necessary, for inter-state trading of electricity; this field has been statutorily allocated and vested in the CERC to the exclusion of the State Electricity Regulatory Commission(s) ('**SERC**'); in terms of Section 86(1)(j) of the Electricity Act, the Appropriate Commission has the power to fix the trading margin for intra-state trading of power; it is settled law that SERCs have no jurisdiction to fix the trading margin for inter-state trading of power, viz.:(a) ***SECI v. UPERC & Anr****.: 2023 SCC OnLine APTEL 21*, and (b) ***SECI v. DERC & Anr****.: 2021 SCC OnLine APTEL 27****;*** as the field is occupied by the CERC, PSERC erred in acting contrary to the CERC

(Fixation of Trading Margin) Regulations, 2010 ('2010 Regulations' for short) read with paragraphs 7 and 8 of the Statement of Reasons which clearly enunciate that:- (a) since the long-term power procurement market is witnessing competitive forces at work, the Commission feels that determination of an appropriate trading margin be best left to the market forces, (b) for short-term buy and short term sell contracts (duration of less than one year), the market prices are currently governed to a large extent by the demand-supply gap prevalent in the country, and to balance the interests of the buyers and the traders, CERC decided to prescribe a trading margin cap. Reliance is placed in this regard on (a) ***Ch. Tika Ramji & Ors. v. State of U.P. & Ors.,*** AIR 1956 SC 676; (b) ***West UP Sugar Mills Assn. v. State of U.P.,*** (2020) 9 SCC 548; (c) ***Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P.,*** (1980) 4 SCC 136; (d) ***Vijay Kumar Sharma v. State of Karnataka***, (1990) 2 SCC 562; (e) ***State of U.P. v. Synthetics and Chemicals Ltd.***, (1991) 4 SCC 139; and (f) ***K.K. Baskaran v. State***, (2011) 3 SCC 793.

56. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that the 2010 Regulations have since been repealed and replaced by the CERC (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 ('2020 Regulations' for short); on and after 02.01.2020, the trading margin for long term contracts is to be decided mutually between the parties in terms of Regulation 8(1)(d) of the 2020 Regulations; in ***PTC India Ltd. v CERC,*** **(2010) 4 SCC 603**, the Supreme Court held that, in case any regulations occupy the field, orders should be passed in conformity with those regulations; the PSERC, by fixing trading margin for PTC, acted contrary to Section 79(1)(j) of the Electricity Act, the 2010 Regulations and the 2020 Regulations; and, hence, PTC is entitled for trading margin as mutually agreed in the original PSA in terms of the 2010 Regulations

read with clauses 7 & 8 of the Statement of Reasons; and the 2020 Regulations.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

57. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would submit that the question of jurisdiction raised by the appellant is erroneous, and is liable to be rejected; the State Commission has the necessary jurisdiction to determine the trading margin, which jurisdiction has been correctly exercised; Sections 79(1)(j) and 86(1)(j) operate in different situations; a trading licensee is not under any regulatory control, except when he supplies to a distribution licensee; a trading licensee can supply to another trading licensee or to a consumer directly, where there is no tariff determination; in such cases, Sections 79(1)(j) and 86(1)(j) enable the Regulatory Commission to fix the margin of the trader; this is an enabling provision, and not a mandatory provision; Sections 79(1)(j) and 86(1)(j) are enabling provisions and are for transactions that are otherwise not regulated, and there is a need felt to limit the trading margin; it is attracted only when the Regulatory Commission considers it necessary for the trading margin to be fixed, and it is not mandatorily determined in all cases; however, when the trading licensee supplies to a distribution licensee, it would come within the regulatory control of the Commission under Section 86(1)(b), and if it involves a back to back transaction under Section 62; Sections 86(1)(b) and 86(1)(f) also support the jurisdiction of the State Commission; and, in such cases, the consideration that the trader can earn is certainly regulated and subject to decision and approval.

C. JUDGEMENTS RELIED UPON UNDER THIS HEAD:

58. In **Solar Energy Corpn. of India Ltd. v. U.P. ERC, 2023 SCC OnLine APTEL 21,** this Tribunal observed that the contention of the State Commission that the Central Commission had not acceded to the prayer of the SECI for trading margin of Rs. 0.07/kWh, and had left it to the parties to decide mutually, and therefore, the trading margin can be suitably adjusted for protecting the pooled tariff had no merit as the Central Commission in its order had categorically stated that as per the relevant Regulations, Trading margin is to be decided with mutual agreement by the Trading Licensee and the seller; and, therefore, there was no merit in the contentions made by the State Commission that the Trading margin of Rs. 0.07/kWh as mutually agreed by SECI and UPPCL through the PSA, shall be final or not; and the decision of the State Commission in directing UPPCL to suitably adjusting the Trading margin could not be agreed to.

59. In **Solar Energy Corpn. of India Ltd. v. Delhi ERC, 2021 SCC OnLine APTEL 27,** this Tribunal opined that that the nature of the transactions involved in these matters being inter-state operations, and not intra-state or within the State operations, the State Commission has no jurisdiction to deal with the *trading margin* of the interstate trading licensee (SECI) acting in terms of such trading License granted by the Central Commission under section 79(1)(e) read with section 14 of the Electricity Act, 2003 and under the applicable Regulations notified by the Central Commission in exercise of powers under section 178 of the Act;, the grant of such trading license to SECI was not by the State Commission under section 86(1)(d) of the Act, such inter-state trading Licensee of the Central Commission not required to obtain the intra-state trading license from the State Commission to undertake even intra-state trading in terms of Rule 9 of the Electricity Rules 2005; in this view of the matter, the jurisdiction to deal with the applicable trading margin of SECI

was of the Central Commission under Section 79(1)(j) of the Electricity Act and not of the State Commission under section 86(1)(j) of the Electricity Act, the jurisdiction being exercised by the State Commission under section 86(1)(b) of the Electricity Act, in cases where the regulatory jurisdiction of the transaction is vested in the Central Commission, being circumscribed and limited as provided under Rule 8 of the Electricity Rules, 2005; the relevant regulatory framework established by the Central Commission vests autonomy unto the parties to take a decision by mutual agreement on the issue of trading margin for such long-term contracts of inter-State supply, there being no role envisaged in law on this subject for the State Commission; any interference by the State Commission on this issue in such scenario under the cover of jurisdiction under Section 86(1)(b) is improper, unauthorized and illegal; a binding mutual agreement exists between the trader and the procurer with regard to applicability of Trading Margin of Rs. 0.07/kWh, it being consistent with the Regulation 8(1)(d) of the Trading License Regulations, 2020; and the Commission had fallen in grave error by disturbing the agreed terms settled by the contracting parties on the subject of *trading margin*.

60. In ***Ch. Tika Ramji v. State of U.P*** **: AIR 1956 SC 676,** it was contended by the State of UP that, under the proviso to Article 254(2), the power to repeal a law passed by the State Legislature was incidental to enacting a law relating to the same matter as is dealt with in the State legislation, and that a statute which merely repeals a law passed by the State Legislature without enacting substantive provisions on the subject would not be within the proviso, as it could not have been the intention of the Constitution that in a topic within the concurrent sphere of legislation there should be a vacuum.

61. It is in this context that the Supreme Court held that, while the proviso to Article 254(2) conferred on Parliament a power to repeal a law passed by the State Legislature, that power was, under the terms of the proviso, subject to certain limitations; it was limited to enacting a law with respect to the same matter adding to, amending, varying or repealing a "law so made by the State Legislature"; the law referred to here is the law mentioned in the body of Article 254(2); it is a law made by the State Legislature with reference to a matter in the Concurrent List containing provisions repugnant to an earlier law made by Parliament and with the consent of the President; it is only such a law that could be altered, amended or repealed under the proviso; the impugned Act was not a law relating to any matter, which was the subject of an earlier legislation by Parliament; it was a substantive law covering a field not occupied by Parliament, and no question of its containing any provisions inconsistent with a law enacted by Parliament could therefore arise; and to such a law, the proviso has no application.

62. In **West U.P. Sugar Mills Assn. v. State of U.P., (2020) 9 SCC 548,** the Supreme Court, after referring to **Rajiv Sarin v. State of Uttarakhand, (2011) 8 SCC 708,** and **M. Karunanidhi v. Union of India, (1979) 3 SCC 431,** observed that clause (1) of Article 254 of the Constitution gives primacy to Central legislations in case of conflict with State laws whether enacted before or after; the Central law operates only in case of repugnancy and not in a case of mere possibility when such an order might be issued under State law; by virtue of Schedule VII List III Entries 33 and 34, both the Central Government as well as the State Government had the power to fix the price of sugarcane; the Central Government, having exercised the power and fixed the "minimum price", the State Government could not fix the "minimum price" of sugarcane.

63. In **Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P., (1980) 4 SCC 136,** the Supreme Court held that the legislative power of the States under Entry 24 List II is eroded only to the extent control is assumed by the Union pursuant to a declaration made by Parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion; subject to such erosion, on the remainder the State Legislature will have power to legislate in respect of the declared industry without in any way trenching upon the occupied field; State Legislature which is otherwise competent to deal with industry under Entry 24, List II, can deal with that industry in exercise of other powers enabling it to legislate under different heads set out in Lists II and III; and this power cannot be denied to the State.

64. In ***Vijay Kumar Sharma v. State of Karnataka*, (1990) 2 SCC 562,** the Supreme Court, by a majority, observed that, when repugnancy is alleged between the two statutes, it is necessary to examine whether the two laws occupy the same field, whether the new or the later statute covers the entire subject matter of the old, whether legislature intended to lay down an exhaustive code in respect of the subject matter covered by the earlier law so as to replace it in its entirety and whether the earlier special statute can be construed as remaining in effect as a qualification of or exception to the later general law, since the new statute is enacted knowing fully well the existence of the earlier law and yet it has not repealed it expressly; for examining whether the two statutes cover the same subject matter, what is necessary to examine is the scope and the object of the two enactments, and that has to be done by ascertaining the intention in the usual way and what is meant by the usual way is nothing more or less than the ascertainment of the dominant object of the two legislations; and there was no repugnancy in the provisions of

Sections 14 and 20 of the Karnataka Act and Sections 74 and 80 of the Motor Vehicles Act, 1988.

65. In ***State of U.P. v. Synthetics and Chemicals Ltd.*****, (1991) 4 SCC 139,** the Supreme Court observed that Ethyl alcohol was principally used as raw material for manufacture of rubber etc; since it was of all-India importance the activities of which affected the country as a whole, it was declared as of public importance by adding it as Item (1) under Entry 26 of the First Schedule appended to the Industries (Development and Regulation) Act, 1951; the effect of this declaration was that it stood removed from Entry 24 of List II and allocated to the Central legislature; the control thus vested in the Parliament; but Entry 33 in the Concurrent List permitted both the Parliament and the State legislature to deal with trade and commerce in it and also regulate production, supply and distribution of goods declared to be of public importance; the State could, therefore, enact law under Entry 33 subject to that the State legislation could not be repugnant to the Central legislation; that is if the field is already occupied by a Central enactment then the State legislation to that extent shall be invalid; the power to tax was a sovereign power; in federal system of governance it was exercised by distribution of power between the Union and the State; both were supreme in their sphere as wa brought out clearly by Article 246(1) and Article 246(3) of the Constitution; the legislative field for levying tax by Union was set out in Entries 82 to 92 in List I and of State in Entries 45 to 63 in List II of the Seventh Schedule; there was no overlapping; fields were clearly demarcated; since the Concurrent List does not contain any entry relating to taxing power the concept of occupied field or repugnancy cannot arise; if there is clash between exercise of power under List II and List I then the State legislation may be invalid due to Article 246(1); but

since there can be no clash or invalidity in relation to taxing power the question of invalidity cannot arise.

66. It is well settled that a judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. (**Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638).** Quotability as 'law' applies to the principle of a case, its ratio decidendi. Statements which are not part of the ratio decidendi are not authoritative. (**Gurnam Kaur, (1989) 1 SCC 101)** It is not everything said by a Judge, while giving judgment, that constitutes a precedent. (**Union of India v. Dhanwanti Devi, (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra 1967 SCC OnLine SC 17; Quinn v. Leathem, [1901] A.C. 495; Mandava Rama Krishna v. State of Andhra Pradesh, 2014 SCC OnLine AP 294).**

67. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (**Padma Sundara Rao (Dead) v. State of T.N. (2002) 3 SCC 533; Herrington v. British Railways Board (1972) 2 WLR 537**). It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. (**State of Orissa v. Sudhansu Sekhar Misra; AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).** A stray sentence in a judgement cannot be read out of context to contend that set off can be

claimed by a person from another with respect to amounts due to him from a third party. **(GUVNL V. GERC: APPEAL NO. 371 OF 2023 DATED 09.11.2023).**

68. Neither the provisions of the 2005 Regulations nor the scope of Regulation 5(1) & (2) of the 2010 Regulations which related to repeal and savings of the 2005 Regulations arose for consideration in either of the afore-said two judgements in **SECI vs. UPERC: 2023 SCC OnLine APTEL 21,** and **SECI vs. Delhi Electricity Regulatory Commission [2021 SCC OnLine APTEL 27.** Reliance placed thereupon, on behalf of the Appellants, is therefore of no avail.

69. In ***Ch. Tika Ramji v. State of U.P*** **: AIR 1956 SC 676, West U.P. Sugar Mills Assn. v. State of U.P., (2020) 9 SCC 548,** and ***Vijay Kumar Sharma v. State of Karnataka*****, (1990) 2 SCC 562,**, the scope of Article 254 of the Constitution arose for consideration. Article 254 of the Constitution, which relates to inconsistency in laws made by Parliament and laws made by the Legislature. Article 254(1) stipulates that, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

70. Article 254(2) provides that where a law made by the Legislature of a State, with respect to one of the matters enumerated in the Concurrent List, contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then,

the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Under the Proviso thereto, nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. In examining a repeal and savings clause, such as in Regulation 5(1) & (2) of the 2010 Trading Regulations, reliance placed on judgements relating to the doctrine of repugnancy under Article 254 of the Constitution, are wholly misplaced.

71. In **Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P., (1980) 4 SCC 136,** the Supreme Court examined the scope of the legislative power of the States under Entry 24 List II of the Seventh Schedule to the Constitution. In ***State of U.P. v. Synthetics and Chemicals Ltd.*****, (1991) 4 SCC 139,** the Supreme Court observed that since the Concurrent List does not contain any entry relating to taxing power the concept of occupied field or repugnancy cannot arise. Neither of these judgements also have any application to the case on hand.

D. ANALYSIS:

i. JURISDICTION IS CONFERRED ONLY BY A LAW MADE BY THE COMPETENT LEGISLATURE:

72. A Tribunal, which is a creation of a Statute, has only the powers expressly conferred on it, or resulting directly from the powers so conferred. Acting otherwise goes to the very existence of the power. Statutory Tribunals, set up under an Act of the legislature, are creations of the Statute, (**R.K. Jain v. Union of India, (1993) 4 SCC 119**), and should be guided by the conditions stipulated in the statutory provisions while exercising powers expressly conferred or those

incidental thereto. (**Commissioner of Central Excise v. Sri Chaitanya Educational Committee, 2011 SCC OnLine AP 1078**). Statutory Tribunals, created by an Act of Parliament, have limited jurisdiction and must function within the four-corners of the Statute which created them. (**O.P. Gupta v. Dr. Rattan Singh, (1964) 1 SCR 259**). It is not open to such Tribunals to travel beyond the provisions of the statute. (**D. Ramakrishna Reddy v. Addl. Revenue Divisional Officers, (2000) 7 SCC 12**).

73. The power to create or enlarge jurisdiction is legislative in character. Parliament alone can do it by law and no court, be it superior or inferior or both combined, can enlarge the jurisdiction of a court (or statutory tribunal). Jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. The Court or Tribunal cannot confer a jurisdiction on itself which is not provided in the law. Thus, jurisdiction can be conferred by statute, and Courts cannot confer jurisdiction or an authority on a tribunal. (**Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602; Bhadreshwar Vidyut (P) Ltd. v. Maharashtra ERC, 2024 SCC OnLine APTEL 47).**

74. Conferment of jurisdiction is a legislative function, and it can neither be conferred with the consent of the parties nor by a Superior Court, and if the court passes an order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter would go to the roots of the cause. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Equally, acquiescence of a party should not be permitted to defeat the legislative animation. (**United Commercial Bank Ltd. v. Workmen, 1951 SCC 364 : AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan [(1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang**

Studios, (1981) 1 SCC 523; Sardar Hasan A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602; Union of India v. Deoki Nandan Aggarwal, 1992 Supp (1) SCC 323; Karnal Improvement Trust v. Parkash Wanti, (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd., (1996) 2 SCC 667; State of Gujarat v. Rajesh Kumar Chimanlal Barot, (1996) 5 SCC 477; Kesar Singh v. Sadhu, (1996) 7 SCC 711; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722; CCE v. Flock (India) (P) Ltd., (2000) 6 SCC 650; and Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307; Bhadreshwar Vidyut (P) Ltd. v. Maharashtra ERC, 2024 SCC OnLine APTEL 47).

75. As these Statutory tribunals are required to function in accordance with the provisions of the Electricity Act, the restriction placed on the exercise of their jurisdiction, by the provisions of the said Act, cannot be said to interfere with their quasi-judicial functions under the Act. (**Tirupati Chemicals v. Deputy Commercial Tax Officer, 2010 SCC OnLine AP 1189**; **State of Telangana v. Md. Hayath Uddin, 2017 SCC OnLine Hyd 356).**

76. The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act,2003, an Act of Parliament. Wherever jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and confer jurisdiction on it for, if they be not complied with, it would lack jurisdiction. (**Nusserwanjee Pestonjee v. Meer Mynoodeen Khan** [LR (1855) 6 MIA 134 (PC); **Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).** As it derives its powers from the express provisions of the Electricity Act, the powers, which have not been expressly given by the said Act, cannot be exercised by the State

Regulatory Commission. (***Rajeev Hitendra Pathak* v. *Achyut Kashinath*, (2011) 9 SCC 541**). An authority created by a statute must act under the Act and not outside it. As it is a creation of the statute, it can only decide the dispute in terms of the provisions of the Act. (***K.S. Venkataraman & Co.* v. *State of Madras*, AIR 1966 SC 1089; *Mysore Breweries Lt.* v. *Commissioner of Income-Tax*, (1987) 166 ITR 723 (KAR)**). The State Regulatory Commission can exercise jurisdiction only when the subject matter of adjudication falls within its competence, and the order that may be passed is within its authority, and not otherwise. (**Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium: 2007 Aptel 764; BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC OnLine APTEL 52).** Consequently, it is only when it is specifically authorised by the Electricity Act, can the State Regulatory Commission entertain a petition from an entity which is statutorily entitled to file such a petition.

ii. RELEVANT STATUTORY PROVISIONS:

77. Before examining the submission, urged on behalf of the Appellant, that the PSERC lacked jurisdiction to fix their trading margin since it related to inter-state trading of electricity, it is necessary to take note of the relevant statutory provisions. Section 2(26) of the Electricity Act defines “electricity trader” to mean a person who has been granted a license to undertake trading in electricity under Section 12. Section 2(39) defines “license” to mean a license granted under Section 14. Section 2(70) defines “supply”, in relation to electricity, to mean the sale of electricity to a licensee or consumer. Section 2(71) defines “trading” to mean purchase of electricity for re-sale thereof and the expression “trade” shall be construed accordingly.

78. Section 14 of the Electricity Act relates to grant of license and, under Section 14(c), the appropriate Commission may, on an application made to it under Section 15, grant a license to any person to undertake trading in electricity as an electricity trader in any area as may be specified in the license. Section 79 relates to the functions of the Central Commission and, under Section 79(1)(e), the Central Commission shall discharge the function of issuing licenses to electricity traders with respect to their inter-state operations; and, under Section 79(1)(j), the Central Commission shall discharge the function to fix the trading margin in the inter-State trading of electricity, if considered necessary. Section 178 relates to the powers of Central Commission to make regulations. Section 178(2)(y) confers power on the Central Commission to make Regulations with respect to the manner in which the market in power. including trading specified under Section 66 of the Electricity Act, should be developed. Residuary power is conferred on the Central Commission by Section 181(2)(ze) to make Regulations on any other matters which is to be, or may be, specified by Regulations.

79. Likewise, Section 86(1)(d) of the Electricity Act confers power on the State Commission to issue licenses to persons, seeking to act as electricity traders, with respect to their operations within the State; and Section 86(1)(j) confers power on the State Commission to fix the trading margin in the intra-State trading of electricity, if considered necessary. Section 181 relates to the powers of the State Commissions to make regulations. Section 181(2)(zh) confers power on the State Commission to make regulations for development of market in power including trading specified in Section 66. Residuary power is conferred on the State Commission by Section 181(2)(zo) to frame regulations with respect to any other matter which is to be, or may be, specified.

80. In exercise of the powers conferred by Section 176 of the Electricity Act, the Central Government made the Electricity Rules, 2005. Rule 8 relates to tariffs of generating companies under Section 79 and, there-under, the tariff determined by the Central Commission, for generating companies under clause (a) or (b) of sub-section (1) of Section 79 of the Act, shall not be subject to re-determination by the State Commission in exercise of its functions under Clauses (a) or (b) of sub-section (1) of Section 86 of the Act and, subject to the above, the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreements or procurement process with such generating companies based on the tariff determined by the Central Commission. Rule 9 relates to Inter-State trading license and, there-under, a license issued by the Central Commission under Section 14 read with Clause (e) of sub-section (1) of Section 79 of the Act to an electricity trader for Inter-State operations shall also entitle such electricity trader to undertake purchase of electricity from a seller in a State and resell such electricity to a buyer in the same State, without the need to take a separate license for intra-state trading from the State Commission of such State.

iii. JURISDICTION MUST BE EXERCISED STRICTLY IN ACCORDANCE WITH THE PROVISIONS OF THE ACT:

80. Since the State Commission is a creation of the Electricity Act under Section 82(1), and a body corporate under Section 82(2) thereof, its jurisdiction is limited to those specifically conferred on it under the provisions of the Electricity Act, and not beyond. The State Regulatory Commission exercises adjudicatory functions, and its tariff orders are both regulatory and quasi-judicial in nature (**BSES Rajdhani Power Ltd vs DERC: (Judgement of the Supreme Court in Civil Appeal No.4324 of 2015 dated 18.10.2022**). Such Tribunals exercise limited jurisdiction

(**S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252)** strictly in terms of the Electricity Act by which they are governed. Every tribunal of limited jurisdiction is bound to determine whether the matter, in which it is asked to exercise its jurisdiction, comes within the limits of its special jurisdiction, and whether the jurisdiction of such a tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it, and that statute also defines the conditions under which the tribunal can function, it goes without saying that, before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. **(Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

81. The distinction between 79(1)(e) and Section 86(1)(d) is that, while the CERC has been conferred the power to issue trading licenses to electricity traders only with respect to inter-State operations, Section 86(1)(d) restricts the power of the State Commission to issue trading licenses only to electricity traders with respect to their operations within the State and not beyond. It is because of Rule 9 of the Electricity Rules 2005 that a license issued by the CERC, under Section 79(1)(e) of the Electricity Act, to an electricity trader for inter-State operations also entitles them to undertake purchase of electricity from a seller in a State and resell such electricity to a buyer within the same State, without the need to take a separate license for intra-State trading from the State Commission of such a State. In view of Rule 9, while an inter-State trading license issued by the CERC can be used by the trading licensee even to carry on operations within any particular State, an intra-State trading licensee is not entitled to carry on trading operations beyond the boundaries of that State.

82. Similarly, while the power to fix the trading margin, for inter-State trading of electricity, is conferred on the Central Commission, the power to fix the trading margin is conferred on the State Commission, under Section 86(1)(j) of the Electricity Act, only for intra-State trading of electricity and not for inter-State trading thereof. The words *'if considered necessary'*, used both in Section 79(1)(j) and 86(1)(j) of the Electricity Act, make it clear that it is not obligatory for the Central/ State Commission, in the exercise of their powers under the afore-said provisions, to compulsorily fix the trading margin, and it is open to them, as they have chosen to do by way of the 2010 and the 2020 Regulations, to leave it open to the parties to mutually agree on the trading margin for long term transactions.

83. Conferment of jurisdiction on a Tribunal is distinct from its exercise. While power is conferred on the Central/State Commissions to fix the trading margin, whether the said power should be exercised at all, and if it is exercised, then the manner of its exercise, are left to the discretion of such Commissions. In view of Section 79(1)(j), the power to fix trading margin, for inter-State trading in electricity, can only be exercised by the Central Commission and not the State Commission. The mere fact that the Central Commission chooses not to exercise the jurisdiction vested in it under Section 79(1)(j), would not result in conferment of jurisdiction on the State Commission to fix the trading margin in inter-state trading of electricity. as such a power is conferred by the Electricity Act exclusively on the Central Commission.

iv. JUDGEMENT IN 'PTC INDIA LTD' IN THE CONTEXT OF THE 2006 TRADING REGULATIONS:

84. The vires of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 was subjected to challenge, as being null and void, before this Tribunal. The appeals were dismissed by

this Tribunal holding that its jurisdiction was restricted by the limits imposed by the Electricity Act, 2003, and the vires of the Regulations could not be examined.

85. Among the questions of law which arose for consideration before the Constitution Bench of the Supreme Court in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** (ie in the appeal preferred against the order of this Tribunal), was whether capping of trading margins could be done by the CERC (the Central Commission) by making a Regulation under Section 178 of the 2003 Act?

86. It was contended before the Supreme Court that the word "fix" in Section 79(1)(*j*) must mean to pass an appropriate order fixing trading margin which is further qualified by the Act saying "if considered necessary"; fixing trading margin was the same as price fixation and, as such, trading margin must be fixed by an order and not by way of Regulation; and therefore Regulations cannot be framed under Section 79(1)(*j*) and under Section 86(1)(*j*) of the 2003 Act.

87. It is in this context that the Supreme Court held that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1), like to regulate the tariff of generating companies, to issue licences, to adjudicate upon disputes, to levy fees, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc; these measures, which the Central Commission is empowered to take, should be in conformity with the Regulations under Section 178, wherever such Regulations are applicable; measures under Section 79(1), therefore, should be in conformity with the regulations under Section 178; making of a regulation is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(*j*); however, if the Central

Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178, then whatever measures the Central Commission takes under Section 79(1)(*j*) should be in conformity with Section 178; instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a Regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act; 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 should 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*); on the making of the 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; all contracts, coming into existence after making of the impugned 2006 Regulations, should also factor in the capping of the trading margin; such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(*j*) of the 2003 Act; fixation of trading margin, in the inter-State trading of electricity, can be done by making of Regulations under Section 178 of the 2003 Act; the power to fix the trading margin under Section 178 is, therefore, a legislative power and the notification issued under that Section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations; these

Regulations make an inroad into contractual relationships between the parties; such is the scope and effect of the 2006 Regulations which could not have taken place by an order fixing the trading margin under Section 79(1)(*j*); it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(*ze*); and the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

88. It is clear from the judgment of the Supreme Course in **PTC India Ltd vs. CERC: 2010 4 SCC 603,** that the power to fix trading margin for inter-State trading both in the exercise of its regulatory power under Section 79(1)(j), and by way of Regulations made under Section 178 of the Electricity Act, is conferred exclusively on the Central Commission. Consequently, the State Commission can neither exercise its regulatory power nor make regulations to fix the trade margin for inter-State trading in electricity. It is not in dispute that, in the present case, the transaction which the Appellant is involved in is inter-State trading in electricity, for they purchase electricity from the 3rd Respondent in the State of Himachal Pradesh, and then sell it to the 2nd Respect in the State of Punjab, which transaction involves more than one State and is inter-state in character. It is evident, therefore, that the PSERC lacks jurisdiction to fix the trading margin of the Appellant, since they not only hold a license granted by the CERC for inter-State trading in electricity but the subject transaction is also one of inter-State trading in electricity.

89. As the PSERC is a tribunal of limited jurisdiction, it must exercise its jurisdiction strictly within the limits of what the Electricity Act, 2003 expressly stipulates, and not beyond. Jurisdiction is the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. (**Chiranjilal Shrilal Goenka v. Jasjit**

Singh, (1993) 2 SCC 507; and A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602; Bhadreshwar Vidyut (P) Ltd. v. Maharashtra ERC, 2024 SCC OnLine APTEL 47). The court cannot derive jurisdiction apart from the statute. (**Bhadreshwar Vidyut (P) Ltd. v. Maharashtra ERC, 2024 SCC OnLine APTEL 47).** A statutory authority cannot go beyond the jurisdiction conferred by the Statute under which it is constituted and derives its power from, and cannot confer itself with jurisdiction. Jurisdiction to a statutory authority also cannot be conferred by an agreement or consent of the parties. **(Allain Duhangan Hydro Power Limited v. Everest Power Private Limited, 2013 SCC OnLine APTEL 4).** As the Electricity Act confers power only on the Central Commission to fix the trading margin in inter-state trading of Electricity, both in the exercise of its Regulatory powers under Section 79(1)(j) of the Electricity Act, and by making Regulations in the exercise of its powers under Section 178 thereof, the State Commission lacks jurisdiction to fix the trading margin for inter-state trading of Electricity.

v. AN ORDER PASSED WITHOUT JURISDICTION IS A NULLITY:

90. A decree passed by a court without jurisdiction over the subject matter is a nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings as it is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. **(Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193; Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke: (1976) 1 SCC 496; Kiran Singh v. Chaman Paswan: AIR 1954 SC**

340; Chandrika Misir v. Bhaiya Lal: (1973) 2 SCC 474; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).

91. The finding of a court or tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of the party should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality the doctrine of waiver also does not apply. (**United Commercial Bank Ltd. v. Workmen: AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan: (1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang Studios: (1981) 1 SCC 523; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar: (1999) 3 SCC 722; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).** The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject-matter. (**Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).**

92. As the PSERC, a State Regulatory Commission constituted under the Electricity Act, lacks jurisdiction to fix trading margin for inter-state Trading of Electricity, the impugned order passed by the PSERC, in Petition No. 71 of 2015 dated 12.03.2019, to the extent the trading margin was fixed at Rs.0.01/ kWh upto the 12th tariff year, is without jurisdiction and is liable to be set aside to this extent.

93. Even on the State Commission being held to lack jurisdiction to fix the Appellant's trading margin (as it relates to fixation of trading margin on inter-state trading of Electricity which power is conferred exclusively on the CERC under Section 79(1)(j) of the Electricity Act), the question

whether the Appellant is entitled for the trading margin, as stipulated in Clause 10.1 of the PSA dated 23.03.2006, is wholly extraneous to the present appellate proceedings which relates to an appeal preferred against an order passed by the PSERC in a petition filed by the Appellant seeking fixation of their trading margin and in which, mid-way, the Appellant had made a u-turn and questioned the jurisdiction of the PSERC to fix their trading margin. Either the PSERC has jurisdiction to fix their trading margin or it does not. If it lacks jurisdiction to do so, this Tribunal, in an appeal preferred there-against, would also lack jurisdiction to consider this aspect or take upon itself the task of determining the trading margin to which the Appellant is entitled to.

94. In any event for this Tribunal to examine this question, it would not only be required to consider the validity of the Tripartite Agreement entered into between the Appellant and the 2nd and 3rd Respondents on 03.01.2013 (whereby the Parties had agreed that the PSERC would fix the trading margin), but also consider (1) the validity of the order passed by the PSERC in Petition No. 11 of 2006 filed by the predecessors of the second Respondent seeking approval of the PSA dated 23.03.2006, which resulted in conditional approval being granted by the PSERC by its order dated 24.01.2007; (2) the order passed by the PSERC on 17.08.2011 in Petition No. 34 of 2011 filed by the Appellant herein; and (3) the order passed by the PSERC in Petition No. 55 of 2012 dated 06.11.2012, modifying the last para of the order passed in Petition No. 34 of 2011 dated 17.08.2011, at the joint request of all the Parties including the Appellant herein, that the tariff of the project would be such as would be determined by the PSERC. None of these orders were subjected to challenge either before the PSERC or is the validity of such orders put in issue in the present appeal.

VI. ARE REGULATORY COMMISSIONS BOUND TO EXERCISE JURISDICTION WITHIN THE FOUR CORNERS OF THE ELECTRICITY ACT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

95. Sri Amit Kapur, Learned Counsel for the appellant, would submit that: (a) a Regulatory Commission has to act within the four corners of the domain conferred upon it under the Electricity Act, 2003; (b) a Regulatory Commission cannot assume jurisdiction even with the consent of the contracting parties contrary to the parent statute; (c) the amendment to Article 10.1 of the PSA, incorporated by the Tripartite Agreement dated 03.01.2013 is ultra vires the Electricity Act to the extent it stipulated that: *"The tariff for the contracted capacity payable by PSPCL to PTC including* ***all aspects of tariff element would be determined by the Commission and also trading margin****, and other charges payable additionally to PTC* ***shall be as per the decision and approval of the Commission****.";* and (d) parties having sought fixation/approval of trading margin by the PSERC for inter-state trading of power cannot vest jurisdiction with the PSERC being violative of Sections 79(1)(j) and 86(1)(j) of the Electricity Act, 2003. Reliance is placed in this regard on ***BSES Rajdhani Power Ltd. v. DERC & Batch***, 2006 SCC OnLine APTEL 69.

B. ANALYSIS:

96. The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act, 2003, an Act of Parliament. They are creations of the Electricity Act, and derive their powers from the express provisions of the said Act. The powers, which have not been expressly given thereby, cannot be exercised by them. (***Rajeev Hitendra Pathak* v. *Achyut Kashinath*, (2011) 9 SCC 541**). An authority created

by a statute must act under the Act and not outside it. As it is a creation of the statute it can only decide the dispute in terms of the provisions of the Act. (***K.S. Venkataraman & Co.* v. *State of Madras*, AIR 1966 SC 1089; *Mysore Breweries Lt.* v. *Commissioner of Income-Tax*, (1987) 166 ITR 723 (KAR)**). The State Regulatory Commission can exercise jurisdiction only when the subject matter falls within its competence, and the order that may be passed is within its authority, and not otherwise. (**Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium: 2007 Aptel 764; BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC OnLine APTEL 52).** Wherever jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and raise the jurisdiction for, if they be not complied with, exercise of such jurisdiction is impermissible. (**Nusserwanjee Pestonjee v. Meer Mynoodeen Khan** [LR (1855) 6 MIA 134 (PC); **Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

97. A Tribunal, which is a creation of a Statute, has only the powers expressly conferred on it, or resulting directly from the powers so conferred by the Statute. Acting otherwise, goes to the very root of the jurisdiction conferred by the Statute. Statutory tribunals, set up under an Act of legislature, are creatures of the Statute, (**R.K. Jain v. Union of India, (1993) 4 SCC 119**), and should be guided by the conditions stipulated in the statutory provisions while exercising powers expressly conferred or those incidental thereto. (**Commissioner of Central Excise v. Sri Chaitanya Educational Committee, 2011 SCC OnLine AP 1078**). Statutory tribunals, created by an Act of Parliament, have limited jurisdiction and must function within the four-corners of the Statute which

created them. (**O.P. Gupta v. Dr. Rattan Singh, (1964) 1 SCR 259**). It is not open to the Tribunal to travel beyond the provisions of the statute. (**D. Ramakrishna Reddy v. Addl. Revenue Divisional Officers, (2000) 7 SCC 12**). Since these tribunals are required to function in accordance with the provisions of the Act, the restriction placed on the exercise of their jurisdiction, by the provisions of the Act, cannot be said to interfere with their quasi-judicial functions under the Act. (**Tirupati Chemicals v. Deputy Commercial Tax Officer, 2010 SCC OnLine AP 1189**; **State of Telangana v. Md. Hayath Uddin, 2017 SCC OnLine Hyd 356).**

98. We have no quarrel with the submission, urged on behalf of the Appellant, that statutory Tribunals must function within the four corners of the statute in terms of which they have been created, and not beyond. The Appellant may, therefore, be justified in contending that the PSERC, in passing the impugned order albeit in a Petition filed by the Appellant, acted beyond the jurisdiction conferred on it by the Electricity Act, and has thereby acted contrary to the provisions of the said Act.

99. While, in principle, the appellant may be justified in its submission that consent or agreement of parties would not confer jurisdiction on a statutory tribunal which is not vested with such a power in terms of the Statute, it is debatable whether this Tribunal, in the exercise of its appellate jurisdiction under the Electricity Act, would be justified in interfering with the order passed by the PSERC in Review Petition No. 55 of 2012 dated 06.11.2012 wherein all the parties had jointly agreed to amend clause 10.1 of the PSA, and had entered into the Tripartite Agreement dated 03.01.2013 in terms of the said order. It is necessary to note that neither the order of the PSERC in Review Petition No. 55 of 2012 dated 06.11.2012, nor the amended clause 10.1 of the Tripartite

Agreement dated 03.01.2013, have been subjected to challenge in the present appeal.

VII. STATUTORY POWER MUST BE EXERCISED CONSISTENT WITH THE STATUTE:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

100. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, if a statute requires things to be done in a particular manner, then it has to be done in that manner, and in no other manner; the Impugned Order violates Sections 79(1)(j) and 86(1)(j) of the Electricity Act read with the 2010 Regulations, and the 2020 Regulations, since trading margin for inter-state trading in electricity has to be decided mutually between the parties; in the present case, it is not in dispute that there is inter-state trading in electricity, and in such a transaction only the CERC has the power to fix the trading margin in terms of Section 79(1)(j) of the Electricity Act; the PSERC, being a creature of the statute, cannot exercise powers which it is not conferred with; and the PSERC has, therefore, erred in fixing the trading margin for inter-state trading in electricity. Reliance is placed in this regard on (a) ***GUVNL v. Essar Power Ltd.*, (2008) 4 SCC 755**, and (b) ***Chandra Kishore Jha v. Mahavir Prasad***, **(1999) 8 SCC 266**.

B. ANALYSIS:

101. We see no reason to disagree with the submission, urged on behalf of the Appellant, that, since the power to fix the trading margin is conferred exclusively on the Central Commission under Section 79(1)(j) with respect to inter-State trading in electricity, and on the State Commissions under Section 86(1)(j), with respect to intra-State trading in electricity, it is only the Central Commission which can exercise jurisdiction to fix the trading margin for inter-State trading in electricity,

and the State Commission can exercise jurisdiction only to fix trading margin for intra-State trading in electricity.

102. It is settled law that, where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, and that other methods of performance are necessarily forbidden. (**Taylor v. Taylor: (1875) 1 Ch D 426**; **Ramchandra Keshav Adke v. Govind Joti Chavare: (1975) 1 SCC 559; Nazir Ahmed v. Emperor: AIR 1936 PC 253; Shiv Bahadur Singh v. State of U.P., AIR 1954 SC 322; and Deep Chand v. State of Rajasthan, AIR 1961 SC 1527).** If a statute requires a thing to be done in a particular manner, it should be done in that manner alone. (**Ramchandra Keshav Adke v. Govind Joti Chavare: (1975) 1 SCC 559; Morgan Stanley Mutual Fund v. Kartick Das, (1994) 4 SCC 225; Shiv Kumar Chadha v. Municipal Corpn. of Delhi: (1993) 3 SCC 161).** When a statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act. (***J&K Housing Board v. Kunwar Sanjay Krishan Kaul*, (2011) 10 SCC 714; *Auto Cars v. Trimurti Cargo Movers (P) Ltd.*, (2018) 15 SCC 166).** Since the power to fix trading margin, for inter-State trading in electricity, is conferred only on the CERC under Section 79(1)(j), it would not be open to the State Commission to undertake the exercise of fixing such trading margin, even if it be at the behest of, or with the consent of, the parties to the proceedings before it.

VIII. NO AGREEMENT CONTRARY TO THE STATUTE CAN BE ENTERED INTO:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

103. Sri Amit Kapur, Learned Counsel for the appellant, would submit that parties can choose to limit jurisdiction on one amongst several judicial or quasi-judicial bodies that have jurisdiction over the dispute; however, parties cannot contractually confer jurisdiction on a forum which has not been bestowed with it; parties cannot enter into an agreement which is against the statute; therefore, any agreement between the parties conferring jurisdiction on a forum, which has not been bestowed with it under the statute, is unlawful; the amended Article 10.1 of the PSA, conferring jurisdiction on the PSERC to decide and approve trading margin, is contrary to Section 79(1)(j) of the Electricity Act; and, therefore, the amended Article 10.1, to the extent it has conferred jurisdiction on the PSERC to decide and approve the trading margin, is against the statute and is void ab initio. Reliance is placed in this regard on (a) ***A.B.C. Laminart (P) Ltd. v. A.P. Agencies***, (1989) 2 SCC 163; (b) ***Inter-Globe Aviation Ltd. v. N. Satchidanand***, (2011) 7 SCC 463; (c) ***Jagmittar Sain Bhagat v. Health Services, Haryana***, (2013) 10 SCC 136; and (d) ***A.V.M. Sales Corpn. v. Anuradha Chemicals (P) Ltd.,*** **(2012) 2 SCC 315.**

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

104. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would submit that the Tripartite Agreement also recognizes the jurisdiction of the State Commission for adjudication of all disputes under the agreements; Article 10.1 of the original PSA stood substituted by the Tripartite Agreement; by the said substitution, the PSA, for all intents and purposes, is to be read only with the substituted Article 10.1 of the PSA and not with the original Article 10.1 of the PSA; in terms of Article 10.1, the parties have agreed for the entire tariff (including trading margin) to be determined by the State Commission; the tariff is what is payable by

PSPCL to PTC, which includes the trading margin; the said Article is to be applied for the whole transaction, and cannot be split; this is particularly when the transaction of the generator is only with the trading licensee, and upstream of the present transaction; and, further, removal of the last portion of the substituted Article 10.1 would still result in the same position, as the first portion deals with the tariff payable by PSPCL to PTC, which would be the total tariff payable to PTC.

C. SUBMISSIONS URGED ON BEHALF OF THE 3RD RESPONDENT:

105. Sri Parinay Deep Shah, Learned Counsel for the 3rd Respondent, would submit that, in provision 2 of the Tripartite Agreement dated 23.03.2006, the parties agreed that the tariff for the contracted capacity payable by PSPCL to PTC would be determined by the State Commission; accordingly, PSERC, in its order dated 27.11.2013, exercised its power to fix the tariff; this tariff issue was in appeal before this Tribunal and finally to the Supreme Court; and the Supreme Court settled the issue by its judgment and order dated 26.4.2015.

D. JUDGEMENTS RELIED UNDER THIS HEAD:

106. In **A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163, A.V.M. Sales Corpn. v. Anuradha Chemicals (P) Ltd., (2012) 2 SCC 315,** and **InterGlobe Aviation Ltd. v. N. Satchidanand, (2011) 7 SCC 463,** the Supreme Court held that any contractual clause which ousts the jurisdiction of courts having jurisdiction, and which confers jurisdiction on a court not otherwise having jurisdiction, would be invalid;' and parties cannot by agreement, confer jurisdiction on a court which does not have jurisdiction.

107. In **Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136**, the Supreme Court held that conferment of jurisdiction is a

legislative function and it can neither be conferred with the consent of parties nor by a superior court; if the court, having no jurisdiction over the matter, passes a decree, it would amount to a nullity as the matter goes to the root of the cause; such an issue can be raised at any stage of the proceedings; the finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction; similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of the party should not be permitted to perpetrate and perpetuate defeating the legislative animation; the court cannot derive jurisdiction apart from the statute, and in such eventuality the doctrine of waiver also does not apply; and the law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject-matter.

E. ANALYSIS:

108. Conferment of jurisdiction is a legislative function. Jurisdiction can neither be conferred on a court or tribunal with the consent of parties or by a Superior Court or Tribunal. (**Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).** Consent does not confer jurisdiction. **(Narendra S. Chavan v. Vaishali V. Bhadekar, (2009) 15 SCC 166).** Nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No consent can give a jurisdiction to a court of limited jurisdiction which it does not possess. **(United Commercial Bank Ltd. v. Workmen, 1951 SCC 364).** The distinction clearly is between the jurisdiction to decide matters and the ambit of the matters to be heard by a tribunal having jurisdiction to deal with the same. In the second case, the question of acquiescence or irregularity may be considered and overlooked. When, however, the question is of the jurisdiction of the Tribunal, no question of

acquiescence or consent can affect the decision. **(United Commercial Bank Ltd. v. Workmen, 1951 SCC 364).**

109. Parties cannot by agreement give the courts' jurisdiction which the legislature has enacted they are not to have. The court cannot give effect to an agreement whether by way of compromise or otherwise, inconsistent with the provisions of the Act. **(Barton v. Fincham [(1921) 2 KB 291; Peachey Property Corporation Ltd. v. Robinson: (1966) 2 All ER 981; Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193).**

110. In principle, the submission urged on behalf of the Appellant, that parties cannot, by agreement, confer jurisdiction on an authority or Tribunal which is not entitled to exercise such power in terms of the statute, has considerable force. It is, however, disconcerting that the Appellant, having filed Petition No. 55 of 2012 seeking review of the order passed by the PSERC in Petition No. 34 of 2011 dated 17.08.2011, having jointly, with respondents 2 and 3, submitted before the PSERC that they intended amending Clause 10.1 of the original PSA to stipulate that the tariff of the project would be such as determined by the PSERC, and having entered into a tripartite agreement in terms of the said undertaking on 03.01.2013, should now turn around and contend that the submission made by them, and the agreement which they entered into should be held to be illegal on the ground that their submission before the PSERC, and the tri-partite agreement which they had executed thereafter, were contrary to the provisions of the Electricity Act.

111. The joint submissions made during the hearing of Petition No. 55 of 2012 was, evidently, to overcome the rigour of the earlier order of the PSERC in Petition No. 34 of 2011 dated 17.08.2012 wherein the

Commission had made it clear that. in terms of its directions in Petition No. 11 of 2006 dated 24.01.2007, the PSA dated 23.03.2006 should be suitably amended. Having avoided compliance with the directions of the PSERC, both in Petition No. 11 of 2006 dated 24.01.2007 and in Petition No. 34 of 2011 dated 17.08.2012, by making a joint submissions in Petition No. 55 of 2012 agreeing to amend the original PSA, the present turn around does not show the Appellant in good light, and gives rise to the suspicion that resort to such a stand is only to somehow ensure implementation of the trading margin as stipulated in Clause 10.1 of the PSA dated 23.03.2006. We refrain from saying anything more in this regard.

112. Likewise, the submission urged on behalf of the 2nd Respondent, that the amended Article 10.1 should, in terms of the Tripartite Agreement dated 03,01,2013, be applied for the whole transaction, and cannot be split particularly when the transaction of the generator is only with the trading licensee and upstream of the present transaction, would require us to examine aspects which were not even the subject matter of the original proceedings before the PSERC. Further such a contention urged on behalf of the 2nd Respondent, which would require examination of the validity of the amended Article 10.1, cannot be considered at their behest, that too in an appeal filed not by them but by the Appellant herein.

113. Even otherwise the Appeals, preferred against the tariff order passed by the PSERC in Petition No. 54 of 2012 dated 27.11.2013, were the subject matter of Appeal No. 30 of 2014 and Appeal No. 35 of 2014 before this Tribunal which, by its Order dated 12.11.2014, upheld the tariff determined by PSERC, and expressly rejected the 2nd Respondent's contention that the capped tariff remained valid; the PSERC also issued a consequential order on 04.12.2014, amending the

Tariff Order for FY 2012-13 and FY 2013-14 in Petition No. 54 of 2012; the 2nd Respondent, subsequently, challenged both the Tribunal's judgment dated 12.11.2014, and the consequential Order dated 04.12.2014, by filing Civil Appeals No. 3346-3347 of 2015 on 12.01.2015; the Supreme Court, by its Order dated 24.04.2015, upheld this Tribunal's judgement and dismissed the 2nd Respondent's Civil Appeals; and, as a result, the tariff for the 3rd Respondent as determined by PSERC, as confirmed by this Tribunal, and upheld by the Supreme Court, has attained finality. It is wholly impermissible for us, therefore, to re-open these issues and re-examine them in the present appeal.

IX. TERMS OF THE CONTRACT CANNOT BE RE-WRITTEN OR AMENDED BY THE COURT OR THE ADJUDICATING AUTHORITIES.

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

114. Sri Amit Kapur, Learned Counsel for the appellant, would submit that the terms and provisions of the contract (PPA or PSA) cannot be re-written or amended either by the Court or the adjudicating authorities; and the PSERC, by fixing the trading margin of PTC contrary to the mutually agreed trading margin in the original Article 10.1 of the PSA, has re-written the terms of the contract. Reliance is placed in this regard on (a) ***GUVNL v. Solar Semiconductor Power Co. (India) (P) Ltd***., (2017) 16 SCC 498; (b) ***Ecoren Energy India Private Limited v. State of Andhra Pradesh***, 2022 SCC OnLine AP 601; (c) ***Haryana Power Purchase Centre v. Sasan Power Ltd.***, (2024) 1 SCC 247.

B. JUDGEMENTS RELIED UNDER THIS HEAD:

115. In **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498,** the Supreme Court held that**, a**fter taking into consideration the factors in Sections 61(*a*) to (*i*), the

State Commission had determined the tariff rate for various categories, and the same was applied uniformly throughout the State; when the said tariff rate was incorporated in the PPA between the parties, it was a matter of contract between the parties; Respondent 1 was bound by the terms and conditions of the PPA entered into between Respondent 1 and the appellant by mutual consent, and the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which was essentially a matter of contract between the parties.

116. In **Ecoren Energy India (P) Ltd. v. State of A.P., 2022 SCC OnLine AP 601,** following the judgement of the Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Solar Semi-Conductor Power Co (India) P. Limited** that terms and provisions of the PPA executed between the parties cannot be re-written or amended by Court or the adjudicating authorities; the terms of PPAs cannot be altered either by the parties or by the Court; and financial difficulty of Government or DISCOM is no ground to permit avoiding the contract or reducing the tariff.

117. In **Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247,** the Supreme Court held that the Tribunal cannot make a new bargain for the parties; the Tribunal cannot rewrite a contract solemnly entered into; it cannot ink a new agreement; such residuary powers to act which varies the written contract cannot be located in the power to regulate; and the power cannot, at any rate, be exercised in the teeth of express provisions of the contract.

C. ANALYSIS:

118. The proposition that courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through

its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties. ***(*Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd., (2020) 13 SCC 564; Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission, (2022) 4 SCC 657).***

119. It is well settled that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties. (**Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508; Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission, (2022) 4 SCC 657).** In interpreting documents relating to a contract, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. **(General Assurance Society Ltd. v. Chandumull Jain, AIR 1966 SC 1644; Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd., (2020) 13 SCC 564).**

120. We are, in principle, in agreement with the submission, urged on behalf of the appellant, that Courts/Tribunals cannot re-write contracts. We have already held that the PSERC lacks jurisdiction to fix the trading margin for inter-State trading in electricity, and have made it clear that the impugned order must be set aside on this score. That, however, does not justify the submission of the Appellant that the provisions of the contract have been re-written by the PSERC. As noted hereinabove, the Appellant had, during the course of the hearing of Review Petition No. 55 of 2012, and evidently to overcome the earlier orders passed by the PSERC in Petition No. 11 of 2006 dated 24.01.2007 and in Petition No.

34 of 2011 dated 17.08.2012 (review of which was sought in Petition No. 55 of 2012), stated that they would amend the original Clause 10.1 of the PSA and incorporate the substituted provision to the effect that the PSERC should determine their tariff, thereby conferring jurisdiction on the PSERC.

121. While consent of the parties would not confer jurisdiction on the PSERC, since no such jurisdiction is conferred on them by the Electricity Act, that does not mean that the Appellant having chosen, on its own accord to enter into an agreement conferring jurisdiction on the PSERC, can now be permitted to shift the blame on to the PSERC and allege that the Commission has re-written the terms and conditions of the PSA.

X. MISTAKE OF COURT SHALL NOT CAUSE PREJUDICE TO PARTIES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

122. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, with respect to the trading margin payable to PTC, the PSERC has, over time, held as under:- (a) Order dated 24.01.2007in Petition No. 11 of 2006 that "*the Commission has also examined the trading margin proposed by PTC in the PSA. The Commission has noted that Clause 10.1 of the PSA states that the trading margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in this PSA, as may be laid down by the CERC from time to time. The Commission agrees with this stipulation and observes that the sale of electricity by PTC from this Project, located in Himachal Pradesh to PSEB is "inter-state trading of electricity". As per Section 79 (1) (J) of the EA 2003, CERC shall fix the trading margin in the interstate trading of electricity if considered necessary. In light of the above, the applicable trading margin shall be as fixed by CERC from time to time..*" **;** (b) Order

dated 17.08.2012 in Petition No. 34 of 2011: Article 10.1 of the PSA was directed to be read as "The tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission"; (c) Order dated 27.11.2013 in Petition No. 54 of 2012: *"The Commission considers it appropriate to fix trading margin for FY 2012-13 and FY 2013-14 in line with the original provision in the PSA dated 23.03.2006 as 5 paise per kWh for the Billable Energy…... Trading margin beyond this period shall be fixed by the Commission on filing of an application by PTC along with the tariff application to be filed by the generating company for determination of tariff as per the applicable tariff regulations*; (d) Impugned Order dated 11.02.2019 in Petition No. 71 of 2015: Trading Margin of Rs. 0.01/kWh shall be payable to PTC from FY 2014-15 till FY 2023-24 contrary to what is prescribed in the original Article 10.1 of the PSA; Trading margin beyond FY 2023-24 shall be fixed by Commission on filing of a separate application.

123. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that the PSERC failed to appreciate that, in terms of Section 79(1)(j) of the Electricity Act, the PSERC does not have the power/jurisdiction to decide and approve the trading margin for inter-state trading; mistake on the part of the Court shall not cause prejudice to the parties; and, therefore, PTC ought not to be prejudiced due to the PSERC's mistake of fixing trading margin of PTC even after PTC raised the issue of jurisdiction before the PSERC in Petition No. 71 of 2015 Reliance is placed in this regard on (i) ***A.R. Antulay v. R.S. Nayak,*** (1988) 2 SCC 602; (ii) ***Jang Singh v. Brij Lal,*** 1963 SCC OnLine SC 219 ; (iii) ***Jagat Dhish Bhargava v. Jawahar Lal Bhargava,*** 1960 SCC OnLine SC 149.

B. ANALYSIS:

124. It is indeed disconcerting that the Appellant, having invited the order passed by the PSERC in Petition No. 55 of 2012 dated 06.11.2012 by filing joint written submissions intimating that they intended to modify clause 10.1 of the PSA, in thereafter executing the tripartite agreement on 03.01.2013, and again in filing Petition No. 71 of 2015 requesting PSERC to fix its trading margin, should now place blame on the PSERC contending that the impugned order is a mistake on its part, without taking any part of the blame on itself. It is unnecessary for us to refer to the judgements cited, on behalf of the appellants, under this head as we are satisfied that the appellant, having induced the PSERC to pass the order in Petition No. 55 of 2012 dated 06.11.2012, cannot now turn around and contend that the said order was a mistake on the part of the PSERC.

125. In any event, be it a mistake attributable to the PSERC, or the Appellant is held to be responsible for having induced the Commission in passing such an order, the fact remains that the impugned order passed by the PSERC is without jurisdiction, since the power to fix the trading margin for an inter-State electricity trader, with respect to an inter-State trading transaction, is conferred by Section 79(1)(j) of the Electricity Act only on the CERC and not on the State Commission.

XI. SECTION 64(5) OF THE ELECTRICITY ACT: ITS SCOPE:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

126. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, from Section 64(5), Section 79(1)(j) and 86(1)(j) of the Electricity Act and Rule 8 and 9 of the Electricity Rules, 2005, it is evident that there is no concurrent jurisdiction on both the CERC and the SERC for fixation of trading margin; even in terms of Section 64(5) of the Electricity Act,

parties cannot confer jurisdiction on the PSERC for fixation of trading margin; Section 64(5) of the Electricity Act must be read along with Section 79(1)(j) of the Electricity Act, and not in isolation or out of context; in ***Energy Watchdog v. CERC,*** **(2017) 14 SCC 80,** the Supreme Court, while interpreting Section 64(5) of the Electricity Act, has made no observation that Section 64(5) of the Electricity Act can be read in isolation by ignoring the other provisions of the Electricity Act; PSPCL's reliance on **M/s Pune Power Development Pvt. Ltd. v. KERC & Ors.** (Judgment of this Tribunal in Appeal No. 200 of 2009 dated 23.02.2011) to demonstrate jurisdiction of the PSERC since part of the cause of action (power is delivered to PSPCL) arose within its statutory jurisdiction, is without merit since: (a) in the said Judgment, the issue was with respect to jurisdiction of SERC under Section 86(1)(f) of the Electricity Act, when a dispute is between the distribution licensee and an inter-state trading licensee with respect to supply of power under a banking arrangement; (b) in the present Appeal, the issue is whether the PSERC can fix trading margin, in case of inter -state trade of electricity, contrary to Section 79(1)(j) of the Electricity Act; and, hence, the said Judgment is clearly distinguishable from the present Appeal.

127. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that determination of tariff and fixation of trading margin are two different components in the Electricity Act; while Sections 62 to 64, Section 79(1)(a), (b) and (d), and Section 86(1)(a) & (b) would relate to tariff, Clause 4(ix) of the Statement of Objects and Reasons, Section 2(26) & (71), Section 12(c), Section 14(c), Section 52, Section 66, Section 79(1)(j) and Section 86(1)(j) relate to trading and trading margin; in terms of the PPA dated 25.07.2005and PSA dated 23.03.2006, supply of power is a mandatory function; PTC is supplying power to PSPCL after procuring it from Everest Power in terms of the tariff determined by

the PSERC under Sections 62 and 64 of the Electricity Act, and the trading margin agreed in the original Article 10.1 of the PSA dated 23.03.2006; in terms of the original Article 10.1 of the PSA dated 23.03.2006, PSPCL shall pay "tariff" and "trading margin" to PTC for purchase of electricity; tariff and trading margin are different components; and PSPCL shall pay "tariff" and "trading margin" to PTC for purchase of electricity.

128. Sri Amit Kapur, Learned Counsel for the appellant, would also submit that this Tribunal has settled the position that:- (a) fixation of trading margin is different from determination of tariff; (b) Clause 4(ix) of the Statement of Objects and Reasons of the Electricity Act indicates that the Electricity Act recognizes trading as a distinct activity, and Regulatory Commissions were authorized to fix trading margins if necessary; (c) the context of tariff determination and fixation of trading margin are statutorily different; (Refer: ***GUVNL v. Green Infra Corporate Wind Power Limited*****,** 2015 SCC OnLine APTEL 15; even otherwise, there is no capping on tariff in the present transaction between PTC, PSPCL and Everest Power; hence, PSPCL's contention that, if trading margin prescribed in the original Article 10.1 of the PSA is allowed to PTC, it will then increase the tariff is without merit; and, further, such a contention runs contrary to the observation of this Tribunal in the Green Infra Judgment and the provisions of the Electricity Act.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

129. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL would submit that tariff is determined under Section 62 of the Electricity Act "for *supply by a generating company to a distribution licensee";* the tariff is not for the generating company alone, but for the transaction of supply by a generating company to a distribution licensee;

a plain reading of Section 62(1)(a) requires the tariff for the entire transaction, of supply by a generating company to a distribution licensee, to be determined by the Commission; in the present case, the transaction involves supply by the 3rd Respondent to the appellant, and the appellant to the 2nd respondent; the entire tariff, involved in this transaction, is to be determined; the tariff payable by the 2nd Respondent to the Appellant includes the consideration payable by PTC to the generator, and also the margin of PTC itself; the transaction is deemed as one for the purposes of Section 62(1)(a), even though in law and in fact there are two transactions of supply (sale) of electricity; the jurisdiction of the State Commission is invoked only on the basis of the transaction being treated as one and the same involving the distribution licensee as the purchaser; the trading margin of PTC is part of tariff, and cannot be said to be different from the tariff under the Electricity Act; the subject transaction is the supply of electricity by the generator – Everest Power Private Limited ("**EPPL"**) to PTC, and supply by PTC to the Respondent PSPCL; supply by EPPL to PTC, and by PTC to PSPCL, is deemed as one transaction and cannot be cut in between claiming lack of jurisdiction; either the State Commission has jurisdiction over the entire transaction or has no jurisdiction at all; if the tariff payable to PTC by PSPCL is held not to fall within the jurisdiction of the State Commission, supply by EPPL to PTC would not have any tariff determination for want of jurisdiction; firstly, supply by a generating company to a trading licensee does not have any tariff determination under Section 62 [**Tata Power v Reliance Energy,** (2009) 16 SCC 659); further, supply by EPPL to PTC is within the State of Himachal Pradesh, and has no nexus or connection with Punjab; and, on both these grounds, the basic jurisdiction of tariff determination by PSERC would fall.

130. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would further submit that the applicable tariff of PTC (trading margin) squarely falls within Section 62 read with Section 64(5); it is only because the entire transaction is treated as one, and the State Commission determines the tariff for purchase by PSPCL in terms of Section 62(1)(a), does its jurisdiction get invoked under Section 64(5); Section 64(5) is a special provision, and is non-obstante to Chapter X, which includes Section 79; the '*inter-state supply*' in Section 64(5), in the present case, is only the supply by PTC to PSPCL, which is inter-state in nature; reliance placed by the Appellant, on ***Energy Watchdog***, is misplaced; firstly, the said decision rejected the contention that CERC had no jurisdiction over inter-state generation and supply; if the contention of the appellant is to be accepted, supply by EPPL to PTC and PTC to PSPCL would itself be outside the jurisdiction of PSERC; in any event, the said decision itself recognizes Section 64(5) as an exception, and that CERC would have jurisdiction which does not bar the State Commission also having jurisdiction; it is also well settled that, if two forums have jurisdiction, it is always open to the parties to identify one of the forums for adjudication, which agreement would be valid and binding. [**Globe Transport Corpn v. Triveni Engineering Works, (1983) 4 SCC 707**]; the expression 'supply' is defined only as sale of electricity [Section 2(70)]; in the present transaction, supply (sale) is by EPPL to PTC, and by PTC to PSPCL; breaking any part of this transaction and claiming it to be beyond the jurisdiction of the State Commission would render the transaction itself outside Sections 62(1)(a) and 64(5); and there will be no regulatory tariff determination at all, for want of jurisdiction.

131. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would also submit that, under Section 86(1)(b), the State

Commission has the power to regulate purchase of power *including the tariff*, by the distribution licensee from any person; this also includes a trading licensee; this power extends to approving the tariff which is payable by the distribution licensee; the only limitation on this power is under Rule 8 of the Electricity Rules, 2005, where the tariff of generating companies is determined by the Central Commission under Section 79(1)(a) or (b); Section 79(1)(a) or (b) are inapplicable in the present case, and does not even apply to PTC, and there can be no further limitation on the power of the State Commission under Section 86(1)(b); if the State Commission has the power to regulate the tariff payable by PSPCL to PTC under Section 86(1)(b), this would include all tariff payable by PSPCL, and no part can be excluded; the margin/profit of PTC would squarely fall within the same; and the State Commission has jurisdiction to determine the margin of PTC for sale to PSPCL.

132. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would contend that the adjudicatory jurisdiction of the State Commission under Section 86(1)(f) would also apply to the present case; all disputes in the electricity sector are to be adjudicated by forums under the Electricity Act, 2003; the said Act has been created as a complete code; disputes between licensees and generating companies would either be subject to the jurisdiction of the Central Commission under Section 79(1)(f) or the State Commission under Section 86(1)(f); Section 79(1)(f) is limited in its applicability; it firstly only involves generating companies and transmission licensees; the present issue is between PTC – a trading licensee and PSPCL – a distribution licensee; Section 79(1)(f) would, therefore, have no application; further, for Section 79(1)(f) to apply, the disputes should relate to Section 79(1)(a) to (d); there is no such issue relating to Section 79(1)(a) to (d); on the other hand, Section 86(1)(f) covers all disputes between licensees and generating

companies, and would include a trading licensee and a distribution licensee; it has been held, in **Gujarat Urja Vikas Nigam Limited v. Essar Power Limited, (2008) 4 SCC 755,** that the said provision includes all disputes and cannot be limited to only those covered by the other provisions of Section 86; and this Tribunal has also held that any dispute, between a trading licensee and a distribution licensee, would be subject to adjudication by the State Commission having nexus and jurisdiction over the distribution licensee, in view of Section 86(1)(b) and 86(1)(f). [**M/s Pune Power Development Private Limited v. Karnataka Electricity Regulatory Commission** – Judgment dated 23.02.2011 in Appeal No. 200 of 2009]

133. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would further contend that the submission that trading margin is separate from tariff is erroneous; the trading margin of PTC is part of tariff, and cannot be said to be different from the tariff under the Electricity Act; trading margin is only the compensation or consideration payable to the trading licensee in any transaction; it is a part of the purchase cost of the distribution licensee, forms part of the purchase tariff, and is passed on in the consumer tariff; the expression 'tariff' is not defined in the Electricity Act, 2003, but has been interpreted to include charges generally for procurement, being a schedule of charges. [**Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited and Another, (2017) 16 SCC 498**]; for PSPCL, the price is paid only to PTC; there is no payment by PSPCL to EPPL; payment to PTC involves the whole cost of power purchase, which includes charges that would be retained by PTC and not paid to EPPL; therefore, there is no basis for any involved interpretation of the Electricity Act to contend that the margin of PTC, for supply to PSPCL, does not form part of tariff.

134. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would also contend that reliance placed by EPPL, on **Gujarat Urja Vikas Nigam Limited v. Green Infra Corporate Wind Power Limited and Ors., 2015 SCC OnLine APTEL 15**, is misplaced; the question of law decided therein was whether the State Commission can reopen PPAs between parties; the context of the above paragraph was based on the contention that the State Commission had no jurisdiction to re-open PPAs for increase in tariff on account of non-availing accelerated depreciation benefit, and therein reliance was placed on the decision of the Supreme Court in **PTC India Limited v. Central Electricity Regulatory Commission** (2010) 4 SCC 603; while dealing with the above contention, it was held that *PTC's* decision of the Supreme Court was in relation to the Trading Margin Regulations, whereas the case on hand was based on the regulated tariff determination under Section 62; the question of law in this context was answered holding that the State Commission can entertain a petition to increase the tariff reopening the PPA, because the generator did not avail accelerated depreciation benefit; firstly, the said judgement did not even deal with the case or issue where the margin of the trading licensee was held to be excluded in the tariff payable by the distribution licensee; there was no trading licensee involved at all; further, the question of law decided in the above decision has been overturned by the Supreme Court in **Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Anr.,** (2016) 11 SCC 182, wherein it has been held that non-availing of the accelerated depreciation benefit would not empower the State Commission to reopen the PPA; in fact, the Supreme Court has, in numerous subsequent decisions, held that the State Commission has no power to reopen PPAs; and, further, the above decision itself is pending in Civil Appeal No. 14098-14101 of 2015, wherein there is an interim

order dated 05.05.2016 for the State Commission not to proceed on the merits of the petition filed (only maintainability was decided).

C. SUBMISSIONS URGED ON BEHALF OF THE 3RD RESPONDENT:

135. Sri Parinay Deep Shah, Learned Counsel for the 3rd Respondent, would submit that, in the present case involving inter-state supply of electricity, the 3rd Respondent, a generator with its hydro-power plant in Himachal Pradesh, supplied power to the appellant under a PPA; the appellant, acting as a trader, sold this electricity to the 2nd Respondent, a distribution licensee in Punjab, under a PSA; this transaction, being a scheme for generation and sale of electricity across more than one State, qualifies as inter-state supply under Section 79 of the Electricity Act, 2003; Section 79(1)(b) grants the Central Electricity Regulatory Commission (CERC) exclusive power to regulate tariff for generating companies involved in inter-state electricity supply; however, under Section 64(5) of the Act, parties may mutually agree to have the State Commission determine the tariff, even for inter-state transactions; the Supreme Court, in **Energy Watchdog v. Central Electricity Regulatory Commission & Ors: (2017) 14 SCC 80,** clarified this regulatory framework; the Apex Court held that, while the Central Commission has jurisdiction over inter-state generation and supply of electricity under Section 64(5), the jurisdiction to determine tariffs for inter-state transactions can be delegated to a State Commission by mutual consent, as detailed in Paragraphs 24, 26, and 29 of the judgment.

136. Sri Parinay Deep Shah, Learned Counsel for the 3rd Respondent, would further submit that the Impugned Order dated 11.02.2019was passed by PSERC in Petition No. 71 of 2015 filed by PTC India Limited (**PTC**) with the prayer for fixation of trading margin; as per the settled and agreed contractual position in terms of the PPA, the PSA and the

Tripartite Agreement, it is the obligation of PSPCL to pay trading margin to PTC as may be determined by PSERC; and, further, it is also the admitted position that this trading margin payable to PTC is over and above the tariff payable to Respondent No. 3 - EPPL towards supply of hydro-power to PTC and to PSPCL in terms of the PPA & PSA, as determined by PSERC, from time to time, as per the provisions of Section 62 of the Electricity Act, 2003 and the Regulations made thereunder.

137. Sri Parinay Deep Shah, Learned Counsel for the 3rd Respondent, would also submit that the distinction between tariff and trading margin is clearly established in the Electricity Act, 2003, and has been reinforced by this Tribunal; in **Gujarat Urja Vikas Nigam Limited vs. Green Infra Corporate Wind Power Limited and Ors [2015 SCC OnLine APTEL 15];** this Tribunal expressly stated that tariff and trading margin are separate regulatory domains; Paragraphs 58 and 62 of the judgment clarify that fixing or capping the trading margin is not the same as fixing tariff, with the two functions being governed by distinct statutory provisions; this statutory framework of the Electricity Act clearly separates tariff determination from trading margin fixation; Sections 61, 62, 63, and 64 focus exclusively on tariffs, detailing the Commission's role in specifying terms, determining tariffs, and adopting tariffs through competitive bidding without any mention of trading; Sections 79(1)(b) and 86(1)(b) specifically deal with tariff regulation at the Central and State levels respectively, while Sections 79(1)(j) and 86(1)(j) separately grant authority to fix trading margins; this separation underscores that tariff regulation and trading margin are distinct functions; further, Sections 178(2)(s) and 181(2)(zd) empower the Commissions to make regulation in-re tariffs, while Sections 178(2)(y) and 181(2)(zi) deal with market development, including trading; and, if trading margin were considered

part of tariff, the separate provisions for trading margin would be redundant, which clearly was not the legislative intent.

D. JUDGEMENTS UNDER THIS HEAD:

138. In **M/s. Pune Power Development Private Limited Vs Karnataka Electricity Regulatory Commission & Ors.** (Judgment of APTEL in Appeal No. 200 of 2009 dated 23.02.2011) (on which reliance is placed on behalf of the 2nd Respondent), the 3rd Respondent therein had conveyed its willingness, to the Appellant therein, to bank power upto 200 MW by the 2nd Respondent under a barter arrangement with M/s. BSES Rajdhani Power Limited through the Appellant. Pursuant thereto, an agreement was entered into between the Appellant and M/s. BSES Rajdhani Power Limited for banking of energy. The 3rd Respondent issued a letter of confirmation to the Appellant on behalf of the 2nd Respondent. The 2nd Respondent also issued a Letter of Intent to the Appellant to bank power with M/s. BSES Rajdhani Power Limited. By virtue of this arrangement, the 2nd Respondent agreed to bank 200 MW of power with BSES Rajdhani Power Limited in the months of July, August and September, 2008, and receive the same in the months of February, March and April, 2009. Both the 2nd and 3rd Respondents withdrew the banking arrangement by which time 37.92 MUs of energy had already been banked. The Appellant informed M/s. BSES Rajdhani Power Limited regarding cancellation of the agreement. M/s. BSES Rajdhani Power Limited protested to the Appellant about the unilateral decision of the 2nd Respondent to cancel the supply of scheduled power, and demanded refund of open access charges as well as monetary compensation for banking of power for July, August and September, 2008. Thereafter the 3rd Respondent informed the Appellant that M/s. BSES Rajdhani Power Limited should return 105% of about 36 MUs of banked energy during March, 2009. Both the 2nd and 3rd Respondents

filed a petition before the Karnataka Electricity Regulatory Commission under Section 86(1)(f) seeking compensation from the Appellant for non-supply of the agreed 105% of power in May, 2009. A preliminary objection was raised by the Appellant to the maintainability of the petition contending that the State Commission has no jurisdiction to decide the issue raised by the 2nd and 3rd Respondents. The State Commission held that it had jurisdiction to go into the dispute raised in the petition questioning which the jurisdiction of this Tribunal was invoked.

139. It is in this context that this Tribunal noted that the dispute raised by the 2nd Respondent was with regards non-supply of power by the Appellant to the 2nd Respondent in terms of the agreement entered into between the parties; the dispute related to a claim by the 2nd and 3rd Respondents for compensation from the Appellant for alleged violation of contractual arrangement for banking of power; and the contention urged by the Appellant, with regards lack of jurisdiction of the State Commission to entertain the dispute, was that the Appellant was a licensee of the Central Commission and not a licensee of the State Commission.

140. On the issue as to whether the State Commission had jurisdiction, under Section 86(1)(f) of the Electricity Act, over a dispute between a licensee within the State and a licensee who had granted a licence by the Central Commission, this Tribunal, after referring to the relevant statutory provisions, observed that the Electricity Act was a complete code; all disputes, which arose in relation to the transaction between licensees, were made subject to the jurisdiction of the State Commission or the Central Commission under Section 86 and Section 79 of the Electricity Act respectively; the jurisdiction conferred on the Central Commission was confined to aspects specified in Section 79 (1) (a) to (d); no such restrictions were placed on the jurisdiction of the State

Commission; in other words all disputes between a licensee which did not fall under Sections 79(1)(a) to (d) were within the jurisdiction of the State Commission; any dispute between a distribution licensee and an inter-State trading licensee was excluded from Section 79(1)(f); the power to adjudicate disputes between a distribution licensee and a trading licensee was vested with the State Commission under Section 86(1)(f) of the Electricity Act; there was no restriction on the location of a trading licensee to determine the jurisdiction of a State Commission under Section 86(1)(f); so long as a distribution licensee which procured power was involved in the State, the State Commission alone would have jurisdiction under Section 86(1)(f) to adjudicate such a dispute; the fact that the supplier of electricity was located at a different place did not oust the jurisdiction of the State Commission, under Section 86(1)(f), to adjudicate a dispute between the parties; and the State Commission had the jurisdiction to adjudicate such disputes under Section 86(1)(f).

141. What was under challenge before this Tribunal, in **M/s. Pune Power Development Private Limited**, was whether the State Commission had jurisdiction to adjudicate a dispute between a trading licensee located outside the State and a distribution licensee located within the State where the State Commission exercised jurisdiction. The question whether the State Commission also has the power to fix the trading margin in inter-State trading of electricity, which power is conferred exclusively on the Central Commission under Section 79(1)(j) of the Electricity Act, did not arise for consideration in the said judgement. Reliance placed on behalf of the 2nd Respondent, on **M/s. Pune Power Development Private Limited**, is therefore misplaced.

142. In **Energy Watchdog v. CERC, (2017) 14 SCC 80,** the Supreme Court held that Section 64(5) begins with a non obstante clause which would indicate that in all cases involving inter-State supply, transmission,

or wheeling of electricity, the Central Commission alone has jurisdiction; Section 64(5) can only apply if, the jurisdiction *otherwise* being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.

143. In **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659 : 2009 SCC OnLine SC 1030,** the Supreme Court held that, in terms of Section 7 of the 2003 Act, all persons are permitted to establish, operate and maintain a generating station; it can, in terms of Section 62(1)(*a*) of the 2003 Act, supply electricity to any licensee i.e. distribution licensee or trading licensee; the 2003 Act permits the generating company to supply electricity directly to a trader or a consumer; the primary object, therefore, was to free the generating companies from the shackles of licensing regime; the 2003 Act encourages free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity; and the generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit, choice of counter-party buyer, and freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.

144. In **Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707,** the Supreme Court held that it is not competent to the parties by agreement to invest a court with jurisdiction which it does not otherwise possess, but if there are more than one forum where a suit can be filed, it is open to the parties to select a particular forum and exclude the other forums in regard to claims which one party may have against the other under a contract.

145. In **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755,** the Supreme Court held that, after the Electricity Act, 2003 came into force, there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it; all disputes, and not merely those pertaining to matters referred to in Clauses (*a*) to (*e*) and (*g*) to (*k*) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it; and this is because there is no restriction in Section 86(1)(*f*) about the nature of the dispute.

146. In **Gujarat Urja Vikas Nigam Limited v. Green Infra Corporate Wind Power Limited, 2015 SCC OnLine APTEL 15,** this Tribunal held that determination of trading margin or fixing a cap on trading margin is different from determination of tariff; clause 4(ix) of the Objects and Reasons indicates that the Electricity Act recognizes trading as a distinct activity and Regulatory Commissions were authorized to fix ceiling on trading margins if necessary; the Statement of Objects and Reasons, the preamble and the provisions of the Electricity Act make it clear that the core function of the Regulatory Commission is determination of tariff which is a statutory function; law does not permit anyone to take over that function; the tariff determined by the Regulatory Commission is incorporated in the PPA; the Regulatory Commission retains control over it all throughout, even during the period of PPA entered into between the parties, because it has not only to fix the tariff but also to regulate it and "regulate" is a word of wide import; if there is a power to amend tariff under Sections t62(4) and 64(6), the parties by contract cannot set it at naught; parties cannot confer jurisdiction or oust jurisdiction by contract which is statutorily vested in an authority. This clause therefore refers to terms of the agreement which are contractual; and, as Tariff is not

determined by agreement, the statutory Commission have jurisdiction in relation to any alteration or amendment of tariff as per the provisions of the Electricity Act.

147. This Tribunal further held that, while tariff can be fixed by orders of the Appropriate Commission, trading margin can be fixed by an order under Section 79(1)(j) or by a regulation issued under Section 178 by the Central Commission; the terms and conditions for fixation of tariff can be fixed by regulations; the procedure for passing of tariff order is laid down under Section 64; the tariff order unless amended or revoked has to continue to be in force for such a period as may be provided in the tariff order; there are two provisions under the Electricity Act i.e. Section 62(4) and Section 64(6) which permit the Appropriate Commission to amend or revoke the tariff by an order; Tariff which is fixed by the Appropriate Commission and then incorporated in the PPA can only be varied by resorting to these statutory provisions even after the PPA is executed; there is nothing in the Electricity Act which states that this power cannot be exercised after the PPA is executed; and that is because the nature of power sector requires the regulator to retain control over tariff during the period of PPA.

148. In **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd., (2017) 16 SCC 498,** the Supreme Court held that Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, wholesale or bulk or retail/various categories of consumers; when the tariff rate, as determined by the Tariff Order, is incorporated in the PPA, it is a matter of contract between the parties; and parties are bound by the terms and conditions of the PPA entered into between them by mutual consent; and the State Commission was not right in exercising its inherent jurisdiction by extending the first

control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.

149. In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** the Supreme Court held that the making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1); if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178; while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61; it is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178; however, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178; making of a regulation, for fixation of trading margin, is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(*j*); however, if the Central Commission makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(*j*) should be in conformity with Section 178; instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act; 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 which can

even override the existing contracts including power purchase agreements which must 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*); on the making of the 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations; the 2006 Regulations make an inroad into even the existing contracts; all contracts, coming into existence after making of the 2006 Regulations, must also factor in the capping of the trading margin; and such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(*j*) of the 2003 Act.

E. ANALYSIS:

150. Part VII of the Electricity Act relates to tariff. While Section 61, thereunder, relates to tariff regulations, Section 62 relates to determination of tariff. Section 62(1)(a) stipulates that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for supply of electricity by a generating company to a distribution licensee. Section 64 details the procedure for tariff orders. Section 64(1) stipulates that an application, for determination of tariff under Section 62, shall be made by a generating company or a licensee in such manner, and accompanied by such fee, as may be determined by Regulations.

151. Under Part VII of the 2003 Act, actual determination/fixation of tariff is done by the appropriate Commission under Section 62, whereas Section 61 is the enabling provision for framing of Regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. Determination of terms and conditions of

tariff is left to the domain of the Regulatory Commissions under Section 61, whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. (**PTC LTD V. CENTRAL ELECTRICITY REGULATORY COMMISSION, (2010) 4 SCC 603).**

152. Section 64(5) stipulates that, notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this Section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

153. Section 64(5) begins with the expression *"notwithstanding anything contained in Part X".* Section 76 to 109 fall under Part X of the Electricity Act which relates to Regulatory Commissions. In **Energy Watchdog v. CERC, (2017) 14 SCC 80,** the Supreme Court observed that Section 64(5) begins with a non obstante clause which indicated that, in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone had jurisdiction, and Section 64(5) could only apply if the jurisdiction, *otherwise* being with the Central Commission alone, by the application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.

154. Section 79 which relates to the functions of the Central Commission also falls within Part X, and consequently Section 64(5) of the Electricity Act would prevail notwithstanding anything contained in Section 79(1) of the Electricity Act. A non-obstante clause is a legislative device to give effect to the enacting part of the Section in case of conflict over the provisions mentioned in the non-obstante clause. **(State (NCT**

of Delhi) v. Narender, (2014) 13 SCC 100; State of Karnataka v. K.A. Kunchindammed : (2002) 9 SCC 90). A clause, beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is more often than not appended to a Section in the beginning with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision of any other law. It is equivalent to saying that, inspite of the provisions of the Act as stated therein, the non-obstante clause, mentioned in the enactment following it, will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for operation of the enactment. **(Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184; Chandavarkar Sita Ratna Rao v. Ashalata S. Guram: (1986) 4 SCC 447 : AIR 1987 SC 117; South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207**).

155. Normally the use of the phrase 'notwithstanding anything contained in any other provision' is equivalent to saying that the other provision shall be no impediment to the measure. Use of such an expression is another way of saying that the provision, in which the *non obstante* clause occurs, would usually prevail over the other provision. **(State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129; Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184).** It is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions. **(Union of India v. G.M. Kokil, 1984 Supp SCC 196*).***

156. It is equivalent to saying that, inspite of the laws mentioned in the non-obstante clause, the provision following it will have full operation, or the laws embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non obstante clause occurs. **(*State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129*; *South India Corpn. (P) Ltd. v. Secy., Board of Revenue, (1964) 4 SCR 280).*** Use of such an expression is another way of saying that the provision, in which the non-obstante clause occurs, would wholly prevail over the other provisions of the Act. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. **(*State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129*; *South India Corpn. (P) Ltd. v. Secy., Board of Revenue, (1964) 4 SCR 280*; *Iridium India Telecom Ltd. v. Motorola Inc., (2005) 2 SCC 145).***

157. The expression *"notwithstanding anything contained in Part X",* is appended to Section 64(5) in the beginning with a view to give the enacting part of the said Section, in case of conflict, an overriding effect over the provisions of Part X of the Electricity Act as mentioned in the non obstante clause. It is equivalent to saying that, in spite of the provisions of Part X as mentioned in the non obstante clause, Section 64(5) will have its full operation or that the provisions embraced in the non obstante clause (ie Part X) would not be an impediment for operation of Section 64(5). **(South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum: AIR 1964 SC 207; Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447).** Section 64(5) overrides any provision to the contrary in Part X of the Electricity Act. In other words, Section 64(5) will operate with full vigour,

notwithstanding anything to the contrary, or any provision inconsistent therewith, in Part X of the Electricity Act. **(Orient Paper and Industries Ltd. v. State of Orissa, 1991 Supp (1) SCC 81).**

158. Section 64(5) will prevail only if there is anything inconsistent therewith in Section 79(1) of the Electricity Act. Things are inconsistent when they cannot stand together at the same time. (**Parmar Samantsinh Umedsinh v. State of Gujarat & Ors. (2021 SCC OnLine SC 138).** One law is inconsistent with another law, when the command or power or provision in the law conflicts directly with the command or power or provision in the other law." (**M. Karunanidhi v. Union of India:(1979) 3 SCC 431).** Inconsistency between two provisions of a statute would arise only if both the provisions relate to the same subject matter, and one such provision is inconsistent with the other. If two provisions of a Statute deal with two distinct and different subjects, the question of one provision being inconsistent with the other would not arise.

159. it is only if both Section 64(5) and Section 79(1)(j) are held to deal with the same subject matter can it then be said that, in view of the non-obstante clause therein, Section 64(5) would prevail to the extent Section 79(1)(j) is inconsistent therewith. Consequently, it is only if *"trading margin"*, as referred to in Section 79(1)(j), is held to form part of *"tariff"*, can Section 64(5) be said to confer jurisdiction on the State Commission to fix the *"trading margin",* notwithstanding Section 79(1)(j) being inconsistent therewith to the extent it confers jurisdiction exclusively on the Central Commission to fix the trading margin in inter-state trading in electricity.

160. The word "tariff", used both in Section 62 and Section 64, has not been defined in the Electricity Act. Tariff means a schedule of

standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, **(*Gujarat Urja Vikas Nigam Ltd.* v. *Solar Semiconductor Power Company (India) Pvt. Limited*, ((2017) 16 SCC 498; Ginni Global Ltd. v. H.P. ERC, 2022 SCC OnLine APTEL 124).** The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. (**PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603).**

161. Clauses (a), (b) and (d) of Section 79(1) specifically relates to tariff. While Clause (a) empowers the Central Commission to regulate tariff of Central Government generating companies, Clause (b) confers power on the CERC to regulate the tariff of other generating companies provided such generating companies have a composite scheme for generation and sale of electricity in more than one State. Clause (d), which also relates to determination of tariff, is inapplicable since it pertains to determination of tariff for inter-State transmission of electricity, and not for generation and supply to a distribution licensee.

162. While Clauses (a), (b) and (d) of Section 79(1) relate to tariff, it is Clause (j) of Section 79(1) which relates to trading margin. Section 79(1)(j) confers power on the CERC to fix the trading margin in inter-State trading of electricity, if considered necessary. Whether or not it considers it necessary to fix the trading margin, the fact remains that the power to fix trading margin, in inter-State trading of electricity, is conferred exclusively on the CERC, and not on the State Commissions.

163. Unlike Section 79(1), Section 86(1)(a) confer power on the State Commission to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be,

within the State. Section 86(1)(b) confers power on the State Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Section 86(1)(d) enables the State Commission to issue licence to persons seeking to act as electricity traders with respect to their operations within the State. But for Rule 9 of the Electricity Rules, 2005, an inter-State trading licensee would also have been required to obtain a licence for sale and purchase of electricity within the same State.

164. Section 86(1)(j) of the Electricity Act confers power on the State Commission to fix the trading margin in intra-State trading of electricity if considered necessary. The Electricity Act delineates the power to fix trading margin between the Central and the State Commissions. While the power to fix trading margins for Inter-State trading of electricity is conferred exclusively on the CERC under Section 79(1)(j), the power to fix trading margin in intra-State trading of electricity is conferred exclusively on the State Commissions.

165. The question which would arise for consideration is whether the State Commission, while determining the tariff under Section 62(1)(a) and (d) read with Section 86(1)(a) and (b), is also entitled to fix trading margin for inter-State trading of electricity on the premise that such trading margin would also form part of the tariff at which the distribution licensee should procure/purchase power from generating companies or licensees.

166. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act.

(Maxwell's Interpretation of Statutes, Edn. 10, p. 522). Ordinarily, the rule of construction is that the same expression where it appears more than once in the same statute, more so in the same provision, must receive the same meaning unless the context suggests otherwise, **(Suresh Chand v. Gulam Chisti, (1990) 1 SCC 593),** or there is something repugnant in the context (**Bhogilal Chunnilal Pandya vs State of Bombay: AIR 1959 SC 356**), in which event, they may also have a different meaning in different provisions of the same statute. (**CIT v. Venkateswara Hatcheries (P) Ltd., (1999) 3 SCC 632).** The word *"tariff"* is common to both Section 62(1) and 64(5) and, since the context does not suggest otherwise and there is nothing repugnant in the context of both these provisions requiring a meaning being given to the word "tariff" in Section 64(5) different from that to be given to the said word in Section 62(1), the word "tariff" must carry the same meaning in both these provisions.

167. If *"trading margin"* is held to fall within the ambit of *"tariff"* under Section 64(5), it would likewise fall within the scope of *"tariff"* under Section 62(1)(a) also. If *"trading margin"* is held to fall within the ambit of, and to form part of, *"tariff"* then, in the exercise of its power to determine the tariff under Section 62(1)(a) and (d), the State Commission can also exercise the power to fix trading margins even in cases where Section 64(5) would not apply. Unlike Section 64(5), Section 62(1) does not use the words *"notwithstanding anything contained in Part X"*. Consequently Section 62(1) cannot be said to prevail over Section 79(1)(j). The logical corollary thereto would be that, while trading margin for inter-state trading in electricity cannot be fixed by the State Commission while determining tariff under Section 62(1)(a) and such a power would continue to remain with the CERC under Section 79(1)(j), the power to fix trading margin can be exercised by the State Commission under Section

64(5). It would also require us to hold that, though the same word "tariff" is used both in Section 62(1)(a) and 64(5), the said expression *"tariff"* would carry a meaning in Section 64(5) different from that in Section 62(1)(a).

168. Under the scheme of modern legislations, a non obstante clause has a contextual and limited application. The impact of a "non obstante clause" on the Act must be kept measured by the legislative policy and should be limited to the extent it is intended by Parliament and not beyond. (***ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.*** **[(2006) 10 SCC 452**; **JIK Industries Ltd. v. Amarlal V. Jumani, (2012) 3 SCC 255; Ganv Bhavancho Ekvott vs South Western Railways: 2022 SCC OnLine Bom 7184).** Interpretation of a non obstante clause must be confined to the legislative policy. **(ICICI Bank Ltd. v. SIDCO Leathers Ltd., (2006) 10 SCC 452).** Therefore, while interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning. **(*Aswini Kumar* v. *Arabinda Bose**; *A.V. Fernandez v. State of Kerala, 1957 SCR 837*).** The court must then try to find out the extent to which the legislature had intended to give such a provision overriding effect. The non obstante clause is no doubt a very potent clause, but for that reason alone, the scope of that provision must be determined strictly. **(Madhav Rao Scindia v. Union of India: (1971) 1 SCC 85; A.G. Varadarajulu v. State of T.N., (1998) 4 SCC 231).**

169. The *non-obstante* clause in Section 64(5) of the Electricity Act should be confined to "tariff", and therefore the said Section must be held to prevail notwithstanding anything to the contrary in Section 79(1) relating to tariff alone. It is only to the extent of a conflict with clauses (a) & (b) of Section 79(1) would Section 64(5) prevail. As a result, though

the power to determine tariff, under clauses (a) & (b) of Section 79(1), vests with the Central Commission, the State Commission is empowered to determine tariff even with respect to these matters, in view of the non-obstnte clause therein, provided of course the other ingredients of Section 64(5) are satisfied. Unlike Section 79(1)(a) & (b) which relates to tariff, trading margin falls within the ambit of Section 79(1)(j). If Parliament intended to bring "trading margin" within the ambit of "tariff", it would neither have used a different expression nor made a separate provision for fixation of trading margin in Section 79(1)(j) and 86(1)(j) of the Electricity Act.

170. While Sections 62 and 64 of the Electricity Act use the expression "tariff", Sections 79(1)(j) and 86(1)(j) of the Electricity Act use the expression "trading margin". It is well settled that when two different words or expressions are used by the same statute, one has to construe these different words as carrying different meanings. **(*Kailash Nath Agarwal* v. *Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.*, (2003) 4 SCC 305; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** Different use of words or expressions in two provisions of a statute is for a purpose. If the field of the two provisions were to be the same, the same word or expression would have been used. **(*B.R. Enterprises* v. *State of U.P.*, (1999) 9 SCC 700; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When two words of different import are used in a statute, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. **(*Member, Board of Revenue* v. *Arthur Paul Benthall, AIR 1956 SC 35;* Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When the legislature has taken care of using different expressions in different sections/Rules,

normally different meaning is required to be assigned to the language used by the legislature. If, in relation to the same subject-matter, different words of different import are used in the same statute, there is a presumption that they are not used in the same sense. **(*Arthur Paul Benthall, AIR 1956 SC 35*; *Oriental Insurance Co. Ltd.* v. *Hansrajbhai V. Kodala,* (2001) 5 SCC 175; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** When the situation has been differently expressed, the legislature must be taken to have intended to express a different intention. **(*CIT* v. *East West Import and Export (P) Ltd., (1989) 1 SCC 760*; Kurapati Bangaraiah and 17 others vs Govt. of A.P: 2014 SCC OnLine Hyd 1294).** We find it difficult, therefore, to agree with the submission, urged on behalf of the 2nd Respondent, that Section 64(5) would confer jurisdiction on the State Commission to fix trading margin of an inter-state electricity trader with respect to an inter-state electricity trading transaction. The submission that fixation of trading margin in inter-state trading in electricity would form part of a tariff determination process by the State Commission when electricity is sold to a distribution licensee, and that Section 79(1)(j) would only apply in other situations, also necessitates rejection, for that would require us to read such words of restriction in Section 79(1)(j) which, in law, we are not permitted to do.

171. Viewed from any angle, we are satisfied that Section 64(5) of the Electricity Act does not confer jurisdiction on the State Commission to fix trading margin of an inter-state electricity trader with respect to an inter-state electricity trading transaction. The submissions, urged on behalf of the 2nd Respondent under this head, do not merit acceptance.

XII. DOCTRINE OF SEVERABILITY:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

172. Sri Amit Kapur, Learned Counsel for the appellant, would submit that the original Article 10.1 of the PSA dated 23.03.2006 provides that: "*PTC's Trading Margin shall be Rs. 0.05/kWh for the Tariff Years 1 to 12 and Rs. 0.10/kWh for the Tariff Years 13 to 40 and shall be payable by the Purchaser to PTC for the entire Billable Energy. Such margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in this PSA, as may be laid down by CERC from time to time.*"; this was sought to be amended/substituted by the Tripartite Agreement dated 03.01.2013; in terms of Section 79(1)(j) of the Electricity Act, the CERC has been vested with domain and power to fix the trading margin for inter-state trading of power, if considered necessary; the amended Article 10.1 of the PSA, to the extent it envisaged that the PSERC shall decide or approve the trading margin, is void ab-initio in terms of Sections 2(h) and 10 of the Indian Contract Act, 1872; that portion of Article 10.1 (as sought to be amended) violates Section 79(1)(j) of the Electricity Act; and as such, in terms of the doctrine of severability incorporated in Article 16.9 of the PSA, that portion is invalid or unenforceable; and the remainder of the agreement shall survive and remain in force.

173. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that, in such a situation, the original contractual arrangement should be given effect to; it is the duty of the Court to sever and separate the illegal portion and retain the remaining portion if the illegal portion is severable (Refer: (a) ***Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.,*** (2006) 2 SCC 628; (b) ***Elektron Lighting Systems (P) Ltd. v. Shah Investments,*** (2015) 15 SCC 137; (c) ***BOI Finance Ltd. v. Custodian,*** (1997) 10 SCC 488; (d) ***Beed District Central Coop. Bank Ltd. v. State of Maharashtra*****,** (2006) 8 SCC 514; (e) ***Texco Marketing (P) Ltd. v. TATA AIG General Insurance Co. Ltd****.,* (2023) 1 SCC 428;

and (f) ***R.M.D. Chamarbaugwalla v. Union of India,*** AIR 1957 SC 628.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

174. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would submit that the doctrine of severability in Article 16.9 does not help the case of PTC in any manner; the said Article 16.9 itself supports that there would be no revival of the original Article 10.1; and under no circumstances can the original Article 10.1 be revived.

C. ANALYSIS:

175. Article 16.9 of the PSA relates to Severability, and stipulates that the provisions of this Agreement are severable, and if any portion of this Agreement is deemed legally invalid or unenforceable, the remainder of this Agreement shall survive and remain In full force and effect; provided that, if a provision is held to be invalid or unenforceable, the Parties shall negotiate in good faith to adopt a replacement provision to carry out, in effect, the Parties' original intention to the extent permitted by applicable Laws.

176. The submission, urged on behalf of the Appellant, is that it is only the amended Article 10.1 of the PSA (ie in terms of the Tri-partite Agreement dated 03.01.2013) which is liable to be struck down (as parties had agreed thereby to confers jurisdiction on the State Commission to fix the trading margin, though no such power is conferred on it under the provisions of the Electricity Act), and the remaining parts of the PSA would continue to remain in force in view of Article 16.9 thereof; and Clause 10.1 of the original PSA dated 23.03.2006 would revive consequent on Clause 10.1 of the tripartite agreement dated 03.01.2013 being struck down. On the other hand the submission,

urged on behalf of the 2nd Respondent, is that Article 16.9 of the PSA, which relates to severability, itself makes it clear that Clause 10.1 of the original PSA would not revive.

177. It is well settled that, while the Appellate Court or Tribunal (such as APTEL) has jurisdiction to uphold, reverse or modify the order against the appeal has been preferred, it has no jurisdiction to adjudicate upon a different kind of dispute that was never taken up while passing the order under challenge in the appeal. The proper function of an appellate court is to correct an error in the judgment or proceedings of the court below, and not to adjudicate upon a different kind of dispute — a dispute that was never taken before the court below. (**Chittoori Subbanna v Kudappa Subbanna & Ors., 1964 SCC OnLine SC 322; Jaipur Development Authority v Prerna Agricultural Farms Private Limited: Judgement of the Rajasthan HC in Civil WP No.15286 of 2018 dated 28.07.2023).**

178. The question whether the other parts of the amended PSA dated 03.01.2013, apart from those by which the parties had conferred jurisdiction on the PSERC, would survive, on the offending parts being severed therefrom, was not the subject matter of the proceedings before the PSERC. We may not be justified, therefore, in undertaking an examination of these aspects in the present appeal. As we are not undertaking an examination of the afore-said aspects, it is unnecessary for us to take note of the contents of the judgements cited under this head.

179. Suffice it conclude with the observation that, what none of the parties, to these appellate proceedings, have addressed is the consequences of the impugned order being declared void; and whether that would result in revival of the earlier orders of the PSERC in Petition

No. 34 of 2011 dated 17.08.2011 and in Petition No. 11 of 2006 dated 24.01.2007. These aspects shall be examined a little later in this order.

XIII. DOCTRINE OF REVIVAL:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

180. Sri Amit Kapur, Learned Counsel for the appellant, would submit that the Supreme Court has interpreted the word "void ab initio" as non-est or unenforceable (Refer: (a) ***CBI v. Dr RR Kishore*, 2023 SCC OnLINE SC 1146**; and (b) ***Keshavan Madhava v. State of Bombay***, **AIR 1951 SCC 16, 1951 SCC OnLine SC 3**; the amended Article 10.1 of the tri-partite agreement, to the extent it was agreed that the PSERC shall decide and approve trading margin, is void ab initio; and, in terms of Article 16.9 of the PSA, the original Article 10.1 of the PSA shall continue to prevail as it is aligned with the applicable CERC (Fixation of Trading Margin) Regulations, 2010. Reliance is placed in this regard on (a) ***Nalini Singh Associates v. Prime Time-IP Media Services Ltd.,*** 2008 SCC OnLine Del 1038; (b) ***Shankarlal Damodhar v. Ambalal Ajaipal***, 1945 SCC OnLine MP 64, AIR 1946 Nag 260; (c) ***Gharati Hiracharan Kalar v. Kehar Mansaram Kalar,*** 1936 SCC OnLine MP 156, AIR 1937 Nag 104.

181. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that the amended Article 10.1, to the extent it provided that the PSERC shall decide and approve the trading margin, is void ab initio; therefore, the original Article 10.1 of the PSA shall prevail as it is aligned with the applicable Trading Margin Regulations, 2010; and, if the amending provision is invalid or declared invalid, then the original provision would revive. Reliance is placed in this regard on (a) ***Supreme Court Advocates-on-Record Assn. v. Union of India,*** (2016) 5 SCC 1;

(b) ***West U.P. Sugar Mills Assn. v. State of U.P.,*** (2002) 2 SCC 645**;** and (c) ***State of T.N. v. K. Shyam Sunder,*** (2011) 8 SCC 737.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

182. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would submit that the doctrine of severability in Article 16.9 does not help the case of PTC in any manner; the said Article 16.9 itself supports that there would be no revival of the original Article 10.1; under no circumstances can the original Article 10.1 be revived; even going by the contention of PTC that the last part of the Article is *void*, it would not result in revival of the Original Article 10.1 of the PSA dated 23.03.2006; firstly, Article 10.1 stands substituted by the Tripartite Agreement in toto; it cannot be that one part is substituted, but the other part remains from the original agreement; in any event, the principle of law is that there is no revival of the earlier provision which has been substituted, even when the substituted provision is held to be invalid; the legal principle is that the process of substitution has two steps, (a) the old provision is repealed and ceases to exist; and (b) the new provision is brought into existence in its place; even if the new provision brought into existence by the second step is held to be invalid, it would not invalidate repeal of the existing provision; the only exceptions are where the legislative competence for the substituting provision is questioned or where fundamental rights are affected by the substituting provision; the doctrine of revival does not even apply to delegated legislation; and reference may be made to the following decisions: (a) **Firm A.T.B. Mehtab Majid and Co. v. The State of Madras and Another, (1962) SCC Online SC 51;** (b)**B.N. Tewari v Union of India, 1964 SCC OnLine SC 231;** (c) **State of Tamil Nadu v. K. Shyam Sunder & Others,** (2011) 8 SCC 737; (d) **West UP Sugar Mills Assn v State of UP, (2002) 2 SCC 645;** (d)

Pernod Ricard India Pvt Ltd v. State of Madhya Pradesh, 2024 SCC OnLine SC 566; and the said principle would squarely apply in the present case.

183. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would further submit that reliance placed by the appellant, on the decision of the Delhi High Court in **Nalini Singh Associates v. Prime Time – IP Media Services Ltd. 2008 (106) DRJ 734,** is misplaced; firstly, it was a case where the earlier contract was discharged by substitution; it was not even dealing with the case of one provision in the contract being substituted; the High Court also did not refer to any of the decisions on the doctrine of revival; further, even in the said decision, the twin conditions provided are to apply, namely, that the new contract is itself void, and when the terms of novation itself provide that the original contract can be revived; it is neither of the conditions; in any event, it is not a case where one provision in a substituted contract is claimed to be void, and a part of an earlier contract gets revived; this would be contrary to the basic principle of consensus ad idem, wherein the parties have agreed to new terms in the place of the existing terms; either the new terms apply or the existing terms apply; the PSA, in the present case, itself makes the original contract being applicable an impossible situation; Article 16.9 of the PSA provides that, if any provision is held to be invalid, the parties would need to negotiate in good faith for amending the contract; it is not that any other provision would automatically apply; Article 10.1 of the PSA stands substituted by the Tripartite Agreement and no benefit or application of the Original Article 10.1 can be claimed thereafter; there would be no revival of the original Article 10.1, let alone any part revival; since Article 10.1 was substituted by the Tripartite Agreement, Article 16.9 needs to be applied considering the PSA with the substituted Article 10.1; if it is held that the

last portion of Article 10.1 or even the entire Article 10.1 is invalid and is contrary to law, the parties need to negotiate on another provision as per Article 16.9; there is no automatic application of any other term; and by no stretch can PTC claim the original Article 10.1 to be revived, when the provision was itself *void* at the time of its execution.

C. JUDGEMENTS CITED UNDER THIS HEAD:

184. In **CBI v. R.R. Kishore, 2023 SCC OnLine SC 1146,** the Supreme Court held that, once a law is declared to be unconstitutional, being violative of Part-III of the Constitution, then it would be held to be *void ab initio*, *still born*, *unenforceable* and *non est* in view of Article 13(2) of the Constitution; the declaration made by the Constitution Bench judgement will have retrospective operation; and Section 6A of the DSPE Act is held to be not in force from the date of its insertion i.e. 11.09.2003.

185. In **Keshavan Madhava Menon v. State of Bombay, 1951 SCC 16,** the Supreme Court held that Article 13(1) of the Constitution only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory, and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution; it has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned for, to say that it is, will be to give the law retrospective effect; there is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force; and, so far as the past acts are concerned,

the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights.

186. In **Nalini Singh Associates v. Prime Time-IP Media Services Ltd., 2008 SCC OnLine Del 1038,** it was held that Section 62 of the Contract Act allows novation, rescission, modification and alteration of an earlier contract with a new agreement or even alteration of an earlier agreement; unless the new contract is void or unenforceable or the amended terms are unenforceable, a party cannot revert back to the original contract; the original contract can get revived in two cases: firstly, when the new contract is unenforceable or void and secondly, when the terms of novation itself provide that original contract can be revived and the said clause becomes applicable; and in case these two conditions are not satisfied, the original contract gets obliterated or wiped out; it dies and cannot confer any cause of action.

187. In **Shankarlal Damodhar v. Ambalal Ajaipal, 1945 SCC OnLine MP 64,** the award and the decree required registration under Section 17(1)(e) of the Registration Act, and, in the absence of registration under Section 49 of that Act neither the award nor the decree could affect any immovable property comprised therein. Neither document was registered and the plaintiff based his claim in this suit on the original mortgage. The defendant contended that the original mortgage had been superseded by the award and decree, and that the plaintiff had no remedy at all because the original contract had gone and the award and decree could not be enforced without registration.

188. It is in this context that the Madhya Pradesh High Court held that there must be a new enforceable agreement, and if the new agreement is not enforceable, then there is no *novation* under Section 62 of the Contract Act; and if by reason of any want of formality, such as

registration, the document containing the contract is inadmissible in evidence or otherwise unenforceable, the original contract will still be operative.

189. In **Gharati Hiracharan Kalar v. Kehar Mansaram Kalar, 1936 SCC OnLine MP 156** reliance was placed on **Nathusa v. Phulchandsa, (1912) 8 NLR 7 : 14 IC 399,** wherein it was held that where an instrument intended to constitute a novation becomes invalid or inoperative, the rights of the creditor under the original contract remained unaffected; and where the intended novation was by a document requiring registration and registration was not carried out, the original contract remained enforceable.

190. In **Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1,** it was held that, if neither the impugned constitutional provision nor the amended provisions of the Constitution would survive, it would lead to a breakdown of the constitutional machinery inasmuch as there would be a lacuna or a hiatus; such a position cannot be the result of any sound process of interpretation; when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive; the above position also emerges from the legal position declared in *Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.*, (1969) 1 SCC 255; the assumption that a judicial verdict setting aside an amendment has the same effect as a repeal of an enactment through a legislation, was unacceptable; when a legislature amends or repeals an existing provision, its action is of its own free will and is premised on well-founded principles of interpretation including the provisions of the General Causes Act; not so when an amendment/repeal is set aside through a judicial process; when a

judgment sets aside an amendment or a repeal by the legislature, it is but natural that the status quo ante, would stand restored.

191. In **West U.P. Sugar Mills Assn. v. State of U.P., (2002) 2 SCC 645,** it was held that, where a subsequent law which modified the earlier law was held to be void, the earlier law shall be deemed to have never been modified or repealed and, therefore, continued to be in force.

192. In **B.N. Tewari v. Union of India, 1964 SCC OnLine SC 231,** the Supreme Court held that. when the Court struck down the carry forward rule as modified in 1955, that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive; and, after the judgment of the Supreme Court in *Devadasan case*: AIR 1964 SC 179, there was no carry forward rule at all, for the carry forward rule of 1955 was struck down by the Supreme Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place.

193. In **State of T.N. v. K. Shyam Sunder, (2011) 8 SCC 737,** the Supreme Court relied on its earlier judgement in **State of Rajasthan v. Mangilal Pindwal** : (1996) 5 SCC 60, wherein it was held that, when the statute is amended, the process of substitution of statutory provisions consists of two parts: (*i*) the old rule is made to cease to exist; (*ii*) the new rule is brought into existence in its place; in other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision.

194. In **State of T.N. v. K. Shyam Sunder, (2011) 8 SCC 737,** the Supreme Court observed that, where the Act is struck down by the Court being invalid on the ground of arbitrariness in view of the provisions of

Article 14 of the Constitution or being violative of fundamental rights enshrined in Part III of the Constitution, such Act can be described as void ab initio meaning thereby unconstitutional, stillborn or having no existence at all; in such a situation, the Act which stood repealed, stands revived automatically; in case the amending Act is struck down by the court for want of legislative competence or is violative of any of the fundamental rights enshrined in Part III of the Constitution, it would be unenforceable in view of the provision under Article 13(2) of the Constitution and in such circumstances the old Act would revive, but not otherwise; and, this proposition of law is, however, not applicable so far as subordinate legislation is concerned.

D. ANALYSIS:

195. The order dated 11.02.2019, which is impugned in this Appeal, was passed by the PSERC in Petition No. 71 of 2015, and the subsequent orders in Petition Nos. 48 of 2016 and 49 of 2016 both dated 13.02.2019. As noted earlier in this Judgment, the PSERC has passed orders in Petition Nos. 48 of 2016 and 49 of 2016 both dated 13.02.2019 merely following the order passed by it earlier in Petition No. 71 of 2015 dated 11.02.2019. Consequently, what we are concerned with is mainly the order passed by the PSERC in Petition No. 71 of 2015 dated 11.02.2019. By way of the said order, the PSERC has fixed the Appellant's trading margin at Rs.0.01/ kWh up to the end of the 12th tariff year, and has observed that, in order to fix the trading margin from the 13th year onwards, the Appellant should approach the PSERC at the appropriate time. Since this order of the PSERC, in fixing the trading margin of an inter-State trading licensee with respect to a transaction involving inter-State trading in electricity, is beyond the jurisdiction of the State Commission, the impugned order, fixing the said trading margin, must be, and is accordingly, set aside.

196. In examining the question, whether setting aside the impugned order would result in revival of Clause 10.1 of the original PSA dated 23.03.2006, we must briefly note what transpired between 23.03.2006 when the PSA was originally executed and 11.02.2019 when the impugned order was passed. As noted hereinabove, the predecessor of the 2nd Respondent, with whom the PSA was executed by the Appellant on 23.03.2006, had filed Petition No. 11 of 2006 before the PSERC seeking approval of the PSA dated 23.03.2006. Para 3.7 of the Order passed by the PSERC, in Petition No. 11 of 2006 dated 24.01.2007, reads thus:

"*3.7 Trading Margin*

3.7.1 Besides the landed cost of power for PSEB in respect of the PSA, the Commission has also examined the trading margin proposed by PTC in the PSA. The Commission has noted that Clause 10.1 of the PSA states that the trading margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in this PSA, as may be laid down by the CERC from time to time. The Commission agrees with this stipulation and observes that the sale of electricity by PTC from this Project, located in Himachal Pradesh to PSEB is "inter-state trading of electricity". As per Section 79 (1)(j) of the EA 2003, CERC shall fix the trading margin in the inter-state trading of electricity if considered necessary. In light of the above, the applicable trading margin shall be as fixed by CERC from time to time. In the eventuality of CERC not fixing the trading margin for any particular period, it shall be such margin last fixed by CERC."

197. Thereafter the Appellant filed Petition No. 34 of 2011 before the PSERC seeking its approval for the 2nd Respondent herein to purchase

electricity from the Appellant in accordance with the tariff calculated as per the CERC Trading Regulations 2010. Among the reliefs sought by the Appellant, in the said Petition, was to allow them to recover their trading margin as per the PSA dated 23.03.2006. In Para 8(iv) of its order in Petition No. 34 of 2011 dated 17.08.2012, with respect to the trading margin, the PSERC observed as under:

> *"(iv) Respondent No.1, after getting the PSA approved from the Commission as per the terms of the PSA by filing Petition No.11 of 2006, failed to convey the approval of the Commission to the Petitioner, which inter-alia was subject to compliance of the directions of the Commission. This was desirable especially in the circumstances that Respondent No.1 had not, at that time arrayed the Petitioner as a Co-Petitioner/Respondent. The directions of the Commission were required to be incorporated in the PSA to make it implementable."*

198. It is relevant to note that the Appellant was the Petitioner in Petition No. 34 of 2011, the 2nd Respondent herein was the 1st Respondent, and the 3rd Respondent herein was the 2nd Respondent in the said Petition.

199. In Para 8(vii) and (viii) of its order, in Petition No. 34 of 2011 dated 17.08.2012, the PSERC then faulted the Appellant holding as under:

> *"(vii) The Petitioner, on its part, failed to make available to the Respondent No.1, all the technical, financial and commercial data with respect to completed cost of the project for filing of the tariff petition.*
>
> *(viii) The Petitioner in association with Respondent No.2 failed to provide the monthly progress reports of the construction of the project to Respondent No.1 as provided in the PSA. Had it been so, Respondent No.1 would, probably, not have raised issues*

opposing the likely increase in tariff due to reasons cited by the Petitioner/Respondent No.2, especially the geological surprises."

200. The PSERC then proceeded to hold that, in issuing the Order in Petition No. 11 of 2006 dated 24.01.2007, it had exercised the jurisdiction vested in it under the statute; the said order had not been challenged and was presently valid and subsisting; the said order cannot, therefore, be set aside and ignored in a collateral proceeding; since the Order in Petition No. 11 of 2006 dated 24.01.2007 is valid and subsisting, it is necessary for the parties to ensure that the said Order is complied with and the *inter se* agreement is suitably amended and incorporates the directions of the Commission issued in its order in Petition No. 11 of 2006 dated 24.01.2007; it cannot be said that the said Order in Petition No. 11 of 2006 dated 24.01.2007 is without jurisdiction or suffers from any patent infirmity; it is clear that the Commission granted approval to the electricity purchase and procurement process under the PSA subject to the 2nd Respondent herein complying with the directions of the Commission in its order in Petition No. 11 of 2006 dated 24.01.2007; the 2nd Respondent herein was required to execute the amendments in the original PSA and get it signed by the Appellant; and the 2nd Respondent had failed to get these amendments executed from the Appellant and jointly sign them along with these amendments in the original PSA despite passage of a period of five years.

201. The PSERC concluded holding that both the 2nd Respondent and the Appellant should get the PSA suitably amended and incorporate the directions of the Commission in its order in Petition No. 11 of 2006 dated 24.01.2007; and it was open for them, thereafter, to file a Petition along audited accounts for determination of the tariff under the relevant provisions of the Act and the Regulations.

202. The Appellant filed Petition No. 55 of 2012 seeking review of the order passed by the PSERC in Petition No. 34 of 2011 dated 17.08.2012. Curiously, during the hearing of Petition No. 55 of 2012, the Appellant along with Respondent Nos. 2 & 3 filed joint written submissions stating that, in compliance with the order passed by the Commission in Petition No. 34 of 2011 dated 17.08.2012, all the parties had agreed to all the amendments in the Power Sale Agreement except amendment relating to tariff; the parties were now agreeable, in respect of condition No.10.1 relating to tariff, for the following amended provisions to be incorporated in the Power Sale Agreement:

> *"The Tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission."*

203. It is only because of these joint Written Submissions, filed on behalf of all the parties before it, that the PSERC modified the last Para of its order, in Petition No. 34 of 2011 dated 17.08.2012, incorporating what the parties had agreed to i.e. for the tariff of the project to be determined by the PSERC. It is in compliance with this order of the PSERC dated 06.11.2012 that the Appellant executed a tripartite agreement with Respondent Nos. 2 & 3 on 03.01.2013. It is relevant to note that the said tripartite agreement not only refers to the PSA dated 23.03.2006 but also to the order passed by the PSERC on 17.08.2012 (in Petition No. 34 of 2011) and the subsequent order of the PSERC dated 06.11.2012 (i.e. in Petition No. 55 of 2012).

204. The amended Article 10.1 of the tripartite agreement dated 03.01.2013 reads thus:

> *"The tariff for the contracted capacity payable by PSPCL to PTC including all aspects of tariff element would be determined by the Commission and also trading margin, and other charges payable*

additionally to PTC shall be as per the decision and approval of the Commission."

205. For the original Article 10.1 of the PSA dated 23.03.2006 to apply, the amended Article 10.1 of the tripartite agreement dated 03.01.2013 must be struck down on the ground that parties cannot by consent confer jurisdiction on the PSERC which is not conferred on them by the Electricity Act. Even if we were to proceed to so hold, we would be further required to hold that the concession made by all the parties, to the proceedings in Petition No. 55 of 2012, is illegal, and to set aside the order of the PSERC in Petition No. 55 of 2012 dated 06.11.2012 on this score. Even if we were to proceed on the premise that we can, in an appeal, challenging the order passed by the PSERC in Petition No. 71 of 2015 dated 13.02.2019, set aside both the amended Article 10.1 of the tripartite agreement dated 03.01.2013 and the order of the PSERC in Petition No. 55 of 2012 dated 06.11.2012 on the ground that parties cannot by consent confer jurisdiction of the PSERC, it would only result in revival of the order passed by the PSERC in Petition No. 34 of 2011 dated 17.08.2012.

206. As noted hereinabove, Petition No. 55 of 2012 was filed seeking review of the order passed in Petition No. 34 of 2011 dated 17.08.2012. If the order in Review Petition No. 55 of 2012 dated 06.11.2012 were to be set aside on the ground that parties could not by consent confer jurisdiction on the PSERC, though no such jurisdiction has been conferred on it under the provisions of the Electricity Act, it would result in revival of the original order in Petition No. 34 of 2011 dated 17.08.2012, whereby they had directed the parties to get the PSA suitably amended and incorporate the directions issued by it earlier in its order in Petition No. 11 of 2006 dated 24.01.2007. The order of the PSERC in Petition No. 11 of 2006 dated 24.01.2007 would also revive.

207. As noted hereinabove, in its order in Petition No. 11 of 2006 dated 24.01.2007, the PSERC had held that the trading margin should be in compliance with the norms, applicable to transactions of the nature and duration as capped in the PSA, as may be laid down by the CERC from time to time; the CERC is empowered under Section 79(1)(j) to fix the trading margin in inter-State trading of electricity; and, in the eventuality of the CERC not fixing the trading margin for any particular period, it shall be such margin last fixed by the CERC. In the light of this order of the PSERC, which is not under challenge in the present appeal and which has attained finality, and as the 2010 Regulations does not prescribe any trading margin and leaves it to the parties to mutually agree on the trading margin, it may well be that the last Trading margin fixed by the CERC, as 4 paise/ kWh in terms of the 2005 Regulations, which may govern.

208. As the CERC Trading Regulations in force on 24.01.2007, when the PSERC had passed the order in Petition No. 11 of 2006, was the 2005 Trading Regulations which fixed a cap of 4 paise/kWh as the trading margin, and in all the subsequent Regulations the CERC has not fixed the trading margin but has left it to the parties to agree thereupon, the order of the PSERC, in Petition No. 11 of 2006 dated 24.01.2007, would require parties to stipulate the trading margin in their agreement as not more than 4 paise/kWh. In any event, in the light of the judgement of the Supreme Court in **PTC India Ltd Vs. CERC: 2010 (4) SCC 603,** the 2005 Regulations would not only override existing contracts between regulated entities, but also cast an obligation on the regulated entities to align their existing and future contracts with the said Regulations. The 2005 Trading Regulations were in force when the PSA was executed on 23.03.2006, and the Appellant and the 2nd Respondent were legally obliged to align the said PSA with the 2005 Trading Regulations.

Prescription of a trading margin, contrary thereto, was therefore impermissible.

209. We have detailed the possible consequence of setting aside the impugned order only to indicate that, setting aside the amended Article 10.1 of the tripartite agreement dated 03.01.2013, as well as the order of the PSERC in Petition No. 55 of 2012 dated 07.11.2012, may not automatically result in revival of Article 10.1 of the original PSA dated 23.03.2006. That apart, the scope of the repealing provisions of Regulation 5.1 and the savings clause in Regulation 5.2 of the 2010 Trading Regulations would also be required to be gone into, in examining application of the various facets of the doctrine of revival, which we are satisfied we should refrain from doing, more so in an Appeal preferred against the impugned order, as we may not be justified in undertaking such an elaborate examination of the question whether or not the Appellant, as a consequence of the impugned order being set aside on this score, be entitled to the trading margin as stipulated in Clause 10.1 of the original PSA dated 23.03.2006. As noted hereinabove, while the Appellate Court or Tribunal (such as APTEL) has jurisdiction to uphold, reverse or modify the order against the appeal has been preferred, it has no jurisdiction to adjudicate upon a different kind of dispute that was never taken up while passing the order under challenge in the appeal.

210. Since we are of the view that these matters do not arise for consideration in the present appeal and we are required to confine our enquiry only to the limited question as to whether or not the PSERC could have exercised jurisdiction to fix the trading margin of a inter-State trading licensee with respect to a inter-State trading transaction, we may not be understood to have expressed any conclusive opinion in this regard.

211. On our holding that the PSERC lacked jurisdiction to fix their Trading margin, any relief which the Appellant may be entitled to as a result, cannot be sought in the present appellate proceedings which relate to the validity of the order passed by the PSERC in Petition No. 71 of 2015 dated 11.02.2019 and the orders in Petition Nos. 48 and 49 of 2016 dated 30.02.2019. While the PSERC has no doubt exercised a jurisdiction, not vested in it under the Electricity Act, in fixing the Appellant's trading margin, the question whether the Appellant would be entitled for the trading margin in terms of Clause 10.1 of PSA dated 23.03.2006, or it is the trading margin as stipulated in the 2005 Trading Regulations which would apply, are matters beyond the scope of the present lis, and are best left open for examination in appropriate independent legal proceedings which the appellant may, if it so chooses, invoke.

212. We also find it difficult to accept the submission, urged on behalf of the 2nd Respondent, that Section 79(1)(j) and Section 86(1)(j) would confer power on the Central Commission and the State Commission respectively to fix trading margin, only in cases other than where the trading licensee, on behalf of a generator, enters into an agreement with a distribution licensee to supply electricity. This contention urged on behalf of the 2nd Respondent pre-supposes that *"trading margin"* is part of *"tariff"* which is subject to determination by the State Commission under Section 62(1)(a) of the Electricity Act.

213. As detailed earlier in this order, this submission urged on behalf of the 2nd Respondent does not merit acceptance since we are satisfied that Parliament did not intend for the trading margin, of a trading licensee with respect to inter-State trading in electricity, to be fixed/determined by the State Regulatory Commission as part of the tariff determination exercise undertaken by it under Section 62(1)(a) of the Electricity Act, as

such power is conferred exclusively on the Central Commission under Section 79(1)(j) of the Electricity Act.

XIV. IS THE CERC (FIXATION OF TRADING MARGIN) REGULATIONS, 2005 APPLICABLE?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

214. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, in terms of the 2010 Regulations, the trading margin for long-term contracts is to be fixed on the basis of prevailing market forces; in the present case, trading of power occurs only after COD of Everest Power's Plant i.e., on 12.07.2012 and the original Article 10.1 of the PSA dated 23.03.2006 is in conformity with the applicable regulations during COD i.e., CERC Trading Margin Regulations 2010 notified on 11.01.2010; the CERC (Fixation of Trading Margin) Regulations, 2005 was repealed and replaced by the CERC Trading Margin Regulations 2010; hence, Trading Margin Regulations, 2005 has no application in the present case since, when trading of power from COD of Everest Power's Plant commenced, the Trading Margin Regulations, 2010was applicable; on 23.01.2006, the CERC notified the Trading Margin Regulations, 2005 along with the Statement of Reasons; PTC had challenged the Trading Margin Regulations, 2006 before this Tribunal in Appeal No. 45 of 2006 prior to signing of the PSA dated 23.03.2006; in terms of Regulation 2 of the Trading Margin Regulations 2005, the trading licensee shall not charge a trading margin exceeding Rs.0.04/ kWh on the electricity traded; this Tribunal disposed of Appeal No. 45 of 2006 filed by PTC observing that this Tribunal lacked jurisdiction to decide the validity of the Trading Margin Regulations, 2006; subsequently, PTC filed Civil Appeal No. 3902 of 2006 before the Supreme Court on 01.07.2006 challenging this Tribunal's Judgment dated 28.04.2006 in Appeal No. 45 of 2006; the Supreme Court, by its Judgment dated 15.03.2010 in (2010) 4 SCC 603)

observed that this Tribunal has no jurisdiction to decide the validity of Trading Margin Regulations 2005; prior to the PTC Judgment, the CERC notified the Trading Margin Regulations, 2010 on 11.01.2010 by repealing the Trading Margin Regulations, 2005 it is settled law that a repealed provision will cease to operate from the date of repeal; and the Trading Margin Regulations, 2005 was repealed by the Trading Margin Regulations 2010. Reliance is placed in this regard on ***Pernod Ricard India (P) Ltd. v. State of Madhya Pradesh & Ors***., 2024 SCC OnLine SC 566,

215. Sri Amit Kapur, Learned Counsel for the appellant, would further submit that the Trading Margin Regulations, 2010 has not enabled any provision of the Trading Margin Regulations, 2005; therefore, Regulation 2 of the Trading Margin Regulations, 2006 ceased to operate after promulgation of the Trading Margin Regulations, 2010; in terms of the Trading Margin Regulations, 2010, the trading margin for long-term contracts is to be fixed on the prevailing market forces; and the original Article 10.1 of the PSA dated 23.03.2006 is in conformity with the Trading Margin Regulations, 2010.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

216. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent-PSPCL, would submit that the Trading Margin Regulations, 2005 of the Central Commission were in force when the PSA was executed; the trading margin agreed in the PSA of 5 paise/ kWh and 10 paise/ kWh were contrary to the limit of 4 paise/ kWh applied by the Regulations; and, therefore, the original Article 10.1 was itself hit by Section 24 of the Contract Act, 1872, and was *void*.

C. ANALYSIS:

217. As noted hereinabove, the Appellant herein had entered into a Power Purchase Agreement with the 3rd Respondent on 30.06.2004, and had thereafter entered into a Power Sale Agreement with the 2nd Respondent on 23.03.2006. By the time the Power Sale Agreement was executed, the Central Electricity Regulatory Commission (CERC) (Fixation of Trading Margin) Regulations, 2005 had already been notified on 23.01.2006 and, in terms of Regulation 2 thereof, a cap was imposed on the trading margin beyond which a trading licensee could not charge ie a trading margin not exceeding 4 paise/kWh for the electricity traded, including all charges except charges for scheduled energy, open access and transmission losses. As noted earlier, the 2005 Trading Regulations were made by the CERC in the exercise of its powers under Section 178 of the Electricity Act.

218. As held by the Supreme court. in **PTC India Ltd Vs. CERC: 2010 (4) SCC 603,** a regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations. Since the 2005 Trading Regulations prescribed a cap of 4 paise/ kWh as the trading margin on inter-state trading in electricity, the validity of the Power Sale Agreement executed by the Appellant with the 2nd Respondent, to the extent clause 10.1 thereof stipulated a trading margin of Rs.0.05/kWh for the tariff years 1 to 12, and Rs. 0.10/kWh for the tariff years 13 to 40, is not free from doubt.

219. The Appellant's contention that it is the 2010 Trading Regulations which are applicable, and not the 2005 Regulations which came into force on 23.01.2006, since the Appellant was entitled to seek trading margin only after the COD of the 3rd Respondent (with whom they had executed a PPA) and the COD was achieved only after the 2010

Regulations came into force, is also debatable. The PSA, which the Appellant had entered into with the 2nd Respondent on 23.03.2006, was executed just two months after the 2005 Trading Regulations came into force on 23.01.2006. When they executed the PSA on 23.03.2006, the Appellant could not have been aware that the 4 paise/kWh cap on trading margin, for inter-state trading in electricity, would be removed, and parties would be permitted to mutually agree on a trading margin, by way of the 2010 Trading Regulations which came into force nearly four years after they had executed the PSA on 23.03.2006.

220. While strong reliance is placed on behalf of the Appellant on Regulation 5(1) of the 2010 Trading Regulations, in terms of which the 2005 Regulations stood repealed from the date of commencement of the 2010 Regulations, Regulation 5(2) of the 2010 Regulations stipulated that, notwithstanding such repeal, anything done or purported to have been done under the repealed regulations (2005 Regulations) shall be deemed to have been done or purported to have been done under the 2010 Regulations. As noted hereinabove, in terms of the judgment of the Supreme Court, in **PTC India Limited,** both the Appellant and the 2nd Respondent were required to align their Power Supply Agreement dated 23.03.2006 in line with the 2005 Trading Regulations which had already come into force a couple of months prior thereto on 23.01.2006. If it is had been so aligned, such an aligned PSA may, possibly, be saved by Regulation 5(2) of the 2010 Regulations. While we do not wish to express any conclusive opinion in this regard, suffice it to observe that the Appellant's claim to be entitled to the trading margin stipulated in Clause 10.1 of the PSA dated 23.3.2006, relying on the 2010 Regulations including Regulation 5(1) thereof, is not free from doubt.

XV. RELIEFS SOUGHT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

221. Sri Amit Kapur, Learned Counsel for the appellant, would submit that, in view of the above submissions, this Tribunal may be pleased to allow the Appeal and (a) set aside the Impugned Order dated 11.01.2019 in Petition No. 71 of 2015 as well as Order(s) dated 13.02.2019in Petition Nos. 48 & 49 of 2016; (b) pass directions that the Trading Margin as fixed in original Article 10.1 of the PSA would be payable by PSPCL to PTC for supply of power from the Project; and (c) pass such other orders as this Tribunal deems fit.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT:

222. Sri Anand Ganeshan, Learned Counsel for the 2nd Respondent, would submit that it was always open to the appellant-PTC to withdraw the petition if it was of the opinion that the State Commission lacked jurisdiction, which it had chosen not to do; and the attempt of the appellant is to secure directions from this Tribunal on the applicable trading margin, which is not permissible when the sole ground of challenge is to the lack of jurisdiction of the State Commission.

C. SUBMISSIONS URGED ON BEHALF OF THE 3RD RESPONDENT:

223. Sri Parinay Deep Shah, Learned Counsel for the 3rd Respondent, would submit that in the above petition, in which the Impugned Order was passed, neither was any relief sought against Respondent No. 3 – EPPL nor was any claim made against the answering respondent; thus, there is no role whatsoever for EPPL to play on the issue of trading margin; the tariff entitlement of Respondent No. 3 (which has attained finality) is not the subject matter of the present appeal proceedings; the present appeal filed by PTC pertains exclusively to its trading margin,

with no prayers directed against EPPL; and, therefore, submissions made by the counsel for PSPCL, contrary to the above-settled position, are liable to be rejected.

D. ANALYSIS:

224. Section 10 of the PSA dated 23.03.2006 related to billing and payment and Clause 10.1, thereunder, provided that, from the commercial operation date of the first (1st) unit, the purchaser (the 2nd Respondent) shall pay to PTC (the Appellant) the payment comprising, among others, tariff payment. The said clause also provided that PTC's trading margin shall be Rs. 0.05/kWh for the tariff years 1 to 12 and Rs. 0.10/kWh for the tariff years 13 to 40, and shall be payable by the purchaser to PTC for the entire billable energy, and such margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in the PSA as may be laid down by the CERC from time to time.

225. It is evident, from a reading of the aforesaid clause, that, while the trading margin was no doubt fixed at Rs. 0.05/kWh for tariff years 1 to 12 and Rs. 0.10/kWh for tariff years 13 to 40, it was also specified that the trading margin shall be in compliance with the norms applicable to transactions of the nature and duration as capped in the PSA as may be laid down by the CERC from time to time. Clause 10.1 of the PSA, executed by the Appellant and the predecessors of the second Respondent on 23.03.2006, which provided that the trading margin shall be Rs. 0.05/kWh for the tariff years 1 to 12 and Rs. 0.10 /kWh for tariff years 13 to 40, was either in ignorance of the 2005 Regulations which had come into force two months prior thereto on 23.01.2006, or possibly in deliberate contravention thereof, for the law, requiring regulated entities to align their existing and future agreements with the statutory

regulations, crystallised later when the Supreme Court delivered its judgement in ***PTC India Ltd. v CERC,*** **(2010) 4 SCC 603**. However the said judgement would relate back from the date the Electricity Act came into force, and would require the PSA dated 23.03.2006 to be in conformity with the 2005 Trading Regulations.

226. The Power Supply Agreement executed between the Appellant and the predecessors of the second Respondent on 23.03.2006 was, in law, subject to approval by the PSERC. It is in such circumstances that the predecessors of the second Respondent filed Petition No. 11 of 2006 before the PSERC on 10.05.2006 seeking approval of the PSA dated 23.02.2006. On its approval being sought to the said PSA, the PSERC passed the order in Petition No. 11 dated 24.01.2007 which has attained finality. In the said order, the PSERC has held that the applicable trading margin shall be as fixed by the CERC from time to time; and, in the eventuality of the CERC not fixing the trading margin for any particular period, it shall be such margin last fixed by the CERC.

227. Approval was granted to the PSA subject to PSEB complying with the directions given by the PSERC in the said order. When the PSA was executed between the Appellant and the second Respondent on 23.03.2006, and when the conditional order of approval was passed by the PSERC on 24.01.2007, the trading margin for Inter-state trading of electricity was governed by the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2005 which was notified on 23.01.2006. In terms of the conditional approval granted by the PSERC, the PSA dated 23.03.2006 should have been amended and brought in alignment with Regulation 2 of the 2005 Regulations which stipulated that the licensee shall not charge trading margin exceeding 4 paise/ kWh on the electricity traded including all charges, except charges for scheduled energy, open access and transmission losses.

228. Consequently, while the Appellant is entitled to be granted relief (a) ie to set aside the Impugned Order dated 11.01.2019 in Petition No. 71 of 2015 as well as Order(s) dated 13.02.2019 in Petition Nos. 48 & 49 of 2016, they are not entitled, in the present appellate proceedings, to be granted relief (b) which is to pass directions that the Trading Margin as fixed in original Article 10.1 of the PSA would be payable by PSPCL to PTC for supply of power from the Project.

XVI. CONCLUSION:

229. For the reasons afore-mentioned, the Orders passed by the PSERC in Petition No. 71 of 2015 dated 11.01.2019, as well as Order(s) passed in Petition Nos. 48 & 49 of 2016 dated 13.02.2019, are set aside as the PSERC lacked jurisdiction, under the provisions of the Electricity Act, 2003, to determine the trading margin payable by the 2nd Respondent to the Appellant. It is made clear that we have not expressed any conclusive opinion on whether or not the Appellant is entitled to the Trading Margin as fixed in original Article 10.1 of the PSA dated 23.03.2006, and the order now passed by us shall not disable the appellant, if it so chooses, to seek such a relief in independent legal proceedings which it may be entitled to invoke. With these observations, the Appeal stands disposed of. All the IAs therein also stand disposed of.

Pronounced in the open court on this the **5th day of December, 2024**.

(Seema Gupta)	(Justice Ramesh Ranganathan)
Technical Member	Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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