

A WARYAM STEEL CASTINGS PVT. LTD.

v.

PUNJAB STATE POWER CORPORATION LTD. AND ANR.

(Civil Appeal No. 7856 of 2012)

B JUNE 19, 2017

[**RANJAN GOGOI AND NAVIN SINHA, JJ.**]

*Electricity Act, 2003:*

C ss. 2(4), 61, 62, 63, 64, 86, 111 and 112 – Levy of surcharge  
on defaulting industries – Legality of – Appellant-companies, arc  
furnace units, established prior to June 1995, drew power from  
11KV High Tension Supply Line – Circular of State Electricity Board  
mandating all existing as well as prospective consumers, who had  
installed induction furnace units with a load above 1500 KVA, to  
shift to 66KV from 11KV voltage supply, failing which they were  
D required to pay surcharge @ 17.5% – However, another circular  
dated 8<sup>th</sup> June, 1999 issued by Electricity Board exempting all units  
existing as on 23<sup>rd</sup> June, 1995 from the necessity of conversion to  
66KV as well as levy of 17.5% surcharge – Electricity bills by State  
Power Corporation imposing surcharge on arc furnaces units  
E established prior to June, 1995 – Writ petitions by appellants,  
dismissed – LPAs by appellants – While the LPAs were pending,  
tariff order issued by Regulatory Commission specifically levying  
surcharge on Induction Furnace Units – Tariff order challenged  
before Appellate Tribunal for Electricity (APTEL) – Levy of surcharge  
held to be justified by APTEL by order dated 16.07.2010 – APTEL's  
F order challenged before Supreme Court, which was dismissed vide  
order dated 14<sup>th</sup> February 2011, thus confirming the levy of  
surcharge – LPAs dismissed by High Court – On appeal, held:  
Insofar as the order of High Court dismissing the LPAs filed by  
appellants is concerned, the levy of surcharge has been upheld by  
G Supreme Court by its order dated 14<sup>th</sup> February 2011 – Thus, the  
issue with regard to legality and justification for levy of surcharge  
stands foreclosed – Further, the absence of continuation of  
exemption granted vide circular dated 8<sup>th</sup> June, 1999 in respect of  
pre-1995 industries, in any of the tariff orders for subsequent years  
i.e. after coming into force of the Electricity Act is a conscious  
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*decision of Regulatory Commission with regard to the necessity and justifiability of the levy of surcharge on defaulting industries – The said reason for levy of surcharge to disincentivize the defaulting units being justifiable, cannot be faulted with – No room for any other view in the matter – High Court was fully justified in dismissing the writ petitions – Electricity Laws.*

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*Surcharge levied on defaulting industries who did not shift from 11KV to 66KV voltage supply as mandated by circular issued by State Electricity Board – Correctness of quantum/rate of said surcharge levied – APTEL vide its order dated 16.07.2010 held the levy of surcharge to be justified, but disagreed with the rate of surcharge and remanded the matter back to Regulatory Commission for deciding the rate of surcharge afresh – Regulatory Commission on remand, reduced the rate of surcharge from 17.5% to 10% – Held: The Regulatory Commission worked out the appropriate rate of surcharge by adding a penal element to the cost of conversion to disincentivise the consumers from continuing to receive supply on the 11 KV transmission lines – This being the basis for determination of the rate and that too by the expert body which has been further upheld by APTEL, no fault can be found with the said exercise.*

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*ss.61 to 64 – Determination of tariff – Nature of power exercised – Held: The said power has been consistently held and understood to be statutory, required to be exercised within the four corners of the relevant provisions of the 2003 Act.*

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*Words and Phrases – ‘Surcharge’ – Meaning of – Explained.*

**Dismissing the appeals, the Court**

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**HELD: 1.** Insofar as the order of the High Court dismissing the Letter Patent Appeals filed by the industrial establishments is concerned, the matter should not detain the Court. Not only the levy of surcharge was upheld by this Court by order dated 14<sup>th</sup> February 2011, though for the year 2009-2010, what stares at the face of the record is the consistent view taken by the Regulatory Commission in all the tariff orders commencing from the year 2004-2005, that to offset the transmission and all other losses and other incidental charges incurred in enabling the Induction Furnace Units to draw power at 11 KV supply without switching over to 66 KV supply line, levy of surcharge on such

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A consumers is necessary. The “compromise” and “concession”  
made and effected by issuing circular dated 8<sup>th</sup> June, 1999 must  
be understood to have come to an end with the introduction of  
the new electricity regime by the 2003 Act unless extension of  
the same had been explicitly made/recognized in any of the tariff  
orders, which fact was conspicuously absent. The absence of  
B continuation of the said concession made by the Government in  
respect of pre-1995 industries in any of the tariff orders for the  
subsequent years i.e. after coming into force of the Act was a  
conscious decision of the Regulatory Commission with regard to  
the necessity and justifiability of the levy of surcharge on the  
C defaulting industries. The reason for levy of surcharge being  
justifiable on the touchstone of the necessity to disincentivize  
the defaulting units cannot be faulted. The exercise being statutory  
and being clear and unambiguous as manifested by the tariff order,  
there is little room for taking any other view in the matter except  
to hold that the High Court was fully justified in dismissing the  
D writ petitions. In fact, from another perspective, the issue with  
regard to legality and justification for levy of surcharge stood  
foreclosed by the order of this Court dated 14th February, 2011.  
[Para 20] [146-C-H]

2. The Regulatory Commission had, on remand, by its order  
E dated 19<sup>th</sup> January, 2011 reduced the rate of surcharge from 17.5%  
to 10%. The industrial establishments in the appeals before the  
Appellate Tribunal contended that the said rate is without  
justification inasmuch as the State Regulatory Commission in its  
order had unambiguously noticed that the cost to the consumers  
F to switch over to the 66 KV supply would correspond to a much  
lower amount than what would work out on the basis of the rate  
of surcharge levied as detailed in paragraph 8 of the order of the  
State Regulatory Commission dated 19<sup>th</sup> January, 2011. However,  
a reading of the entire paragraph 8 of the said order of the State  
Regulatory Commission would go to show that the State  
G Commission thought it proper to work out the appropriate rate  
of surcharge by adding a penal element to the cost of conversion  
to disincentivise the consumers from continuing to receive supply  
on the 11 KV transmission lines. It is on the aforesaid basis that  
an additional input had been added to the cost of conversion to  
H work out the rate of surcharge as determined in the order dated

19<sup>th</sup> January, 2011. If the aforesaid is the basis for determination of the rate and that too by the Expert Body which has been upheld by the Appellate Tribunal no fault can be found with the said exercise. In this regard note is taken of the fact that though under the Act of 2003 “surcharge” is not specifically defined, the said expression stands “for an additional/extra charge ... surcharge is thus a super added charge, a charge over and above the usual or current dues ... it is in substance an addition to the stipulated rate of tariff.” [Para 23] [149-B-H] A B

*M/s Bisra Stone Lime Co. Ltd. v. Orissa State Electricity Board and Anr.* AIR 1976 SC 127 : [1976] 2 SCR 307 – held applicable. C

*Transmission Corporation of Andhra Pradesh Ltd. and Anr. v. Sai Renewable Power Private Ltd. and Ors.* (2011) 11 SCC 34 : [2010] 8 SCR 636 – relied on.

Case Law Reference D

[2010] 8 SCR 636                      relied on                      Para 22

[1976] 2 SCR 307                      held applicable                      Para 23

CIVIL APPELLATE JURISDICTION :Civil Appeal No. 7856 of 2012. E

From the Order dated 27.07.2012 of the Appellate Tribunal for Electricity (APTEL) in Appeal No. 198 of 2011

WITH

C. A. Nos. 6625-6626, 6289-6290, 6291-6292, 6276 and 6269 of 2013. F

Jaideep Gupta, Ms. Meenakshi Arora, Sr. Advs., Buddy Ranganathan, Mohit D. Ram, Ms. Monisha Handa, Tajinder Joshi, Chandan Kaushal, Subhasish Bhwomick, Ms. Shikha Ohri, Piyush Singh, Ms. Sharmila Upadhyay, Ms. Shikha Ohri, Piyush Singh, Ms. Divya Roy, Himanshu Shekhar, Advs. for the Appellants. G

V. Giri, Sr. Adv., Anand K. Ganesan, Ms. Neha Garg, Manav Vohra, Ms. Naresh Bakshi, Satinder S. Gulati, Mrs. Kamaldeep Gulati, Rakesh Kumar and Ms. Anuradha Muthatkar, Advs. for the Respondents. H

A The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. The appellant-companies are arc furnace industries engaged in the manufacture of steel ingots. The very nature of the operations carried out require the appellants to draw heavy load of electrical power i.e. above 2500 KVA. The said connections are, accordingly, categorized as “Industrial Connections”.

C 2. The appellants who were all established prior to June 1995 draw power from 11 KV High Tension Supply Line. Electricity in the State of Punjab, where the industrial units are located, are supplied through different kinds of voltage supply system i.e. (i) low tension (LT) at 440 volt – normally fed to domestic, small power or medium supply electric connection below 100 KW; (ii) high tension (HT) at 11,000 voltage (11 KV) to large supply industrial connections; and (iii) extra high tension (EHT) at 66,000 voltage (66 KV) – supplied to very big industrial consumers for whom a dedicated 66 KV line directly from sub-Station of the Board is provided.

D 3. A circular dated 23<sup>rd</sup> June, 1995 was issued by the Punjab State Electricity Board (hereinafter referred to as “the Board”) mandating all existing as well as prospective consumers, who had installed induction furnace units with a load above 1500 KVA, to shift to 66 KVA voltage supply failing which they were required to pay surcharge at the rate of 17.5%. All the appellants received due notice for conversion of their voltage supply from 11 KV to 66 KV on or before 31<sup>st</sup> December, 1996. On receipt of such notices, the Induction Furnace Industries Association of the State of Punjab took up the matter with the State Government and on the advice of the High Powered Committee constituted, recommendations were made to the effect that all units existing as on 23<sup>rd</sup> June, 1995 should be exempted from the necessity of conversion to 66 KV as well as levy of 17.5% surcharge.

G 4. The aforesaid recommendations of the Committee (made in its meeting held on 19<sup>th</sup> January, 1999) were accepted by the Board and a commercial circular bearing No.25/1999 dated 8<sup>th</sup> June, 1999 was issued to the following effect.

H “3. To resolve the issue, a Committee comprising of officers of PSEB and representatives of Public & Industry, was constituted on the intervention of State Government. The committee was asked to study the grievances of Induction Furnace Industry in

details and give its recommendations acceptable to both PSEB and Industry. Accordingly, the committee went into this issue in detail and has submitted the following recommendations to PSEB, which have now been accepted by the Board. A

i) Board may not insist to levy 17.5% surcharge for non-conversion by the consumers as existing in 6/95 and also by those consumers who were released connections at 11 KV with an undertaking to pay 17.5% surcharge after 6/95. B

ii) The 17.5% surcharge already billed and the late payment surcharge already levied w.e.f. 1.1.97 may be written back. Wherever certain consumers have deposited this surcharge, the same may be refunded through subsequent energy bills. C

iii) All future connections above 1500 KVA/2500KW shall be at 66 KV only. However, where feasibility at 11 KV has already been given before 3/97, the same need not be reviewed. (This para has been corrected vide CC No.30/99)" D

5. The Electricity Act, 2003 (hereinafter referred to as "2003 Act") came into force with effect from 10<sup>th</sup> June, 2003. The object of the 2003 Act, *inter alia*, is to protect the interests of consumers and rationalize electricity tariff. Part VII of the 2003 Act deals with 'tariff'. Specifically, Section 61 of the 2003 Act contained in Part VII thereof provides that "the Appropriate Commission" shall specify the terms and conditions for the determination of tariff and while doing so the Appropriate Commission shall be guided by the principles mentioned in the said Section. Section 62 of the 2003 Act deals with determination of tariff and is in the following terms: E

"62. Determination of tariff:- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for – F

(a) supply of electricity by a generating company to a distribution licensee: G

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company H

- A and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;
- (b) transmission of electricity ;
- (c) wheeling of electricity;
- (d) retail sale of electricity:
- B            Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.
- C            (2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.
- D            (3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position
- E of any area, the nature of supply and the purpose for which the supply is required.
- (4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms
- F of any fuel surcharge formula as may be specified.
- (5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.
- G            (6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred
- H by the licensee.

6. Under Section 2(4) of the 2003 Act “Appropriate Commission” is defined in the following terms: A

“Appropriate Commission” means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be. B

Section 86 of the 2003 Act defines the functions of the “State Commission” which, *inter alia*, includes determination of tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State.

Under Section 111 of the 2003 Act an order passed by any of the Adjudicating Authority under the 2003 Act including an order made by “the Appropriate Commission” is appellable to the Appellate Tribunal for Electricity constituted under Section 112 thereof. C

7. Though it may not be necessary to notice in any detail the views expressed by this Court, from time to time, with regard to the nature of power exercised in determining tariff under the Act of 2003, all that would require a mention is that the said power has been consistently held and understood by this Court to be statutory, required to be exercised within the four corners of the relevant provisions of the 2003 Act i.e. Sections 62 to 64 and in accordance with the principles laid down in Section 61 thereof. D E

8. Prior to coming into force of the 2003 Act with effect from 10<sup>th</sup> June, 2003 the Punjab State Electricity Regulatory Commission established under the Electricity Regulatory Commission Act, 1998 (since repealed by the 2003 Act) had issued a tariff order for the year 2003-2004 on an application made by the Licensee Board for determination of tariff for the said year. In the tariff proposals, the Board, *inter alia*, proposed to levy surcharge at the rate of 17.5% from Induction Furnace Units who had not shifted to 66 KV voltage supply and to whom exemption from payment of such surcharge had been earlier granted by circular No.25/99 dated 8<sup>th</sup> June, 1999. In the course of the deliberations leading to the final determination/ fixation of tariff, the North India Induction Furnace Association was heard in the matter and the reliance placed by the Association on the above circular No.25/99 dated 8<sup>th</sup> June, 1999 was taken note of along with the fact that the Board in its reply dated 17<sup>th</sup> March, 2003 had admitted that such exemption was allowable and that it F G H

- A (the Board) did not press its proposal to levy surcharge at the rate of 17.5% from Induction Furnace Units which were in operation on the relevant cut-off date i.e. 23<sup>rd</sup> June 1995.

9. After the coming into force of the 2003 Act, for the year 2004-2005 the State Commission announced and published its tariff order dated 30<sup>th</sup> November, 2004 which contained provisions with regard to the aforesaid surcharge in paragraph 9.11 thereof in the following terms:

**“9.11 17.5% SURCHARGE FOR 11 KV ARC/INDUCTION FURNACE CONSUMERS**

- C Some Industrial Consumers Associations have objected to the proposal of PSEB to levy 17.5% surcharge on induction furnace consumers catered supply at 11 KV especially when tariff has been fixed at 11 KV.

- D As per present policy, all Large Supply consumers except arc furnaces with contract demand exceeding 2500 KVA and upto 4000 KVA can be catered at 11 KV provided they are ready to compensate for transformation losses, incremental line losses and service charges incurred in this regard. For this purpose, energy recorded at 11 KV is enhanced by 10% for billing purposes. For all arc furnace consumers and other consumers having demand above 4000 KVA which are given supply 11 KV, surcharge @ 17.5% is leviable.

- F The Board in its reply has stated that the tariffs for various categories are worked out at a base voltage level for each category. The rebate/surcharge is offered to incentivize/penalize the consumer for shifting from the base voltage to higher/lower voltage, keeping in view the additional transformation cost, transformation losses and line losses saved/incurred by the Board by such shifting. Hence the energy recorded at 11 KV is to be enhanced by 10% for consumers with demand exceeding 2500 KVA & upto 4000 KVA (except arc furnaces) to cover for transmission losses, incremental line losses and service charges. It has been further stated by the Board that surcharge @ 17.5% shall be leviable on all arc furnace consumers above 2500 KVA and other consumers with Contract Demand exceeding 4000 KVA catered supply at 11 KV. It has also been stated that surcharge @ 17.5% is levied

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on arc furnace consumers catered supply at 11 KV since last 30 years. A

The Commission notes that Large Supply Consumers with bulk demand are required to be catered supply at 33 KV or higher voltage. Where they are allowed to avail supply at lower than permitted voltage, the same involves number of costs to the Board by way of setting up sub-station and its operation and maintenance. It also involves additional line losses and transformation losses for the Board. As such, these consumers are definitely liable to pay. B

The Commission, therefore, decides to uphold the version of PSEB and continue levy of surcharge." C

10. For the year 2005-2006, the Board in its proposal took the following plea in respect of Arc Furnace consumers:

"(ii) For Large Supply consumers except Arc Furnaces having contract demand exceeding 2500 KVA and upto 4000 KVA catered at 11 KV, the energy consumption is enhanced by 10% to cover for transformation losses, incremental line losses and service charges. 17.5% surcharge is leviable on all Arc Furnace consumers and other Large Supply consumers having contract demand above 4000 KVA and catered at 11 KV." D

11. The State Commission by its tariff order dated 14<sup>th</sup> June, 2005 for the year 2005-2006 decided as follows: E

"The Commission directs the Board to submit a comprehensive proposal bringing out all the aspects of the matter and the proposal should also include revenue implications. The proposal should be submitted along with next ARR for 2006-07. Meanwhile the Commission decides to continue the existing system." F

12. A similar decision was taken by the State Commission in the tariff order dated 10<sup>th</sup> May, 2006 for the year 2006-2007 by holding that it would be appropriate "to continue with existing provisions of rebates and surcharges for availing supply at different voltages". G

13. Thereafter, it appears that on 18<sup>th</sup> May, 2006, the North India Induction Furnace Association had moved the State Power Corporation against the levy of surcharge on all Arc Furnace consumers drawing electrical power exceeding 2500 KVA on 11 KV Supply Line. The H

A Power Corporation on 27th June, 2006 had advised the said Association to agitate the issue before the Electricity Regulatory Commission. Accordingly, a review petition was filed by the said Association before the Electricity Regulatory Commission seeking review of the tariff order of 2006-2007, which came to be dismissed on 13<sup>th</sup> October, 2006.

B 14. Thereafter, it appears that the State Power Corporation issued electricity bills for April 2007 and had imposed surcharge on Arc Furnaces established prior to June 1995. Challenging the same, writ Petitions were filed by aggrieved industries before the High Court of Punjab and Haryana. While the said writ petitions were pending, the Regulatory Commission had passed its tariff order dated 17<sup>th</sup> September, 2007 for the year 2007-  
C 2008 and pursuant thereto a circular bearing No.66/2007 dated 28<sup>th</sup> November, 2007 was issued seeking to recover electricity surcharge from the concerned establishments for the financial years 2004-2005, 2005-2006 and 2006-2007. The aforesaid subsequent events were brought on record in the writ petitions before the High Court by means  
D of amendments thereto.

15. A learned single judge of the High Court by order dated 27<sup>th</sup> April, 2009 dismissed the writ petitions filed by the arc furnace industries, *inter alia*, on the ground that after the 2003 Act had come into force with effect from 10<sup>th</sup> June, 2003 fixation of tariff assumed the character  
E of a statutory exercise to be performed by the Regulatory Commission on the basis of the principles and parameters laid down in the 2003 Act. As such, the “concession” made by the Government culminating in circular No.25/99 dated 8<sup>th</sup> June, 1999 would cease to have any legal effect unless specifically acknowledged by the Regulatory Commission which the Commission had not done. The High Court also took the view  
F that the circular No.25/99 dated 8<sup>th</sup> June, 1999 cannot operate as an estoppel against the provisions of the 2003 Act and the exercise of power thereunder by the Regulatory Commission to determine and fix the tariff. In this regard, the High Court also specifically took note of the fact that the arc furnace industries i.e. the writ petitioners before it had not  
G challenged any of the tariff orders levying or reiterating the levy of surcharge and what was challenged before it were only the bills levying surcharge as raised by the Board/Power Corporation, as may be.

16. The aforesaid order of the learned single judge of the High Court dated 27<sup>th</sup> April, 2009 was challenged by the industries before the Division Bench of the High Court by means of several Letter Patent  
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Appeals. While the aforesaid Letter Patent Appeals were pending before the High Court another significant development took place, namely, the issuance of the tariff order dated 8<sup>th</sup> September, 2009 for the year 2009-2010 specifically reiterating and levying the surcharge on Induction Furnace Units. The tariff order for the year 2009-2010 was challenged by the concerned industrial establishments before the Appellate Tribunal for Electricity (hereinafter referred to as "Appellate Tribunal"). The aforesaid challenge made was answered by the Appellate Tribunal by its order dated 16<sup>th</sup> July, 2010 by holding that the levy of surcharge being compensatory in nature is fully justified. The transmission losses and other charges that are incurred by the Board in providing power at the required load (above 2500 KVA) to induction furnace units from a 11KV supply line has to be recovered from a defaulting unit (one which had not migrated to the mandatory 66 KV supply line). However the learned appellate Tribunal disagreed with the State Regulatory Commission on the rate thereof i.e. 10% and 17.5% respectively for non-induction (large consumer) and induction furnace units. The learned Appellate Tribunal by its aforesaid order dated 16<sup>th</sup> July, 2010, therefore, remanded the matter to the State Commission for a fresh decision on the rate/quantum of the surcharge leviable.

17. Though the order dated 16<sup>th</sup> July, 2010 of the learned Appellate Tribunal was challenged before this Court in Civil Appeal No.10889 of 2010, no interim relief was granted to the appellants by this Court. Consequently, on 19<sup>th</sup> January, 2011, the Punjab State Electricity Regulatory Commission, on consideration of the matter on remand, had passed its orders reducing the surcharge from 10% and 17.5% to 7% and 10% respectively.

18. On 14<sup>th</sup> February, 2011, Civil Appeal No.10889 of 2010 filed against the order of the learned Appellate Tribunal dated 16<sup>th</sup> July, 2010 was dismissed by this Court thereby confirming the levy of surcharge. On 9<sup>th</sup> September, 2011 the Division Bench of the High Court of the Punjab and Haryana also dismissed the Letter Patent Appeals filed by the industrial establishments. By its Order dated 27<sup>th</sup> July, 2012 the learned Appellate Tribunal had dismissed the appeal filed by the industrial establishments against the order dated 19<sup>th</sup> January, 2011 of the Regulatory Commission with regard to the reduced rate/quantum of surcharge i.e. 7% and 10% respectively, as already noticed.

19. It is challenging the common order of the High Court dated 9<sup>th</sup>

- A September, 2011 dismissing the Letters Patent Appeals filed by the industrial establishments that civil Appeal Nos.6269 of 2013, 6276 of 2013, 6289-6290 of 2013, 6291-6292 of 2013 and 6625-6626 of 2013 have been filed whereas challenging the order of the learned Appellate Tribunal with regard to quantum/rate of surcharge re-determined by the Regulatory Commission Civil Appeal No.7856 of 2012 has been filed. It is the correctness of the aforesaid two orders that would require to be determined in the present group of appeals.

20. Insofar as the order of the High Court dismissing the Letter Patent Appeals filed by the industrial establishments is concerned the matter should not detain the Court. Not only the levy of surcharge has been upheld by this Court by dismissal of Civil Appeal No.10889 of 2010, though for the year 2009-2010, what stares at the face of the record is the consistent view taken by the Regulatory Commission in all the tariff orders commencing from the year 2004-2005, that to offset the transmission and all other losses and other incidental charges incurred in enabling the Induction Furnace Units to draw power at 11 KV supply without switching over to 66 KV supply line, levy of surcharge on such consumers is necessary. The “compromise” and “concession” made and effected by issuing circular No.25/99 dated 8<sup>th</sup> June, 1999 must be understood to have come to an end with the introduction of the new electricity regime by the 2003 Act unless extension of the same has been explicitly made/recognized in any of the tariff orders, which fact is conspicuously absent. The absence of continuation of the said concession made by the Government in respect of pre-1995 industries in any of the tariff orders for the subsequent years i.e. after coming into force of the Act is a conscious decision of the Regulatory Commission with regard to the necessity and justifiability of the levy of surcharge on the defaulting industries. The reason for levy of surcharge being justifiable on the touchstone of the necessity to disincentivize the defaulting units cannot be faulted. The exercise being statutory and being clear and unambiguous as manifested by the tariff order, noticed and extracted above, there will be little room for taking any other view in the matter except to hold that the High Court was fully justified in dismissing the writ petitions. In fact, from another perspective, it can very well be said that the issue with regard to legality and justification for levy of surcharge stands foreclosed by the order of this Court dated 14<sup>th</sup> February, 2011 dismissing the Civil Appeal No.10889 of 2010 filed in the circumstances already noticed.

21. This will bring the Court to a consideration of the other limb of the case, namely, the correctness of the quantum/rate of surcharge as determined by the Regulatory Commission and upheld by the learned Appellate Tribunal.

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22. The nature of the power under the Act of 2003 and the scope of interference with orders passed by the statutory/ appellate authorities thereunder has been dealt with by this Court in Transmission Corporation of Andhra Pradesh Ltd. and Anr. vs. Sai Renewable Power Private Ltd. and Ors.<sup>1</sup>, The view expressed in paras 36 to 40 of the report in the said case, quoted below, may require to be specifically noticed.

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“36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Sections 11(1)(c) and (e) is expected to fix the tariff as well as the terms of licence.

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37. There are three different legislations in course and the Regulatory Commission has been constituted under the Reform Act, 1998 which in turn would be the Commission as contemplated under the Electricity Regulatory Commission Act, 1998 and the Electricity Act, 2003. In terms of first proviso to Section 82(1) of the Electricity Act, 2003 the State Electricity Regulatory Commission established by the State Government under Section 17 of the Electricity Regulatory Commission Act, 1998 and the enactment specified in the Schedule shall be the State Commission for the purposes of this Act. Even in terms of Section 185(3) of the Electricity Act, 2003 the said authority would be deemed to be an appropriate Commission for all purposes and intent as the

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<sup>1</sup>(2011) 11 SCC 34

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A Reform Act, 1998 has been specifically mentioned in Entry 3 of the Schedule to the Electricity Act, 2003. In other words, as already noticed the Regulatory Commission constituted by the said notification would be the appropriate Commission under all these Acts and is required to perform the functions as contemplated under Sections 11, 17 and 82 of the respective Acts.

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

39. We do not consider it appropriate to go into the merit or demerit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the courts refrain from adverting into this arena.

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily

prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one." A

(Underlining is ours)

23. In this regard, it has already been noticed that the Regulatory Commission had, on remand, by its order dated 19<sup>th</sup> January, 2011 reduced the rate of surcharge from 10% and 17.5% respectively to 7% and 10% respectively. The industrial establishments in the appeals before the learned Appellate Tribunal contended that the said rate is without justification inasmuch as the State Regulatory Commission in its order had unambiguously noticed that the cost to the consumers to switch over to the 66 KV supply would correspond to a much lower amount than what would work out on the basis of the rate of surcharge levied, details of which are available in paragraph 8 of the order of the State Regulatory Commission dated 19<sup>th</sup> January, 2011. However, a reading of the entire paragraph 8 of the said order of the State Regulatory Commission would go to show that the State Commission thought it proper to work out the appropriate rate of surcharge by adding a penal element to the cost of conversion to disincentivise the consumers from continuing to receive supply on the 11 KV transmission lines. It is on the aforesaid basis that an additional input had been added to the cost of conversion to work out the rate of surcharge as determined in the order dated 19<sup>th</sup> January, 2011. If the aforesaid is the basis for determination of the rate and that too by the Expert Body which has been upheld by the learned Appellate Tribunal we can find no fault with the said exercise. In this regard we may take note of the fact that though under the Act of 2003 "surcharge" is not specifically defined, the said expression stands "for an additional/extra charge ... surcharge is thus a super added charge, a charge over and above the usual or current dues ... it is in substance an addition to the stipulated rate of tariff." The above observations made in the context of the provisions of the Electricity (Supply) Act, 1948 in M/s Bisra Stone Lime Co. Ltd. vs. Orissa State Electricity Board and Anr.<sup>2</sup>, would be squarely applicable to the present case to dismiss all speculations with regard to the nature of the levy (surcharge) and the power of the Commission to impose the same at particular rate(s) as may be determined. B C D E F G

<sup>2</sup> AIR 1976 SC 127

- A        24. For the aforesaid reasons, we do not find any merit in the appeals filed against the order of the High Court as well as the order of the learned Appellate Tribunal. We, therefore, affirm the order of the High Court dated 9<sup>th</sup> September, 2011 as well as the order of the learned Appellate Tribunal dated 27<sup>th</sup> July, 2012 and dismiss both set of appeals leaving the parties to bear their own costs.
- B

Divya Pandey

Appeals dismissed.