A GUJARAT URJA VIKAS NIGAM LIMITED

v.

TARINI INFRASTRUCTURE LTD. & ORS.

(Civil Appeal No. 5875 of 2012)

B JULY 05, 2016

[RANJAN GOGOI AND PRAFULLA C. PANT, JJ.]

Electricity Act, 2003 – ss. 61,62, 64 and 86 – Tariff under a Power Purchase Agreement (PPA) – Review of – Whether permissible by State Electricity Regulatory Commission – Held: Determination and fixation of tariff is a statutory function to be performed by the Commission, in exercise of its powers u/s. 86(1)(b) in consonance with the principles enuniciated by the Electricity Act – Under Regulation 31 of Gujarat Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2016, tariff fixed is subject to periodic review – Further under Regulation 23 of 2016 Regulations, adjustment in tariff is permissible on account of uncontrollable factors – Thus, in view of s. 86(1)(b), the Court must lean in favour of flexibility and not read inviolability in terms of the agreement – Court to lean in favour of such a view also in view of ss. 14 and 21 of General Clauses Act – Gujarat Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2016 – Regulations 23 and 31 – General Clauses Act, 1897 – ss. 14 and 21.

Dismissing the appeals, the Court

HELD: 1. A reading of the provisions of the Electricity Act, 2003 would go to show that apart from fixation of tariff in a "situation of open access" or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Regulatory Commissions constituted under the Electricity Regulatory Commissions Act, 1988 and exercising powers in consonance with the principles enunciated by the Electricity Act 2003. [Para 9] [997-F-G]

2. The principles on which tariff is to be determined by the commission are set out in Section 61 of Electricity Act. Generation, transmission, distribution and supply of electricity is required to

be conducted on commercial principles; while the consumers' interest is to be safeguarded, recovery of cost of electricity in a reasonable manner has also to be ensured. Under Section 64(6) a tariff order continues to remain in force for such period as may be specified. In the State of Gujarat, currently, the Gujarat Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2016 govern the fixation of tariff by the State Commission. As per Regulation, the Commission is required to determine the tariff of a generating company, transmission licensee, SLDC and distribution licensee for each financial year during the control period (control period is 5 years). [Para 11] [1003-C-E]

3. Not only the tariff fixed is subject to periodic review, furthermore the above Regulations provide for taking into consideration the force *majeure* events. Any force *majeure* is considered as an uncontrollable factor. In fact Regulation 23 provides that the approved aggregate gain or loss on account of uncontrollable factor shall be passed through as an adjustment in the tariff over such period as may be specified in the order of the Commission. [Para 12] [1003-H; 1004-A]

4. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of the PPA in the case of Junagadh in C.A.Nos. 1973-1974 of 2014. That apart, modification of the tariff on account of air cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory. [Para 14] [1005-C-D]

5. Section 86(1)(b) of the Electricity Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. The power of regulation is indeed of wide import. [Para 15] [1005-C-E]

Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors. v. State of A.P. 1964 SCR 456 : AIR 1964 SC 1781; *K.*

A *Ramanathan v. State of T.N. & Anr.* **1985 (2) SCR 1028 : (1985) 2 SCC 116** *and D.K. Trivedi & Sons v. State of Gujarat & Ors.* **1986 SCR 479 : (1986) Supp. SCC 20 – relied on.**

6. Thus, in view of Section 86(1)(b) the Court must lean in
B **favour of flexibility and not read inviolability in terms of the PPA in so far as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review**
C **of the tariff. The facts of the present case would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1897. [Para 16] [1007-G-H; 1008-A-B]**

D.K. Trivedi & Sons v. State of Gujarat & Ors. **1986 SCR 479 : (1986) Supp. SCC 20**; *Shree Sidhbali Steels*
D *Ltd. And others v. State of Uttar Pradesh and Others* **2011 (3) SCR 134 : (2011) 3 SCC 193 - relied on.**

7. In the present case, admittedly, the tariff incorporated in the Power Purchase Agreement between the generating company and the distribution licensee is the tariff fixed by the State
E **Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a**
F **determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved. [Para 10] [1003-A-C]**

Transmission corporation of Andhra Pradesh v. Sai Renewable Power Pvt. Ltd. **2010 (8) SCR 636 : (2011) 11 SCC 34**; *Gujarat Urja Vikas Nigam Limited v.*
G *EMCO Ltd. & Anr.* **2016 SCR 857 : 2016 (2) SCALE 75**; *Bangalore Electricity Supply Co. v. Konark Power Projects Ltd.* **2015 (5) SCALE 711– distinguished.**

Case Law Reference

H	**1964 SCR 456**	**relied on**	**Para 15**

1985 (2) SCR 1028	**relied on**	**Para 15**	A
1986 SCR 479	**relied on**	**Paras 15 and 16**	
2011 (3) SCR 134	**relied on**	**Para 17**	
2010 (8) SCR 636	**distinguished**	**Para 10**	B
2016 SCR 857	**distinguished**	**Para 18**	
2015 (5) SCALE 711	**distinguished**	**Para 18**	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5875 of 2012. C

From the Judgment and Order dated 31.05.2012 passed by the Appellate Tribunal for Electricity at New Delhi in Appeal No. 29 of 2011

WITH

C.A. Nos. 1973-1974 of 2014. D

C. A. Sundaram, Sr. Adv., M. G. Ramachandran, Anand Ganesan, Ms. Ranjitha Ramachandran, Ms. Hemantika Wahi, Advs. for the Appellant.

Sanjay Sen, Sr. Adv., Matrugupta Mishra, Ms. Shikha Ohri, Santosh Kumar, Ms. Sharmila Upadhyay, Advs. for the Respondents. E

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Is the tariff fixed under a PPA (Power Purchase Agreement) sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission which is the statutory authority for fixation of tariff under the Electricity Act, 2003 F (hereinafter for short 'the Act'). This is the short question that arises for determination in the present appeals. The Regulatory Commission did not consider it appropriate to confer on itself the said power upon a construction of the provisions of the Act and the terms of the PPA(s) in question. The Appellate Tribunal disagreed and held that the power G would be available to the State Regulatory Commission. This is how the matter has come up before us in the present appeals filed at the instance of the distribution licensee which is common in both the cases, namely, Gujarat Urja Vikas Nigam Limited.

2. A very brief resume of the relevant facts would be appropriate H

A and would assist a determination of the question arising identified hereinabove.

The respondent No. 1 in Civil Appeal No. 5875 of 2012, namely, Tarini Infrastructure Ltd., is a power producer which has set up/installed two small hydro power projects in the State of Gujarat. In January, 2008 B the respondent No. 1-power producer entered into a PPA with the appellant- distribution licensee for sale of electricity from the generating stations to the extent of the contracted quantity for a period of 35 years at Rs. 3.29 per KWH subject to escalation of 3% per annum till date of commercial operation. In March, 2010, just before commissioning of the generating station, the respondent power producer sought an increase C in the tariff to Rs. 4.70 per unit on the ground that though under the Concession Agreement power was to be evacuated at the nearest sub-station at Rakholi under the jurisdiction of the Gujarat Electricity Transmission Company (GETCO) which was at a distance of 4 Kms from its switch yard, it was later realized that Rakholi was in Dadar D Nagar Haveli. Consequently, the transmission line was required to be laid up to a point known as Mota Pondha which involved a total distance of 23 Kms. instead of the originally envisaged 4Kms. The additional infrastructure, admittedly, cost about Rs. 10 crores which was not envisaged in the Concession Agreement entered into between the respondent-power producer and Narmada Water Resources Department E (respondent No. 2). In these circumstances, the power producer applied to the State Regulatory Commission for a redetermination of the tariff. The said request was refused by an order dated 03.09.2010, primarily, on the ground that once the tariff was determined and thereafter incorporated in the PPA there was no scope for redetermination of the F same at the unilateral request of the power producer.

3. Insofar as Civil Appeal Nos. 1973-1974 of 2014 are concerned, the respondent-power producer, namely, Junagadh Power Projects Pvt. Ltd., has set up a biomass based power generation plant and had entered into a PPA with Gujarat Urja Vikas Nigam Limited (distribution licensee) G on 26.11.2010. The tariff incorporated in the PPA was earlier approved by the State Regulatory Commission by tariff order dated 17.05.2010 on the basis of cost of biomass at Rs. 1600 per MT with escalation of 5% per annum for a period of 20 years of operation. The Biomass Energy Developers Association sought revision of the biomass fuel cost to Rs. 3000/- per MT and for consequential redetermination of the tariff. The

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said review petition was dismissed by the State Commission in November, 2010. Thereafter, the power producer, on its own, moved the State Regulatory Commission seeking modification of tariff on account of air cooled condenser and also seeking increase in the biomass fuel cost and consequential redetermination of the tariff on that basis. The State Regulatory Commission by its order dated 05.12.2010, while allowing an increase in tariff on account of air cooled condenser, rejected the request of the power producer to review the price of biomass fuel cost, primarily, on the ground that the review of the price of biomass fuel having been earlier rejected in the case of Biomass Energy Developers Association, the review of the said price at the request of the power producer cannot now be allowed.

4. The learned Appellate Tribunal by the impugned orders overruled the view taken by the State Regulatory Commission on a consideration of the provisions of the Act and the terms and conditions of the PPA(s). The above view of the learned Appellate Tribunal is primarily based on the reasoning that under the Act it is the State Regulatory Commission which has been statutorily vested with the power to determine the tariff and that the tariff as may be fixed and incorporated in the PPA between the distribution licensee and the power producer is liable to be reviewed in the light of changes in the circumstances of a given case. In the case of Junagadh Power Projects Pvt. Ltd. the learned Appellate Tribunal even went to the extent of holding that if in the changed scenario occasioned by a drastic alteration of the facts and circumstances surrounding the determination of tariff, a review is declined/refused the power producer will be left with no option but to shut down its plants. Therefore, a review of the tariff in exercise of the statutory power vested in the State Regulatory Commission would be fully justified. It is the correctness of the aforesaid view that has been assailed in the present appeals under Section 125 of the Act.

5. We have heard Shri C.A. Sundaram, learned senior counsel appearing for the appellant and Shri Sanjay Sen, learned senior counsel appearing for the respondent-power producers in both sets of appeals.

6. The arguments on behalf of the appellant-distribution licensee in both the cases are more or less common. In the case of Tarini Infrastructure Ltd. it is urged that under Clause 5.2 of the PPA the appellant is required to pay tariff as determined by the State Commission which is liable to escalation @ 3% per annum. The tariff order has not

A been challenged by the power producer. Therefore, the tariff approved by the State Regulatory Commission and incorporated in the PPA would remain in force for the period of time agreed upon and the same cannot be altered unilaterally. Reliance in this regard is placed on two recent decisions of this Court in the case of ***Gujarat Urja Vikas Nigam Limited*** Vs. ***EMCO Ltd. & Anr.***[1] and ***Bangalore Electricity Supply Co.*** Vs. ***Konark Power Projects Ltd.***[2]. It is contended that in the said cases it has been held that a PPA duly entered into and otherwise consistent with the tariff order of the State Regulatory Commission cannot be reopened. A somewhat "discordant note" struck by this Court in ***Transmission Corporation of Andhra Pradesh*** Vs. ***Sai Renewable Power Pvt. Ltd.***[3] has been sought to be explained by the appellant by contending that in the PPA involved in that case there was a specific clause that the tariff would be as revised by orders of the State Regulatory Commission from time to time.

Specifically in the case of Junagadh Power Projects Pvt. Ltd. (respondent No. 1 in Civil Appeal Nos. 1973-1974 of 2914) it is urged that the demand raised by Biomass Energy Developers Association for redetermination of the tariff by enhancing the fuel cost to Rs. 3000 per MT had been dismissed earlier and the issue has attained finality in law. The PPA stood novated to the extent of modification of tariff allowed on account of the issue of air cooled condenser is concerned and no further, it is urged. For clarity it may be noted that in an earlier proceeding a higher tariff had been allowed to biomass based power plants with air cooled condensers.

7. On the other hand, on behalf of the power producers it is argued that determination and fixation of tariff are instances of the exercise of the statutory powers of the State Regulatory Commission under Section 62 read with Section 86(1)(a) of the Act. The mere incorporation of the tariff in a PPA between the generating company and the distribution licensee would not make the tariff a consensual decision by and between the contracting parties which, can only be altered by the Commission with the mutual consent of the parties.

8. The decisions relied upon in ***Gujarat Urja Vikas Nigam Limited*** Vs. ***EMCO Ltd. & Anr.*** (supra) and ***Bangalore Electricity***

[1] 2016 (2) SCALE 75
[2] 2015(5) SCALE 711
[3] (2011) 11 SCC 34

Supply Co. Vs. ***Konark Power Projects Ltd.*** (supra) have sought to be distinguished by reference to the facts in the context of which the same have been rendered. The observations of this Court in ***Transmission Corporation of Andhra Pradesh*** Vs. ***Sai Renewable Power Pvt. Ltd.*** (supra) (para 64) with regard to the role and authority of the Regulatory Commission in the matter of fixation of tariff have been relied upon. Furthermore, the language appearing in Section 86(1)(b) of the Act has been specifically relied upon to contend that the said provision of the Act confers on the State Regulatory Commission the power *"to regulate the price at which electricity shall be procured from the generating companies or licensees ..... through agreements for purchase of power for distribution and supply within the State."* Reliance has also been placed on the decisions on this Court in **Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors.** Vs. ***State of A.P.***[4], ***K. Ramanathan*** Vs. ***State of T.N. & Anr.***[5] and ***D.K. Trivedi & Sons*** Vs. ***State of Gujarat & Ors.***[6] with regard to wide meaning of word "regulate". It is further pointed out that power production for purposes of supply on the terms envisaged in the PPA is commercially not viable resulting in closure of the Junagadh Power Projects Ltd. for the past 3 years and the possible loss of the huge investment made.

9. The Electricity Act of 2003 has been enacted to consolidate and upgrade the existing laws relating to generation, transmission, distribution, trade and use of electricity; for taking measures conducive to development of electricity as an industry; to promote competition therein and to protect the interest of consumers; rationalize tariff and promote efficient and environment friendly policies besides creating different regulatory and appellate bodies to deal with highly complex technical issues with regard to production, distribution and sale of electricity including fixation of tariff. A reading of the provisions of the 2003 Act would go to show that apart from fixation of tariff in a "situation of open access" or in a situation of competitive bidding covered by Section 63 of the Act, determination and fixation of tariff is a statutory function to be performed by the State Regulatory Commissions constituted under the Electricity Regulatory Commissions Act, 1988 and exercising powers in consonance with the principles enunciated by the Electricity Act, 2003. Insofar as fixation of tariff is concerned, Part VII of the Act read with the functions of the

[4] AIR 1964 SC 1781
[5] (1985) 2 SCC 116
[6] (1986) Supp. SCC 20

A State Commission contained in Section 86 thereof are relevant and would require to be specifically noticed. Sections 61, 62 64 and Section 86 of the Act therefore are being extracted herein below.

"**61. Tariff regulations**:- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions
B for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

C (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

D (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

E 1[(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;]

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

F (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commission Act, 1998 (14 of 1998) and the enactments
G specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

"**62. Determination of tariff:** - (1) The Appropriate Commission

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shall determine the tariff in accordance with the provisions of this Act for – A

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

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity; B

(b) transmission of electricity; C

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. D

(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. E

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. F

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. G

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for

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A calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid
B such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

"64. Procedure for tariff order: - (1) An application for determination of tariff under section 62 shall be made by a
C generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

D (3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such
E modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

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Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person
G concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any interstate 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

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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.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

"86. Functions of State Commission: - (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) 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;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified

A under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

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(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-

C (i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

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(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while

E exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

10. While Section 61 of the Act lays down the principles for

F determination of tariff, Section 62 of the Act deals with the different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary

G functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/ fixation undoubtedly is statutory and that has been the view of this Court expressed in paragraphs 36 and 64 of ***Transmission Corporation of Andhra Pradesh*** Vs. ***Sai Renewable***

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Power Pvt. Ltd. (supra). This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63). In the present case, admittedly, the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

11. The principles on which tariff is to be determined by the Commission as set out in Section 61 have already been noticed. Generation, transmission, distribution and supply of electricity is required to be conducted on commercial principles; while the consumers' interest is to be safeguarded, recovery of cost of electricity in a reasonable manner has also to be ensured. Under Section 64(6) a tariff order continues to remain in force for such period as may be specified. In the State of Gujarat, currently, the Gujarat Electricity Regulatory Commission (multi-year tariff) Regulations, 2016 govern the fixation of tariff by the State Commission. As per Regulation 31 the Commission is required to determine the tariff of a generating company, transmission licensee, SLDC and distribution licensee for each financial year during the control period (control period is 5 years) (financial year 2016 to financial year 2021) having regard to the following factors:

> "(a) The approved forecast of Aggregate Revenue Requirement and expected revenue from tariff and charges of the Generating company, Transmission Licensee, SLDC and Distribution Licensee for such financial year, including modification approved at the time of mid-term review, if any, and
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> (b) Approved gains and losses, including the incentive available to be passed through in tariffs, following the Truing Up of previous year.

12. Not only the tariff fixed is subject to periodic review, furthermore the above Regulations provide for taking into consideration the force majeure events. Any force majeure is considered as an uncontrollable

A factor. In fact Regulation 23 provides that the approved aggregate gain or loss on account of uncontrollable factor shall be passed through as an adjustment in the tariff over such period as may be specified in the Order of the Commission.

13. Regulations 23 and 31 of the Gujarat Electricity Regulatory B Commission (multi-year tariff) Regulations, 2016 are reproduced hereunder.

23. Mechanism for pass through of gains or losses on account of uncontrollable factors

C *23.1 The approved aggregate gain or loss to the Generating Company or Transmission Licensee or SLDC or Distribution Licensee on account of uncontrollable factors shall be passed through as an adjustment in the tariff of the Generating Company or Transmission Licensee or SLDC or Distribution Licensee over such* D *period as may be specified in the Order of the Commission passed under these Regulations.*

23.2 The Generating Company or Transmission Licensee or SLDC or Distribution Licensee shall submit such details of the variation between expenses incurred and revenue E *earned and the figures approved by the Commission, in the prescribed format to the Commission, along with the detailed computations and supporting documents as may be required for verification by the Commission.*

23.3 Nothing contained in this Regulation 23shall apply in F *respect of any gain or loss arising out of variations in the price of fuel and power purchase, which shall be dealt with as specified by the Commission from time to time.*

31. Annual determination of tariff

G *The Commission shall determine the tariff of a Generating Company, Transmission Licensee, SLDC and Distribution Licensee covered under a Multi-Year Tariff framework for each financial year during the Control Period, at the commencement of such financial year, having regard to the following:*

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(a) The approved forecast of Aggregate Revenue Requirement and expected revenue from tariff and charges of the Generating Company, Transmission Licensee, SLDC and Distribution Licensee for such financial year, including modifications approved at the time of mid-term review, if any; and

(b) Approved gains and losses, including the incentive available to be passed through in tariffs, following the Truing Up of previous year."

14. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of the PPA in the case of Junagadh. That apart, modification of the tariff on account of air cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory.

15. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in **Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors.** Vs. ***State of A.P.*** (supra), ***K. Ramanathan*** Vs. ***State of T.N. & Anr.*** (supra) and ***D.K. Trivedi & Sons*** Vs. ***State of Gujarat & Ors.*** (supra) the power of regulation is indeed of wide import. The following extracts from the reports in the above cases would illuminate the issue.

Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors. Vs. *State of A.P.* (supra)

"20. Then it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and

A its availability at fair prices.

....."

K. Ramanathan Vs. ***State of T.N. & Anr.*** (supra)

"18. The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in *Corpus Juris Secundum*, Vol. 76 at p. 611:

"'Regulate' is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

'Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict."

See also: *Webster's Third New International Dictionary*, Vol. II, p. 1913 and *Shorter Oxford Dictionary*, Vol. II, 3rd Edn., p. 1784.

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain

circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."

D.K. Trivedi & Sons Vs. State of Gujarat & Ors. (supra)

"30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). Each of these provisions confers the power to make rules for "regulating". The Shorter Oxford English Dictionary, 3rd Edn., defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings". Thus, the power to regulate by rules given by Sections 13(1) and 15(1) is a power to control, govern and direct by rules the grant of prospecting licences and mining leases in respect of minerals other than minor minerals and for purposes connected therewith in the case of Section 13(1) and the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith in the case of Section 15(1) and to subject such grant to restrictions and to adapt them to the circumstances of the case and the surroundings with reference to which such power is exercised. It is pertinent to bear in mind that the power to regulate conferred by Sections 13(1) and 15(1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to "purposes connected therewith", that is, purposes connected with such grant."

16. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the

surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898. In this context, the views of this Court on the purport and effect of Sections 14 and 21 of the General Clauses Act may be re-noticed by extracting paragraphs 47, 48 and 49 of the decision of this Court in ***D.K. Trivedi & Sons*** Vs. ***State of Gujarat & Ors.*** (supra).

> **"47.** The next contention was that though under Section 15(1) the State Governments may have the power to make rules providing for payment of royalty and dead rent, sub-section (3) showed that such power did not extend to amending the rules so as to enhance the rate of dead rent. The submission in this behalf was that the power to enhance the rate of royalty by amending the rules was expressly provided for in sub-section (3) by the use of the words "at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals" but there was no such provision in Section 15 with respect to dead rent. We are unable to accept this submission. Rules under Section 15(1), though made by the State Governments, are rules made under a Central Act and the provisions of the General Clauses Act, 1897, apply to such rules. Under Section 21 of the General Clauses Act, where by any Central Act, a power to make rules is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions if any, to add to, amend, vary or rescind any rules so made. The power to amend the rules is therefore, comprehended within the power to make rules and as Section 15(1) confers upon the State Governments the power to make rules providing for payment of dead rent and royalty, it also confers upon the State Governments the power to amend those rules so as to alter the rates of royalty and dead rent so prescribed, either by enhancing or reducing such rates.
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> ....
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> **48.** It was then contended that the very language of sub-section (1) of Section 15 shows that it does not confer any power upon the State Governments to enhance the rate of royalty or dead rent because the rules which are to be made under that sub-section

are for regulating the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and, therefore, the rules under that sub-section can be made only with respect to the time when such leases or concessions are granted and not with respect to any point of time subsequent thereto and there being no provision similar to sub-section (3) of Section 15 with respect to dead rent, any rule providing for increase in the rate of dead rent during the subsistence of a lease would be ultra vires Section 15. This submission is devoid of substance. As pointed out earlier, sub-section (3) of Section 15 does not confer any power to amend the rules made under Section 15(1), for the power to amend the rules is comprehended within the power to make the rules conferred by sub-section (1) of Section 15. The construction sought to be placed upon the word "grant" in Section 15(1) also cannot be accepted. While granting a lease it is open to the grantor to prescribe conditions which are to be observed during the period of the grant and also to provide for the forfeiture of the lease on breach of any of those conditions. If the grant of a lease were not to prescribe such conditions, the lessee could with impunity commit breaches of the conditions of the lease. Ordinary leases of immovable property at times provide for periodic increases of rent and there is no reason why such increases should not be made in a mining or quarry lease or other mineral concession granted under a regulatory statute intended for the benefit of the public and even less reason why such a statute should not confer power to make rules providing for increases in the rate of dead rent during the subsistence of the lease. ....

....

49. In support of the above contention it was also submitted that in the absence of a provision like the one contained in Section 15(3) the power to enhance the rate of dead rent cannot be so exercised as to affect subsisting leases and that unless this construction were placed upon sub-section (1), the power conferred by that sub-section would be bad in law as being an arbitrary power. It was submitted that a mining lease is the result of a contract entered into between two parties and dead rent is part of the consideration for the grant of the lease, and just as in the case of a contract of sale of goods, it cannot be left to the

A sweet will of the seller to charge what price he liked, in the same way in the case of leases and concessions granted under Section 15(1), it cannot be left to the State Governments to amend the rules so as to charge whatever dead rent they like and whenever they like during the subsistence of the lease. We find no substance in either of these submissions. ***A quarry lease, mining lease or other mineral concession in respect of a minor mineral does not stand on the same footing as an ordinary contract. These leases and concessions are granted by the State Governments pursuant to rules made under the statutory power conferred upon them by a regulatory Act. Minerals are part of the material resources which constitute a nation's natural wealth and if the nation is to advance industrially and if its economy is to be benefited by the proper development and exploitation of these resources, they cannot be permitted to be frittered away and exhausted within a few years by indiscriminate exploitation without any regard to public and national interest.*** The same view was expressed by the Court in State of Tamil Nadu v. Hind Stone. .... The presumption is that an authority clothed with a statutory power will exercise such power reasonably, and if in the public interest and for the efficacious regulation of mines and quarries of minor minerals and the proper development of such minerals, a State Government as the delegate of the Union Government thinks fit to amend the rules so as to enhance the rate of dead rent, it cannot be said that it is prevented from doing so by the principles of the ordinary law of contracts. It may be that in certain cases by enhancing the rate of dead rent the holders of leases in respect of certain types of minor minerals may be adversely affected but private interest cannot be permitted to override public interest. Conservation of minerals and their proper exploitation result in securing the maximum benefit to the community and it is open to the State Governments to enhance the rate of dead rent so as to ensure the proper conservation and development of minor minerals even though it may affect a lessee's liability under a subsisting lease."

17. A similar view expressed in ***Shree Sidhbali Steels Ltd. and Others*** Vs. ***State of Uttar Pradesh and Others***[7] may also be noticed.

[7] (2011) 3 SCC 193

"**41.** By virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It would be too narrow a view to accept that chargeability once fixed cannot be altered. Since the charging provision in the Electricity (Supply) Act, 1948 is subject to the State Government's power to issue notification under Section 49 of the Act granting rebate, the State Government, in view of Section 21 of the General Clauses Act, can always withdraw, rescind, add to or modify an exemption notification. No industry can claim as of right that the Government should exercise its power under Section 49 and offer rebate and it is for the Government to decide whether the conditions are such that rebate should be granted or not."

18. Before parting, a word about the recent pronouncements of this Court in ***Gujarat Urja Vikas Nigam Limited*** Vs. ***EMCO Ltd. & Anr.*** (supra) and ***Bangalore Electricity Supply Co. Vs. Konark Power Projects Ltd.*** (supra), relied upon by the appellant. All that would be necessary to note in this regard is the context in which the bar of a review of the terms of a PPA was found by this Court in the above cases. In ***Gujarat Urja Vikas Nigam Limited*** Vs. ***EMCO Ltd. & Anr.*** (supra) the power purchaser sought the benefit of a second tariff order made effective to projects commissioned after 29.01.2012 (the power purchaser had commissioned its project on 02.03.2012) though under the PPA it was to be governed by the first tariff order of January, 2010. Under the first tariff order for such projects which were not commissioned on or before the date fixed under the said order, namely, 31.11.2011 the tariff payable was to be determined by the Gujarat Electricity Regulatory Commission. The power producer in the above case did not seek determination of a separate tariff but what was sought was a declaration that the second tariff order dated 27.01.2012 applicable to PPA(s) after 29.01.2012 would be applicable. It is in this context that this Court had taken the view that the power producer would not be relieved of its contractual obligations under the PPA. In the case of ***Bangalore Electricity Supply Co.*** Vs. ***Konark Power Projects Ltd.*** (supra), this Court held that it was beyond the power of State Commission

A to vary the tariff fixed under the approved PPA in view of the specific provisions in Regulations 5.1 and 9 of the KERC(Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 and 2011 respectively as the same specifically excluded a PPA concluded prior to the date of notification of the Regulations in question.

B 19. In view of the above, the appeals are dismissed and the orders dated 31.05.2012 and 02.12.2013 of the Appellate Tribunal are affirmed. In the facts and circumstances of the case, the parties are left to bear their own costs.

Kalpana K. Tripathy Appeals dismissed.

C