

BEFORE THE HON'BLE LOKAYUKTA  
JUSTICE MANMOHAN SARIN  
COMPLAINT NO. C-557/LOK/2011

In the matter of:

Sh. Ravinder Balwani ..... Complainant

Vs. .....

Sh. Shyam Wadhwa,  
Member, Delhi Electricity Regulatory  
Commission ..... Respondent No.1  
Through Mr. Buddy A. Ranganathan, Advocate

Sh. S.R. Sethi,  
Member, Delhi Electricity Regulatory  
Commission ..... Respondent No.2  
Through Mr. S.K. Dubey, Advocate

Mr. Arvind K. Nigam, Senior Advocate ... .....Amicus Curiae  
And Ms. Manmeet Arora, Advocate

**ORDER**

1. This order shall decide preliminary objections, raised by Respondent No. 1 in his affidavit in reply dated 19-03-2011 and preliminary objections raised by Respondent No. 2 in his application dated 21-03-2011. Respondents contended that Lokayukta has no jurisdiction since as members of Delhi Electricity Regulatory Commission (hereinafter called the DERC) they do not fall within the definition of "Public Functionary" under the Delhi Lokayukta and Upalokayukta Act, 1995 (herein after called the 'Act'). The submission being that DERC was not a Commission owned and controlled by the Government of NCT of Delhi, as is required by Section 2(m)(iv)(5) of the Act.
2. At this stage it may be noted that Sh. Varun Balwani, son of the Complainant has, vide his letter submitted on 16-05-2012, informed

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about the death of his father Sh. Ravinder Balwani. He also visited this office on 16-05-2012 and informed that his father met with an accident under mysterious circumstances on 23-04-2012, wherein he suffered head injuries to which he succumbed on 26-04-2012. As such the Complainant is no longer available for prosecution of the complaint.

3. In the proceedings so far, Respondents had been heard on their preliminary objections on the maintainability of the complaint. The Complainant in response to the said objections was heard. The Amicus Curiae has also addressed on the same. In addition, Respondent no. 1 had raised the plea that irrespective of the jurisdictional objection, the matter had become infructuous on account of the binding and authoritative pronouncement by the High Court of Delhi in **Nand Kishore Garg & Anr. v. Govt. of NCT of Delhi & Ors.** MANU/DE/1953/2011. The Division Bench on perusal of the record and notings of DERC had reached the conclusion that there was no tariff order that had been signed. Further, the record did not disclose a decision having been arrived at on agreed tariff. It was thus submitted that the very foundation or substratum of the complaint therefore could not be said to be existing.

#### **FACTS AND ALLEGATIONS IN COMPLAINT RELEVANT TO THE PRELIMINARY OBJECTIONS**

4. In the complaint, it is alleged that Delhi Electricity Regulatory Commission has been established by Government of NCT of Delhi and its Chairman and Members are appointed by Government of NCT of Delhi. DERC is fully financed and controlled by Government of NCT of Delhi. It is alleged that due to partisan and questionable conduct of both the Respondents, first time in the history of DERC, tariff orders for the year 2010-11 could not be issued as electricity rates were being reduced and DISCOMS had complained to Government of NCT of Delhi. Smt. Sheila Dikshit, Chief Minister and Power Minister, on learning that DERC was going to reduce the electricity rates, forwarded representation of three private DISCOMS. The Delhi Govt. in its communication

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stated that the issues raised by the DISCOMS in their representations were serious and required thorough examination for setting a sustainable model of tariff as prescribed under section 61 and 62 of the Electricity Act 2003 and the National Tariff Policy clause 5.3(h)-4, requiring recovery of costs so as not to burden future consumers. Further, in purported exercise of powers under section 86(2)(iv), directed the DERC to give statutory advice and clarifications on the issues raised by the Distribution companies. A direction under section 108 of the Electricity Act 2003 was also issued, directing DERC not to issue the Tariff Orders till the government receives advice from DERC, examines it and gives a go ahead in the matter.

5. It is further alleged that against the settled legal position and opinion of the Solicitor General of India that no advice could be given to Govt. of NCT of Delhi regarding tariff fixation, both the Respondents sent the same vide letter dated 15-12-2010. It is alleged that both the respondents withheld the tariff orders till the retirement of Chairman of DERC on 24-09-2010. After the retirement of the Chairman, both the Respondents took a U-turn under the influence of Govt. of NCT of Delhi and private DISCOMS. The DERC vide its later dated 15-12-2010 termed the communication sent by the Chairman bearing no. F.11 (570)/DERC/2010-11/CFno.2293/dated 30.06.2010 as the personal views of the Chairman. Further, they proceeded to give the advice based on the meeting of Commission held on 15-12-2010. It is alleged that Respondents no. 1 and 2 reversed their previous decision / tariff order which was duly signed by majority. The tariff was thereafter set to be increased substantially instead of being lowered as was being done before interference by Smt. Sheila Dikshit.
6. In his affidavit dated 19-03-2011, Respondent No. 1, inter-alia, states that the present complaint does not lie within the jurisdiction of Lokayukta since he, that is Respondent No. 1, is not a Public Functionary. He submits that DERC is not a Commission owned and controlled by Govt. of NCT of Delhi. The words, "owned" and "controlled" have to be read conjunctively. Mr. Buddy A Ranganathan relied on the following judgments in support of his

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preliminary objections. The ratio of these judgments is being stated for reference and ascertaining applicability of the said judgments.

- i) Jagganath Mishra V/s State of Orissa, (1996) 3 SCR 134 at 139 Placitum C.

In this case a detention order gave several grounds of detention, which were stated to be its basis. It was held that the court expected the various grounds to be joined by the conjunctive "and". The use of the disjunctive "or" in such a case makes no sense. The detention order was quashed for non-application of mind by setting of grounds of detention on disjunctive basis.

- ii) The Punjab Produce & Trading Co. Ltd. V/s The Commissioner of Income Tax West Bengal, AIR 1971 SC 2471 at 2474.

In the cited judgment, the court held that the word "or" is often used to express the alternative of terms defined or expression of the same thing in different words. Therefore, if either of the two negative conditions remains unfulfilled, the conditions laid down in the entire clause cannot be said to be satisfied.

- iii) Kamta Prasad Aggarwal V/s Ex. Officer, (1974) 4 SCC 440 at Para 11.

In this case the court while interpreting Article 276(2) of the Constitution of India, held that the words in the Article namely, "any one person" has been used in juxtaposition with "any one municipality, district board, local board or other authority". The provisions are clear in their effect and that the word "or" occurring between the words "the state" and the words "to any one municipality" cannot be read as "and" in a conjunctive sense.

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- iv) Municipal Corporation of Delhi V/s Tek Chand Bhatia, (1980) 1 SCC 158 at 163 Para 11.

The court while dealing with the case under the Prevention of Food Adulteration Act 1974, quoted with approval the meaning of "and" and "or" as stated in Stroud's Judicial Dictionary, holding that "and" has generally a cumulative sense requiring the fulfillment of all the conditions that it joins together, and herein it is the antithesis of "or". Sometimes, however, even in such a connection, it is, by force of a context, read as "or". The court also noted that "you will find it said in some cases that 'or' means 'and', but 'or' never does mean 'and'."

- v) Hindustan Aluminium Corporation V/s State of U.P. (1981) 3 SCC 578 at 582 Para 10.

The court while dealing with the case under the U.P. Sales Tax Act, observed in para. 10, "But here the expression "including" does not enlarge the meaning of the word "metal" and must be understood in a conjunctive sense as a substitute for "and". This is the reasonable and proper construction having regard to the scheme followed in the framing of the notifications."

- vi) Shiromani Gurudwara Prabhandak Committee V/s Mahant Kirpa, (1984) 2 SCC 614 at 6621 Para-18.

This was a case under the Sikh Gurudwara Act. The question was if an institution was established by a follower of Udasi sect in the memory of his guru and where later on Granth sahib was also included in its dera, was it a Sikh institution? The court held that in section 16(2) (iii) by use of conjunctive "and", it requires two conditions to be satisfied. Not only that is must be satisfactorily established that the institutions was established for use of Sikhs for the purpose of public worship but also that it was used for such worship by Sikhs before and

at the time of presentation. It could have been established by anyone but it must be used by Sikhs for public worship.

- vii) Paras Ram V/s State of Haryana, AIR 1993 SC 1212 at 1214 Para 10.

This was a case under TADA ACT where the court considered the application of Section 5. It was held that Section 5 of TADA Act applied only when a person was in possession of arms and ammunition, while the appellant had been found in possession of a country made pistol but without ammunition. The Court held that arms and ammunition under section 5 should be read conjunctively.

- viii) Union of India V/s Surhid Geigy, (1997) 11 SCC 657.

In this case, the question was regarding the entitlement to the benefit of an exemption notification under the Central Excises and Salt Act. The High court rightly held that word "and" between "i" and "ii" of the explanation must be read as conjunctive and not disjunctive. In that view of the matter, the respondent company was held entitled to the benefit of exemption notification.

- ix) Kurukshetra University V/s Devender Kumar, (2002) 4 SCC 172 at 179 Para 8 Placitum 'b'.

The cited case, while holding that "and" was a conjunctive expression, held that there was no compelling reason for reading "and" as "or". Barring the above, the rest of the case would not have any application in as much as it dealt with advertisement clauses specifying the basic qualification required. It also prescribed an additional qualification namely an M.Phil. or Masters level degree. However, if a candidate with both i.e. basic and additional was not available, then option of going with the first criteria of M.A. education with



B.ED. or with Masters degree in any subject with M.ED, was to be applied.

- x) Rajesh Kumar V/s DCIT, (2006) 10 JT 76 (SC) at 813 Para 12.

This is again an authority for the proposition that the use of the word "and" shows that it is conjunctive and not disjunctive.

From the foregoing it would be seen that cited judgments have broadly provided that the expression "and" is to be read conjunctively. It cannot be used as interchangeable for "or". There is no quarrel with this proposition that the words "owned" and "controlled" require ownership and control. In the instant case, one of the submissions made by Amicus Curiae has been that in the Hindi version of the statute, the words "owned" and "controlled" are used for and are confined to a 'body' while for 'commission' there is no such requirement and that setting up of the commission by the government would suffice. The above argument does not flow from the interplay of either the conjunctive or disjunctive but is based on the words owning and control being confined to a "body" and not being applicable to a "commission" set up the government. The cited judgments are hardly of any assistance in countering the plea raised by Amicus Curiae based on the Hindi version of the statute.

- 7. Mr. Ranganathan further submitted that DERC is a statutory commission constituted under Section 82 read with Section 2(iv) of the Electricity Act 2003. The Commission functions under a parliamentary legislation and is neither owned nor controlled by the State Government. The State Electricity Regulatory Commission is a statutory body which has legislative, quasi judicial and administrative functions. It is urged that it is completely independent of the State Government in the discharge of its functions. This independence has been recognized by a constitution bench of the Supreme Court of India in PTC Vs. CERC and ors., (2010) 4 SCC 603. Reference was invited to "para. 17" of the judgment regarding

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scope of the Electricity Act 2003. Ld. Counsel for Respondent No. 1 has referred to Sections 2(4) i.e. definition of appropriate commission read with Section 82 – the State Commission, as created by the Act is constituted by state govt. for each state, Section 85 - Constitution of Selection Committee to select Members of State Electricity Regulatory Commission, Section 86 – Provides Functions of State Commission, one of them being to advise state govt. on matters mentioned in Section 86(2), Section 61 - Tariff Regulations, Section 62 - Determination of Tariff, Section 90 – Removal of Member, Section 91 – Secretary, officers and other employees of Appropriate Commission, Section 92 – Proceedings of Appropriate Commission, Section 94 – Powers of Appropriate Commission, Section 95 – Proceeding before Commission, Section 103 – Establishment of Fund by State Government, Section 104 – Accounts and audit of State Commission; Section 108 – Directions by State Government, Section 142 – Punishment for non compliance of Directions by Appropriate Commission to show that DERC is neither owned nor controlled by Govt. of NCT of Delhi. He also referred to Section 168 of the Electricity Act 2003, according to which no suit, prosecution or other proceeding shall lie against any member of the State Commission for anything done or in good faith purporting to be done under the Electricity Act 2003 and the Rules and Regulations there under. He further submits that as per Section 174 of the Electricity Act 2003, Section 168 thereof would over ride any provision of the Act. He submitted that tariff fixation is a legislative exercise as has been held in CESC Vs. West Bengal Electricity Regulatory Commission, (2002) 8 SCC 715 and complainant cannot interfere in the legislative process. Any tariff order passed by Commission is capable of being challenged in appeal under Section 111 of the Electricity Act 2003 and the Complainant cannot be permitted to subvert the appellate proceedings. Complainant ought not to be permitted to use the present proceedings as an appellate remedy against statutory advice given by the Commission under Section, 86 (2) of the Electricity 2003. He has also stated that the Hon'ble Delhi High Court is also seized of the matter in issue in a Writ Petition (Civil) No. 4821/2010 titled Nand Kishore Garg Vs. Govt. of NCT & Ors.

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8. In his application raising preliminary objections, Respondent No. 2 urged the complaint being not maintainable since the Respondents are not "Public Functionaries" as DERC is not owned and controlled by Government of NCT of Delhi. While referring to the dictionary meaning of the words 'owned' and 'controlled', he submitted that only those commissions and bodies can be brought under the jurisdiction of Lokayukta on which the Govt. of NCT of Delhi has exclusive legal title of ownership and can exercise its influence, regulate, govern and has influence over them. He referred to preamble of the Electricity Act 2003 and Section 82 thereof to submit that the commission has its perpetual succession, power to acquire, hold and dispose of property. As per Section 83 (3) & (4) of the Electricity Act 2003, Govt. of NCT of Delhi has no control over the functions of DERC, which are guided by the National Electricity Policy under electricity plan and tariff policy published under Section 3. Further the appellate authority provided under Section 113 of the Electricity Act 2003, hears appeal against the order of the commission and thus the Govt. of NCT of Delhi has no control over members of DERC in its functioning. As per Section 90, Govt. of NCT of Delhi cannot remove any member of DERC. He has also referred to Section 94 – Powers of Appropriate Commission, Section 95 – Proceeding before Commission, Section 174 – Act to have overriding effect, Section 185 – Repeal and Saving to urge that DERC is neither owned nor controlled by the Govt. of NCT of Delhi. Reliance was also placed on PTC India Ltd. Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603.

Lastly, Mr. Dubey submitted that when a member of DERC is discharging statutory functions, then an enquiry into allegations in terms of section 2(b) would be outside the jurisdiction and scope of Lokayukta. Counsel for both the Respondents submitted that their applications be read in support of their submissions.

9. Ld. Amicus Curiae, Mr. Arvind Nigam, Senior Advocate, submitted that the text of Sec. 2 (m)(v) of the Act as published in Hindi, evidences that the words, "owned" and "controlled" are not intended

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to control the interpretation of the expression "commission". In the Hindi text, the said words only control the interpretation of the expression "body". Therefore the simpliciter act of setting up of the Commission by the Delhi Government is sufficient to bring the Commission within the ambit of the Delhi Lokayukta and Upalokayukta Act 1995. Further, as per the Official Languages Act 1963, the authoritative text of the Act is the one published in Hindi. Accordingly, he urged that if there was a difference between the Official Hindi version and the English translation thereof, then the former shall prevail. This was sought to be countered by the Counsel for Respondent by relying on Article 348(3) of the Constitution of India, providing that for all Acts passed by the legislature, the authoritative text would be in the English language. Counsel for Respondent also placed reliance on Section 34 and 35 of the Government of National Capital Territory of Delhi Act 1991 (Act 1 of 1992), to urge that under these provisions, precedence cannot be given to the Hindi version.

Ld. Amicus Curiae further submits that DERC came into existence through Notification of NCT of Delhi under Sec. 17 of the Electricity Regulatory Commissions Act, 1988 on 3<sup>rd</sup> March, 1999. The Electricity Regulatory Commission Act, 1998 was repealed by the Electricity Act 2003, and as per proviso to Sec. 82(1) of the Electricity Act 2003, the State Electricity Regulatory Commission was deemed to be the State Commission for the purpose of the Electricity Act 2003. As per Sec. 82, 85 and 90 of the Electricity Act 2003, the State Government entirely funds the Commission and also exercises control over the administrative functioning of the Commission which includes the power to appoint and remove its Chairperson and members. Further, Sec.91 empowers the State Government to appoint the Secretary, Officers and other employees of the Commission. The Commission is funded through the State Government as is evident from Sec. 102, 103 and 106 of the Act. A perusal of the Annual Report of DERC shows that DERC is accountable to the State Government for all receipts and it cannot utilize the same without the consent of the State Government. Further, Sec. 104 and 105 stipulate that the accounts and audit of the

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Commission shall be prepared as prescribed by the State Government in consultation with CAG and the annual report shall be forwarded by the Commission to the State Government. The annual report is required to be laid before the State Legislature as per Sec. 105(2). Sec. 108 and 180 evidences the role of the State Government and its power to make rules. He further submits that the Order dated 11-02-2011 passed by High Court of Delhi in the case of Nand Kishore Garg V/s Govt. of NCT of Delhi in WP(C) 4821/2010 does not evidence any lack of control of State Government on DERC. The said order is limited to quashing the communication dated 4-5-2010. The order does not have any bearing on the fact of extensive control exercised by the State Government on the affairs of DERC. He relied on GMR Infrastructure Ltd & Anr V/s National Highway Authority of India, 156(2009) DLT 257 (DB), wherein a Division Bench while striking down a communication issued under Sec. 33 of NHAI Act, 1988 for being ultra vires the statute, held that there cannot be any doubt that NHAI is extensively controlled administratively and financially by the Central Government. The Ld Counsel submitted that Sec. 108 of the Electricity Act 2003 was similar to Sec. 33 of the NHAI Act. He thus argued that the independence afforded to DERC in discharge of its statutory functions has no bearing on the fact that the Commission is extensively controlled administratively and financed by the State Government. He further submitted that the test of the extent of control under the Act is not deep and pervasive as laid down by the Courts for the purpose of Art. 12 of the Constitution of India. Further, DERC has also been notified as a public authority under Sec. 2 (h) of the Right to Information Act, 2005. He also referred to Reserve Bank of India V/s Peerless General Finance Ltd & Ors, (1987) 1 SCC 424, to urge that no part of the statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

10. It is relevant to refer to Sec. 2(m) (iv)(5) of the Act which reads as under:-

*"2(m) "Public functionary" means a person who is or has been at any time-*

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(i) to (iii) xxx xxx xxx

(iv) a Chairman, Vice Chairman or Managing Director or a Member of a Board of Directors (by whatever name they be called) in respect of-

(1) to (4) xxx xxx xxx xxx

(5) any Commission or body set up by the Government which is owned and controlled by it".

11. In order to determine whether DERC is a Commission set up by the government of NCT of Delhi and is owned and controlled by it, the provisions of the Electricity Act 2003 pertaining to the following aspects need to be considered :-

- (a) Setting up of the Commission,
- (b) Appointment, condition of service and removal of members,
- (c) Grants, funds, accounts and audit of the Commission, and
- (d) Functions of the Commission.

10. Sec. 2(4) of the Electricity Act 2003 defines the 'appropriate Commission' as under:-

"2. In this Act, unless the context otherwise requires,

(1) to (3) xxxx xxxx xxxx

(2) (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 ;

Appropriate Government as per Sec. 2(5) (b) of the Electricity Act 2003 means:-

"(5) "Appropriate Government" means, -

(a) The Central Government-

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(i) to (iv) xxxx xxxx

(b) in any other case, the State Government, having jurisdiction under this Act.”

Sec. 2(43) of the above Act defines member as under:-

*“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”.*

12. Regarding the constitution of State Commission, Sec. 82 (1) provides as under:-

*“82. (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission;*

*Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts.*

*Provided further that the Chairperson and other Members of the State Commission appointed before the commencement of this Act under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may on the recommendations of the Selection Committee constituted sub-section (1) of Section 85 be allowed to opt for the*

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*terms and conditions under this Act by the concerned State Government."*

There is no dispute about the fact that "Delhi Electricity Regulatory Commission" is a State Commission in terms of Sec. 82(1) of the Electricity Act 2003.

Section 82(2) to (5) of the Electricity Act 2003, provide for the nature and composition of the Commission as under:-

*"82 (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."*

*(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.<sup>44</sup>*

*(4) The State Commission shall consist of not more than three Members, including the Chairperson.*

*(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in section 85."*

13. From the above it is clear that it is the State Government which has not only set up the DERC but also specifies the place where the head office of the Commission shall be located and it also appoints the Chairperson and members of the Commission, though on the recommendation of the Selection Committee. The Selection Committee is constituted under Section 85 by the State Government. Mr. Balwani had submitted that composition of this Selection Committee is as follows: 1. Chairman (a person who has been a High Court Judge); 2. Member (Chief secretary of State) and 3. Member (Chairperson of CEA/ Chairman of CERC). Mr. Balwani had submitted that the State govt. virtually exercises

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control in getting selected its favourites as members by handpicking members of the selection committee. He had submitted that it can pick its own chairperson i.e. any High Court judge for which even consultation with the Chief Justice is not required. He argued that the Respondent no. 2 was handpicked and his membership of the DERC was manipulated by the Chief Minister, though he was the second choice of the selection panel. He has filed on record the minutes of the selection committee which had recommended the names of Shri. V Ramakrishna and Respondent no. 2 in the order of preference, unanimously. The recommendation of the selection committee was that only if Shri. V Ramakrishna declines the offer, the post may be offered to the second person in the panel.

14. Assuming for the sake of argument, that the requirement as given under Section 2 m (v) of the English version of the Delhi Lokayukta and Upalokayukta Act 1995 is to be met without the Hindi version prevailing, even then DERC would fulfill the criteria.

The Chief Minister as head of the State Govt. reversed the decision and recommendation of the Selection Committee, ruling that "we need to put in place a member of the DERC who is fully conversant about the electricity distribution system of Delhi and who will be appreciative of the government's need to tackle the problems in the power sector in a pro-active and professional manner. Shri S.R. Sethi would be the right person to become member of the DERC at this stage even if he does not have the full tenure of five years. We cannot afford to put in place arm-chair specialists divorced from reality, formal and judicious in approach, oblivious to the need for dynamic interaction for ensuring customer satisfaction."

15. It was urged by the Complainant that the above action of the State Govt. through the Chief Minister in overruling the Selection Committee by making unfavourable assessment of the person selected by the selection committee showed

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the extent of control exercised by the government. He urged that events have shown that the Respondent no. 2 was selected by the Chief Minister overruling the selection committee. Moreover, the conduct of the Respondents showed that they were both under the control of the Delhi Govt. and felt bound by the instructions given by the Delhi Govt. under section 108 of the DERC Act. He urged that their position before the High Court was that unless the advisory or order of the state government was quashed by a Competent court, they were bound to follow the same, despite the advice of the Solicitor General of India. The above events amply demonstrate the extent of control exercised by the state govt. over the Respondents as members of the DERC.

16. As per Sec. 89(2), the State government also prescribes the salary, allowances and other terms and conditions of service of the Chairperson and other members of the Commission. Sec. 89(2) reads as under:-

*"89 (2) The salary, allowances and other terms and conditions of service of the Chairperson and Members shall be such as may be prescribed by the Appropriate Government.*

*Provided that the salary, allowances and other terms and conditions of service of the Members, shall not be varied to their disadvantage after appointment."*

The power to suspend and remove any member of the Commission has also been vested in the State Commission on the grounds given in Sec. 90, which reads as under:-

*"90. (1) No Member shall be removed from office except in accordance with the provisions of this section.*

*(2) The Central Government, in the case of a Member of the Central Commission, and the State Government, in the case of a Member of the State Commission, may by order remove from office any Member, if he-*

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- (a) has been adjudged an insolvent;*
- b) has been convicted of an offence which, in the opinion of the Appropriate Government, involves moral turpitude;*
- (c) has become physically or mentally incapable of acting as a Member;*
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member;*
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest; or*
- (f) has been guilty of proved misbehaviour;*

*Provided that no Member shall be removed from his office on any ground specified in clauses (d), (e) and (f) unless the Chairperson of the Appellate Tribunal on a reference being made to him in this behalf by the Central Government, or the State Government, as the case may be, has, on an inquiry, held by him in accordance with such procedure as may be prescribed by the Central Government, reported that the Member ought on such ground or grounds to be removed.*

*(3) The Central Government or the State Government, as the case may be, may, in consultation with the Chairperson of the Appellate Tribunal suspend any Member of the Appropriate Commission in respect of whom a reference has been made to the Chairperson of the Appellate Tribunal, under sub-section (2) until the Central Government or the State Government, as the case may be, has passed orders on receipt of the report of the Chairperson of the Appellate Tribunal, on such reference :*

*Provided that nothing contained in this section shall apply to the Chairperson of the Appropriate Commission who, at the time of his appointment as such is a sitting Judge of the Supreme court or the chief Justice of a High Court or a Judge of a High Court."*

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17. Similarly, it is the State Government which appears the appointment of the Secretary, Officers and other employees of the Commission and specify their salaries, allowances and other terms and conditions of service. Sec. 91 stipulates in this regard as under:-

*"91. (1) The Appropriate Commission may appoint a Secretary to exercise such powers and perform such duties as may be specified.*

*(2) The Appropriate Commission may, with the approval of the Appropriate Government, specify the numbers, nature and categories of other officers and employees.*

*(3) The salaries and allowances payable to, and other terms and conditions of service of, the Secretary, officers and other employees shall be such as may be specified with the approval of the Appropriate Government.*

*(4) The Appropriate Commission may appoint consultants required to assist that Commission in the discharge of its functions on the terms and conditions as may be specified."*

18. State government also provides grants and loans to the Commission, as per Sec. 102 of the Electricity Act 2003, which provides;

*"102. The State Government may, after due appropriation made by Legislature of a State in this behalf, make to the State Commission grants and loans of such sums of money as that Government may consider necessary."*

Sec. 103 of the Electricity Act 2003 provides for constitution of The State Electricity Regulatory Commission Fund and the power of the State government to prescribe the manner of applying the fund as under:-

*"103. (1) There shall be constituted a Fund to be called the State Electricity Regulatory Commission fund and there shall be credited thereto-*

*(a) any grants and loans made to the State Commission by the State Government under Section 102;*

*(b) all fees received by the State Commission under this Act;*

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*(c) all sums received by the State Commission from such other sources as may be decided upon by the State Government.*

*(2) The Fund shall be applied for meeting –*

*(a) the salary, allowances and other remuneration of Chairperson, Members, Secretary, officers and other employees of the State Commission;*

*(b) the expenses of the State Commission in discharge of its function under Section 86; and*

*(c) the expenses on objects and for purposes authorized by this Act.*

*(3) The State Government may, in consultation with the Comptroller and Auditor-General of India, prescribe the manner of applying the Fund for meeting the expenses specified in clause (b) or clause (c) of sub-section (2)."*

19. Section 104 of the Electricity Act 2003 provides for control by the State government of the form in which accounts are to be maintained by the Commission, audit of the accounts of the Commission by the CAG and laying of the audit report before the State Legislature by the State government. Sec. 104 reads as under:-

*"104. (1) The State Commission shall maintain proper accounts and other relevant records and prepare annual statement of accounts in such forms as may be prescribed by the State Government in consultation with the Comptroller and Auditor-General of India.*

*(2) The Accounts of the State Commission shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the State Commission to the Comptroller and Auditor-General of India.*

*(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the*

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*accounts of the State Commission under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the State Commission.*

*(4) The accounts of the State Commission, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the State Government and that Government shall cause the same to be laid, as soon as may be after it is received, before the State Legislature."*

20. The State government also receives annual reports of the summary of activities of the Commission and lays it before the State legislature. Sec. 105 of the Electricity Act 2003 reads as under:-

*"105. (1) The State Commission shall prepare once every year in such form and at such time as may be prescribed, an annual report giving a summary of its activities during the previous year and copies of the report shall be forwarded to the State Government.*

*(2) A copy of the report received under sub-section (1) shall be laid, as soon as may be after it is received, before the State Legislature."*

The Commission also forwards its budget showing the estimated receipt and expenditure to the State government. In this regard, Sec. 106 provides as under:-

*"106. The Appropriate Commission shall prepare, in such form and at such time in each financial year as may be prescribed, its budget for the next financial year, showing the estimated receipts and expenditure of that Commission and forward the same to the Appropriate Government."*

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21. The State government also guides the Commission in matters of policy involving public interest as per Sec. 108 which lays down as under:-

*"108. (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.*

*(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."*

22. From the aforesaid provisions, it can be seen that so far as setting up of the Commission, appointment, prescribing salaries, allowances and other terms and conditions of service and removal of members of the Commission, and the grants, funds, accounts and audit of the Commission is concerned, it is the State government which exercises control over the Commission. Although the State Commission enjoys independence to perform its statutory functions under Sec. 86 of the Act, it does not per-se lead to a conclusion that the State government has no control over it. Even the State government officers and employees enjoy a certain amount of freedom in discharging their functions subject to the administrative hierarchy. The orders of Commission are subject to appeal under the statutory hierarchy provided under the Electricity Act 2003. Independence in the discharge of certain statutory functions does not take it out of the ownership and control of the Government. Government's role does not come to an end after setting up of the Commission. Government continues with the power to appoint and remove the members of the Commission, control their conditions of service, provide grants to the Commission, control the application of funds and monitor its budget and activities. Even in discharge of its functions, DERC is to be guided by the directions given by the State government in matters of policy involving public interest. The very fact that DERC had at the asking of Government of Delhi, given advice to Government of Delhi on the issue of tariff, indicates the de-facto control of the GNCTD over the DERC even in discharge of its functions. The very appointment of Respondent no. 1, who did not even have the time for full tenure, by the Chief Minister

reversing the decision of the Selection Committee amply demonstrates the control of the State Govt.

23. Ld. Counsel for the Respondent no. 2 had argued that even if the Respondents are considered to be public functionaries, falling within the jurisdiction of the Lokayukta, Sec. 168 bars this Forum, from proceeding against the Respondents for anything done or in good faith purporting to be done under the Electricity Act 2003, or the rules / regulations made there under. Ld. Amicus Curiae rightly countered the said plea by urging that the question as to whether not issuing the tariff order, advising the State government on the question of tariff and reversing the decision already taken on the representation of the Discoms forwarded by the C.M, amount to acts purported to be done in good faith or not, would be facts in issue, which can be appropriately decided only after evidence is led by both the parties thereon. Sec. 168 of the Electricity Act 2003, provides as under:-

*"168. No suit, prosecution or other proceeding shall lie against the Appropriate Government or Appellate Tribunal or the Appropriate Commission or any officer of Appropriate Government, or any Member, Officer or other employees of the Appellate Tribunal or any Members, officer or other employees of the Appropriate Commission or the assessing officer or any public servant for anything done or in good faith purporting to be done under this Act or the rules or regulations made there under."*

24. The question as to whether the action of the Respondents in not issuing the tariff order, advising State government on the question of tariff and reversing the earlier decision were purported to be done under the Electricity Act 2003 and, if so, whether the same were done in good faith or not are mixed questions of fact and law, which can be appropriately decided only after evidence is led on the said issues.
25. Further, the fact that the High Court of Delhi is seized of the non issuance of tariff in a Writ Petition or that the Electricity Act 2003 provides an appeal mechanism against the orders of the Commission, it would not affect the exercise of jurisdiction of this Forum. Proceedings under the Act are in addition to any other remedy under

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any other law. In this regard reference can be made to Sec. 18 of the Act, which provides as under:-

*“18. Provision of this Act to be in addition to any other law for the time being in force. – the provisions of this Act shall be in addition to the provisions of any other enactment or any rule or law under which any remedy by way of appeal, revision, review or in any other manner is available to a person making a complaint under this Act in respect of any action, and nothing in this Act shall limit or affect the right of such person to avail of such remedy.*

Besides, once it is established that DERC was a Commission set up by the State Govt. within the meaning of Section 2 (m)(v) of the Delhi Lokayukta and Upalokayukta Act 1995, then Respondents would be public functionaries and there would be jurisdiction to entertain a complaint against them for breach of norms of integrity and conduct expected of public functionaries.

26. Respondents relied on the decision of the Delhi High Court in **Nand Kishore Garg & Anr. v. Government of NCT of Delhi & Ors.** reported at 177 (2011) DLT 689:

The court observed as under, in para. 21:

*“In any event, under Section 108, the State government could have only issued policy direction, not pre-emptory directions. The Communication of the present nature made by the state government is absolutely unjustified, unwarranted and untenable and, accordingly, the same stands quashed.”*

The interpretation given by the High Court to the limited powers of intervention under Section 108 does not have any bearing on the fact of the extensive control exercised by the state government on the affairs of the DERC as noted hereinbefore

27. It is to be noted that like Section 108 of the 2003 Act, vide Section 33 of the National Highway Authority of India Act 1988, the Central government has the power to issue directions on questions of policy to the National Highway Authority of India, a statutory body. It was

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held in **GMR Infrastructure Ltd. v. N.H.A. of India 156 (2009) DLT 257(DB)** that the Union of India/Ministry's direction to NHAI to seek clarifications from the bidders and re-evaluation of the bids, does not involve any matter of policy as envisaged by section 33 of the NHAI Act and the same amounted to interference with NHAI's functioning as well as with its day to day business.

28. Despite making the above observation, the Court noted that the plea of learned Additional Solicitor General of India indeed shows the nature and extent of the statutorily mandated administrative control, the financial control and the power to divest certain highways vesting with the government of India.

The Court further noted in the GMR Infrastructure Ltd. case that in order to ensure that the affairs of the authority are conducted in the best interest of society, a general government control over the working of the authority is highly desirable.

29. Thus it is clear that assurance of autonomy to regulatory bodies in certain areas does not conflict with administrative and financial control over those bodies by the appropriate government and also their responsibility to ensure transparency and accountability.
30. Respondents have relied on and referred to the judgment of the High Court in **Nand Kishore Garg & Anr. v. Government of NCT of Delhi & Ors. MANU/DE/1953/2011**. The court observed:

*(para. 51) – "We have no ounce of doubt that the tariff order was not signed and hence no order was made and further the commission had not become functus officio."*

*(para. 52) – "The petitioner may be correct that had there been no interjection by the government of Delhi, which has been adversely commented upon, the tariff order may have been made or issued. This is different from stating that the tariff order was made or issued."*

Two issues have been settled by the decision of the High Court in the aforementioned case:

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1. No tariff order had been determined by the DERC at the time of interdiction by the State Government.
  2. Interdiction by the State Government to prohibit the DERC from issuing the tariff order was illegal.
31. The Court also observed in **Nand Kishore Garg & Anr. v. Government of NCT of Delhi & Ors.** MANU/DE/1953/2011;

(para. 72 )-

*"Keeping the statutory role ascribed to it and the jurisdiction determined by the Apex Court, the Commission has to function with responsibility, intellectual integrity, consistent objectivity and transparent functionalism, appreciating the essential nature of the regulatory body. We emphasize on intellectual integrity and transparent functionalism as we are totally dissatisfied with the way the Commission has proceeded with the manner of determination of tariff."*

Thus, the Court also emphasized that the DERC must function in a 'transparent' manner. It is to be noted that a state funded commission can be said to function in a transparent manner, only if it opens itself to scrutiny to Anti-Corruption Institutions, such as Lokayukta.

32. It is pertinent to note that DERC is a 'public authority' under the Right to Information Act, 2005. If DERC is under an obligation to share information regarding its functioning and finances under the Right to Information Act 2005, then it would be an anomaly if it were to not come within the ambit of Delhi Lokayukta and Upalokayukta Act 1995.

Learned Amicus Curiae has rightly argued that the object of the Right to Information Act 2005 and the Delhi Lokayukta and Upalokayukta Act 1995 is similar i.e. promotion of transparency and accountability and bringing probity in governance and functioning of state funded institutions.

In the context of the object sought to be achieved by the Delhi Lokayukta and Upalokayukta Act 1995, the question is not whether

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there is deep and pervasive control over DERC by the State Govt. but whether there is absence of control over it by the State Govt.

33. In the preceding paragraphs, it has been amply demonstrated that far from absence of control, there is sufficient degree of control by State Govt. over DERC. The fact that DERC has certain statutory functions to be exercised independently does not negate the control of State Govt over it.

Reference is also invited to the decision of the Division Bench of the Delhi High Court in LPA no. 160/09 (Office of Lokayukta v. Govt. of NCT of Delhi & Anr.). The Division Bench after consideration of the historical background, role and function of the Lokayukta and an in-depth analysis of various provisions of the statute, recognized the intention of the legislature in conferring powers, wider than that of any court of law on the Lokayukta, in the manner of conducting inquiries. The court observed that the object of the Act is to provide administrative justice to aggrieved citizens without being circumscribed by rigours of law. The Court further held that the provisions of the enactment being for the eradication of evil of corruption and maladministration, the same had to be liberally construed.

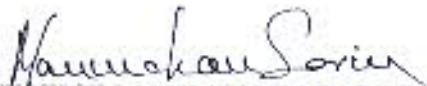
34. It is therefore held that Respondent no. 1 and Respondent no. 2 are 'Public Functionaries', being members of DERC and that DERC is a 'Commission' within the meaning of Section 2m (v) of the Delhi Lokayukta and Upalokayukta Act 1995. Accordingly, preliminary objections of Respondent no. 1 and Respondent no. 2 as to jurisdiction are dismissed.

35. Due to the demise of the Complainant, the prosecution of the complaint has become impractical. More importantly, in view of findings of the Division Bench of Delhi High Court in **Nand Kishore Garg & Anr. v. Government of NCT of Delhi & Ors.** MANU/DE/1953/2011, holding that "*the tariff order was not signed and hence no order was made*", the basic foundation or substratum of allegations in complaint disappears. In the circumstances,

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continuation of proceedings would be an exercise in futility. The inquiry proceedings are therefore closed.

  
(JUSTICE MANMOHAN SARIN)  
LOKAYUKTA

DELHI

Date: ~~27/10~~ 29/10 October, 2013

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