



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1197 OF 2010  
WITH  
NOTICE OF MOTION NO. 100 OF 2010

Multi Commodity Exchange of India Limited )  
a Company incorporated under the Companies Act, 1956 )  
having its registered office at Exchange Square, CTS No. )  
255, Suren Road, Andheri (East), Mumbai-400 093 )...Petitioner

versus

1. Central Electricity Regulatory Commission )  
having its office at 3<sup>rd</sup> and 4<sup>th</sup> floors, )  
Chanderlok Building 36, Janpath, New Delhi-110 001 )
2. Forward Markets Commission, having its office at )  
“Everest”, 3<sup>rd</sup> Floor, 100 Marine Drive, )  
Mumbai-400 002 )
3. Power Exchange of India Limited )  
having its offices at Exchange Plaza, Bandra-Kurla )  
Complex, Bandra (East), Mumbai-400 051 )
4. Indian Energy Exchange Limited, )  
having its offices at 10<sup>th</sup> floor, B-Wing, )  
Statement House, Barakhamba Road, )  
Connaught Place, New Delhi-110 001 )
5. Union of India, through Cabinet Secretary, )  
Rashtrapati Bhavan, New Delhi-110 004 )
6. Ministry of Law and Justice, through its Secretary, )  
4<sup>th</sup> Floor, A Wing, Shastri Bhavan, )  
New Delhi-110 001 )..Respondents

Mr. N.H. Seervai, Senior Advocate, with Mr. Chirag S. Balsara, Ms. Gulnar Mistry, Mr. Amit Vyas, Mr. Melvyn Fernandes and Mr. Varun Mamnia, instructed by M/s. Rajani Associates, for the petitioner.

Mr. Aspi Chinoy, Senior Advocate, with Mr. J.J. Bhatt, Senior Advocate and Mr. Arijit Maitra, instructed by Mr. Ratnakar Singh, for respondent No.1.

Mr. Janak Dwarkadas, Senior Advocate, with Dr. Poornima Advani, Mr. Himanshu Kode and Mr. Omprakash Jha, instructed by M/s. The Law Point, for respondent No.2.

Mr. Vikas Singh, Senior Advocate, with Mr. V.K. Ramabhadran, Ms. Amnita Narayan and Ms. Jyoti Maheshwari, instructed by M/s. Hemant Sahai Associates, for respondent No.3.

Ms. Cynthia Fernandes, instructed by M/s. RMG Law Associates, for respondent No.4.

Dr. G.R. Sharma with Mr. G. Hariharan, instructed by Dr. T.C. Kaushik, for respondent Nos. 5 and 6.

**WITH**  
**WRIT PETITION NO. 1604 OF 2009**  
**WITH**  
**NOTICE OF MOTION NO. 71 OF 2010**

Forward Markets Commission, having its office at )  
"Everest", 3<sup>rd</sup> Floor, 100 Marine Drive, )  
Mumbai-400 002 ).. Petitioner

versus

1. Central Electricity Regulatory Commission )  
having its office at 3<sup>rd</sup> and 4<sup>th</sup> floors, )  
Chanderlok Building 36, Janpath, New Delhi-110 001 )
2. Multi Commodity Exchange of India Limited )  
a Company incorporated under the Companies Act, 1956 )  
having its registered office at Exchange Square, CTS No.)  
255, Suren Road, Andheri (East), Mumbai-400 093 )
3. Power Exchange of India Limited )  
having its offices at Exchange Plaza, Bandra-Kurla )  
Complex, Bandra (East), Mumbai-400 051 )

4. Indian Energy Exchange Limited, )  
having its offices at Barakhamba Road, )  
Connaught Place, New Delhi-110 001 )
5. Union of India, through Cabinet Secretary, )  
Rashtrapati Bhavan, New Delhi-110 004 )
6. Ministry of Law and Justice, through its Secretary, )  
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Ms. Cynthia Fernandes, instructed by M/s. RMG Law Associates, for respondent No.4.

Dr. G.R. Sharma with Mr. G. Hariharan, instructed by Dr. T.C. Kaushik, for respondent Nos. 5 and 6.

**CORAM: P.B. MAJMUDAR &**  
**ANOOP V. MOHTA, JJ.**

**Judgment reserved on : 7<sup>th</sup> January, 2011**  
**Judgment pronounced on : 7<sup>th</sup> February, 2011**

**JUDGMENT: (Per P.B. Majmudar, J.)**

Two regulatory authorities functioning under two different enactments are locked horns and fighting tooth and nail against each other. The regulatory authority functioning under the Consumer Protection Act i.e. Forward Market Commission (FMC) claims sole right in the matter of forward contract whereas the authority functioning under the Electricity Act, 2003 i.e. Central Electricity Regulatory Commission (CERC) claims exclusive right in the matter of dealing with the trading activities in connection with the electricity including dealing in forward contract. In order to comprehend the controversy raised in these two writ petitions, a brief synoptical view of the facts in Writ Petition No.1197 of 2010 may be noticed:

2. Multi Commodity Exchange of India (MCX), petitioner herein and Respondent No.2 in Writ Petition No. 1604 of 2009, is a company incorporated under the provisions of the Companies Act, 1956 and a Commodity Exchange duly recognised by the Central Government/Forward Market Commission under the provisions of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as "FCRA"). The MCX has been formed and/or constituted for facilitating the on-line trading, clearing and settlement operations for commodity futures contracts across the country. The MCX started operations in November, 2003 with the object of establishing, operating, regulating, maintaining and managing facilities to enable the members of the exchange,

their authorized agents and constituents and other participants to transact, clear and settle the trade of future contracts in more than 103 commodities/goods including Electricity and Natural gas as notified by the Ministry of Consumer Affairs, Food and Public Distribution vide Gazette of India Notification dated 9<sup>th</sup> January, 2006 and as permitted by Forward Markets Commission.

3. The first respondent in both these petitions, Central Electricity Regulatory Commission ("CERC"), is established by the Central Government under sub-section (1) of Section 3 of the Electricity Regulatory Commissions Act, 1998 and functioning as such before the date of coming into force of the Electricity Act, 2003. Section 79 of the said 2003 Act specifies some of the specific functions to be discharged by the Central Commission.

4. The second respondent, Forward Market Commission (FMC) herein and the petitioner in Writ Petition No. 1604 of 2009, was established in 1953 for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under the provisions of the FCRA. It is a regulatory authority which is overseen by the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India.

5. Then third and fourth respondents are Power Exchanges recognised by the CERC.

6. The challenge in both these writ petitions is to the two orders dated 28<sup>th</sup> April, 2009 and 11<sup>th</sup> January, 2010 passed by the CERC as well as the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (hereinafter referred to as “the Regulations”) notified by the CERC on 20<sup>th</sup> January, 2010 under Section 66 read with Section 178 (2) (y) of the Electricity Act, 2003 purporting to exercise jurisdiction over forward contracts and futures in electricity.

7. On 19<sup>th</sup> March, 2005, MCX applied to the FMC seeking approval for launching electricity futures contracts. The FMC granted its approval on January 07, 2009 to the petitioner to commence trading in electricity futures at its exchange. MCX accordingly launched forward trading in electricity with effect from 8<sup>th</sup> January, 2009. The third respondent, Power Exchange of India Limited (PXIL) challenged the electricity futures contracts formulated by the petitioner by its application dated 18<sup>th</sup> December, 2008, before the CERC on the ground that (i) the CERC has the exclusive jurisdiction over regularising electricity including all forward contracts, futures, etc. (ii) after the enactment of the Electricity Act, 2003, the MCX and the FMC have been denuded of jurisdiction over electricity and (iii) the MCX had commenced launch of trading in electricity futures contracts without any approval of CERC and mere approval FMC had no efficacy in the eyes of law. MCX has raised an objection about the

maintainability of such an application on the ground that CERC has no jurisdiction to entertain such application as the FMC is a statutory regulatory authority functioning under the Forward Market Act and the same is not subjected to the jurisdiction of CERC. The Commission vide order dated 28<sup>th</sup> April, 2009, disposed of the said application by giving certain directions which read thus:

- (a) FMC exercises jurisdiction over the forward contracts in accordance with the provisions of the 1952 Act as they cannot be said to be inconsistent with those of the 2003 Act and the two statutes operate in independent fields.
- (b) Regulatory oversight to promote development of market in power is vested in this Commission as mandated under Section 66 of the 2003 Act and, therefore, the orders, guidelines issued by this Commission and the regulations framed shall be binding on all concerned.
- (c) Power Exchanges approved by this Commission need not approach FMC for any approval for the reasons that the contracts traded or to be traded outside the scope of Section 15 of the 1952 Act.
- (d) MCX and other commodity exchanges permitted trading of forward contracts by FMC at their platform shall be governed by the orders, guidelines, regulations and other prescriptions of this Commission since they are not inconsistent with the provisions of the 1952 Act."

8. Being aggrieved by the aforesaid order, MCX preferred a Review Petition being Review Petition No. 115 of 2009 seeking re-consideration and/or review and/or modification of certain observations and findings of the said order dated 28<sup>th</sup> April, 2009. The review petition has been decided by the Commission

on 11<sup>th</sup> January, 2010 by which the CERC suo motu reversed the original order and deleted crucial observations which expressly stated that there was no conflict between the provisions of the FCRA and the Electricity Act. The CERC held that the ground of review as stated in para 5 (c) stood rejected as not maintainable. By the said order, CERC also held that there was a conflict between the FCRA and the Electricity Act and in view of Sections 174 and 175 of the Electricity Act, the Electricity Act would have an overriding effect. Further, the Electricity Act was also a later central statute hence the provisions thereof would prevail. It also held that as there was a conflict between the provisions of the FCRA and the Electricity Act, the provisions of the Electricity Act would prevail. In the said order, CERC modified the last sentence of paragraph 54 and held thus : *“However, we make it clear that MCX cannot launch such products without the prior approval of this Commission in accordance with this Commission’s guidelines or the statutory regulations”*.

9. Pursuant to the above order, FMC filed the above petition being Writ Petition No. 1604 of 2009 challenging the validity of the order dated 28<sup>th</sup> April, 2009 as also the review order dated 11<sup>th</sup> January, 2010 passed by CERC . During the pendency of the petition, CERC issued a public notice dated 22<sup>nd</sup> September, 2009, enclosing draft power market regulations seeking comments/suggestions/objections on the said draft regulations. The petitioner recorded its comments/objections to the said draft regulations. The CERC



thereafter framed regulations viz. Central Electricity Regulatory Commission (Power Market) Regulations, 2010. The said Regulations are also subject matter of challenge in these writ petitions. The said Regulations were also tendered in the Court. Thereafter the matter has not been listed on the Board. Again, CERC came up with a press release dated 20<sup>th</sup> January, 2010 notifying the said regulations. The petitioners herein challenge the Regulations on the ground that the action of the first respondent being wrongful exercise of jurisdiction, arbitrary, capricious, mala fide as well as being discriminatory in nature and violative of the principles of Article 14 of the Constitution. The said Regulations also seek to deprive the petitioner from entering into forward contracts inspite of being authorised by the second respondent and notified by the Govt. of India as a recognized association.

10. According to MCX, so far as forward market in electricity is concerned, it is the regulatory authority under the Forward Market Act which alone is competent to deal with the same and CERC has no right to frame any regulation in this behalf. The Regulations as notified by CERC provides for forward and futures contracts relating to electricity to come under the purview of CERC, whereas prior to the notification of the Regulations, the forward and future contracts relating to electricity were under the purview of FMC pursuant to the notification dated 9<sup>th</sup> January, 2006 by the Union of India. The Regulations framed by CERC are also challenged on the said ground.

11. Initially after hearing the learned counsel appearing for the parties this Court reserved the matter for judgment. However, by an order dated 26<sup>th</sup> November, 2010, this Court subsequently issued notice to the added respondents by passing the following order.

“ The matters were heard and judgment was reserved. Subsequently, this Court while going through the papers came across the minutes of the meeting of Committee of Secretaries of various departments wherein the Cabinet Secretariat has ultimately given the following directions.

(i) There will be no trading in electricity futures for the time being. The decision to introduce electricity futures will be taken by the Central Government at an appropriate time with concurrence of FMC/DoCA and CERC/MoP.

(ii) In view of the decision at (i) above, CERC would omit the provisions relating to electricity derivatives from its Power Market Regulations.

(iii) In view of the deviation at (i) above, DoCA will de-notify the electricity under Section 15 of the FCRA.

(iv) DoLA will obtain the opinion of Attorney General on the question of regulatory jurisdiction on electricity derivatives in view of the provisions of the Electricity Act and FCRA. CERC/MoP and DoCA/FMC have already sent the relevant material representing their viewpoints to DoLA in this regard with reference to the meeting held on 25.5.10 in the Cabinet Secretariat.

2. Learned Senior Counsel Mr. Dwarkadas and Mr. Seervai state that the minutes dated 16<sup>th</sup> July, 2010 were not properly recorded to some extent. Mr. Chinoy, learned senior counsel appearing for CERC states that CERC is willing to abide by the decision taken in the meeting before the Cabinet Secretariat. Since the dispute is in connection with two

departments of the Union of India, we are of the opinion that the Union of India is required to be added as party respondents in these matters and their say is also required to be taken into consideration while deciding the issue involved in these matters. For the aforesaid purpose, we deem it proper to join (i) Union of India through Cabinet Secretariat, having its office at Rashtrapati Bhavan, New Delhi and (ii) Secretary, Ministry of Law and Justice, Govt. of India, Shastri Bhavan, New Delhi-110 001, as party respondent Nos. 5 and 6 respectively. Leave to amend the petition is granted. Amendment to be carried out forthwith.

3. Issue notice to the added respondents returnable on 10<sup>th</sup> December, 2010 at 3.00 p.m. before this Bench. We make it clear that since the petitioners and respondents have already addressed this Court and concluded their arguments, the Court is now required to hear only the added respondents in respect of the issue involved in the matter and regarding minutes dated 16<sup>th</sup> July, 2010 and decision taken during such meeting before the Cabinet Secretariat. As the matter is pending since long, the added respondents may point out their views on the next date of hearing.

4. Mr. Janak Dwarkadas, learned senior counsel appearing for FMC, states that a subsequent letter dated 13<sup>th</sup> September, 2010 has been issued to the Cabinet Secretary pointing out that the aforesaid minutes are not properly recorded.

5. The petitioner to take steps to serve the added respondents so that matters may not be required to be adjourned on the ground that they are not served”.

12. Mr. M.K. Sharma, Joint Secretary and Legal Adviser in the Department of Legal Affairs, Ministry of Law and Justice, New Delhi, for and on behalf of Law Secretary, Ministry of Law and Justice and also on behalf of Cabinet Secretary, Cabinet Secretariat, Rashtrapati Bhawan, New Delhi, initially filed an affidavit on 13<sup>th</sup> December, 2010 raising preliminary objections about

the maintainability of the petitions. The preliminary objections raised in paras

(i) to (v) of the said affidavit read thus:

“(i) The Respondent Nos. 5 and 6 strongly object to the maintainability of the present petition because the petitioners in Petition No. 1640 of 2009 have already pursued remedy (ies) with the Competent Body consisting of Secretaries to the Government of India from different Ministries.

(ii) I say that in the said constituted Committee, the petitioners hailing from the Ministry of Consumer Affairs and the other side from the Ministry of Power through their Secretaries not only participated in the proceedings on 16.07.2010 conducted by the said Committee but also deliberated in the said proceedings on the subject matter (s), in question, which proceedings ultimately culminated into certain decision(s) taken by the said High Power Committee. I say that the said Committee constituted and consisting of Secretaries of different Departments/Ministries have given their say and for their Department's views, which were duly considered with consensus opinion and accordingly, the said decisions. In such an event, I strongly object to the maintainability of the present petition on the ground that the petitioner cannot simply choose two different forums for the same cause of action or the cause of action touching the present subject matter(s). Accordingly the present petition deserves to be dismissed in limine.

(iii) I strongly object to the present petition on the ground (s) that the Forward Market Commission is born out of statute known as Forward Contracting (Regulation) Act, 1952 (FCRA) and likewise, CERC is born out of Electricity Act 2002. In other words, I say that both the statutory bodies have their birth/establishment out of the said statutes enacted by the Parliament and therefore, they are the Government of India statutory bodies. Being so, any of their issues in dispute need to be adjudicated upon by the said Committee meant for the purpose.

(iv) I say that the Hon'ble Supreme Court of India in case of ONGC vs. Collector of Central Excise reported as (2004) Vol. 6 SCC 437 and earlier reported as (1992) 104 CTR (SC) 31 has categorically laid down the law to the extent that dispute (s) between Department to Department of the Government or

Government of India Undertakings or Enterprises etc. need to be referred or such other matters which are the bone of contention, need to be resolved by said such Committee. I say that most of the Government of India Undertakings or Government of India Enterprises are born out of various statutes enacted by the Act of Parliament. As the present aforesaid two statutes are enacted by the Parliament and the dispute(s) are between two statutory bodies established under the said two Statutes, the same disputes between the such two statutory bodies are the disputes which need to be referred to for the purpose of adjudication or/conciliation to the said Committee consisting of the Secretaries of the various Departments/Ministries and headed by the Cabinet Secretary, Union of India.

(v) I say that the said two statutory bodies are within the scope of Government of India Undertaking or Government of India Enterprises as they are equally born/established out of the said two Statutes, as referred to hereinabove. In such an event and in view of the said ruling of the Supreme Court of India, the petition(s), in question, need to be dismissed with costs.”

13. On the next date of hearing i.e. 20<sup>th</sup> December, 2010, learned counsel appearing for respondent Nos. 5 and 6 pointed out that the Cabinet Secretary could not go through the affidavit filed by Mr. M.K. Sharma, Joint Secretary and Legal Advisor in the Department of Legal Affairs, Ministry of Law and Justice and that the Cabinet Secretary would like to file a detailed affidavit in this regard. This Court passed the following order on December 20, 2010.

“A bitter dispute is going on between two Regulatory Authorities functioning under the Union of India, in so far as one of the writ petition is concerned. Since we have issued notices to the respondent Nos. 5 and 6, today learned counsel appearing for respondent Nos. 5 and 6 states that because of the pre-occupation, the Cabinet Secretary could not go through the affidavit filed by Mr. M.K. Sharma, Joint

Secretary and Legal Advisor in the Department of Legal Affairs, Ministry of Law and Justice and therefore, he would like to file detailed affidavit in this regard. It is very unfortunate that between the two Departments of Union of India, there is a lack of communication and in our view, such happening is really disturbing. Learned counsel for respondent Nos. 5 and 6 states that Cabinet Secretary has called meeting of all the Secretaries to sort out the problem. However, since the arguments are already heard and with a view to see that the matter is not further delayed and since in view of the submission that the Cabinet Secretary has not gone through the reply filed by Mr. M.K. Sharma, we give last chance to respondent No. 5 to file appropriate reply if any before 04-01-2011, with an advance copy to the learned counsel for the petitioners and the respective respondents. No further adjournment will be given in this behalf. The petitioners or the other contesting respondents may file their respective rejoinder, if any, before the next date. Pleadings should be completed by both the sides before the next date.

2. Stand over to 07-01-2011. On the aforesaid date, the Court may consider to proceed with the judgment.”

14. A subsequent affidavit has been filed on behalf of respondent No.5 on 4<sup>th</sup> January, 2011. Before we proceed further, it is necessary to incorporate the averments made in the said affidavit and the same read as under:

“ I, V.P. Arora, working as Under Secretary in the Cabinet Secretariat, Rashtrapati Bhavan, New Delhi, aged about 57 years, do hereby state and submit on solemn affirmation as under:-

1. I say that I have perused relevant records. I say that I crave leave of this Hon’ble Court to further add, amend, alter or delete any of the contents of this affidavit. I say that I have been authorised to file this affidavit.

2. That this Hon’ble High Court had impleaded the Cabinet Secretary as Respondent No.5 in both the petitions.

3. That on the last date of hearing, Special Counsel for Union of India – Dr. G.R. Sharma had informed this Hon'ble High Court that the Cabinet Secretary will be calling a meeting of Secretaries of respective Departments/Ministries to amicably settle the issue at large in the present writ petitions and accordingly an attempt was made on 29.12.2010 by the Cabinet Secretary through the Secretary (Co-ordination) of the Cabinet Secretariat, New Delhi and had deliberations relating to the present issues.

4. That in the said meeting held on 29.12.2010, an attempt was made to settle and reconcile the issues which was not successful.

5. That apart from the two statutory bodies i.e. The Central Electricity Regulatory Commission and the Forward Markets Commission, other private bodies are also parties in the writ petition.

6. That I submit that as the attempt at the level of the Cabinet Secretariat has not been successful, it is respectfully prayed that this Hon'ble High Court may be pleased to decide the matter as may be deemed fit and proper in the facts and circumstances of the case.

7. I say that the contents contained in para 2 to 6 are true to my knowledge and belief"

15. On 7<sup>th</sup> January, 2011, this Court passed further order which reads thus:

" Initially these matters were heard at length and adjourned for pronouncing the judgment. However, subsequently, this Court felt that considering the important issue involved in the matter, it would be desirable to hear Union of India through Cabinet Secretary as well as Ministry of Law and Justice. On the last date, Counsel for Union of India appeared and tendered an affidavit filed by respondent Nos. 5 and 6. At his

instance the matter was adjourned till today. In the meanwhile, a further affidavit is filed by respondent No.5. To the affidavit filed by respondent No.5, replies have also been filed by the petitioners and respondent No.3.

2. It is submitted on behalf of the Union of India by the learned counsel Dr. Sharma that the Cabinet Secretary tried to settle the dispute but in spite of his best efforts he could not convince the concerned Secretaries for settling the same. It is requested that in view of the same, the matters may now be decided by this Court on merits. He also submitted that this matter cannot be sent to the High Power Committee as the issue involved in the matter can only be decided by the Court especially when there is a private party who has also filed the petition. It is the submission of all the learned counsel appearing in the matter that the issue referred to in the petitions cannot be sent to High Power Committee as per the judgment of the Supreme Court in the case of ONGC and the matter may be decided by this Court one way or the other on merits. The submissions of the learned counsel are accordingly recorded. Dr. Sharma further submits that he does not want to say anything further and it is for the Court to decide the rival claims in the matter between the petitioners and the concerned respondents. Now the arguments stand concluded. Judgment reserved”.

16. In the case of *Oil and Natural Gas Commission vs. CCE*<sup>1</sup> the Supreme Court held that in every case where a dispute is between government departments and/or between a Government department and a public sector undertaking, the matter should be referred to the High Power Committee established by the Government pursuant to an order of the Supreme Court dated 11<sup>th</sup> September, 1991 and that it is the duty of every court or tribunal to demand clearance from the Committee and that in the absence of clearance, the proceedings must not be proceeded with. In the case of Chief Conservator of

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1 1995 Supp (4) SCC 541



Forest vs. Collector<sup>1</sup> it has been held by the Supreme Court as under:

“Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all inter-departmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and Union of India, this Court in Oil and Natural Gas Commission vs. Collector of Central Excise (1992 Suppl. (2) SCC 432) called upon the Cabinet Secretary to handle such matters.

17. It is pointed out by the learned counsel appearing for the Union of India that the attempts made by the Cabinet Secretary to solve the dispute have been failed and in view of the argument of the learned counsel for the Union of India as well as learned counsel appearing for the parties in the matter, the issue in question is required to be decided only by this Court as the Regulations framed by CERC is under challenge at the instance of private party, this dispute cannot be sent to High Power Committee. In view of the said submission, this Court is now required to decide the controversy raised in these petitions on its own merits.

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1 2003 (3) SCC 742

18. We have heard the learned counsel appearing for the parties, examined the matter on merits and also considered the written submissions of the petitioners, CERC and PXIL.

19. Mr. Seervai, the learned counsel for the petitioner in Writ Petition No. 1197 of 2010, submits that the provisions of the FCRA and the Electricity Act deal with two separate and distinct subjects. The FCRA deals with futures markets and forward contracts in electricity being, in essence, financial contracts which provide for delivery but which may be and, in fact, are often settled by inter alia the payment of differences. The Electricity Act deals with the physical trading and delivery of electricity as a commodity for actual physical use and according to the learned counsel, the spheres of the two enactments are separate and distinct and there is no scope for overlap or conflict. The Electricity Act and the authorities established thereunder have been empowered to govern the various aspects of electricity, including generation, transmission, distribution and trading. Mr. Seervai submits that FCRA conceives of a specialized financial market, rather than a conventional physical one, which operates in the realm of price discovery and price risk management. The option of delivery is available only in respect of residual contracts which remain outstanding on the date of expiry of contract period, but most participants offset their contracts before the date of expiry by entering into opposite contract, thus obviating the need for any delivery. On the other hand, the Electricity Act deals with the actual physical

delivery and utilization of electricity. Mr. Seervai further submits that “trading” under the Electricity Act is limited to the physical market which is clear from the definition under sub-section 71 of Section 2 viz. Purchase of electricity for resale thereof. The Electricity Act provides for and facilitates physical trading in electricity between States i.e. Inter-State as well as within a given State i.e. intra-State. The FCRA deals with all future and forward contracts including electricity futures contracts. Mr. Seervai submits that FCRA has been enacted under Entry 48, List I of the Constitution whereas the Electricity Act is a statute enacted under Entry 38, List III. The FCRA creates a single statutory authority which regulates and controls all forward contracts, including futures, in all commodities notified by the Central Government across the territory of India. Under Section 15 of the FCRA, the Central Government is empowered to notify goods in respect of which forward contracts may be entered into only through associations recognised by the Central Government. Central Electricity Regulatory Commission (CERC) is concerned with inter State and not intra State electricity. He submits that there is no provision in the Electricity Act which can even remotely be said to refer to and/or deal with forward contracts and futures. The forward contract is different from ready delivery contract. In view thereof, therefore, there is no question of conflict between FCRA and Electricity Act. He submits that CERC and Forward Market Commission (FMC) are both regulatory authorities, governed by their respective special statutes, operating within their defined spheres, with distinct statutory functions, powers

and duties. The impugned Regulations make it clear that the CERC has misused its power as a regulatory authority in order to bring forward contracts in electricity within its jurisdiction. Section 178 (2) (y) read with Section 66 gives CERC the power to issue regulations. He submits that the Regulations notified by the CERC seek to deprive the petitioner, Multi Commodity Exchange of India Ltd. (MCX) from entering into forward contracts inspite of being authorised by FMC and notified by the Government of India as a recognized association. Mr. Seervai further submits that the CERC under the guise of the impugned regulations, usurped legislative power not conferred upon it. According to Mr. Seervai, the Electricity Act does not even remotely contemplate a situation pertaining to financial contracts and the CERC cannot, by the simple expedient of notifying subordinate legislation, traverse beyond the provisions of its parent statute. Mr. Seervai submits that the impugned Regulations are ex facie ultra vires and void ab initio. Indisputably, a subordinate legislation must be read in the context of the principal Act. It is well settled that the power exercised by a delegate must conform to the power granted by its parent statute, there cannot be any presumption in favour of exercise of power or assumption of such a power in the absence of specific enabling provision in the Electricity Act itself. Mr. Seervai further submits that there is not a single provision in the Electricity Act that allowed CERC to issue the impugned Regulations to regulate and control a market that it now purporting to do so. CERC is attempting to do so in the face of a special statute that exclusively bestows that authority on another

regulatory body. It is submitted that the FCRA is a statute enacted prior in time as that of the Electricity Act. The petitioner is a recognized Association under the FCRA and is governed by FMC. Mr. Seervai submits that in the original order, CERC has acknowledged that FCRA governs forward contracts in which rights and liabilities are transferable, unless exempted by the Central Government and that the provisions of the FCRA cover certain specific areas which are not covered under any of the provisions of the Electricity Act. It is submitted that in the subsequent review order, CERC suo motu rewrote and reversed the original order dated 28<sup>th</sup> April, 2009 and deleted crucial observations which expressly stated that there was no conflict between the provisions of the FCRA and the Electricity Act on the ground that these observations were not relevant or germane to the inquiry. Mr. Seervai submits that the impugned orders are without jurisdiction inasmuch as the provisions of Section 79 of the Electricity Act do not give CERC any authority to trespass into the jurisdiction of another unrelated statutory regulator and interpret the provisions of the FCRA. In view of the above, the Regulations, in so far as it pertain to futures contract in electricity, issued by the CERC pending disposal of the writ petition filed by FMC are liable to be quashed and set aside. Mr. Seervai submits that while the original order enunciated a harmonious construction of the two statutes, the review order placed them in a position of irreconcilable conflict, robbing the FMC entirely of its jurisdiction over forward contracts vis-a-vis-electricity. He submits that on a comparison of the two orders

it is abundantly clear that the review order is illegal, improper and bad in law, being no more than a motivated attempt to re-write the original order and allow the CERC to usurp power and authority not vested in it or conferred upon it under the Electricity Act. Mr. Seervai further submits that on perusal of the Regulations, it is clear that CERC has once again misused its power as a regulatory authority in order to bring forward contracts in electricity within its jurisdiction. Mr. Seervai finally submits that the futures contracts cannot be dealt with under the Electricity Act as it is in the domain of FCRA and that CERC has no jurisdiction to frame any Regulations in this behalf.

20. Mr. Aspi Chinoy, learned senior counsel appearing for CERC, submits that the Electricity Act, 2003 was enacted 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. The Act makes provisions for every aspect of the matter concerning electricity including, inter alia, referring for arbitration disputes involving generating companies or transmission licensees

or disputes between licensees and generating companies. The learned counsel further submits that the 2003 Act is a Special Act and is a complete Code with respect to all matters concerning electricity, including the development of a market in power. He submits that Section 66 read with Section 178 (2) (y) of the Act enables CERC to make regulations for the development of the market in power, including trading. This necessarily covers all aspects of the market and business/trading in power and would include both spot and forward contracts for the sale or purchase of electricity. Mr. Chinoy submits that the concept of trading necessarily covers all forms of business in electricity and includes both spot and forward contracts for sale and purchase of electricity. He submits that CERC is the Central Commission established by the Central Government under sub-section (1) of Section 3 of the Electricity Regulatory Commissions Act, 1998 and functioning as such before the date of coming into force of the Act of 2003 and as such is the Central Commission for the purpose of the Act in terms of Section 76 thereof. CERC exercises functions and powers as a regulator in the whole of India in regard to Electricity. Section 79 of the 2003 Act specifies some of the specific functions to be discharged by the CERC. Sub-section (j) of Section 79 of the Electricity Act deals with fixing the trading margin in the inter-State trading of electricity, if considered necessary. In the instant case, electricity is not a good which can be delivered. It is submitted that the CERC is empowered to take appropriate measures to regulate to regulate transactions in power as it thinks fit. Mr. Chinoy submits that the forward contracts in

electricity/for the delivery of electricity are necessarily matters concerning electricity and are within the ambit of Section 55 read with Section 178 (2) (y) of the Electricity Act. Mr. Chinoy further submits that if there is a conflict between Union and State Lists, the Union list will prevail but when Parliament has framed two enactments, then the object of the Act is to be seen. Mr. Chinoy submits that the contention that forward contracts for electricity are not within the purview of Electricity Act, is based on a misreading of the nature of forward contracts under the FCRA. The learned counsel submits that the forward contracts in electricity are necessarily contracts for the delivery of electricity. He submits that FMC cannot file any proceedings as the writ can only be filed by Union of India through the Ministry of Consumer Affairs. FMC is a department of the Ministry of Consumer Affairs and is not a body corporate. He submits that the Electricity Act, 2003 is an exhaustive code on all matters concerning electricity. He submits that Sections 173 and 174 of the Act of 2003 stipulate that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. He submits that the Electricity Act is a consolidating statute on all matters concerning electricity. Section 66 read with Section 178 (2) (y) gives CERC the power to legislate and frame the regulation. He submits that Article 246 of the Constitution can never apply to the instant case as that Article deals only with a conflict between entries pertaining to the Union and the States. He submits that the forward contracts in electricity/for the delivery of electricity are necessarily



matters concerning electricity and within the ambit of Section 66 read with Section 178 (2) (y) of the Act of 2003. He submits that all forward contracts are delivery contracts. It is not a financial contract. He submits that the impugned Regulations have been made by CERC under Section 66 read with Section 178 (2) (y) of the Act of 2003 which have been published under a public notice dated 22<sup>nd</sup> September, 2009. There is nothing unconstitutional in the regulations so as to consider the prayer of the petitioner for staying the operation of the regulations. He submits that the Regulations deal with the creation of a comprehensive market structure and enabling the transaction, execution and contracting of all types of possible products in the electricity markets. Section 66 of the Act of 2003 mandates the CERC to promote the development of a market in power. He submits that in the event of repugnancy between the regulations/prescriptions made by the FMC and CERC, the CERC's guidelines/prescriptions/regulations will prevail. He submits that the principle of *contemporaneo expositio* is inapplicable to the instant case as is clear from the judgments to which we shall refer later on. He submits that the Regulations have been made by the CERC in exercise of the powers vested in and functions laid down under the provisions of Section 66 read with Section 178 (2) (y) of the Act of 2003 and in compliance with the mandate of National Electricity Policy notified by the Central Government under Section 3 of the Electricity Act of 2003.

21. Mr. Dwarkadas, learned senior counsel appearing for the FMC, submits that the FMC is a Regulatory authority under the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India and has been set up in 1953 under the provisions of the FCRA. He submits that FMC has filed the above petition being Writ Petition No. 1604 of 2009 challenging the order dated 28<sup>th</sup> April, 2009 passed by CERC, modified order dated 11<sup>th</sup> January, 2010 passed by CERC and the Regulations notified by CERC on 20<sup>th</sup> January, 2010. Mr. Dwarkadas submits that by passing the impugned orders and the regulations, CERC has tried to usurp jurisdiction over forward and futures market which fall within the exclusive domain of FMC by virtue of the provisions contained in FCRA enacted by Parliament in exercise of the power vested in it by Entry 48 of List-1 in the Seventh Schedule of the Constitution of India which gives power to the Parliament to legislate on the subject of Stock Exchanges and Futures markets. Mr. Dwarkadas further submits that FMC vide its letter dated 7<sup>th</sup> January, 2009 explained to the CERC that under the FCRA and the notification issued by the Central Government, through the Ministry of Consumer Affairs, Food and Public Distribution on 9<sup>th</sup> January, 2006 under Section 15 of FCRA, the FMC alone has jurisdiction to regulate forward contracts in electricity. Spot market and Forward markets in goods can be regulated by two different regulators. Forward trading in electricity comes under the purview of FCRA and this does not take away the jurisdiction of CERC in respect of

regulating spot trading in electricity. He submits that the provisions of FCRA were analysed in great detail by the Supreme Court in the case of *Raghubir Dayal Jai Prakash and others vs. Union of India and another*<sup>1</sup> wherein the Supreme Court quoted the Expert Committee's report regarding functioning of forward trading. He submits that the impugned orders of the CERC and the regulations in so far as they relate to forward trading in electricity, therefore, deserve to be quashed. He submits that FMC had granted approval in January, 2009 to MCX, a national level Multi Commodity Exchange, for providing a platform to trade in electricity forward contracts, following the notification issued by the Central Government applying provisions of Section 15 of the FCRA whereby forward contracts in electricity could be traded only through the members of Associations/Exchange which have been granted recognition by the Central Government under Section 6 of the FCRA. MCX had been recognised by the Central Government vide notification dated 26-09-2003. He submits that in view of the provisions of FCRA and the notification issued by the Central Government, FMC alone has jurisdiction to regulate forward contracts in electricity. He submits that spot market and forward markets are two separate and distinct economic realms, the former is concerned with transactions involving payment and delivery within the period specified for ready delivery contracts whereas the latter is concerned with financial contracts mostly settled by payment of differences between the contract rate and the settlement rate. He submits that the futures market is included in List I of Schedule VII of the

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1 (1962) 3 SCR 547

Constitution at Entry No. 48 whereas the electricity is included in List III at entry 38. Spot markets in various commodities, agricultural or mineral are governed by the relevant statutes of the Central or State Lists. He submits that as per the allocation of Business Rules, the Ministry of Power has been allocated the administration of the Electricity Act as well as matters relating to CERC, whereas the Ministry of Consumer Affairs, Food and Public Distribution has the control of future trading and FMC. Forward Trading in Electricity comes under the purview of FCRA and this does not take away the jurisdiction of the CERC in respect of regulating spot trading in electricity. He submits that during the pendency of the petition, the CERC gave permission on 31<sup>st</sup> August, 2009 to PXIL and IEXL which are power exchanges set up under the Electricity Act, 2003 to facilitate spot trading in electricity, to organise month ahead contracts in electricity which are essentially forward contracts in the nature of Non Transferable Specific Delivery Contracts. Neither PXIL nor IEXL have been granted certificate of registration by the FMC under Section 14A nor recognition has been granted by the Central Government under Section 6 of the FCRA. Mr. Dwarkadas further submits that the Regulations notified by the CERC also suffer from other fatal flaws. It speak of derivatives which include options which are specifically prohibited by the FCRA. Mr. Dwarkadas further submits that the inclusion of associations and exchanges recognized or registered by FMC in the list of market participants covered by the Regulations is misconceived because their operations cannot be classified into interstate or intrastate. Mr. Dwarkadas

submits that the Regulations cannot be allowed to undo the notification under Section 15 of FCRA issued in January, 2006 introducing forward trading in electricity through recognized exchanges since the law vests no authority in CERC to countermand orders issued by the Government under a statutory provision of FCRA. Mr. Dwarkadas further submits that CERC cannot be said to be an expert body in the field of regulation of forward trading and risk management. He submits that the regulations have sought to define terms like “derivative contracts”, “exchange” which means a power exchange and other exchanges, “option position”, “other exchange” for the first time. According to Mr. Dwarkadas, these definitions do not find their place in the parent Act which is basically structured to cater to the physical aspect of the market like generation of electricity, licensing, transmission, distribution of electricity, tariff, etc. Mr. Dwarkadas submits that since there is no concept of exchange trading in the Electricity Act, the regulations cannot provide such a structure along with fees. Mr. Dwarkadas submits that the Regulation in so far as they relate to forward contracts deserve to be struck down because (i) they seek to restrict the forward market only to inter-state which is neither feasible nor permissible because there has to be one national market in which all traders need to have access to the trading platform; (ii) they extend the scope of the CERC jurisdiction beyond the power exchanges to embrace “other exchanges” already recognised by the Govt. under the statutory provisions of FCRA; (iii) they encroach on the Central Government’s role in deciding when forward trading is

to be introduced in a particular commodity. The regulations provide for deferment of introduction of power trading to a future date to be decided by the CERC; (iv) they bring options within the ambit of CERC when they have been specifically prohibited under Section 19 of FCRA and (v) the regulations lack the necessary vires because they seem to derive their authority from an unsustainable broad interpretation of Section 66 of the Electricity Act which provides for the “development of a market (including trading) in power’ by the appropriate Commissions. Mr. Dwarkadas submits that the interpretation of the Section and the word “trading” is not supported by either the text or the context contained in the Electricity Act. Sub-section 71 of Section 2 defines trading which means purchase of electricity for resale. This definition has no relevance for forward trading in which “short” and “long” positions are taken by traders based on their perceptions of future trends of prices and these are not connected with a prior purchase or a necessary resale. In view of the aforesaid, Mr. Dwarkadas submits that the two orders of the CERC and the Regulations in so far as they relate to forward trading in electricity deserve to be quashed.

22. Mr. Vikas Singh, the learned counsel appearing for respondent No. 3 in Writ Petition No. 1197 of 2010, has submitted that the petitions are not maintainable. The learned counsel has raised preliminary objection to the maintainability of the writ petitions. He submits that under Section 179 of the Electricity Act, a regulation framed by the CERC is supposed to be laid before the

Parliament and after the passage of 30 days of such laying, the regulation is deemed to be approved by the Parliament and as per the Constitution Bench judgment of the Supreme Court in the case of *PTC India Ltd. vs. Central Electricity Regulatory Commission, through Secretary*<sup>1</sup> the Regulations framed by the CERC are subordinate legislation and are thus law under Article 13 of the Constitution of India wherein law has been defined to include any ordinance, order, bye-law, rules and regulation etc. He submits that the FCRA in its preamble states that the same only deals with certain types of forward contracts whereas the Electricity Act which is also by the same legislature i.e. The Union Parliament in the preamble states that it is 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 permitting competition therein protecting interest of consumers and supply of electricity to all areas, rationalization of electricity, tariff” etc. He, therefore, submits that the Electricity Act deals with the entire subject of electricity and hence after the passing of the said Act any other Central Act which could have been dealing with the subject of electricity is denuded of its power to deal with the same. He submits that Section 3 of the Electricity Act which finds mention in Section 66 of the Electricity Act provides that the Central Government shall from time to time prepare the national electricity policy. The learned counsel further submits that the notification issued by the Ministry of Consumer Affairs in January, 2006 was contrary to the express provisions of the

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1 AIR 2010 SC 1338

Electricity Act which Act was an Act to consolidate the laws relating to electricity. The learned Counsel further submits that on a plain reading of Article 246 of the Constitution of India, it is clear that the Constitution does not create any primacy of Acts of the Union Parliament under List-1 vis-a-vis other Acts of the Union Parliament under List-III. The said Article is only dealing with a conflict between the legislation by the Union Parliament as against the legislation by the State Legislature. The learned counsel further submits that after the enactment of the Electricity Act, the Central Government was denuded of its power to issue a notification under Section 15 of the FCRA as the entire subject of electricity was taken over in the Electricity Act including trading in electricity and development of the market of power in electricity including trading. It is the further submission of the learned counsel that the sale and purchase of electricity in power exchanges is a relatively new development all over the world and hence the Union Parliament in its wisdom thought it appropriate to confer the power on the various appropriate commissions to decide as to when the market of electricity becomes right for being traded on power exchanges. Lastly he submits that futures in electricity, whether to be permitted or not and if to be permitted under what conditions is to be determined by the appropriate commission as a part of its mandate to develop the market of power including trading of electricity as specified that is by regulations as per the National Electricity Policy formulated by the Central Government under Section 3 of the Electricity Act. He submits that the writ



petitions, being devoid of any merits, be rejected with costs.

23. It may be noted that against the interim order dated 15<sup>th</sup> February, 2010, passed in Writ Petition No. 1197 of 2010 and order dated 23<sup>rd</sup> March, 2010 in Notice of Motion No. 100 of 2010, by which a Division Bench of this Court refused to grant reliefs, the MCX preferred a Special Leave Petitions in the Supreme Court of India wherein MCX raised the following principal questions viz. (i) whether forward contract in electricity would be governed by the FCRA in view of the notification dated 9<sup>th</sup> January, 2006 expressly notifying electricity as a commodity under the FCRA?, (ii) whether the CERC would have jurisdiction for framing regulations in respect of forward contracts in electricity despite no specific power having been given to the CERC under the Electricity Act, 2003? (iii) whether the CERC, which is a statutory commission, can interfere with or regulate the working of another statutory commission i.e. FMC ? and (iv) whether in view of the fact that the provisions of the FCRA can be harmonized with the provisions of the Central Electricity Regulation Act, CERC is justified in giving direction in respect of members of the FMC. The said Special Leave Petitions came to be dismissed on 5<sup>th</sup> April, 2010. The order of the Supreme Court of India reads thus:

“Heard learned counsel for the parties. Since the High Court is seized of the main case as well as interim matter, we do not find any justification to entertain the petitioner’s prayer. The Special Leave petition is dismissed.

We have no doubt that the High Court will take note of

the urgency involved in the matter and pass appropriate order at an early date in accordance with law.”

24. This Court is, therefore, now required to consider as to whether the forward contract is exclusively within the jurisdiction of FMC in view of the notification dated 9<sup>th</sup> January, 2006 and whether CERC can deal with futures contract in the matter of electricity in view of the Regulations framed by it. At this stage, the decision of the Supreme Court in the case of *Sarwan Singh v. Kasturi Lal*<sup>1</sup> is required to be taken into consideration. The Supreme Court in para of the said judgment held as under.

“When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration”

25. It is required to be noted that both the regulatory authorities are functioning under different statutes and, therefore, neither of them can be said to be subject to the jurisdiction of other. In our view, CERC has no jurisdiction to give any direction in connection with the decision taken by FMC under the FCRA. As long as the statutory enactment prevails today, the subject matter of forward contract is regulated under the provisions of FCRA in connection with the delivery of goods and the payment of a price therefor.

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1 (1977) 1 SCC 750

26. Before we delve into the matter, it is necessary to have the factual matrix in connection with the enactment of the FCRA and Electricity Act, 2003. The FCRA was enacted on 26<sup>th</sup> December, 1952, providing for regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. Sub-section (b) of Section 2 defines “Commission” means the Forward Markets Commission established under Section 3. The forward contract means a contract for the delivery of goods and which is not a ready delivery contract. Section 2 (i) deals with “ready delivery contract” and the same reads as under:

“ (i) “ready delivery contract” means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the official Gazette, specify in respect of any goods, the period under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise.”

Chapter II of FCRA deals with Forward Market Commission. Insofar as spot/physical market is concerned, the seller delivers the good immediately and the buyer pays for it on the spot. No conditions are attached to the delivery. The main characteristic of spot market is that there is immediate delivery of the electricity. In the case of forward markets, considering the volatility of the prices of the spot market, buyers and sellers often agree to the price, quality and quantity of goods in advance of actual delivery and the goods are delivered on a

future date. These contracts will have a mode and timing of payments as also penalties, if any, for failure to deliver goods or failure to make payment. Instead of having one to one relationship, many buyers and sellers may develop a market for trading in advance of the delivery. In the electricity sector, long term power purchase agreements are examples of forward contracts between generators and distribution companies. The forward contracts can be traded in a secondary market. The traders, including those neither producing nor consuming the good, can participate in this market. Parties not willing to take physical delivery can also participate in this market by selling their forward contracts. Such markets where contracts are not backed by physical delivery are futures markets. On the face of it, this market consists of speculators. However, the market benefits from the presence of these speculators as they increase depth and liquidity. It is required to be stated that the future prices for electricity traded on the exchanges make the demand and supply to adjust themselves to the signals they provide and converge onto the spot market prices. In addition thereto, futures markets consist of stakeholders who are beyond the physical market stakeholders and also participate in the price discovery process making it a highly participative process for providing a better future indication on electricity prices allowing all users of electricity to hedge the risks in electricity prices through the financial instrument called 'electricity futures' without fear of providing or taking delivery.

27. By virtue of Section 15 of the FCRA, forward contracts can be entered into only in respect of goods notified by the Central Government in the Official Gazette and the said contracts in respect of the goods so notified are mandatorily required to be entered into only by and between the members of a recognised association or with any such member, failing which a forward contract even in respect of notified goods would be illegal. On a notification being issued in respect of any of the goods by the Central Government, the forward contracts in respect thereof would be regulated under the provisions of FCRA by the regulatory authority being the FCA constituted under Section 3 of the FCRA. Under Section 15 of the FCRA, the Central Government issued a notification dated 9<sup>th</sup> January, 2006, whereby electricity was specified as goods in respect of which forward contracts could be entered into. Pursuant thereto, forward contracts relating to electricity came to be traded on the platform of MCX. Under Section 4 of the FCRA, FMC is required, inter alia, to keep forward markets under observation and to take such action as necessary in relation to forward markets, collect and publish information regarding trading conditions and to undertake inspection of the accounts and other documents of a recognized association viz. Associations recognized by the Central Government under Section 6, which associations may enter into contracts with respect to specified goods or classes of goods. The FCRA is a complete code which provides for setting up the FMC which advises the Central Government in the matter of forward trading in commodities, registers every association which organizes

forward trading and approves Rules and Bye laws of Associations organizing forward trading. FCRA provides for recognition of associations by the Central Government (Ministry of Consumer Affairs, Food and Public Distribution) which may provide for trading in futures in notified commodities. FMC is also responsible for keeping forward market under observation, inspection of associations or their members and working for improving the organization of markets. FCRA provides emergency powers to the FMC and the Central Government to suspend trading, suspend members of Association and even to supersede the governing body of the Exchange. FCRA also provides for penalties for contravention of provisions contained in the Act.

28. The Electricity Act, 2003 came to be enacted on 26<sup>th</sup> May, 2003 and the same provided for the establishment of CERC to regulate, inter alia, the price of electricity. The Electricity Act also provides for intra-state transactions in contracts relating to electricity by State Electricity Regulatory Commissions. Under the ambit of the Electricity Act, the regulatory authorities are the CERC and the State Electricity Regulatory Commissions. Pursuant to Section 14 (c), each of these authorities has the power to grant a license to any person to undertake trading in electricity as an electricity trader. Part V of the Electricity Act provides for both inter-state and intra-state transmission of electricity; the CERC governs inter-state transmission, while a State Regulatory Commission would govern intra-state transmission within a given time. Section 66

conceives of a developmental role for the appropriate commission and provides that it shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified. The mandate of the Central Commission under Section 79 is to, inter alia, regulate inter state transmission of electricity, determine tariff and issue licenses to electricity traders with respect to inter-State transmission and to fix trading margins in inter-State trading. Under Section 86, the State Commissions are required to, inter alia, facilitate intra-State transmission of electricity, issue licenses to electricity traders with respect to their operations in the State and fix the trading margin in the intra-State trading of electricity.

29. On a conjoint reading of the provisions of FCRA and the Electricity Act, it is axiomatic that the Electricity Act and the authorities established thereunder have been empowered to govern the various aspects of electricity including generation, transmission, distribution and trading. It is also clear that the FMC established under the provisions of FCRA is empowered to govern all futures and forward contracts including electricity futures contracts (being a notified good under FCRA). To put it pithily, FMC and the CERC have been established under separate special statutes.

30. The following definitions in the Regulations may also be noticed.

“(f) “Contract” means a contract for or relating to the purchase or sale of electricity or its related products”

(k) “Day ahead contract” means contracts where transaction occurs on day (T) and delivery of power is on the next day (T + 1) and which are scheduled by Regional Load Despatch Centre or National Load Despatch Centre.

(o) “Intraday contract”/contingency contract” means contracts where transaction occurs on day (T) after the closure of day ahead transaction window and the delivery of power is on the same day (T) or next day (T + 1) and which are scheduled by Regional Load Despatch Centre or National Load Despatch Centre.

(jj) “Term ahead market” means a market where physical delivery of electricity occurs on a date more than one day ( T + 2) or more) ahead from the date of transaction (T) and the contracts in such market can be transacted weekly/monthly/yearly or more in advance and have a defined delivery period on expiry of contract and is scheduled by Regional Load Despatch Centre or National Load Despatch Centre.”

31. At this stage, the authorities cited at the Bar by the learned counsel appearing for the parties may be noticed succinctly.

32. FCRA is enacted under Entry 48 of List I to the Seventh Schedule of the Constitution of India i.e. The Union List. Mr. Seervai has relied upon the judgment of the Supreme Court in the case of *Waverly Jute Mills vs. Raymon and Co. (India) Private Ltd.*<sup>1</sup> to submit that FCRA has been enacted under Entry 48 is unquestionable. In this case, the Supreme Court was required to resolve a conflict between Entry 48 of List I and Entry 26 of List II. Entry 48 deals with stock exchanges and futures markets whereas Entry 26 deals with trade and commerce. The Supreme Court held that trade and commerce would in their

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1 1963 (3) SCR 209



ordinary and accepted sense include forward contracts, but in a case where there are two entries, one general in its character and the other specific, the former must be construed as excluding the latter. It is settled that while reading entries in legislative lists, the widest possible construction according to the ordinary meaning of the words in the entry must be put upon them. The words employed in the entry are to be interpreted so as to include all ancillary and subsidiary matters. Mr. Seervai has also relied upon the judgment of the Supreme Court in the case of *Calcutta Gas Company (Proprietary) Ltd. vs. The State of West Bengal and others*<sup>1</sup>. In this case the Supreme Court was faced with interpreting the scope of Entries 24 (Industry) and 25 (Gas and Gas Works) in List II of Schedule VII. The appellants in the said case contended that Entry 24 was to be given the widest meaning, so as to include the industry aspect of gas and gas works, leaving other aspects to be covered by Entry 25. The Supreme Court held that if industry in Entry 24 is interpreted to include gas and gas works, entry 25 may become redundant thereby depriving of all its contents. He submits that every attempt should be made to harmonize the apparently conflicting entries not only of different lists but also of the same lists and to reject that construction which will rob one of the entries of its entire content and make it nugatory. Mr. Seervai further submitted that the Entry in the Union List-I cannot be said to be useless lumber. In the said case the Supreme Court has held thus:

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1 1962 Supp (3) SCR 1

“..The rule of construction adopted by that decision for the purpose of harmonizing the two apparently conflicting entries in the two Lists would equally apply to an apparent conflict between two entries in the same List. Patanjali Sastri, J. as he then was, held in *State of Bombay v. Narothamdas Jethabai* (1951 S.C.R 51) that the words “administration of justice” and “Constitution and organization of all Courts” in item One of List II of the Seventh Schedule to the Government of India Act, 1935 must be understood in a restricted sense excluding from their scope “jurisdiction and powers of courts” specifically dealt with in item 2 of List II. In the words of the learned Judge, if such a construction was not given “the wider construction of entry 1 would deprive entry 2 of all its content and reduce it to useless lumber.” This rule of construction has not been dissented from in any of the subsequent decisions of this Court. It may, therefore, be taken as a well settled rule of construction that every attempt should be made to harmonize the apparently conflicting entries not only of different lists but also of the same list and to reject that construction which will rob one of the entries of its entire content and make it nugatory.”

33. The legislative entries are useful guides, valuable in ascertaining the scope and ambit of a given statute and may be used to resolve conflicts, real or perceived, between the statutes so as to give effect to both. In order to buttress the submission to the effect that the legislative entries are important guides to interpretation, Mr. Seervai has relied upon the observation of the Supreme Court in the case *ITC Ltd. vs. Agricultural Produce Market Committee and others*<sup>1</sup> wherein the Supreme Court has held as under:

“107. The starting point in any controversy dealing with apparently conflicting legislative jurisdictions is to see whether the conflict can be fairly reconciled by reading the entries to which the legislations are referable, together and ‘by interpreting

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1 (2002) 9 SCC 232

and, where necessary, modifying the language of the one by that of the other'. It is only when such resolution is not possible that the courts should be called upon to decide the question of legislative competence. This principle has been stressed in a number of cases by the Privy Council, the Federal Court and more recently by this Court."

In view of the above, the learned counsel for the petitioner submits that considering the scheme of the two statutes and the entries under which they have been enacted, the contention of the learned counsel for the first respondent ought not to be countenanced.

34. Mr. Seervai submitted that the well-settled principle of interpretation of the legislative entries in the three lists of the Seventh Schedule has been enunciated in the judgment of the Supreme Court in the case of ITC Ltd. (supra). The relevant observation of the Supreme Court is as under.

" 93. That the legislative power of Parliament in certain areas is paramount under the Constitution is not in dispute. ...The supremacy of Parliament has been provided for by the non obstante clause in Article 246 (1) and the words "subject to" in Articles 246 (2) and (3). Therefore, under Article 246 (1) if any of the entries in the three lists overlap, the entry in List 1 will prevail. Additionally some of the entries in the State List have been made expressly subject to the power of Parliament to legislate either under List I or under List III. Entries in the lists of the Seventh Schedule either under List I or under List III. Entries in the lists of the Seventh Schedule have been liberally interpreted, nevertheless courts have been wary of upsetting this balance by a process of interpretation so as to deprive any entry of its content and reduce it to useless lumber.."

35. The Supreme Court in the case of *Greater Bombay Co-op. Bank Ltd. vs. United Yarn Tex (P) Ltd. and others*<sup>1</sup> has reiterated the aforesaid observations in the case of ITC Ltd. (supra)

36. Mr. Seervai submitted that the principle of repugnancy applied only in the case of conflict between legislation enacted by the Union and a State under entries in List III of the Constitution and cannot be applied to conflicts between List I and List III at all, simply because Article 254 refers only to the matters enumerated in the concurrent list. Mr. Seervai has relied upon the judgment of the Supreme Court in the case of *Ashoka Marketing Ltd. And another vs. Punjab National Bank and others*<sup>2</sup>. In the said case the Supreme Court was required to decide whether the provisions of the Delhi Rent Control Act, 1958 prevailed over those of the Public Premises (Eviction) Act, 1971. In the said case the Supreme Court resorted to the general principles of statutory interpretation for the purpose of resolving the conflict between the statutes only due to the fact that both enactments fell under the said legislative list. In the said case the Supreme Court observed as under.

“49. This means that both the statutes, viz. The Public Premises Act and the Rent Control Act, have been enacted by the same legislature, Parliament, in exercise of the legislative powers in respect of the matters enumerated in the

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1 (2007) 6 SCC 236

2 (1990) 4 SCC 406

Concurrent List. We are, therefore, unable to accept the contention of the learned Additional Solicitor General that the Public Premises Act, having been enacted by Parliament in exercise of legislative powers in respect of matters enumerated in the Union List would ipso facto override the provisions of the Rent Control Act enacted in exercise of the legislative powers in respect of matters enumerated in the concurrent list”.

Mr. Seervai submits that on the strength of the provisions of Article 246, the FCRA ought to prevail over the provisions of the Electricity Act.

37. Mr. Seervai then submitted that contemporaneous documents throwing light on the construction of a statute are admissible external aids to the interpretation of such a statute. In support of his submission, the learned counsel has relied upon the decision of the Supreme Court in the case of *Desh Bandhu Gupta and Co. and others vs. Delhi Stock Exchange Association Ltd.*<sup>1</sup> In the said case, certain documents issued by the Government simultaneously with a notification under the Securities Contracts (Regulation) Act, 1956 were used as a contemporanea exposition of the notification. In both cases, using executive documents as a contemporaneous exposition of the Government's intention, the Supreme Court referred to Crawford on Statutory Construction and stated that contemporaneous construction placed by administrative or executive officers charged with executing a statute should be shown to be clearly wrong before it is overturned and that while it is not controlling, it is, nevertheless, entitled to considerable weight and is highly persuasive. The Supreme Court in the case of

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<sup>1</sup> (1979) 4 SCC 565

*K.P. Varghese vs. Income-tax Officer, Ernakulam and another*<sup>1</sup> followed the above dictum and held that this rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous.

38. Mr. Seervai submits that there is a clear distinction between physical markets and forward markets. The forward markets are markets which are, in a sense, conceptual as they deal with financial aspects of trading in a commodity. The physical markets are engaged in the actual transmission and distribution of electricity. The forward markets and futures provide an opportunity for hedging and stabilising the commodity market against sharp price rises that may occur. While forward contracts provide for delivery of the commodity at a future date, less than 1 per cent of trades of futures contracts actually culminate in delivery. In short, a future contract is not a merchandising contract but a financial contract entered into for the purpose of hedging price risk, and the sheer volume transacted in the futures markets makes it evident that the physical commodity is not, in fact, changing hands. There exists no urgent necessity for the CERC to exercise jurisdiction over the markets in electricity forward trading. What is required is, nay, a regulatory body such as the FMC with expertise in forward contracts to oversee the futures markets in electricity. Mr. Seervai submits that the two Acts operate in different fields and there is no conflict between the

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<sup>1</sup> (1981) 4 SCC 173

provisions thereof. Even if there is any conflict between the provisions of the two Acts, the FCRA having enacted under Entry 48 of List I of Schedule VII will prevail over the Electricity Act which has been enacted under Entry 38 of List III i.e. Concurrent List. Mr. Seervai submits that in fact even where the CERC attempted to impose disqualifications in the context of grant of trading licence, the Supreme Court found against the legality, propriety and constitutionality of the delegated legislation. In support of his contention, the learned counsel has placed reliance on the judgment of the Supreme Court in the case of *Global Energy Ltd. and another vs. Central Electricity Regulatory Commission*<sup>1</sup>

39. Controverting the submissions of Mr. Seervai, Mr. Aspi Chinoy submits that the Electricity Act is a consolidating Act and repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. Mr. Chinoy submitted that the Electricity Act, 2003 is an exhaustive Code on all matters concerning electricity. The learned counsel has placed reliance of the Supreme Court in the case of PTC India Ltd. (supra). The Supreme Court held thus:

“ 9. The 2003 Act is enacted as an exhaustive Code on all matters concerning electricity. It provides for “unbundling” of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (“1998 Act”) mandated the establishment of an independent and transparent regulatory mechanism, and has

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1 AIR 2009 SC 3194

entrusted wide ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc .

The learned Counsel submits that the Act, therefore, makes provisions for every aspect of the matter concerning electricity including, inter alia, referring for arbitration disputes involving generating companies or transmission licenses. Sections 173 and 174 of the Act of 2003 stipulate that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Mr. Chinoy has relied upon the judgment of the Supreme Court in the case of *Gujarat Urja Vikas Nigam Limited vs. Essar Power Ltd.*<sup>1</sup> wherein the Supreme Court has held thus:

“57. In our opinion, the principle laid down in Section 174 of the Electricity Act, 2003 is the principal or primary whereas the principle laid down in Section 175 is the accessory or subordinate to the principal. Hence, Section 174 will prevail over Section 175 in matters where there is any conflict (but no further).

58. In our opinion, Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilising the samanjasya, badha and gunapradhana principles of Mimansa. This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act, then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.”

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1 (2008) 4 SCC 755



40. Mr. Chinoy further submits that Section 66 read with Section 178(2) (y) of the Act of 2003, clearly enables the CERC to make Regulations for the development of the market in power (including trading). This necessarily covers all aspects of the market and business/trading in power and would include both spot and forward contracts for the sale or purchase of electricity. The concept of trading necessarily covers all forms of business in electricity and includes both spot and forward contracts for sale and purchase of electricity. Section 2 (71) of the Act refers to purchase of electricity for resale thereof. This is wide enough to cover both spot and forward contracts for electricity. Mr. Chinoy has referred to the decision of the Supreme Court in the case of *Waverly* (supra) and submits that the trade and commerce would in their ordinary and accepted sense include forward contracts. He submits that the market is a place where business in the sale and purchase of goods is carried on/transacted. While relying on the judgment of the Supreme Court in the case of *Chimanlal Premchand vs. The State of Bombay*<sup>1</sup>, Mr. Chinoy submits that the power under Section 26 of the Bombay Agricultural Produce Markets Act to make rules for a market would include the power to make rules for the regulation of business and conditions of trading in the market area and that included making rules stipulating that no person could do business in agricultural produce except under a license granted by the Market Committee.

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1 AIR 1960 SC 96

41. Mr. Chinoy further submits that Article 246 of the Constitution of India provides for the supremacy of Parliamentary legislation over State legislation and has no application when considering which of two Parliamentary Legislations will prevail/override the other. Since both the legislations are Parliamentary legislations, there is no issue of constitutional competence to enact the Act of 2003 or any of its provisions can arise. It is well settled that an enactment can be attributed to more than one entry in the lists. He submits that a piece of legislation need not necessarily fall within the scope of one entry alone, more than one entry may overlap to cover the subject matter of a single piece of legislation. Mr. Chinoy submits that if both Acts were special laws containing non obstante clauses, the latter Act must prevail. The learned counsel has placed reliance on the judgment of the Supreme Court in the case of *Solidaire India Limited vs. Fairgrowth Financial Services Limited and others*<sup>1</sup> wherein the Supreme Court has held as under:

“Where there are two special statutes, which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply”

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1 (2001) 3 SC C 71

Relying on the aforesaid, Mr. Chinoy submits that since both the enactments are Parliamentary legislations, no question of lack of competence arises nor is there any need to read down or interpret entry 38 of List III vis a vis Entry 48 of List I as has been submitted by the learned counsel for the petitioners. The learned counsel reiterates that it is well settled that an enactment can be attributed to more than one entry in the Lists. In view thereof, the provisions of the Act of 2003 in so far as they relate to forward contracts in electricity, could, in addition to Entry 38 of List III, also be rested on Entry 48 of List I, in so far as provisions of the Act of 2003 relate to forward contracts. Mr. Chinoy has submitted that time has not reached where electricity can be effectively dealt with in futures contract at present though in future the position may change.

42. Mr. Dwarkadas, Senior Counsel, appearing for FMC, submits that the Supreme Court in the case of *Raghubar Dayal Jai Parkash and others vs. Union of India*<sup>1</sup> scrutinised in great detail the provisions of FCRA wherein the Supreme Court quoted the Expert Committee report to which the bill on Forward Contract Regulation had been referred. The said quotation reads thus:

“Forward trading involves speculation about the future, but not all forms of forward trading could be considered as either unnecessary or undesirable for the efficient functioning of anything but the most primitive economy... To the extent to which forward trading enables producers, manufacturers and traders to protect themselves against the uncertainties of the future, and enables all the relevant factors whether actual or anticipated, local or international, to exercise their due influence on prices, it confers a definite boon on the community, because

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1 AIR 1962 SC 263

to that extent, it minimises the risks of production and distribution and makes for greater stability of prices and supplies....It is therefore necessary to eliminate certain forms of forward trading, and permit others under carefully regulated conditions, in order to ensure that, while producers, manufacturers and traders will have the facility they need for the satisfactory conduct of their business, the wider interest of the community, and particularly, the interest of consumers, will be adequately safeguarded against any abuse of such facilities by others.”

43. The status of the FMC as an expert body to ensure the proper regulation of forward contracts in the best interest of the society has been reiterated by the Supreme Court in the cases of (i) *Waverly Jute Mills (supra)*, (ii) *Union of India and another vs. Rajdhani Grains and Jaggery Exchange Ltd. and others*<sup>1</sup>, and (iii) *The Mahabir Beopar Mandal Ltd. vs. The Forward Markets Commission*<sup>2</sup>.

44. The term “market” has been elaborately defined by the Supreme Court in the case of *Waverly Jute Mills (supra)*. The relevant observations of the Supreme Court read thus:

“9. Market no doubt ordinarily means a place where business is being transacted. That was probably all that it meant at a time when trade was not developed and when transactions took place at specified places. But with the development of commerce, bargains came to be concluded more often that not through correspondence and the connotation of the word ‘market’ underwent a corresponding expansion. In modern parlance the word ‘market’ has come to mean business as well as the place where business is carried on. Labour Market for example, is not a place where labourers are recruited but the conditions of the business of labour. The word ‘market’ being

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1 AIR 1975 SC 1218,

2 AIR 1977 SC 1562

thus capable of signifying both business and the place where the business is carried on, the question in what sense it is used in a particular statute must be decided on a consideration of the context of that statute. Thus in *Public Prosecutor vs. Cheru Kutti* (AIR 1925 Mad. 1095) and *Commissioner, Coimbatore Municipality vs. Chettimar Vinayagar Temple Committee* (1956 (2) MLJ 563), the question arose with reference to provisions as to licensing by local authorities, and for that purpose market was interpreted as meaning a place. We we must examine that the word market means in Entry 48 "Futures Markets" in List 1. The word 'futures' is thus defined in *Encyclopaedia Britannica* "contracts which consist of a promise to deliver specified qualities of some commodity at a specified future time. The obligation is for a single quantity in a given month... Futures are thus a form of security, analogous to a bond or promissory note". In this sense a market can have reference only to business and not to any location. In our opinion, a legislation on Forward Contracts would be a legislation on futures markets."

45. Referring to the judgment of the Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd.*<sup>1</sup>, Mr. Dwarkadas submitted that CERC has sought to contend only the third test of Mimansa System (Badha). However, before applying this test, there are two tests to be applied, as observed in the said case. The principles are as under:

" 1. Where two texts which are apparently conflicting are capable of being reconciled, then by the principle of harmonious construction (which is called the Samanjasya Principle in Mimansa) they should be reconciled.

2. The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation, the vikalpa principle applies, which says that whichever law is more in consonance with reason and justice should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is

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1 (2008) 4 SCC 755

only when all efforts of reconciliation fail that the vikalpa principle is to be resorted to.

3. There is a third situation of a conflict and this is where there are two conflicting irreconcilable texts but one overrides the other because of its greater force. This is called a badha in the Mimansa system (similar to doctrine of ultra vires)

46. Mr. Vikas Singh, learned counsel appearing for respondent No.3 submits that in view of the special enactment under the Electricity Act, it is only the authority under the Electricity Act can deal with futures contract and FMC cannot deal with electricity in any manner including the futures contract. The learned counsel submits that whenever a central regulation is to be challenged, notice has to go to the Attorney General of India. In order to buttress the submission of the learned counsel, he has placed reliance of the Supreme Court of India in the cases of (i) *A.C. Sharma vs. Delhi Administration*<sup>1</sup> and (ii) *Basant Lal vs. State of U.P. And another*<sup>2</sup>. The learned counsel further submits that the preamble in the FCRA is similarly worded to the preamble in the Specific Relief Act in which Act also it is stated to be concerning certain kinds of specific relief. The Supreme Court has held that the Specific Relief Act is not a comprehensive legislation dealing with all aspects of specific relief. In this connection, the learned counsel has relied upon the decision of the Supreme Court in the case of *Hungerford Investment Trust Limited (In voluntary Liquidation) vs. Haridas Mundhra and others*<sup>3</sup>. The learned counsel has also relied upon the decision of

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1 (1973) 1 SCC 726

2 (1998) 8 SCC 589

3 (1972) 3 SCC 684

the Supreme Court in the case of PTC India Ltd. (supra) and submitted that the Electricity Act was a comprehensive Act dealing with all aspects of electricity and that development of market of power was an exclusive jurisdiction vested in the regulatory commissions.

47. In the case of *Firm of Patapchand Nopaji vs. Firm of Kotrike Venkata Setty and sons and others*<sup>1</sup>, the Supreme Court while dealing with the Bombay Forward Contract Act, 1947, whose provisions were similar to the FCRA, except that under Section 9 of the said Act option in goods were banned only if a notification was issued by the provisional government in the official gazette whereas under the FCRA all option in goods are banned, held that if a contract was not for actual delivery and supply to bona fide purchaser, then such contracts are tainted with unlawfulness of their object and are forbidden by the law. The learned counsel has also placed reliance on the judgment of the Supreme Court in the case of *Shivnarayan Kabra vs. The State of Madras*<sup>2</sup> wherein the Supreme Court had noticed the expert committee's report prior to the enactment of the FCRA and then had the occasion to consider the arguments wherein a defence had been taken that the contract being not for delivery of goods and being speculative in nature was not a forward contract, was pleased to reject the said argument as according to the Supreme Court the FCRA was meant to curb the mischief of speculation and hence any person indulging in

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1 (1975) 2 SCC 208

2 (1967) 1 SCR 138

such practice which were not resulting in delivery was held to be violating the prohibition under the Act. The learned counsel submits, while relying upon the decision of the Supreme Court in the case of *Ashoka Marketing Ltd. vs. Punjab National Bank*<sup>1</sup>, that since Electricity Act also is dealing with a large number of subjects which are exclusively in List-I like railways, telegraph under Section 67, 159, 160 and 164, the said Act insofar as they relate to such subjects can easily be traced to List-I. The learned counsel lastly submits that in case of an express or implied conflict, the Electricity Act will prevail. To fortify his argument, the learned counsel has relied upon the decision of *Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd.*<sup>2</sup>.

48. To recapitulate, FCRA was enacted in the year 1952. The object of the Act as per the preamble is to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. It is a complete code providing for setting up of FMC which advises the Central Government in the matter of forward trading in commodities, registers every Association which organises forward trading and approves Rules and Byelaws of Associations organizing forward trading. As per the provisions of FCRA, contracts/agreements are classified into two categories i.e. Ready delivery contract and forward contract. Ready delivery contract is one which deals with delivery of goods and full payment of price thereof is made,

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1 1990 (4) SCC 406

2 (2008) 4 SCC 755



either immediately or within a period of eleven days after the date of the contract. Forward contract as per the definition under Section 2 (c) is a contract of delivery of goods and which is not a ready delivery contract. Considering the provisions of the FCRA, in our view, it can be said that a forward contract is one in which it is a contract for delivery of goods which can be realised either wholly or partly by payment of any offsetting contract.

49. The CERC while deciding the matter has observed as under in paragraph 48 of its original order.

“ ..When seen in the light of the various provisions of the two enactments, there does not appear to be any overlapping or inconsistency between them. The two statutes can operate independently in the fields assigned to them without any possibility of collision and without any invasion into the specific areas covered by the other. For this reason, both the statutes have to be given effect by harmoniously reading together the provisions of the 1952 Act and the 2003 Act. Such a conclusion will be in consonance with the law laid down by the Hon’ble Supreme Court at para 58 of its judgment in Gujarat Urja Vikas Nigam Ltd. (supra). In view of this conclusion, approval accorded by FMC to MCZ for trading of daily electricity contracts, weekly electricity contracts and monthly electricity contracts cannot be faulted and we do not propose to interfere in the matter.”

Thereafter in the review order, substantial changes were made in the original order passed by CERC.

50. It is no doubt true, as argued by Mr. Chinoy and Mr. Vikas Singh, that Section 174 of the Act provides for overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In our view, in view of the specific provisions in FCRA, which is a central legislation enacted earlier in point of time, by which in a notified commodity forward contract can be undertaken only through the machinery under the said Act, the futures contract in electricity cannot be exclusively dealt with by the authority under the FCRA. Similarly, in view of the specific provisions under the FCRA, CERC also cannot deal with the futures contract on its own and have no power to deal with the same in the futures contract, unless appropriate enactment has been made by way of statutory provision regulating the futures contract giving powers only to one authority out of the aforesaid two authorities.

51. It is no doubt true that electricity is a special legislation provided for a specific purpose wherein the interest of consumer is also required to be taken into consideration. In our view, both the enactments operate in the respective fields. If any futures contract in case of a notified commodity under the FMC is concerned, it can be done only through the machinery provided under the FMC. Looking to the special nature of the electricity commodity and even considering the controlling of prices, etc. in our view, the futures contract in electricity

cannot be exclusively dealt with by FMC. Similarly, the CERC has no jurisdiction to frame any Regulation in connection with the futures contract in electricity. With a view to harmonise the provisions of both the Acts, in our view, the futures contract no doubt is within the domain of FMC. Even if futures contract is to be taken into consideration in the matter of electricity, the same can be done only in consultation with the CERC. Each domain is exclusive under the respective statutes. One cannot transgress into another domain. In our view, CERC cannot be totally taken out of consideration as the physical delivery of the electricity and electricity derivative products also form part of various aspects of the electricity market structure under the Electricity Act.

52. It is also required to be noted that the CERC under the Electricity Act is required to promote development of market including trading in power, in a specified manner. The CERC is assigned a duty to promote development of market in power through the Regulations. The CERC has, therefore, jurisdiction to regulate development of market in electricity in all forms but in view of the specific provisions under the FCRA regarding futures contract, at present it is not possible to hold that the CERC is entitled to even act in the futures contract in view of the clear provisions in this behalf in the FCRA. In our view, neither of the regulatory authorities will have exclusive jurisdiction to deal with in the futures contract so far as electricity is concerned. Since statutory duty is cast upon the CERC under the Electricity Act regarding market development, the

Commission, in our view, is entitled to issue appropriate guidelines in connection with regulating the development of market in electricity. It is also the duty of the CERC under the Electricity Act to see that the transactions on the exchanges are conducted in a free and fair manner, while keeping the interest of the consumer in mind. As on today, the Regulations framed by the CERC also cannot be given any effect to as the power to deal with futures contract is specifically dealt with by other statute and in view of the same, it is not necessary to examine as to whether the CERC was justified in exercising jurisdiction on the basis of the application filed by Respondent No.3 before the CERC or not. As stated above, neither the FMC nor the CERC can exclusively deal with electricity in the matter of futures contract. The CERC cannot act in the futures contract in the matter of electricity unless appropriate enactment has been made by the Parliament in this behalf. The Regulations under challenge cannot be given effect to and it will have no effect so far as futures contract in electricity is concerned. In so far as the power of CERC to deal with electricity in the futures contract is concerned, as pointed out earlier, even the Cabinet Secretary also asked both the Regulatory authorities not to act further and CERC has been specifically asked not to give effect to the Regulations till the dispute can be sorted out.

53. So far as Electricity Act is concerned, it is a special Act which deals with various aspects of electricity including fixation of rates, etc. However, so far as

futures contract is concerned, the CERC cannot frame any Regulations in connection with futures contract. Considering the same, the Regulations framed by CERC cannot be given any effect to unless proper enactment is made in this behalf. After considering the provisions of the FCRA and Electricity Act and the Regulations framed thereunder and considering the nature of controversy as well as considering the case laws cited by the learned counsel appearing for the parties, in our view, neither of the regulatory authorities will have exclusive jurisdiction to deal with in the futures contract in electricity independently. In view of the above, the provision regarding “term ahead market” in the Regulations providing for futures contract or term ahead contract beyond eleven days cannot be made applicable, unless proper enactment in this behalf is made by the Parliament. Till appropriate legislation is enacted by the Parliament, the Regulations framed by the CERC is held to be not applicable so far as futures contract in electricity is concerned.

54. In view of the above, the following order:

- (a) The Central Electricity Regulatory Commission (Power Market) Regulations, 2010 are declared inoperative hereinafter, so far as the futures/forward contracts in electricity is concerned;
- (b) The orders dated 28<sup>th</sup> April, 2009 passed in Petition No. 159 of 2008 and 11<sup>th</sup> January, 2010 passed in Review Petition No.115 of 2009 are

quashed and set aside so far as reasoning and directions with regard to futures/forward contract in electricity;

- (c) It is further declared that the Petitioner-FMC and authority/commission under it have no sole and exclusive jurisdiction to regulate and control forward trading/futures contract in electricity and also CERC and authorities/commission under it.
- (c) In view of the above, both these Petitions are partly allowed and disposed of accordingly, with no order as to costs. Rule in each of the petitions is accordingly partly made absolute to the extent indicated above.
- (d) The Notices of Motion are also disposed of in view of disposal of the petitions. No costs.

**P. B. MAJMUDAR, J.**

**ANOOP V. MOHTA, J.**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1197 OF 2010**

**WITH**

**NOTICE OF MOTION NO. 100 OF 2010**

Multi Commodity Exchange of India Ltd.

...Petitioner

Vs.

Central Electricity Regulatory Commission & Ors.

...Respondents.

**WITH**

**WRIT PETITION NO. 1604 OF 2009**

**WITH**

**NOTICE OF MOTION NO. 71 OF 2010**

Forward Markets Commission

...Petitioner

Vs.

Central Electricity Regulatory Commission & Ors.

...Respondents.

**J U D G M E N T**

**Per- Anoop V. Mohta, J.**

I have the advantage of reading the judgment of my esteemed brother Justice P. B. Majmudar. I am in agreement with the conclusions. As important issues, having large ramification, are involved, I would like to address it by additional reasons:-

2           The Constitution of India, Union List I of Schedule VII provides entry 48, which deals with “stock exchanges and futures markets”. Concurrent List III Schedule VII provides entry 38 “Electricity”. Both the entries are operating in their respective fields without any conflicts.

3           “Under the Constitution, the subject of “stock exchanges and future markets” is included in the Union List. Consequently, the State Legislatures are no longer competent to enact any fresh legislation with regard to forward markets, and unless Central legislation on this subject is enacted, the resulting lacuna may prevent desirable action being taken, when needed”.

          “The FCR Act basically take into consideration “forward trading, which normally plays a useful part in tempering price fluctuations, tends in certain situations to exaggerate such fluctuations to the detriment of the interests of producers as well as consumers”.

          “The main principle underlying these provisions is that forward contracts should be allowed to be entered into only in accordance with the rules and bye-laws of a recognized association. The rules and bye-laws will be subject to the approval of the Central Government who will also have the power to make such rules and bye-laws.”

          “The regulatory provisions of this Act will be extended by notification to different classes of goods and to different areas as and when necessary”. (Statements of objects and reasons- The Forward Contract



(Regulation) Act, 1952. (The FCR Act).

4           The FCR Act deals with the establishment, operating, regulating, maintaining and managing facilities to enable the member of exchange, their authorized agents and constituents and other participants, to transact, clear and settle the trade of Futures contracts of a commodity exchange, duly recognized by the Central Government-Forward Markets Commission (FMC). Under the FCR Act about 103 commodities/goods are covered. FMC is a regulatory authority, under the FCR Act and MCX (Multi Commodity Exchange of India Limited) under FMC. The expressions “Forward contract” and “Ready delivery contract” have been amended to check the misuse of ready delivery contracts. These authorities/ commissions have exclusive jurisdiction and control over the trading of futures and forward contracts in all respects, even reconfirmed by the Supreme Court in the Judgments. *((i) Waverly Jule Mills Co. Ltd. Vs. Raymon & Co. (India) Pvt. Ltd., (ii) Union of India & Anr. Vs. Rajdhani Grain and Jaggery Exchange Ltd. & Ors. (iii) The Mahabir Beopar Mandal Ltd. Vs. The Forward Markets Commission (Supra).*

5           The Electricity Act, 2003 (the Electricity Act) is an exhaustive code in all matters concerning electricity. The objects and reasons speak for itself.

*“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.”*

6 It provides for; a National electricity and tariff policy and plan, generation of electricity, licensee, transmission of electricity (inter-State transmission, Regional Transmission, Distribution of electricity consumer protection, tariff regulations and its determination and development of power market. It also provides for Central Electricity Authority, Regulatory Commissions, its powers and functions and an Appellate Tribunal. There are other protective clauses and miscellaneous provisions which empowers authorities/ commissions to make rules and regulations.

7 The Apex Court in (PTC India Ltd. Vs. Secy. CERC, AIR 2010 SC 1338=(2010) 4 SCC 603) elaborated the same in following words:-

“17. The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for “unbundling” of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation,

*namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.*

18. *Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as tariff policy for development of the power system based on optimum utilization of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the tariff policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) after the 2003 Act (see also Section 66).*
26. *The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.*
28. *The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also*

*empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Section 179 and 182. The Parliament has the power to modify the rules/ regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.”*

8           The Central Electricity Regulatory Commission (CERC) is a creation of Electricity Act. The Power Exchange of India Limited (PXI), recognized by CERC, has set up under the Electricity Act. Same is the position of Indian Energy Exchange (IEX).

9           The concept “trading” is defined under Section 2(71) of the Electricity Act as under:-

*“2(70)       “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly.”*

The meaning of “trading” as per-

**BLACK’S LAW DICTIONARY, EIGHTH EDITION-**

*“The business of buying and selling, esp. of commodities and securities. [Cases: Commodity Futures Trading Regulation; Securities Regulation, C.J.S. Securities Regulation].*

**THE OXFORD ENGLISH DICTIONARY, VOL. XI- T-U**

*“The action of the verb TRADE in various senses; esp. the carrying on of trade; buying and selling; commerce, trade, traffic.”*

Section 66 provides for development of power market as under:

**“66. Development of market.-** *The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.”*

Section 178 empowers the CERC to make regulations consists with and for carrying out the purpose of the Electricity Act. Relevant clause is 178(y)-

*“178(y) the manner by which development of market in power including trading specified under Section 66;*

The regulation 2010 in question is the offshoot of this Section.

10 In my view, the development of power market nowhere contemplates speculative business/ market in electricity. The concept “development of power market” may cover all related and relevant steps including trading and all types of contracts for the electricity development. Therefore, CERC through its regulations is not specifically empowered to do

speculative trading and/or forward trading or future contract, independently, by overlooking the mandate of FCR Act. The FMC and MCX are also not in a position to do the same business exclusively, by overlooking the Electricity Act and its authorities.

11 The Ministry of Consumer Affairs, Food and Public Distribution, vide Gazette by Notification dated 9<sup>th</sup> January, 2006 by invoking Sections 15 and 16 of the FCR Act has covered “Electricity” and “Natural Gas”. FMC has by order of January, 2009 permitted MCX to have trading of electricity in future/forward market. This was probably in view of national and international developing market of electricity. Therefore, the conflict so far as the trade of Futures contract in electricity.

12 The respective entries of the Constitution of India and the Acts based upon it need to keep in mind, while considering development of power/ electricity market in India and/or for facilitating permission of investment in electricity sector and for protecting the interest of the consumers. The mandate of Electricity Act needs to be noted while dealing with the marketing and/or trading in electricity. When it comes to futures contracts or forward market, the provisions of Sections 14, 15 and 81 of FCR Act which govern the field by its rules and regulations and authorities also just cannot be overlooked. The power market in electricity developing and is at evolving stage which needs clear and

unqualified rules, regulations and controlling authorities in view of specific provisions of the Electricity Act, that itself is not sufficient to permit FMC and MCX to do business of futures contract in electricity exclusively. All commodities/goods are storable. The electricity is not storable goods, except produced by Hydro-Projects. There cannot be any comparison of electricity as goods with the other goods/commodities. This typical characteristic of electricity as goods, goes to the root of the matter. The Electricity Act deals with and covers all aspect of electricity rights from an establishment of projects of electricity, manufacturing, process, production, supply, distribution, tariff, rate of electricity and its regulations. The CERC controls and deals with such issues in the respective States. The Electricity Act basically permits/provides the trading and supply of electricity as goods for actual physical use.

13           The FCR Act deals with futures market and forward contracts in all goods which in essence are financial contracts for delivery of goods, which may or may not be physical and/or may settle by the payment of differewnces. Any market/ trading basically means physical delivery of the goods but the FCR Act also provides specialized financial market to permit the traders to do business in the realm of price discovery and price risk management.

14           The futures market is a centralized place for buyers and sellers, who could be speculators, from around the nation and/or around the World, who

enters into futures contracts. Such contracts provides for the quality, the quantity, the fixed price and the date of delivery. The spot/ cash market is different than future market. The profits and losses of future contracts based on the daily movements in the market of the commodity. The concepts and importance of “margin”, “leverage”, “hedging”, “price discovery” and “risk reduction” are well known in the field. Various factors have a major effect on supply and demand and price of a commodity. The future markets always quite risky, complex and volatile. All above elements are essential of any future contract and need to be governed and controlled by regulatory authority/commission, which in India at present constituted under FCR Act only. No such power or authority is available under the Electricity Act and/or provided in any other such statute to the CERC or other authority at present.

15           Such future trading or future markets of electricity which non-storable goods, cannot be permitted without expertized body or statute or regulator under the guise of nation power policy or global market for development of electricity. The electricity falls within the ambit of “commodity features”. The maintaining of update index like other commodity is also important factor. It is only the exchange decides whether the future contract is cash settled or settlement is delivery based.

16           The Electricity Act nowhere permits the CERC to use and/or suspend



the control and/or delegate and/or handover the charges/control of electricity to FMC or to other associations under the FCR Act, considering the speciality of electricity as a non-storable goods. No other authorities even under the FCR Act can have exclusive and independent control and authority to trade in the electricity in futures market/ forward market. No other authority/ commission is entitled to challenge and control the trading power of CERC by any modes in any markets, but this can be subject to appropriate rules/regulations as contemplated under Section 178 (2) of the Electricity Act based upon the desirable and workable electricity power policy. Mere notification and/or approval under Sections 15/16 of the FCR Act itself is not sufficient to empower the authorities/ commission to do the future markets of electricity under its existing rules and regulations.

17 Any electricity market/ trading covers and means availability of electricity, electricity producers, Central, State, private projects/sectors, suppliers, distributors, transmitters and transporters from one place to another, from one State to other State and/or within a State considering the demand and supply for the consumers. The demand and supply of electricity, the price and/or tariff of electricity at all levels/ stages need to be under the strict control of the CERC and its authorities.

18           The business of future market in any exchange is always based upon the national level. The speculations in electricity trading as contemplated and understood in futures market or forward market may create complications and problems, because of various market factors. The fixed forward price and fixed forward quantity and the date of delivery are the basic elements of any such contract/ trading. The price uncertainty always impact on the certainty of supply/ price. The interest of the supplier, the manufacturer and the consumers and traders need to be considered in all respect, at all the stages. Therefore, it is necessary to have an efficient and a harmonized system in the country for futures trading in electricity. There is central system in futures market for other goods under the FCR Act. In contrast to that, there is only State based controlled systems in electricity under the Electricity Act. The domestic and international trade business and taxes at various stages also play an important role in futures market.

19           MCX has been permitted by order of January, 2009 by the FMC to trade daily electricity contracts, weekly electricity contracts and monthly electricity contracts also raises doubts. The notification dated 9<sup>th</sup> January, 2006 is also of no assistance. The transactions/contracts where physical delivery of goods “spot market” takes place, the same will not fall within the ambit of forward contract. Such contract falls within the exclusive jurisdiction of CERC. However, in view of the specialized goods and its requirement of infrastructure,

technical expertise/tariff/price, fixation in the interest of consumers at large, the CERC, cannot be permitted to transgress its jurisdiction by venturing into futures market, forward contracts and/or derivative as contemplated and covered under the FCR Act, in the guise of trading and developing the market of electricity. The orders and guidelines therefore, issued by the CERC in questions are in conflicts with the provisions of FCR Act in so far as the business in futures contract and forward market. Any such future contract or forward market of electricity falls within the scope and Sections of 15 and 16 of the FCR Act, the Power Exchange of India Limited (PXI) and Indian Energy Exchange Limited (IEX) therefore, also cannot be permitted to the future trading, even though it is approved by the CERC. Merely because Electricity Act also deals with subjects like railway, telegraph, telephone that itself is not sufficient to do futures trading in electricity. Any trading of power on PXI/IEX where delivery and payment is made beyond 11 days, falls within the ambit of forward contracts. But any contract having fixed delivery period, fixed parties and certain price stands on different footing.

20 Furthermore, apart from knowledge of law, engineering, finance, commerce, economics and management and various factual and technical details are required even for commission and also to the appropriate appellate body to deal with the various aspects of tariff and electricity. The availability and/or non-availability of transmission facility, generation facility at sale point

and/or availability of demand or electricity at the point of purchase, the wheeling facilities, all these are important aspects which are necessary while dealing with the trading in electricity. The notification issued under Section 15 of the FCR Act, itself is not under challenge, but in view of above, it is difficult and not practicable and feasible for FMC and MCX to deal with the physical delivery of the electricity. To say that there would not be necessary to have physical delivery in every matter is not contemplated under FCR Act and regulations made thereunder. The speculative trading in electricity, in the circumstances, is impracticable and impermissible.

21           The concept of “trading and development of power or electricity” nowhere contemplates the speculative trading, but still the provisions of FCR Act and its regulations with regard to the futures contract or forward contract cannot be taken away, under the existing provisions of law. CERC also therefore, cannot be permitted to do the same nature of trading, exclusively by running parallel exchanges. I am not inclined to accept that for futures contract/ forward contract of electricity is taken out and placed under the jurisdiction of regulatory commission under the Electricity Act, though inter State trade, licensee is also permitted to do intra-State trading without permission/ licence from the State Commission to do intra-State trading. The requirement and necessity as contemplated under FCR Act and rules and regulations made thereunder, are again just cannot be overlooked for permitting the CERC for

trading in futures/ forward contracts. There is no question of which entry and/or schedule should prevail and/or conflict of two entries, but the point is a practical and a feasible deal of the electricity in future/forward markets exclusively under one authority/commission. We need to read and consider both these Acts together and find out a solution by appropriate rules, regulations and/or amendment, if market available to permit futures trading in electricity, though in wider sense, trading covers trade and commerce including spot and forward contract for sale and purchase of electricity. The point is, who should control and regulate such contracts/ trading protecting the interest of consumer, specially when at present in India power markets is not yet fully developed.

22 The CERC cannot be permitted to have regulations under Section 66 and 178(2)(y) by virtue of Section 174 of the Electricity Act, to prevail over the provisions of Section 14-A and 15 of the forward contracts in such fashion with regard to the futures contracts/ forward contracts. The Supreme Court Judgment in Gujarat Urja Vikas Nigam Limited (supra) no way assist the CERC to prevail over different and distinct provisions of FCR Act. In the present circumstances, though the Electricity falls within ambit of commodities /goods in FCR Act, by notification in the year 2006, which was definitely after Electricity Act of 2003, the conflict therefore, definitely needs to be resolved by appropriate laws and regulations. In view of the above, the grant of approval in January, 2002 by the FMC to MCX permitting to trade in Electricity forward

contracts based upon notification of January, 2006 is by itself not sufficient.

23           The domain and jurisdiction of respective authorities/ commission is totally different and distinct in every aspect. CERC is a statutory authority being constituted under the Electricity Act, cannot be provided that the power beyond the statutes permitting to do futures, forward, derivative contracts which is admittedly a domain jurisdiction of authorities/commission under the FCR Act. It is difficult to go beyond for both these authorities to cross and/or interfere with the powers, functions and duties as provided under their parents statute, unless relevant provisions including Section 18 and 27 of the FCR Act and also of Electricity Act are invoked.

24           There is no question of giving any overriding effect in case of statutory conflicts, as it is impracticable, uncontrollable and it will not be in the interest of consumers to permit any of the authorities to do forward future and derivative market in electricity in the present scenario without proper and effective revised national power policy and/or guidelines and laws under the supervision of expert bodies. Apart from the conflict, it is difficult to control and regulate forward market of electricity excluding respective authorities under both Acts.

25 In the present case, as it is a question of interpretation of constitutional entries and the provisions of the central Acts, the authorities or departments could not have resolved the issues/conflicts.

26 The power and the jurisdiction of these statutory tribunals are quite limited and normally governed by their own rules and regulations. These tribunals are not the Court having jurisdiction to decide complicated question of law and/or the conflict of laws, based upon the constitutional entries and the related enactments. Therefore, the CERC and/or even the Appellate authority under the Electricity Act have no jurisdiction to decide the validity of regulations framed by CERC under Section 178 of the Act. It is subject to challenge by invoking judicial power under Article 226 of the Constitution of India. (PTC India Ltd. Vs. Secy. CERC, (Supra).)

To conclude:-

- (a) The Electricity Act deals with in every respect including trading in electricity. The electricity is a non-storable goods, except produced by hydro-projects. The trading of electricity falls within the concept of commodity trading. Therefore, it may or may not physically available all the time, unless generated on the day and/or the date of delivery. This distinguishes

electricity as a goods from other commodities as contemplated under the FCR Act, which at present deals exclusively with all aspect of futures/ forward contracts.

- (b) In view of the reasonings earlier recorded, it will not be possible either for FMC or MCX to control and regulate the mandatory requirements of electricity, at various stages, which are well within the exclusive domain and control of the CERC and/or authorities/commissions. It will create more complications than solving it, unless an experts body constituted and specialized rules and regulations are framed. Both authorities/commissions cannot deal in futures/forward contract in electricity excluding other and/or independently.
- (c) It is not only question of resolving the conflict between two entries and/or mandates of the respective specialized Act, but actual and physical workable solution to permit and/or to allow either authorities/ commissions/ exchanges to deal with the electricity in the futures/ forward market. Both authorities/ commissions under the respective Acts may not be in a position to control and regulate the futures contract in electricity exclusively, unless those Acts and regulations are



amended /revised and re-framed. Both cannot have exclusive jurisdiction as claimed in the present scenario in India.

- (d) It is clarified that the Union of India and/or the concerned commission and/or the regulatory authorities are free to revise and/or to reframe the rules and the regulations and/or to amend the concerned statutes to permit the futures/ forward and derivatives contract in electricity, if so advised.
- (e) The regulations of CERC as notified on 20 January, 2010, which deals with the aspects of futures contracts or forward contracts, therefore, are inoperative to that extent only. The impugned order dated 28<sup>th</sup> April, 2009 and order dated 11<sup>th</sup> January, 2010 upholding the regulations are also unsustainable to the extent of reasoning and direction relates to forward contracts in electricity.

**(Anoop V. Mohta, J.)**