



MONTHLY NEWSLETTER

The Law Desk

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1 MULTIPLICITY OF SUITS AND MULTIPLICITY OF ISSUES-RESJUDICATA APPLIES TO BOTH RE-ITERATES THE APEX COURT - VARNALI PUROHIT

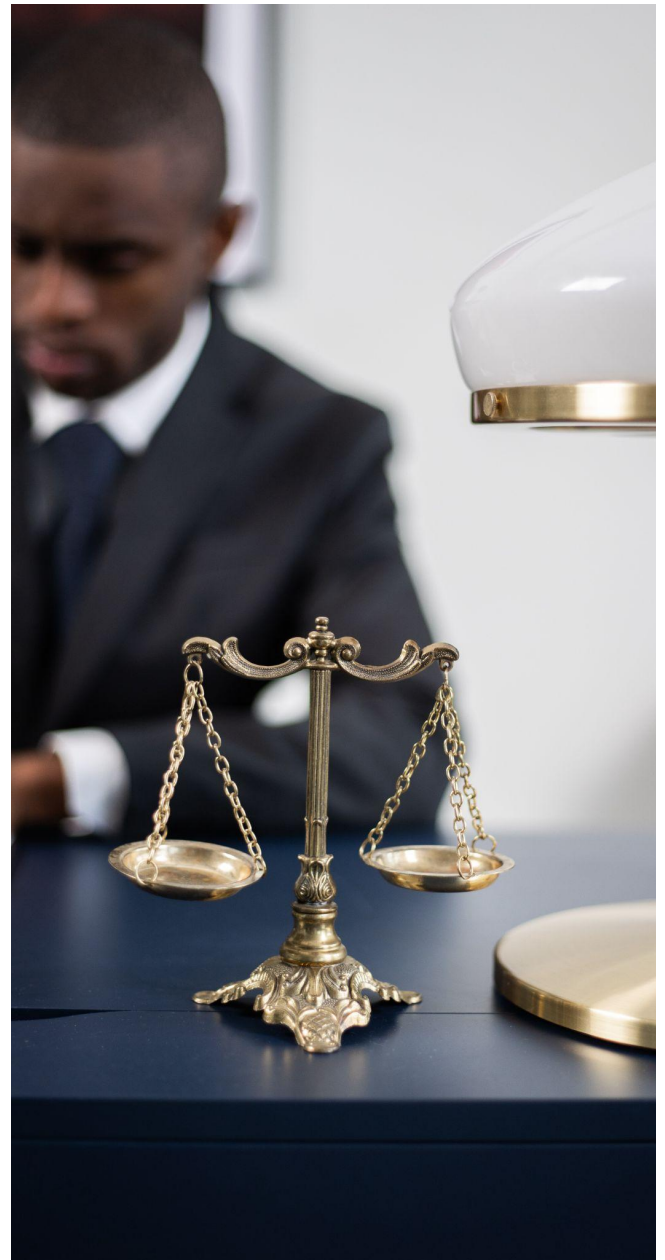
In the instant case, two issues arose which have been settled by the Hon'ble Supreme Court.

First one being that the doctrine of Res Judicata enshrined in section 11 of the Code of Civil Procedure, 1908 is applicable not only in separate subsequent proceedings but also at subsequent stage of the same proceedings.

Further the Apex Court also held merely because the person appearing on behalf of a Plaintiff is enrolled as an advocate, if the said person is General Power of Attorney (GPA for brevity) holder, then Section 32 Of the Advocates Act, 1961 does not create a bar for him/her to appear on behalf of a plaintiff.

Facts

In the present case, the question was whether the Plaintiff's (Appellant plaintiff Hereinafter) wife, who was the GPA Holder and got subsequently enrolled as an advocate during the partition suit, could represent the appellant plaintiff in the civil proceedings that followed.



The Trial Court and the Andhra Pradesh High Court held that there was no legal restriction on the plaintiff's wife acting on behalf of her husband as a GPA holder simply because she was an advocate, however she would appear in

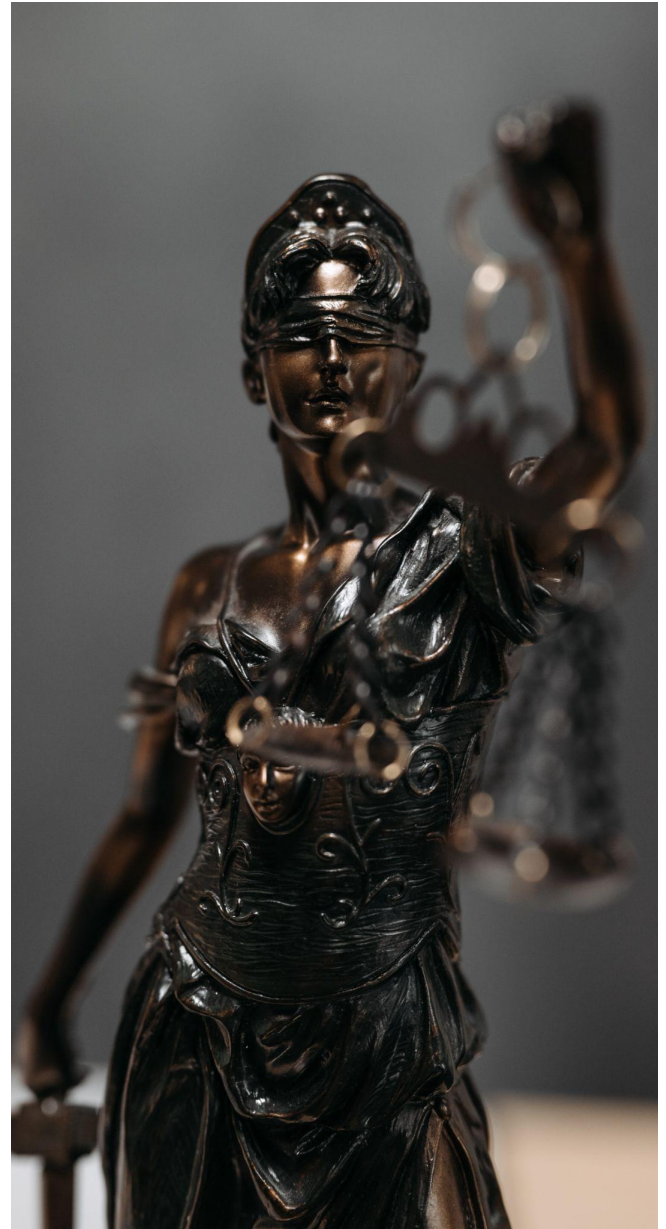
person as a power agent of her husband and not in her professional capacity as an advocate.

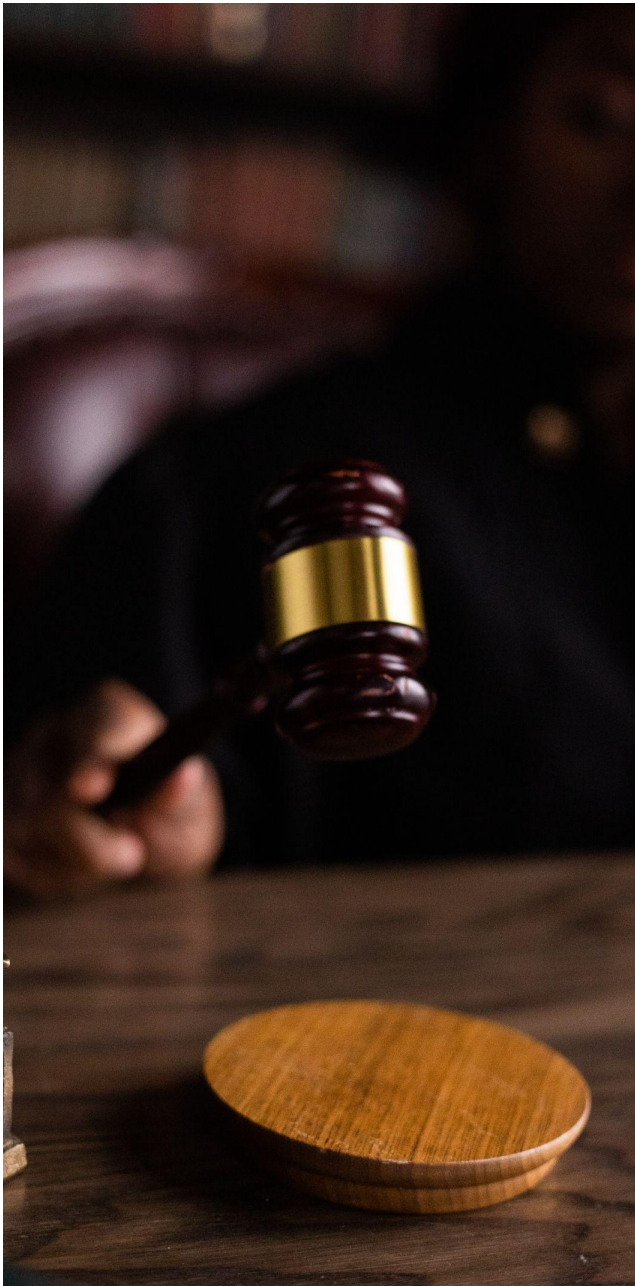
Subsequently a separate application was filed in the same suit wherein it was contended that the wife of the Plaintiff representing him as the GPA holder was not entitled to examine the witnesses. The Andhra Pradesh High Court ruled that the GPA holder could not plead or argue on behalf of his principal, but as she was a practicing advocate, she was given the liberty to do so in the instant case.

The matter reached the Apex Court wherein it was contended that issue in question relating to the appearance of wife of the Appellant Plaintiff as his GPA holder stood concluded in these proceedings by virtue of the previous orders of the High Court and such an issue could not have been re-opened for being barred by *Res Judicata*.

LEGAL PRINCIPLES INVOLVED

Before delving into the analysis of the instant case further it is important to state and discuss relevant provisions of the Advocates Act, 1961 (Act of 1961 for brevity) and the Code of Civil Procedure, 1908 (CPC, 1908 Hereinafter).





1. As per the Act of 1961, only the person enrolled as an advocate under the said Act is entitled to practice. However, section 32 of the Act carves an exception

to this Right of practice by the Advocates by permitting non-advocates to appear before the courts if the courts grant permission. The underlying principle for the same is that if the court is assured that a person appearing on behalf of someone is conversant with law, facts and can address and assist the court then such a person even if not enrolled as an Advocate, can make an appearance before the court.

2. Section 11 of CPC, 1908 empowers Courts to dismiss subsequent suits (under the principles of Res Judicata) if any matter directly and substantially in issue between the same parties has been decided in the former suit by a competent court. The underlying principle of the same is that once a matter has attained finality it must not be adjudicated again.

JUDGMENT

Hon'ble Supreme Court opined that *the principles of Res Judicata can be invoked not only in separate subsequent proceedings; they also get attracted in subsequent stages of the same proceedings. Once an order made during a proceeding becomes final, it would be binding at the subsequent stage of that proceeding.*

Furthermore, if the courts have while rendering any judgment have erred on the issue of jurisdiction, or have acted against the directions provided in any statute then despite the same being adjudicated upon will not act as Res Judicata.

In the instant case, the issue concerning the capacity of the wife of the Plaintiff (Appellant before the Supreme Court) to participate in the Court Proceedings as his GPA holder has been conclusively adjudicated by the High Court initially (when the issue was first contended before it) and hence cannot be agitated over again. Further, the Apex Court also mentioned that the High Court had, in the previous rounds of proceedings, cautiously balanced the requirements of law under CPC, 1908 and the Advocates Act, 1961 by specifically providing that wife of the appellant shall appear only as his GPA holder and not as an advocate.

ANALYSIS

The Apex Court rightly pointed out the fact that since the High Court had in its initial proceedings already directed the wife of the Appellant (Plaintiff in the Original suit) to act as a power agent and not in her professional capacity as an advocate. And once the said issue has been settled, adjudicating again on the issue as to whether the GPA holder of the

Appellant Plaintiff can be permitted to act like a counsel and cross-examine witnesses is going against the principles underpinning the doctrine of Res Judicata.



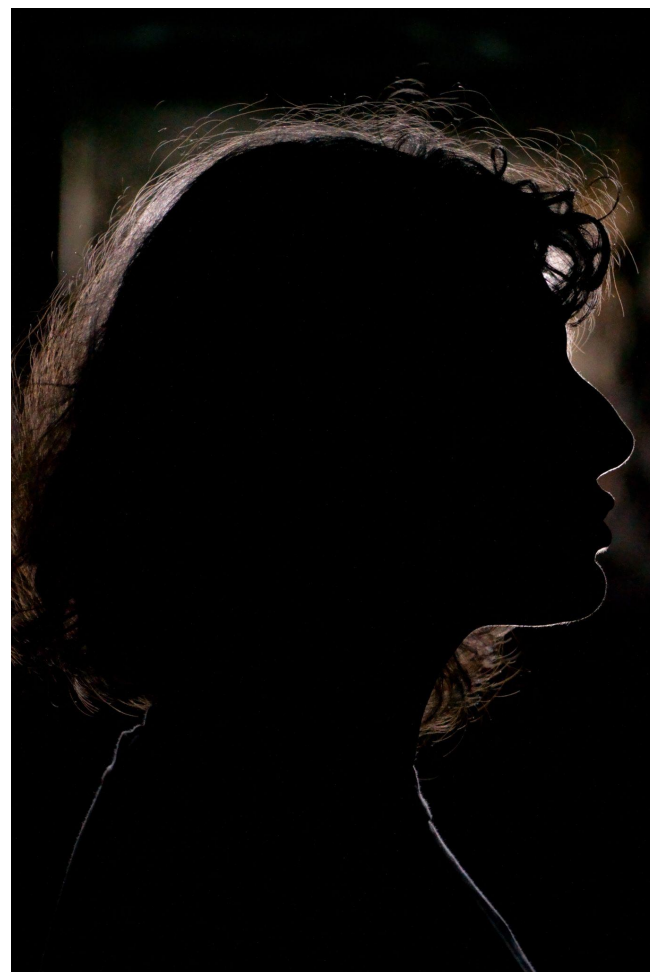


FACTS

An appeal was filed before the Hon'ble Apex Court under Article 136 of the Constitution against the judgment of the Jharkhand High Court which allowed appeal against conviction and sentence of life imprisonment passed by the Additional Sessions Judge, FTC-II Deoghar for offences under Sections 302, 376, 341 and 448 of the Indian Penal Code 1860.

The prosecution's case was that the deceased (victim) was raped and then burnt by the Respondent. The Sessions Court convicted the respondent and concluded that "the dying declaration was voluntary, credible, and did not suffer from any infirmities. It therefore held that the prosecution had proved its case beyond reasonable doubt, and convicted the respondent of offences punishable under Sections 302, 341, 376 and 448 of the IPC on the basis of the dying declaration."

The respondent preferred an appeal before the High Court of Jharkhand and the High Court set aside the judgment of the Sessions Court



and acquitted the respondent against which the appeal was filed^[1].

ISSUES

Whether the statement of the deceased is relevant under Section 32(1) of the Indian Evidence Act 1872?

[1] The State of Jharkhand vs Shailendra Kumar Rai @ Pandav Rai, Criminal Appeal No 1441 of 2022

Whether the prosecution has proved the charges against the respondent beyond reasonable doubt?



JUDGEMENT

The Court decided the two issues in favor of the victim and the appeal allowed.

The instant matter also brought forth the prevalence of the practice of 'Two-finger test' as the same was conducted by the Medical Board which examined the victim to determine whether she was habituated to sexual intercourse. The Court expressed concern over the continuance of the practice despite being deprecated by the Court time and again. The Court thus issued the following directions to the Union and State Governments-

- *“Ensure that the guidelines formulated by the Ministry of Health and Family Welfare are circulated to all government and private hospitals;*
- *Conduct workshops for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape;*
- *Review the curriculum in medical schools with a view to ensuring that the “two-finger test” or per vaginum examination is not prescribed as one of the procedures to be adopted while examining survivors of sexual assault and rape.”*

The court held that *“any person who conducts the “two-finger test” or per vaginum examination (while examining a person alleged to have been subjected to a sexual*

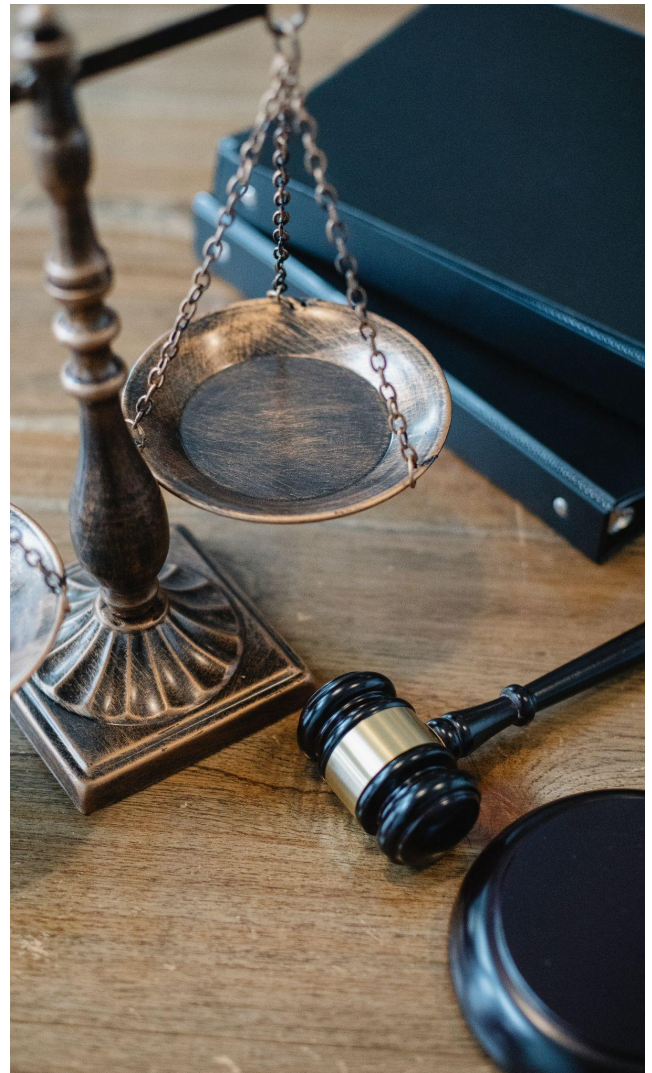
assault) in contravention of the directions of this Court shall be guilty of misconduct. “

Analysis

The Hon'ble Apex Court has held in *Lillu v. State of Haryana*^[2],

“13. ... rape survivors are entitled to legal recourse that does not retraumatise them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy.

14. Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.”

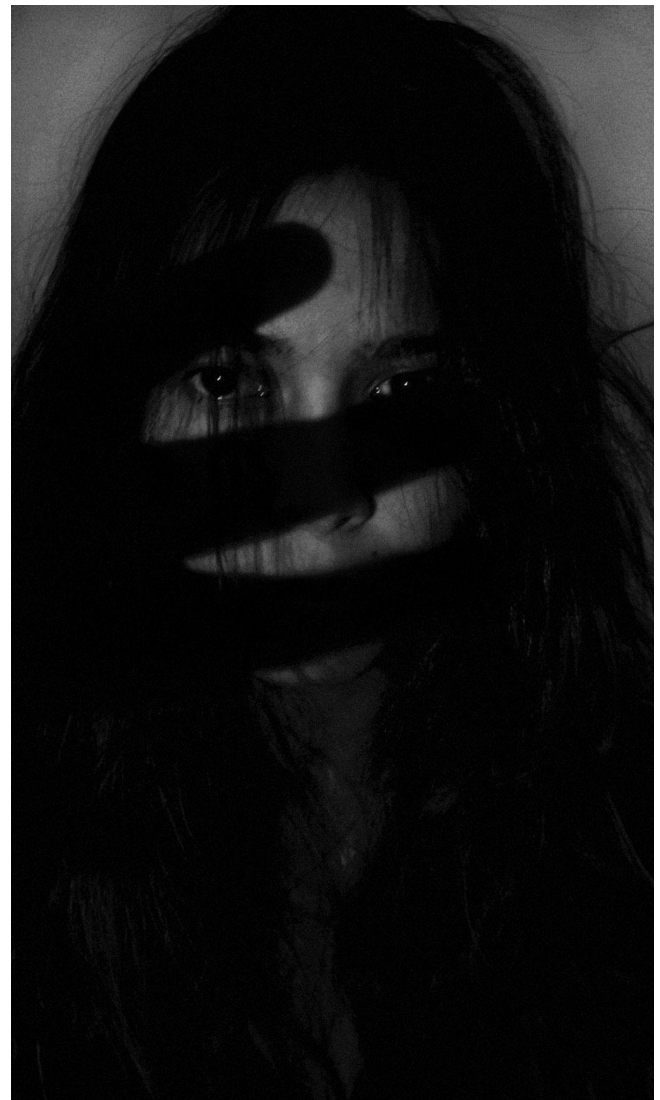


^[2] 2 (2013) 14 SCC 643

The Ministry of Health and Family Welfare has also issued guidelines which proscribe the application of the test in cases of sexual violence^[3]

“Per-Vaginum” examination commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated. The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.”

Despite this all, the practice continues even today as has been witnessed in the instant matter. It is astonishing that such a practice is still prevalent today, one that brings ignominy to the woman who has already suffered and even more traumatized. Strict adherence to the directions of the Supreme Court is the need of the hour to curb this practice.



^[3] Ministry of Health and Family Welfare, Government of India, “Medico-legal care for survivors / victims of sexual violence” (19 March 2014)

3 POWER TARIFF PAYABLE TO DISCOM CAN'T BE REVISED BY THE REGULATORS ON THE PRETEXT OF PRUDENCE CONTEXT - SUPREME COURT - DOLLY SHARMA

The Apex Court in the case of BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission while disposing of the Civil Appeal filed by the Appellants observed and held that it is not permissible to amend the tariff order under Section 64 of the Electricity Act, 2003 (in short "Act of 2003") during the "truing up" exercise.

BACKGROUND

The BSES Rajdhani Power Ltd. ("BRPL") and BSES Yamuna Power Ltd. ("BYPL") (hereinafter collectively referred as "BSES Discoms/Appellant"). The Appellants here are Distribution Licensee in terms of section 2(17) of the Act of 2003 who purchased 90% to 95% of power from the Central & State Generating Companies which is determined by the Central electricity Regulatory Commission (in short "CERC") and hence the Discoms has no control over the tariff to be paid. The BSES Discoms filed a Civil Appeal before the Apex Court challenging findings of the Appellate Tribunal for Electricity ("APTEL") in the common



Judgment dated 28.11.2014 ("Impugned Judgment") passed in Appeal No's. 61 & 62 of 2012 ("Tariff Appeals"), respectively filed by BRPL and BYPL.

In the Tariff Appeals, BSES Discoms had challenged disallowances in their respective Tariff Orders dated 26.08.2011 passed by Delhi Electricity Regulatory Commission ("DERC") for (a) determination of Aggregate Revenue

Requirements ("ARR") and Tariff for FY 2011-12 and (b) truing up of financials for FY 2008-09 and FY 2009-10.

ISSUES INVOLVED

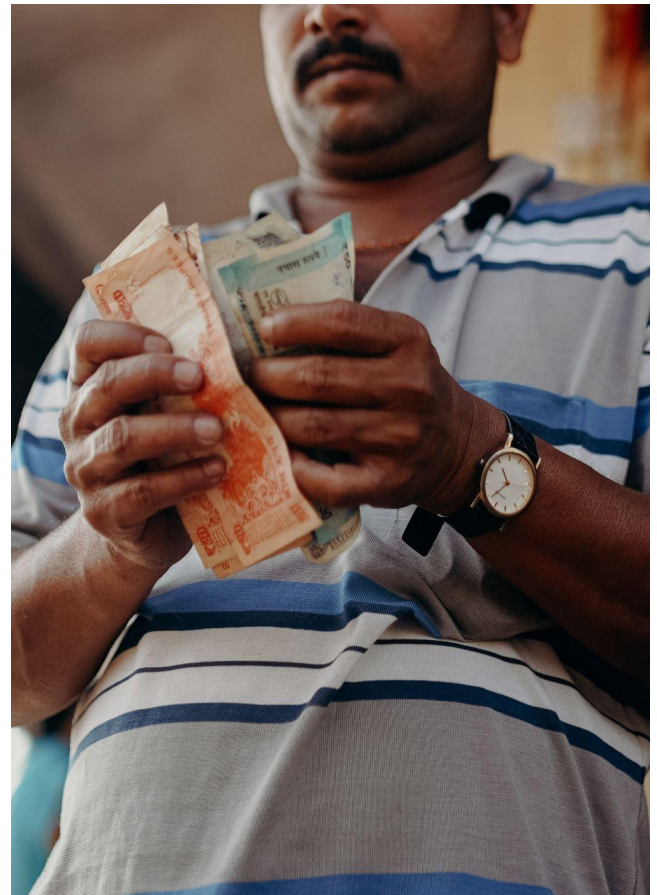
According to the Appellants the issues decided by the APTEL give rise to substantial questions of law.

- Change in methodology in computation of AT&C Losses.
- Change in methodology for computation of Depreciation.
- Disallowance of salary for FR/SR Structure
- Disallowance of interest incurred on Consumer Security Deposit retained by DPCL.
- Disallowance of Fringe Benefit Tax.
- Reduction in MUs in relation to Enforcement sale of the purpose of calculation of AT&C Losses (this issue deals with the theft/unauthorised use of electricity).

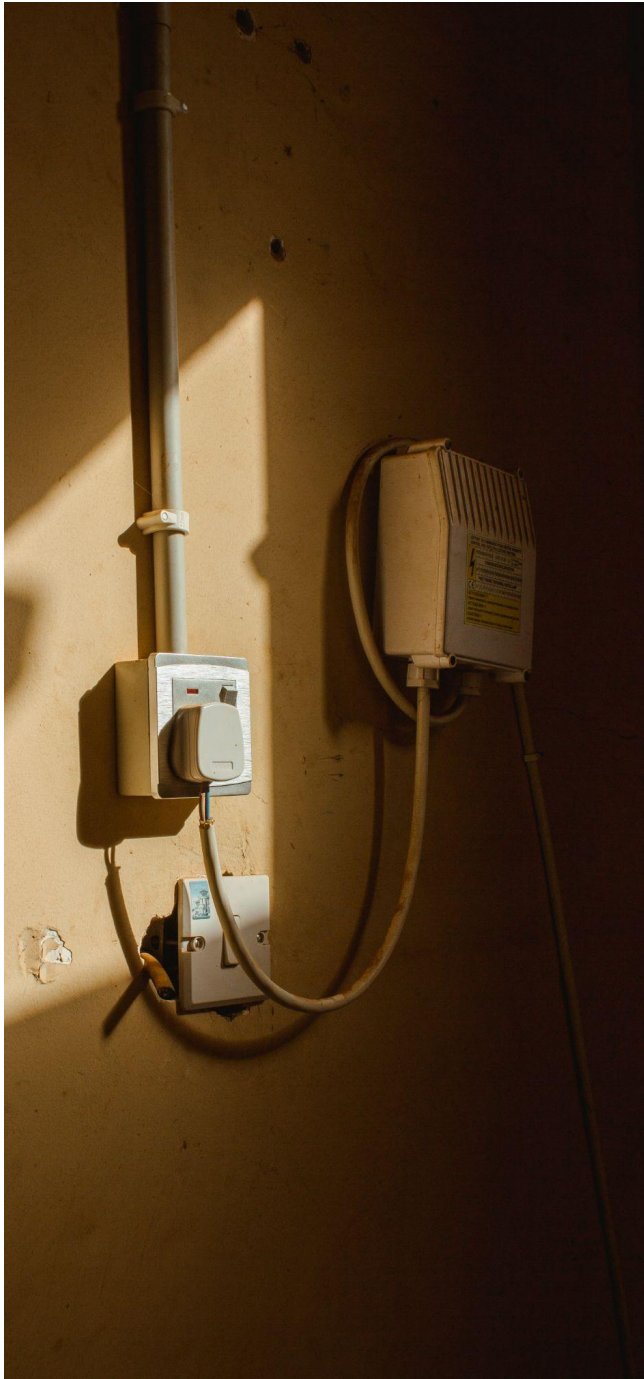
JUDGEMENT

The SC while allowing the Civil Appeals, laid down the tests for determining the substantial questions of law u/s 125 of Act of 2003 and held that Electricity Regulatory Commissions cannot re-open Tariff Orders during 'true-up' exercise

to change the methodology /principles of original tariff determination.



The Court stated that for determining whether a case involves substantial question of law: (a) Test is not merely importance of the question, but its importance to the case itself necessitating decision of the question.(b) the appropriate test for determining whether question of law raised in a case is substantial or not would be to see whether it directly and substantially affects rights of the parties.



If it is established that the decision is contrary to law or decision has failed to determine some material issue of law or if there is substantial error or defect in the decision of the case on merits, the court can interfere with the conclusion of the lower Court or Tribunal. Furthermore, the Stakes involved in a case are immaterial if the impact or effect of the question of law has a bearing on the parties.

That DERC performs a quasi-judicial function while determining tariff which is governed inter alia by Section 61 of Act of 2003 requiring safeguarding of all consumers' interest and at the same time recovering the cost of electricity in a reasonable manner, such that 'distribution and supply of electricity are conducted on commercial principles' which encourage and reward competition, efficiency, economic use of resources, good performance and optimum investments.

Since tariff and ARR are regulated, Discoms cannot recover anything more from its consumers than what is allowed by DERC. It is imperative to mention here that Tariff Order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority.

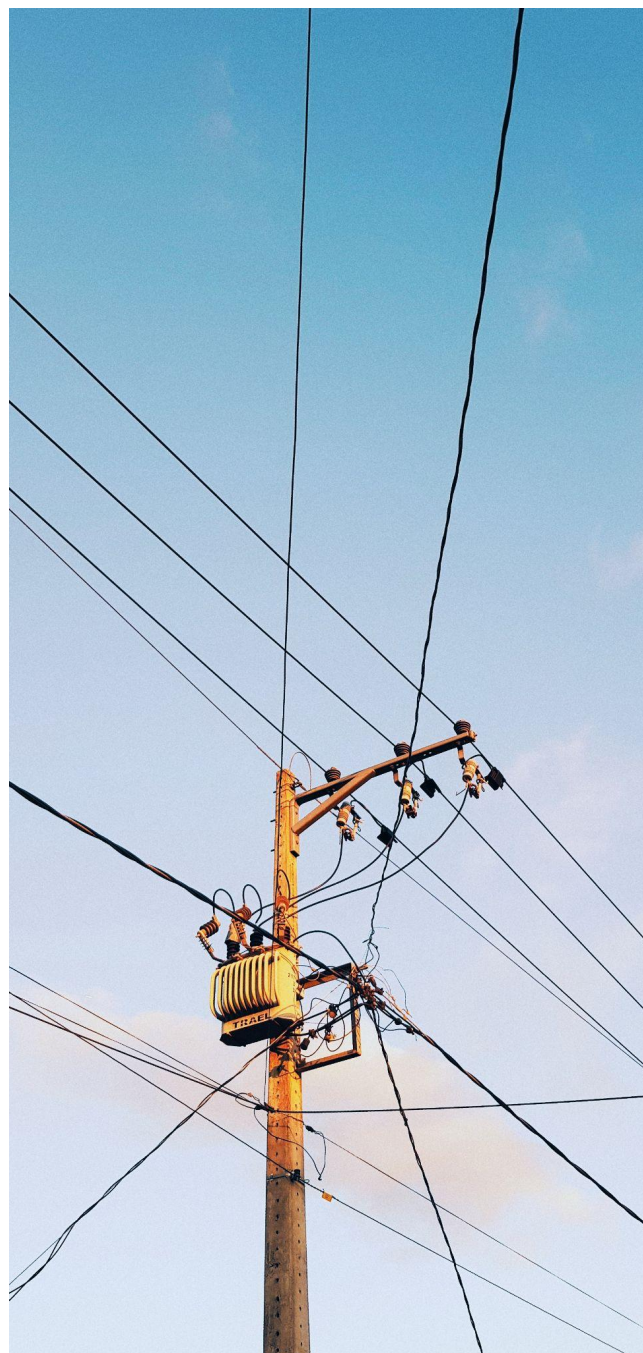
It was held that at the stage of 'truing up', the DERC cannot change the rules/methodology

used in the initial tariff determination by changing the basic principles, premises and issues involved in initial projection of ARR. Truing up exercise cannot be done to retrospectively change methodology/principles of tariff determination and re-open the original tariff determination order thereby setting tariff determination process to a naught at 'true-up' stage.

DERC cannot amend the Tariff Order in the guise of 'true-up' after the relevant financial year is over and same is replaced by a subsequent Tariff Order. This would amount to a retrospective revision of tariff when relevant period for such Tariff Order is already over. It is not permissible to amend Tariff Order made under Section 64 of Act of 2003 during the 'truing up' exercise.

CONCLUSION

The aforesaid observations of the Hon'ble Court have industry-wide implications since it not only bolsters and justifies the assertions of BSES Discoms that they are victims of unwarranted regulatory interdict, but will also help other Discoms as it clearly lays down the principles of tariff determination and truing up by State Electricity Regulatory Commissions.



4 LEGAL NEWS AND UPDATES

1. Centre constitutes tribunal to review ban on PFI, to be headed by Justice DK Sharma of Delhi High Court: The Popular Front of India (PFI), and its affiliated organizations have been subject to a ban under the strict guidelines of the Unlawful Activities (Prevention) Act, 1967, because of their alleged involvement in terrorism-related activities. The Union of India has established a tribunal to review the ban. The tribunal will review the factors contributing to the ban as well as the justifications for prohibiting the organization and its associates, and Justice Dinesh Kumar Sharma, a judge on the Delhi High Court, has been chosen by the Central Government as its presiding officer.

2. Former CJI KG Balakrishnan to head new Commission to examine if Dalit Christians, Dalit Muslims can retain Scheduled Caste status despite conversion: The Central government has established a three-person commission with a two-year term under the leadership of former Chief Justice of India (CJI) K.G. Balakrishnan to determine whether a new applicant for Scheduled Caste (SC) status can receive it. This applicant claims to have historically belonged to the SC community but

has converted to other religions for a variety of reasons.



3. CJI UU Lalit names Justice DY Chandrachud as successor, hands over letter of recommendation in presence of all Supreme Court judges.



4. President Murmu appoints Justice DY Chandrachud as next Chief Justice of India:

Justice DY Chandrachud has been named the 50th Chief Justice of India, the Central government announced today (CJI). After UU Lalit, the present Chief Justice of the Supreme

Court, leaves office on November 8, 2022, Justice Chandrachud will become the new Chief Justice. After serving as CJI for two years, Justice Chandrachud will step down on November 10, 2024.

5. The Central Government notified the elevation of Justice PB Varale as Chief Justice of Karnataka High Court.

6. Justice Ali Mohammad Magrey will be the Chief Justice of Jammu & Kashmir and Ladakh High Court.

7. Issue guidelines to minimize the consumption of paper for saving the environment: Delhi High Court: The use of A4 size paper with double-sided printing or typing was approved by the Delhi High Court on Monday for all sorts of pleadings included in petitions, affidavits, and applications. The High Court and all Delhi District Courts are now able to use A4 pages for memoranda of appeals, decisions, and verdicts. According to the Delhi High Court's Registrar General, the same would take effect on November 1, 2022.

8. Amend the Notaries Act and Rules to facilitate digitization: Delhi High Court tells Central government: The Notaries Act, 1952 and its Rules must be amended in accordance with the Delhi High Court's directive in order

to facilitate digitization. This was mandated by a bench of Chief Justice Satish Chandra Sharma and Justice Subramonium Prasad during a Public Interest Litigation (PIL) hearing on the subject of the digitization of notaries. According to the ruling, the Notaries Act of 1952 needs to be amended, and the central government must expand certain adjustments made under that law in order to account for digitization.

9. Competition Commission of India slaps fine of Rs 1337.76 crore on Google for anti-competitive practices on Android phones:

According to Section 27 of the Competition Act, 2002, the Competition Commission of India (CCI) fined Google Rs. 1337.76 crore for abusing its dominant position in the Android mobile device ecosystem. The internet giant has been granted a cease-and-desist order, and according to a statement released by the competition watchdog on Thursday, it has been instructed to comply with several actions in order to stop engaging in anti-competitive acts.



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