IN THE COURT OF THE LOKPAL (OMBUDSMAN),

ELECTRICITY, PUNJAB,

66 KV GRID SUB-STATION, PLOT NO. A-2,

INDUSTRIAL AREA, PHASE-1, S.A.S NAGAR (MOHALI)

1. Appeal No. 76/2017

Modern Steels Limited and Others

1. Appeal No. 77/2017

Paramount Steels Limited and Others

1. Appeal No. 78/2017

Bedi Steels (Pvt.) Limited and Others

1. Appeal No. 79/2017

Juneja Castings (Pvt.) Limited and Others

1. Appeal No. 80/2017

Saeco Trips (Pvt.) Limited and Others

1. Appeal No. 81/2017

Sudershan Forge (Pvt.) Limited and Others

1. Appeal No. 82/2017

Pact Industries Limited

1. Appeal No. 83/2017

Allied Recycling Limited and Others

…Petitioners

*Through*

1. Shri Puneet Jindal, Senior Advocate (PC)
2. Shri Tajender K. Joshi, Advocate (PC)

Versus

Punjab State Power Corporation Limited

…Respondent

*Through*

1. Shri Sehaj Bir Singh, Advocate (Counsel)­­,
2. Ms. Gurcharan Kaur Maan, Advocate (Counsel)

Before me for consideration are Appeals No. 76 to 83 received in this Court arising out of the order dated 06.10.2017 of Hon’ble Punjab and Haryana High Court in CWP No. 15641 of 2015 deciding that:

***“…****This order will dispose of aforesaid petitions.*

*Petitioners have posed a challenge to bills raised by Respondent No. 1 to 3 for the period October to December 2014 and in March 2015 for charges/arrears on account of change of consumption from Kilowatt-hours to KiloVolt Ampere hours; further praying that excess amount recovered from the petitioners for the period October 2014 to December 2014 be refunded with interest and also that the Respondent be restrained from implementing the tariff order dated 22.08.2014 for the year 2014-15 as introduction of KiloVolt Ampere hours (KVAh) was not applicable prior to amendment of Regulations which were actually amended i.e. on 01.01.2015.*

*Mr. Nanda, Learned Advocate General, Punjab at the outset submits that petitioners have efficacious remedy by way of a petition under section 42(7) of the Act.*

*In view of alternate statutory remedy available to the petitioners, this petition is disposed of with liberty to the petitioners to approach the said authority. In case it does so within one month from today, learned Advocate General, Punjab submits that it shall not contest the same on the ground that it is barred by delay/latches, as petitioners have been agitating before an alternate Forum. On filing of said petition, the Ombudsman shall endeavor to decide it expeditiously preferably within three months.*

*Admittedly, 50% of the amount has already been deposited by the petitioners. Recovery of rest of the amount for the period in question shall remain stayed till appropriate decision is taken*. ..”

2. The cases were initially listed for hearing on 07.12.2017 but were adjourned, on the request dated 27.11.2017 of the Petitioners’ Counsels, to 09.01.2018. Another hearing in the matter was considered necessary, in view of the submissions of the Counsel for the Respondent and was accordingly held on 30.01.2018

Arguments, discussions and evidences on record were held on 09.01.2018 and 30.01.2018.

3. Shri Puneet Jindal, Senior Advocate and Shri Tajender K. Joshi, Advocate, Petitioners’ Counsels (PCs), appeared on behalf of the Petitioners. Shri Sehaj Bir Singh, Advocate and Ms. Gurcharan Kaur Maan, Advocate, Respondent’ Counsels (RCs) alongwith Addl. S.Es/Senior Executive Engineers of the respective Distribution Divisions attended the Court proceedings on behalf of the Respondent – PSPCL on 09.01.2018. On the next date of hearing i.e. 30.01.2018, Shri Puneet Jindal and Shri Tejinder K. Joshi (PCs), Shri Sehaj Bir Singh and Ms. Gurcharan Kaur Maan (RCs) alongwith Shri Harvinder Singh, Senior Executive Engineer, Centralised Billing Cell (CBC), PSPCL, Ludhiana and Shri Dipanjit Singh, AEE, Metering Billing & Collection (MBC) office of Addl. S.E/MBC both under Engineer-in-Chief, Commercial, PSPCL, Patiala, attended the Court proceedings.

4. Presenting the case on behalf of the Petitioners, PCs stated that the Petitioners were Consumers of Electricity having set up their factories/ works in the State of Punjab. Since all the Petitioners were aggrieved by action of the Respondent for charging contrary to the Statutory Regulations framed by the Hon’ble Punjab State Electricity Regulatory Commission (PSERC) and recovering the same from retrospective effect, therefore, joint Petitions based on common facts and common law points involved therein were maintainable.

PCs also stated that the Petitioners had filed Civil Writ Petition No. 15641 of 2015 titled *Bedi Steels Pvt. Ltd. and others V/S PSPCL* and others before the Hon’ble Punjab and Haryana High Court which had decided the same by passing a common order dated 06.10.2017 due to which, the Petitioners were filing the present Petitions before this Court.

PCs further stated that all the Petitioners were Large Supply Industrial Consumers situated in the State of Punjab and belonged to category PIU (Power Intensive Unit). The Distribution Licensee had installed Energy Meters at the factory premises of all the Petitioners. The said Energy Meters had a memory register for measurement of three indexes/parameters: (a) Kilowatt Hours (kWh), (b) KiloVolt Ampere Hours (kVAh) and (c) Maximum Demand (MD) in kVA.

At the time of grant of electricity connection to all the Petitioners, a contract/ agreement was signed between the Consumer and the erstwhile Punjab State Electricity Board (now PSPCL). Right from inception of the Board and even before that, consumption had always been meant as units recorded on the kWh index/parameter.

As regards the purpose of second index on the Energy Meter i.e. kVAh, it was submitted that right from inception, the said reading had been recorded only in order to ascertain ‘Power Factor’ (PF= kWh/ kVAh).

PCs contended that before coming into force of the Electricity Act-2003, the Punjab State Electricity Board had framed Regulations under the Electricity (Supply) Act-1948, where under the unit of consumption charged upon every consumer was only kWh recorded in the Meter.

PCs added that the Electricity Act-2003, provided for setting up of the ‘State Commission’ in Punjab. Accordingly, the Punjab State Electricity Regulatory Commission (PSERC) was created as a State Commission which besides other functions had two different and distinct functions to perform namely:

1. Framing of Regulations as per powers conferred under Section 181 read with various other provisions enabling Regulatory Commission/State Commission to frame such Regulations;
2. Determination of Annual Revenue Requirement (ARR) of the Licensee and framing of Tariff Orders as envisaged under Sections 62 to 64 of the Electricity Act, 2003.

PCs also stated that under the Electricity Act-2003, different procedure had been prescribed for the two different duties/functions exercised by the Regulatory Commission. On one hand, the State Commission forms Regulations (in exercise of powers conferred on it) and there are laid before the State Legislature for approval. The Regulations so made could amend the agreement between the Consumer and Distribution Licensee. On the other hand, the Tariff Order was approved annually by the State Commission which was empowered to lay down rates for the supply of electricity (including wheeling, open access, etc.). The two functions can not be mixed up together. In the scheme of the Act, a Tariff Order could not override the express provisions of Regulations framed by the State Commission and had to be in consonance with the regulations applicable.

PCs stated that the Constitutional Bench of Hon’ble Supreme Court had occasion to deal with the two different and distinct functions of the State Commission in *PTC India Ltd. V/S Central Electricity Regulatory Commission, (2010) 4 SCC 603**wherein it was* decided that **:**

*The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.*

*Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-a-vis Regulatory Commissions under other enactments”*

PCs stated that in exercise of powers conferred under Section 181 of the Electricity Act-2003, the Hon’ble PSERC notified Regulations called ‘The Punjab State Electricity Regulatory Commission (Electricity Supply Code and Related Matters), Regulations 2007 (hereinafter to be referred as ‘Supply Code-2007’.

PCs added that in exercise of Subordinate Legislative Powers being vested with Hon’ble PSERC, the Supply Code-2007 was repeatedly amended and approved by the Legislature. At least four amendments were carried out upto the year 2013, however, Section 2(*l*), reproduced below, continued to remain un-amended/ undisturbed:

***2(l) “Consumption” means utilization of electricity in kilowatt- hours (units)”***

PCs further stated that the Petitioners came to know through a Press Release issued in the last week of August 2014 that Tariff Order for the Financial Year 2014-15 had been issued by the PSERC. From the Press release, it came to the knowledge of the Petitioners that the existing system of charging of kWh Tariff had been changed and now kVAh tariff system had been introduced for Large Supply Industrial Consumers. Apart from introduction of kVAh Tariff in Para 3 (i) of the Press Release, the Petitioners also came to know that in Para 3(ii), Time of Day (ToD) Tariff was also being introduced. Besides, as per Para 3 (iv), introduction of Contract Demand system for Medium Supply Industrial Category Consumers was also being introduced. All the Petitioners were adversely affected by the change only in respect of one category of consumers i.e. “Large Supply-Industrial” from whom, recorded consumption Index on the Energy Meter had been changed from kWh to kVAh.

PCs also stated that there was another aspect of the matter. In the category of LS Industrial consumers having Power Factor close to Unity (say PF is 0.99) would not be much affected. On the other hand, Industrial Consumers, who were running their Plants on PF 0.90, would face huge and unreasonable enhancement of Tariff by almost 10%.

PCs also contended that out of the three major changes being introduced for the first time in the history of Punjab, only introduction of kVAh Tariff was made effective on the Petitioners retrospectively from 01.04.2014 (i.e. about five months back from the date of notification of the Tariff Order for the FY 2014-15), whereas ToD Tariff was made applicable, only after a period of more than one month, prospectively from October 2014. Still further, the Contract Demand system for Medium Supply consumers was ordered to be made effective from 01.01.2015. Thus, adequate opportunity/notice was not given to the Petitioners.

PCs further stated that the said Tariff Order for the FY 2014-15, which was passed only on 22.08. 2014 and qua imposition of kVAh tariff on LS industrial consumers, was imposed with retrospective effect from 01.04.2014, the statutory regulations framed by the PSERC continued to define “consumption” only as “kWh” for all the categories of consumers including LS – Industrial Consumers till coming into effect of Supply Code-2014 effective from 01.01.2015.

PCs clarified that the Petitioners were not challenging the Tariff Order FY 2014-15 here before this Court, which remedy could be availed under Section 111 of the Electricity Act-2003. The Petitioners waited for the Hon’ble PSERC to see whether in exercise of Powers of Delegated Legislation, Regulations were amended in tune with their own Tariff Order FY 2014-15 and if so, from which date, such change in Regulations was made. The Petitioners were sure that during the currency of the Regulations under the “Supply Code-2007”, it could not be contemplated that PSERC would bring about a change in the existing definition of “Consumption” from kWh tariff to kVAh.

PCs contended that the Regulations of Supply Code-2007 were amended/re-framed by the PSERC by changing the definition of ***“Consumption” means utilization of electricity in kilowatt - hours (units) or kilo volt ampere hours*** only by virtue of their notification dated November 5, 2014, further made effective only w.e.f. 1.1.2015. Thus, till 31.12.2014, for no category of Consumers, the consumption could be other than kWh and the Tariff Order for the FY 2014-15 could only be given effect to w.e.f. 01.01.-2015 as far as change of unit of consumption was concerned.

PCs also stated that the Constitution Bench decision [ (2010) 4 SCC 603] of the Hon’ble Supreme Court laying down that the order passed by the State Commission could not override regulation has been followed and aptly interpreted by various courts and also by the Hon’ble Appellate Tribunal (APTEL) for Electricity at New Delhi in a recent decision of ***Maruti Suzuki India Limited V/s Haryana Electricity Regulatory Commission*** decided on 24th March, 2015 (In Appeal No. 103 of 2012), The Hon’ble APTEL in the said case held as under:-

*“We have already extensively referred to the Constitution Bench judgment in P.T.C. India Ltd. We have held that judgment of this Tribunal in R.V.K. Energy is not applicable to the present case. P.T.C. India Ltd. has clarified the legal position.* ***At the cost of repetition, we may state that Regulations framed under Sections 178 and 181 of the said Act have a primacy over the orders passed by the Regulatory Commissions in discharge of their functions enumerated in Section 61 read with 62, 79 and 86 of the said Act because they are framed under the authority of subordinate legislation****. Hence, National Electricity Policy and Tariff Policy framed under Section 3 of the said Act cannot override Regulations framed under Section 61 read with Sections 178/181 of the said Act. Ideally, National Electricity Policy, Tariff Policy and the Regulations are expected to be in tune with the provisions of the said Act. Regulations notified by the State Commission under Section 181 of the said Act can specify methodology or formula for calculation of cross-subsidy surcharge which is different from the one mentioned in the Tariff Policy. But it must be in consonance with the provisions of the said Act. Further, if the State Commission is specifying a different formula than that stipulated in the Tariff Policy, it should give reason for adopting a different formula and why the formula given in the Tariff Policy was not adopted in the context of the tariff determination of the concerned distribution licensee*….”.

PCs contended that PSERC had always followed the procedure of granting adequate notices to the consumers to enable them to take necessary steps. However, for the imposition of the kVAh Tariff, vide the said Tariff Order for the FY 2014-15 dated 22.08.2014, sufficient time was not given for compliance of the same. The said procedure, followed by Hon’ble PSERC was to be seen in respect of the revision of the “Power Factor Limit” applicable to the Petitioners and similarly situated other industrial consumers wherein:-

1. Till the year 2005, the threshold limit for Power Factor (PF) was 0.88. In the Annual Revenue Requirement and Tariff Application filed by the erstwhile PSEB for the FY 2004-05, the Board proposed for enhancing the Power Factor threshold limit from 0.88 to 0.90 for Large Supply and Medium Supply Industrial Consumer categories. On due consideration of the material on record, PSERC deemed it appropriate to “give adequate notice to consumers to install additional shunt capacitors” and decided that the threshold limit of Power Factor could be reviewed from 0.88 to 0.90. However, the same would be applicable w.e.f. 01.07.2005. The PSERC further directed that the Punjab State Electricity Board would serve adequate notices of not less than six months to the consumers to enable them to take necessary steps.

(ii) The PSEB, in compliance to the above Tariff Order dated 30.11.2004, issued notices to all concerned and thus granted due opportunity to all the affected industries in respect of change of the Power Factor bench mark. Commercial Circular No. 42 of 2005 dated 17.6.2005 was then issued, whereby it was laid down that for MS and LS General Industry, the PF bench mark shall be 0.90 whereas for PIUs and Arc Furnaces, PF shall be 0.95. As per this circular, PIUs, which had got PF less than 0.90, would be liable for PF Surcharge/penalty. In case, they had PF better than 0.95, then, they were entitled to PF incentive, whereas, General Industry Consumers were entitled to PF incentive over and above 0.90. The said Commercial Circular No. 42 of 2005 remained operative throughout.

1. Now by changing the consumption to kVAh, the Limit had been sought to be revised from 0.90 to 0.99, vide PSERCs’ Tariff Order dated 22.08.2014 and that had been made applicable retrospectively w.e.f. 01.04.2014.

PCs stated that the PSERC, issued notification of amending the Supply Code-2007 by substituting the same with Supply Code-2014 vide notification dated 05.11.2014 making the new Supply Code applicable w.e.f. 01.01.2015. Thus, as per Regulation 2 (*p*) of Supply Code-2014, the definition of ‘consumption’ was amended only with effect from 01.01.2015.

PCs contended that with these changes, Petitioners were sure that now Distribution Licensee will not commit any illegality in demanding arrears on account of change of unit of consumption from kWh to kVAh for the period from 01.04.2014 to 31.12.2014, as Regulations had primacy over the Tariff Order. Actually, in the Tariff Order for the year 2014-15, there was no increase in the rate payable by the Industrial Consumer, only change of definition of consumption qua the Industrial Consumer from kWh to kVAh had taken place.

PCs stated that in utter disregard of the legal position, the Petitioners received bills for the month of March 2015 wherein, under the heading ‘Sundry Charges’ the Respondent had raised arrears from 04/2014 to 09/2014 on account of difference of consumption recorded as per kWh and kVAh mode. Thereafter, a circular bearing CC No. 07/2015 dated 11.03.2015 was issued by the PSPCL directing the Petitioners to deposit the said arrears in six installments. The Petitioners deposited the two installments under the threat of disconnection of the electricity connection.

PCs also stated that the Tariff Order dated 22.08.2014 passed by the PSERC deserved to be ignored only to the extent of the date of applicability of newly introduced kVAh Tariff effective retrospectively from 01.04.2014 as ordered in para 7.1.5 and also as reflected in Chapter 9 of Tariff Order 2014-15 because the same was contrary to the then existing and applicable regulation 2 (*l*) in the Supply Code-2007 (as mentioned above). The said Tariff Order, providing for introduction of kVAh tariff, could be made applicable only w.e.f. 01.01.2015 when the new Supply Code-2014 came into effect. Thus, the Distribution Licensee had no power and authority to demand arrears on account of the change of consumption on the basis of kVAh till December 2014. All the Petitioners were ready to make payment of the bills on the basis of kVAh index recorded on their respective Energy Meters with effect from 01.01.2015 i.e. the date when the regulations provided for so in the definition of ‘consumption’.

PCs next stated that the action of the PSPCL in levying of kVAh tariff instead of kWh tariff from 01.04.2014 to 31.12.2014 was totally illegal, arbitrary, discriminatory against the rules and principles of natural justice and equity, against the provisions of Electricity Act 2003 apart from violating Article 14 and 16 of the Constitution of India and was, therefore, liable to be set aside.

PCs prayed that :

i) the bills raised by the Respondent for the months of October to December 2014 during March 2015 for charges/ arrears on account of change of “consumption” from kiloWatt-hours (units) (also known as kWh) to kiloVolt Ampere hours (also known as kVAh) from the month of April 2014 onwards, as the amendment in regulations had only been brought about w.e.f. 01.01.2015, may be quashed.

ii) necessary directions may be issued to the Respondent to refund the excess charges recovered from the Petitioners during the months of October 2014 to December 2014, by changing the ‘Consumption from kWh to kVAh, alongwith interest @ 18% per annum, as the amendment in regulations had only been brought about w.e.f. 01.01.2015.

iii) the Respondent may be restrained from implementing the   
Tariff Order dated 22.08.2014 for the FY 2014-15, only to the extent, whereby PSERC approved the proposal of the PSPCL for introduction of kVAh Tariff for Large Supply (General and PIU/Arc Furnace) w.e.f. 01.04.2014, without amending the Regulations in this regard and to implement the Tariff Order only w.e.f. 01.01.2015 from which date, the PSERC enforced Supply Code-2014.

iv) necessary directions may be issued to the Respondent to refund the installments deposited by the Petitioners of the disputed bills alongwith interest @ 18% per annum.

v) any other appropriate order or direction deemed suitable in the facts and circumstances of the case may be granted in favour of the Petitioners.

5. Defending the case on behalf of the Respondent – PSPCL, Shri Sehaj Bir Singh, Advocate and Ms. Gurcharan Kaur Maan, Counsels stated that the instant Petitions were bad and liable to be dismissed in as much as the Petitions did not involve any question of law. The complainants had raised a dispute with respect to the arrears being demanded in accordance with the Tariff Order as approved by the appropriate Commission. No challenge had been raised to the Tariff Order dated 22.08.2014. The dispute involving the consequential actions could not be raised in the instant Petitions. The grievances, being espoused by the complainants, were only to the effect that the arrears were being claimed from the consumers. The appropriate Commission was competent to approve the Tariff on year to year basis and the appropriate Commission, issued the Tariff Order for the FY 2014-15 which could not be notified in time, as the Model Code of Conduct was in force on account of elections for the Lok Sabha. Thereafter, by-elections were to be held for certain seats/constituencies of the Legislative Assembly for the state of Punjab. As a result, the Tariff Order for the FY 2014–15, commencing from 1st of April 2014, could not be notified earlier and was delayed. Various changes were incorporated in the Tariff Order for the purpose of securing the interests of the ultimate consumer. One of the said changes was also with respect to billing to be carried out under the kVAh regime rather than the kWh regime. In the former kilowatt-hour regime, the energy charges were calculated on kWh consumption which was one component of the energy bills while Power Factor surcharge or Power Factor incentive which were other components of bills of Large Supply/Medium Supply industrial consumers calculated on the basis of both readings i.e. kWh and kVAh readings. So, both the measurement units of electric energy were in use earlier for industrial consumers. Calculation of bill amount, by applying both types of consumption, was complicated method and many disputes arose due to this method of billing whereas, now billing on the basis of kVAh consumption only was more consumer friendly as the billing system had become simple and had reduced the disputes.

The Counsels added that the Petitioners had not disputed that the Tariff Order was notified with a delay because of the Model Code of Conduct due to Lok Sabha General Elections and Assembly by-elections, yet, they had objected to enforcing the provisions relating to shift to kVAh consumption w.e.f. 01.04.2014. Hence, the arrears on account of revision of Tariff were reflected as sundry charges in the bills sent by the answering Respondent. In order to avoid burdening the consumers from payment of the entire arrears in one go, the amount was split up and was allowed to be paid in six installments. Thus, the bills had been raised strictly in accordance with the Tariff Order as approved by the appropriate Commission. **Not only arrears had been charged from the consumers as per new Tariff Order but refunds were also given to the consumers who maintained high Power Factor i.e. Power Factor more near to unity.**

The Counsels further stated that the Petitioners had neither challenged the Tariff Order dated 22.08.2014 nor had disputed that the bills had not been raised in accordance with the said Tariff Order so approved.

The Counsels also stated that it was well settled that the Courts did not settle the Appeals over the wisdom of the body of experts and decide as to which form of Tariff would be better. The statute had left the said aspect to be determined by the appropriate Commission. Various aspects had to be taken into consideration while determining the Tariff. The procedure was well prescribed and objections/ suggestions from all stakeholders/General Public were sought. Thereafter, the Tariff was approved by the appropriate Commission. There was no allegation that the procedure prescribed in law had not been followed while determining the Tariff. Hence, the decision, so taken by the Competent Authority, could not be interfered with.

The Counsels for the Respondent further stated that the Tariff Order was an annual exercise and was intended, inter-alia, to fill up the revenue gap. In case, the said Tariff Order was not made applicable with effect from the date when it was to be made enforceable, the same was likely to prejudice the revenue generation and lead to alteration of the entire ARR. Obligations required to be discharged besides and the projects to be executed could not thus be completed in time. The very purpose of the approval of the ARR would thus be defeated if the Tariff Order for the FY 2014-15 was not implemented in its present form. Besides, the Petitioners failed to point out as to which provision of the Electricity Act-2003 had been violated. The Petitioners had also not brought any evidence on record to show that any objection was raised at any time after issuance of the Tariff Order dated 22.08.2014 that it was not in consonance with the provisions of Supply Code-2007. Hence, the present Petitions were not maintainable.

The Counsels for the Respondent submitted that not all the connections pertained to the Power Intensive Unit, rather, some of the connections were also General Industrial connections.

The Counsel for the Respondent contended that reliance on the judgment of the Hon’ble Supreme Court was misplaced. The controversy in hand did not relate to the issues that were put up for consideration before the Hon’ble Supreme Court which heard and decided the issue relating to the jurisdiction of the Hon’ble Appellate Tribunal to examine the validity of the regulations framed by the appropriate Commission. The present case related to determination of Tariff by the Hon’ble PSERC for which the prescribed procedure was duly followed and a Public Notice was published in the leading newspapers, all stakeholders were invited to file their objections and after the objections were filed, the same were examined by the PSERC and the Tariff Order so framed was duly notified. In the instant case, the Tariff was revised by the Respondent as per Commercial Circular No. 44 of 2014 that had been issued in compliance to the order dated 22.08.2014 passed by PSERC for determining the Annual Revenue Requirements after hearing and deciding the Petition No. 63 of 2013 filed by the PSPCL. The present Petitions were thus only misconceived and the reliance on the judgment of the Hon’ble Supreme Court was without any tangible basis.

The Counsels for the Respondent also stated that the absence of defining kVAh in the consumption as per the regulations did not, in any manner, invalidate the Tariff so determined especially in view of the fact that prior to the issuance of Tariff Order dated 22.08.2014, kVAh was being used as a component to determine the usage of electricity by the consumers and the same had been admitted by the Petitioners. The larger public interest had to be taken into consideration in the determination of Tariff which was one of the prime functions of the Regulatory Commission and it had to strike a balance so as to protect the interests of the consumers at large.

The Counsels for the Respondent submitted that **once the Petitioners had accepted the Tariff Order, there could be no challenge to the demand of the Tariff raised by the answering Respondent with effect from the date when such Tariff was to become applicable.** By having accepted the Tariff Order, the Petitioners lost all their rights to raise any challenge to the demand that had been raised by the answering Respondent in terms of the Tariff Order so approved and bills so issued were not a subject matter of dispute in so far as it related to the calculation part.

The Counsel for the Respondent added that the appropriate alteration/modification of the definition of “Consumption” had to be carried out by the appropriate Commission. In any case, merely because the said amendment had not been carried out simultaneously, could not be the basis to hold that the Tariff determined became illegal or that the consumers were not liable to pay the bills that had been raised in accordance to the approved Tariff as determined/approved by the appropriate Commission. The Petitioners had failed to point out any discrepancy or excess billing contrary to the Tariff Order. In the absence of any allegation duly substantiated showing that there had been any breach in raising the clause or that such bills had been raised by the Respondent in violation to the Tariff Order approved by the appropriate Commission, the Petitions were liable to be dismissed.

The Counsels for the Respondent contended that judgment dated 24.03.2015of the Hon’ble APTEL, New Delhi, cited by the Petitioners, was not applicable to the facts of the instant cases. The Petitioners nowhere pleaded that the regulations framed by the Commission, were, in any manner, violative of the Electricity Act -2003. The dispute in the said case was in reference to the prominence of regulations vis-a-vis the policies framed by Central/State Commission, it was concluded by the Hon’ble Supreme Court that the policy could not override the regulations which was statutory and enforceable. The Counsels further stated that the decision of the Commission being valid, the bills raised by the answering Respondent in compliance to the said decision, were also valid and enforceable. In case, the Petitioners had any relevance with respect to the assessment of the bill or alleged non compliance of the procedure/directions issued by the PSERC, the remedy available to the Petitioners was already prescribed under the Act and the regulations as approved by the appropriate Commission will render the present Petitions in this Court under Articles 226/227 as not maintainable. The averments made in the Petitions, in respect to the Commercial Circular No. 42 of 2005 were wrong. The new Tariff regime had also put an end to the disputes arising on account of Power Factor Incentive/Surcharge.

The Counsels for the Respondent reiterated that the account of difference of consumption was not the basis for claiming the arrears from 01.04.2014 till 01.09.2014, rather, the same had been on account of revision of the Tariff. The Petitioners had deliberately made an attempt to mislead this Court and filed the instant Petitions which deserved to be dismissed on the said account itself. The CC no. 7 of 2015 was issued by the answering Respondent as the financial year was to come to an end on 31st of March 2015. Appropriate and adequate time had been granted by the Respondent to the consumers to deposit the arrears in installments to avoid burdening the consumers with the bills to be deposited in a single installment. Merely because the said arrears were mentioned as sundry charges did not, in any manner, render the recovery invalid or illegal.

The Counsels for the Respondent prayed that the instant Petitions praying, inter-alia, to restrain the Respondent from implementing the Tariff Order for FY 2014-15 w.e.f. 01.04.2014, were not maintainable and may be dismissed in view of the facts and circumstances of the case and in the interest of justice and fair play.

**Decision**

6. I have gone through the written submissions made in the Petitions by the Petitioners and written replies of the Respondent as well as oral arguments made by the Counsels of the Petitioners and Respondent - PSPCL alongwith material brought on record by both the sides.

The issue requiring adjudication is the maintainability of the Petitions praying, inter-alia for restraining the Respondent - PSPCL from implementing the Tariff Order dated 22.08.2014 for the FY 2014-15, only to the extent, whereby Hon’blePSERC decided the *Petition no. 63/2013 in the matter of Annual Revenue Requirement (ARR) for FY 2014-15* filed by the PSPCL and approved its proposal for introduction of kVAh Tariff for Large Supply (General and PIU/Arc Furnace) consumers w.e.f. 01.04.2014, without ensuring to amend the Regulations in this regard and to implement the Tariff Order only w.e.f. 01.01.2015 from which date, the Hon’ble PSERC enforced Supply Code-2014.

I noted the contention of the PCs that under the Electricity Act-2003, different procedure had been prescribed for the two different duties/functions exercised by the Regulatory Commission. On one hand, the State Commission forms Regulations (in exercise of the powers conferred on it) and seeks approval of the State Legislature and Regulations so made, could even amend the agreement between the Consumers and the Distribution Licensee. On the other hand, the Tariff Order was approved/notified annually by the State Commission which was empowered to lay down the rates for the supply of electricity (including wheeling, open access charges, etc.). I also noted other submissions made by the Counsels for the Petitioners in para 4 above.

I also perused the written replies filed by the Counsels for the Respondent stating that the Draft Tariff Order for FY 2014-15 was given due publicity through print media by inviting suggestions and views of the General Public. However, in view of the Lok Sabha Elections and subsequent by-elections in some constituencies/seats of Legislative Assembly of the State of Punjab, the Model Code of Conduct remained in operation. As a result, Hon’ble PSERC was constrained to withhold issuance of Tariff Order and finally issued the same on 22.08.2014. The Counsels for the Respondent added that the date of its implementation with regard to charging “Consumption” in terms of kVAh, instead of kWh, had to be retained as from 01.04.2014, with a view to ensure that the Tariff Order for the FY 2014-15 served the desired purposes, inter-alia of implementation of the entire ARR obligations required to be discharged, revenue neutrality and timely completion of the projects. The Counsels for the Respondent pleaded that reliance, by PCs on the judgment of the Hon’ble Supreme Court was misplaced as the Apex Court adjudicated on the issue of jurisdiction of the Hon’ble Appellate Tribunal to examine the validity of the Regulations framed by the appropriate Commission while the present cases related to determination of the Tariff and its applicability from 01.04.2014 as per order dated 22.08.2014 of the Hon’ble PSERC for which the prescribed procedure was duly followed. The Counsels for the Respondent further stated that ignorance of Law could not be held to be a valid excuse as stated in the Petitions. In case, the Petitioners did not raise any objection to the proposals in ARR, it would be deemed that they had no suggestion to be made for determination of Tariff by the Appropriate Commission. Merely because the said arrears were mentioned as sundry charges did not, in any manner, render the recovery invalid or illegal.

Apart from making the above submissions in the written reply to the Petitions, the Counsel for the Respondent stated in writing, during the course of hearing on 09.01.2018, that the Appeals preferred before this Court were liable to be dismissed on the singular ground of ‘jurisdiction’ as the Petitioners were indirectly laying challenge to the Tariff Order issued by the Hon’ble PSERC for the FY 2014-15 and that as per the provisions of Section 111 of the Electricity Act-2003, any challenge to the contents or applicability of the Tariff Order issued by the Hon’ble PSERC, lies only before the Hon’ble APTEL, New Delhi. The Counsel for the Respondent added that :

*“If the prayer of the Appellants is accepted, the same will tantamount to the alteration of the Tariff Order passed by the Hon’ble PSERC for the FY 2014-15. It would also be imperative to mention here that the power to adjudicate any claim, which requires or provides for the alteration or change in the Tariff Order, lies solely with the Hon’ble APTEL, New Delhi in accordance with the provisions of the Electricity Act-2003*.”

I also find that the Petitioners have referred to the implementation of Time of Day (ToD) Tariff for Large Supply category consumers, with effect from 01.10.2014 i.e. its applicability after more than a month from the date of issue of the Tariff Order for the FY 2014-15 (22.08.2014) despite the fact that the said Tariff Order was applicable and implemented w.e.f. 01.04.2014. I also noted that the Counsels for the Respondent, during the course of oral arguments, defended by stating that cushion time was given to the consumers for replacement of ordinary Energy Meter with ToD type Energy Meter.

I find that the justification given by the Counsel for the Respondent for deferring implementation of kVAh Tariff for Medium Supply industry w.e.f. 01.01.2015 is in order because change of Energy Meter was involved for such consumers for measuring the consumption in kVAh as approved by the Hon’ble PSERC in the Tariff Order for the FY 2014-15.

I also noted the contention of the Counsels for the Respondent, during the course of oral arguments on 09.01.2018, that the acceptance of the prayer of the Petitioners for refund of the arrears charged on account of kVAh consumption units from 01.04.2014 would involve significant financial implication by way of loss of revenue and would adversely affect the ARR for the FY 2014-15. On a specific query about the magnitude of the amount involved in refund of arrears, loss of revenue etc. the Counsels for the Respondent stated that they would revert back after getting the details from the Billing Cell of the Respondent - PSPCL. Thereafter, the Respondent’s Counsels collected the requisite details and intimated on 18.01.2018 that the financial implication, due to loss of revenue, by implementing kVAh tariff w.e.f. 01.01.2015 in the Tariff Order for the FY 2014-15 shall be a sum of Rs. 39.71 crore (approximately) exclusively in respect of the Large Supply consumers including the Petitioners.

As another hearing was necessitated to deliberate on the strong reservations by the Counsels for the Respondent on the maintainability of the Appeals, the same was accordingly held on 30.01.2018 at 15.00 hrs wherein the Counsels for both the Petitioners and Respondent alongwith Er. Harvinder Singh, Senior Executive Engineer, CBC, PSPCL, Ludhiana and Er. Dipanjit Singh, AEE, MBC, PSPCL, Patiala (authorized by the Engineer-in-Chief/Commercial, PSPCL, Patiala) were present. During the course of oral discussions, the Representative of the PSPCL submitted that the financial implication of Rs. 39.71 crore (approximately) was involved in the case of all the Large Supply consumers including the Petitioners and **if these consumers were not charged as per “kVAh” consumption from 01.04.2014 as provided in the Tariff Order FY 2014-15, this would tantamount to alteration in the ARR/Tariff Order for the FY 2014-15 approved and notified by the Hon’ble PSERC.**

The Counsels for the Petitioners contested this view by stating that the relief was claimed from this Court by the Petitioners and the financial implication involved may be roughly to the extent of Rs. 10 crore qua the Petitioners who were the only eligible consumers to get this relief by way of filing the case in Hon’ble Punjab and Haryana High Court. PCs also argued that the remaining LS consumers, otherwise eligible, were barred from getting this relief due to application of principle of Estoppel and Law of Limitation. The Counsels for the Respondent did not agree with this reply and argued that PSPCL was a Public Utility Organization performing public duties, as such, it could not discriminate with regard to the Petitioners vis-a-vis non-Petitioners (consumers) in view of the spirit of the provisions laid in Section 62 (3) of Electricity Act-2003. Besides, other LS consumers will not be precluded/barred from filing Appeals, claiming similar relief/refund, due to Law of Limitation (as contended by PCs) because Law of Limitation will be applicable from the date of issue of order by the Court of Ombudsman, amending the provisions of Tariff Order FY 2014-15. At the same time, the implementation of the Tariff Order was a policy matter and had to be decided in entirety.

Further, the Counsel for the Respondent also contested the plea of the PCs questioning raising of the issue of the maintainability and jurisdiction of this Court to hear and decide the present Appeals despite the fact that Hon’ble Punjab and Haryana High Court had remitted these Appeals to this Court for adjudication. The Counsel for the Respondent pleaded that the Petitioners, being electricity consumers, were governed under Electricity Act-2003 which mandated that challenge to the applicability of provisions of any order passed by the State Commission had to be adjudicated accordingly in terms of the provisions of the Section 111 (1) of said Act which stipulated that :

*“Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:*

*Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:*

*Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safe guard the realization of penalty.”*

PCs also argued that in case, the Respondent - PSPCL considered the order dated 06.10.2017 of the Hon’ble High Court, remitting the present cases to this Court for adjudication, as inconsistent with the provisions of the Electricity Act-2003, it could have filed a Petition in the Hon’ble Punjab and Haryana High Court, for recall of the order ibid. The Counsel for the Respondent, in its defence, stated that order dated 06.10.2017 was still under examination in the PSPCL who during this process, came to know that the Petitioners had filed their Appeals on 06.11.2017 in this Court which issued notices to the PSPCL on 09.11.2017 calling for their comments etc.

With a view to adjudicate on the maintainability of the Petitions, challenging the applicability/implementation of Tariff Order for the FY 2014-15 w.e.f. 01.04.2014, I have studied the Tariff Order for the FY 2014-15 (Chapter 7–Tariff Related Issues) notified by the Hon’ble PSERC on 22.08.2014 and noted that suggestions for introduction of kVAh consumption based tariff instead of kWh tariff, for Large Supply and Medium Supply consumers initially came from many Industrial Consumer Chambers and one Employees’ Association of the erstwhile PSEB at the time of processing of ARR and Tariff Petition for 2004-05. It was brought out that the suggestion, if implemented, would go a long way in motivating the Large Supply and Medium Supply industrial consumers to have higher Power Factor which, in turn would help in improving the system parameters and reduce technical losses. In response, Hon’le PSERC, in its Tariff Order for FY 2004-05, directed the erstwhile PSEB to submit a detailed paper on the introduction of kVAh based tariff in the ARR for FY 2005-06. Accordingly, the Utility examined the matter at that time and stated that it could ill afford to experiment with introduction of kVAh Tariff. Keeping in view the apprehensions of possible loss of revenue adversely affecting the poor financial health of the Utility, Hon’ble PSERC, vide its ARR of subsequent years, continued to advise the utility (PSEB/PSPCL) to work on the practicability/implications of the introduction of kVAh tariff in the state. Finally, in compliance to the directive issued by the Hon’ble PSERC in Tariff Order for the FY 2013-14, PSPCL submitted the consolidated proposal for introduction of kVAh tariff for Large Supply (general and PIU/Arc Furnace), Bulk Supply (HT/LT), Railway Traction, Medium Supply, Domestic Supply (for load more than 100kW) and NRS (for load more than 100kW), vide its letter no. 2696 dated 23.10.2013. PSPCL proposed conversion factors for switch over from kWh tariff regime to kVAh tariff.

I noted that for the purpose of designing the kVAh tariff, PSPCL adopted a revenue neutral approach, wherein the overall revenue for a particular consumer category/sub category would remain the same as in the case with kWh billing system. In order to maintain revenue neutrality for designing kVAh tariff, PSPCL took into consideration the following parameters:

* kWh consumption
* kVAh consumption (in case it was being recorded, otherwise determined values)
* Revenue from the sale of Power
* Power Factor surcharge/rebate (wherever being recorded, otherwise determined values)

In order to arrive at kVAh based tariffs in a revenue neutral scenario, PSPCL used a multiplication/conversion factor, which was normally equal to the desired value of the Power Factor, as per the following equation:

Tariff in kVAh = Tariff in kWh x Conversion Factor (= desired value of

average P.F.)

A public notice was then issued by the Hon’ble PSERC for inviting objections/comments by 02.12.2013 from the public and stakeholders on the proposal submitted by the PSPCL for introduction of kVAh tariff with effective from FY 2014-15. Public hearings in the matter were also held and various consumers/consumer organizations filed their objections/ comments on the said proposal of the PSPCL. Many consumers/consumer associations appreciated the introduction of kVAh tariff as the same would resolve a lot of complications and disputes related with kWh tariff and Power Factor surcharge, whereas some desired that the kVAh tariff should not be introduced as it will increase financial burden on the consumers of the State.

The PSPCL submitted its reply to the objections by the aforesaid consumers raised to the Hon’ble PSERC. Hon’ble PSERC noted that the objections raised by various objectors had been adequately replied by the PSPCL and many consumer associations/consumers had appreciated and welcomed the introduction of kVAh tariff. The conversion factors worked out and proposed by the PSPCL in its proposal were for achieving categoriwise/sub-categoriwise revenue neutrality for conversion from kWh tariff to kVAh tariff. The Commission held that there was sufficient justification for introduction of kVAh tariff, instead of the then existing kWh tariff, as it will be beneficial for both, Utility and the consumers. Hon’ble PSERC, therefore, approved the proposal of the PSPCL for introduction of kVAh tariff for Large Supply (General Industry), Large Supply (PIU/Arc Furnace), Bulk Supply (HT/LT), Railway Traction, Medium Supply, DS (Load more than 100kW) and NRS (Load more than 100kW) categories of consumers. The kVAh tariff was determined broadly on the basis of conversion factors proposed by the PSPCL. It was also decided that kVAh tariff shall be applicable with effect from 1st April, 2014.

I observe that the Petitioners have actually challenged the applicability of the Tariff Order dated 22.08.2014 for FY 2014-15 with regard to the introduction of kVAh consumption for Large Supply (General Industry) and Large Supply (PIU/Arc Furnace) with effect from 01.04.2014 and they have accordingly prayed for restraining the Respondent-PSPCL from implementing the order ibid from 01.04.2014 and instead, implement the same from 01.01.2015 apart from quashing the arrears raised on this account. I also observe that the Tariff Order ibid was notified by the Hon’ble PSERC, after hearing and deciding the Petition No. 63 of 2013 in the matter of Annual Revenue Requirement (ARR) filed by the PSPCL for the FY 2014-15, in exercise of powers conferred on it under the provisions of Electricity Act-2003 and no documentary evidence, pinpointing any objection/lacunae in the said order after its issuance, has been brought on record.

*My findings on the points deliberated are as under:*

1. I observe that during the course of oral arguments, the Counsel for the Respondent – PSPCL argued that the introduction of kVAh based Tariff for various categories of consumers was not opposed by the Petitioners during the Public Hearing held by Hon’ble PSERC while deciding the Petition no. 63 of 2013 in the matter of Annual Revenue Requirement (ARR) filed by the PSPCL for the FY 2014-15. I note that the objections at Serial no. 5 and 6 of Tariff Order for FY 2014-15, were raised by Mandi Gobindgarh Induction Furnace Association and All India Re-Roller Association respectively.

One of the issues raised by them was for introduction of kVAh based Tariff. The objectors proposed the introduction of kVAh Tariff based on input Power Factor of the Power Supply at the Energy Meter and accordingly the Conversion Factor may be considered. In response, PSPCL stated that Conversion Factor for kVAh Tariff had been proposed equal to average of PF of various categories of consumers and this had been followed by other Electricity Corporations and system carried inbuilt incentive to reduce the Energy Bill with improvement in PF. The views expressed by the Objectors to adopt PF at the input end of the Energy Meter was not in order as the inductive load of the consumers was needed to be governed and averaged out for levy of kVAh Tariff judiciously.

*I find that Hon’ble PSERC noted that the PSPCL had adequately replied to the objections. Many Consumers Association/Consumers appreciated and welcomed the introduction of kVAh based Tariff. Hon’ble PSERC finally held that there was sufficient justification for introduction of kVAh based Tariff, instead of kWh based Tariff, as it will be beneficial for both the Utility and the consumers and therefore, approved the proposal for introduction of kVAh based Tariff for some categories of the consumers including the Petitioners.*

1. I also observe from the perusal of the Tariff Order for the FY 2014-15, that no threshold limits of Power Factor were specified in respect of category of the consumers for whom the kVAh based Tariff was prescribed in the General Conditions of the tariff. In case kWh based tariff is to be levied, then the threshold limits of Power Factor were necessarily required to be prescribed on the analogy of limits specified in the Tariff Orders for the preceding financial years. *This certainly tantamounts to altering the Tariff Order for the FY 2014-15, approved by the Hon’ble PSERC, which is beyond the purview of this Court.*
2. *I observe that natural consequence of acceptance of the prayer of the present Petitioners would be passing on the burden of Rs. 39.71 crore (approximately) Plus interest w.e.f. 01.04.2014 to all the categories of consumers (including the Petitioners) in the forthcoming ARR, and in turn, benefitting the inefficient consumers (including most of the Petitioners) who did not maintain the required Power Factor and instead, contributed towards lowering the Power Factor thereby, increasing the line losses and thwarting the stability of Power System in the State of Punjab. I, therefore, find no reason to disbelieve that the Tariff Structure pronounced by the Hon’ble PSERC for the FY 2014-15, will be affected considerably by making modifications in the Tariff Order for the FY 2014-15 and restraining the Respondent from implementing the same in toto, as prayed by the Petitioners. Surely, this does not fall within the ambit of this Court.*
3. *I find it appropriate to go through and consider the submissions made by the Learned Advocate General, Punjab (referred to in order dated 06.10.2017 of Hon’ble Punjab and Haryana High Court in the present cases) to the effect that:*

*“Petitioners have efficacious remedy by way of a Petition under Section 42 (7) of the Act.”*

I also note that based on the above submissions,Hon’ble Punjab and Haryana High Court passed the order that:

“*In view of the alternate statutory remedy available to Petitioners, this Petition is disposed of with liberty to Petitioners to approach the said authority”.*

To put the records straight, I would like to reproduce Section 42 (7) of the ElectricityAct-2003 as under:

“*The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission”.*

As a matter of fact, the above provision is to be read with Section 42 (6) of Electricity Act-2003 and is reproduced as under:

*“Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of this grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission”.*

*A bare perusal of the said provisions would reveal that reference to Section 42 (7) of Electricity Act-2003 was not applicable to the present prayer of the Petitioners case which if accepted, shall lead to alteration in the Tariff order 2014-15*

In view of the above, I agree with the Counsel for the Respondent – PSPCL that these Petitions are not maintainable in this Court taking into consideration the totality of the facts and circumstances of the cases.

**As a sequel of above discussions, it is held that the present Petitions, challenging the applicability of the order dated 22.08.2014 of Hon’ble PSERC, are not maintainable in this Court and the Petitioners, aggrieved by the said order, are at liberty to seek remedy, if they so desire, from the appropriate Body viz. Hon’ble APTEL in terms of provisions contained in Section 111 (1) of Electricity Act-2003.**

7. The Petitions are disposed off accordingly.

(VIRINDER SINGH)

Date : 05.02.2018 LokPal (Ombudsman)

Place: S.A.S. Nagar (Mohali) Electricity, Punjab.