

## UNIT 13

### APPELLATE TRIBUNAL FOR ELECTRICITY (ATE)

*“While the perception of opposed interests promotes conflicts the perception of shared interests pacifies it” - MK Gandhi*

#### 13.1 Background

Many of the issues raised or disputes in the Power sector it seems would involve technical and special matters, secondly speedy disposal of the matter would be in the interest of all stakeholders including the consumers. Consequently it would be desirable to have a specialist tribunal to adjudicate on the matters raised in the national electricity framework.

It is contemplated that Appellate Tribunal for Electricity would avoid delays in dispute resolution in the courts but some of the sector expert are of the opinion that the “Regulatory Commissions” have been subordinated by this provision. These matters have been taken up in the following paragraphs.

#### 13.2 Establishment of Appellate Tribunal<sup>1</sup>

The Central Government has the mandate to establish the Appellate Tribunal by issuing a notification in this regard. The name of the tribunal shall be Appellate Tribunal for Electricity (ATE).The ATE has the jurisdiction to hear appeals against the orders of-

- Adjudicating officer or
- Central Electricity Regulatory Commission
- State electricity regulatory Commission

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<sup>1</sup> Section 110 of the Electricity Act 2003

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### **13.3 Jurisdiction of Appellate Tribunal**

All appeal to the ATE shall be filed under section 111. Any Company or body corporate or association or body of individuals whether incorporated or not, or artificial juridical person aggrieved by an order made by an adjudicating officer or an order made by the CERC of State Electricity Commission may prefer an appeal to the Appellate Tribunal for Electricity.

However in case of appeal lying under section 127 to the Appellate authority, or a final order of the appellate authority . The case shall not be preferred before the ATE.

The act is silent on the issue whether one member can exercise the jurisdiction of the ATE. However it clearly states that the jurisdiction of the Appellate Tribunal may be exercised by Benches constituted by the Chairperson.

### **13.4 Preliminary Condition for Appeal to ATE**

Any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the entire amount of such penalty. This provision can be contrasted with the provision in section 127(2) where the act provides that the Adjudicating authority shall not entertain any appeal unless one third of the assessed amount is deposited by the appellant.

In many ways this seems to be unequal. However this may be to deter non-serious appellant from approaching the honorable ATE. This can also be judged from the the second proviso of Section 111(1), which states that the ATE can dispense with such deposit which may cause undue hardship to the aggrieved person. However the ATE can impose such conditions as it may deem fit to impose so as to safeguard the realization of penalty.

### **13.5 Limitation Period**

Limitation period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person has been provided in

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the Act. The Application shall be verified and should be accompanied by such fee as may be prescribed

However the Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

### **13.6 Order of ATE**

The ATE can dispose of the Appeal after giving the parties to the appeal an opportunity of being heard. The order can confirm, modify or set aside the order appealed against.

The Act also provides that ATE shall send a copy of every order made by it to the-

- Parties to the appeal and to
- the concerned adjudicating officer or
- The Appropriate Commission, which is involved in the present case.

### **13.7 Time frame for disposal of the Case**

One of the main objective for establishment of the EAT is to expedite the cases relating to the power sector and hence bring in certainty in the market. Therefore the Act also provides that the ATE shall deal with cases as expeditiously as possible and shall endeavor to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal. Whenever ATE is unable to dispose of the case within the period of 180 days, It shall record its reasons in writing for not disposing the appeal within the said period.

### **13.8 Writ of Certiorari**

Section 111(6) provides that ATE may, for the purpose of examining the –

- legality,
- propriety or

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- correctness

-of any order made by the adjudicating officer or the Appropriate Commission, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit. This power will protect the Rule of Law and would be helpful in proper enforcement of the rules and regulation in the power industry.

### **13.9 Composition of Appellate Tribunal<sup>2</sup>**

The ATE will be a three member body which shall consist of one Chairperson and three other members. The Act enables the Chairperson to constitute benches with two or members of the ATE as the Chairperson of the ATE may deem fit.

However every Bench constituted under this clause shall include at least one Judicial Member and one Technical Member;

### **13.10 Location of ATE**

The Benches of the Appellate Tribunal shall ordinarily sit at Delhi and such other places as the Central Government may, in consultation with the Chairperson of the Appellate Tribunal, notify. The Central Government shall also notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction. This provision on first glance seems to be unjust because it vests power in the central Government which it should not have. However by providing that the Chairperson of the ATE may transfer a Member of the Appellate Tribunal from one Bench to another Bench, the scope of arbitrary action on part of any government has been reduced to a negligible extent.

### **13.11 Qualification for appointment of Chairperson**

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<sup>2</sup> Section 112 of the Electricity Act 2003

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A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal unless he is or has been, a judge of the Supreme Court or the Chief Justice of a High Court and the Chairperson of the Appellate Tribunal shall be appointed by the Central Government after consultation with the Chief Justice of India.

### **13.12 Qualification for appointment of Members**

A person shall not be qualified for appointment as the member of the ATE unless he

- is or has been or is qualified to be, a judge of High Court; or
- is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or
- is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce law or management.

It is also provided that the Members of the Appellate Tribunal shall be appointed by the Central Government on the recommendation of the Selection Committee<sup>3</sup>.

### **13.13 Disqualification for appointment as Member of ATE**

The person having any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, shall be disqualified from appointment at such position. It is the responsibility of the Central Government to satisfy itself that the person does not have such a interest.

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<sup>3</sup> See Chapter 12 (Independent Regulatory Commission) for the details on constitution of Selection Committee

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### **13.14 Term of office**

The Chairperson of the Appellate Tribunal or Member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office. The Chairperson and other members are eligible for appointment for a second term. However the Act is silent on the issue whether the abovementioned can have a third term in office.

The Chairperson can not hold office after he attains the age of 70 years and in case of members the age of 65 years has been provided.

### **13.15 Term and conditions of service**

To protect the independence of the ATE it is provided that salary and allowances nor the other terms and conditions of service of the Chairperson or a Member of the Appellate Tribunal shall be varied to his disadvantage after appointment. However initially the Central Government shall prescribe the same.

### **13.16 Registration and removal<sup>4</sup>**

The Chairperson or a Member of the Appellate Tribunal may, by giving 3 months notice in writing under his hand addressed to the Central Government, resign his office.

The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall be removed from his office by an order by the Central Government on the ground of-

- proved misbehavior or
- incapacity

This can be done after an inquiry made by a Judge of the Supreme Court, as the Central Government may appoint for this purpose in which the Chairperson or a Member of the Appellate

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<sup>4</sup> Section 117 of The Electricity Act 2003

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Tribunal concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges.

There seems to be a minor anomaly in the sense that the Chairperson of ATE can be a supreme court judge and if it happens that a junior colleague of the judge has to investigate his incapacity or misbehavior then there may be a certain amount of bias. One important legal principle is that " Justice may not only be done it should also be seen to be done"

One Way out could be that the Vice President can investigate the same or a committee can be formed to investigate the matter with the Chief Justice of India being its chairperson. This will require an amendment to the Act and presently the status remains the same.

### **13.17 Member to act as Chairperson in certain circumstances**

In the event of any vacancy in the office of the Chairperson by reason of his

- death,
- resignation or
- otherwise, or
- unable to discharge his functions owing to absence, illness or any other cause

It is provided that the senior-most Member of the Appellate Tribunal shall act as the Chairperson of the Appellate Tribunal until the date on which a new Chairperson, appointed, enters upon his office.

### **13.18 Procedure and powers of Appellate Tribunal**

Section 120 of The Act provides for the powers of the EAT. Sub section (1) states that The ATE shall not be bound by the procedure laid down by the *Code of Civil Procedure, 1908*, but shall be guided by the principles of natural justice. It is also provided that confirming to

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the provisions of the Electricity Act 2003 the ATE shall have powers to regulate its own procedure. This gives wide discretion and powers to the ATE.

Probably this will provide flexibility to the institution to act in the interest of justice and not go into procedural details of the civil Procedure Code.

Section 20(2) provides that the ATE shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the *Code of Civil Procedure, 1908*, while trying a suit, in respect of the following matters, namely:-

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavits;
- subject to the provisions of sections 123 and 124 of the *Indian Evidence Act, 1872*, requisitioning any public record or document or copy of such record or document from any office;
- issuing commissions for the examination of witnesses or documents;
- reviewing its decisions;
- dismissing a representation of default or deciding it ex parte;
- setting aside any order of dismissal or any representation for default or any order passed by it ex parte;
- any other matter which may be prescribed by the Central Government.

It is also stated that an order made by the Appellate Tribunal under this Act shall be executable by the ATE as a decree of civil court and, for this purpose; the ATE shall have all the powers of a civil court. Moreover if the honorable ATE desires, it may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appellate Tribunal shall be deemed to

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be a civil court for the purposes of sections 345 and 346 of the *Code of Criminal Procedure, 1973*.

### **13.19 Section 121 and Difference of Opinion**

Section 121 states -

*“Power of Chairperson of Appellate Tribunal.:- The Chairperson of the Appellate Tribunal shall exercise general power of super-intendance and control over the Appropriate Commission.”*

Many of the Power industry stake holders were of the opinion that the “Regulatory Commissions” have been subordinated by this provision of giving power of superintendence and control over IRC to the ATE. It is also alleged that this may lead to over-interference by the ATE in the day to day activity of the IRCs.

The Central Government recognizing the importance of this contention did not enforce this section. As of now on 10<sup>th</sup> June 2003 the entire Electricity Act 2003 was enforced except for Section 121.

Consequently the Power minister gave an assurance in the Rajya Sabha that this section will be suitably be modified to take into consideration the view of the industry experts.

Thereafter a Bill to amend Electricity Act 2003 has been introduced in the parliament, which seeks to substitute the section with following words-

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

### **13.20 Distribution of business amongst Benches**

Where Benches are constituted, the Chairperson of the ATE may, from time to time, by notification, make provisions as to the distribution of the business of the ATE amongst the Benches and also provide for the matters which may be dealt with by each Bench.

### **13.21 Transfer of cases**

A case can be transferred from one bench to another bench in two ways –

- 1) **On the application of any of the parties** – In case of an application of any of the party the Chairperson shall give a notice and after hearing such of them as they may desire to be heard may transfer the case to another bench.
- 2) **On his own motion** – Suo moto also the chairperson may transfer a case from one bench to another bench. In this case no notice is required.

### **13.22 Decision to be by majority**

In case the Members of the ATE of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

### **13.23 Right of appellant to take assistance of legal practitioner**

A person preferring an appeal to the Appellate Tribunal under this Act may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the ATE.

### **13.24 Commission to appoint presenting officers**

The CERC and various State electricity Regulatory Commission may appoint one of its officer or authorize one or more legal practitioners to act as presenting officers and every person so

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authorized may present the case with respect to any appeal before the Appellate Tribunal, as the case may be.

### **13.25 Jurisdiction of Supreme Court**

By virtue of Section 125 the supreme Court shall have the jurisdiction to try cases in appeal from the ATE. Section 125 provides that Any person aggrieved by any decision or order of the ATE, may, file an appeal to the Supreme Court on any one or more of the grounds specified in section 100 of the *Code of Civil Procedure, 1908*.

Section 100 of The Code of Civil Procedure primarily provides that the appeal shall lie when substantial question of law is involved.

### **13.26 Limitation period of Sixty Days**

The appeal shall be filed within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to the applicant party. It is also provided that that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

### **13.27 Conclusion**

ATE will help in quick disposal of cases relating to the specialized field of Electricity. The sanctity of the ATE is very high almost equivalent to the high court. This will ensure greater certainty in the power sector for faster development.