Airports Economic Regulatory ... vs Delhi International Airport Ltd on 18 October, 2024

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Bench: Dhananjaya Y Chandrachud

Reportabl

2024 INSC 791

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 3098-3099 of 2023

Airports Economic Regulatory Authority of India …Appellant

Versus

Delhi International Airport Ltd. & Ors. …Respondents

With Civil Appeal Nos.1798-1799 of 2021 With Civil Appeal No.1806 of 2021 With Civil Appeal Nos. 10668-10670 of 2024 With Civil Appeal Nos. 3697-3698 of 2022 With With With 14:43:55 IST Reason:

Civil Appeal Nos.10691-10692 of 2024 With With And With JUDGMENT Dr Dhananjaya Y Chandrachud, CJI INDEX A. Statutory Background ..... 4 B. Submissions..... 11 C. Issues ..... 14 D. Analysis ..... 15 i. Authorities exercising 'adjudicatory functions' cannot defend their orders in appeal..... 15 ii. Necessary and proper parties in regulatory proceedings ..... 21 iii. The test of quasi-judicial functions: A misnomer..... 29 iv. The test for determining an 'adjudicatory function': Exploring Sitaram Sugar ..... 36 v. Whether tariff determination is an adjudicatory function: PTC and GRIDCO ..... 39 vi. Tariff determination for aeronautical services by AERA is a regulatory function

1. Airports Economic Regulatory Authority1 has instituted proceedings under Section 31 of the Airport Economic Regulatory Authority of India Act 20082 for challenging the judgments of the Telecom Disputes Settlement and Appellate Tribunal3. TDSAT is the Appellate Tribunal for the purposes of the AERA Act and it has the competence to hear appeals against orders of AERA. The respondents have raised a preliminary objection to the maintainability of the appeals on the ground that AERA, which is a quasi-judicial body, cannot file an appeal against the judgment of TDSAT. This judgment disposes of the preliminary issue of whether the appeals filed by AERA under Section 31 of the AERA Act are maintainable.

A. Statutory Background

2. The long title of the AERA Act provides that it is an Act to establish AERA and to a) regulate tariff and other charges for aeronautical services rendered at airports; (b) monitor performance standards of airports; and (c) for other incidental and connected matters.4 The Act applies to all airports where air transport services are operated or are intended to be operated, other than airports in the control of the Armed Forces or paramilitary forces of the Union.5 “AERA” “AERA Act” “TDSAT” “An Act to provide for the establishment of an Airports Economic Regulatory Authority to regulate tariff and other charges for the aeronautical services rendered at airports and to monitor performance standards of airports and for matters connected therewith or incidental thereto.” AERA Act; Section 1(3)(a) PART A The Act also applies to all private and leased airports6, all civil enclaves7 and all major airports8.

3. Section 3 of the AERA Act stipulates that the Central Government must, by a notification, establish AERA within three months from the date of commencement of the Act. By a notification dated 12 May 2009, the Central Government established AERA. Section 13 of the AERA Act prescribes the functions of AERA. AERA must perform the following functions in respect of major airports:

a. Determine tariff for aeronautical services [Section 13(1)(a)]; b. Determine the amount of development fees [Section 13(1)(b)]; c. Determine the passengers service fee levied under Rule 88 of the Aircraft Rules 1937 notified under the Aircraft Act 1934 [Section 13(1)(c)];

d. Monitor the performance standards relating to quality, continuity and reliability of service as specified by the Central Government or any other authority authorised by it [Section 13(1)(d)]; e. Call for information necessary to determine the tariff [Section 13(1)(e)]; and f. Perform such other functions relating to tariff which may be entrusted to it by the Central Government or which may be necessary to carry out the provisions of the Act [Section 13(1)(f)].

AERA Act; Section 1(3)(b) AERA Act; Section 1(3)(c) AERA Act; Section 1(3)(d) PART A

4. Section 13(1)(a) also prescribes the factors which AERA must take into consideration to "determine" tariff. The following are the seven factors provided by the provision:

a. The capital expenditure incurred and timely investment in improvement of airport facilities;

b. The service provided, its quality and other relevant factors; c. The cost of improving efficiency;

d. Economic and viable operation of major airports; e. Revenue received from services other than aeronautical services; f. The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise; and g. Any other factor which may be relevant for the purposes of this Act. The proviso to Section 13(1)(a) provides that different tariff structures may be determined for different airports, having regard to all or any of the considerations stipulated in the provision.

5. Section 13(2) provides that AERA must determine the tariff once in five years and may amend the tariff at any time within the five years in public interest.9 Section 13 (1A) provides that notwithstanding anything in Clauses (1) and (2) of Section 13, AERA will not determine the tariff or the structure of tariff or the development fees if it is incorporated in the bidding document which is the basis for award of operatorship.10 However, the proviso to Section 13(1A) 13(2): "The Authority shall determine the tariff once in every five years and may if so considered appropriate and in public interest, amend, from time to time during the said period of five years, the tariff so determined." AERA Act; Section 13(1A) PART A requires AERA to be "consulted" in advance regarding the tariff or development fee which is proposed to be included in the bidding document and such fee is required to be notified in the Official Gazette.11 Section 13(3) provides that AERA is required to act in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality while discharging its functions.12 Section 13(4) provides that AERA while discharging its functions must ensure transparency by, inter alia, (a) holding due consultations with all stake-holders with the airport; (b) allowing all stake-holders to make submissions before it; and (c) making all decisions of the Authority fully documented and explained.

6. Section 2(a) defines "aeronautical service" as the service provided for the following:

a. For navigation, surveillance and supportive communication for air traffic management;

b. For the landing, housing or parking of an aircraft or any other ground facility offered in connection with aircraft operations at an airport; c. For ground safety

services at an airport;

d. For ground handling services relating to aircraft, passengers and cargo at an airport;

e. For the cargo facility at an airport;

f. For supplying fuel to the aircraft at an airport; and g. For stake holder at an airport.

AERA Act; proviso to Section 13(1A) AERA Act; Section 13(3) PART A

7. Section 14 confers AERA with the power to call for an information and conduct investigation regarding the activities of a service provider. The provision confers it with the power to do the following by an order in writing:

a. Call upon the service provider to furnish in writing such information or explanation relating to its functions to access the performance of the service provider;

b. Appoint persons to inquire into the affairs of a service provider; c. Direct the inspection of book of accounts or other documents of any service provider; and d. Issue directions to monitor the performance of service providers.

8. The service provider is bound to produce all books of account and documents relating to the subject matter of the inquiry and furnish such statement or information. Section 15 confers AERA with the power to issue directions to service providers to discharge its functions under the Act.13

9. Section 17 provides that TDSAT established under the Telecom Regulatory Authority of India Act 1997 will be the Appellate Tribunal for the purposes of the AERA Act. TDSAT exercises original jurisdiction and appellate jurisdiction under the Act. Section 17(a) confers TDSAT with the original jurisdiction to adjudicate any dispute that arises between (a) service providers; or (b) service providers and consumers. The proviso to the Clause states that TDSAT can obtain the opinion of AERA on any matter relating the above “15. Power of Authority to issue directions.- The Authority may, for the purpose of discharge of its functions under this Act, issue, from time to time to the service providers, such directions, as it may consider necessary.” PART A disputes. Section 17(b) confers TDSAT with appellate jurisdiction over “any direction, decision or order” of AERA.14

10. Section 18 of the AERA Act deals with the procedure for settlement of disputes and appeals to the Appellate Tribunal. Sub-sections (1) and (2) of Section 18 provide that the Central Government, the State Government, a Local Authority or any person may make an application for adjudication of a dispute covered by Section 17(a) or prefer an appeal against the order of AERA. Section 18(4) stipulates that TDSAT must pass orders after giving the “parties to the dispute or the appeal” the opportunity of being heard. Section 18(5) provides that TDSAT must send a copy of the order to the parties to the dispute or the appeal and the Authority, “as the case may be”:

"(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be." (emphasis supplied) "Appellate Tribunal.- The Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act] to—

(a) adjudicate any dispute—

(i) between two or more service providers;

(ii) between a service provider and a group of consumer:

Provided that the Appellate Tribunal may, if considers appropriate, obtain the opinion of the Authority on any matter relating to such dispute:

Provided further that nothing in this clause shall apply in respect of matters—

(i) relating to the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(ii) relating to the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(iii) Which are within the purview of the Competition Act, 2002 (12 of 2003);

(iv) relating to an order of eviction which is appealable under section 28K of the Airports Authority of India Act, 1994 (55 of 1994).

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

PART A

11. In terms of sub-section (6), TDSAT must endeavour to dispose the application or the appeal within ninety days of the receipt of it. It must record reasons in writing if it is unable to dispose the application within the specified period. Sub-section (7) provides that TDSAT may call for the records relevant to disposing the appeal or application15.

12. Section 31(1) provides that notwithstanding anything contained in the Code of Civil Procedure 190816 or any other law, an appeal will lie against the order of the Tribunal to the Supreme Court on one or more of the grounds stipulated in Section 100 of CPC.17 "18. Application for settlement of disputes and appeals to Appellate Tribunal.—(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute as referred to in clause (a) of section 17. (2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal. (3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority or 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 any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. (4) On receipt of an application under sub-section (1) or an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the dispute or the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.
>
> (5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be. (6) The application made under sub-section (1) or the appeal preferred under sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application or appeal finally within ninety days from the date of receipt of application or appeal, as the case may be:
>
> Provided that where any such application or appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the application or appeal within that period.
>
> (7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness, of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to disposing of such application or appeal and make such orders as it thinks fit." "CPC" "31. Appeal to Supreme Court.—(1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code." PART B
> B. Submissions

13. Mr K K Venugopal, Dr Abhishek Manu Singhvi, Mr Arvind Datar and Mr Prashanto Chandra Sen, Senior Counsel, and Ms Neelam Rathore, counsel appeared for the respondents. They

submitted that the appeal filed by AERA is not maintainable for the following reasons:

> a. AERA which is a tariff fixing authority, cannot be an "aggrieved party" at any stage of the proceedings. Since it cannot file an appeal before TDSAT, it also cannot file an appeal before this Court under Section 31 of the Act assailing the order of TDSAT. Section 18(2) provides that "any person" aggrieved by any direction, decision or order made by the Authority may prefer an appeal to TDSAT. AERA will not be covered by the expression "any person" since that would amount to AERA challenging its own order;

b. AERA cannot defend its own actions in the appeal against its order since tariff determination is a quasi-judicial function:

> i. Numerous judgments of this Court have held that tariff determination is a quasi-judicial exercise (see PTC India v. Central Electricity Regulatory Commission18, BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission19, Sitaram Sugar Co. Ltd v. Union of India20 (2010) 4 SCC 603 (2023) 4 SCC 788 (1990) 3 SCC 223 PART B and GRIDCO v. Western Electricity Supply Company of Orissa Limited21);

ii. The procedure followed by AERA while fixing tariff elucidates that it is a quasi-judicial exercise. Section 13(4) requires AERA to follow principles of natural justice before determining the tariff of aeronautical services;

c. The AERA Act does not expressly provide that AERA must be impleaded as a respondent to the appeal against its order before TDSAT;

d. The interests of affected parties will be safeguarded even if AERA does not file an appeal against the order of TDSAT under Section 31. Section 18(2) permits any aggrieved person or even the Central Government who may act as a parens patriae to prefer an appeal against the order of AERA, and by extension the order of TDSAT; e. Section 31 does not expressly empower AERA to file an appeal against the order of TDSAT, unlike Section 53T of the Competition Act 200222 which empowers the Competition Commission to prefer an appeal before the Supreme Court against an order of the Appellate Tribunal;

2023 SCC Online 1249 "Competition Act" PART B f. Section 18(5) provides that TDSAT must send a copy of all its orders to (a) parties to the dispute or appeal; and (b) the Authority. The provision by specifying the Authority separately from the parties to the dispute or appeal clarifies that it cannot be a party to the dispute or appeal, and consequently cannot prefer an appeal; and g. TDSAT or this Court may have to remand matters back to AERA for redetermination of tariff. AERA cannot be both a contesting party and also redetermine tariff. It would result in the possible operation of bias.

14. Mr Venkataramani, Attorney General for India and Mr Tushar Mehta, Solicitor General appearing for the Union Government, and Mr N Venkataraman, Additional Solicitor General

appearing for AERA made the following submissions:

> a. An association representing the passengers may not necessarily prefer appeals in every case. While stakeholders may be allowed to make submissions before AERA in terms of Section 13(4), there is no statutory obligation on them to contest disputes or maintain appeals. AERA is concerned with the outcome of the decision by TDSAT on, inter alia, 'tariff determination' in its own interest as a regulatory body and in the interest of the general public;
>
> b. AERA will always be a contesting respondent when an appeal against its order or direction is filed before TDSAT. It will be covered by the expression "parties to the appeal" in Section 18(5). However, it will not be a party to the dispute. It is to cover such situations that the PART C "Authority" has been separately referred. This is evident from the expression "as the case may be" in the provision; c. AERA is not a quasi-judicial authority. It is a regulator which performs multiple functions other than determination of tariff; d. Even assuming that AERA is a quasi-judicial authority, the embargo that applies to judicial authorities, that they cannot contest an appeal against their own orders, need not always apply to quasi-judicial authorities;
>
> e. A comparison cannot be made with Section 53T of the Competition Act. Section 53T identifies the parties that can file an appeal, as opposed to Section 31 of the AERA Act which only mandates that "an appeal shall lie against any order, not being an interlocutory order of the Appellate Tribunal to the Supreme Court"; and f. Institutional bias is not recognised in Indian jurisprudence. An institution or authority is independent of its officers who act under it. C. Issues

15. The following issues arise for the consideration of this Court:

> a. Whether AERA has a right to contest an appeal against its order determining tariff for aeronautical services before TDSAT, and then consequently prefer an appeal against the order of TDSAT before this Court under Section 31 of the AERA Act; and PART D b. Even if AERA does not have a right to contest an appeal against its order determining tariff for aeronautical services before TDSAT, does it have a right to prefer an appeal against the order of TDSAT before this Court in terms of Section 31 of the AERA Act. D. Analysis i. Authorities exercising 'adjudicatory functions' cannot defend their orders in appeal

16. The respondents referred to judgments of this Court and of various High Courts for the proposition that statutory authorities exercising quasi-judicial functions cannot defend their orders in appeal. Before we proceed to determine if AERA is a quasi-judicial authority, it is necessary that we first clarify the contours of this proposition.

17. The judicial principle that a judicial or quasi-judicial authority must not be impleaded as a party to an appeal against its order is premised on two reasons, both rooted in constitutional philosophy.

The first reason is that with the impleadment of the judicial or quasi-judicial authorities as respondents, they will be required to justify their decision before the Appellate Court. This is contrary to the established principle that Judges only speak through their judgments. Any dilution of this principle would lead to a situation where every judicial authority would be called upon to justify their decisions in the Court of appeal. This would break down the entire edifice of the judicial system. PART D

18. In Savitri Devi v. District Jugde, Gorakhpur23, a civil suit for maintenance was filed in the Court of the Munsif, Gorakhpur. The plaintiff filed a revision in the Court of the District Judge, Gorakhpur which was dismissed. The order of the District Judge was challenged in a writ petition before the High Court which was also dismissed. A Special Leave Petition was instituted assailing the order of the High Court. In the writ petition before the High Court and the Special Leave Petition before this Court, the District Judge, Gorakhpur and the 4th Additional Civil Judge (Junior Division) were impleaded as respondents and contesting respondents respectively. A three-Judge Bench of this Court deprecated the practice of impleading judicial officers who had disposed of "the matter in a civil proceeding":

> "14. We do not approve of the course adopted by the petitioner which would cause unnecessary disturbance to the functions of the judicial officers concerned. They cannot be in any way equated to the officials of the Government. It is high time that the practice of impleading judicial officers disposing of civil proceedings as parties to writ petitions under Article 226 of the Constitution of India or special leave petitions under Article 136 of the Constitution of India was stopped. We are strongly deprecating such a practice."

19. In Md. Omer v. S Noorudin24, an appeal was preferred against an order of the Registrar of Trade Marks before the High Court of Bombay. The Solicitor General of India put an appearance for the Registrar. The Solicitor General submitted that "he appeared to help the Court by pointing out certain errors in (1999) 2 SCC 577 AIR 1952 Bom 165 PART D the judgment of the lower Court." The Division Bench of the High Court of Judicature at Bombay held that though there are certain cases in which the Registrar should appear, this was not one such case. Chief Justice Chagla, writing for the Division Bench observed that the Solicitor General made a startling proposition by which the Judge of the Court of first instance appears before the Court of second appeal to argue that his judgment was correct and the judgment of the Court of the first appeal was wrong. The Bench observed that: (a) there may be cases in which the Registrar could be a contesting respondent; and (b) the Registrar acting as a Court of first instance cannot appear before the second appellate Court "merely" to point the errors in the judgment of the Court of first appeal.25

20. The second reason for this principle is that the impleadment of the judicial authority as a respondent would contravene one of the primary tenets of natural justice, that an adjudicating authority must not be biased. It is in deviation of the principle that an authority exercising adjudicatory functions is required to be a 'neutral arbitrator' which does not have a 'personal interest' in the matter. In Jindal Therma Power Company Ltd. v. Karnataka Power "14. [...] I have never heard of a Judge of first instance briefing counsel in a Court of appeal in order to point out

that the judgment of the lower appellate Court was wrong and his judgment was right. If this were the true principle, then every time we hear a second appeal we should look to being guided by the Judge of the trial Court appearing by counsel and telling us what the mistakes in the judgment of the lower Court are. We take it that this Court is sufficiently competent to find out for itself, with the guidance of the counsel of parties, as to what errors, if any, have been committed by the lower Court. We, therefore, think that it was entirely wrong on the part of the Registrar in this case to have appeared merely for the purpose of elucidating his own judgment and pointing out the errors in the judgment of the Court below. That is not the proper function of the Court of first instance, and in this case the Registrar is nothing else except the Court of first instance. [...] But, as I said before, this Court neither needs illumination nor guidance from the Judge of the first instance as to what are the errors in the judgment of the lower appellate Court." [emphasis supplied]; Also see the judgments of the Delhi High Court in Union Public Service Commission v. Shiv Shambhu25 and SBI v. Mohd. Shahjahan25 in which the impleadment of the Competition Commission of India as a respondent in writ petitions filed challenging its orders was reprimanded. PART D Transmission Corporation Ltd.26, an appeal under Section 41 of the Karnataka Electricity Reforms Act 1999 was preferred before the High Court against the orders passed by the Karnataka Electricity Regulatory Commission by which the Power Purchase agreement between the appellant and the respondent was modified27. One of the issues before the High Court was whether the Electricity Regulatory Commission was either a necessary or a proper party to the appeal. The High Court held that the Electricity Regulatory Commission was neither a proper nor a necessary party in the appeal. The Court observed that an Authority must not take sides when an appeal is filed against its quasi-judicial order because if it exhibits an abnormal interest in the appeal "normally unknown to statutory authorities performing quasi-judicial function" it would give the impression that it is more of an "affected party".28

21. Hari Vishnu Kamath v. Syed Ahmad Ishaque29 was one of the first judgments in which this Court held that a Tribunal was not required to be impleaded as a respondent in an appeal against its order. In that judgment, a seven-Judge Bench of this Court heard an appeal against the decision of the High Court on a writ of certiorari for quashing the decision of the Election Tribunal. One of the issues before this Court was whether the High Court 2004 SCC OnLine Kar 204 "Electricity Regulatory Commission" 2004 SCC OnLine Kar 204 [31, 33] "33. We also find considerable force in the contention of Dr. Singhvi that if ultimately this Court decides to remand the proceedings to the Commission for fresh consideration in exercise of its appellate jurisdiction, the Commission having contested the matter before this Court with abnormal interest and psyche of a private contesting litigant, cannot be fair enough to decide the issue with impartiality and disinterestedness required of it and that the confidence reposed by the appellant on the impartiality of the Commission will be lost. It is true if this Court in exercise of its appellate jurisdiction remands the proceedings to the Commission for reconsideration of evidence, there will be likelihood of the appellant entertaining apprehension that the Commission is not impartial in the decision making..." (1954) 2 SCC 881 PART D could not have issued a writ of certiorari because the Election Tribunal was an ad hoc body which became functus officio, having served its purpose, upon the pronouncement of the decision. It was contended that there would be no authority against which the writ could be issued if the Tribunal had become functus officio. This Court rejected the argument and held that the fact that the Tribunal had become functus officio did not affect the jurisdiction of the Court to quash the

order because the presence of the Election Tribunal, though proper, was not necessary.30

22. However, in Udit Narain Singh Malpaharia v. Additional Member Board of Revenue31, a four-Judge Bench of this Court drew a fine line of distinction between an appeal against a decree and a writ of certiorari to quash the order of the Tribunal. Justice K Subba Rao (as the learned Chief justice then was), writing for the Bench observed that the Tribunal is a necessary party if a writ of certiorari is filed to quash its order because: (a) otherwise the order of quashing could be ignored; and (b) a writ of certiorari is filed to quash orders of the Tribunal which are outside their jurisdiction as opposed to a regular appeal where the Court decides if the order is erroneous.32 (1954) 2 SCC 881 [13] AIR 1963 SC 786 "8. [...] But there is an essential distinction between an appeal against a decree of a subordinate court and a writ of certiorari to quash the order of a tribunal or authority: in the former, the proceedings are regulated by the Code of Civil Procedure and the court making the order is directly subordinate to the appellate court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of certiorari is issued to quash the order of a tribunal which is ordinarily outside the appellate or revisional jurisdiction of the court and the order is set aside on the ground that the tribunal or the authority acted without or in excess of jurisdiction. If such a tribunal or authority is not made a party to the writ, it can easily ignore the order of the High Court quashing its order, for not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or tribunal is certainly a necessary party to such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition." (emphasis supplied) PART D

23. In Jogendrasinhji Vijaysinghji v. State of Gujarat33, a two-Judge Bench of this Court culled out the following principles on the impleadment of Tribunals and Courts as parties in appeals against their orders after analysing the above three judgments. Justice Dipak Misra (as the learned Chief Justice then was) writing for the Bench made the following observations:34 a. Civil Courts are "courts in the strictest sense of the term". The Court and the judicial officer do not contest the order. The High Court in its revisional jurisdiction can call for the records (if required) without impleading the court or the presiding officer as a party; and b. Many Tribunals only adjudicate and have nothing to do with the "lis". Tribunals must be impleaded as a necessary party if in law they are entitled to defend the order passed by them.

24. It is clear from the above judgments that the principle that a judicial or quasi-

judicial authority cannot be a respondent in the appeal is circumscribed by certain other factors. The first factor applied by this Court is based on the relief sought. A judicial or a quasi-judicial authority may be required to be impleaded as a party in a challenge against its order if it is necessary as in case of a writ of certiorari. Second, this Court has consistently drawn a distinction between Courts in the "strictest sense" and Tribunals because the former are nearly never involved in a 'lis' and perform a purely adjudicatory function. However, a statutory authority may be entrusted with the (2015) 9 SCC 1 (2015) 9 SCC 1 [41] PART D performance of both adjudicatory and regulatory functions. This Court has held that while it need not be impleaded as a respondent in an appeal against an adjudicatory order, it may be made a contesting party in an appeal against an order

issued in exercise of its regulatory functions because then it may have a vital interest in the 'lis' bearing on matters of public interest.

25. However, it must be noted that the judgment in Jogendrasinhji Vijaysinghji (supra) also holds that a Tribunal is entitled to defend the order in the appeal only if it is provided by law. That leads us to the subsequent question of whether the statute establishing the Authority and conferring it with powers and functions must expressly stipulate that it must be impleaded as a respondent in an appeal or it can be inferred by necessary implication. ii. Necessary and proper parties in regulatory proceedings

26. In Syed Yakoob v. KS Radhakrishnan35, the State Transport Authority36 constituted under the Motor Vehicles Act 1988 and the State Transport Appellate Tribunal37 were impleaded as respondents in the appeal against the judgment of the High Court. The High Court held that the STA and STAT had overlooked material considerations while issuing transport permits. The counsel who appeared for STA and STAT before this Court asked for costs. Rejecting the argument, Justice PB Gajendragadkar writing for the majority of the Constitution Bench, observed that though STA and STAT were proper and necessary parties in the proceedings, it is unusual for them to be 1963 SCC OnLine SC 24 "STA" "STAT" PART D represented by counsel unless allegations are made against them for which they need to respond because "they are not interested in the merits of the dispute":

> "19. [...] It may be that in such proceedings, the Authority and the Appellate Tribunal are proper and necessary parties, but unless allegations are made against them which need a reply from them, it is not usual for the authorities to be represented by lawyers in Court. In ordinary cases, their position is like that of court or other Tribunals against whose decisions writ proceedings are filed; they are not interested in the merits of the dispute in any sense, and so, their representation by lawyers in such proceedings is wholly unnecessary and even inappropriate." (emphasis supplied)

27. In State Transport Authority Tribunal and Regional Transport Authority, Meerut v. Mohd. Lucman Shariff38, this Court refused to entertain an appeal filed by the Transport Authorities against the judgment of the High Court because they were not "aggrieved parties". In Bar Council of Maharashtra v. MV Dabholkar39, the issue before a seven-Judge Bench of this Court was whether the State Bar Council was an 'aggrieved party' to maintain an appeal under Section 38 of the Advocates Act 196140. Section 38 provides that "any aggrieved person" may prefer an appeal before this Court against the order made by the Disciplinary Committee of the Bar Council of India. Chief Justice A N Ray, writing the opinion for the majority held that the State Bar Council was an aggrieved person for the following reasons:

> (1975) 2 SCC 702 "Advocates Act" PART D a. Under the provisions of the Advocates Act, the State Bar Council may initiate disciplinary proceedings either on its own or upon the receipt of information. Thus, there was no 'lis' in the proceedings before the Disciplinary Committee like there is in a suit between parties;41 and b. The expression "person aggrieved" must be interpreted widely in terms of the purpose

> and the provisions of the enactment. The test to be applied to interpret the expression "person aggrieved" is whether "a person has a genuine grievance because an order has been made which prejudicially affects his interests".42 The interest need not be personal or pecuniary. The Advocates Act confers the Bar Council a statutory interest in the rights and privileges of the advocates and the purity and dignity of the profession.43

28. Justice Bhagwati, in his concurring opinion agreed with the conclusions in the opinion of Chief Justice Ray but diverged on the limited point of whether there was a 'lis' between the delinquent advocates and the Bar Council. The learned Judge distinguished between the executive functions (ensuring professional conduct of advocates) and adjudicatory functions of the Bar Council (acting through the Disciplinary Committee).44 Irrespective of the divergence on whether this dispute could be termed as a 'lis', it is clear that this Court was of the uniform view that a statutory authority can be impleaded as an interested party.

(1975) 2 SCC 702 [25] (1975) 2 SCC 702 [28] (1975) 2 SCC 702 [29] (1975) 2 SCC 702 [40] PART D

29. In Competition Commission of India v. Steel Authority of India45, this Court has in detail dealt with the issue that concerns us. In that case, Jindal Steels and Powers invoked the provisions of Section 19 read with Section 26(1) of the Competition Act by providing information to allege that SAIL had abused its dominant position by entering into an exclusive supply agreement with Indian Railways. The Competition Commission of India rejected the application for extension of time by SAIL. It held that a prima facie case was made out against SAIL and directed the Director General to make an investigation. SAIL challenged the above order before the Competition Appellate Tribunal. The Commission filed an application for impleadment before the Competition Appellate Tribunal on the ground that it was a necessary and proper party. Emphasis was placed on Section 18 of the Competition Act to contend that the powers, functions and duties of the Commission required it to be impleaded as a party in the appeals filed before the Tribunal. The Tribunal dismissed the application for impleadment. An appeal was preferred against this order. This issue framed by this Court was : "whether the Commission would be a necessary or at least a proper party in the proceedings before the Tribunal in an appeal preferred by a party".46 A three-Judge Bench of this Court held that the Commission was a necessary party in cases where it initiated a suo moto inquiry and that it was a proper party in all other proceedings before the Competition Tribunal:

> "31(3). The Commission, in cases where the inquiry has been initiated by the Commission suo moto, shall be a necessary party and in all other cases the (2010) 10 SCC 744 (2010) 10 SCC 744 [30.3] PART D Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication and effective and expeditious disposal of matters. Bring an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be."

30. While arriving at this conclusion, this Court relied on the following aspects:

a. Section 53-S(3) of the Competition Act provides that the Commission may authorise one or more Chartered Accountants, Company Secretaries, Cost Accountants or legal practitioners to present the case of the Commission with respect to any appeal before the Appellate Tribunal.47 The Commission's legal right to representation before the Appellate tribunal would be diluted if the Commission was absent;48 b. The Competition Commission can initiate suo moto proceedings in terms of Section 19 read with Section 26 of the Competition Act. Principles of fairness require that such a party be heard by the Tribunal before any orders "adverse to it are passed". Thus, the Competition Commission is a necessary party in cases where an appeal is preferred against orders or directions in proceedings initiated suo moto by it since it is a dominus litus in such proceedings;49 The Competition Act 2002; Section 53S; Also see the Competition Commission of India (General) Regulations 2009; Regulation 51 (2010) 10 SCC 744 [104] (2010) 10 SCC 744 [105,112] PART D c. The Competition Commission is a proper party in other matters for the following reasons:

i. The Commission is an expert body and discharges regulatory functions50. The assistance rendered by the Commission would be useful for a complete and effective adjudication;51 and ii. Regulations 24 to 26 of the Competition Commission of India (General) Regulations 200952 define the powers of the Commission to join or substitute parties in proceedings, allow persons or enterprises to take part in proceedings and to strike out unnecessary parties. The 2009 Regulations stipulate that the person or enterprise to be impleaded must have a substantial interest in the outcome of the proceedings and/or that it must be necessary in public interest.53 This principle must be extended to the exercise of jurisdiction by the Tribunal. The Competition Commission has a substantial interest in the outcome of the proceedings in most cases as the judgments of the Tribunal: (i) will be binding on it; (ii) provide guidelines for determining various matters of larger public interest; and (iii) affect the economic policy of the country.

See Brahm Dutt v. Union of India, AIR 2005 SC 730 (2010) 10 SCC 744 [106] "2009 Regulation" The Competition Commission of India (General) Regulations 2009; Regulation 25(1) PART D

31. The Competition Act, unlike the AERA Act, expressly provides the statutory authority with the right to present its case before the Appellate Tribunal.54 Section 52T of the Competition Act also expressly grants the Competition Commission the right to file an appeal before this Court against an order of the Appellate Tribunal.55 The judgment of this Court in Competition Commission of India (supra), however, does not hinge only on the express stipulations in the Competition Act. This Court drew a functional analysis of the role of the Competition Commission. This Court by creating a distinction between proceedings initiated by the Competition Commission suo moto and others, in effect made a classification between matters in which the Commission is an "interested party" and the ones in which it would assist in "effective adjudication". When the Commission initiates proceedings suo motu, it is discharging its duty to: (a) eliminate practices having an adverse effect

on competition; (b) promote and sustain competition; (c) protect the interests of consumers; and (d) ensure the freedom of trade by other participants in markets in India. Thus, when it initiates a suo moto proceeding, it is discharging its function as a party vitally interested in the elimination of anti-competitive practices. In appeals against the orders of the Commission in inquiries initiated otherwise (on receipt of information or on a reference made to it by the Central Government or a State Government or a statutory Competition Commission of India Act 2002; Section 53S(2) "53T. Appeal to Supreme Court.- The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them:

> Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days." [emphasis supplied] PART D authority56), the representation of the Commission is seen as necessary for the effective adjudication in view of its expertise in the field. Thus, the Competition Commission of India (supra) lays down the clear proposition of law that a statutory authority can be impleaded as a respondent in an appeal against its order even if the statute does not provide for it. It can be read by necessary implication based on the role conferred upon the authority by the statute.

32. Order 1 Rule 10 of CPC grants the Court the power to strike out or add parties.

The Rule provides that the Court may either with or without the application of the party, add the name of the party who ought to have been joined or whose presence before the Court may be necessary for the Court to effectively adjudicate upon the questions involved in the suit.57 This Court has sufficiently dealt with proper and necessary parties referable to Order 1 Rule 10 of CPC. A necessary party is defined as someone who is indispensable to the suit and without whom the suit cannot effectively proceed. A proper party, on the other hand, is a party who has an interest in the adjudication of the suit though they may not be a person in whose favour or against whom a decree ought to be made.58 This Court has further held that a party would not become a necessary party merely because she has an interest in the correct solution of The Competition Act, 2002; Section 19(1) Order 1 Rule 10(2): "Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. See Vidus Impex & Traders Ltd. v. Tosh Apartments Pvt. Ltd. (2012) 8 SCC 384; Thomson Press (India) Ltd. v. Nanak Builders & Investors P. Ltd. (2013) 5 SCC 397 PART D the question involved. She would be a necessary party only when she would be bound by the result of the action and has a direct or a legal interest in the proceeding.59 In view of the judgments of this Court in Competition Commission of India (supra) and Dabholkar (supra), a statutory authority would have a legal interest in appeals against orders made by it in discharge of

its regulatory duty.

33. In view of the above discussion, the following principles emerge:

> a. An authority (either a judicial or quasi-judicial authority) must not be impleaded in an appeal against its order if the order was issued solely in exercise of its "adjudicatory function"; b. An authority must be impleaded as a respondent in the appeal against its order if it was issued in exercise of its regulatory role since the authority would have a vital interest in ensuring the protection of public interest; and c. An authority may be impleaded as a respondent in the appeal against its order where its presence is necessary for the effective adjudication of the appeal in view of its domain expertise. iii. The test of quasi-judicial functions: A misnomer

34. The next issue is whether AERA is undertaking an adjudicatory function in determining tariff under Section 13(1)(a) of the AERA Act. We have already in See Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay (1992) 2 SCC 524(14); Also see karthuri v. Uyyamperumal (2005) 6 SCC 733 PART D the preceding section clarified that the test to be adopted is whether the authority was undertaking an adjudicatory exercise. However, before we proceed with this analysis, we deem it necessary to deal with the concept of 'quasi-judicial' functions since judgments of larger Benches have approached the issue of whether an authority can contest an appeal against its order based on whether it was issued in exercise of its quasi-judicial functions.

35. The respondents placed reliance on certain observations of the Constitution Bench of this Court in Express Newspaper Pvt. Ltd. v. Union of India60 on the tests to be adopted to determine whether an administrative body is exercising a quasi-judicial function. One of the issues before this Court in that case was whether the functions performed by the Wage Board constituted under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act 1955 are administrative, judicial, quasi-judicial or legislative in character. This Court had to determine this question to decide if the decisions of the Wage Board were open to judicial view and whether the principle of audi alteram partem applied to the proceedings before the Wage Boards.61 The Constitution Bench laid down the following test to determine if an administrative body is exercising a quasi-judicial function:

> "112. In order, therefore, to determine whether an administrative body is exercising a quasi-judicial function, it would be necessary to examine in the first instance, whether it has to decide on evidence between a proposal and an opposition and secondly, whether it under a duty to act judicially in the matter of arriving at its decision." 1959 SCR 12 1959 SCR 12 [93] PART D

36. In the subsequent section, we will refer to the meaning of the phase "quasi-

judicial" and its legal underpinnings. We will explain how the test of the duty to act 'judicially' was a standard that was evolved to ensure the compliance of the principles of natural justice and how it is no more relevant in view of the constitutionalising of the principles of natural justice.

37. In the 1950s, a functional distinction was drawn between executive and judicial62 actions and between an action that deprives rights and an action that deprives privileges63 for deciding the applicability of the principles of natural justice.64 It was presumed that only a judicial body must act 'judicially' by following the principles of natural justice. Numerous judgments of this Court (similar to the judgment in Express Newspaper (supra) discussed above) speak of the 'duty to act judicially'. To act 'judicially' meant to comply with the principles of natural justice. Courts began diluting the distinction between quasi-judicial and administrative actions to ensure that administrative actions or proceedings by authorities which are not Courts in a strict sense also comply with the principles of natural justice. The term "quasi-judicial" came into vogue to describe the exercise of power which though administrative in some respects was required to be exercised judicially, that is, in accordance with the principles of natural justice because of its impact on the rights of persons affected.65 The King v. Inspector of Leman Street Police Station, Ex Parte Venicoff, (1920) 3 K.B. 72 Nakkuda Ali v. MF De S Jayaratne, [1951] AC 66 id Wade & Forsyth's Administrative Law (12th ed. Oxford University Press) 393 PART D

38. In R v. ex p London Electricity Joint Committee Co. (1920) Ltd.66, Lord Atkin laid down the following three components of a "quasi-judicial order": (a) there must be a legal authority; (b) the authority must determine questions affecting rights of subjects; and (c) the authority must have a duty to act judicially. This test has been applied by this Court in Province of Bombay v. Khushaldas S Advani67, Shivji Nathubhai v. Union of India68 and Indian National Congress (I)69 to determine if a function is quasi-judicial.

39. In Khushaldas S Advani (supra), the issue before a four-Judge Bench of this Court was whether an order requisitioning a flat under Section 3 of the Bombay Land Requisition Ordinance70 was quasi-judicial. Section 3 of the Ordinance stipulated that the Provincial Government may by an order in writing requisition any land for a public purpose provided that it is necessary or expedient to do so. Sections 10 and 11 of the Ordinance stipulated that the Provincial Government may obtain information, enter and inspect land. One of the arguments was that a decision is quasi-judicial whenever there is a determination of a fact which affects the rights of parties.71

40. Chief Justice Harilal Kania held that the test to be applied to determine if a decision is quasi-judicial is if the law under which the authority is making a decision itself requires a quasi-judicial approach. The learned Chief Justice considered two factors in arriving at the conclusion that Section 3 of the (1924) 1 KB 171 (CA) 1950 SCR 621 AIR 1960 SC 606 (2002) 5 SCC 685.

"Ordinance" 1950 SCR 621 [11] PART D Ordinance did not confer a quasi-judicial power: first, whether the opinion can be revised by another authority or whether it can only be challenged on the grounds on which legislative actions are challenged72; and second, Sections 10 and 11 of the Ordinance which conferred the Provincial Government with the power to inspect and make inquires, were not mandatorily required to be followed. Justice Fazl Ali in his concurring opinion observed that an order will be quasi-judicial or judicial if issued by a person or an authority who is "legally bound to or authorised to act as if he was a court or a Judge."73 The learned Judge further expanded that to act as a Judge or a Court included the following: (a) right to representation; and (b) inquiry,

hearing and weighing of evidence. Justice SR Das in his concurring opinion, made a crucial observation. The learned Judge held that an action will be quasi-judicial even if there was no lis between two parties, provided the statutory authority has the power to do an act which will prejudicially affect the subject:74 "81. In other words, while the presence of two parties besides the deciding authority will prima facie, and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

41. In Ridge v. Baldwin75, Lord Reid observed that the judicial character of the duty must be inferred from the nature of the duty itself. Since the decision in Ridge (supra), Courts have inferred the duty to act judicially, that is, in 1950 SCR 621 [14] 1950 SCR 621 [21] 1950 SCR 621 [80.2] [1964] A.C 40 PART D compliance with the principles of natural justice based on whether the decision adversely affects legal rights. Over time, Courts have abandoned the classification between quasi-judicial and administrative functions because the duty to act fairly, in compliance with the principles of natural justice has been read into administrative actions as well.76 MP Jain and SN Jain in their treatise on Administrative law elucidate the reasons for the blurring of this distinction77:

"Differentiation between quasi-judicial and administrative seems to be merely an artificial formality, as many a time such a distinction is elusive and mostly a manner of judicial policy. Also, since the functions of the Administration have been expanding adversely affecting the rights and interests of individuals, the courts are convinced that it is essential to concede the right of hearing on a broader scale, but, at the same time, it may be artificial to call a function as quasi-judicial as it may have no judicial element involved. Or, in a situation, the court may feel that the function of the Administration is such that it is susceptible to the application of only a few but not all the elements of natural justice. [...] Further, when a proceeding is characterised as administrative, the person whose interests are adversely affected thereby may be left with no effective means of redress of his grievances as he could claim no procedural safeguards. To overcome these difficulties, the new trend has emerged. The advantage is that procedural fairness can be imposed on a large number of decision-

making bodies without having to characterise their functions as quasi-judicial. This approach has resulted in applying hearing procedure to a large chunk of administrative process. The nexus between hearing and quasi-judicial no longer exists in administrative process. This approach does away with the conceptual approach of calling a function as quasi-judicial when not much of judicial element is discernible there. [...] The emphasis is now placed on the element of injury to the concerned person by the administrative See In r HK (An Infant), (1967) 1 All ER 226 MP Jain & SN Jain, "Principles of Administrative Law" (7th ed. Vol I, LexisNexis) 352 PART D action in question to concede hearing to the affected person." (emphasis supplied)

42. In AK Kraipak v. Union of India,78 a Constitution Bench renounced the distinction between quasi-judicial and administrative functions for the purpose of a compliance of the principles of natural justice. Relying on the judgment of the Queen's Bench Division in In re H.K (An Infant)79

and the constitutional imperative of the rule of law80, the Constitution Bench held that the principles of natural justice will apply even to administrative decisions.81 The judgment of the Constitution Bench in Maneka Gandhi v. Union of India82 has cemented this interpretation.83

43. The above discussion elucidates that the exercise of power by Authorities and Tribunals was described as "quasi-judicial' to ensure that the principles of natural justice were complied with. However, with the evolution of the doctrine of fariness and reasonableness, all administrative actions (even if there is (1969) 2 SCC 262 (1967) 2 QB 617; "But at the same time, I myself think that even if an immigration officer is not in a judicial or a quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him." In this context, also see the observations of Lord Parker C.J., in Reginal v. Criminal Injuries Compensation Board Ex parte Lain, (1967) 2 QB 684: "With regard to Mr Bridge's second point, I cannot think that Atkin L.J., intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights. Indeed, in the Electricity Commissioners case the rights determined were at any rate not immediately enforceable rights. [...] the remedy is available even though the decision is merely a step as a result of which legally enforceable rights may be affected." (1969) 2 SCC 262 [13] "20. [...] If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquires. [...] Arriving at a just decision I the aim of both quasi-judicial enquiries as well as administrative enquiries." [emphasis supplied] AIR 1978 SC 597 "The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involved civil consequences, the doctrine of natural justice must be held to be applicable." Also see SL Kapoor v. Jagmohan, AIR 1981 SC 136 PART D nothing 'judicial (or adjudicatory)' about them) are required to comply with the principles of natural justice. The evolution of the fairness doctrine has transcended many boundaries. Thus, the reason for which the expression 'quasi-judicial' came into vogue is no longer relevant. Neither are the tests to identify them because the functions of an authority no more need to have any semblance to 'judicial functions' for it to act judicially (that is, comply with the principles of natural justice).

44. The observations in judgments of this Court that a quasi-judicial authority must not be impleaded as a party in an appeal against its order must be interpreted in view of the doctrinal expansion of the principle of fairness. The substitution of the standard of whether the Authority undertakes a quasi- judicial function with the test of adjudication is thus, not an aberration. It is a standard which is true to the purpose of the principle and which accounts for the subsequent constitutional developments.

iv. The test for determining an 'adjudicatory function': Exploring Sitaram Sugar

45. Before we proceed to determine if tariff-determination by AERA is an adjudicatory function, we must answer a more preliminary question: what are the tests to identify if a function is an adjudicatory one?

46. In Sitaram Sugar (supra), the constitutional validity of notifications issued under Section 3(3C) of the Essential Commodities Act 1995 was before a Constitution Bench of this Court. Section 3(3C) provides that where producers are required to sell sugar, they must be paid an amount calculated with PART D reference to the price of sugar determined by the Central Government. The provision also lays down the factors which must be considered by the Central Government while determining the price of sugar.84 The provision further provides that different prices may be determined from time to time for (a) different areas or; (b) for different factories; or (c) for different kinds of sugar. This Court distinguished between legislation and adjudication. The Constitution Bench held that the former affects the rights of individuals in an abstract manner while adjudication operates "upon individuals in their individual capacity."85 Relying on the following observations of this Court in Union of India v. Cynamide India Ltd.86, the Bench held that price fixation is usually a legislative measure and that it may occasionally take an adjudicatory character when it relates to an individual:

> "A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. Viewed from whatever angle, the angle of general application, the prospectiveness of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity." "Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes
>
> (a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;
>
> (b) the manufacturing cost of sugar;
>
> (c) the duty or tax, if any, paid or payable thereon;
>
> (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar, (1990) 3 SCC 223 [34] (1987) 2 SCC 729 PART D necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character".

(emphasis supplied)

47. On the facts of the case, the Bench held that price fixation is of a legislative character but the amount determined based on the price is adjudicatory because the former applies generally to a class of commodities while the latter is decided after taking individual aspects into consideration.

This Court also held that price fixation can be of a legislative character even if it is based on an objective criteria87. 88

48. Two principles are deducible from the judgment of this Court in Sitaram Sugar (supra). The first is that one of the factors to determine if an order was issued in exercise of an adjudicatory function, is whether it was specific to an individual or of general application. The second is that it is not necessary that a legislative action must always be 'subjective' and an adjudicatory function 'objective'. The Constitution Bench repudiated this distinction by observing that a legislative action can also be based on an objective set of factors. (1990) 3 SCC 223 [41]; See Saraswati Industrial Syndicate Ltd. v. Union of India, (1974) 2 SCC 630 "41. The impugned orders, duly published in the official gazettes notifying the prices determined for sugar of various grades and produced in various zones, and applicable to all producers of such sugar, can, in our view, be legitimately characterised as legislative. These orders are required by sub-section (6) to be laid before both Houses of Parliament. The notified prices are applicable without exception to all persons falling within well defined groups. The prices are determined in accordance with the norms postulated in the sub-section. It is with reference to such predetermined prices of sugar that the "amount" payable to each producer, who has sold sugar in compliance with an order made with reference to clause (f) of sub-section (2), is calculated. The calculation of such amount is, in contradistinction to the determination of "price of sugar", a non-legislative act." PART D v. Whether tariff determination is an adjudicatory function: PTC and GRIDCO

49. In PTC (supra), a Constitution Bench of this Court made certain observations on the fixation of tariff by the Electricity Commission under the provisions of the Electricity Act 200389. Section 61 of the Electricity Act provides that the Appropriate Commission (which is defined under the Act to mean Central Regulatory Commission, State Regulatory Commission or Joint Commission) must, subject to the provisions of the Electricity Act, specify the terms and conditions for the determination of tariff. The provision also stipulates factors that the Appropriate Commission must be guided by. Section 62 deals with the "determination of tariff". The provision confers the Appropriate Commission with the power to determine tariff for supply, transmission, wheeling and retail sale of electricity. Section 63 deals with "determination of tariff by bidding process". The provision provides that notwithstanding Section 62, the Appropriate Commission must adopt the tariff determined through a transparent bidding process. Section 64 of the Electricity Act prescribes the procedure to determine tariff under Section 62 which includes filing an application and provision for suggestions and objections. Referring to these provisions, the Constitution Bench made the following observations:

> " 26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the "Electricity Act" PART D said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same

under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. (See Shri Sitaram Sugar Co.

Ltd. v. Union of India [(1990) 3 SCC 223] .)

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. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow." (emphasis supplied)
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50. The observations of the Constitution Bench are analysed below:

a. Tariff-fixation, like price fixation is generally of a legislative character; b. Tariff-fixation is of an adjudicatory or quasi-judicial character if it is made so by the statute which confers the Authority with the power to determine tariff;

c. The Electricity Act confers the Appropriate Commission with both regulatory and adjudicatory/decision-making powers, even with respect to tariff. Section 61 which confers the Appropriate Commission with the power to specify terms and conditions for the determination of tariff, is of legislative character while the power to determine tariff in terms of Sections 62 and 64 is an adjudicatory function;

d. Though the decision does not expressly make a distinction between powers that are general in nature and powers that are specific/individual in nature, such an inference can be drawn from paragraph 50 which specifically applies the tests

formulated in Sitaram Sugar (supra); and e. The fact that the order of the Appropriate Commission determining tariff was subject to appeal was also one of the factors that weighed with this Court.

51. The respondents have relied on PTC (supra) to contend that tariff determination by an Authority constituted under any statute is an adjudicatory PART D function. Such an interpretation of the judgment in PTC (supra), in our opinion is erroneous. This Court in PTC (supra) expressly noted that tariff fixation, like price fixation is generally of a legislative character. The judgment in PTC (supra) is an authority only for the proposition that the question of whether determination of tariff is a legislative or an adjudicatory function must be determined upon an analysis of the provisions of the statute conferring the power. That was the test that was propounded in Sitaram Sugar (supra) as well.

52. In GRIDCO (supra), this Court was hearing appeals arising out of the decisions of the Appellate Tribunal for Electricity constituted under Section 110 of the Electricity Act 2003 which arose from orders issued by the Orissa Electricity Regulatory Commission determining tariff. Relying on the judgment in PTC (supra), a two-Judge Bench of this Court held that tariff determination being a quasi-judicial function, the Commission could not have preferred an appeal against the order of the Appellate Tribunal.90 The judgment of the two- Judge Bench in GRIDCO (supra) also dealt with the nature of function of the Appropriate Commission under Section 62 of the Electricity Act which was already settled by the judgment of the Constitution Bench in PTC (supra) that it was adjudicatory.

“31. There is one more aspect of the matter. As held by the Constitution Bench [PTC (India) Ltd. v. CERC, (2010) 4 SCC 603] , under Section 62, the Commission exercises quasi-judicial powers. There are appeals preferred by the Commission against the orders of the Appellate Tribunal in appeals under Section 111 of the Electricity Act. The Appellate Tribunal in appeals has dealt with the legality and validity of the decisions of the Commission rendered in the exercise of quasi-judicial power. In short, the Appellate Tribunal has tested the correctness of the orders of the Commission. The Commission is bound by the orders of the Appellate Tribunal. Therefore, we have serious doubt about the propriety and legality of the act of the Commission of preferring appeals against the orders of the Appellate Tribunal in appeal by which its own orders have been corrected. The Commission cannot be the aggrieved party except possibly in one appeal where the issue was about the non-compliance by the Commission of the orders of the Appellate Tribunal. If the Commission was exercising legislative functions, the position would have been different.” PART D vi. Tariff determination for aeronautical services by AERA is a regulatory function

53. The question that falls for our consideration is whether AERA in exercise of its power under Section 13(1)(a) of the AERA Act is discharging an adjudicatory function. The issue of whether AERA is a necessary or a proper party must be determined based on whether the AERA is an aggrieved/interested party or merely an expert body whose views would be necessary for the effective adjudication of the appeal.

54. A simplistic conclusion that AERA regulates tariff and does not adjudicate it cannot be arrived at merely because the long title to the AERA Act states that AERA is established to, inter alia, “regulate

tariff". An analysis of the statutory provisions must indicate the regulatory character of tariff determination by AERA.

55. Before we proceed to analyse the statutory provisions of the AERA Act, we deem it appropriate to refer to the reasons for creating an independent Airport Economic Regulatory Authority. On 30 November 2003, the Committee on a Road Map for the Civil Aviation Section published a report which highlighted the underlying economic rationale for establishing an Airport Economic Authority. The Report noted that an independent economic regulator must be established to prevent the abuse of monopoly power in airport activities. The Report further notes that the Airport Authority of India acts both as an operator and regulator of airports and thus, there is an inherent conflict of interest. It is PART D to ensure that there was no such conflict of interest that an Independent Authority was sought to be established.

56. On 22 December 2009, AERA issued a White Paper to ensure transparency in the process leading up to the framing of appropriate procedures/systems for economic regulation. The White Paper dealt with various issues relating to economic regulation of airports and air navigation services. On 16 February 2010, AERA issued a consultation paper after considering the responses received on the White Paper. On 2 August 201091, AERA laid down "its philosophy and approach for economic regulation of services" at major airports. In exercise of its powers under Section 15 of the AERA Act, AERA issued the Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Services Provided for Cargo Facility, Ground Handling and Supply of Fuel to the Aircraft) Guidelines 201192. Clause 3 of the 2011 Guidelines lays down a three-stage procedure to regulate services by assessing (a) materiality; (b) competition; and (c) the reasonableness of the existing user agreement.93

57. It may be argued by relying on the judgment in PTC (supra) that the 2011 Guidelines issued in exercise of the power under Section 15 is a regulatory function while the determination of tariff under Section 13(1)(a) is adjudicatory by relying on the distinction between 'general' and 'specific' as highlighted above. In PTC (supra), this Court drew a distinction between Section 61 of Order No.05/2010-11 dated 1 August 2010 "2011 Guidelines" 2011 Guidelines; Clause 3 PART D the Electricity Act which grants the Appropriate Commission the power to issue specific terms and conditions for determination of tariff and Section 62 which grants the power to determine tariff. The crucial test that has been consistently applied by this Court in drawing the distinction is to determine if the function is discharged in the capacity of a regulator or an adjudicator. Now, it may be possible that certain statutes create a clear distinction between the regulatory and adjudicatory roles with respect to the same function. When such a distinction is created, the Authority does not put on the hat of a regulator while undertaking the adjudicatory function. On the other hand, certain other statutes may require the Authority to 'determine' something in its capacity as a regulator. In such cases, a clear distinction between the adjudication and regulatory functions cannot be drawn.

58. On an analysis of the statutory provisions, it can be reasonably concluded that AERA is performing a regulatory function while determining tariff under Section 13(1)(a) of the AERA Act. The reasons for this conclusion are summarised below:

a. It cannot be concluded that AERA is performing an adjudicatory function merely because Section 13(1)(a) uses the phrase "determine" with respect to tariff. This would amount to a formalistic interpretation. The Court ought to make an assessment by undertaking a holistic analysis;

b. Section 13(1)(a) lays down seven factors which must be considered by AERA for determining the tariff of aeronautical services. To recall, PART D the Constitution Bench in Sitaram Sugar (supra) has held that the function can be regarded as legislative even if objective guidelines are prescribed for the exercise of the function. Further, the provision only prescribes broad guidelines that AERA must "take into consideration". AERA still has sufficient discretion to adapt to circumstances and various concerns while determining tariff. The Act does not prescribe the weightage that must be provided to each of the factors. That is well within the discretion of AERA. This is also evident from Section 13(1)(a)(viii) which provides that AERA may consider "any other factor which may be relevant for the purposes of the Act";

c. The factors which are required to be considered by AERA indicate the underlying policy considerations of the assessment.94 The factors, inter alia, include the cost of efficiency and economic and viable operation of major airports;

d. Section 13(1A) requires that AERA be consulted regarding tariff and tariff structures which are proposed to be incorporated in bidding documents. This provision elucidates that even if AERA does not in a strict sense, "determine" tariff in terms of Section 13(1)(a), it will always be interested in the economic viability of airports and in that sense is a regulator of tariff. Thus, the considerations of AERA while determining tariff will be those of a regulator concerned with public See Express Newspaper (Private) Ltd. v. Union of India, 1958 SCC OnLine SC 23 [111] PART D and economic interests, which are purely non-adjudicatory considerations;

e. Section 13(2) by enabling AERA to amend the tariff structure even before the completion of the prescribed five year period in "public interest" is clearly indicative of its regulatory role in the regulatory sphere entrusted to it; and f. The "overarching" limitations placed on AERA's functions by Section 13(3) resemble the grounds for reasonable restrictions prescribed by Article 19 of the Constitution. These grounds are limitations on the broad policy considerations that AERA undertakes while determining tariffs.

59. The respondents have relied on two clauses of Section 13 to argue that tariff determination is an adjudicatory function. The first is the proviso to Section 13(1)(a) which provides that different tariff structures may be determined for different airports. This, it is argued, is a specific/individualistic component which is an indicator of the adjudicatory function. It is true that this Court in Sitaram Sugar (supra) held that one of the factors to assess if a function is adjudicatory is by determining if it has a specific or a general application. However, the observations cannot be interpreted to mean that it is an overarching consideration in the determination of whether the function is adjudicatory.

Neither can it be interpreted to mean that the factor must be considered de hors the context. The consideration of the factors while exercising the function is equally and if not more important as a factor. As the PART D judgment in Sitaram Sugar (supra) notes, "judicial decisions are made according to law while administrative decisions emanate from administrative policy."95 As held above, the factors to be considered by AERA in terms of Section 13(1)(a) are purely 'policy' factors. Further, the function of AERA to determine tariff must be read in the context of the role of the Authority as a 'regulator' as has been highlighted above. Modern constitutional governance requires that legislation is not general but context specific. Over-emphasising the distinction between general and specific provisions to determine if a function is regulatory or adjudicatory would be to completely ignore the jurisprudential developments governing both the regulatory domain and Article 14.

60. The second provision that the respondents relied on was Section 13(4) of the AERA Act which requires AERA to follow certain principles of natural justice to ensure transparency in discharging its functions. There is no doubt that Section 13(4) incorporates some of the principles of natural justice. It requires holding consultations and allowing stakeholders to make submissions, and reasoned decisions to obviate the influence of bias in them. However, as explained above, that in itself is not sufficient to conclude that the AERA's determination of tariffs for aeronautical services is an adjudicatory function. In the previous section, we have in detail explained that principles of natural justice are not just a requirement for 'judicial' actions. They are required to be complied with even in the exercise of administrative actions. Thus, the (1990) 3 SCC 223 [32] PART D requirement of the principles of natural justice does not render the determination, an adjudication.

vii. Interpretation of Sections 18 and 31 of the AERA Act

61. The respondents made the following submissions based on Section 18 to argue that AERA cannot be impleaded as a party to the proceedings before TDSAT:

> a. Section 18 of the AERA Act does not expressly provide that TDSAT must hear AERA before passing any order. Clause (4) of Section 18 provides that TDSAT may pass an order "after giving the parties to the dispute or appeal" an opportunity of being heard; and b. Section 18(5) expressly excludes AERA as a party in the appeal before TDSAT because it provides that a copy of every order of TDSAT must be provided "to the parties to the dispute or appeal and to the Authority, as the case may be". There is disagreement over whether the expression "as the case may be" takes after "dispute or appeal" or "Authority". If the expression takes after the former, it means that Authority is not subsumed within "parties to dispute or appeal". If the expression takes after the latter, it could mean that a copy of the order must be given to AERA if it is not a party to the dispute or the appeal.
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62. We have already, in the previous section of this judgment after an analysis of the precedent, concluded that the Authority can be impleaded as a respondent in an appeal against its order even if

the provisions of the statute do not provide for it. This power can be read by necessary implication based on the role conferred on the Authority by the statute. To recall, Section 17(1)(a) grants TDSAT the jurisdiction to adjudicate any dispute between two parties, either between two service providers or a service provider or a consumer. There is clearly a lis before TDSAT in such cases. However, the proviso to the section recognises the expertise of AERA in the economic regulation of airports by providing TDSAT with the discretion to "obtain the opinion of the Authority on any matter relating to the dispute". This is referable to the role of AERA as a proper party in the proceedings, where its expertise may be required for the effective adjudication of the dispute.

63. However, when it comes to appeals against the tariff orders issued by AERA, it is not just acting as an 'expert body' but as a regulator interested in the outcome of the proceedings. AERA has a statutory duty to regulate tariff upon a consideration of multiple factors to ensure that airports are run in an economically viable manner without compromising on the interests of the public. This statutory role is evident, inter alia, from the factors that AERA must consider while determining tariff and the power to amend tariff from time to time in public interest as discussed above. When AERA determines the tariff for aeronautical services in terms of Section 13(1)(a) of the AERA Act, it is acting as a regulator and an interested party. It is interested not in a personal capacity. Its interest lies in ensuring that the concerns of public PART D interest which animate the statute and the performance of its functions by AERA are duly preserved. Thus, AERA is a necessary party in the appeal against its tariff order before TDSAT and it must be impleaded as a respondent.

64. Section 18(5) refers to parties in a dispute or appeal. AERA is not a party to the lis when TDSAT adjudicates a dispute between two or more service providers, or a service provider and a consumer in terms of Section 17(1)(a). For disputes adjudicated by TDSAT under Section 17(a), AERA may be included as a party in terms of the proviso to the provision. If the expression "as the case may be" is interpreted to refer to "dispute or appeal", thereby excluding AERA as a party to either the dispute or the appeal, it would amount to reading down the proviso to Section 17(1)(a).

65. It may be recalled that determination of tariff for aeronautical services is merely one of the functions discharged by AERA. Section 17(1)(b) grants TDSAT the jurisdiction to "hear and dispose of appeal against any direction, decision or order of the Authority under this Act." Section 18(5) by using the expression "as the case may be" accounts for such a situation and requires that a copy of the order to be provided to AERA even if it is not a party to the appeal. Thus, the expression "as the case may be" in Section 18(5) must be read to mean that a copy of the order of TDSAT must be given to AERA even if it is not a party to the appeal or the dispute. The expression cannot be interpreted to impliedly exclude AERA as a respondent in the appeals against its orders before TDSAT.

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66. Section 31 does not expressly confer AERA with the right to file an appeal against the order of TDSAT before this Court. In fact, it does not confer that power to any party expressly. As Mr Datar put it, there are three ways in which provisions dealing with statutory appeal are drafted. First, the provision may not prescribe who can file an appeal such as Section 31 of the AERA Act. Second, the provision may provide that an appeal may be preferred by a 'person aggrieved' such as under the

Electricity Act96, the Major Port Authorities Act 202197, the Securities and Exchange Board of India Act 199298 and the Pension Fund Regulatory and Development Authority Act 201299. The third category is where the statute confers 'any party' with the right to file an appeal as under the Companies Act 2013.100 With respect to the first of the three categories, at a minimum the parties to the appeal before first appellate body (in this case TDSAT) will have a right to file an appeal before this Court. AERA can file an appeal under Section 31 in view of our conclusion that it is a necessary party in the appeals against the tariff orders issued by it. "Section 125. Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court..." "Section 60(2). Any party aggrieved by any decision or order of the Adjudicating Board, may file an appeal ..." "Section 15Z. Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal..." "Section 38. Any person aggrieved by any decision or order of the Securities Appellate Tribunal..." See Companies Act 2013; Section 242 PART E E. Conclusion

67. In view of the discussion above, the appeals filed by AERA against orders of TDSAT under Section 31 of the AERA Act are maintainable. The Registry shall list the matters before the Regular Bench for adjudication of the appeals on merits.

... ... C J I [D r D h a n a n j a y a Y C h a n d r a c h u d]
.....J [J B Pardiwala] .....J [Manoj Misra]
New Delhi;

October 18, 2024.