HIMACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION AND ANOTHER

v.

HIMACHAL PRADESH STATE ELECTRICITY BOARD

(Civil Appeal No. 6128 of 2009)

OCTOBER 03, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Electricity Regulatory Commission Act, 1998:

s. 27 – Appeal under – Maintainability of – After repeal of the 1998 Act and enactment of Electricity Act, 2003 – Held: Maintainable, since the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act, as the 2003 Act did not provide for transfer of pending cases – Electricity Act, 2003 – s. 111.

s. 22 – Determination of Tariff under – By regulatory Commission – Also issued certain directions as part of the tariff order – The Commission imposed fine on Electricity Board for non-compliance of the directions – Propriety of – Held: The Commission was competent to issue the directions as all the directions were connected with the tariff fixation – However, it was not correct for the Commission to impose penalty on the Board, as the Board had substantially complied with the directions.

Prospective Operation – Enactments dealing with vested rights are primarily prospective, unless expressly or by necessary intention or implication given effect retrospectively – A right to appeal as well as forum is a vested right.

Himachal Pradesh State Electricity Regulatory Commission constituted under Electricity Regulatory Commission Act, 1998, in exercise of its powers u/ss. 22

A and 29 of the 1998 Act, determined the tariff applicable for electricity in the State and also issued certain directions as a part of the tariff order.

In view of the complaints, the Commission issued
B notice to the respondent-Board for non-compliance of the directions issued by the Commission. Respondent-Board, in its reply, questioned the jurisdiction and competence of the Commission to issue those directions. The Commission held the respondent-Board guilty of
C non-compliance of the directions and imposed penalty of Rs. 5000/- on the Board.

The respondent-Board, challenging the order of the Commission, filed appeal before High Court u/s. 27 of the 1998 Act. In the meantime 1998 Act was repealed and
D Electricity Act, 2003 was enacted. Pursuant thereto, the Commission took preliminary objection as to maintainability of the appeal by the High Court and contended that in view of s. 111 of the 2003 Act the appeal would lie to the Appellate Tribunal established
E under 2003 Act. High Court held that the appeal was maintainable because the 2003 Act would have prospective operation. While deciding the appeal on merit, set aside the order passed by the Commission. Hence the present appeals.

F Disposing of the appeals, the Court

HELD: 1.1. It is a well settled proposition of law that enactments dealing with substantive rights are primarily prospective unless it is expressly or by necessary
G intention or implication given effect retrospectively. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. A right
H of appeal as well as forum is a vested right unless the

said right is taken away by the Legislature by an express provision in the Statute by necessary intention. [Para 25] [937-H; 938-A-B]

1.2. It is the admitted position that Legislature by expressed stipulation in the new legislation has not provided for transfer of the pending cases as was done by the Parliament in respect of service matters and suits by financial institutions/banks by enactment of Administrative Tribunal Act, 1985 and Recovery of Debts due to Banks and Financial Institution Act, 1993. No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is not perceptible from the scheme of the 2003 Act. [Para 26] [938-C-F]

1.3. On reading of Section 185 of the 2003 Act in entirety, it is difficult to say that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. There is no contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right. [Para 28] [939-F-H]

Ambalal Sarabhai Enterprises Ltd. vs. Amrit Lal and Co. and Anr. **(2001) 8 SCC 397: 2001 (2) Suppl. SCR 195;** *Kolhapur Canesugar Works Ltd. vs. Union of India* **(2000) 2**

A **SCC 536: 2000 (1) SCR 518;** *M.S. Shivananda vs. Karnataka State Road Transport Corporation and Ors.* **(1980) 1 SCC 149: 1980 (1) SCR 684;** *Vijay vs. State of Maharashtra and Ors.* **(2006) 6 SCC 289: 2006 (4) Suppl. SCR 81 – relied on.**

B **1.4. Tested on the touchstone of doctrine of fairness, the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act. Thus the conclusion of the High Court that it had jurisdiction to hear the appeal is absolutely flawless. [Paras 30 and 31] [940-C-D]**

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Garikapati Veeraya vs. N. Subbiah Choudhry and Ors. **AIR 1957 SC 540: 1957 SCR 488 – followed.**

State of Punjab vs. Mohar Singh **(1955) 1 SCR 893;** D *Brihan Maharashtra Sugarsyndicate Ltd. vs. Janardan Ramchandra Kulkarni and Ors.* **AIR 1960 SC 794: 1960 SCR 85;** *Manphul Singh Sharma vs. Ahmedi Begum (Smt) (since deceased) through her alleged legal representative/ successors (A) M.A. Khan (B) Delhi Wakf Board* **(1994) 5 SCC 465: 1994 (2) Suppl. SCR 495;** *Commissioner of* E *Income Tax, Bangalore vs. R. Sharadamma* **(1996) 8 SCC 388: 1996 (3) SCR 1200;** *Commissioner of Income Tax, Orissa vs. Dhadi Sahu* **1994 Supp (1) SCC 257: 1992 (3) Suppl. SCR 168;** *Messrs. Hoosein Kasam Dada (India) Ltd. vs. The State of Madhya Pradesh and Ors.* **AIR 1953 SC 221:** F **1953 SCR 987 – relied on.**

Colonial Sugar Refining Company Ltd. vs. Irving **1905 AC 369 – referred to.**

G **2.1. The finding recorded by the High Court that the Commission has no authority to issue directions or to impose penalty as it had become *functus officio* is not correct. [Para 32] [940-E]**

2.2. The language employed in Section 22(1)(d) has H **to be understood in its proper connotative expanse. It**

enables the State Commission to carry out the function for promoting competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act. The State Commission under Section 22(1)(d) was conferred power to address various facets and there is no reason that the terms, namely, "efficiency, economy in the activity of the electricity industry" should be narrowly construed. That apart, it would not be seemly to say that under Section 22(1) of the 1998 Act, the Commission had only the power to fix the tariff and no other power. Had that been so, the legislature would not have employed such wide language in Section 22(1)(d). The powers enumerated under sub-section (2) of Section 22 are more enumerative in nature and the jurisdiction conferred comparatively covers more fields. In the present case, if the directions issued by the Commission are read in proper perspective, the same really do not travel beyond the power conferred under Section 22(1)(d) of the 1998 Act. All of them can be connected with the tariff fixation and with the associated concepts, namely, purpose to promote competition, efficiency and economy in the activities of the electricity industry regard being had to achieve the objects and purposes of the Act. [Para 33] [941-E-H; 942-A-B]

2.3. It is not inapposite to take note of the fact that the Board had agreed to comply and submit the report. Though the Commission later on has found some fault with the Board, yet it is factually found on a close perusal of the explanation by the Board that there has been real substantial compliance with the directions. In this factual backdrop, it was not correct on the part of the Commission to impose penalty on the Board. However, under the 2003 Act, constitution of the State Commission is governed by Section 82. Section 86 deals with the function of the State Commission. On a reading of Section 86 it is found that at present no notification is required

to be issued to confer any power on the State Commission. It is conferred and controlled by the statute. If anything else is required to be done in praesenti, the Commission is at liberty to proceed under the provisions of the 2003 Act. It is clarified, that grant of liberty may not be understood to have said that the Commission can take any action arising out of its earlier order dated 29.10.2001 or any subsequent orders passed thereon. [Para 34] [942-C-F]

Case Law Reference:

(1955) 1 SCR 893	relied on	Para 18
1960 SCR 85	relied on	Para 18
1994 (2) Suppl. SCR 495	relied on	Para 18
1996 (3) SCR 1200	relied on	Para 18
1992 (3) Suppl. SCR 168	relied on	Para 18
1953 SCR 987	relied on	Para 20
1957 SCR 488	followed	Para 21
1905 AC 369	referred to	Para 21
2001 (2) Suppl. SCR 195	relied on	Para 27
2000 (1) SCR 518	relied on	Para 27
1980 (1) SCR 684	relied on	Para 28
2006 (4) Suppl. SCR 81	relied on	Para 29

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6128 of 2009.

From the Judgment & Order dated 21.11.2007 of the High Court at Shimla in FAO No. 493 of 2002.

WITH

C.A. Nos. 6129, 6130, 6131, 6132 & 6133 of 2009.

Rana S. Biswas, Sunil Kumar Sharma, Matrugupta Mishra (for Sharmila Upadhyay for the Appellants.

Anand K. Ganeshan, K.V. Mohan for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. These appeals, by special leave, are directed against the common Judgment and order dated 21.11.2007 passed by the High Court of Himachal Pradesh in FAOs (Ord.) Nos. 489, 490, 491, 492, 493 & 494 of 2002 whereby the learned Single Judge overturned the decision dated 17.08.2002 rendered by the Himachal Pradesh State Electricity Regulatory Commission (for short, "the Commission") constituted under the provisions of Chapter IV of Electricity Regulatory Commission Act, 1998 (hereinafter referred to as "the 1998 Act").

2. The controversy that has emerged for consideration being common to all the appeals, we shall adumbrate the facts from Civil Appeal No. 6128 of 2009 for the sake of convenience.

3. The facts requisite to be stated are that the Commission was established for rationalization of electricity tariff, transparent policies regarding subsidies, promotions of efficient and environmentally benign policies and for matters connected therewith or incidental thereto. In exercise of the power conferred on it under Sections 22 and 29 of the 1998 Act the Commission vide order dated 29.10.2001 determined the tariff applicable for electricity in the State of Himachal Pradesh. While determining the tariff it also issued certain directions which are as follows:-

(a) "Furnishing of information and also periodical reports with respect to the value of the assets and

A capital projects of the Board.

(b) Replacement of all dead and defective meters by electronic meters from 31st March, 2002 onwards and reporting the status, as on 31st December, 2001 by 31st March, 2002.

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(c) To develop and implement a comprehensive public interaction programme through Consultative Committees, preparation, publication and advertisement of material helpful to various consumer interest groups and general public on various activities of the utility, dispute settlement mechanism, accidents, rights and obligations of the consumers etc. Accordingly, the Board was directed on September 22, 2001, to submit its plan for approval of the commission and implement the same by 31st March, 2002.

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(d) Submission of plans, short term and long term, by 31st March, 2002, for rationalization of existing manpower for improvements in efficiency through scientific engineering resources management, improving and updating the organization strategies and systems and skills of human resources for increased productivity. The Board in its affidavit of 3rd October, 2001 has agreed to comply and submit the above study by the above-mentioned date.

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(e) Submission of a plan by 31st March, 2002, for reducing loss, both technical and non-technical, together with relevant load flow studies and details of investment requirement to achieve the planned reductions. The Commission also observed in its interim order of 20th September, 2001 passed in the course of public hearing that investments must aim at reducing the T & D losses and better quality

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of supply and service to the consumers as it happened in the case of Palampur area which has mixed domestic and commercial loading. The strategy can be considered for adoption elsewhere also to produce similar results. The Board has confirmed and undertaken to complete this study by 31st March, 2002

(f) To do a comparison of the capital costs of Malana Plant with the capital costs of HPSEB Plants and submit a report on this by 31st March, 2002."

4. Be it noted, the commission issued the directions as a part of the tariff order and the said directions were contained in paragraphs 7.1, 7.4, 7.5, 7.6, 7.8, 7.9 and 7.13. The Commission in paragraphs 7.31 and 7.32 had further stated as follows:-

"7.31 The Commission would monitor the progress in complying with these directions. The Commission accordingly directs the Board to furnish the information on milestones required in column 3 of the Annex (7.1) by December 31, 2001. Subsequent reports should be sent every quarter, providing the information required in columns 4, 5, 6 and 7. The first report should be submitted by January 15, 2002.

7.32 In the directions where the Board is to comply by the next tariff petition and the same is not filed within next six months, the directions should be complied within the next six months."

5. Thereafter, the Commission while discharging its regulatory functions proceeded to review the directions issued by it and found that part of the tariff had not been complied with. In view of the complaints, the Commission issued notice on 23.7.2002 under Section 45 of the 1998 Act. Pursuant to the aforesaid notice the Board filed its reply raising the question

A of jurisdiction and competence of the Commission to issue the aforesaid directions. The Commission while dealing with the same framed number of issues and thereafter came to hold that the Board had not fully complied with the directions of the Commission, and accordingly imposed penalty of Rs.5000/- on
B the Board with a further stipulation that the same shall be deposited within a period of 30 days. The Board was directed to submit further steps taken by it before the Commission.

6. Being aggrieved by the aforesaid order, the Board
C preferred an appeal under Section 27 of the 1998 Act forming the subject matter of FAO No. 489 of 2002.

7. During the pendency of the appeal, the 1998 Act was repealed and the Electricity Act, 2003 (for short, "the 2003 Act") came into force. The 2003 Act was brought in to consolidate
D the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff,
E ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

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8. At this juncture, it is apt to state that the batch of appeals was taken up for hearing by the learned Single Judge, learned counsel for the respondent-Commission raised a preliminary objection about the maintainability of the appeals. It was
G contended that as under Section 110 of the 2003 Act the appellate tribunal has already been established and an appeal would lie to the appellate tribunal as contemplated under Section 111 of the said Act, the High Court had lost its jurisdiction to hear the appeals. The learned Single Judge took
H note of the fact that the appeals were preferred under Section

27 of the 1998 Act and at that stage an appeal was maintainable before the High Court. The High Court referred to the repealed Act and the language employed under Section 185 of the Act of 2003 and Section 6 of the General Clauses Act, 1897 and analyzing the gamut of the provisions came to hold that the appeal preferred under the 1998 Act could be heard by the High Court even after coming into force of the 2003 Act.

9. After dwelling upon the maintainability of the appeal the learned Single Judge delved into the merits of the appeal and for the aforesaid purpose, he studiedly scrutinized the language employed in Section 22 of the 1999 Act and came to hold that when the Commission was approached by the Board to determine the tariff for electricity, the Commission was called upon to discharge the functions mentioned in sub-Section 1 (a) of Section 22 of the 1998 Act and under the said provision it had the jurisdiction to issue further directions. Thereafter, the learned Single Judge proceeded with regard to the monitoring facet by the Commission, appreciated the directions and, eventually, opined thus:-

> "Commission's observation that the directions were issued in the larger interest of the Board and the consumers is also out of the context. As already noticed, the Commission was approached by the Board to fix the tariff of electricity. Once the tariff had been fixed the job of the Commission was over. It became *functus officio* once the function of determination of tariff had been performed. The interests of the Board and the consumers were required to be borne in mind and protected while fixing the tariff. The Commission could not have arrogated to itself and superintendence and control of the Board on the pretension of watching and protecting the larger interests of the Board and the consumers."

As stated earlier, the aforesaid judgment and order are the

A subject matter of assail before us in these appeals.

10. Mr. Jaideep Gupta, learned senior counsel, questioning the sustainability of the judgment of the High Court has raised the following submissions:-

B (a) The High Court has absolutely flawed by coming to hold that appeal was maintainable before it despite a separate forum having been created and provision for appeal being engrafted under Section 111 of the 2003 Act. It is urged by him that the High C Court has totally misguided itself in interpreting the Repeal and Saving provision contained in Section 185 of the 2003 Act.

(b) The High Court has erred in holding that despite the D repeal of the 1998 Act and coming into force of the 2003 Act the right to prefer an appeal under the old Act would still survive. It is urged by him that from the schematic content of the 2003 Act it is graphically clear that a contrary intention of the E legislature is clear from the 2003 Act that the appeal has to lie to the appellate tribunal and the High Court has been divested of its appellate jurisdiction to deal with the pending appeals.

F (c) The view expressed by the High Court that the Board had approached the Commission to fix the electricity tariff and once the said tariff had been fixed by the Commission it became *functus officio* and it could not have arrogated to itself the power of superintendence and control of the Board on the G pretext of monitoring of larger public interest, is sensitively susceptible. Learned counsel would submit that the Commission had been conferred power under Section 22 (1) of the 1998 Act by virtue of issuance of notification by the State of

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Himachal Pradesh but the High Court failed to appreciate and scrutinize the effect of conferment of power under the said provision as a consequence of which an indefensible order came to be passed.

11. Mr. Anand K. Ganesan, learned counsel appearing for the respondent-Board, resisting the aforesaid submissions contended as follows:-

(i) The conclusion arrived at by the High Court that the appeal can be heard despite repeal of the 1998 Act and introduction of the 2003 Act on the basis of Section 6 of the General Clauses Act 1897 and the provision contained in Section 185(5) of the 2003 Act cannot be found fault with, for there is no express provision to take away the vested right of appeal and no contrary intention can be gathered from any of the provisions of the new enactment.

(ii) The right of appeal before the High Court was a vested right and the same has not been taken away by the 2003 Act and, therefore, the opinion expressed by the High Court being impregnable deserves to be concurred with by this Court. Right of forum as regards an appeal is also a vested right unless abolished or altered by subsequent law and in the case at hand the 2003 Act does not extinguish the said vested right and hence, the judgment and order passed by the High Court are impeccable.

(iii) The Commission under the 1998 Act could not have issued directions inasmuch as the notification issued by the State had only conferred powers under Section 22 (1) of the 1998 Act and not under any other provisions, and hence, the directions issued travel beyond the power conferred which have been appositely nullified. It is further argued

A that though the finding of the High Court that the Commission had become *functus officio* may not be a correct expression in law but directions issued being without jurisdiction, the Commission could not have been proceeded and imposed penalty. B Alternatively, it is submitted that even if the issue of jurisdiction is determined in favour of the Commission. The directions issued by it having been substantially complied with by the respondent and there being no willful and deliberate non- C compliance, on the facts and circumstances imposition of penalty was not justified.

12. First, we shall proceed to deal with the jurisdiction of the High Court to hear the appeal after coming into force the 2003 Act. The Board, as is manifest, was grieved by order D imposing penalty. The relevant part of the order of the Commission reads as follows:-

"The instant matter is one of the first incidents of the contravention of the Commission orders/ directions E attributable to the conduct of Respondents / objectors. The commission has determined the quantum of fine to be imposed after considering the nature and extent of non-compliance and other relevant factor as per Regulation 51 (iii) of HPERC's Conduct of Business Regulations, 2001 F under the overall provision of Section 45 of the ERC Act, 1998. Penalty of Rs. 5,000/- only is hereby imposed upon Respondent No. 7-HPSEB. The penalty be deposited with the Secretary of the Commission within a period of 30 days from today. Additional penalty for continuing failure @ Rs. G 300/- only per day is further imposed on HPSEB and shall be ipso facto recoverable immediately after January 15, 2002 until the date of compliance to the Commission's satisfaction to be so notified by the Commission. The Board shall submit the Status / Action taken reports on the fifteenth day of every month until compliance is made." H

13. By the time the order was passed by the Commission it was subject to challenge in appeal before the High Court under Section 27 of the 1998 Act, which reads as follows:-

> "27. **Appeal to High Court in certain cases.** – (1) Any person aggrieved by any decision or order of the State Commission may file an appeal to the High Court.
>
> (2) Except as aforesaid, no appeal or revision shall lie to any court from any decision or order of the State Commission.
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> (3) Every appeal under this section shall be preferred within sixty days from the date of communication of the decision or order of the State Commission to the person aggrieved by the said decision or order.
>
> Provided that the High Court may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that the aggrieved person had sufficient cause for not preferring the appeal within the said period of sixty days."

14. It is not in dispute that when the appeals were preferred under Section 27 of the 1998 Act pending before the High Court awaiting adjudication the 2003 Act was enacted. Chapter XI of the 2003 Act deals with "Appellate Tribunal for Electricity". Section 110 deals with establishment of appellate tribunal. The said provision reads as under:-

> "110. **Establishment of Appellate Tribunal.** – The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Electricity to hear appeals against the orders of the adjudicating officer or the Appropriate Commission [under this Act or any other law for the time being in force]."

15. Section 111 provides for an appeal to the appellate tribunal. Sub-Sections (1) and (2) being relevant for the present

A purpose are reproduced below:-

"111. **Appeal to Appellate Tribunal** - (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate

Tribunal for Electricity: Provided that any person appealing against the order of the adjudicating officer levying and penalty shall, while filling the appeal , deposit the amount of such penalty: Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period."

16. From the aforesaid provision it is clear as crystal that a different forum of appeal has been created under the new G legislation with certain conditions.

17. At this stage, we may usefully refer to Section 185 which deals with Repeal and Saving. It reads as follows:-

"185. **Repeal and saving.** -(1) Save as otherwise H provided in this Act, the Indian Electricity Act, 1910 (9 of

1910, the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made thereunder shall have effect until the rules under section 67 to 69 of this Act are made;

(c) The Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

A (3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

B (4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of C section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals."

18. It is submitted by Mr. Jaideep Gupta, learned senior Counsel that when the 1998 Act has been repealed and a new D legislation has come into force the intention of the legislature is clear to the effect that the appeals are to be heard by the newly constituted appellate tribunal. Learned senior counsel would also contend that if the interpretation placed by the High Court is accepted then there would be two appellate authorities E after the enactment of the 2003 Act which would lead to an anomalous situation. In this context Mr. Gupta has commended us to the authorities in *State of Punjab v. Mohar Singh*[1], *Brihan Maharashtra Sugarsyndicate Ltd. v. Janardan Ramchandra Kulkarni and Others*[2], *Manphul Singh Sharma v. Ahmedi* F *Begum (Smt) (since deceased) through her alleged legal representative/successors (A) M.A. Khan (B) Delhi Wakf Board*[3], *Commissioner of Income Tax, Bangalore v. R. Sharadamma*[4] and *Commissioner of Income Tax, Orissa v. Dhadi Sahu*[5].

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1. (1955) 1 SCR 893.
2. AIR 1960 SC 794.
3. (1994) 5 SCC 465.
4. (1996) 8 SCC 388.

H 5. 1994 Supp (1) SCC 257.

19. In *Mohar Singh* (supra), the Court has ruled thus:-

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

[Underlining is ours]

20. In *Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and others,*[6] this Court was considering the effect of amendment of provisions of Central Provinces and Berar Sales Tax Act. Section 22(2) prior to the amendment of the Act stipulated that no appeal against an order of assessment with or without penalty could be entertained by the appellate authority unless it was satisfied that such amount of tax or penalty, or both, as the appellant had

6. AIR 1953 SC 221.

A admitted due to him had been paid. The amended provision laid a postulate that appeal had to be admitted subject to the satisfaction of proof of payment of tax in appeal to which the appeal had been preferred. It was contended that the appellant was covered under the unamended provision and that he had
B not admitted any tax and hence, he was not liable to deposit any sum along with the appeal. It was urged before this Court that the restriction imposed by the amending Act could not affect his right to appeal as the same was a vested right prior to the amendment at the time of commencement of the proceeding
C under the Act. Dealing with the said contention, the Court opined that a right of appeal is not merely a matter of procedure but a matter of substantive right. It was also held that the right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first
D initiated and before a decision is given by the inferior Court. It has been further observed that such a vested right cannot be taken away except by express enactment or necessary intendment and an intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such
E intention is clearly manifested by express words or necessary implication. Eventually, the Court ruled that as the old law continues to exist for the purpose of supporting the pre-existing right of appeal and that old law must govern the exercise and enforcement of that right of appeal and there is no question of
F applying the amended provision preventing the exercise of that right.

21. In this context, we may refer with profit to the Constitution Bench judgment in *Garikapati Veeraya v. N. Subbiah Choudhry and others.*[7] In the said decision, the
G Constitution Bench referred to the leading authority of the privy council in *Colonial Sugar Refining Company Ltd. v. Irving*[8]. The Constitution Bench observed that the doctrine laid down

7. AIR 1957 SC 540.

H 8. 1905 AC 369.

in the decision of the privy council in *Colonial Sugar Refining Company Ltd.* (supra) has been followed and applied by the Courts in India. The passage that was quoted from the Privy Council's judgment is as follows:-

> "As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, Their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

22. Thereafter, the larger Bench referred to number of authorities and proceeded to cull out the principles as follows:-

> **"23.** From the decisions cited above the following principles clearly emerge:
>
> (*i*) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of

A proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(*ii*) The right of appeal is not a mere matter of procedure but is a substantive right.

B (*iii*) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

C (*iv*) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by D the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at *the* date of the filing of the appeal.

(*v*) This vested right of appeal can be taken away E only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

23. On a proper understanding of the authority in *Garikapati Veeraya* (supra), which relied upon the Privy Council decision, three basic principles, namely, (i) the forum of appeal F available to a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure; (ii) that it is an integral part of the right when the action was initiated at the time of the institution of action; and (iii) that if the Court to which an appeal G lies is altogether abolished without any forum constituted in its place for the disposal of pending matters or for lodgment of the appeals, vested right perishes, are established. It is worth noting that in *Garikapati Veeraya* (supra), the Constitution Bench ruled that as the Federal Court had been abolished, the Supreme H

Court was entitled to hear the appeal under Article 135 of the Constitution, and no appeal lay under Article 133. The other principle that has been culled out is that the transfer of an appeal to another forum amounts to interference with existing rights which is contrary to well known general principles that statutes are not to be held retrospective unless a clear intention to that effect is manifested.

24. In *Dhadi Sahu (supra)*, it has been held thus:-

> **"18.** It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them.
>
> xxx xxx xxx
>
> **21.** It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums."

25. At this stage, we may state with profit that it is a well settled proposition of law that enactments dealing with substantive rights are primarily prospective unless it is expressly or by necessary intention or implication given

A retrospectivity. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. As has been stated in various authorities referred to hereinabove, a right of
B appeal as well as forum is a vested right unless the said right is taken away by the Legislature by an express provision in the Statute by necessary intention.

26. Mr. Gupta has endeavoured hard to highlight on
C Section 111 of the 2003 Act to sustain the stand that there is an intention for change of forum. It is the admitted position that Legislature by expressed stipulation in the new legislation has not provided for transfer of the pending cases as was done by the Parliament in respect of service matters and suits by
D financial institutions/banks by enactment of Administrative Tribunal Act, 1985 and Recovery of Debts due to Banks and Financial Institution Act, 1993. No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right
E to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is
F not perceptible from the scheme of the 2003 Act.

27. It is urged by Mr. Gupta that Section 6 of the General Clauses Act would not save the vested right of forum in view of the language employed in Section 185(2) of the 2003 Act. In this context, we may usefully refer to *Ambalal Sarabhai*
G *Enterprises Ltd. v. Amrit Lal & Co. and Another*[9] wherein the learned Judges referred to the opinion expressed in *Kolhapur Canesugar Works Ltd. v. Union of India*[10] and distinguishing

9. (2001) 8 SCC 397.

H 10. (2000) 2 SCC 536.

the same observed as follows:-

> **"18.** In *Kolhapur Canesugar Works Ltd. v. Union of India,* this Court held: (SCC p. 551, para 37)
>
> "*37.* The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed."
>
> **19.** Relying on this the submission for the tenant is, if the repealing statute deletes the provisions, it would mean they never existed hence pending proceedings under the Rent Act cannot continue. This submission has no merit. This is not a case under the Rent Act, also not a case where Section 6 of the General Clauses Act is applicable. This is a case where repeal of rules under the Central Excise Rules was under consideration. This would have no bearing on the question we are considering, whether a tenant has any vested right or not under a Rent Act."

28. We have referred to the aforesaid paragraphs as Mr. Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right (See *M.S. Shivananda v. Karnataka State Road*

A *Transport Corporation and Others*[11]).

29. In this context, a passage from *Vijay v. State of Maharashtra and Others*[12] is worth noting:-

B "....It is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness."

C

30. We have referred to the aforesaid passage to hold that tested on the touchstone of doctrine of fairness, we are also of the opinion that the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act.

D

31. On the basis of the aforesaid analysis it can safely be concluded that the conclusion of the High Court that it had jurisdiction to hear the appeal is absolutely flawless.

32. The next aspect that emanates for consideration is that E whether the finding recorded by the High Court that the Commission has no authority to issue directions or to impose penalty as it had become *functus officio* is correct or not. We may state here that the learned counsel appearing for the parties very fairly stated that the High Court was not correct in F using the expression that the Commission had become *functus officio*. Learned counsel for the parties, however, urged that the High Court, by stating that the Commission had become *functus officio*, it meant after the Commission had fixed the tariff it had no power to give directions or proceed with monitoring G for the purpose of compliance of the directions. It is submitted by Mr. Ganesan, learned counsel for the respondent, that Section 22 occurring in Chapter V of the 1998 Act deals with

11. (1980) 1 SCC 149.

H 12. (2006) 6 SCC 289.

powers and functions of the State Commission and for exercise of power of Board under Section 22(2) a notification in the official Gazette by the State Government is required to be issued, but the same was not issued when the Commission passed the order and hence, it is bereft of jurisdiction. In oppugnation of the said submission, Mr. Gupta, learned senior counsel appearing for the Commission, has submitted that though no notification under Section 22(2) of the 1998 Act has been issued, yet the directions which had been issued can fall within the ambit of Section 22(1)(d) of the 1998 Act.

33. To appreciate the said submission we may refer to Section 22(1)(d) of the 1998 Act. It reads as follows: -

> "**22. Functions of State Commission.** – (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely: -
>
> xxx xxx xxx
>
> (d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act."

The language employed in Section 22(1)(d) has to be understood in its proper connotative expanse. It enables the State Commission to carry out the function for promoting competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act. We find that the State Commission under Section 22(1)(d) was conferred power to address to various facets and we see no reason that the terms, namely, "efficiency, economy in the activity of the electricity industry" should be narrowly construed. That apart, it would not be seemly to say that under Section 22(1) of the 1998 Act the Commission had only the power to fix the tariff and no other power. Had that been so, the legislature would not have employed such wide language in Section 22(1)(d). At this stage, we may also note that the powers enumerated under sub-section (2) of Section 22 are more

A enumerative in nature and the jurisdiction conferred comparatively covers more fields. In the present case, if we read the directions issued by the Commission in proper perspective, the same really do not travel beyond the power conferred under Section 22(1)(d) of the 1998 Act. We are inclined to think so
B as all of them can be connected with the tariff fixation and with the associated concepts, namely, purpose to promote competition, efficiency and economy in the activities of the electricity industry regard being had to achieve the objects and purposes of the Act.

C 34. It is not inapposite to take note of the fact that the Board had agreed to comply and submit the report. Though the Commission later on has found some fault with the Board, yet we factually find on a close perusal of the explanation by the Board that there has been real substantial compliance with the
D directions. In this factual backdrop, it was not correct on the part of the Commission to impose penalty on the Board. However, we may hasten to add that under the 2003 Act constitution of the State Commission is governed by Section 82. Section 86 deals with the function of the State Commission. On a reading
E of Section 86 we find that at present no notification is required to be issued to confer any power on the State Commission. It is conferred and controlled by the statute. If anything else is required to be done in praesenti, the Commission is at liberty to proceed under the provisions of the 2003 Act. Be it clarified,
F our grant of liberty may not be understood to have said that the Commission can take any action arising out of its earlier order dated 29.10.2001 or any subsequent orders passed thereon. We have said so, for the Commission and a statutory Board can really work to achieve the objects and purposes of the 2003
G Act.

35. The appeals stand disposed of in the above terms leaving the parties to bear their respective costs.

K.K.T. Appeals disposed of.

H