

M/S NTPC LTD.

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v.

M.P. STATE ELECTRICITY BOARD & ORS.
(Civil Appeal No. 2451 OF 2007)

SEPTEMBER 29, 2011

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[J. M. PANCHAL AND H.L. GOKHALE, JJ.]

Electricity Act, 2003 – s. 62 – Determination of Tariff – Power supplied by NTPC to Electricity Boards from its power station – Tariff payable by the Electricity Board to NTPC – Determination of, by Central Electricity Regulatory Commission – Final tariff determined at a rate lesser than the pre-existing tariff – Collection of excess amount by NTPC during the intervening period – Payment of interest on the differential amount – Claim of Electricity Board – Rejected by the Central Commission – Appeal to Appellate Tribunal u/s. 111 – Appellate Tribunal rejected the interest on the differential amount to the concerned Electricity Boards u/s. 62 (6), however, allowed interest on differential amount on basis of justice, equity and fair-play – On appeal held: s. 62 (6) cannot be pressed into service to claim interest on the differential amounts – It does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount – It is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined u/s. 62 (6), such person can claim the excess price or charge paid by him alongwith interest – Instant case was not where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat – NTPC was not in any way responsible for the delay in process of determination of tariff – Once the tariff was finalized subsequently, NTPC adjusted the excess amount which it

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A *received – Tariff charged at the relevant time was as per the
previous notifications – Interest came to be provided
subsequently by a Notification under the Regulations of 2004
– Thus, the principles of equity, justice and fair-play could not
have been brought in, to award interest to the Electricity
B Boards.*

*Interest – Payment of interest on differential amounts –
On the ground of justice, equity and fair play – Collection of
excess amount of tariff by NTPC from Electricity Board during
the intervening period – Appellate tribunal awarding interest
C on differential amounts on the ground of justice, equity and
fair play – Justification of – Held: The instant case was not
where the beneficiaries were made to pay the excess tariff at
the instance of NTPC through force, coercion or threat or in
D an unjust way – Thus, the principles of equity, justice and fair-
play could not have been brought in to award interest to the
Electricity Boards – More so, the terms of the supply
agreement, the governing regulation and notifications as also
the industry practice did not contain any provision for interest
– Thus, interest could not be claimed either on the basis of
E equity or on the basis of restitution.*

**Madhya Pradesh State Electricity Board (MPSEB),
Punjab State Electricity Board (PSEB) and Delhi Vidyut
Board (DVB) receive the power generated from the
F thermal power plants of NTPC situated at Kawas,
Gandhar and Rehand. NTPC filed petitions before the
Central Electricity Regulatory Commission for
determining the tariff with respect to the power supplied
by it during the period 1.4.2001 to 31.3.2004 to MPSEB,
PSEB, Delhi Vidyut Board and others from the Power
G Stations. The Central Commission by orders dated
1.4.2005, 7.4.2005 and 2.6.2005 determined the final tariff
payable by the Electricity Boards to NTPC at a rate lesser
than the pre-existing tariff, and found that NTPC had
H collected excess amounts during the intervening period,**

and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts. However, the Central Commission disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between the tariff finally determined by the Central Commission and the pre-existing tariff continued by the Central Commission until the final determination of the tariff. Thereafter, NTPC adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills. MPSEB, PSEB and DVB filed appeals before the Appellate Tribunal under Section 111 of the Electricity Act, 2003 against the orders of the Central Commission. The Appellate Tribunal rejected the claim of the Electricity Boards for interest as being payable under Section 62(6) of the Electricity Act, 2003, however, held that NTPC was liable to pay interest on the differential amounts on the grounds of justice, equity and fair-play. Therefore, the instant cross appeals were filed.

Allowing the appeals filed by the NTPC and dismissing those filed by the Electricity Board, the Court

HELD: 1.1 Sub-section (6) of Section 62 of the Electricity Act, 2003 lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this Section, the excess amount shall be recoverable by the person who has paid such excess price or charge alongwith interest at bank rate. The earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter, sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words 'tariff determined under this Section' indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections. It was submitted that this

A sub-section should be applied even during the period when the tariff was being determined (as in the instant case), and if in the final determination the price fixed is lesser than what was charged during the intervening period, then interest should be read as recoverable for the excess amount collected during the intervening period. Sub-section does not refer to the period during which the tariff is being determined. It also does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount. This sub-section further states that this right to claim interest is without prejudice to any other liability incurred by the licensee. Besides what is prohibited is recovery of price or charge exceeding the tariff determined under this Section and then only, the generating company will have to pay the interest on the difference. That is why the Appellate Tribunal observed that it is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under Section 62 (6), that such person can claim the excess price or charge paid by him alongwith interest. The view taken by the Appellate Tribunal that Section 62 (6) cannot be pressed into service to claim interest on the differential amounts in the instant case, is accepted. [Para 15] [667-E-H; 668-A-D]

1.2 Prior to 1.6.2006 there was no such specific provision for claiming interest for the intervening period. The very fact that such a regulation was required to be issued, indicates the necessity for having such a regulation, but at the same time it is not possible to make it applicable retrospectively. The provision for charging interest is a substantive provision which has to be specifically provided and would become operative when provided. In the circumstances, the submission based on

the new regulation, Regulation 5A of the 'Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulation, 2004, inserted by a Notification dated 01.06.2006 which recognized the appropriateness of allowing interest on the differential amount between the provisional tariff and final tariff also cannot help the Electricity Boards to claim interest on the differential amounts. [Para 18] [669-H; 670-A-B]

1.3 The Appellate Tribunal awarded interest at an average of the prevailing lending rates (PLR) of the Reserve Bank of India to the Banks during the relevant period. The Central Commission, by issuing notifications continued the tariff existing on 31.3.2001 as an interim measure until the final tariff was determined, and the notifications did not provide in any way for interest. The Appellate Tribunal commented that the notifications were issued mechanically without bestowing any prima facie consideration as to what should be the tariff as an interim arrangement. The Appellate Tribunal was of the view that in passing an interim or provisional order, an examination of all the pros and cons was necessary. The interim arrangement continued for over a period of four years and according to the Appellate Tribunal, it resulted into an undue monetary benefit to the NTPC. [Para 19] [670-C-F]

1.4 In the instant case, the second proviso to Regulation 79(2) of 1999 permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz. that interest was not

A payable earlier. It is difficult to appreciate as to how the Appellate Tribunal could bring in either the principles of justice, equity and fair-play or that of restitution in the instant case. What is important to note is that the Appellate Tribunal specifically observed in terms that this

B was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat. This being the position the principles of equity, justice and fair-play could not have been brought in to award interest to the Electricity Boards.

C There was delay in the process of determination of the tariff. The Commission became functional only on 15.5.1999. NTPC had filed the tariff petitions duly as required by the Central Commission. The delay in the case of Kawas and Gandhar Power Stations was

D because of the Commission requiring them to appropriately devise norms and parameters. As far as Rihand Station is concerned, one of the beneficiaries, namely Rajasthan Rajya Vidyut Vitaran Nigam Limited had obtained stay of proceedings before the Commission from the High Court of Rajasthan. NTPC was not in any

E way responsible for these factors. Ultimately, the tariff was reduced, but the tariff charged by the NTPC in the meanwhile was in accordance with the rates permitted under the notifications issued by the Commission. It cannot, therefore, be said that NTPC had held on to the

F excess amount in an unjust way to call it unjust enrichment on the part of NTPC, so as to justify the claim of the Electricity Boards for interest on this amount. [Paras 22, 26 and 27] [672-B-C; 674-D-H; 675-A]

G *BSES Ltd. v. Tata Powers Co. Ltd.* 2004 (1) SCC 195; *South Eastern Coalfields Ltd. v. State of M.P. and Ors.* 2003 (8) SCC 648; *Union of India v. Rallia Ram* AIR 1963 SC 1685; *Bengal Nagpur Railway Co. v. Ruttanji Ramji* AIR 1938 PC 67; *Union of India v. Watkins Mayor and Co.* AIR 1966 SC 275; *Commissioner of Sales Tax v. Hindustan Aluminum*

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NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 657
ORS.

Corporation 2002 (127) STC 258; Kavita Trehan and Anr. v. A
Balsara Hygiene Products Ltd. 1994 (5) SCC 380 – referred
to.

1.5 Price fixation is really legislative in character, but
since an appeal is provided under Section 111 of the Act,
it takes a quasi-judicial colour. That by itself cannot justify
the claim for interest during the period when the
proceedings were pending for the tariff fixation. The tariff
that was being charged at the relevant time was as per
the previous notifications. Once the tariff was finalized
subsequently, NTPC has adjusted the excess amount
which it has received. It cannot be said that during this
period the NTPC was claiming the charges in an unjust
way, to make a case in equity. The industry practice
which also shows that on all such occasions interest has
never been either demanded or paid when the price
fixation takes place. The claim for interest could not be
covered under Section 62 (6). The provision for interest
has been introduced by regulations subsequent to the
period which was under consideration before the
Commission. The terms of the supply agreement, the
governing regulation and notifications did not contain
any provision for interest. The industry practice did not
provide for it as well. In view thereof, interest could not
be claimed either on the basis of equity or on the basis
of restitution. [Para 30] [677-A-E]

West Bengal Electricity Regulatory Commission v. G
CESC 2002 (8) SCC 715; Shri Sitaram Sugar Mills v. UOI
1990 3 SCC 223; Saraswati Industrial Syndicate v. UOI 1974
(2) SCC 630; Malaprabha Sugars v. UOI 1994 (1) SCC 648;
Mahalakshmi Sugar Mills v. UOI 2009 (16) SCC 569; Pallavi
Refractories v. Singareni Collieries 2005 (2) SCC 227; ONGC
v. Assn. of Natural Gas Consuming Industries of Gujarat 1990
Supp. (1) SCC 397; Prag Ice and Oil Mills v. UOI 1978 (3)
SCC 459; PTC India Ltd. v. Central Electricity Regulatory
Commission 2010 (4) SCC 603 – referred to H

A 1.6 In the circumstances, it cannot be said that the Appellate Tribunal erred in any way in declining to award interest under Section 62 (6) of the Act. There was however, an error on its part in granting the same under the concept of equity, justice and fair-play. [Para 31] [677-
B F]

Case Law Reference:

	2004 (1) SCC 195	Referred to	Para 20
C	2003 (8) SCC 648	Referred to	Para 21
	AIR 1963 SC 1685	Referred to	Para 23
	AIR 1938 PC 67	Referred to	Para 23
	AIR 1966 SC 275	Referred to	Para 24
D	2002 (127) STC 258	Referred to	Para 25
	1994 (5) SCC 380	Referred to	Para 26
	2002 (8) SCC 715	Referred to	Para 28
E	1990 (3) SCC 223	Referred to	Para 28
	1974 (2) SCC 630	Referred to	Para 28
	1994 (1) SCC 648	Referred to	Para 28
F	2009 (16) SCC 569	Referred to	Para 28
	2005 (2) SCC 227	Referred to	Para 28
	1990 Supp. (1) SCC 397	Referred to	Para 28
	1978 (3) SCC 459	Referred to	Para 28
G	2010 (4) SCC 603	Referred to	Para 29

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2451 of 2007.

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NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 659
ORS.

From the Judgment & Order dated 20.4.2007 of the Appellate Tribunal for Electricity in Appeal No. 64 of 2006. A

WITH

Civil Appeal No. 2452, 2493, 3972 and 4231 OF 2007 B

A.K. Ganguly, Shail Kr. Dwivedi, AAG, M.G. Ramachandran, K.V. Mohan, Anand K. Gansesan, Ranjitha Ramachandran, Pradeep Misra, Sakesh Kumar, K.V. Bharathi Upadhyaya, Yogmaya Agnihotri, Ashok Kumar Singh, Suraj Singh and T. Mahipal for the appearing parties. C

The Judgment of the Court was delivered by

H.L. GOKHALE J.1. All these five appeals arise out of a common order dated 20.4.2007 passed by Appellate Tribunal for Electricity ('Appellate Tribunal' for short) while deciding the First Appeals to the Appellate Tribunal under Section 111 of the Electricity Act, 2003 against the orders of the Central Electricity Regulatory Commission ('The Central Commission' for short), dated 1.4.2005, 7.4.2005 and 2.6.2006 passed under Section 62 of the Electricity Act, 2003. While admitting these appeals, this Court has stayed the operation of the impugned order until further orders. D E

(a) First three of these three Civil Appeals are filed by M/s NTPC Ltd. The Madhya Pradesh State Electricity Board ('MPSEB' for short) and others are respondents to Civil Appeal No.2451/2007. The Punjab State Electricity Board ('PSEB' for short), Delhi Vidyut Board and others are the respondents to the other two appeals being Civil Appeal No.2452/2007 and Civil Appeal No.2493/2007. F G

(b) Civil Appeals Nos. 3972 and 4231 of 2007 are filed by the PSEB and Delhi Vidyut Board. The Central Commission, M/s NTPC Ltd. and others are the respondents to these two appeals. H

A 2. M/s NTPC Ltd. is a power 'generating company' within the definition of the concept under Section 2 (28) of the Electricity Act, 2003. The Electricity Boards concerned, receive the power generated from the thermal power plants of NTPC situated at Kawas, Gandhar and Rihand. The Central Commission had determined the tariff payable by the Electricity Boards to NTPC by the above referred orders dated 1.4.2005, 7.4.2005 and 2.6.2006.

C (i) The orders dated 1.4.2005 and 7.4.2005 were on the Petitions No.33 of 2001 and 31 of 2001 respectively filed by NTPC for determining the tariff with respect to the power supplied by it during the period 1.4.2001 to 31.3.2004 to MPSEB and others from Gandhar and Kawas power stations.

D (ii) The order dated 2.6.2006 was on Petition No.38 of 2001 by NTPC for the determination of tariff with respect to power supplied during the same period from the Rihand power station to PSEB, Delhi Vidyut Board and others.

E 3. The Central Commission while determining the tariff, had determined the final tariff at a rate lesser than the pre-existing tariff, as a result of which NTPC was found to have collected excess amounts during this intervening period, and the Electricity Boards became entitled to get the refund/adjustment of these differential amounts. Thus, the amount overcharged in respect of Gandhar power station is to the tune of Rs.460.52 crores and the one in respect of Kawas power station is Rs.254.47 crores. The Central Commission had however disallowed the claim of the Electricity Boards for payment of interest on the differential amounts between (i) the tariff finally determined by the Central Commission and (ii) the pre-existing tariff continued by the Central Commission until the final determination of the tariff. There is no dispute that thereafter NTPC has duly and immediately adjusted the excess amounts in favour of the purchaser Electricity Boards in their subsequent bills.

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 661
ORS. [H.L. GOKHALE, J.]

4. The MPSEB, PSEB and Delhi Vidyut Board, therefore, invoked Section 111 of the Electricity Act, 2003 and filed appeals against the above three orders of the Central Commission before the Appellate Tribunal which were numbered as Appeal Nos.64, 212 and 237 of 2006. The Appellate Tribunal rejected the claim of the Electricity Boards for interest as being payable under Section 62(6) of the Electricity Act, 2003. It however, held by its impugned common order dated 20.4.2007, that NTPC was liable to pay interest on the differential amounts on the grounds of justice, equity and fair-play. The NTPC has therefore, filed three Civil Appeals being Civil Appeal Nos. 2451/2007, 2452/2007 and 2493/2007 to challenge this order. As against that, PSEB and Delhi Vidyut Board have filed Civil Appeal Nos. 3972/2007 and 4231/2007 to challenge the same order of the Appellate Tribunal to the extent it rejected their claim for interest under Section 62(6) of the Electricity Act.

Main questions for determination –

5. These Civil Appeals therefore raise two principle questions for determination, (a) whether the Appellate Tribunal erred in denying the interest on the differential amounts to the concerned Electricity Boards under Section 62 (6) of the Electricity Act, 2003, and (b) whether the Appellate Tribunal was justified in allowing interest on the differential amounts on the basis of justice, equity and fair-play.

6. Shri M.G. Ramachandran, learned counsel appeared for NTPC Ltd.. Shri A.K. Ganguli, Senior Advocate and Mr. Pradeep Misra, learned counsel have appeared for the concerned Electricity Boards.

7. Before we deal with these issues which arise with these appeals, we must note that the law concerning the determination of tariff of electricity has undergone changes from time to time.

(i) Earlier the Electricity (Supply) Act, 1948 was governing

A the field. The Central Government was then determining the tariff for the power supplied by NTPC under Section 43 A (2) of the Act, since NTPC is a Government of India enterprise.

B (ii) The Electricity Regulatory Commissions Act 1998 was enacted for distancing of the Government from determination of tariffs. It created the Central Commission. The act, came into force on 25.4.1998. Tariff determination and other Regulatory functions as far as power generation of NTPC was concerned, no longer remained with the
 C Central Government, and came to be vested in the Central Commission.

(iii) The Electricity Act, 2003, came into force from
 D 10.6.2003 as a comprehensive piece of legislation. Section 185 of this Act, repealed the Electricity Supply Act, 1948 and the Electricity Regulatory Commissions Act, 1988 as well as the Indian Electricity Act, 1910. In view of the proviso to Section 61 of the Electricity Act, 2003, however the act became available for the determination
 E of tariff of NTPC from 1.4.2004. The Central Commission constituted under the Electricity Regulatory Commissions Act continued to exercise its functions under the Electricity Act, 2003 in view of Section 76 of the Electricity Act, 2003.

F 8. As noted above earlier, under the Electricity Supply Act, 1948, the Central Government was the tariff determining authority for NTPC, since it is a wholly owned corporation of the Central Government. This was on account of proviso of Section 43A (2) of the Electricity Supply Act 1948, which reads as follows:-

G ***"43A. Terms, conditions and tariff for sale of electricity by Generating Company***

(1).....

H (2)

**NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 663
ORS. [H.L. GOKHALE, J.]**

Provided that the terms, conditions and tariffs for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the Government or Governments concerned.”

9. The NTPC has been making bulk supply of power to the concerned Electricity Boards from these Power Generating Stations. The bulk power supply agreements mostly provided that the tariff will be as per the notification issued by the Government of India under Section 43A of the Electricity Supply Act, 1948. We may refer to the bulk power supply agreement for Rihand Power Station. The power supply agreement with respect to Rihand Station dated 2.11.1992 provided that the tariff as per those notifications will be applicable for a specified period but it also added thereafter as follows:-

“In case a new tariff for the period beyond above is not finalized before that date, the Beneficiary (ies) shall continue to pay to NTPC for the power supplied from the STPC beyond this date on adhoc basis in the manner detailed in this notification.”

Similar was the position with respect to power supply agreements concerning Kawas and Gandhar Power Stations.

10. After the Central Commission was constituted with the authority for determining the tariff fixation, the Central Commission published Central Electricity Regulatory Commission (Conduct of Business) Regulation 1999. Second proviso to Regulation 79 (2) thereof provided as follows:-

“Provided further that the existing tariff being charged by generating companies owned by or controlled

A by the Central Government shall continue to be charged
after the date of the notification as referred to in the above
regulation for such period as may be specified in the
notification without prejudice to the powers of the
Commission to take up any matter relating to tariff falling
B within the scope of the Section 13 of the Act.”

Accordingly, the Central Commission issued notifications from
time to time on 12.5.1999, 4.4.2001 and 21.10.2003 continuing
the existing tariff as on 31.3.2001 until further orders to be
passed by the Commission. NTPC raised the monthly invoices
C as per the existing tariff and the Electricity Boards honoured
the same.

11. NTPC duly filed the tariff petitions as required by the
Central Commission for the tariff determination, however the
D proceedings before the Central Commission took their own
time and the petitions were ultimately decided on 1.4.2005,
7.4.2005 and 2.6.2006. . As stated earlier when the tariff was
finalised, the rates were in fact reduced, and the Electricity
Boards became entitled to receive the excess amounts paid
E in the meanwhile. We must note at this stage that while
determining the tariff, the appropriate Commission has to
safeguard the consumer’s interest as well as recovery of cost
of electricity in a reasonable manner under Section 61(d) of the
Act which is what is done by the Commission. Subsequently,
F NTPC adjusted the excess amount which it had received in the
intervening period in the subsequent bills to the Electricity
Boards.

12. As stated earlier, when the tariff was determined, the
Central Commission did not award any interest on the excess
G amounts which were collected by the NTPC in the meanwhile,
and therefore, the Electricity Boards filed appeals before the
Appellate Tribunal by invoking Section 111 of the Electricity Act
2003. The Appellate Tribunal has taken the view that the claim
of the Electricity Boards could not be entertained under Section
H 62 (6) of the Electricity Act though they are entitled to it on the

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 665
ORS. [H.L. GOKHALE, J.]

basis of justice, equity and fair-play. It is this order which is under consideration in this matter. A

Consideration of rival submissions

13. For deciding the issue of applicability of Section 62(6), we may refer to the relevant Section 62 of the Electricity Act, 2003, which reads as follows:- B

"Section 62 - Determination of tariff

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for— C

(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; D E

(b) transmission of electricity;

(c) wheeling of electricity; F

(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 the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. G

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as H

A may be specified in respect of generation, transmission and distribution for determination of tariff.

B (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.

C (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.

D (5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

E (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 by the licensee.

F 14. If we look to this Section 62, sub-section (1) thereof lays down the authority of the Appropriate Commission to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee. It also permits the appropriate commission to fix the minimum and maximum ceiling of tariff in certain situations. Sub-section (2) lays down that the Appropriate Commission in its process of determining the tariff may call upon the licensee or a generating company to furnish particulars with respect to

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 667
ORS. [H.L. GOKHALE, J.]

generation, transmission and distribution of power. Sub-section (5) permits the commission to require the licensee or the generating company to comply with the procedure to be specified by the commission for calculating the expected revenue from the tariff which it is permitted to recover. Sub-section (3) lays down that while determining the tariff the commission will take into consideration consumer's load factor, power factor, voltage, total consumption of electricity during any specified period, the geographical position of any area, the nature of supply and the purpose for which it is sought. It may differentiate in the matter of determining the tariff on such basis, though of course it is not expected to show any undue preference to any consumer of electricity. Sub-section (4) lays down that the tariff once fixed will normally operate for a financial year, and will not be amended more frequently than once in a financial year.

15. On this background sub-section (6) lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this section, the excess amount shall be recoverable by the person who has paid such excess price or charge alongwith interest at bank rate. We have noted that the earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words 'tariff determined under this section' indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections. The counsel for the Electricity Boards submitted that this sub-section should be applied even during the period when the tariff was being determined (as in the present case), and if in the final determination the price fixed is lesser than what was charged during the intervening period, then interest should be read as recoverable for the excess amount collected during the intervening period. In this connection, we must note that this sub-section does not refer

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A to the period during which the tariff is being determined. It also
 does not state that if the finally determined tariff is less than the
 provisional tariff or an existing tariff continued by a statutory
 notification, then interest shall be payable on the differential
 amount. This sub-section further states that this right to claim
 B interest is without prejudice to any other liability incurred by the
 licensee. Besides what is prohibited is recovery of price or
 charge exceeding the tariff determined under this section and
 then only, the generating company will have to pay the interest
 on the difference. That is why the Appellate Tribunal has
 C observed that it is only when a licensee or generating company
 deliberately recovers or extracts from a person a price or charge
 in excess of the price determined under section 62 (6), that
 such person can claim the excess price or charge paid by him
 alongwith interest. For the reasons stated above we are unable
 D to accept the submission on behalf of the Electricity Boards,
 and are in agreement with the view taken by the Appellate
 Tribunal that Section 62 (6) cannot be pressed into service to
 claim interest on the differential amounts in the present case.

E 16. The learned counsel for the Electricity Boards pointed
 out that the Central Commission has amended the Central
 Electricity Regulatory Commission (Terms and Conditions of
 Tariff) Regulations, 2004 by a notification dated 01.06.2006 and
 has recognized the appropriateness of allowing interest on the
 differential amount between the provisional tariff and final tariff
 F by inserting Regulation 5A which reads as under:-

G *"5A. Provisional tariff or provisional billing of
 charges, wherever allowed by the Commission based on
 the application made by the generating company or the
 transmission licensee or by the Commission on its own
 motion or otherwise, shall be adjusted against the final
 tariff approved by the Commission.*

H Provided that where the provisional tariff charged
 exceeds the final tariff approved by the Commission under
 these regulations, the generating company or the

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 669
ORS. [H.L. GOKHALE, J.]

transmission licensee, as the case may be, shall pay simple interest at the rate of 6% per annum, computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment. A

Provided further that where the provisional tariff charged is less than the final tariff approved by the Commission, the beneficiaries shall pay simple interest at the rate of 6% per annum, computed on monthly basis on the deficit amount from the date on which final tariff will be applicable up to the date of billing of such deficit amount. B C

Provided also that excess/deficit amount alongwith simple interest at the rate of 6% shall be adjusted within three months from the date of the order failing which the defaulting utility/beneficiary shall be liable to pay penal interest on excess/deficit amount at the rate as may be decided by the Commission." D

It was submitted that the principle contained in this regulation should be applied during the period covered in the present case also. E

17. The counsel for NTPC on the other hand pointed out that the price determined in the present case is for the period 1.4.2001 to 31.3.2004 and even the orders passed by the Central Commission are dated 1.4.2005, 7.4.2005 and 2.6.2006, and that this regulation of 1.6.2006 cannot have a retrospective effect. What was prevalent at the relevant time was regulation 79(2), the second proviso of which has been quoted above, and it did not contain any such provision for interest during the intervening period. F G

18. We have noted the submissions of both the counsel. It is very clear that prior to 1.6.2006 there was no such specific provision for claiming interest for the intervening period. The very fact that such a regulation was required to be issued, H

- A indicates the necessity for having such a regulation, but at the same time it is not possible to make it applicable retrospectively. The provision for charging interest is a substantive provision which has to be specifically provided and would become operative when provided. In the circumstances,
- B the submission based on this new regulation also cannot help the Electricity Boards to claim interest on the differential amounts.

19. Now, we come to the issue as to whether the Appellate Tribunal was right in awarding the interest on the differential amounts on the basis of justice, equity and fair-play. The Appellate Tribunal has awarded interest at an average of the prevailing lending rates (PLR) of the Reserve Bank of India to the Banks during the relevant period. In this connection, we must note that the Central Commission had, by issuing

D notifications continued the tariff existing on 31.3.2001 as an interim measure until the final tariff was determined, and the notifications did not provide in any way for interest. The Appellate Tribunal has commented that the notifications were issued mechanically without bestowing any prima facie

E consideration as to what should be the tariff as an interim arrangement. The Appellate Tribunal was of the view that in passing an interim or provisional order, an examination of all the pros and cons was necessary. The interim arrangement continued for over a period of four years and according to the

F Appellate Tribunal, it resulted into an undue monetary benefit to the NTPC.

20. In coming to its conclusion, the Appellate Tribunal relied upon the judgment of this Court in *BSES Ltd. Vs. Tata Powers Co. Ltd.* reported in [2004 (1) SCC 195] wherein it was

G observed that an interim arrangement is normally based on a prima facie consideration of the matter and on broad principles without examining the matter in depth. In this matter the Court held that payment by way of interim arrangement to the generating company would be subject to the final adjustment

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NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 671
ORS. [H.L. GOKHALE, J.]

by awarding interest. However, it is material to note that in this matter the dispute regarding the standby charges was referred for the determination of the commission, and since the same were not paid during the pendency of various proceedings, the payment of interest was directed in that context.

21. The counsel for the Electricity Boards laid stress on the judgment of this Court in *South Eastern Coalfields Ltd. Vs. State of M.P. and others* reported in [2003 (8) SCC 648] wherein this Court had held that a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by the award of interest which would also be payable in equity. In this matter, the appellants were operating coal mines in the State of Madhya Pradesh. The Central Government enhanced the royalty payable on coal, and the State Government was entitled to recover the same from the appellant who would pass on the burden to their purchasers. The appellant, however, challenged the hike in royalty in the High Court of M.P. Initially an interim order was passed and subsequently the notification was quashed. On appeal, the order of the High Court was set-aside. Subsequently, the State Government claimed interest from the appellant at the rate of 24% per annum in regard to the period when the enhanced royalty was delayed. The appellant passed on this claim to their consumers who challenged the same and succeeded in the High Court in reducing the interest from 24% to 12%. While dismissing the appeal filed by the appellant, this Court held that the interest would be payable even in equity and on the basis of the principle of restitution which is recognized in Section 144 of Code of Civil Procedure.

22. In this connection, it is material to note that the claim in *South Eastern Coalfields* was essentially covered under Section 61 of Sale of Goods Act 1930, and the interest by way of damages was payable as per this statutory provision itself. The liability had been crystallized and the interest had become payable because of the failure to pay the amount as per the

A liability. Besides, there was nothing in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79(2) of 1999 (supra) which permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz. that interest was not payable earlier.

23. *Union of India Vs. Rallia Ram* reported in AIR 1963 SC 1685 was one of the earliest cases where the principles concerning payment of interest by way of restitution came up for consideration. In August 1946, the Government had entered into a contract with the respondent for sale of a stock of American cigarettes lying at different places. After some deliveries were taken by the respondent, he found part of the stock unfit for use. The Government cancelled the contract and asked the respondent to return the cigarettes which were unfit for use. An arbitration followed and compensation was awarded for the loss suffered by the supplier alongwith interest. This Court noted that there was no provision for interest in the contract or in the Act, and set-aside the award to the extent it granted interest. The Court laid down the proposition that interest is payable in equity only if there are circumstances attracting equitable jurisdiction or under the Interest Act and quoted with approval the propositions laid down in *Bengal Nagpur Railway Co. Vs. Ruttanji Ramji* reported in [AIR 1938 PC 67].

24. In *Union of India Vs. Watkins Mayor and Co.* reported in [AIR 1966 SC 275], the plaintiff had entered into a contract with the defendant Union of India for supply of drums made out

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 673
ORS. [H.L. GOKHALE, J.]

of iron sheets to be supplied by latter. Though the iron sheets were initially supplied to the plaintiff, subsequently the defendant cancelled the contract and removed the iron sheets in small quantities from time to time for a period of nearly five years. Plaintiff claimed the compensation under various heads, claiming that they had acted as bailee for the defendants. This included (a) godown rent, (b) chowkidar's salary, (c) terminal tax, (d) cartage, (e) unloading charges, (f) cooliage and (g) interest. This Court accepted the claim of the plaintiff with regards to items (a) to (f) but rejected the claim with respect to interest. The Court relied upon the observations of Judicial Committee of the Privy Council in *Bengal Nagpur Railway Co. Vs. Ruttanji Ramji* (supra) to the following effect :-

"As observed by Lord Tomlin in Maine and New Brunswick Electrical Power Co. v. Hart (1929) AC 631, at p. 640: (AIR 1929 PC 185 at p. 188), 'In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."

It also referred to the judgment and ratio in *Union of India Vs. Rallia Ram* (supra) and then held that interest would be claimable only if there is an agreement or when the interest is payable by the usage of the trade having force of law or there is some substantive statutory provision. Thus, rule of equity could not be brought in to justify the claim of interest.

25. In *Commissioner of Sales Tax Vs. Hindustan Aluminum Corporation* reported in (2002 (127) STC 258), the dispute was regarding the classification of certain products of a dealer for payment for sales tax. After the dispute was resolved by this Court, the dealer made the payment of the differential amount of tax. The department claimed interest only from the date of filing of return. This Court held that there was no liability on the dealer for the amount of tax unpaid which was

A the subject matter of dispute until the dispute was resolved. Ideas of equity could not be brought in such manner and there could be no liability for interest until assessment was finalised.

B 26. It is true that the power to make restitution is inherent in every Court as observed by this Court in *Kavita Trehan and Anr. Vs. Balsara Hygiene Products Ltd.* reported in (1994 (5) SCC 380) which was relied upon by the council for the Electricity Boards. Thus, restitution will apply even where the case does not strictly fall under Section 144 of CPC . However, we must note that *Kavita Trehan* was a case where the submission was made to the effect that termination of the contract was wrong and an injunction was sought in a civil suit to restrain the respondent from interfering with the disposal of goods. It was in this context that the principle of restitution was applied. It is therefore, difficult to appreciate as to how the Appellate Tribunal could bring in either the principles of justice, equity and fair-play or that of restitution in the present case. What is important to note is that in paragraph 16 of its order the Appellate Tribunal has specifically observed in terms that this was not a case where the beneficiaries were made to pay the excess tariff at the instance of NTPC through force, coercion or threat. This being the position the principles of equity, justice and fair-play could not have been brought in to award interest to the Electricity Boards.

F 27. It is true that there was delay in the process of determination of the tariff. We are informed that the Commission became functional only on 15.5.1999. NTPC had filed the tariff petitions duly as required by the Central Commission. The delay in the case of *Kawas and Gandhar Power Stations* was because of the Commission requiring them to appropriately devise norms and parameters. As far as *Rihand Station* is concerned, one of the beneficiaries, namely *Rajasthan Rajya Vidyut Vitaran Nigam Limited* had obtained stay of proceedings before the Commission from the High Court of Rajasthan. NTPC was not in any way responsible for these factors.

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NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 675
ORS. [H.L. GOKHALE, J.]

Ultimately, the tariff was reduced, but the tariff charged by the NTPC in the meanwhile was in accordance with the rates permitted under the notifications issued by the Commission. It cannot, therefore, be said that NTPC had held on to the excess amount in an unjust way to call it unjust enrichment on the part of NTPC, so as to justify the claim of the Electricity Boards for interest on this amount.

28. Submissions were advanced before us on the question as to whether the tariff determination under Section 62 was in any way legislative or quasi-judicial. The counsel for NTPC drew our attention to a number of judgments concerning price fixation.

a. In *West Bengal Electricity Regulatory Commission V. CESC* (2002 (8) SCC 715), the court noted, in the context of electricity tariff determination under the Electricity Regulatory Commissions Act, 1998, that price fixation is in the nature of a legislative function, and hence, generally, no hearing is required. However, as the statute provides for a hearing opportunity, the same must be provided.

b. Similar view was taken in this context in the following cases:

(i) Levy sugar pricing under the Essential Commodities Act, 1955 has been held to be a legislative function in *Shri Sitaram Sugar Mills Vs. UOI* (1990 3 SCC 223), *Saraswati Industrial Syndicate V. UOI* (1974 (2) SCC 630), *Malaprabha Sugars V. UOI* (1994 1 SCC 648) and *Mahalakshmi Sugar Mills V. UOI* (2009 (16) SCC 569).

c. Coal price fixation has been held to be a legislative function under the Essential Commodities Act, 1955 in *Pallavi Refractories V. Singareni Collieries* (2005 (2) SCC 227).

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A d. Fixation of the price of Natural Gas under the Essential Commodities Act, 1955, is held to be legislative function in *ONGC V. Assn. of Natural Gas Consuming Industries of Gujarat* (1990 Supp. (1) SCC 397).

B e. In *Prag Ice and Oil Mills V. UOI* (1978 (3) SCC 459), the court in the context of price fixation of oil under Essential Commodities Act, 1955, observed as under-

C *"We think that unless by the terms of particular statute or order, price fixation is made a quasi judicial function for specified purposes or cases, it is really legislative in character. The legislative measure does not concern itself to the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind of class."*

D 29. The counsel for the Electricity Boards, however, drew our attention to a recent judgment of a Constitution Bench of this Court in *PTC India Ltd. Vs. Central Electricity Regulatory Commission* reported in (2010 (4) SCC 603), wherein this Court has observed in para 50 as follows:-

E *"50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that 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....."*

H 30. In the facts of the present case, however, this

NTPC LTD. v. M.P. STATE ELECTRICITY BOARD & 677
ORS. [H.L. GOKHALE, J.]

controversy as to whether tariff fixation is legislative or quasi-judicial need not detain us any further. As held by the Constitution Bench, price fixation is really legislative in character, but since an appeal is provided under Section 111 of the Act, it takes a quasi-judicial colour. That by itself cannot justify the claim for interest during the period when the proceedings were pending for the tariff fixation. The tariff that was being charged at the relevant time was as per the previous notifications. Once the tariff was finalized subsequently, NTPC has adjusted the excess amount which it has received. It cannot be said that during this period the NTPC was claiming the charges in an unjust way, to make a case in equity. Our attention has been drawn to the industry practice which also shows that on all such occasions interest has never been either demanded or paid when the price fixation takes place. As held by us hereinabove, claim for interest could not be covered under Section 62 (6). The provision for interest has been introduced by regulations subsequent to the period which was under consideration before the Commission. If we apply the propositions in *Rallia Ram* (supra) and *Watkins Mayor* (supra), we find that the terms of the supply agreement, the governing regulation and notifications did not contain any provision for interest. The industry practice did not provide for it as well. In view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution.

31. In the circumstances, it is not possible to accept the submission that the Appellate Tribunal erred in any way in declining to award interest under Section 62 (6) of the Act. There was however, an error on its part in granting the same under the concept of equity, justice and fair-play. Hence, we allow the appeals filed by the NTPC and dismiss those which are filed by the Electricity Boards. Civil Appeal Nos. 2451, 2452 and 2493/2007 are allowed. Civil Appeal Nos. 3972 and 4231/2007 are dismissed. Parties will bear their own costs.

N.J.

Appeals disposed of.