

State Of Gujarat vs Utility Users Welfare Association ... on 12 April, 2018

Equivalent citations: 2018 (6) SCC 21, AIR 2018 SUPREME COURT 4215, (2018) 3 PAT LJR 265, (2018) 5 MAD LJ 460, (2018) 5 SCALE 572, (2018) 3 SERVLR 802, (2018) 3 JLJR 230, (2018) 2 CURCC 329, (2018) 4 GUJ LR 3545, AIRONLINE 2018 SC 44

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Bench: Sanjay Kishan Kaul, J. Chelameswar

REPORTA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.14697 of 2015

STATE OF GUJARAT & ORS.

...Appellants

versus

UTILITY USERS' WELFARE
ASSOCIATION & ORS.

...Respondents

With

C.A. No.13451/2015

T.C.(C) No.139/2015

T.C.(C) No.138/2015

T.C.(C) No.137/2015

T.C.(C) No.140/2015

C.A. No.3759-3760/2016

T.P.(C) No.974/2016

JUDGMENT

SANJAY KISHAN KAUL, J.

1. The Electricity Act, 2003 (hereinafter referred to as the ‘said Act’) provides for Central and State Regulatory Commissions. Insofar as the appointment of the Chairperson of these Commissions is concerned, the relevant provisions stipulate that the Chairperson “may” be a Judge of a High Court for the State Commission, a Judge of the Supreme Court or the Chief Justice of a High Court for the Central Commission. The common question, which arises for consideration in these appeals is whether the expression “may” should be read as “shall”, i.e., whether it is mandatory to have a judicial mind presiding over these Commissions in the form of a Judge.

2. The Division Bench of the Madras High Court vide judgment dated 7.2.2014 took the view in respect of the challenge laid to the selection process of the Chairman of the Tamil Nadu State Electricity Commission that there was no such mandatory requirement though there was an option to appoint a Judge.

3. The Division Bench of the Gujarat High Court in a similar case in respect of the appointment of a Chairperson of the Gujarat State Regulatory Commission vide impugned order dated 8.10.2015 opined that it was so mandatory.

4. The aforesaid judicial conflict being before this Court, the challenges laid in different States were transferred to this Court through Transfer Petitions vide order dated 3.11.2015.

5. The Union of India, as also some of the State Commissions are arrayed on the one side to canvas for an interpretation of the provision as it reads, while on the other side, are consumers, activists and some affected parties, who canvassed the importance of the State Regulatory Commissions and the nature of functions it performs, to establish that a Judge alone should preside over these Commissions.

6. We do not see the necessity of going into individual facts nor were the pleas advanced on that basis before us. The submissions have been based on the provisions of the said Act and the legal pronouncements dealing with the issue of the mandatory requirement of certain Commissions to be headed by a judicial mind. The Act:

7. The said Act came into force on 10.6.2003 on publication in the Gazette. The Act seeks to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity. The Preamble to the said Act states as under:

“An Act to consolidate 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, 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.”

8. The detailed Statement of Objects & Reasons mentions that the Electricity Supply Industry in India was governed by the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. The State Electricity Boards constituted under the Electricity (Supply) Act, 1948 failed to perform on account of various factors inter alia fixation of appropriate tariff and the cross-subsidies reached unsustainable levels. The Electricity Regulatory Commission Act of 1998 was an endeavour to distance the Government from determination of tariffs by having independent regulatory commissions.

9. Part X of the said Act deals with matters relating to Regulatory Commissions – their constitution, powers and functions, etc. Sections 76 & 77 of the said Act are concerned with the constitution of the Central Commission and the qualifications for appointment of Members of the Central Commission. The provisions are similar to the appointment of the Members and Chairperson of the State Commissions except to the extent that while the relevant sub-section provides that the Central Government “may” appoint the Chairperson from amongst persons who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court in the case of the Central Commission, in the case of State Commissions, the provision states that the State Government “may” appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. Section 78 of the said Act deals with the constitution of the Selection Committee to recommend Members, while the functions of the Central Commission are specified in Section 79 of the said Act. Section 80 of the said Act provides for establishment of a Central Advisory Committee with the Chairperson of the Central Commission being the ex officio Chairperson of the Central Advisory Committee. This Committee is to advise the Central Commission on major questions of policy; quality, continuity and extent of service provided by the licensees; compliance by the licensees with the conditions and requirements of their licence; protection of consumer interest; electricity supply and overall standards of performance by utilities (Section 81 of the said Act).

10. Section 82 of the said Act is in respect of constitution of State Commission while Section 84 prescribes the qualifications for appointment of Chairperson and Members of State Commissions. Section 85 of the said Act provides for constitution of Selection Committee to select Members of State Commission and Section 86 prescribes the functions of State Commission. Similar to the Central Advisory Committee, the State Advisory Committee can be constituted under Section 87 of the said Act with similarity of functions under Section 88 of the said Act. The relevant provisions, which will have to be referred to are being reproduced hereunder:

“Section 84. Qualifications for appointment of Chairperson and Members of State Commission. – (1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management.

(2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has

been, a Judge of a High Court:

Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court.

(3) The Chairperson or any other Member of the State Commission shall not hold any other office.

(4) The Chairperson shall be the Chief Executive of the State Commission.

Section 85. Constitution of Selection Committee to select Members of State Commission. – (1) The State Government shall, for the purposes of selecting the Members of the State Commission, constitute a Selection Committee consisting of –

(a) a person who has been a Judge of the High Court.... Chairperson;

(b) the Chief Secretary of the concerned StateMember;

(c) the Chairperson of the Authority or the Chairperson of the Central Commission Member:

Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson who is or has been a Judge of the High Court.

(2) The State Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a Member and six months before the superannuation or end of tenure of the Chairperson or Member, make a reference to the Selection Committee for filling up of the vacancy.

(3) The Selection Committee shall finalise the selection of the Chairperson and Members within three months from the date on which the reference is made to it.

(4) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.

(5) Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, as the case may be.

(6) No appointment of Chairperson or other Member shall be invalid merely by reason of any vacancy in the Selection Committee

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

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

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

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

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

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

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

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

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

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

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

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

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

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

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

- (ii) promotion of investment in electricity industry;
 - (iii) reorganisation and restructuring of electricity industry in the State;
 - (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government:
- (3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.
- (4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”

11. We may note a distinction between the Members of the Central Commission and the State Commissions inasmuch as Section 77 dealing with the appointment of Members of Central Commission provides as under:

“77. Qualifications for appointment of Members of Central Commission.- (1) The Chairperson and the Members of the Central Commission shall be persons having adequate knowledge of, or experience in, or shown capacity in, dealing with, problems relating to engineering, law, economics, commerce, finance or management and shall be appointed in the following manner, namely:--

- (a) one person having qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;
- (b) one person having qualifications and experience in the field of finance;
- (c) two persons having qualifications and experience in the field of economics, commerce, law or management:

Provided that not more than one Member shall be appointed under the same category under clause (c).”

12. However, for appointment of a Member for State Commission, there is no such limitation on the number of Members from a particular field though it does state that such Members should have adequate knowledge and shown capacity in, dealing with problems relating to engineering, law, economics, commerce, finance or management. Sub- section (2) of both Sections 77 and Section 84 are similar except for the person to be appointed. Thus, irrespective of the provisions in sub- section (1) of Section 84 stipulating the fields from which the Members will have to be appointed, sub-section (2) begins with a ‘notwithstanding’ clause stating that the State Government “may” appoint any person as the Chairperson from amongst those, who have been, or is a Judge of the High Court. The proviso to sub-section (2) stipulates that no appointment under sub-section (2)

shall be made except after consultation with the Chief Justice of that High Court. This, in fact, recognizes the pre-eminence and requirement of consultation with the Chief Justice of the High Court in case of appointment of a Judge as the Chairperson of a State Commission. For the Central Commission, the consultation is with the Chief Justice of India, because the appointment envisaged is of a Judge of the Supreme Court or the Chief Justice of a High Court.

13. The Selection Committee under Section 85 of the said Act for selecting Members of the State Commission is to be headed by a Judge of the High Court but once again the proviso states that this would not be applicable to the appointment of a person as the Chairperson who is or has been a Judge of the High Court. The effect of this is that, in case the person to be appointed as Chairperson to the State Commission is a Judge, necessary consultation will have to be with the Chief Justice of the High Court as per the proviso to Section 84(2).

14. It may be noticed that under Section 78 of the said Act, insofar as the Selection Committee to recommend Members of the Central Commission is concerned, the Chairperson of the Selection Committee has to be a Member of the Planning Commission in-charge of the energy sector. Once again, the proviso to Section 78 makes an exception to the appointment of a person as a Chairperson of the Central Commission, who is, or has been a Judge of the Supreme Court or the Chief Justice of the High Court, as in that eventuality, the Chief Justice of India has to be consulted.

15. The Appellate Tribunal for Electricity is provided in Part XI of the said Act. Section 111 of the said Act deals with the appeal to Appellate Tribunal from orders made by an adjudicating officer under the said Act, or the Appropriate Commission under the said Act. Section 112 of the said Act deals with the composition of the Appellate Tribunal. The Tribunal sits in Benches with at least one judicial member and one technical member. Section 113 of the said Act provides for qualifications for appointment of Chairperson and Member of the Appellate Tribunal. The Chairperson of the Appellate Tribunal has to be someone, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court. Thus, there is no quibble over the proposition that there is a senior judicial mind heading the Appellate Tribunal and that every Bench of the Appellate Tribunal mandatorily has to have at least one judicial member and one technical member.

The Attorney General's Argument:

16. The learned Attorney General, appearing on behalf of the Union of India and the State of Gujarat, took us through the provisions and the scheme of the said Act and referred to the judicial pronouncements. He canvassed for the reading of the statute as it stands and, thus, pleaded that where the legislature in its wisdom had used the word "may" consciously, there was no need to read it as "shall". Learned Attorney General sought to emphasise that the functions of both the Commissions are more technical in nature and really do not have much of an adjudicatory element requiring a legal mind. This is apart from the fact that it is not as if a non-lawyer or non-Judge is incapable of appreciating a legal point, as even arbitrators are appointed from these fields when the dispute is more technical in character. The primary function is determination of tariff, regulating electricity purchase and procurement process of distribution licensees, facilitating intra-State transmission, issuance of license, promotion of cogeneration and generation of electricity from

renewable sources of energy, levying fee, etc. Out of the 11 functions enlisted of a State Commission under Section 86 of the said Act and for the Central Commission under Section 79 of the said Act, adjudication of disputes between licensees and generating companies and to refer any dispute for arbitration is the only one, which can be said to have any adjudicatory flavor. In fact, the argument advanced was that the nature of work would not be something which the Judges would be comfortable with, being highly technical in nature, nor are Judges trained for such technical matters. In the context of the functions and duties of the authority, relevant provisions under the said Act were referred to. Section 16 requires an Appropriate Commission to specify conditions of license. Section 45 of the said Act makes provision for power to recover charges, Section 46 of the said Act makes provision for power to recover expenditure. Section 50 provides for the State Commission to specify an Electricity Supply Code for recovery, billing, etc., while Section 57 empowers the Appropriate Commission to specify standards of performance of a licensee. Section 61 deals with tariff regulations and Section 66 deals with the development of a market in power, guided by the National Electricity Policy. Looking to all these functions, it was canvassed that a purposive interpretation should be given to the expression used, for interpreting the provisions of appointment of the Chairperson. Mindful of the technical nature of functions as they are, it was argued that a Judge was not required and that this was apparent from the fact that even at present, all State Commissions are headed by non-Judges, except one. The provision was stated to be only felicitous in character, as it gives an option to appoint a Judge. It was argued that there could be a possibility of a Judge, rarely, as it may be, being an expert in this field who could be so appointed. However, if a Judge is to be appointed, the process of appointment is different by reason of his/her having held a constitutional post and thus, the Selection Committee constituted would not be recommending the appointment, but the consultation would have to be with the Chief Justice concerned.

17. Learned Attorney General then proceeded to refer to the judgment of this Court in Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Company Private Limited¹ wherein this very Act was under consideration. The matter related to inter alia the jurisdiction of the State Commission in Tamil Nadu to either adjudicate a dispute or refer it to arbitration under Section 86(1)(f) of the said Act, which was held to be required to be exercised reasonably and not arbitrarily. In para 55, the Court gave its imprimatur to the submission advanced on behalf of the appellant that adjudicatory functions generally ought not to be conducted by the State 1 (2014) 11 SCC 53 Commission in the absence of a judicial member, especially in relation to disputes which are not fairly relative to tariff fixation or the advisory and recommendatory functions of the State Commission. In the said context, a reference was also made to the Constitution Bench judgment of this Court in Kihoto Hollohan v. Zachillhu² which examined the nature of the power of the Speaker or the chairman under Para 6(1) of the Tenth Schedule of the Constitution of India. The finding recorded is that the State Commission in deciding a lis relating to the generating company was discharging judicial functions and exercising the judicial powers of a far reaching effect and must therefore have the essential 'trappings of the Court' for which it was said "....This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a civil court..." It was also observed that the decisions of the State Commission had far reaching consequences and were final and binding between the parties subject,

of course, to judicial review.

18. The Bench thereafter proceeds to examine Section 84(2) of the 2 1992 Supp (2) SCC 651 said Act. It was observed that Section 84(2) “enables” the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court, and that such appointment shall be made after consultation with the Chief Justice of the High Court. Thus, where complicated legal issues have been raised, it was observed, the presence of one or more judicial members in the State Commission would become necessary. No judicial member had been appointed in the Tamil Nadu State Commission and, thus, the authorities concerned were required to look into the desirability and feasibility for making appointments, of any person, as the Chairperson from amongst persons, who is or has been a Judge of a High Court.

19. The provisions of Section 113 of the said Act were referred to, to conclude that the legislature was aware that the functions performed by the State Commission as well as the appellate tribunal are judicial in nature and, thus, the appellate authority has the trappings of the Court. This essential feature had not been made mandatory under Section 84 of the said Act. In the opinion of the Bench, it would be “advisable” for the State Government to exercise the enabling power under Section 84(2) of the said Act to appoint a person, who is, or has been a Judge of a High Court as Chairperson of the State Commission. The aforesaid discussions were referred to by the learned Attorney General to canvas that the question involved in the case really did not pertain to Section 84(2) of the said Act but certain observations had been made, nonetheless. The Tribunals envisaged under Part XIV A of the Constitution would stand on a different footing and therefore cannot be compared with the Commission in question. In any case, the observations itself show that the Bench was conscious of the limitations of the said Act and, thus, only rendered an advise to the State Government, rather than issue a direction. In the alternative, at best, the discussion was with reference to the desirability and feasibility of at least one member having legal knowledge rather than a mandatory requirement of a Chairman being a Judge.

20. Next, referring to the judgment in Pareena Swarup v. Union of India³, it was emphasized that the nature of functions of a Commission under the said Act cannot be equated to the functions being performed by a Tribunal under the Prevention of Money Laundering Act, 2002, an 3 (2008) 14 SCC 107 adjudicatory function. The observations were made in the context of tribunals being created, which were seeking to exercise functions earlier performed by regular judicial forums. The functions, now vested with the Appropriate Commission under the said Act, were really being performed under the Electricity Regulatory Commission Act.

21. The aforesaid judicial pronouncements, it was, thus, canvassed, could not have been utilized by the Gujarat High Court to come to a conclusion that the post of the Chairperson of the State Commission mandatorily has to be occupied by a Judge, though it could be occupied by a Judge.

22. We may, however, note that the view adopted by the Gujarat High Court is also based on the nature of powers vested with the Appropriate Commission under Sections 94, 95 & 96 of the said Act, which are as under:

“94. Powers of Appropriate Commission.- (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:--

- (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) discovery and production of any document or other material object producible as evidence;
 - (c) receiving evidence on affidavits;
 - (d) requisitioning of any public record;
 - (e) issuing commission for the examination of witnesses;
 - (f) reviewing its decisions, directions and orders;
 - (g) any other matter which may be prescribed.
- (2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.
- (3) The Appropriate Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.

95. Proceedings before Commission.- All proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appropriate Commission shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

96. Powers of entry and seizure.- The Appropriate Commission or any officer, not below the rank of a Gazetted Officer specially authorised in this behalf by the Commission, may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, insofar as it may be applicable.”

23. The conclusion in favour of an Appropriate Commission being headed by a Judge in the context of the Commission having the ‘trappings of a Court’ is drawn on the basis of the aforesaid provisions, apart from the provisions relating to the appointment of Members and the Chairperson.

C.A. No.13451/2015 (stand of the State of Tamil Nadu):

24. The State Government, having succeeded before the Madras High Court as per the impugned judgment dated 7.2.2014, supported the view taken by the Madras Bench and adopted the arguments of the learned Attorney General. Mr. Shekhar Naphade, learned Senior Advocate appearing for the State of Tamil Nadu pleaded that the whole scheme of the said Act ought to be taken into consideration and that disproportionate importance was being given to sub-section (2) of Section 84 for appointment of a Judge as a Chairperson, not realizing the variety of functions performed by the Commission, of which the adjudicatory functions were only a small percentage. C.A. No.14697/2015 (plea of the Gujarat State Regulatory Commission):

25. Mr. Jayant Bhushan, learned Senior Advocate appearing for the Gujarat State Electricity Regulatory Commission, sought to pose a question, i.e., where does the judgment in Tamil Nadu Generation and Distribution Corporation Limited⁴ make it mandatory for a Judge to be the Chairperson? The very wordings were said to be recommendatory in character, which had already been read out by the learned Attorney General. In the alternative, it was pleaded that the observations made were really obiter dicta, as the issue of appointment of the Chairperson of the State Commission was not the lis before the Court in that matter.

26. He then posed a question: – when the Act and the judgment does not make the appointment of a Judge as the Chairperson mandatory, then is there any other material, which can be said to make the appointment of the Chairperson as a Judge mandatory? In this behalf he submitted that the opposite side could only fall back on Madras Bar Association v. Union of India & Anr. 5 (MJ-II). The said judgment dealt with the creation of the National Tax Tribunal under the National Tax Tribunal Act, 2005. The constitution of the Tribunal was held to 4 supra 5 (2014) 10 SCC 1 be one for transfer of the appellate jurisdiction under Tax Laws vested in the High Courts. The majority held that the Act could not pass the test of constitutionality, on account of inter alia, the provisions relating to the appointment of the Chairpersons and Members of the Tribunals. In the said case, reference was made to the earlier Constitution Bench judgment in the Union of India v. Madras Bar Association 6 (MJ-I), crystallizing the legal position while transferring adjudicatory functions from Courts to Tribunals. It was observed that such Tribunals should possess the same independence, security and capacity as the courts which the Tribunals are mandated to substitute and thus, Members of the Tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. Technical members could also be appointed where such technical expertise is essential. But where the adjudicatory process transferred to the Tribunal did not require any specialized skills, knowledge or expertise, the provision for appointment of technical Member would constitute a clear case of delusion and encroachment upon the independence of the judiciary, and the “rule of law.” On the stature of Members, it was observed that 6 (2010) 11 SCC 1 the same would depend on the jurisdiction transferred, i.e., if the jurisdiction of the High Court was transferred to the Tribunals, the stature of the members of the newly constituted tribunal, should be possessed of qualifications akin to the Judges of the High Court. The same would be the position qua District Judges appointment. Such a process of judicial review, in Madras Bar Association v. Union of India⁷ (MJ-II), was held to be a part of the basic structure of the Constitution.

27. In the context of the functions to be carried out under the said Act, it was observed that the present case was not one where the powers of judicial review which were vested in a judicial forum was sought to be transferred. The importance of judicial review and its sanctity was maintained by the composition of the Appellate Tribunal, which would hear appeals from the orders of the Commission. The functions of the Commission were canvassed to be one of technical nature largely, and thus, would not require a Judge to head the Commission. In the alternative, it was stated that, at best, the requirement of a mandatory legal Member may be read into the 7 supra provisions, though the explicit terms of the statute do not say so.

28. Learned counsel took us through the provisions of Section 85 of the said Act to contend that the reference to the Chairperson under sub- sections (2), (3), (5) & (6) of Section 85 would be made otiose, as in that eventuality, the Selection Committee would never be called upon to appoint a Chairperson. A Judge could be appointed as the Chairperson only through the alternative route of Section 84(2) read with the proviso thereto.

29. Learned counsel also referred to Tamil Nadu Generation and Distribution Corporation Limited⁸, more specifically to para 25, which recorded the submission of the counsel for the appellant therein to the effect that the State Commission cannot be an adjudicatory body as it does not have the trappings of the Court, which would normally be manned exclusively by the Judges. The plea was that under Section 84 of the said Act, there is no requirement for the Chairperson or the Member of a State Commission to be a Judge of a High Court. No such appointment had actually been made in that case nor did the Commission have a judicial member and, thus, the same was contrary to the Constitution Bench judgment of this Court in Madras Bar 8 supra Association⁹ (MJ-I). He, thus, submitted that it is in the context of this argument that what was observed by the Bench in that judgment would have to be construed and nothing more than that. It is this argument, which has been dealt with when the observations relied upon in the impugned order were referred to. This is stated to be quite apparent even from para 55, which records the submissions of the then counsel for the appellant in Tamil Nadu Generation and Distribution Corporation Limited¹⁰ and what was accepted by the Court in para 59 of the judgment, i.e., adjudicatory functions generally ought not to be conducted by the State Commission in the absence of a Judicial Member, which are not fairly relative to tariff fixation or the advisory and recommendatory functions of the State Commission.

30. Learned Senior Advocate next turned to Section 86(1)(f) of the said Act and referred to the judgment in Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.¹¹ (GJ-I) to submit that the expression ‘and’, used in Sub-Section 86(1)(f) has already been read as ‘or’. For clarity, the sub-section is reproduced hereunder:

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

9 supra 10 supra 11 (2008) 4 SCC 755 xxxx xxxx xxxx xxxx xxxx

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

31. Therefore, the functions of the State Commission in respect of the aforesaid clause refers to adjudication upon the disputes between the licensees and generating companies as also to the function of reference of any dispute for arbitration. Our attention was invited to para 40 in Tamil Nadu Generation and Distribution Corporation Limited¹² to contend that there is no requirement that an arbitrator should be a judicial person. A submission was also made that the data collected in respect of the functioning of the Gujarat State Commission showed that the adjudicatory functions were not more than 10 per cent. A large number of functions were of tariff fixation, which was over 30 per cent, while the regulatory functions were 59 per cent and grant of licenses were a fraction of a percentage.

32. The emphasis on the reading of the judgment in *Union of India v. Madras Bar Association*¹³ (MJ-I), it was contended, is on the 12 supra 13 supra shifting of the adjudicatory functions from the High Courts to the Tribunals but when, as in the present case, the State Commission has not replaced the functioning of the High Court, the same would have no application. For example, the Electricity (Supply) Act, 1948, dealt with the issue of reference to arbitration in Section 76(2) of that Act. There was no question of any judicial mind. The Electricity Regulatory Commission Act, 1998 provided for an appeal to the High Court in certain cases from the order of the State Commission. Therefore, the appellate authority constituted as a replacement for the appeal before the High Court is manned by a sitting or retired Supreme Court Judge or the Chief Justice of the High Court. Learned counsel also referred to the epilogue in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*¹⁴(GJ-II), which dealt with the vital issue of composition and functioning of Tribunals and statutory framework thereof. In the context of the observations in *Madras Bar Association v. Union of India & Anr.*¹⁵ (MJ-II), it was observed in para 33 that the law laid down by this Court may call for review of composition of Tribunals under the Electricity Act or other corresponding statutes. This was so as an appeal to this Court on questions of law or 14 (2016) 9 SCC 103 15 supra substantial questions of law show that Tribunals deal with such questions or substantial questions, and that the direct appeals to this Court has the result of denial of access to the High Court. Such Tribunals, thus, become a substitute for the High Courts, without the manner of appointment to such Tribunals being the same as the manner of appointment of High Court Judges.

33. Lastly, learned counsel referred to *Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited & Ors.*¹⁶ where observations were made qua the function of the Central Commission constituted under Section 3 of the Electricity Regulatory Commissions Act, 1998 as an expert body, which had been entrusted with the task of determination of tariff, which involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management. Thus, it was held that the issues with regard to determination of tariff should be left to the expert body and ordinarily the High Court and even this Court should not interfere with the determination of tariff.

34. Mr. Jayant Bhushan, learned Senior Advocate sought to 16 (2011) 12 SCC 400 crystallize his interpretation of the Act and the challenge to the impugned judgment of the Gujarat High Court on

a four point basis:

i. The constitution of the Selection Committee for Members under Section 85 is not applicable to a Judge for which there is a separate channel under Section 84(2). Thus, to the extent that Section 85 referred to a Chairperson, that portion would be made otiose, if a Judge alone is to be appointed as the Chairperson. ii. The appointment of a Chairperson under Section 84(2) of the said Act is an enabling provision and not a mandatory provision. iii. The observations in Tamil Nadu Generation and Distribution Corporation Limited¹⁷, if read to give a binding direction for the Chairman being a Judge, would then be obiter as that was not the issue before the Court.

iv. The necessary and mandatory requirement of having a Judge to head a Tribunal is only where the shifting of the adjudicatory function from the High Court to the Tribunals are envisaged.

35. Now turning to the other point of view and the various entities, which canvassed for the Chairperson to be mandatorily a Judge of the High Court :

Stand of Interveners (National Solar Energy Federation of India) in Civil Appeal No.13451/2015:

17 supra

36. Mr. Sajan Poovayya, Senior Advocate appearing for the aforesaid entity sought to support the Gujarat line of reasoning and submitted that there should be, at least, one judicial Member in the Commission, who should be the Chairman. He seeks to support this view by reason of the nature of powers vested in the Chairman of the Commission and has referred to Section 92, which reads as under:

“92. Proceedings of Appropriate Commission.- (1) The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify.

(2) The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.

(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding

shall have a second or casting vote.

(4) Save as otherwise provided in sub-section (3), every Member shall have one vote.

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf.”

37. Thus, as per sub-section (2) of Section 92, the Chairperson has a right to nominate a member who would chair the meeting in his absence and as per sub-section (3), the Chairperson has a casting vote. This, he contended was vital to the adjudicatory process, which is by majority and, thus, the necessity of having a judicial Member as a Chairperson apart from the aspect of power wielded by the Commission from Sections 94 to 96 of the said Act.

Stand of Madurai Power Corporation Private Limited:

38. Mr. Mohan Parasaran, learned Senior Advocate appearing for the aforesaid intervener referred to Section 84(1) of the said Act to contend that where reference is made to a person of law, that cannot be a reference to a judicial Member. It is only in Section 84(2) that there is a specific reference to a person, who is or has been a Judge of the High Court to be a Chairperson. Thus, the presence of a man of law would be no substitute to the requirement of a Judge who would bring a judicial thought process to the decision making. In this behalf he referred to the observations in *Madras Bar Association v. Union of India & Anr.*¹⁸ (MJ-II). We may, however, add at this stage itself that these are the same observations, which relate to the ground situation where the adjudicatory functions of the Court are shifted to the Tribunal.

39. He also contended that para 59 of the Tamil Nadu Generation and Distribution Corporation Limited¹⁹ only records the submission of the then counsel for the appellant while the ratio is contained in para

60. The ratio speaks of the enabling character of Section 84(2) of the said Act to appoint a Judge and in that eventuality the appointment is to be made after the consultation with the Chief Justice of the High Court. In this context, he submitted that the ratio of a judgment is something that has to be culled out on certain established principles and not from every line of every observation. In this context he referred to the judgment in *Natural Resources Allocation In re Special Reference No.1 of 2012*²⁰. Article 141 of the Constitution laid down that “law declared” by the Supreme Court is binding upon all Courts within the territory of India and, thus, it was held that “ “law declared” has to be construed as a principle of law that emanates from 18 supra 19 supra 20 (2012) 10 SCC 1 a judgment or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided.....the “law declared” is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided.” What is binding upon courts, “is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which the case is decided which has to be ascertained in relation to the subject-matter of the decision.” Stand of the *Madras Bar Association* (Original Petitioner) in Civil

40. The challenge to the impugned judgment of the Madras High Court in that matter was laid by Mr. Arvind Datar, learned Senior Advocate. He sought to contend that the year 1991 saw a paradigm shift in the economic functioning in the country where State functions were opened up to private players. This was not supposed to be unregulated and, thus, the Parliament provided a regulatory body. By the time the said Act was enacted in 2003, the Parliament had become wiser and the introduction of the requirement of a Judge to head the regulatory commission was, thus, introduced in this Act.

41. Turning to the specific provisions of the Act, he referred to Section 82(4) of the said Act, which provides that a State Commission would consist of not more than three members including the Chairperson. Section 2(43), defines a Member to include a Chairperson and reads as under:

“2. Definitions.- In this Act, unless the context otherwise requires,--

xxxx xxxx xxxx xxxx xxxx (43) "Member" means the Member of the Appropriate Commission or Authority or Joint Commission, or the Appellate Tribunal, as the case may be, and includes the Chairperson of such Commission or Authority or Appellate Tribunal;”

42. In the sittings of the Commissions, disputes emanating from Section 86(1)(f) of the said Act being adjudicated upon are categorized as DRP (Dispute Resolution Petition) cases. Tariff fixation is, of course, not adjudicatory. He submitted that Section 4 of The Telecom Regulatory Authority of India Act, 1997 was similar to Section 84(2) of the said Act, but there was no provision for a Judge to be appointed. Similar was stated to be the position of Section 4 of the Securities and Exchange Board of India Act, 1992. On the other hand, the specific provision made in Section 84(2) of the said Act has to be read in the context of the objects and reasons for the enactment, i.e., distancing the regulating body from the Government.

43. Learned Senior Counsel referred to the Electricity Regulatory Commission Act, 1998 to submit that Section 17 of that Act was the earlier avatar of Section 84 of the said Act, while Section 18 of that Act was the earlier avatar of Section 85 of the said Act. A reference was also made to The Petroleum and Natural Gas Regulatory Board Act, 2006, more specifically to Section 3(3) of that Act. The tariff regulatory functions are determined as per Section 62 and 64 of the said Act. On the prevalent provisions under different Acts, it was submitted that the constitution of the Competition Commission of India came to be examined in *Brahm Dutt v. Union of India* 21. The argument was similar, i.e., the functions of the Commission being more of a judicial body having adjudicatory powers, the right to appoint a judicial member of the commission should rest with the Chief Justice of India or his nominee and further the Chairman of the commission necessarily has to be a retired Chief Justice or Judge of the Supreme Court or the High Court. The contention was that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the Head of the Judiciary and should not be a bureaucrat or 21 (2005) 2 SCC 431 other person appointed by the Executive without reference to the Head of the Judiciary. In this context, the Supreme Court observed in para 6 that if an expert body is to be created, as submitted on behalf of the Union of India consistent with what is said to be the international practice, it may be

appropriate to consider the creation of two separate bodies – one with the expertise, i.e., advisory and regulatory and the other adjudicatory. This is followed up by an appellate body as contemplated, which could go a long way in meeting the challenge sought to be raised in the writ petition. Insofar as the working of the Commission was concerned, it was observed that it had a number of adjudicatory functions as well.

44. In Gujarat Urja Vikas Nigam Ltd.²² (GJ-I), the implied conflict between Section 86(1)(f) of the said Act and Section 11 of the Arbitration & Conciliation Act, 1996, was reconciled and applying the harmonious construction principles (Mimansa principles) it was observed that where there is a dispute between a licensee and the generating company, only the State Commission or the Central Commission or arbitrator nominated by it could resolve such disputes, ²² supra whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration & Conciliation Act, 1996. This was stated to be also in consonance with Section 158 of the said Act in Part XVI dealing with Dispute Resolution where arbitration was provided for in terms of the Arbitration & Conciliation Act, 1996.

45. Learned Senior Counsel sought to point out that no Judge had ever been appointed as the Chairperson. The mandate of Section 85(2) of the said Act, in fact, required that six months prior to the superannuation or end of the tenure of the Chairperson or Member, a reference should be made to the Selection Committee to fill up the vacancy. The expression “may”, it was submitted should be read as “shall” in Section 84 of the said Act. The alternative submission advanced was that when a vacancy of the Chairperson is to arise, it should be intimated to the Chief Justice of the High Court to confirm whether any Judge was available or not. In any case, at least, one legal mind should be there, who has no baggage or past connection with the special area in question directly. This was more so as apart from Section 86(1)(f), it was submitted that Section 33(4) deals with compliance of directions, if any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid and Section 9(2) proviso, which is in reference to construction of a captive generating plant and the maintenance and operation of the same being entitled to open access for the purpose of carrying the electricity from the captive generating plant to the destination of its use, with the proviso making such open access subject to availability of adequate transmission facility to be determined by the Central Transmission Utility or the State Transmission Utility. As per the second proviso, any dispute regarding the availability of transmission facility has to be referred to the Appropriate Commission for adjudication. It is submitted that these are two examples clearly requiring an adjudicatory bend of mind.

46. This petition has been filed by a Senior Advocate of the Madras high Court against the exercise of suo moto power by the Commission in respect of a tariff hike and in that process sought to challenge the appointment of the Chairperson and seeks to canvass that there exists a mandatory requirement for him to be a retired Judge of a High Court.

47. This petition filed before the Madras High Court is, once again, by an Advocate, purportedly in public interest. Apart from the fundamental issue raised of a Judge to be appointed as the Chairman of the State Commission, like in the previous Transfer Petition, certain notifications have also been assailed. The Tamil Nadu Government had published a Notification dated 26.9.2013, constituting a

three Member Selection Committee for selection of the Members of the State Commission in terms of Section 85 of the said Act. This selection process was required to be completed in three months and had to recommend, at least, two names for the post of Members. The Committee recommended the name of Mr. G. Rajagopal (respondent No.7) on 27.12.2013. This appointment is specifically assailed on the ground that he was still working as Director (Finance), TANGEDCO when his name was recommended by the Selection Committee, and that Mr. Rajagopal opted for voluntary retirement after his name had been recommended by the Selection Committee. The Notification of his appointment was issued on 31.12.2013 whereafter he assumed office on 9.1.2014.

48. The impugned decision of the Madras High Court opining that the Chairperson need not be a High Court Judge was rendered on 7.2.2014.

49. Another Notification dated 27.2.2014 was published constituting a Selection Committee for selecting a person for the post of the Chairperson. Mr. S. Akshayakumar (respondent No.6) retired from the post of the Managing Director of TANTRANSCO on 31.5.2014 and was appointed as the Chairperson of the State Commission vide Notification dated 6.6.2014, assuming charge on 9.6.2014.

50. On 12.12.2014, the State Commission consisting of these two persons as Member and Chairman and Mr. S. Nagalsamy, passed a tariff order permitting a tariff hike by TANGEDCO by a majority of 2:1 with respondent Nos.6 & 7 concurring on the issue of tariff hike while the third Member (Mr. Nagalsamy) was dissenting. The dissent was on the legality of the suo moto tariff order.

51. We have recited these facts only to bring on focus that the grievance is only with the tariff order, but under the garb of the same, the appointment of respondent Nos.6 & 7 is now sought to be assailed on the ground that the said two persons could not be really categorized as not having any financial or other interest, which is likely to prejudice their functioning as Chairperson and Member in terms of Section 85(5) of the said Act. The two companies TANGEDCO and TANTRANSCO were established for power generation and transmission of power respectively by restructuring the Tamil Nadu Electricity Board in compliance of Section 131 of the said Act and are State owned companies.

52. The original petitioner seeks to impute bias against these two persons because of the post they have held. Learned counsel appearing on behalf of the petitioner referred to the judgment of this Court in *Rajesh Awasthi v. Nand Lal Jaiswal*²³ wherein in the process of assailing an appointment to the Commission, Section 85(5) was analysed. It was observed that the power under the said sub-section (5) was to be exercised by the Selection Committee and not by the Government. Thus, whether the persons named by the panel have any financial or other interest, which is likely to affect their functioning as Chairperson was a matter which depended upon the satisfaction of the Selection Committee before recommending it to the State Government. In the facts of the case, it was found that the concerned person was ²³ (2013) 1 SCC 501 working as Joint President of the JP Power Ventures Limited at the time of selection, hence he had financial and other interest in the company, which would prejudicially affect his functions as the Chairperson of the Commission. The judgment of this Court in *Mor Modern Cooperative Transport Society Ltd. v. Financial Commissioner & Secretary to Govt. of Haryana* and *Anr.* ²⁴ was also referred to. The provision in question was

Section 68(2) of the Motor Vehicles Act, 1988. Section 68 of the Motor Vehicles Act, 1988 empowered the State Government to constitute a State Transport Authority and Regional Transport Authorities to exercise powers and functions specified in Chapter V. Section 68(2) put a restriction that no person who has a financial interest whether as proprietor, employee or otherwise in any transport undertaking was to be appointed and in case such financial interest was acquired post appointment, the person was required to give notice in writing to the State Government of acquisition of such interest and would vacate office. The Transport Commissioner and Traffic Manager working in the Office of the General Manager of the Haryana Roadways, a State Undertaking, were held to fall within the mischief of sub-section (2) of Section 68 of that 24 (2002) 6 SCC 269 Act. The nature of “financial interest” as contemplated by the said sub-section was examined in the narrower sense and it was held to imply direct personal benefit of an economic nature while in the wider sense it would include direct or indirect interest that a person has in relation to the finances of an undertaking. Such an interest was held to include the interest of an official who manages the finances of the undertaking or on whom rests the burden of financial accountability. The intention of the legislature was deciphered from reading the statute as a whole.

53. We may, however, note at this stage itself that the factual matrix in the said case dealt with the situation where a person was holding both the offices.

T.C.(C) No.140/2015 and T.C.(C) No.137/2015 & IA Nos.3 & 4/2016

54. There was really no fresh material addressed before us so far as the aforesaid petitions are concerned.

55. Insofar as IA Nos.3 & 4/2016, filed by CLP Wind Farms Private Limited, seeking intervention in T.C.(C) No.137/2015, are concerned, the prayer for intervention is made on the ground that the Court issues appropriate directions to the Tamil Nadu Electricity Regulatory Commission for time bound hearing and expeditious adjudication of the applicant’s petitions, being DRP Nos.62/2014 & 63/2014. The Court finds no merit in the applications, as the prayers made in the applications are outside the lis being adjudicated by the Court. The same are accordingly disposed of.

56. This Transfer Petition arises from the Delhi High Court. Ms. Sujatha Balachander on behalf of the original petitioner before the High Court sought to plead that the word “may” should be read as “shall” keeping in mind the intent of the legislature (Bachahan Devi & Ar. V. Nagar Nigam, Gorakhpur & Anr25). Normally, it was observed, “may” is an enabling or discretionary while “shall” is obligatory the connotation is not inelastic or inviolate. Thus, where to interpret the word “may” as directory would render the very object of the Act as nugatory, the word “may” must mean “shall.” The Act was actually enacted in the interest of the public while seeking to distance the Government from determination of tariff. Such distance from the Government, it was contended, could be brought about by appointment 25 (2008) 12 SCC 372 of a High Court Judge with a trained judicial mind as the Chairman of the Commission.

57. Learned counsel referred to A.P. Power Coordination Committee & Ors. v. Lanco Kondapalli Power Ltd. & Ors. 26, where it was held that a claim coming before the Commission could not be

entertained or allowed if it is barred by limitation prescribed for an ordinary suit before a Civil Court. This aspect was sought to be emphasized in the context of the discussion that the Commission was performing judicial functions. The view taken by this Court in *Union of India v. Namit Sharma*²⁷ was sought to be distinguished since no adjudicatory functions were involved in the performance of the functions of an Information Commissioner.

58. A reference was, once again, made to the powers of the Commission under Section 94 to 96 of the said Act as also to Section 97, which provides for delegation of the power to any Member, Secretary, Officer of the Commission except the powers to adjudicate disputes under Sections 79 and 86, and the powers to make Regulations under Section 178 or 181 as may be deemed necessary. 26 (2016) 3 SCC 468 27 (2013) 10 SCC 359

59. Our attention was also drawn to the order of the Appellate Authority dated 27.2.2013 in Appeal No.184/2011 where some observations have been made on the functioning of the State Commission. Apparently the State Commission had refused to follow the judgment of the Tribunal on a specious plea and this attitude of the State Commission was called ‘audacious’ and ‘most unfortunate’, ‘reflecting a lack of judicial approach, judicial knowledge and judicial ethics’. It was, thus, pointed out that the absence of a Judge as a Chairperson is resulting in such orders of the Commission, in ignorance of the well-established principles of law, including that of precedent.

Rejoinder Response:

60. We are dealing with the rejoinders of the counsel only to the extent that they seek to add something arising from the submissions of the counsel propagating that a Judge should be the Chairman of the Commission. Learned Attorney General referred to the judgment in *Union of India v. Namit Sharma* 28 but then we may note that the principle advanced is based on a non-adjudicatory function. Learned AG also referred to Part XI dealing with the Appellate Tribunal where 28 supra under Section 111(6), the Appellate tribunal can call for records of proceedings and make orders and can act even on its own motion. The provision reads as under:

“111. Appeal to Appellate Tribunal.-

xxxx xxxx xxxx xxxx xxxx (6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

61. Not only that, under Section 121, orders, instructions or directions can be made by the Tribunal to the Appropriate Commission for the purpose of performance of its statutory functions under the Act.

The provision reads as under:

“121. Power of Appellate Tribunal.- The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act.”

62. The contention thus advanced, is that the scheme of the Act looks to the appellate authority as a body which is supervising the Commission, and is chaired by a person who is, or has been the Chief Justice of the High Court or a Judge of the Supreme Court. Thus, there is really no need to have a High Court Judge as the Chairperson of the State Commission albeit an enabling provision having been made.

63. Mr. Naphade, learned Senior Advocate appearing for the State of Tamil Nadu submitted that orders dated 11.12.2014 and 12.12.2014 had been unsuccessfully carried in appeal and even the Special Leave Petitions were dismissed. Thus, the merits of the orders passed cannot be questioned. He further submitted that suo moto proceedings were initiated on 23.9.2013 while the appointment was made on 31.12.2013.

Thus, respondents Nos. 6 & 7 were both appointed after the suo moto proceedings had been initiated. The Selection Committee had not been impleaded as a party even though the selection process was being questioned. This Selection Committee was presided over by a retired Judge of the High Court. It was also submitted that a suo moto revisionary power was actually conferred on the appellate tribunal under Section 111(6) of the said Act to cure any defects in the orders passed by the Commission.

64. Our attention was also invited to the order of the appellate authority in OP No.1/2011 dated 11.11.2011. This arose out of a letter stated to be sent by the Ministry of Power dated 21.1.2011 complaining that most of the State Distribution Utilities have failed to file annual tariff revision petitions in time and, thus, a number of State's tariff revision had not taken place for a number of years. The Tribunal was requested to take appropriate action by issuing necessary directions to all the State Commissions to revise the tariff periodically. The State Commission framed two questions out of which the first question was as under:

“(i) Whether the State Regulatory Commissions have the jurisdiction to suo moto initiate proceedings for determination of tariff under section 62, 64 and 86 of the Electricity Act, 2003 in the absence of the Tariff application to be filed by the Utilities under Section 64 of the Act?”

65. The answer to this question was given by the Commission by opining that the State Commission must initiate suo moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the tariff policy in the event of the delay in filing of the ARR, truing-up and annual performance review one month beyond the scheduled date of submission of the petition.

66. Learned Senior Advocate, turning to the provisions of Section 84(2) of the said Act sought to emphasise that the same was a “notwithstanding” clause as is apparent from its bare reading and it clearly states “notwithstanding anything contained in sub-section (1)”. Thus, it does not take away what is stated in sub-section (1). Learned counsel relied upon the Constitution Bench judgment of this Court in *The Dominion of India & Anr. v. Shrinbai A. Irani & Anr.* 29 for the proposition as to how a non-obstante clause should be dealt with. It was observed that “While recognizing the force of this argument it is however necessary to observe that although ordinarily there should be a close approximation between the non obstante clause and the operative part of the section, the non obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof, a non obstante clause cannot cut down that construction and restrict the scope of its operation. In such cases the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of 29 (1955) 1 SCR 206 the operative part of the enactment.”

67. For the same purpose, the reference was also made to *Ajit Singh (II) v. State of Punjab*³⁰. It was, once again, emphasized that the appellate tribunal takes care of various concerns, more so when matters have to be heard by a Bench with at least one judicial member. It was also emphasized that under Section 82(2) of the Act a State Commission has to be a body corporate having perpetual succession and common seal and the provision reads as under:

“82. Constitution of State Commission.-

xxxx xxxx xxxx xxxx xxxx (2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.”

68. As per Section 84(4) of the said Act, the Chairperson is to be the Chief Executive of the State Commission. It was, thus, pleaded that it may not even be advisable for a Judge to hold this nature of office.

69. It was also emphasized that the reliance placed by the opposite side on *Mor Modern Cooperative Transport Society Ltd.*³¹ is 30 (1999) 7 SCC 209 ³¹ supra misplaced as the observations made in para 14 of the judgment have to be understood in the context of a dual charge being held by the said person, an aspect we have already noted while referring to that argument of the opposite side.

70. Mr. Jayant Bhushan, learned Senior Advocate, in addition, referred to the Petroleum and Natural Gas Regulatory Board Act, 2006 to contend that the Board constituted under the Act has to have a Chairperson and a Member (Legal) as per Section 3 of the said Act though the functions of the Board provide for adjudicatory functions under Chapter V, more specifically, in Section 24. Thus, it is not as if a non-Judge cannot carry out any adjudicatory functions.

71. He also sought to emphasise the merit of the Chairperson of the Gujarat Commission, who has a Master of Business Management in Finance, Bachelor of Engineering (Electrical), has gone through a software course, and a regulatory course on economic regulations from eminent universities and has total experience of 37 years in the power sector. This includes more than 19 years' experience in electricity regulation and is fully conversant with electricity laws and related issues.

72. Learned Senior Advocate sought to assail the impugned order of the Gujarat High Court based on the rule of purposive construction and contended that this principle cannot be utilized to hold something as different from what the legislature has expressed in clear words. Our View:

Section 84(2) of the said Act:

73. The controversy in question would have to be dealt with at two plains. The first, is as to how the statute itself has to be read insofar as the appointment of the Chairperson of the tribunal is concerned. The second is, having read the statute in a particular manner, what is the effect of the judicial pronouncements and the relevant legal literature in terms of the remaining composition of the tribunal apart from the Chairperson. If we turn to the first question, on a plain reading of Section 84(1) of the said Act all that is mandated is that both the Chairperson and the Members of the State Commission "shall" be persons of ability, integrity and standing who have adequate knowledge of and have shown capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. A plain grammatical reading of this Section shows that no distinction has been made qua the qualifications of a Chairperson and Member. All that is required is the mandates contained in the sub- section, which begin with the word "shall". Thus, any person of the fields mentioned therein, having the ability, integrity and standing can be appointed as a Member or Chairperson.

74. Section 85 of the said Act provides for constitution of a Selection Committee to select the Members of the State Commission, which in turn has to consist of the persons as set out therein and mandatorily has to have a person, who has been a Judge of the High Court as the Chairperson of the Selection Committee. We may also note that this provision refers to the appointment of 'Members' of the State Commission but then that would also include the Chairperson of the State Commission, in view of sub-section 43 of Section 2 of the said Act, which reads as under:

"2. Definitions.

....

(43) "Member" means the Member of the Appropriate Commission or Authority or Joint Commission, or the Appellate Tribunal, as the case may be, and includes the Chairperson of such Commission or Authority or Appellate Tribunal;"

75. Thus, the reading of sub-section (1) of Section 84 read with Section 85 of the said Act would leave no manner of doubt as to the fields from which a Chairperson or a Member of the State Commission can be chosen from. However, the controversy has emanated from the inclusion of

sub-section (2) of Section 84 of the said Act. This is so, as sub-section (2) begins with a “notwithstanding” clause providing that the State Government “may” appoint any person as Chairperson from amongst the persons, who is, or has been, a Judge of the High Court. This is to be read with the proviso that such an appointment would have to be made in consultation with the Chief Justice of that High Court.

76. The proviso only respects and maintains the accepted position that in appointment of persons, who have been holding such senior judicial office, consultation with the judicial head, being the Chief Justice, should be mandatory. The question which thus arises, is whether sub-section (2) of Section 84 is facilitative in character for the purposes of appointment of a retired or current Judge of the High Court as a Chairperson, or is the said provision mandatory in character. Both the golden rule and the literal rule of statutory construction are well established that a statute must be read as it is framed by the legislature. It is not the function of the Court to supplant or read into the statute something which is not provided. This is not to say that there have not been judicial views taken qua the interchangeability of the expression “may” and “shall” in certain provisions. Thus, the use of the word “shall” raises a presumption that a particular provision is imperative. However, it has been construed as merely directory in certain cases if the context or intention of the legislature demands otherwise. The Courts may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute (*Sainik Motors v. State of Rajasthan*³² and *State of U.P. v. Babu Ram*³³). We are, however, faced with a converse situation as to whether “may” can be read as “shall”. In this behalf we may take recourse to the judicial opinion that where in the same section the word ‘may’ has been used at one place and ‘shall’ at another place, it would strengthen the inference that the words have been used in the primary sense (*Chairman Canara Bank, Bangalore v. M.S. Jasra*³⁴).

77. A reference to Maxwell on The Interpretation of Statutes (Twelfth Edition), more specifically the chapter on “Exceptional Construction” would show that the modification of the language of a statute is the tool used only if, in its ordinary meaning and grammatical ³² (1962) 1 SCR 517 ³³ (1961) 2 SCR 679 ³⁴ AIR 1992 SC 1341 construction, there is a manifest contradiction of the apparent purpose of the enactment, or some inconvenience or absurdity which could hardly have been intended. It has been observed that in ordinary usage, “may” is permissive and “must” is imperative and that the word “may” used in a statute would not generally be held to be mandatory. However, in some cases where “may” is used in the context of a compulsory force, the meaning has been so modified by judicial exposition. The heading of the Chapter itself shows what is intended:

“Modification of the language to meet the intention”.

78. It is well-nigh impossible to lay down a general rule for determining whether a provision is imperative or directory. We extract the relevant portion as under:

““No universal rule,” said Lord Campbell L.C., “can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.”³⁵ And Lord Penzance said: “I believe,

as far as any rule is concerned, you cannot safely go further than that, in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.”³⁶

³⁵ *Liverpool Borough bank v. Turner* (1860) 2 De G.F. & J. 502 at pp.507, 508. ³⁶ *Howard v. Bodington* (1877) 2 P.D. 203, at p. 211.

79. If we turn back to the provisions of Section 84 of the said Act, we find that the expression “shall” is used in sub-section (1) both in the context of the requirement of ability, integrity and standing as also in the context of adequate knowledge and capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. On the other hand, in sub-section (2) while dealing with the possibility of appointment of a Chairperson from the pool of sitting or retired Judges, the expression used is “may” indicating it to be a discretionary power.

80. We are, thus, inclined to accept the line of reasoning advanced by the learned counsel led by the learned Attorney General that the plain reading of the section leaves no manner of doubt that the legislature only envisaged a possibility of appointment of a Chairperson from the pool of sitting or retired Judges of the High Court, in which case the method of appointment would be different from the one as envisaged under Section 85 of the said Act.

81. We may also look to the nature and functions performed by the State Commission. Functions of the State Commission are prescribed under Section 86 of the said Act. The enumerated functions are determination of tariff, regulation of electricity purchase and procurement process of distribution licencees, facilitating intra-state transmission, issuing licences to persons, promoting cogeneration and generation of electricity from renewable sources, levy fee, specify or enforce standards, fix trading margins. All these functions are regulatory in character rather than adjudicatory. The real adjudicatory function is only provided in sub-clause (f) whereupon the Commission has the option of adjudicating the disputes between the licencees and generating companies, or to refer such disputes to arbitration. There is also an advisory role to be performed by the State Commission as specified in sub-section (2). The issue, however, is not whether a Judge would be comfortable doing this function but whether these are types of functions which necessarily mandate a Judge to be a Chairperson. The answer to this would also be in the negative, supporting the view we have adopted on the plain reading of the section.

82. We are conscious of the observations made in *Tamil Nadu Generation and Distribution Corporation Limited*³⁷ in the context of ³⁷ supra Section 86(1)(f) of the said Act opining that the adjudicatory functions generally ought not to be conducted by the State Commission in the absence of a judicial Member, but then sub-section (1) of Section 84 of the said Act provides for a person with knowledge in the field of law albeit not mandatorily, on a plain reading of the section. The effect of this will be dealt with in the latter part of our judgment.

83. We may also look at this issue from two other perspectives. Firstly, the composition of the Appellate Tribunal under Section 112 of the said Act which mandates that there has to be a Bench of two or more persons of which at least one should be a judicial member. The Chairperson as per Section 113, mandatorily has to be a present or retired Judge of the Supreme Court or a Chief Justice of the High Court. Thus, at the appellate stage there is necessary judicial scrutiny, which takes place. Secondly, looked at from the perspective of the position prevailing prior to the said Act coming into force, the nature of functions sought to be performed by the State Commission, were to be so performed, not by person, who necessarily held a judicial office. The observations, thus, made in the context of the “tribunalisation” of judicial process and the requirement of it to be headed by a Judge have to be read in the context of shifting of the adjudicatory role from the Courts to the Tribunals.

84. There are undoubtedly certain powers vested in the Commission under Sections 94, 95 & 96 of the said Act, which weighed with the Gujarat High Court while taking a contrary view inasmuch as they seek to give the ‘trappings of a court’ to the Commission, but that aspect we will examine in the latter part of the judgment, i.e., if there are certain judicial functions to be performed by the Commission, what then should be the nature of composition of the Commission.

85. Mr. Jayant Bhushan, learned senior counsel also rightly emphasized that were it to be presumed that the Chairperson had to be mandatorily a Judge, the process of appointment would have to be in terms of the proviso and not in terms of Section 85 of the said Act. This would make the reference to a Chairperson under Sub-Sections (2), (3), (5) & (6) of Section 85 otiose as that eventuality would never arise were such a plea to be accepted.

86. We are, thus, unable to accept the contention advanced on behalf of the parties, who sought to sustain the view adopted by the Gujarat High Court. The fact that the Chairperson has a right to nominate the Member, who would chair meetings in his absence as per sub-section (2) of Section 92, or that the presence of a man of law would be no substitute to the requirement of a Judge who would bring a judicial thought process to the decision making as Chairman, or that the regulatory body should not be unregulated, are generalized pleas, which are difficult to accept. No doubt, the law declared by the Supreme Court is binding on all Courts within the territory of India, which would also include principles of law emanating from a judgment or interpretation of the law, but then the ratio decidendi of the judgments of the Supreme Court, makes the principle of mandatory requirement of a Judge applicable only to cases where the judicial function is sought to be shifted through the process of ‘tribunalisation’.

87. We may also note that Section 84(2) of the said Act begins with a non-obstante clause, i.e., Notwithstanding anything contained in sub-section (1), it does not take away what is stated in sub-section (1), which deals with the requirements that are necessary in the appointment of a Member or Chairperson. It would not cut down the clear terms of the enactment being sub-section (1). The occasion to use such a non-obstante clause really arose because the process of appointment of a Chairperson who is, or has been a Judge, is required to be different, and thus, the mandatory consultation with the Chief Justice. It is nothing more or less. Further sub-section (1) of Section 85 provides for a Selection Committee to be headed by a Judge of the High Court but with the proviso that the said provision would not apply for the appointment of a person as a Chairperson who is, or

has been, a Judge of the High Court. This, in fact, shows that a non-Judge can be appointed as the Chairperson by the Selection Committee constituted under Section 85 of the said Act, which in turn is chaired by a Judge of the High Court. We are, thus, unequivocally of the view that Section 84(2) of the said Act only gives the discretionary option to the State Government to appoint a Judge as the Chairperson of the State Commission. The said provision therefore, is not mandatory in nature.

Composition of the State Commission:

88. Our conclusion aforesaid on the appointment of a Chairperson, necessitates a discussion on the composition of the State Commission as a whole. This is so in the context of Section 84(1) of the said Act.

In terms of Section 82(4) of the said Act, the State Commission is to consist of not more than three members including the Chairperson. In other words, there have to be two other members other than the Chairperson. Now if the Chairperson is not a Judge, the question arises whether any of the other two members has to be a person from the legal field considering the nature of functions performed by the State Commission. Section 84(1) of the said Act prescribes the requirement of knowledge and shown capacity in dealing with problems relating to six different fields, i.e., engineering, finance, commerce, economics, law or management. If the Chairperson is from a non-legal field, it would imply that he/she would be a person from any of the other five fields. That would still leave the appointment of two members from the fields specified, including law. Thus, there can be a possibility and we are informed that it is so, where State Commissions have no members from the legal field at all. The moot point arises whether there can be a mandatory provision read into Section 84(1) of the said Act for opining, that at least one person from the legal field is necessary as a member, although on a plain reading of the Section it is not so.

89. The distinguishing feature, as pointed out aforesaid between appointment of members to the Central Commission and the State Commission is that, with regards to the Central Commission, it is specifically provided in Section 77 of the said Act, how many persons from which field are to be appointed. There is a further proviso to sub- clause (c) of sub-section (1) of Section 77 of the said Act restricting it to not more than one member from the fields specified in the said clause, viz. economics, commerce, law or management. This is not the position insofar as the State Commission is concerned.

90. In order to appreciate any such requirement for a person from the legal field as a member of the State Commission, it becomes necessary to turn to the nature of functions performed by the State Commission.

91. We have, in the context of Section 84(2) of the said Act, discussed the various functions of the State Commission which are specified under Section 86 of the said Act. The argument on behalf of the learned Attorney General and the counsel supporting him was that other than sub-clause (f) of Section 86, there are really no adjudicatory functions. There is, however, no dispute that sub-clause (f) is clearly an adjudicatory function. It provides for adjudication of disputes between the licencees and the generating companies. There is also a power to refer the dispute to arbitration and the

expression “and” in the said clause has been read as “or” in Gujarat Urja Vikas Nigam Ltd.³⁸ (GJ-I), implying that the option is available to the State Commission to do either of the two.

92. Now turning to the powers of the State Commission, we may note that the same are specified from Sections 94 to 96 of the said Act. The reference in these Sections is to the ‘appropriate commission’, i.e., it can either be the Central Commission or the State Commission or the Joint Commission. The relevant definition clause is as under:

“2. Definitions.-

In this Act, unless the context otherwise requires,--

.....

4. "Appropriate Commission" means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be;" The powers conferred under these Sections are, thus, undisputedly exercisable by the State Commission.

93. A perusal of these provisions would show that apart from their definition, even otherwise, these are powers of a civil court under the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘said 38 supra Code’). Powers such as summoning, enforcement of attendance of any person and examination on oath, discovery and production of documents, receiving affidavit of evidence, requisitioning of public records, etc., all form part of Section 94. In terms of Section 95, all such proceedings before the State Commission would be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 and the commission would be a civil court for purposes of Sections 345 & 346 of the Code of Criminal Procedure, 1973. Not only that, Section 96 confers the extreme power of entry and seizure in respect of any building and place where the Commission has reason to believe that any document relating to the subject matter of enquiry may be found and may be seized. The power is conferred on the Commission under Section 129 for securing compliances of orders and under Sections 142 & 146 for punishment for non-compliance of orders and directions. This, thus, leaves no manner of doubt that the State Commission, though defined as a ‘Commission’ has all the ‘trappings of the Court’.

94. We may also note that in terms of what has been opined in Gujarat Urja Vikas Nigam Ltd.³⁹ (GJ-I), such adjudication of disputes between the licensees and generating companies by the State Commission or the arbitrator nominated by it under clause (f) of sub- section (1) of Section 86 of the said Act extends to all disputes and not merely to those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) of Section 86(1) as may arise between licensees and generating companies. In effect, it has been observed that this is the only process of adjudication which has to be followed as there is no restriction in Section 86(1)(f) of the nature of the dispute that may be adjudicated. Similarly in A.P. Power Coordination Committee & Ors.⁴⁰ while referring to the judgment in Gujarat Urja Vikas Nigam Ltd.⁴¹ (GJ-I), it has been observed that the Commission has been

elevated to the status of a civil court in respect of all disputes between the licensees and generating companies. Such disputes need not arise from exercise of powers under the said Act but even claims or disputes arising purely out of contract have to be either adjudicated by the Commission or be referred to an arbitrator nominated by the Commission. In that context it has also been observed that the 39 supra 40 supra 41 supra advisability of having the State Commission presided over by a Judge of the High Court as a Chairperson was mentioned in Tamil Nadu Generation and Distribution Corporation Limited 42. The provisions of the Limitation Act, 1963 like Sections 5 & 14 have also been imported into the Act as observed.

95. What else can be called the ‘trappings of the court’? We are buttressed in our conclusion by judicial pronouncements dealing with the expression “The trappings of the court”. The expression “trappings of the court” initially found mention in a judgment of the Judicial Committee of The Privy Council in *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*⁴³. It was observed by Lord Chancellor Sankey that there are tribunals with many of the “trappings of a court” but are not courts in the strict sense of exercising judicial power. In *Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd.*⁴⁴, while dealing with the Industrial Tribunal, it was observed that the said Tribunal has powers vested in a civil court under the said Code while trying a suit, discovery of documents, inspecting, granting adjournment, reception of evidence on affidavit, enforcing attendance 42 supra 43 (1931) AC 275 44 AIR 1950 SC 188 of witnesses, etc. The observations in *R. v. London County Council*⁴⁵, of Saville, L.J. giving a meaning to the word “court” or “judicial authority” was cited with approval. Saville, L.J. observed as under:

“It is not necessary that it should be a Court in the sense that this Court is a Court, it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court if it is a tribunal which has to decide rights after hearing evidence and opposition.”

96. The Supreme Court also took note of the definition of “judicial power” and “judicial decision” in *Huddart, Parker & Co. v.*

*Moorehead*⁴⁶ and *Cooper v. Wilson*⁴⁷ respectively. Griffith, C.J., in the first judgment observed as under:

“The words ‘judicial power’ as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.”

97. In the latter judgment, it was observed as under:

“A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of

45 (1931) 2 KB 215 46 8 CLR 330, 357 47(1937) 2 KB 309, at p. 340 evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister’s free choice.”

98. The subsequence judgments in *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*⁴⁸; *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*⁴⁹; *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh* ⁵⁰; *Associated Cement Companies Ltd. v. P.N. Sharma* ⁵¹; *Sarojini Ramaswami v. Union of India*⁵² and *State of Gujarat v. Gujarat Revenue Tribunal Bar Association*⁵³ followed the aforesaid views in the same breath.

99. Once we find that the tribunal has the trappings of the court in respect of its functions, we turn to the effect of the same.

100. The judgment of this Court in *Tamil Nadu Generation and 48 1963 Supp (1) SCR 242 49 AIR 1963 SC 874 50 (1964) 6 SCR 594 51 (1965) 2 SCR 366 52 (1992) 4 SCC 506 53 (2012) 10 SCC 353 Distribution Corporation Limited*⁵⁴ would first have to be dealt with at some length, as it deals with the provisions of the very Act. Of course, the context was, inter alia, in respect of the interpretation of Section 86(1) of the said Act. The Bench took note of the *Gujarat Urja Vikas Nigam Ltd.*⁵⁵ (GJ-I) on account of the observations made in that judgment, that the State Commission can adjudicate all the disputes, including the dispute on money claims between the licensees and the generating companies. The then counsel for the appellant sought to canvas that the exercise of such judicial powers should be either by a civil court or a tribunal having, at least, one judicial member, as the absence of a judicial member would be an anathema to judicial process and would directly impinge on the impartiality and the independence of the judiciary. It was also contended that the same would undermine the principle of separation of powers which was sought to be strictly maintained by the Constitution of India. The counsel, in fact, went further that the function of the Chairman of such a commission required only a retired Judge of the High Court to occupy that post, an aspect, which has been negated by us hereinbefore. The Supreme Court gave its imprimatur to the submission advanced on behalf of the ⁵⁴ supra ⁵⁵ supra appellant to the extent that the adjudicatory functions generally ought not to be conducted by the State Commission in the absence of judicial members. It was noticed that no judicial member had been appointed in the Tamil Nadu State Commission, and that the feasibility for making the appointment of a person as the Chairman from amongst persons, who is, or has been, a Judge of the High Court should be explored.

101. It is undoubtedly true that the question which the Court was seized of, related to the interpretation of Section 86 of the said Act and certain other matters, which are not connected with the controversy herein. Thus, the issue arises, whether the observations made, albeit to be construed as advisory or suggestive qua the appointment of a Chairman and a Member are to be treated as ratio decidendi or obiter dicta.

102. In order to determine this aspect, one of the well-established tests is “The Inversion Test” propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called “The Study of Cases” 56 in the year 1892. This 56 Eugene Wambaugh, The Study of Cases (Boston: Little, Brown, & Co., 1892) text book propounded inter alia what is known as the “Wambaugh Test” or “The Inversion Test” as the means of judicial interpretation. “The Inversion Test” is used to identify the ratio decidendi in any judgment. The central idea, in the words of Professor Wambaugh, is as under:

“In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also.57”

103. In order to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e., to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. This test has been followed to imply that the ratio decidendi is what is absolutely necessary for the decision of the case. “In order that an opinion may have the weight of a 57Eugene Wambaugh, The Study of Cases (Boston: Little, Brown, & Co., 1892) at pg. 17 precedent”, according to John Chipman Grey 58, “it must be an opinion, the formation of which, is necessary for the decision of a particular case.”

104. Now applying the test to the aforesaid judgment, the proposition is reversed, i.e., “the Chairman need not be a judicial member”, the fact remains that it would have no impact on the decision in that case, which was related to inter alia the interpretation of Section 86 of the said Act. This, in fact, justifies what we have held aforesaid qua the appointment of a Chairperson from the pool of Judges.

105. In the context of the question which we are now dealing with, if we were to take the proposition as “no member having knowledge of law is required to be a member of the Commission” then we have a problem at hand. This is so because while interpreting Section 86 of the said Act, it has been expressed that the Commission has the ‘trappings of the Court’, an aspect we have agreed to hereinbefore. Once it has the ‘trappings of the Court’ and performs judicial functions, albeit limited ones in the context of the overall functioning of the Commission, still while performing such judicial functions 58 Another distinguished jurist who served as a Professor of Law at The Harvard Law

School which may be of far reaching effect, the presence of a member having knowledge of law would become necessary. The absence of a member having knowledge of law would make the composition of the State Commission such as would make it incapable of performing the functions under Section 86(1)(f) of the said Act.

106. In *Madras Bar Association*⁵⁹ (MJ-II), the Constitution Bench, referring to the decision in *Madras Bar Association*⁶⁰ (MJ-I) observed that members of tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. We are conscious of the fact that the case (MJ-I) dealt with a factual matrix where the powers vested in courts were sought to be transferred to the tribunal, but what is relevant is the aspect of judicial functions with all the ‘trappings of the court’ and exercise of judicial power, at least, in respect of same part of the functioning of the State Commission. Thus, if the Chairman of the Commission is not a man of law, there should, at least, be a member who is drawn from the legal field. The observations of the Constitution Bench in *Madras Bar Association*⁶¹ (MJ-II) constitutes a 59 supra 60 supra 61 supra declaration on the concept of basic structure with reference to the concepts of “separation of powers”, “rule of law” and “judicial review”. The first question raised before the Constitution Bench as to whether judicial review was part of the basic structure of the Constitution was, thus, answered in the affirmative.

107. We are, thus, of the view that it is mandatory to have a person of law, as a member of the State Commission. When we say so, it does not imply that any person from the field of law can be picked up. It has to be a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

108. In *Brahm Dutt v. Union of India*⁶², it has been observed that if there are advisory and regulatory functions as well as adjudicatory functions to be performed, it may be appropriate to create two separate bodies for the same. That is, however, an aspect, which is in the wisdom of the legislature and that course is certainly open for the future if the legislature deems it so. However, at present there is a 62 supra single Commission, which inter alia performs adjudicatory functions and, thus, the presence of a man of law as a member is a necessity in order to sustain the provision, as otherwise, it would fall foul of the principles of separation of powers and judicial review, which have been read to be a part of the basic structure of the Constitution.

109. We are also not in a position to accept the plea advanced by the learned Attorney General that since there is a presence of a Judge in the Appellate Tribunal that would obviate the need of a man of law as a member of the State Commission. The original proceedings cannot be cured of its defect merely by providing a right of appeal.

110. We are, thus, of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

111. The challenge laid in TC (C) Nos.139/2015 & 138/2015 is to the appointments made to the Tamil Nadu State Commission and the exercise of the powers suo moto by the Commission. The fundamental plea is of financial bias of the two members as they were working in their erstwhile avatars. The name of Mr. G. Rajagopal was recommended when he was still working as the Director, TANGEDCO and he opted for voluntary retirement after his name had been recommended. Mr. Akshayakumar retired from the post of Managing Director of TANTRANSCO on 31.5.14 and was appointed as Chairman of the Commission on 6.6.14. The tariff hike was approved by a majority of 2:1 with these two members being part of the majority view.

112. In respect of the aforesaid, reliance was placed on the judgment in Rajesh Awasthi⁶³ and Mor Modern Cooperative Transport Society Ltd.⁶⁴. We, however, find that those judgments would not apply in the present case. The nature of financial interest was examined in the narrower sense as well as the wider sense and in the wider sense, it was held to include the direct or indirect interest of a person in relation to a financial undertaking. The situation arose when the person concerned was holding both the posts simultaneously, which is not so in the present case. (as noticed in para 52 above) It is also pointed out by the learned counsel appearing for the State of Tamil Nadu that the orders 63 supra 64 supra of appointment have been exclusively assailed right till the Supreme Court. It may be added that the Selection Committee was presided over by a retired Judge of the High Court.

113. We, thus, find no merit in the plea sought to be advanced assailing either the appointment or the suo moto tariff revision. Conclusion:

114. In view of our observations above, we conclude as under:

i. Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so.

ii. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

iii. That in any adjudicatory function of the State Commission, it is mandatory for a member having the aforesaid legal expertise to be a member of the Bench.

iv. The challenge to the appointment of the Chairman and Member of the Tamil Nadu State Commission is rejected as also the suo moto proceedings carried out by the Commission.

v. Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time.

vi. In case there is no member from law as a member of the Commission as required aforesaid in para 2 of our conclusion, the next vacancy arising in every State Commission shall be filled in by a Member of law in terms of clause (ii) above.

115. Transfer Petition (C) No.974/2016 is allowed and the Transferred Case arising out of transfer petition stands disposed of.

116. The appeals as well as the other transferred cases stand disposed of accordingly leaving the parties to bear their own costs. Pending application(s), if any, also stand(s) disposed of.

.....J. (J. Chelameswar)J. (Sanjay Kishan Kaul) New Delhi.

April 12, 2018.