RAJIV SAHAI ENDLAW, J.

1. The common questions involved in these proceedings which have been heard together are:-

(I) Whether under Section 20(1) of the Comptroller and Auditor Generals' (Duties, Powers and Conditions of Service) Act, 1971 (CAG Act) the Comptroller and Auditor General of India (CAG) can be requested to undertake the audit of the accounts of the Distribution Companies (DISCOMs), entrusted with the work of distribution and retail of electricity in Delhi pursuant to the unbundling of the erstwhile Delhi Vidyut Board (DVB), which are public-private partnerships in which 51% shares are held by private entities and 49% shares are held by a company wholly owned by the Government of National Capital Territory of Delhi (GNCTD).

(II) If the answer to the aforesaid question is in affirmative, whether the said decision to request such audit is to be of the Administrator, acting on his own, or on the aid and advice of the Council of the Ministers of GNCTD.

(III) If the answer to the question no. 1 is in affirmative, whether the direction so given to the CAG in the present case has been taken in accordance with the procedure prescribed under Section 20 of the CAG Act and if not, to what effect.

(IV) Whether the audit so directed can be since the date of inception of DISCOMs i.e. 1st July, 2002 and if not, for what period.

(V) If it were to be held that the CAG can conduct audit of DISCOMs but the direction impugned in these proceedings is bad for the reason of having been issued without compliance with the proper procedure, whether a mandate ought to be issued to the GNCTD or to the CAG to conduct the audit of the DISCOMs

2. **Writ Petition (C) No. 895/2011** was filed as a Public Interest Litigation (PIL) seeking *inter alia* a direction to the CAG to audit the accounts for at least three latest completed years i.e. financial years 2007-08; 2008-09 and 2009-10, of the three DISCOMs in Delhi. It is *inter alia* the

case in the said PIL:

(i) that the DISCOMs have been manipulating their records and showing huge losses; the tariff orders of the previous years were based on these manufactured records and thus the consumers had to pay a higher tariff than what would have been paid if the tariff had been based on the correct data;

(ii) that the Delhi Electricity Regulatory Commission (DERC) had also taken into cognizance the continuous fraud being played by the DISCOMs;

(iii) that several stake holders also during the public hearing held for determination of tariff for the financial year 2010-11 had raised objections in this regard including that the DISCOMs had indulged in procurement of capital goods from sister concerns at much higher prices and demanded audit by the CAG;

(iv) that the Tariff Division of the DERC also, while dealing with the said objections had *inter alia* observed that the refusal of the DISCOMs to substantiate or render explanation of the documents produced by them gives rise to strong suspicion of manipulation of data and for which reason no reliance could be placed on the auditor's

certificate unless and until the DISCOMs establish the source of the documents and data;

(v) that the inaction of the GNCTD to ask the CAG to audit accounts of the DISCOMs was arbitrary and violative of Article 14 of the Constitution of India; and

(vi) that some of the members of the DERC were playing into the hands of the DISCOMs in dereliction of their statutory duties as Regulators.

3. The PIL was entertained and notice thereof issued. The DISCOMs contended that once there had been privatisation of the electricity companies, CAG had no jurisdiction *qua* them.

4. The GNCTD in its counter affidavit stated that, (a) the DERC vide its letter dated 8th July, 2010 had requested the GNCTD to request the CAG for an audit of the accounts of the three DISCOMs i.e. (i) BSES Rajdhani Power Limited (BRPL); (ii) BSES Yamuna Power Limited (BYPL); and, (iii) North Delhi Power Limited (NDPL) (since changed its name to Tata Power Delhi Distribution Ltd.(TPDDL)) for the financial years 2007-08, 2008-09 and 2009-10; (b) however GNCTD has no *locus standi* to accede to the said request of the DERC as there is no such enabling provision under the

Electricity Act, 2003 or under the Delhi Electricity Reform Act, 2000 (Reforms Act) or under the tariff policy to refer the matter of audit of accounts of the DISCOMs; (c) there is no such power also under the Article 149 of the Constitution of India or under the CAG Act; and, (d) that otherwise also a routine audit by the CAG every year may not be desirable but in order to respect the public sentiment it may be desirable to get an occasional CAG audit done.

5. During the pendency of the aforesaid PIL, elections were held to the Legislative Assembly of Delhi and a new Government came into power on 28th December, 2013 and which in exercise of powers under Section 20 of the CAG Act, on 7th January, 2014, asked the CAG to conduct an audit of the accounts of the DISCOMs from the date of their inception i.e. 1st July, 2002 till date. This led to the filing of the **Writ Petitions (C) No. 529/2014, 539/2014 and 559/2014** by the three DISCOMs aforesaid. The said writ petitions came up as per Roster Bench before a Single Judge of this Court on 24th January, 2014 when notice thereof was issued but on the application of DISCOMs for interim relief of stay of the decision directing CAG to conduct audit, the only ad interim relief granted was that the CAG shall not submit its final report.

6. Aggrieved therefrom, **LPAs No. 125/2014, 140/2014 and 141/2014** were filed by the three DISCOMs. The Division Bench which was seized of the said LPAs, on 24th March, 2014, withdrew the writ petitions pending before the Single Judge for being heard by the Division Bench only along with the appeals; however, the interim relief sought by the DISCOMs was denied and rather it was ordered that the DISCOMs shall continue to cooperate fully with the CAG.

7. The PIL was also pending before the Division Bench. It is in this manner that the proceedings have been taken up together for hearing.

8. We have heard senior counsels for the DISCOMs, counsel for the public interest writ petitioner, senior counsels for the CAG and DERC and the senior counsel appearing for the GNCTD. **Arguments in the writ petitions having been heard, the LPAs aforesaid have become redundant and are disposed of as such**.

9. We may at this stage record that the political party which had formed the government on 28th December, 2013 and which had ordered the impugned audit by CAG, lasted till 14th February, 2014 only. Thereafter, GNCTD was being administered by the Central Government and on 4th November, 2014 the Legislative Assembly of Delhi was dissolved.

Elections to the Legislative Assembly of Delhi were again held on 7th February, 2015 and the political party which earlier formed Government came back into power on 14th February, 2015. Though the counter affidavit on behalf of GNCTD in the writ petitions was filed when it was being administered by the Central Government but by the stage of addressing arguments on behalf of GNCTD, the political party which while in power had issued the direction of audit, was back in power.

10. The counsels have addressed arguments with respect to the record of Writ Petition (C) No. 559/2014 and hence, while referring to the pleadings, we will be referring to the pleadings in the said petition only. We may also record that in accordance with the liberty given while reserving the judgment, written submissions have also been filed on behalf of the three DISCOMs, CAG and GNCTD.

11. It is the case of the DISCOMs in the writ petitions filed by them:

(a) that during the period 2001-2003, Power Sector in NCT of Delhi and its performance was closely monitored by the Supreme Court in Writ Petition (C) No. 328/1999 tilted ***In Re: Power Crisis in NCT, Delhi vs. Union of India***; this led to the Reforms Act which came into force on 23rd November, 2000;

(b) that the GNCTD on 6th January, 2001, in exercise of powers under the Reforms Act decided to unbundle the Delhi Vidyut Board (DVB), its undertaking and assets into six successor companies; the GNCTD on 20th November, 2001 notified the Transfer Scheme relating to transfer and vesting of assets liabilities, proceedings and personnel of the erstwhile DVB in the successor entities;

(c) that in the meanwhile, the three DISCOMs, the Delhi Transco Limited, the two generating companies namely Indraprastha Power Generation Company Ltd. (IPGCL) and Pragati Power Corporation Ltd. (PPCL) and one holding company namely Delhi Power Supply Company Limited (DPCL) were formed by GNCTD;

(d) that the International Competitive Bidding for sale of 51% equity, management and control of the three DISCOMs was held and 51% share holding of the three DISCOMs was transferred to the successful bidders; the remaining 49% share holding of the three DISCOMs was held by DPCL, a company fully owned by the GNCTD;

(e) that though earlier the accounts of the DISCOMs, being Government companies, were being audited by the CAG but the CAG

on 22nd August, 2002, subsequent to the transfer of 51% equity stake and management control in the DISCOMs to private entities, took a decision that the DISCOMs having ceased to be government companies, the CAG could not appoint its statutory Auditor;

(f) that the Reforms Act established the DERC with function *inter alia* of determination of tariff and with provision for appeals against the orders of the DERC first to the Appellate Tribunal for Electricity and thereafter to the Supreme Court; the DERC thereafter has been determining tariff for the electricity to be distributed and retailed by the DISCOMs;

(g) that the DISCOMs on 28th December, 2013 were issued the notice calling upon them to submit their representations under Section 20(3) of the CAG Act latest by 1700 hours on 30th December, 2013 in the office of the Principal Secretary (Power) GNCTD and to also state if they require any personal hearing, and in that case to attend the office of the Principal Secretary (Power) GNCTD at 1700 hours on 30th December, 2013; on 30th December, 2013, the DISCOMs filed a response protesting the short time given and challenging the right of the GNCTD to direct/order the audit of DISCOMs;

(h) that on 31st December, 2013 the DISCOMs were given an opportunity to submit additional documents and to come for personal hearing at 1200 hours on 1st January, 2014;

(i) that the DISCOMs in the hearing which took place on 1st January, 2014 challenged the power of GNCTD to direct audit of the DISCOMs and also protested that they had not been given resonable opportunity within the meaning of Section 20(3) of the CAG Act; on 6th January, 2014, the DISCOMs issued an additional response reiterating their concern; and

(j) that on 7th January, 2014, the Deputy Secretary of Power, GNCTD issued the impugned order for audit of the DISCOMs by the CAG under Section 20 of the CAG Act.

We at this stage are not recording the legal contentions urged in the writ petitions as oral arguments addressed are hereafter being recorded in detail.

12. The GNCTD in its counter affidavit dated 13th March, 2014 has pleaded:

(i) that the issue of audit of DISCOMs by CAG had been raised time and again by the various stake holders over the previous four to

five years alleging large scale discrepancies in the accounts;

(ii) that the DERC also in its letter dated 8th July, 2010 had opined that it has become necessary to get the matter settled and the best way to do the same was an audit by the CAG;

(iii) that after the GNCTD had filed its affidavit dated 9th November, 2011 in the PIL, the DERC had again vide its letter dated 22nd February, 2012 asked the GNCTD to expedite the proposal for CAG audit of the three DISCOMs at least for the previous three years;

(iv) that in pursuance thereto the GNCTD had filed an additional affidavit dated 20th March, 2012 in the PIL informing that the Cabinet had taken a decision on 27th December, 2011 and approved the audit of the three DISCOMs since inception i.e. 1st July, 2002;

(v) that on 1st October, 2013 a note was processed by the Department of Power, GNCTD in this regard and the arguing counsel in his opinion dated 23rd December, 2013 had opined that the GNCTD was empowered to entrust the audit of the DISCOMs to the CAG under Section 20 of the CAG Act;

(vi) that acting on the aforesaid opinion, the notices dated 28th December, 2013 were issued to the DISCOMs;

(vii) approval of the Administrator, Delhi was sought which was granted on 30th December, 2013; consultation with the CAG was also held; thereafter, again vide letter dated 31st December, 2013 (supra) opportunity was given to the DISCOMs; the CAG vide its letter dated 1st January, 2014 conveyed in principle agreement to conduct the audit of the three DISCOMs;

(viii) after considering the objections, the opposition of the DISCOMs to the audit was found to be meritless as it was felt that substantial public funds have been invested in the DISCOMs and considering the fact that GNCTD is a 49% share holder in the DISCOMs, it would be in larger public interest to have the accounts of the DISCOMs audited by the CAG; it was also felt that it may lead to overall reduction in electricity tariff by the DERC; it was yet further felt that it was important to carry the conviction of the general public/consumers about the authenticity of the claims made by the DISCOMs of suffering losses;

(ix) that the pre-requisite of Section 20 have been complied with;

(x) that the Administrator, Delhi, after considering the replies of the DISCOMs, on 1st January, 2014 granted his approval to request

the CAG to conduct the audit of the three DISCOMs since inception;

(xi) the DISCOMs, if their accounts are proper and in order, have no reason to oppose the audit by the CAG and thus the audit by the CAG would instill greater confidence in the mind of the general public and consumers about the authenticity of the claims of losses made by the DISCOMs;

(xii) that there is nothing in the Electricity Act or the Reforms Act which prohibits the audit by the CAG; and

(xiii) that the CAG itself had issued Public Auditing Guidelines in case of Public Private Partnership (PPP) projects, as per which also, even where the Government is a minority partner, public audit should happen when there is a transfer of assets to the private party; the purpose of said audit is to ensure that the said partnership has yielded value for money and the public interest is adequately protected.

We are again not recording the legal contentions urged in the counter affidavit, as the arguments addressed before the Court are hereafter being recorded in detail.

13. The CAG, in its counter affidavit has pleaded:

(A) that under Regulation 107 of the CAG Regulations on Audit

and Accounts, 2007, the time period of audit has been specified as "preferably for five accounts years" which essentially means that the initial period of entrustment for a period of five years, though extendable for a further period;

(B) that though the entrustment by the GNCTD of the audit of the accounts of the DISCOMs since their inception is for more than five years but the CAG had agreed thereto;

(C) that as per the Regulations, in respect of taking up Audit under Section 20 of the CAG Act, CAG during the audit is authorised to put such questions or make such observations as it may consider necessary and to call for such information as it may require for preparation of the report;

(D) that accounts do not mean financial account only and includes all types of audit that is financial / compliance / performance;

(E) that as per the terms of reference agreed with GNCTD, the audit is not to be financial only;

(F) that since the audit has been taken up at the request of GNCTD, in public interest, scope of audit has been framed keeping in mind the said aspects, to include financial compliance performance audit;

(G) that though the DISCOMs had been directed vide the interim order in the proceedings to co-operate in the audit but have been delaying the audit;

(H) that the audit is being conducted in accordance with the Regulations and the Guiding Principles of auditing standards.

14. Though rejoinders to the counter-affidavits and additional affidavits have also been filed but we do not deem it necessary to record the contents thereof, as the same were not referred to during the hearing.

15. Dr. Abhishek Manu Singhvi, senior counsel appearing for TPDDL, has argued:

(I) that the Political Party which formed the Government on 28th December, 2013 and directed audit of the DISCOMs by CAG had in its election manifesto itself promised a reduction in electricity tariff; it is for this reason only, that the direction for audit, by giving an illusory opportunity of hearing was issued hurriedly;

(II) that Delhi has its special status under Article 239 AA of the Constitution of India;

(III) that under Article 239-AA (4), the Council of Ministers are to aid and advise the Administrator of Delhi only in the exercise of his

functions in relation to matters with respect to which the Legislative Assembly has power to make laws (except in so far as he is by or under any law required to act in his discretion);

(IV) that the Audit under Section 20 of the CAG Act can be directed only where the Administrator is satisfied that it is expedient to do so in public interest and only after giving reasonable opportunity to make representation to the entity sought to be audited;

(V) that the opportunity to represent cannot be reasonable unless the proposal for audit is disclosed;

(VI) that Section 41 of the Government of National Capital Territory of Delhi Act, 1991 (GNCTD Act) prescribes the matters in which the Administrator is to act in his own discretion; that as per the said provision, Administrator is to act in his own discretion in matters which fall outside the purview of the powers conferred on the Legislative Assembly and / or in which he is required by or under any law to act in his discretion and, in exercise any judicial or quasi-judicial functions;

(VII) that the matters in respect of which Legislative Assembly of Delhi has power to make laws are prescribed in Article 239 AA

(3)(a);

(VIII) that under Article 149 of the Constitution of India, the CAG is to perform such duties and exercise such powers as may be prescribed by or under any law made by the Parliament;

(IX) that Entry 76 of List I of the Seventh Schedule to the Constitution deals with audit of accounts;

(X) that thus no law made by the Legislative Assembly of Delhi can be with respect to accounts of the Union and the States;

(XI) that even as per the noting dated 1st October, 2013 on the file notings leading to the decision for directing audit by CAG, the grievances were against the other two DISCOMs and not with respect to TPDDL;

(XII) that though the notings also do not show any decision of the need for audit and only contain a decision that it is desirable to have the accounts of the DISCOMs audited; the same does not amount to satisfaction i.e. it is expedient to have the accounts audited by the CAG in public interest, within the meaning of Section 20(3) of the CAG Act;

(XIII) that for such a satisfaction, the Administrator ought to be the

originator of the decision for having the accounts so audited;

(XIV) that from the file notings, it is evident that the Administrator in the present case merely acted on the aid and advise of the Council of the Ministers without recording his personal satisfaction;

(XV) that if a proposal mooted by another is merely approved by the Administrator, the same does not amount to the Administrator acting in his own discretion;

(XVI) that the reasons for the audit as borne out from the file notings even though approved by the Administrator, do not constitute a ground within the meaning of Section 20 of the CAG Act;

(XVII) that the Administrator in the present case, as per the file notings, has merely put his signatures on the proposal for audit mooted by the GNCTD without any application of mind and no reasonable opportunity to represent has been given;

(XVIII) that electricity tariff cannot be determined by the CAG and it has to be determined by the DERC;

(XIX) that the representation made by the DISCOMs against the proposal for audit for CAG has not been decided;

(XX) that the Administrator has not given any reasons whatsoever for

forming an opinion that the audit by CAG is expedient in public interest;

(XXI) that even the so called hearing given to the DISCOMs before issuance of the order for audit was by the Additional Secretary Power and not by the Administrator Delhi;

(XXII) that though in the proposals for consideration submitted to the Administrator Delhi, the item of "regulatory assets" was deleted from the terms of reference but is included in the final terms of reference;

(XXIII) that the file notings show the decision making to be of the GNCTD and not of the Administrator, Delhi;

(XXIV) that the GNCTD has indulged in flip flop—while in response to the PIL it took a stand that Audit under Section 20 was not possible, with the change in the political party at the helm, view was changed and which could not have been done;

(XXV) that there is no financial assistance by GNCTD to meet the expenditure of DISCOMs; the expenditure incurred by DISCOMs is approved by DERC after prudence checks in terms of Electricity Act;

(XXVI) that the decision to direct CAG audit of DISCOMs is of the persons not entitled to take such a decision;

(XXVII) that accounts of only those bodies and authorities can be audited under Section 20 which are statutory bodies or authorities and not of any other body or authority, even if performing a public function;

(XXVIII) that the words "body or authority" in Section 20 cannot include every company incorporated under the Companies Act, 1956 and or every firm under the Partnership Act, 1932;

(XXIX) that the Government has no deep or pervasive control of the DISCOMs; the DISCOMs are not performing a public function; reliance is placed on ***Jatya Pal Singh Vs. Union of India*** (2013) 6 SCC 452;

(XXX) reference was made to ***Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology*** (2002) 5 SCC 111 holding that the tests formulated in ***Ajay Hasia Vs. Khalid Mujib Sehravardi*** (1981) 1 SCC 722 for determining whether a body is to be considered to be a State within the meaning of Article 12 of the Constitution of India or not are not a rigid;

(XXXI) that audit under Section 20 of the CAG Act can be directed only of such bodies or authorities which have the colour of the Union

or the State;

(XXXII) that though Article 149 does not use the word State but since there are no judgments under the said Article, help of judgments under Article 12 of the Constitution is being taken;

(XXXIII) that just because the functions of the DISCOMs are regulated under the various Electricity Statutes does not make the DISCOMs a Government entity—reliance in this regard was placed on ***Federal Bank Limited Vs. Sagar Thomas*** (2003) 10 SCC 733;

(XXXIV) that wherever the Government deemed it necessary that the account of any body or authority should be audited by the CAG, a provision therefor has been made; reference in this regard was made to Section 24 of the Delhi Development Act, 1957 and Section 203 and Section 204 of the Delhi Municipal Corporation Act, 1950;

(XXXV) that no such provision was made in the Electricity Laws while providing for privatisation of the DISCOMs;

(XXXVI) that the recent Judgment of the Supreme Court in ***Association of Unified Tele Services Providers Vs. Union of India*** (2014) 6 SCC 110 upholding CAG Audit of Telecom Licensees has no application to the present case inasmuch as the audit thereunder

was under Section 16 of the CAG Act and the Telecoms were to pay dividends to the Government;

(XXXVII) sections 14 to Section 19 of the CAG Act prescribe the bodies or authorities of which CAG can conduct audit and extent of the audit and the DISCOMs at best can fall in Section 15 as body or authority to which any grant or loan for specific purpose from the Consolidated Fund of India (CFI) or any State or Union Territory has been given and of which only a limited audit is provided and for which the DISCOMs are ready;

(XXXVIII) the question is not as to what harm the DISCOMs will suffer from the CAG audit but whether the DISCOMs can jurisprudentially be subjected to CAG audit;

(XXXIX) if it were to be held that meting out any such state benefit to any body or authority makes it a body or authority within the meaning of Section 20 of the CAG Act, it would bring every private enterprise within the ambit of CAG and which could never have been intention;

(XL) CAG in these proceedings is seeking to justify its jurisdiction under Sections 13 to 15 of the CAG Act but the action impugned in

these proceedings is the one under Section 20 and the validity has to be decided only on the anvil of Section 20 and not any other provisions.

16. Mr. Dhruv Mehta, senior counsel also appearing for TPDDL contended:

(A) that CAG Act being a law made by the Parliament, the Administrator in taking decision under Article 239 AA(4) of the Constitution of India is not to act on the aid and advise of the Council of Ministers;

(B) reliance was placed on ***Delhi Bar Association (Regd.) Vs. Union of India*** (2008) 13 SCC 628 where the challenge to a notification issued by the Administrator dividing the NCT of Delhi into nine civil districts on the ground that the same was beyond the competence of the GNCTD and should have been issued only by the Union of India was dismissed finding that the subject matter thereof fell under the discretionary powers of the Administrator;

(C) that the procedure prescribed in Sub-section (3) of Section 20 of the CAG Act has not been followed;

(D) reliance was placed on ***Bhuri Nath Vs. State of J&K*** (1997) 2

SCC 745 where, with respect to the exercise of the power by the Governor to, upon finding Shri Mata Vaishno Devi Shrine Board to be persistly defaulting in performing its duty, dissolve the same, it was held that the Governor before doing so required to have a due enquiry conducted, after giving the Board reasonable opportunity of being heard i.e. observing principles of natural justice and after an objective consideration of the material placed before him and it was contended that no such opportunity has been given in the instant case; there is no speaking order also with respect to the objection / representation of DISCOMs;

(E) that the file notings in the present case do not show the Administrator to have reached any such satisfaction;

(F) that there is no mention even that the Administrator was satisfied that it was expedient in public interest to have the audit conducted;

(G) that the decision, even if of the Administrator, to have the accounts of DISCOMs audited, is thus not an informed decision;

(H) that even in the notice dated 28th December, 2013 supra served on DISCOMs, no public purpose was stated;

(I) that it is a clear instance of a pre-meditated exercise of powers;

(J) that the same is also evident from the speed with which the decision was taken between 28th December, 2013 to 7th January, 2014 and in which also there were several holidays;

(K) that the file notings show that the decision on the objection / representation of DISCOMs, of they being not a body or authority within the meaning of Section 20 of the CAG Act, was left to the CAG;

(L) reliance was placed on ***S.N. Mukherjee Vs. Union of India*** (1990) 4 SCC 594 in support of the proposition that such an order has to be a reasoned one;

(M) that file notings cannot be an order / direction for audit within the meaning of Section 20 of the CAG Act—reliance in this regard was placed on para 43 of ***Shanti Sports Club Vs. Union of India*** (2009) 15 SCC 705 holding that a noting recorded in the file is merely a noting simpliciter and nothing more and it merely represents expression of opinion and cannot be treated as a decision of the Government;

(N) reliance in this regard was also placed on para 24 of ***State of***

Uttaranchal Vs. Sunil Kumar Vaish (2011) 8 SCC 670;

(O) reliance was placed on paras 31 to 34 of ***Babu Verghese Vs. Bar Council of Kerala*** (1999) 3 SCC 422 to contend that the procedure prescribed has to be followed;

(P) the argument, that DISCOMs, from denial of reasonable opportunity to object / represent, have not suffered any prejudice, does not apply because the prejudice doctrine applies to common law and not to statutory compliances; reliance in this regard was placed on paras 88 to 91 of ***Swadeshi Cotton Mills Vs. Union of India*** (1981) 1 SCC 664 and on ***Smt. Chatro Devi Vs. Union Of India*** 137 (2007) DLT 14 approved in ***Union of India Vs. Chatro Devi*** (2014) 7 SCALE 217;

(Q) that under Section 69 of the Electricity Supply Act, 1948, the accounts of the Electricity Boards were to be audited by the CAG—however while enacting the Electricity Act and the Reforms Act, no provision for such an audit of DISCOMs was made—therefrom the intention of the Parliament that the accounts of DISCOMs are not to be audited by CAG is clear; on the contrary audit by the CAG of the Electricity Regulatory Commissions has been provided;

(R) that the Hayden's mischief rule is thus attracted;

(S) that the whole purpose of the electricity reforms was to increase competition to benefit the consumers and free electricity from over-regulation and such purpose cannot be permitted to be defeated;

(T) attention was invited to the letter dated 22nd August, 2002 supra of the CAG to the effect that since DISCOMs had ceased to be government companies, it was not required to audit the accounts of DISCOMs; the accounts of DISCOMs are separate from accounts of GNCTD and have no relation to CFI of the State or of the Union;

(U) that the impugned direction dated 7th January, 2014 for audit of the accounts of DISCOMs from inception i.e. 1st July, 2002 i.e. for 14-15 years is even otherwise barred by limitation;

(V) that even where no limitation is provided, the principle of reasonable time is applied; reliance in this regard was placed on ***Ram Chand Vs. Union Of India*** (1994) 1 SCC 44;

(W) in view of the specific statutory prescription under the Electricity Act, the CAG Report and even any scrutiny of the same by Public Accounts Committee would not be of any consequence as neither the legislature of NCT of Delhi nor the GNCTD can direct any

reduction of tariff charged by DISCOMs, which is determined by DERC; the legislative field of determination of tariff is occupied by Electricity Act and proposed CAG audit can in no manner affect the determination of tariff or process thereof before the DERC.

17. Mr. Sandeep Sethi, senior counsel for two other DISCOMs contended:

(i) that Section 10 of the CAG Act provides for audit of accounts of Union and States; Section 11 requires the said accounts to be placed before the Parliament / State Legislator;

(ii) that Section 14 for the first time uses the expression "any body or authority" and provides that where any body or authority is substantially financed by grants or loans from the CFI or of any State or any Union Territory having a Legislative Assembly, CAG shall subject to the provisions of any law applicable to such body or authority, audit all receipts and expenditure of that body or authority; it is argued, that the audit thereunder is not of accounts but only of receipts and expenditure;

(iii) Section 15 again uses the words "any authority or body" and provides for scrutiny by the CAG as to fulfilment of conditions

subject to which any grant or loan is given for any specific purpose to any body or authority from the CFI or of any State—in this case also there is no provision for audit of all accounts; however sub-section (2) prohibits such audit if the law by which such body or authority is established provides for audit of accounts of such body / authority by an agency other than CAG;

(iv) Section 19 provides for audit of government companies and corporations; Section 19(3) is *pari materia* to Section 20(1);

(v) thus the expression "any body or authority" in Section 20 has to take colour from preceding Sections 14 & 15 i.e. that body / authority which is not a government company or corporation for which provision is made in Section 19(3);

(vi) that thus 'body or authority' within the meaning of Section 20 has to be a body or authority owned / controlled by the government and / or performing a sovereign function;

(vii) while sub-section (1) of Section 20, empowering the President / Governor / Administrator to order audit of any body or authority does not have any such condition, sub-section (2) thereof empowering the CAG to seek such authorisation from the President / Governor /

Administrator for audit is limited only to those body or authority in which substantial amount is invested by the Central or the State Government—it follows that the expression "any body or authority" in Section 20 thus refers only to those entities which are owned / controlled by the Government or are performing sovereign functions;

(viii) that the accounts of DISCOMs are audited not only as per company law but also by the Regulator i.e. DERC; attention in this regard was invited to the proviso to Sections 128, 129 and 61 of the Electricity Act;

(ix) on enquiry, it was informed that in the matter of taxation for the purposes of property tax of the immovable properties of the erstwhile DVB vested in DISCOMs, it has been held that DISCOMs vis-a-vis the said properties are the licensees of the State;

(x) attention was invited to Parliamentary Debates with respect to the CAG Act (Mr. Paras Kuhad, senior counsel for CAG interjected that the Supreme Court in ***Association of Unified Tele Services Providers*** supra has held the reference thereto to be irrelevant);

(xi) that though the GNCTD / Administrator left the question of applicability of Section 20 to DISCOMs to be determined by the

CAG, CAG also without deciding the same has proceeded with the audit; attention was invited to the counter affidavit of CAG in this regard, stating that once it had been directed to audit, has to audit;

(xii) if Section 20 were to be interpreted to include private companies, it would create a situation where even though CAG would prepare a report, there would be no procedure established by law to govern the said report.

18. Dr. Singhvi, senior counsel further contended that telecom is different from electricity in the sense that spectrum on which telecom is dependent has been held to be a natural resource. He further contended that Rule 5 of The Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and Other Documents) Rules, 2002 (TRAI Rules) also empowered the government in this regard; however there is no *pari materia* provision in the Electricity Laws. Attention was also invited to paras 48, 50 & 51 of ***Association of Unified Tele Services Providers*** supra to contend that the audit permitted therein is only a revenue audit and not a statutory audit and for the reasons of the telecom agreements providing for revenue sharing and which is not the case here.

19. Mr. Paras Kuhad, senior counsel appearing for the CAG wanted to

assert the right of CAG to audit DISCOMs *de hors* the direction under Section 20 of the CAG Act but since no such foundation had been laid in the pleadings, he was asked to confine his argument to DISCOMs being a body or authority within the meaning of Section 20 of the said Act; he argued:

(a) that the present controversy is covered by the judgment of the Apex Court in ***Association of Unified Tele Services Providers*** supra;

(b) that though Article 12 of the Constitution does not use the expression "body" but the Supreme Court in ***Pradeep Kumar Biswas*** supra has held the same to be included in State; the test is whether the functions performed by such body has imprimatur of State;

(c) that the word "Comptroller" as per Black's Law Dictionary IX Edition means, an officer who is charged with duties relating to fiscal affairs including auditing and examining accounts and reporting the financial status periodically; therefore the functions of the CAG are not merely that of an auditor;

(d) that any body or authority having financial relationship with the Union or the State would be covered by Section 20 of the CAG Act;

(e) It matters not, whether such body or authority is owned by the government or privately;

(f) that the words body or authority mean aggregation of persons, irrespective of whether private or public;

(g) that had the arguments of the appellant in ***Association of United Tele Services Providers*** supra as recorded in paras 17 to 19 of the judgment been accepted, Rule 5 of the TRAI Rules would have been struck down;

(h) that in the said judgment, the power for CAG audit of the telecom was traced to Article 149 of the Constitution of India and not to Section 13 or 16 of the CAG Act;

(i) that DISCOMs enjoy the funding of more than Rs.2400 crores from the State as is apparent from the Delhi Electricity Reform (Transfer Scheme) Rules, 2001 and if the assets vested in DISCOMs are also taken into account then the funding enjoyed by them is of over Rs.5000 crores; attention in this regard was invited to Section 15(1) of the Reforms Act whereunder all property, interest in property, rights and liabilities of the erstwhile Delhi Vidyut Board is vested in the GNCTD and to Section 15(2) empowering GNCTD to transfer the same *inter alia* to DISCOMs;

(j) that DISCOMs thus have nexus with the Consolidated Fund of

the State; consolidated fund includes fixed assets;

(k) that the transactions and the relationship of the State with DISCOMs is very wide and all encompassing;

(l) that formation of opinion by the Administrator is required only for exercise of power under Section 20(2) of the CAG Act and not for exercise of power under Section 20(1) thereof;

(m) that CFI and the States is described in Article 266 of the Constitution of India;

(n) that the function of distribution of electricity was a State function and for performance of which the Electricity Boards were set up; no private player was allowed; however, the said functions along with distribution and retail were vested in DISCOMs;

(o) that the Supreme Court in para 46 in ***Association of Unified Tele Services Providers*** supra equated public accounts to CFI;

(p) that though the CAG has not invoked its own power to audit DISCOMs but the same is not material as the validity of the action and permissibility of the audit is under consideration;

(q) that it would be ridiculous to say that in the case of government lending Rs.5000/- to any body or authority, CAG would be entitled to

audit but if instead of lending money, the government hands assets worth Rs.5000 crores to such body or authority, CAG would be not entitled to audit;

(r) attention was invited to Public Auditing Guidelines, 2009 supra for PPP in infrastructure projects to contend that public purpose projects, financed / managed by private persons also fall in the ambit thereof;

(s) reliance was placed on ***Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam*** (1989) 3 SCC 709 where it was held that it is undisputed that the electricity generated and distributed by the undertaking therein constituted material resources of the community for the purpose and within the scope and meaning of Article 39(b) of the Constitution;

(t) with respect to the letter dated 22nd August, 2002 of the CAG, it was stated that it was in the context of Section 19 and not Section 20; it was further submitted that the clarity emerged only after the Telecom judgment;

(u) attention was invited to the Government of India (Audit & Accounts) Order, 1936 under which the Auditor General was

entrusted to audit all expenditures from the revenues of the Federation and of the Provinces and to ascertain whether monies shown in the accounts as having been disbursed were legally available for and applicable for the services or purpose to which they have been applied or charged and it is contended that the Auditor General, under Section 136 of the Government of India, would have thus been empowered to audit an entity as the DISCOMs;

(v) that the expression "in relation to" used in Article 149 as well as in the CAG Act is a broad expression; reliance in this regard is placed on ***Doypack Systems Pvt. Ltd. Vs. Union of India*** (1988) 2 SCC 299;

(w) that the object of Article 149 and the CAG Act is to provide Parliamentary control of executive and the public funds; the ambit of powers of CAG cannot be limited to scrutiny of accounts of Union but has to extend to all matters that relate to and are in any way connected with accounts of Union.

20. Mr. Prashant Bhushan, Advocate for the PIL petitioner contended:

(I) that the CAG is entitled to audit DISCOMs because:

(A) of the 49% share holding of the GNCTD therein;

(B) entire distribution infrastructure having been handed over thereto for free;

(C) enjoying a monopolistic position within its own territory;

(II) that irrespective of the direction of the GNCTD under Section 20, CAG is obliged to audit DISCOMs;

(III) that the DERC had also recommended a CAG audit of DISCOMs;

(IV) that DERC is to regulate tariff on the basis of cost incurred by DISCOMs—the value of the cost as potrayed by DISCOMs cannot be taken on the face of it, as by inflating the cost, DISCOMs become entitled to a higher tariff;

(V) that unless the costs of distribution as put forward by the DISCOMs are audited, the consumer will suffer;

(VI) that the PIL seeks an audit of such cost by the CAG, whether under Section 20 or under any other provision;

(VII) that though the PIL writ petitioner has also sought Central Bureau Investigation (CBI) enquiry but the same can await the CAG audit report;

(VIII) that the word 'Consolidated Fund of India' has to be widely

construed;

(IX) that DISCOMs are akin to telecoms; rather the DISCOMs enjoy monopoly which the telecom service providers do not enjoy;

21. Mr. Vikas Singh, senior counsel appearing for TPDDL in the PIL contended that only a limited notice of the PIL has been issued and the PIL, after the audit had been ordered, had become infructuous.

22. Mr. Meet Malhotra, senior counsel for DERC which is a party only in the PIL contended:

(a) that DERC has no wherewithal to investigate into the balance sheet prepared and submitted by DISCOMs and thus for the purposes of determination of tariff has to accept the same;

(b) that DERC was however of the view that DISCOMs were effecting purchases from their sister concern for inflated value thereby increasing the cost of distribution and which in turn leads to higher tariff;

(c) that it is for this reason only that DERC had asked the GNCTD to have the accounts of DISCOMs audited.

23. Dr. Rajiv Dhawan, senior counsel appearing for GNCTD has argued:

(i) that an opportunity to file objections / representations was duly

given to DISCOMs before directing audit of their accounts;

(ii) that there has been no violation of the principles of natural justice;

(iii) that the decision was not taken hurriedly; the said question was under consideration right since the letter dated 8th July, 2010 of the DERC to the GNCTD for having the accounts of DISCOMs audited;

(iv) reference was made to ***Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujarat*** (2014) 4 SCC 156, ***Shahid Balwa Vs. Union of India*** (2014) 2 SCC 687 and ***Association of Unified Tele Services Providers*** supra with respect to the role of CAG;

(v) that the decision to direct audit is Wednesbury reasonable, within jurisdiction and meets the test of proportionality;

(vi) that no prejudice is shown to have been suffered by DISCOMs, even if any of the principles of natural justice are found to have been violated in taking the decision;

(vii) that the admission if any in the counter affidavit of the GNCTD in the PIL about the non-applicability of Section 20 of the CAG Act is not binding as the Principle of Estoppel is not applicable thereto.

Neither the senior counsel who addressed arguments for

GNCTD nor any of the counsels briefing him were present on any of the earlier dates of hearing, when the other counsels had addressed arguments. We as such at the close of hearing apprised in a nutshell the senior counsel for GNCTD of the issues arising for adjudication and upon on his request the hearing was adjourned to enable him to address the same. During the hearing on 2nd March, 2015, he contended, (a) that DISCOMs are performing a public function; (b) that at least two of them are in grave financial crises; (c) that the writ jurisdiction under Article 226 of the Constitution extends to bodies / authorities performing public functions as well; (d) reliance was placed on ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust Vs. V.R. Rudani*** (1989) 2 SCC 691 holding that the jurisdiction of the High Court under Article 226 would extend to a body performing public duty; and, (e) that it is because of performance of public duty only that the regulatory mechanism was deemed necessary; (f) that the very purpose of setting up DERC is to protect the interest of the consumers; attention in this regard was drawn to the Sections 3, 10(5), 10(10), 28(2)(e) of Reforms Act; (g) that the test of applicability of Article 12 or Article

226 would not be relevant as Section 20(1) enables audit by CAG wherever deemed so in public interest.

24. Mr. Dhruv Mehta, senior counsel in rejoinder contended:

(A) invited attention to our judgment dated 3rd December, 2014 in W.P.(C) No.8502/2014 titled ***Sarvesh Bisaria Vs. Union of India*** where we have *inter alia* held that the role of CAG reports is to enable the Legislature to oversee the functioning of the government;

(B) that it is for the Legislature to take action on the basis of CAG reports or to direct the government to take action on the basis thereof and till the Legislature has not so directed, the Court cannot direct any action to be taken on the basis of CAG reports; thus the PIL aforesaid is infructuous upon audit having been ordered;

(C) that Section 20(3) is couched in a negative form—it is therefore peremptory;

(D) that before Section 20 can be invoked, notice must be given to the body or authority of the proposal for audit; the same has not been done in the present case;

(E) that 49% share in DISCOMs is owned by DPCL and not by GNCTD; it matters not, if the shares of DPCL in turn are held by

GNCTD;

(F) that in the notice dated 28th December, 2013 issued to DISCOMs, no terms on which audit by the CAG was proposed, were mentioned;

(G) that though the senior counsel for GNCTD has argued on the premise of the audit having been ordered for three years but in fact it has been ordered for fourteen to fifteen years, for which it was not even proposed;

(H) that the hearing prior to the decision / direction dated 7th January, 2014 given was by the Principal Secretary (Power) who is on the Board of Directors of DISCOMs;

(I) that though another notice dated 31st December, 2013 was given but there were no particulars therein also;

(J) that the impugned decision / direction dated 7th January, 2014 is a non-speaking one and there is nothing therein to indicate that the objections / representations of DISCOMs were considered and negatived;

(K) that the Administrator has merely acted on the dictates of the GNCTD and has not reached any satisfaction as he was required to;

(L) that the judgments on the powers of the CAG cited on behalf of the GNCTD are general, having no relevance to the matter in controversy;

(M) that the CAG is beyond the jurisdiction of the Legislative Assembly;

(N) that executive power are co-terminus with the legislative power—it thus cannot be said that GNCTD could, in the exercise of its executive powers, issue directions to the CAG;

(O) that a distinction was carved out between Article 163 and Article 239 AA(4); the former is not limited to the State List whereas the latter is;

(P) that while there is a residuary entry i.e. Entry 97 in List I of the 7th Schedule, there is no corresponding Entry in List II;

(Q) that there is no provision for laying CAG reports with respect to Municipal Corporations before the Parliament / Legislative Assembly;

(R) that Article 151 also does not provide for reports of body / authority to be laid before Legislative Assembly;

(S) that Section 19A of the CAG Act provides for laying of reports of CAG in relation to audit of government companies or corporations

referred to in Section 19 before the Parliament / Legislature of the State but there is no provision for laying of CAG reports under Section 20 before the Legislative Assembly;

(T) that it is thus not understandable as to what purpose the audit report of the CAG will serve;

(U) that even if it were to be held to be a case of *casus omissus*, no *casus omissus* can be presumed; attention was invited to the judgment of the Division Bench of this Court in ***K. Satyanarayanan Vs. Union of India*** MANU/DE/0531/1995 holding that the Parliament in its legislative wisdom has not thought it fit that the accounts and affairs of the State Bank of India and other public sector banks and financial institutions should be audited by the CAG;

(V) that it will be incongruous that while the audit by the CAG of a government company under Section 19 can be a limited one, the audit of a private company, if ordered under Section 20, would be an unlimited one;

(W) that Section 20 is clearly intended for statutory bodies only;

(X) that the functioning of DISCOMs is to be governed by the share purchase agreement on the file of the PIL and there is no power in the

Legislative Assembly of Delhi to issue any direction to DISCOMs;

(Y) that thus the exercise, even if any undertaken by the CAG under Section 20 of the CAG Act would be a futile one; no direction can be issued to DISCOMs in pursuance thereto;

(Z) that government companies are not a body or authority; that it is for this reason only that a special provision with respect thereto was made in Section 19 of the CAG Act;

(AA) attention was invited to Article 283 of the Constitution providing for control over the CFI;

(BB) the judgments cited by the senior counsel for GNCTD qua public interest were distinguished;

(CC) that there is no guidance in Section 20 of the CAG Act as to accounts for what period can be ordered / directed to be audited; unless interpreted reasonably i.e. of 2 or 3 years, it will be violative of Article 14;

(DD) that in the file notings, at different places different reasons have been given for wanting CAG audit.

25. Mr. Sandeep Sethi, senior counsel in rejoinder reiterated that as on the date on which the Administrator appended his signatures, there was no

reason for satisfaction that audit was expedient in public interest. He further contended that the Administrator merely went by the reasoning of the Chief Minister that there was no reason why DISCOMs should not be audited. He also placed reliance on ***Bangalore Medical Trust Vs. B.S. Muddappa*** (1991) 4 SCC 54 to contend that the decision, whether the CAG was empowered to audit under Section 20 or not, could not have been left to the CAG. Reliance in this regard was also placed on ***Marathwada University Vs. Seshrao Balwant Rao Chavan*** (1989) 3 SCC 132 to reiterate that the language of Section 20 is peremptory; reliance was also placed on ***A.K. Roy Vs. State of Punjab*** (1986) 4 SCC 326 in this regard.

26. Before proceeding to analyse the aforesaid contentions and adjudicate the controversy, we deem it appropriate to set out herein below Articles 149 & 151 of the Constitution of India:

> *"**Article 149 - Duties and Powers of the Comptroller and Auditor-General***
>
> *The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the*

accounts of the Dominion of India and of the Provinces respectively.

Article 151 - Audit reports

(1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor of the State, who shall cause them to be laid before the Legislature of the State.''

and Sections 2(a) and 10 to 20 of the CAG Act; the same are as under:

*"**Section 2(a)***

"accounts", in relation to commercial undertaking of a Government, includes trading, manufacturing and profit and loss accounts and balance-sheets and other subsidiary accounts;

Section 10 - Comptroller and Auditor-General to compile accounts of Union and States

(1) The Comptroller *and Auditor-General shall be responsible-*

(a) for compiling the accounts of the Union and of each State from the initial and subsidiary accounts rendered to the audit and accounts offices under his control by treasuries, offices or departments responsible for the keeping of such accounts; and

(b) for keeping such accounts in relation to any of the matters specified in clause (a) as may be necessary:

Provided that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for compiling-

(i) the said accounts of the Union (either at once or gradually by the issue of several orders); or

(ii) the accounts of any particular services or departments of the Union:

Provided further that the Governor of a State may, with the previous approval of the President and after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for compiling-

(i) the said accounts of the State (either at once or gradually by the issue of several orders), or

(ii) the accounts of any particular services or departments of the State:

Provided also that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for keeping the accounts of any particular class or character.

(2) Where, under any arrangement, a person other than the Comptroller and Auditor-General has, before the commencement of this Act, been responsible-

(i) for compiling the accounts of any particular service or department of the Union or of a State, or

(ii) for keeping the accounts of any particular class or character.

*such arrangement shall, notwithstanding anything contained in sub-section (1), continue to be in force unless, after consultation with the Comptroller and Auditor-General, it is revoked in the case referred to in clause (i), by an order of the President or the Governor of the State, as the case may be, and in the case referred to in cl*ause (ii), by an order of the President.

Section 11 - Comptroller and Auditor-General to prepare and submit accounts to the President, Governors of State and Administrators of Union territories having Legislative Assemblies

The Comptroller and Auditor-General shall, from the accounts compiled by him or by the Government or by any other person responsible in that behalf, prepare in each your accounts (including, in the case of accounts complied by him, appropriation accounts) showing under the respective heads and annual receipts and disbursements for the purpose of the Union, of each State and of such Union territory having a Legislative Assembly, and shall submit those accounts to the President or the Governor of a State or Administrator of the Union territory having a Legislative Assembly, as the case may be, on or before such dates as he may, with the concurrence of the Government concerned, determine.

Provided that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for the preparation and submission of the accounts relating to annual receipts and disbursements for the purpose of the Union or of a Union territory having a Legislative Assembly:

Provided further that the Governor of a State may, with the previous approval of the President and after-consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for the preparation and submission of the accounts relating to annual receipts and disbursements for the purpose of the State.

Section 12 - Comptroller and Auditor-General to give information and render assistance to the Union and States

The Comptroller and Auditor-General shall, in so far as the accounts, for the compilation or keeping of which he is responsible, enable him so to do, give to the Union Government, to the State Governments or to the Governments of Union territories having Legislative Assemblies, as the case may be, such information as they may, from time to time, require, and render such assistance in the preparation of their annual financial statements as they may reasonably ask for.

Section 13 - General provisions relating to audit

It shall be the duty of the Comptroller and Auditor-General—

(a) to audit all expenditure from the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it;

(b) to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts,

(c) to audit all trading, manufacturing, profit and loss accounts and balance sheet and other subsidiary accounts kept in any department of the Union or of a State;

and in each case to report on the expenditure, transactions or accounts so audited by him.

Section 14 - Audit of receipts and expenditure of bodies or authorities substantially financed from Union or State Revenues

(1) Where any body or authority is substantially financed by grants or loans from the Consolidated Fund of India or of any State or any Union territory having a Legislative Assembly, the Comptroller and Auditor-General shall, subject to the provisions of any law for the time being in force applicable to the body or authority, as the case may be, audit all receipts and expenditure of that body or authority and to report on the receipts and expenditure audited by him.

Explanation.- Where the grant or loan to a body or authority from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly in a financial year is not less than rupees twenty-five lakhs and the amount of such grant or loan is not less than seventy-five per cent of the total expenditure of that body or authority, such body or authority shall be deemed, for the purposes of [this sub-section], to be substantially financed by such grants or loans, as the case may be.

(2) Notwithstanding anything contained in sub-section (1), the Comptroller and Auditor-General may, with the previous approval

of the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, audit all receipts and expenditure of any body or authority where the grant or loan to such body or authority from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly, as the case may be, in a financial year is not less than rupees one crore.

(3) Where the receipts and expenditure of any body or authority are, by virtue of the fulfilment of the conditions specified in sub-section (1) or sub-section (2), audited by the Comptroller and Auditor-General in a financial year, he shall continue to audit the receipts and expenditure of that body or authority for a further period of two years notwithstanding that the conditions specified in sub-section (1) or sub-section (2) are not fulfilled during any of the two subsequent years.

Section 15 - Functions of Comptroller and Auditor-General in the case of grants or loans given to other authorities or bodies

(1) Where any grant or loan is given for any specific purpose from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly to any authority or body not being a foreign State or international organisation, the Comptroller and Auditor-General shall scrutinise the procedures by which the sanctioning authority satisfies itself as to the fulfilment of the conditions subject to which such grants or loans were given and shall for this purpose have right of access, after giving reasonable previous notice, to the books and accounts of that authority or body:

Provided that the President, the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be may, where he is of opinion that it is necessary so to do in the public interest, by order, relieve the Comptroller and Auditor-General, after consultation with him, from making any such scrutiny in respect of any body or authority receiving such grant or loan.

(2) Except where he is authorised so to do by the President, the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, the Comptroller and Auditor-General shall not have, while exercising the powers conferred on him by sub-section (1), right of access to the books and accounts of any corporation to which any such grant or loan as

is referred to in sub-section (1) is given if the law by or under which such corporation has been established provides for the audit of the accounts of such corporation by an agency other than the Comptroller and Auditor-General:

Provided that no such authorisation shall be made except after consultation with the Comptroller and Auditor-General and except after giving the concerned corporation a reasonable opportunity of making representations with regard to the proposal to give to the Comptroller and Auditor-General right of access to its books and accounts.

Section 16 - Audit of receipts of Union or of States

It shall be the duty of the Comptroller and Auditor-General to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon.

Section 17 - Audit of accounts of stores and stock

The Comptroller and Auditor-General shall have authority to audit and report on the accounts of stores and stock kept in any office or department of the Union or of a State.

Section 18 - Powers of Comptroller and Auditor-General in connection with audit of accounts

(1) The Comptroller and Auditor-General shall, in connection with the performance of his duties under this Act, have authority—

(a) to inspect any office of accounts under the control of the Union or of a State, including treasuries and such offices responsible for the keeping of initial or subsidiary accounts, as submit accounts to him;

(b) to require that any accounts, books, papers and other documents which deal with or form the basis of or are otherwise

relevant to the transactions to which his duties in respect of audit extend, shall be sent to such place as he may appoint for his inspection;

(c) to put such questions or make such observations as he may consider necessary, to the person in charge of the office and to call for such information as he may require for the preparation of any account or report which it is his duty to prepare.

(2) The person in charge of any office or department, the accounts of which have to be inspected and audited by the Comptroller and Auditor-General, shall afford all facilities for such inspection and comply with requests for information in as complete a form as possible and with all reasonable expedition.

Section 19 - Audit of Government companies and corporations

(1) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of Government companies shall be performed and exercised by him in accordance with the provisions of the Companies Act, 1956.

(2) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of corporations (not being companies) established by or under law made by Parliament shall be performed and exercised by him in accordance with the provisions of the respective legislations.

(3) The Governor of a State or the Administrator of a Union territory having a Legislative Assembly may, where he is of opinion that it is necessary in the public interest so to do, request the Comptroller and Auditor-General to audit the accounts of a corporation established by law made by the Legislative Assembly of the State or of the Union territory, as the case may be, and where such request has been made, the Comptroller and Auditor-General shall audit the accounts of such corporation and shall have, for the purposes of such audit, right of access to the books and accounts of such corporation:

Provided that no such request shall be made except after consultation with the Comptroller and Auditor-General and except after giving reasonable opportunity to the corporation to make representations with regard to the proposal for such audit.

Section 19A - Laying of reports in relation to accounts of Government Companies and Corporations

(1) The reports of the Comptroller and Auditor-General, in relation to the accounts of a Government company or a corporation referred to in section 19, shall be submitted to the Government or Governments concerned.

(2) The Central Government shall cause ever report received by it under sub-section (1) to be laid, as soon as may be after it is received, before each House of Parliament.

(3) The State Government shall cause every report received by it under sub-section (1) to be laid, was soon as may be after if it is received, before the Legislature of the State.

Explanation:- For the purposes of this section, "Government" or "State Government", in relation to a Union territory having a Legislative Assembly, means the Administrator of the Union territory.]

Section 20 - Audit of accounts of certain authorities or bodies

(1) Save as otherwise provided in section 19, where the audit of the accounts of any body or authority has not been entrusted to the Comptroller and Auditor-General by or under any law made by Parliament, he shall, if requested so to do by the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, undertake the audit of the accounts of such body or authority on such terms and conditions as may be agreed upon between him and the concerned Government and shall have, for the purposes of such audit, right of access to the books and accounts of that body or authority:

Provided that no such request shall be made except after consultation with the Comptroller and Auditor-General.

(2) The Comptroller and Auditor-General may propose to the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, that he may be authorised to undertake the audit of the accounts of any body or authority, the audit of the accounts of which has not

been entrusted to him by law, if he is of opinion that such audit is necessary because a substantial amount has been invested in, or advanced to, such body or authority by the Central or State Government or by the Government of a Union territory having a Legislative Assembly, and on such request being made, the President or the Governor or the Administrator, as the case may be, may empower the Comptroller and Auditor-General to undertake the audit of the accounts of such body or authority.

(3) The audit referred to in sub-section (1) or sub-section (2) shall not be entrusted to the Comptroller and Auditor-General except where the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, is satisfied that it is expedient so to do in the public interest and except after giving a reasonable opportunity to the concerned body or authority to make representations with regard to the proposal for such audit."

27**.** A question which arises for consideration is, whether in Article 149 of the Constitution the words 'as may be prescribed by or under any law made by Parliament' are with reference to the words 'any other authority or body' i.e. whether a law made by Parliament is to specify the authority or body qua which CAG can exercise powers. The said question, in our view arises more so because of the observation of the Supreme Court in para 59 of ***T.N. Godavarman Thirumulpad Vs. Union of India*** (2006) 1 SCC 1:

> *"Section 20 is in the nature of a residuary provision providing that CAG, if requested by the President of India or the Governor of a State or the Administrator of a Union Territory having a Legislative Assembly* ***to undertake the audit of the accounts of such other body or authority of which audit has been entrusted to CAG****, the CAG shall undertake such audit."*
>
> ***(emphasis added)***

28. In our view, to answer the aforesaid question, the language of Article 149 has to be broken down as under:

a) the CAG shall perform such duties and exercise such powers

b) in relation to the accounts of the Union and of the States and of any other authority or body

c) as may be prescribed by or under any law made by Parliament.

and not as under:-

A. The CAG shall perform such duties and exercise such powers.

B. In relation to the accounts of the Union and of the States.

C. And of any other body or authority as may be prescribed by or under any law made by Parliament.

29. In our view the words, "as may be prescribed by or under any law made by Parliament" relate to the words "such duties and exercise such powers" and not to the words "any other authority or body". We hold so because the word 'such' precedes the words duties and powers; if the intent had been that the authority or body with respect to which CAG exercises power should be prescribed by or under any law made by Parliament, the word 'such' would have preceded the words 'other authority or body'. Thus, Article 149 creates domain of the CAG over the accounts not only of

the Union of India and the States but also of any other authority or body but leaves it to the Parliament to by law prescribe the duties and powers which CAG shall exercise in relation to the accounts of the Union, States and of any other body or authority. Article 149 or for that matter no other Article of the Constitution does not prescribe the duties and powers of the CAG in relation to the accounts of the Union and the States also. The law made by Parliament is thus not required to specify the "authority or body" in relation to whose accounts CAG may exercise powers but is only required to specify the duties and power which the CAG may perform / exercise in relation to accounts of any 'authority or body'.

30. Parliament, while making any law, can thus prescribe the duties and powers which the CAG may perform and / or exercise in relation to accounts of any body or authority established under the said law or which may be subject matter of such law. Instances, thereof are to be found, as contended by the counsels, in the DDA Act and MCD Act. Section 104 of the Electricity Act also provides for the audit of the accounts of the State Electricity Regulatory Commission (SERC) by the CAG with the CAG having the same rights and privileges and authority in connection therewith as in connection with audit of Government Accounts. The Reforms Act also

provides so with respect to DERC, in Section 50 thereof.

31. However the Parliament has also enacted the CAG Act whereunder besides prescribing the duties to be performed and powers to be exercised by the CAG in relation to the accounts of the Union and the States, CAG has also been vested with certain duties and powers to be exercised not with respect to any particular body or authority but in respect of any body or authority which satisfies the criteria laid down therein. Viz.,

(i) Section 14 empowers the CAG to audit all receipts and expenditure of a body or authority which is substantially financed by grants or loans from the CFI or of any State, subject however to the provisions of any law applicable to that body or authority;

(ii) Section 15 empowers the CAG to scrutinize the procedures by which the authority which has given a grant or loan for any specific purpose from the CFI or of any State to any body or authority, satisfies itself as to the fulfilment of the conditions subject to which such grant or loan has been given and for this purpose gives the CAG a right to access the books and accounts of the body or authority which has received the loan or grant;

however if the law by or under which such body or authority which has received the grant or loan has been established provides for the audit of accounts of such body or authority by an agency other than the CAG, CAG is not to have any access to the books of accounts of such body or authority;

(iii) Section 16 empowers the CAG to, for auditing of receipts payable into CFI and State, satisfy himself that the rules and procedure in that behalf are designed to secure an effective check on the assessment and collection of revenue, examine the accounts (of any other entity);

(iv) Section 19(1) empowers the CAG to exercise powers in accordance with the provisions of the Companies Act, 1956 in relation to the audit of accounts of government companies;

(v) Section 19(2) empowers the CAG to in relation to the accounts of Corporations (not being companies) established by or under law made by Parliament, perform duties and exercise powers in accordance with the provisions of such law.

It may be highlighted that none of the aforesaid provisions expressly name any body or authority and become applicable to whichsoever body or

authority satisfies the parameters thereof. Thus if a body or authority has been substantially financed by grants or loans from CFI or of any State, notwithstanding whether any such condition has been laid down in the terms of grant of loan or not, CAG would be required to exercise the powers in terms of Section 14(1) with respect thereto. Similarly, where any body or authority has been given a grant or loan for any specific purpose from the CFI or of any State, CAG is vested with powers with respect thereto as provided in Section 15, again notwithstanding whether it is so provided in terms of the grant of loan or not. And, CAG has powers as under Sections 19(1) and 19(2) with respect to government companies and government corporations irrespective of whether provision therefor is made in their Articles of Association or not or in the law by which they have been established, respectively.

32. The question which we are required to answer is, what is the meaning to be ascribed to the words "body or authority". The said question assumes significance because Section 20 of the CAG Act with which we are concerned in the present case also uses the same words. Though, we in the present controversy are not concerned with Sections 14, 15, 16 and 19 of the Act referred to hereinabove but the same have been considered only for the

reason of understanding the meaning to be ascribed to the words "body or authority" which is common to the said Sections as well as to Section 20 subject matter of the present controversy.

33. Section 20 as aforesaid, empowers the CAG, a) if requested so by the President / Governor / Administrator b) to undertake audit of the accounts of such a body or authority, audit of accounts whereof has not been entrusted to the CAG by or under any law made by Parliament c) on such terms and conditions as may be agreed upon between the CAG and the concerned government and d) gives right of access to the CAG to the books of accounts of that body or authority. Section 20, followings Sections 14 to 16 and 19, in the Scheme of the CAG Act is in the nature of a residuary provision.

34. Though Article 149 requires the Parliament to by law specify the duties and powers which CAG may exercise in relation to accounts of Union / state / any body or authority, and which the Parliament has *inter alia* done by enacting the CAG specifying the duties and powers to be performed / exercised by CAG with respect to accounts of Union, States as well as certain bodies and authorities which satisfy the parameters of Sections 14 to 16 and 19 but the Parliament by same law i.e. the CAG Act (Section 20) has also empowered the President / Governor / Administrator to direct the CAG

to perform such duties and exercise such powers, in relation to accounts of any body or authority, as may be agreed upon between the CAG and the concerned Government.

35. A question legitimately arises, whether what is required by the Constitution to be done by law made by Parliament can be so delegated to President / Governor / Administrator, to be done not by subordinate legislation but by executive fiat. However the same has not been raised and there is no challenge to *vires* of Section 20.

36. According to the DISCOMs, since the words any other authority or body though found in Article 149 as well as in the provisions aforesaid of the CAG Act have not been defined, neither in the Constitution nor in the CAG Act, have to be given a meaning as ascribed under Article 12 of the Constitution of India i.e. would mean only such body or authority which satisfies the test of being a State under Article 12 of the Constitution of India. The contention of the GNCTD and CAG of course is that the said words are not subject to such limitation and would include any aggregation of persons, even if of a purely private character.

37. The gravamen of the contention of the DISCOMs is that because the DISCOMs are not State within the meaning of Article 12, they would not be

a body or authority within the meaning of Article 149 of the Constitution or the CAG Act.

38. We are unable to agree. We see no reason to so limit the domain and jurisdiction of the CAG particularly when framers of our Constitution have not chosen to do so. The reasons which prevail with us to hold so are as under:

A. Neither counsel has contended that the meaning to be ascribed to the words "body or authority" in Article 149 and in the CAG Act is to be different. We also do not find any reason therefor. Once Articles 148 & 149 have created the CAG and vested it with duties and powers, besides in relation to the accounts of the Union and of the States, also in relation to the accounts of any other body or authority, to the extent as may be prescribed by any law made by Parliament and Parliament while making one of such laws i.e. the CAG Act supra has used the same expression "body or authority", the same has to be given the same meaning under the Constitution as well as the CAG Act.

B. Sections 14, 15 and 16 of the CAG Act vests the CAG with the duties and powers, though to a limited extent, in relation to

accounts of i) a body or authority which has been substantially financed or ii) a body or authority which has been given a grant or loan for any specific purpose or iii) a body or authority by which any amounts are payable into CFI or of any State. Such body or authority may or may not satisfy the test of a State within the meaning of Article 12. To hold, that only that body or authority which satisfies test of Article 12 is in the domain of Article 149, would axiomatically mean only that body or authority which besides satisfying the parameters of Sections 14, 15 and 16 of the CAG Act additionally also satisfies the requirement of being a State within the meaning of Article 12 can be audited under Sections 14 to 16. Axiomatically, such an interpretation would exclude from the ambit of Sections 14 to 16 a body or authority which though satisfies parameters thereof but does not satisfy the requirement of being a 'State', even though Sections 14 to 16 do not contain any such limitation, rendering the said provisions of the CAG otiose to that extent. Thus, from making of such a law by Parliament vesting CAG with powers and duties in relation to accounts of

such body or authority which may not be State within the meaning of Article 12 and to which law there is no challenge, it is evident that the words body or authority are free of the test of Article 12. When body or authority within the meaning of Sections 14 to 16 need not be State, there is no reason to require body or authority referred to in Section 20 to be 'State'.

C. Even otherwise, once the Constitution itself has confined the meaning of State as given in Article 12 to only that part of Constitution in which Article 12 is placed, we see no reason to read the said definition in Article 149 placed in another part of the Constitution.

D. Article 149 empowers the Parliament to by law prescribe the duties / powers which CAG may perform / exercise in relation to accounts of any body or authority. Article 149 does not place any limitation on the said power of Parliament to make law thereunder even with respect to a private body or authority which the DISCOMs claim themselves to be. We are not told of or have been able to fathom any such limitation on the law making power of Parliament.

E. It thus follows that the powers of the CAG under Article 149 read with the CAG Act cannot be restricted only to that body or authority which satisfies the test of Article 12 of the Constitution of India.

F. Independently of the above also, we do not find it in the fitness of the constitutional scheme to so limit the powers of the CAG.

G. Article 148 of the Constitution provides that there shall be a Comptroller and Auditor General of India which shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and / on the like grounds as a Judge of the Supreme Court. The salary and other conditions of service of the CAG are to be determined not by the Executive but by the Parliament by law and are not to be varied to his disadvantage after his appointment. The CAG has also been made ineligible for further office either under the Government of India or under the government of any state after he has ceased to hold office. The expenses of the office of the CAG have been made chargeable upon the CFI. It would thus be seen that the provisions of the Constitution with

respect to the CAG are quite akin to the provisions with respect to Judges of the Supreme Court.

H. Article 148 is to be found in Chapter-V of Part-5 of the Constitution, titled the "Union", Chapter-1 whereof is titled "The Executive", Chapter-2 whereof is titled "Parliament", Chapter-3 whereof is titled "Legislative Powers of the President" and Chapter-4 whereof is titled "the Union Judiciary". CAG has thus been constituted as one of the four limbs of the Union under the Constitution and has been recognized so and been held to be part of the basic structure of the Constitution.

I. Supreme Court in ***Arvind Gupta Vs. Union of India*** (2013) 1 SCC 393, faced with a contention that the CAG has no power to give Performance Audit Report and a challenge to the Regulations on Audit and Accounts, 2007 framed under the CAG Act empowering the CAG to conduct performance audit on the ground of the same being violative of the Constitution of India held that the CAG's function to carry out examinations into economy, efficiency and effectiveness with which the

Government has used its resources is inbuilt in the 1971 Act and the Performance Audit Reports have to be viewed accordingly and hence negatived the challenge. Again, in ***S. Subramaniam Balaji Vs. The Government of Tamil Nadu*** (2013) 9 SCC 659 it was held that CAG cannot be robbed of its power to ensure that large-scale unauthorised spending of public funds does not take place. It was held that the provisions of CAG Act must be given purposive interpretation that would further its intent to ensure that the government's spending is only on purposes that are legally allowable. The dicta of the Chancery Division of as far back as ***In Re: Kingston Cotton Mills Company*** [1896] 2 Ch 279 that an auditor is a "watchdog" against any large-scale illegal expenditures, was reiterated.

J. Even in ***Association of Unified Tele Services Providers*** supra it was held that CAG exercises constitutional powers and duties in relation to accounts, while the High Courts under Article 226 and the Supreme Court under Article 32 exercise judicial powers and that duties and powers conferred by the

Constitution on the CAG under Article 149 cannot be taken away by the Parliament being the basic structure of our Constitution, like Parliamentary democracy, independence of judiciary, rule of law, judicial review, unity and integrity of the country, secular and federal character of the Constitution and so on. It was further held that the functioning of the government is controlled by the government, laws of the land, legislature and the CAG; CAG has the power to examine the proprietary, legality and validity of all expenses incurred by the government and the office of the CAG exercises effective control over the government accounts and expenditure on the schemes, after implementation of the schemes; as a result the duty of the CAG arises only after the expenditure has been incurred. It was reiterated that Constitution is a living organic thing and must be applied to meet the current needs and requirements; Constitution is not bound to be understood and accepted to the original understanding of the constitutional economics; parliamentary debates may not be the sole criteria to be adopted by a Court while examining the meaning and content of Article

149 since its content and significance has to vary to age to age.

K. Even in ***Shahid Balwa*** supra, CAG was held to be the most important officer under the Constitution of India and his duty, being the guardian of the public purse, is to see that not a farthing of it is spent without the authority of the Parliament. It was held that audit plays an important role in the scheme of Parliamentary Financial Control and it is directed towards discovering waste, extravagance and disallow any expenditure violating the Constitution or any law.

L. The Constitution of India, as of any other country, though capable of amendment is not expected to be amended as per the exigency of the time from time to time and is to be interpreted as a living document to satisfy the needs and requirements of the changing and evolving times. Once CAG is found to be the fourth pillar of the Union of States that is India, constituted to perform duties and exercise powers in relation to the accounts of the Union and of the States and of any other authority or body, the expanse of its powers cannot be stifled and limited. Mode and manner in which the governments govern and

administer the State is ever evolving. Soon after the framing of the Constitution of India, it was felt that the government, for proper governance, needs to have its hand and control in each and every major industry and business. The same, over the times has not found favour and we today have transformed to public-private partnerships where the government works in partnership with private persons, with the extent of participation of the government varying from venture to venture. DISCOMs subject matter of present petition are an example thereof. We are of the opinion that to limit the meaning of the words "authority or body" under Article 149 as is contended by the petitioners, to only those which satisfy the criteria of Article 12 of the Constitution may deprive one of the four limbs of the Union from exercising powers and duties in relation to accounts of an authority or body as may be required as per exigencies from time to time.

M. It is significant that Article 149 though extends the jurisdiction of CAG besides in relation to the accounts of the Union and the States also in relation to the accounts of any other body or

authority but the extent to which CAG is to exercise such jurisdiction has been left to be prescribed by law to be made by Parliament. Thus, unless the Parliament has made a law in that respect, CAG would not be in a position to perform any duty or exercise any power in relation to accounts of any authority or body. The same allays the fears expressed by the petitioners, of the words "body or authority" if not restricted to the meaning as under Article 12 of the Constitution, vesting the CAG with power over accounts also of private companies. CAG would not have any jurisdiction or domain over the accounts of private companies till a provision therefor has been made by law of Parliament. Such law when made would remain amenable to challenge if any thereto.

N. That brings us to Section 20 which is such a law and which is not under challenge.

O. It is not as if under Section 20 accounts of every body or authority, even if of a purely private nature and character, become amenable to the CAG. Under Sub-Section (1) thereof accounts of only such body or authority become amenable to

audit by CAG which are directed to be so audited by the President / Governor / Administrator. The discretion in this regard has however not been left in the sole domain of the President / Governor / Administrator and as per proviso to sub-section (1) of Section 20, direction thereunder can be issued only in consultation with CAG who as aforesaid is a constitutional functionary. Thus, the decision in this regard has not been left solely to the Executive. The extent of audit is again not in sole domain of the Executive in as much as under sub-section (1), the terms of reference of such audit are to be as per mutual agreement of the concerned government and the CAG.

P. The power of the President / Governor / Administrator to direct so is further circumscribed by the requirement of Sub-Section (3), of the same being expedient in public interest and has to be preceded by an opportunity to such body or authority to represent against such audit. The same, again in our view provides sufficient safeguard and we see no reason to restrict the powers of the CAG only to body or authority which satisfies

the test of being a State when need in public interest for having its accounts so audited may arise as per exigencies of the time.

Q. Supreme Court in ***S.P. Gupta Vs. Union of India*** 1981 Supp. SCC 87 held that interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. It was further held that law does not operate in a vacuum and is intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. A Judge has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice.

R. Again, in ***Prafull Goradia Vs. Union of India*** (2011) 2 SCC

568 Supreme Court reiterated that Constitution is not to be interpreted in a narrow or pedantic manner because it is an organic statute and because it is intended to endure for ages to come. Similarly, in ***State of West Bengal Vs. Committee for Protection of Democratic Rights*** (2010) 3 SCC 571 it was held that constitutional provisions have to be construed broadly and liberally having regard to the changing circumstances and the needs of time and polity. Recently, also in ***Manoj Narula Vs. Union of India*** (2014) 9 SCC 1 it was reiterated that a Constitution must not be construed in a narrow and pedantic sense and the full import and true meaning of the words therein has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve.

S. Reference may also be made to ***I.R. Coelho Vs. State of Tamil Nadu*** (2007) 2 SCC 1 holding that the principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the domestic principle upon which it is based and that the said principle advocates a check and balance model of the separation

of power, it requires the diffusion of power necessitating different independent centres of decision making. In our opinion, the constitutional office of CAG is one of such powers, necessary for operation of the check and balance model.

T. We, more today than perhaps in the first fifty years after independence, are living in changing times, where the modes of doing business are what could never even have been imagined even five or ten years ago. Most of the large businesses are carried on not by natural persons but by artificial persons and identification of the natural persons in control and management of the same becomes virtually incapable of knowing save by a detailed scrutiny. With the opening up of international barriers, the need to knowing the same may arise for diverse reasons and which, as well as the transactions of such entities, may not be capable of knowing without an audit by the CAG.

U. We refuse to interpret Article 149 of the Constitution in a manner, to restrict the powers of the CAG for all times to come when the fears expressed arising from such interpretation are found to be capable of being addressed otherwise.

39. Before parting with the topic, we may also record that during the hearing we had felt that Section 20 of the CAG Act merely extends the duties and powers of CAG from that of, limited audit of bodies and authorities referred to in Sections 14 to 16 of the CAG Act, to a full audit of accounts under Section 20, of the said bodies, and had put so to the counsels. What had made us think so, are the words "Save as otherwise provided in Section 19" in the beginning of Section 20. It was felt that since Sections 14 to 16 lay down the parameters of body or authority with respect to accounts of which CAG may exercise powers as prescribed therein, the purport of Section 20 was only to permit, under the conditions mentioned therein, exercise of powers by CAG beyond the restrictions in Sections 14 to 16. It was further felt that the same would also take care of our doubt, of the Parliament being not entitled to delegate to the Executive to be done in exercise of executive powers what it is required by Article 149 to be done by making law. It was yet further felt that though Section 19 also places limitations on duties and powers of CAG vis-a-vis accounts of government companies and corporations but since the same was being done by law framed by Parliament, the same was exempted from the exercise of power under Section 20. The said trend is found to be running in Sections 14 to 16

also, all of which are also subject to the provisions of law if any relating to bodies or authorities subject matter thereof.

40. However, our aforesaid proposition was not accepted by either of counsels except Mr. Dhruv Mehta who, in his rejoinder arguments tend to agree therewith.

41. However on further consideration, including for the reasons hereinabove given and considering that there is no challenge to vires of Section 20, we have not pursued the said reasoning. The same may be relevant in the event of a challenge to Section 20 and the same being successful, to save / read down the same. We also now feel that the audit of bodies or authorities subject matter of Sections 14 to 16 having been entrusted to CAG by law made by Parliament i.e. the CAG Act, Section 20 would not apply to them. We though still wonder the purport of the words "save as otherwise provided in Section 19" in Section 20 of the CAG Act.

42. Once it is held that the words 'body or authority' are not restricted only to those entities which satisfy the test of Article 12 of the Constitution, the need to adjudicate, whether DISCOMs are State within the meaning of Article 12 of the Constitution, does not arise.

43. However, DISCOMs have also challenged the direction under Section

20(1) to the CAG for their audit, on the grounds of, (i) the same having not been issued by the authority entitled to issue the same; (ii) audit of their accounts being not expedient in the public interest; and, (iii) reasonable opportunity to make representation with regard to the proposal for such audit having not been given to them. We will now proceed to adjudicate the said challenge.

44. The challenge on the ground of the direction for audit being not by the authority competent to do so is premised on the authority to issue such a direction being the Administrator of Delhi and the direction, though under his signatures, being at the instance of GNCTD.

45. In our opinion, there is no merit in the said challenge also. The reasons which prevail with us to hold so are as under:

(A) The contention, that since the functions and powers of CAG are to be prescribed by a law made by the Parliament, the Administrator of Delhi in exercise of powers under Section 20 is not to act on the aid and advise of GNCTD and / or its Council of Ministers and the contention that under Entry 76 in List I of the 7th Schedule, the power to make law with respect to audit of accounts of Union and States is with the Parliament and not with the Legislature of State of Delhi, is

misconceived.

(B) The decision to be taken by the Administrator i.e. the Lt. Governor of Delhi under Section 20 is the need for directing CAG to audit the accounts of a body or authority and not a decision whether a law should be made in relation to the audit of the accounts of Union of India or of Delhi. The question, whether such decision is to be taken by the Administrator as Lieutenant Governor of Delhi, which by virtue of Article 239AA has a hybrid position, is dependent upon whether the body or authority direction qua accounts of which is to be issued is under the domain of Union / Parliament or under the domain of GNCTD / State Legislature.

(C) It cannot be doubted that DISCOMs are under the domain of GNCTD and / or Legislature of State and not of the Union / Parliament. To say, that the Administrator for taking the said decision is to act as the representative of Union of India would defeat the very purpose inasmuch as Union would have no concern with the accounts of DISCOMs. It is the State Legislative Assembly which is concerned with the functioning of DISCOMs. Electricity is a concurrent subject and it is the State Government i.e. GNCTD only which alone is

concerned with the State level transmission and distribution of electricity.

(D) Once it is held that the Administrator of Delhi in the matter of issuance of a direction under Section 20 does not act as the representative of Union of India, the next question which arises is whether the Administrator, in exercise of such power, is to act eo nomine i.e. by or in that name or on the aid and advise of the Council of Ministers of GNCTD.

(E) Supreme Court in ***State of Gujarat Vs. Hon'ble Mr. Justice R.A. Mehta (Retd.)*** (2013) 1 SCC 1 held / reiterated:-

(i) that the universal rule is that the Governor is bound to act only in accordance with aid and advice of Council of Ministers headed by Chief Minister in whom the real executive power vests;

(ii) whenever the Constitution requires the satisfaction of the President or the Governor for the exercise of such power, such satisfaction is not the personal satisfaction of the President or Governor in their personal capacity but satisfaction of the Council of Ministers on whose aid and

advise the President or Governor generally exercises all their powers and functions;

(iii) mere use of the word Governor in any Statute is not sufficient to impute to the legislature an intention to confer power eo nomine;

(iv) however where a Statute confers the President or the Governor *ex officio* with the powers of an office viz. as Visitor or Chancellor of a University, the President or Governor in exercise of powers of that office is not to act on aid and advice of Council of Ministers and is to discharge duties of that office in accordance with the Statute; and,

(v) the President / Governor is to act eo nomine in his own discretion where by reason of peril to democracy or democratic principles an action may be compelled which from its nature is not amenable to Ministerial advice; such a situation may be where bias is inherent and or manifest in the advice of the Council of Ministers.

(F) Certainly, a direction for audit of acts of any body or authority,

under Section 20 of CAG Act, does not fall in category (iv) or (v) aforesaid.

(G) The language of Section 20(1) leaves no manner of doubt that the exercise of power by the Administrator, Delhi is to be on advice of Council of Ministers. The same provides for audit thereunder on such terms and conditions as may be agreed between the CAG and the 'concerned Government'. Had the power to be exercised eo nomine, the question of empowering the concerned Government to agree to terms and conditions of audit would not have arisen.

(H) The action of the Administrator under Section 20, though required to be taken after giving an opportunity to the body or authority proposed to be audited to represent thereagainst, cannot be said to be adjudicatory. Supreme Court in ***Subramanian Swamy Vs. Arun Shourie*** (2014) 12 SCC 344 held that merely because a body is required to follow procedure of a legal character will not make its function adjudicatory. It was further held that the general rule is that an administrative authority need not even give reasons for its decision unless the rules so require, even where the decision inflicts civil consequences on the petitioner.

46. It thus follows that the exercise of powers by the Administrator, Delhi under Section 20 of CAG Act is to be on the aid and advice of the Council of Ministers led by Chief Minister of GNCTD and has been rightly so exercised.

47. The next challenge is on the ground of reasonable opportunity to represent with regard to the proposal for such audit having not been given. The said challenge is under two heads. Firstly, of sufficient time to represent against having not been given and secondly, of the same being not reasonable. While we do not find any merit in the former, we uphold the latter. The reasons therefor are as under:

(I) The challenge on the ground of sufficient time having not been given is on the ground of, time only of 48 hours having been given to represent against the proposal for audit. It is unfortunate that we all have got used to time ceasing to be of any essence and which explains the ground urged of a 48 hours notice to represent against being called not reasonable. We have got used to testing reasonableness in terms of days and months and that is why a legal plea of time given of hours being unreasonable and insufficient.

(II) In our opinion, a time has come for changing such mindset. While we in one breath frown upon governance and administration *inter alia* for the reason of the same being very slow and non-responsive, we in the other breath cannot strike down an action on the ground of the Government concerned having acted with speed. Seen in this light, the time of 48 hours to represent against cannot be said to be violative of the requirement of Section 20(3) of giving reasonable opportunity.

(III) In this context, we also find merit in the contention of the senior counsel for GNCTD that the proposal for audit in fact had been mooted long back. A PIL in this regard was pending before this Court, in any case since long prior thereto. DERC had also asked for such an audit.

(IV) Reasonableness of time has to be in the context of all the aforesaid factors and considering the same, the time of 48 hours cannot be said to be violative of the test of reasonable opportunity under Section 20(3) of the Act.

(V) Over the ground urged, of the direction for audit being a pre-

decided one, being a poll promise, we need only observe that the Courts are flooded with petitions for fulfilment of promise on the plank whereof election is won. Certainly no grievance can be made of such promise having been fulfilled.

(VI) However, we find favour with the contention, of the opportunity granted being not reasonable, but for the reason of being not preceded by a 'proposal for such audit'.

(VII) Sub-section (3) of Section 20 of the CAG Act prohibits entrustment of audit of accounts of any body or authority to the CAG in exercise of power under sub-section (1) "except after giving a reasonable opportunity to the concerned body or authority to make representation with regard to the proposal for such audit". The words 'proposal for such audit' in sub-section (3) of Section 20 have to be understood in the context of sub-section (1). Sub-section (1) requires the President / Governor / Administrator to direct CAG to undertake audit of account of such body or authority, 'after consultation' with CAG and on such terms and conditions as may be agreed upon between CAG and the concerned government. Thus, a proposal for audit can be said to have concretised only after consultation with

CAG and after the terms and conditions of audit have been settled between the concerned government and CAG.

(VIII) What has emerged from a perusal of the notings on the file of GNCTD in the present case is that, (i) the consideration of the proposal for audit commenced on 26th April, 2011 i.e. soon after the filing of PIL aforesaid; (ii) on 13th May, 2011 it was observed that CAG audit was not possible in the legal framework and it was in view of the said "constitutional and legal limitations / constraints" that the National Tariff Policy on electricity stipulated and directs SERC to institute a system of independent scrutiny of financial and technical data submitted by licensee and accordingly DERC was asked the steps it had taken in this regard; iii) Cabinet of GNCTD on 26th December, 2011 approved infusion of equity and audit of DISCOMs by CAG since inception; iv) however the matter continued to be debated, awaiting the decision of this Court in the PIL, in which the DISCOMs were opposing audit by CAG; v) on 28th December, 2013, a decision was taken to obtain approval of the Administrator for the proposal for conducting audit of DISCOMs by CAG, "keeping in view larger public interest involved, to carry the conviction of the general public /

consumers about the authority of the claims of the DISCOMs" and to, in accordance with Section 20 of the CAG Act hold consultation with CAG; vi) on 1st January, 2014, the representations of DISCOMs against the proposal of audit by CAG was considered and, it was reasoned, a) that the reluctance of DISCOMs could not be understood; b) conduct of audit may bring out several possibilities of scope of reduction of financial requirements of DISCOMs leading to an overall reduction of electricity tariff for consumers of Delhi; c) the jurisdictional issue raised by DISCOMs would in any case be looked at by the CAG before starting the audit; d) the proposed terms of reference would be finalized in "two-three days" after detailed deliberations but would involve amongst others, analysis of sale / purchase of power by DISCOMs, analysis of capital projects executed for network expansion, analysis of consumer billing, scope of cost reduction etc.; vii) accordingly, it was decided to obtain approval of Administrator for, after completion of consultation with CAG and finalization of terms and conditions of audit, request CAG to under Section 20(1) conduct audit of DISCOMs since inception; viii) the Chief Minister consented to the said decision observing that there is

no reason for DISCOMs to resist audit; ix) the Administrator gave his approval, reasoning that audit is necessary for detecting the truth and in the larger interest of public; x) on 9th January, 2014 the issue of framing terms of reference for proposed audit were finalized by GNCTD and discussed with CAG; xi) on 16th January, 2014 an entry conference was held between officials of CAG and GNCTD to discuss issues related to the "audit of three private DISCOMs of Delhi" and to finalize the terms of reference for audit; xii) CAG clarified that the issue relating to unbundling of DVB would not be audited as it had already been reviewed and reported in the CAG audit report for the year ended March, 2003 and which report had been discussed in several Public Accounts Committee (PAC) meetings held in 2005 and in 2006 and the third and final report of PAC been presented to Delhi Legislative Assembly on 2nd March, 2006.

(IX) GNCTD, vide letter dated 28th December, 2013 to DISCOMs, as aforesaid, informed them of the proposal for their audit by CAG, under Section 20 of the CAG Act and gave them opportunity to represent thereagainst latest by 30th December, 2013 and also gave them an opportunity of hearing at 1700 hours on 30th December, 2013

itself; no reasons for such audit and no terms and conditions thereof agreed with CAG were mentioned therein.

(X) Though vide letter dated 30th December, 2013, another opportunity was given to make additional submission by 1st January, 2014, in writing as well as orally, but no reasons or terms and conditions of audit were mentioned therein also.

(XI) Rather, what transpires from the file notings is, that till 30th December, 2013, neither had the approval of Administrator been sought nor the terms and conditions of audit been finalized with CAG.

(XII) What emerges is that the DISCOMs were given an opportunity to represent, even before any such consultation had taken place between the Administrator and CAG and before any terms and conditions of such audit had been agreed upon between CAG and the concerned government i.e. GNCTD.

(XIII) What further emerges is that the GNCTD first wrote to CAG in this regard on 31st December, 2013 and on 1st January, 2014 conveyed to CAG that approval of Administrator had been obtained.

(XIV) Even in the impugned letter dated 7th January, 2014 of GNCTD to DISCOMs informing that CAG will be conducting audit of

DISCOMs since inception, under Section 20 of the CAG Act, no terms and conditions agreed with CAG were mentioned.

(XV) What is thus evident is that there was no 'proposal of audit' within the meaning of Section 20, till the time opportunity to represent against was given.

(XVI) In our opinion, 'proposal of audit' within the meaning of Section 20 cannot merely be the desire or intention to audit but has also to contain the terms and conditions of audit agreed upon by the CAG in the consultation to be held for such purpose as well as the reasons for which satisfaction is reached that the proposed audit is in public interest;

(XVII) The ingredients of Section 20, permitting audit thereunder only when it is expedient in public interest, after consultation with CAG and on the terms and conditions agreed with CAG are essential safeguard for invocation of power thereunder and non-compliance wherewith would render the action bad.

(XVIII) We say so because Article 149, as aforesaid, empowers CAG to perform such duties and exercise such power in relation to accounts of any body or authority which may be prescribed by Parliament by

law; thus the concerned body or authority, from such law would know what duties / powers CAG is to exercise in relation to its accounts; however Parliament, by law contained in Section 20 of the CAG Act has left it to the Executive to in consultation and agreement with CAG assign such duties / powers to CAG; when the Constitution of India has deemed it appropriate for such duties and powers of CAG to be prescribed by law and making whereof has all the implicit safeguards, even if it were permissible for Parliament to delegate what is required to be done by law, to the Executive, to be done not by subordinate delegation but by Executive fiat, the conditions imposed by Parliament in exercise of such executive fiat assume significance.

(XIX) Thus, before the body or authority proposed to be audited under Section 20 is given an opportunity to represent against the proposal, there must be a consultation with the CAG and upon CAG agreeing to the audit, terms and conditions thereof should have been agreed.

(XX) CAG, as aforesaid is a independent constitutional authority and consultation with CAG and agreement with CAG of terms and conditions of audit are important restrictions on the Executive, under

Section 20 of CAG Act, doing by Executive fiat what the Parliament under Article 149 is required to do by law.

(XXI) The fact that while issuing the direction under Section 20 in the present case, the question of applicability thereof was left to be decided by CAG is indicative of consultation being namesake and being not meaningful.

(XXII) Supreme Court in ***Mr. Justice Chandrashekaraiah (Retd.) Vs. Janekere C. Krishna*** (2013) 3 SCC 117 held that consultation is never meant to be a formality, but meaningful and effective. Similarly in ***Hon'ble Mr. Justice R.A. Mehta*** supra, on an examination of a host of case law, it was held that (i) the object of consultation is to render its process meaningful, so that it may serve its intended purpose; (ii) consultation requires the meeting of minds between the parties that are involved in the consultation process, on the basis of material facts and points, in order to arrive at a correct or at least a statutory solution; (iii) if certain power can be exercised only after consultation, such consultation must be conscious, effective, meaningful and purposeful; to ensure this, each party must disclose to the other, all relevant facts for due deliberation and the consultee must

express his opinion only after complete consideration of the matter on the basis of the relevant facts and quintessence; (iv) consultation may have different meanings in different situations depending upon the nature and purpose of the statute; (v) consultation or deliberation can neither be complete nor effective before the parties thereto make their respective point of view known to other or others and discuss and examine the relevant merits of their views; (vi) that where a decision is thickly clouded by non-consideration of the most relevant and vital aspect, the mandatory statutory requirement of consultation cannot be said to even rendered effectively and meaningfully; (vii) if the process of consultation is vitiated, it would render the ultimate order vulnerable and liable to questioning; (viii) it is for the Court to determine in each case in the light of facts and circumstances, whether the action is after consultation and / or whether there was sufficient consultation; (ix) that the meaning of consultation varies from case to case depending upon its fact, situation and the context of the statute as well as the object it seeks to achieve and no straight-jacket formula can be laid down; (x) ordinarily consultation means a free and fair discussion on a particular subject, revealing all material that the

parties possess in relation to each other and then arriving at a decision, where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision or by way of implication, consultation may mean concurrence; (xi) the Court must examine the fact situation in a given case to determine, whether the process of consultation as required in a particular situation did in fact stand completed.

(XXIII) The mere fact that CAG accepted the terms and conditions of audit contained in the directive issued under Section 20(1) cannot be a substitute for the legislative requirement of arriving of an agreement between the concerned government and CAG and which agreement has to be arrived at before an opportunity to represent thereagainst is given to the body or authority to be audited; it is well nigh possible, the body or authority proposed to be audited may not have any objection to an audit of a limited nature; thus, the opportunity to represent against has to be against a concrete proposal arrived at after an agreement between the concerned government and CAG; we, in this regard reiterate that though Article 149 required the Parliament to by law lay down the functions and duties which CAG is to perform in

relation to accounts of any body or authority but the Parliament, vide Section 20 has empowered the Administrator / concerned Government to, in agreement with CAG, formulate the functions and duties which CAG may perform in relation to the said accounts; the body or authority with respect whereto such power is exercised, if not entitled to know from law, is certainly entitled to know the functions and duties which are proposed to be performed in relation to its accounts.

(XXIV) We are further of the view that there can be no reasonable opportunity to represent against without disclosing to the DISCOMs the public interest in which it was deemed expedient to direct audit of DISCOMs; the nature and content of the representation would be dependent on the reason for which audit is proposed; for instance, representation against an audit on the ground of whether privatisation of electricity distribution in Delhi has served the objectives thereof would be different from representation against audit for tariff determination; we have already noticed above that CAG refused to include in the terms of reference the unbundling of DVB on the ground of the same having already been subject matter of audit report of earlier years; the nature of representation against such audit would

have been entirely different.

(XXV) We are strengthened in our view of the opportunity to represent being required to be given after consultation and agreement under Section 20(1), also from the placement of sub-sections of Section 20; while consultation and agreement are provided for in sub-section (1), giving of opportunity to represent against is provided for in sub-section (3), as a rider thereto.

48. Having held that DISCOMs were not given reasonable opportunity to make representation with regard to the proposal for such audit for the reasons aforesaid, the question which axiomatically arises is, the effect thereof. In this context, we agree with the contention noted above of DISCOMs that to non-compliance of statutory requirement of reasonable opportunity to represent against, the reasoning of no prejudice having been suffered therefrom does not apply. We may in this context also refer to ***Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board*** (2010) 13 SCC 216 laying down that in case there is a non-compliance of a statutory requirement of law, such non-compliance may itself be prejudicial to a party and in such an eventuality it is not required that a party has to satisfy the Court that his cause has been prejudiced for non-compliance of

statutory requirement or principles of natural justice. Hence, it has but to be held that the action of the respondents being in non-compliance of Section 20(3) has to be struck down.

49. The last ground of challenge to the action under Section 20 is on the ground of the action being not in public interest. In our view, the decision to direct audit under Section 20 on the ground of the same being in public interest would be subject to judicial review. However having held hereinabove that DISCOMs were not given reasonable opportunity to make representation to the proposal for such audit, including on the ground that the public interest in which the same was deemed to be expedient was not disclosed to DISCOMs and having thus struck down the action and which would leave it open to the respondents to, if so desire, issue a fresh direction, we have wondered the need to go into the question, whether a direction for audit of DISCOMs is in public interest or not. Having heard the detailed arguments we feel compelled to give our reasons for being of the view that audit for the reasons for which it was ordered earlier is not in public interest as we fear that the GNCTD, in the absence thereof, may undertake another misguided exercise in this regard, after giving reasonable opportunity and which may ultimately not serve any purpose.

50. Article 151 of the Constitution provides for the reports of CAG relating to the accounts of Union to be laid before each House of the Parliament and relating to the accounts of State to be laid before the Legislature of the State. We have in ***Sarvesh Bisaria*** supra held that the Executive and the Courts have no jurisdiction to use the information contained in the CAG Report for initiation of any action and it is only the Legislative Assembly which has exclusive jurisdiction on CAG Report. Reliance was placed on ***Centre for Public Interest Litigation Vs. Union of India*** (2012) 3 SCC 1 holding that since the PAC and Parliamentary Committee of Parliament were seized of the CAG Report, it would not be proper for Court to refer to the findings and conclusions therein and on ***Centre for Environment & Food Security Vs. Union of India*** (2011) 5 SCC 668 holding that investigation by CBI on the basis of CAG Report could be ordered only after the CAG Report had been accepted by the Government.

51. Section 20 does not indicate the manner in which the report of CAG of audit thereunder is to be dealt with. However, since in ***Pathan Mohammed Suleman Rehmatkhan*** supra it was held that CAG is a key figure in the system of parliamentary control of finance and is empowered to

delve into the economy, efficiency and effectiveness with which the departmental authorities or other bodies had used their resources in discharging their functions and that CAG is also the final audit authority and is a part of the machinery through which the legislature enforces the regulatory and economy in the administration of public finance, it has to follow that the Report of CAG in pursuance to direction under Section 20 of the CAG Act also has to be placed before the Legislative Assembly of Delhi.

52. We have wondered even if the CAG Report is to find truth in the allegations against the DISCOMs leading to the impugned direction of their audit by CAG and the said Report is to be accepted by the Legislative Assembly of Delhi and direction issued to GNCTD to take action in accordance therewith, what action will GNCTD take.

53. In our opinion, the question, whether it is possible for the concerned government to take any action against a body or authority on the basis of the report of CAG, under the laws otherwise applicable to such body or authority and / or under the agreement, if any of the concerned government with such body or authority, would be a relevant consideration, whether it is expedient in public interest to direct such audit or not. Needless to state that

if under the law applicable and / or the agreement, the concerned government is unable to take any action against the body or authority of which audit is sought to be directed in exercise of powers under Section 20, the audit cannot be said to be expedient in public interest; after all the audit is not be an empty exercise / formality.

54. Inspite of the arguments of DISCOMs, of GNCTD having no right to take any action against DISCOMs, we have not been shown any such right under the law applicable to DISCOMs or under the agreement, if any with DISCOMs. We on our own have not found any.

55. We, in this context looked into the genesis of DISCOMs and the rights, if any of GNCTD with respect thereto on the basis of the report of the audit by CAG ordered thereagainst.

56. Prior to the Electricity Act, 2003, the supply of electricity in the country was governed by the Indian Electricity Act, 1910, The Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. Though the 1910 Act envisaged growth of electricity through private licensees but the 1948 Act mandated the creation of State Electricity Boards and vested them with the responsibility of arranging the supply of electricity in the State and with the power to fix tariff. However, over a period of time

it was realised that the performance of the State Electricity Boards had deteriorated, including on the ground that they had been unable to take decision on tariffs in a professional and independent manner and tariff determination in practise had been done by the State Governments. To address this issue, the 1998 Act was enacted establishing Central and Sate Electricity Regulatory Commissions *inter alia* to determine tariff.

57. The aforesaid development also having not served any purpose and with the policy of encouraging private sector participation in generation, transmission and distribution and with the objective of distancing the regulatory responsibilities from the government to the Regulatory Commissions (Refer statement of objects and reasons) the comprehensive Electricity Act, 2003 was enacted and which repeals the earlier three legislations aforesaid.

58. The reasons which prevailed with GNCTD for directing the audit of DISCOMs in exercise of powers under Section 20(1), as borne out from the file notings and as borne out from the counter affidavits filed in this proceeding, was that DISCOMs were alleged to have in their balance-sheet inflated their cost of operation by making purchases of equipments from their sister companies at values above the market price resulting in the tariff

which DISCOMs are entitled to collect from the consumers being determined at a higher rate and DERC not having the wherewithal to catch such overpricing by DISCOMs in their balance-sheet of the purchase price and the operational cost. We highlight that the CAG refused to go into the question of unbundling of DVB, with respect whereto it had already submitted a report and which had been considered by PAC. Thus, the purpose of audit was / is not whether privatisation has served any purpose or whether the terms of transfer Scheme were in the interest of GNCTD. The sole purpose / purport of audit thus is tariff determination.

59. We have combed the provisions of the Electricity Act and the Reforms Act to find out the justification if any for the aforesaid reason, including the power if any of GNCTD to, if the said allegation against DISCOMs is supported by the report of CAG, take appropriate action thereon.

60. We first deal with the Electricity Act, 2003 i) Section 12 to 14 and 16 thereof bar any person from transmitting or distributing or undertaking trading in electricity save under a licence issued by an appropriate Commission (i.e. either the Central Electricity Regulatory Commission (CERC)) or the SERC) and on such terms and conditions as may be

specified. ii) Sections 19 and 20 vest the power of revocation of such licence and of sale of utilities of the licensees after such revocation, also in the appropriate Commission only and not in the State Government. iii) Section 23 vests the appropriate Commission with the power to issue any direction to the licensee. iv) Section 45 entitles the distribution licensee, as the DISCOMs are, to charge the price for the supply of electricity in accordance with the tariffs fixed from time to time in accordance with the methods and principles as may be specified by the concerned State Commission and in the conditions of its licence and further in accordance with the provisions of the Act and the Rules made by the concerned State Commission. v) Section 51 enables a distribution licensee to, with prior intimation to the appropriate Commission, engage in any other business for optimum utilization of its assets subject to a proportion of the revenues derived from such business being utilized for reducing its charges for wheeling. vi) Section 57 empowers the appropriate Commission to specify the standards of performance of a licensee or a class of licensees and penalties for failure to meet the same (in our opinion, under this power the appropriate Commission can specify the Standard Operating Cost for a distribution licensee with penalties for not achieving the same). viii) Section 61 empowers the

appropriate Commission to specify the terms and conditions for the determination of tariff guided by commercial principles, intended to encourage competition and efficiency, safeguarding consumer interest while at the same time recovering the cost of electricity, rewarding the efficiency in performance and the tariff reflecting the cost of supply of electricity. ix) Section 62 *inter alia* empowers the appropriate Commission to in case of distribution of electricity in the same area by two or more distribution licensees, for promoting competition amongst distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. x) Section 63 also provides for determination of tariff through the transparent process of bidding. xi) Section 64 empowers a licensee including a distribution licensee to make an application to the appropriate Commission for determination of tariff (no such power to apply for determination of tariff has been given to the State Government though Sub-Section (4) thereof requires the appropriate Commission to send a copy of the order on such application including to the appropriate government). xii) Sections 70 and 73 provide for the constitution of a Central Electricity Authority with the function and duty *inter alia* of advising the Central Government on optimum utilization of resources to provide affordable electricity for all consumers and to carry

out studies relating to cost efficiency, competitiveness and such like matters and to make public from time to time the information secured. xiii) Section 74 imposes a duty on the licensees to furnish to the Central Electricity Authority such statistics, returns or other information relating *inter alia* to distribution of electricity as the Central Electricity Authority may require from time to time and in such form and manner as may be prescribed by the Central Electricity Authority. xiv) Section 76 provides for constitution of a CERC and Section 82 provides for the constitution of SERC. xv) Section 84 requires the Chairperson and the members of the SERC to have adequate knowledge *inter alia* of finance, commerce and economics with the appointment thereto being made by the State Government after consultation with the Chief Justice of that High Court. xvi) Section 86 requires the SERC to discharge the function *inter alia* of determination of tariff, grant of licences including for distribution of electricity. xvii) Section 104 provides for audit of the accounts of the SERC by the CAG with the same powers as CAG has in connection with audit of government accounts. xviii) Section 110 provides for establishment of an Appellate Tribunal to hear appeals against the orders of the appropriate Commission. xix) Section 125 provides for appeal to the Supreme Court against the orders of the Appellate Tribunal.

xx) Section 131 provides for vesting of the property of the erstwhile State Electricity Boards in the concerned government to be re-vested by the concerned State Government in a government Company or in a company in accordance with transfer scheme to be framed thereunder. xxi) Section 174 gives the provisions of the Act an overriding effect notwithstanding anything contained in any other law for the time being in force; however Section 175 provides that the provision of the Act are in addition to and not in derogation of any other law. xxii) Section 181 empowers SERC to make regulations providing *inter alia* for the conditions of licence, standards of performance of a licensee, the terms and conditions for determination of tariff, the details to be furnished by the licensee and the minimum information to be maintained by a licensee.

61. The Delhi Electricity Reforms Act, 2000 as per its Preamble was enacted to provide for the constitution of an Electricity Regulatory Commission, restructuring of the electricity industry, increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi. i) Section 3 of the Act

constitutes the DERC. (ii) Section 10 vests the DERC besides with the powers as of a Civil Court under the Code of Civil Procedure, 1908 for the purposes of any inquiry or proceedings and also with a power to require any person to produce before it and allow to be examined such books, accounts or other documents in the custody or under the control of the person so required as may be specified or described in the requisition being the documents relating to any matter concerning *inter alia* transmission, distribution and supply of electricity and the functioning of any undertaking involved in the same, as the Commission may require for proper discharge of its functions as well as with a power of search and seizure. iii) Sub-Section (6) of Section 10 specifically empowers the DERC to by a general or special order, call upon any person including the licensees to furnish to the DERC, periodically or as and when required, any information concerned with the activities carried on by such person relating *inter alia* to distribution and supply of electricity, the connection between such person and any other person or undertaking including such other information related to the organisation, business, cost of production, conducts, etc. as may be prescribed to enable the DERC to carry out its functions; sub-section (8) of Section 10 empowers DERC to at any time call for and examine,

information, details, books, accounts and other documents from any person including a licencee for the purpose of providing the same to Central Electricity Authority, CERC, the Central Government or the State Government, if so required by them. iv) Section 11 lists the functions of the DERC as including determination of tariff *inter alia* for retail of electricity, to regulate power purchase and procurement process of the licensees, to promote competition, efficiency and economy in the activities of the electricity industry, to promote competitiveness and make avenues for participation of private sector in the electricity industry, to issue licence for distribution or supply of electricity and to determine the conditions of the licence. v) Section 12 titled "General Power of the Government" provides for the DERC, in the discharge of its functions being guided by the directions in matters of policy involving public interest as the Government may issue from time to time (we emphasize, the role of the GNCTD is limited to this only). vi) Section 14 prescribes for incorporation of companies for the purpose of generation, transmission and distribution of electricity. vii) Section 15 provides for re-organization of the Delhi Vidyut Board (DVB) and transfer of its properties, functions and duties to the Government and further empowers the Government to transfer such

property, interest in property, rights and liabilities to any company or companies established under Section 14. viii) Section 19 prohibits any person from engaging in transmission and supply of electricity save with the licence from the DERC. ix) Section 20 empowers the DERC to issue licences authorizing any person to transmit and supply electricity on specified terms including a condition to comply with the requirements of the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 or the Rules framed thereunder as may be applicable. x) Sub-Section (6) thereof deems the provisions contained in the Schedule to the 1910 Act to be incorporated with and to form part of every supply licence and Sub-Section (9) provides for non exclusivity of licences. xi) Section 23 empowers the DERC to revoke the licence after holding an inquiry. xii) Section 27 requires the licensees to prepare and render to DERC, an annual statement or statement of account of its undertaking containing such particulars as may be set out in the licence. xiii) Section 28 requires a licensee to observe methodologies and procedures specified by the DERC from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect those revenues. xiv) Sub-Section (2) of Section 28 entitles the DERC to prescribe the terms and

conditions for determination of the licensee's revenues and tariffs by regulations prescribed and mandates the DERC to in doing so be guided by the financial principles and their application provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 and the factors which would encourage efficiency, economic use of resources, good performance, optimum investments etc. as well as the interest of the consumers. xv) Sub-Section (5) of Section 28 requires the licensees to provide to the DERC at least three months before the ensuing financial year full details of its calculation for that financial year of the expected aggregate revenue from the charges which it believes it is permitted to recover pursuant to the terms of its licence and empowers the DERC to seek such further information which it may require to assess the licensee's calculation. xvi) Sub-Section (7) of Section 28 provides that the tariff implemented shall be just and reasonable so as to promote economic efficiency in the supply and consumption of electricity. xvii) Section 29 empowers the Government to inspect and verify the accounts of licensee claiming any subvention. xviii) Section 37 empowers the DERC to determine standards of overall performance, and, xix) Section 38 empowers the DERC to collect information *inter alia* with respect to overall performance achieved by the licensee. The other

provisions are *pari materia* to the Electricity Act discussed hereinabove.

62. DERC in exercise of the powers vested in it has framed the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 to determine the tariff for wheeling of electricity and for retail supply of electricity. i) Regulation 7 thereof empowers the DERC to set targets for each year for items or parameters that are deemed to be controllable including AT&C loss, distribution loss, operation and maintenance expenditure including employee expenses, repair and maintenance expenses, administrative and general expenses and other miscellaneous expenses return of capital employed, depreciation, quality of supply etc. ii) Regulation 14 thereof provides for approval by the DERC of the capital investment plan of the licensee. iii) Regulation 18 provides that capital expenditure shall normally be incurred by the licensee after approval of the Commission. The said Regulations are found to be providing for detailed methodology for working out *inter alia* of the tariff and maintenance expenses, return on capital, working capital etc.

63. Though we have already referred hereinabove to Section 20 and particularly Sub-Section (6) of the Reforms Act but deem it necessary to set

out the same herein below:

> "20. **Grant of licences by the Commission.-**
>
> (1) .....
>
> (2) .....
>
> (3) .....
>
> (4) .....
>
> (5) .....
>
> (6) **The provisions contained in the Schedule to the Indian Electricity Act, 1910 (9 of 1910), shall be deemed to be incorporated with, and to form part of, every supply licence granted under this Part save in** so far as they are expressly varied or excepted by the supply licence and shall, subject to any such additions, variations or exceptions which the Commission is empowered to make having regard to the purposes of this Act, apply to the undertaking authorised by the licence in relation to its activities in the National Capital Territory of Delhi:
>
> Provided that where a supply licence is granted by the Commission for the supply of energy to other licensees for distribution by them, then in so far as such licence relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the said Schedule shall not be deemed to be incorporated within the supply licence."
>
> (**emphasis added**)

64. The Schedule to the Indian Electricity Act, 1910 referred to hereinabove is found, in Clauses II and III thereof, to contain the following condition:

> "*II.* ***Audit of Accounts of licensee not being local authority.*** – Where the licensee is not a local authority, the following

provisions as to the audit of accounts shall apply, namely:

(a) **The annual statement of accounts of the undertaking shall,** before being rendered under Section 11 of the Indian Electricity Act, 1910, **be examined and audited by such person as the [State Government] may appoint or approve in this behalf** and the remuneration of the auditor shall be such as the [State Government] may direct, and his remuneration and all expenses incurred by him in or about the execution of the duties, to such an amount as the [State Government] shall approve, shall be paid by the licensee on demand;

(b) The licensee shall afford to the auditor, his clerks and assistants, access to all such books and documents relating to the undertaking as are necessary for the purposes of the audit, and shall, when required, furnish to him, and them all vouchers and information [including technical data and statements of energy generated and sold] requisite for that purpose, and afford to him, and them all facilities for the proper execution of his and their duty;

(c) **The audit shall be made and conducted in such manner as the [State Government] may direct;**

(d) Any report made by auditor, or such portion thereof as the [State Government] may direct, shall be appended to the annual statement of accounts of the licensee, and shall thenceforth form part thereof;

(e) Notwithstanding the foregoing provisions of the clause, the [State Government] may, if it thinks fit, accept the examination and audit of an auditor appointed by the licensee.

III. *Separate accounts.* – The licensee shall unless the [State Government] otherwise directs, at all times keep the accounts of the [undertaking relating to the generation, supply or distribution of energy] distinct from the accounts kept by him of any other undertaking or business."

(emphasis added)

As per Section 20(6) supra of the Reforms Act, the aforesaid conditions shall be deemed to be incorporated with and forming part of the licence granted to the DISCOMs save insofar as they are expressly varied or accepted by the DERC.

65. Though the DISCOMs, in their pleadings or submissions have not referred to their licences but during the hearing of another writ petition being W.P.(C) No.5307/2012 titled ***Delhi State Industrial & Infrastructure Development Corporation Ltd. Vs. Delhi Electricity Regulatory Commission & Anr.*** we came across the licence granted by DERC in favour of TPDDL filed by TPDDL as annexure to its counter affidavit in that case. We also find copy thereof in the Convenience Volumes handed over during the hearing by Dr. Singhvi. Part-II of the said Licence titled "General Conditions", in Clause 7 provides as under:

"7. Accounts

7.1 The financial year of the Licensee shall run from the first of April to the following thirty-first of March.

7.2 Accounting Principles

The Licensee shall, in respect of the Licensed Business and any Other Business:

a. **keep such accounting records as would be required to be kept in respect of each such business so that the revenues, costs, assets, liabilities, reserves and provisions of, or reasonably attributable to the Licensed Business are separately identifiable in the books of the Licensee**, from those of Other Business in which the Licensee may be engaged;

b. prepare on a consistent basis from such accounting records and deliver to the Commission:

   i. the Accounting Statements;

   ii. in respect of the first six months of each financial year, an interim unaudited profit and loss account, cash flow statement, funds flow statement and provisional balance sheet;

   iii. in respect of the Accounting Statements prepared in accordance with this Clause 7, an Auditor's report for each financial year stating whether in their opinion, these statements have been properly prepared in accordance with this Clause 7 and give a true and fair view of the revenues, costs, assets, liabilities, reserves and provisions of, or reasonably attributable to such businesses to which the statements relate; and

   iv. a copy of each interim unaudited profit and loss account not later than three months after the end of the period to which it relates, and copies of the Accounting Statements and Auditor's report not later than nine months after the end of the financial year to which they relate.

7.3 Accounting Statements under Clause 7.2 shall be prepared in accordance with generally accepted Indian accounting standards and / or as may be prescribed by the Commission.

7.4 References in this Clause 7 to costs or liabilities of, or reasonably attributable to the Licensed Business or the Other Business shall be construed as excluding taxation, and capital liabilities which do not relate principally to such Business and interest thereon.

7.5 The Commission may, from such time it considers appropriate, require the Licensee to comply with the provisions of Clause 7.1 to 7.4 above treating the Distribution Business and the Retail Supply Business of the Licensee as separate and distinct businesses.

7.6 Notwithstanding anything contained in this Clause 7, whenever deemed fit, the Commission may require the submission of a report prepared by an independent Auditor at the expense of the Licensee to be included as an expense in the determination of aggregate revenues made in accordance with Clause 24."

[emphasis added]

66. Clauses 2.3 (i), (ii), (iv), (xxxix) and (xivi) of the Distribution Licence are found to contain a precise definition of "Accounting Statement", "Annual Accounts", "Auditors", "Overall Performance Standards", "Standards of Performance" respectively. Clause 3.2 empowers the DERC to unilaterally modify and amend the terms of licence in accordance with provisions of DERA or Electricity Laws or the Rules & Regulations framed thereunder. Clause 4 requires the licencee to comply with the Regulations,

Orders or directions issued by DERC from time to time. Clause 9 requires the DISCOMs as licencees to provide information to DERC as provided therein and as the DERC may require from time to time, for its own purposes or for the purposes of the Government of India, State Government, Central Commission or the Central Electricity Authority. It is thus evident that even if the State Government i.e. the GNCTD requires any information from the DISCOMs, it is to approach the DERC and if the DERC approves of it, can direct the DISCOMs to supply the same and which direction the DISCOMs will be bound to comply.

67. Thus, the distribution licence itself provides for the accounting principles and the audit of the accounts of the DISCOMs and empowers the DERC to, if so deems fit, require the DISCOMs to submit a report prepared by an independent auditor and does not provide for an audit by the CAG. It may also be noticed that though the provisions of the Schedule to the Indian Electricity Act, 1910 which have been incorporated in the licences vide Section 20(6) of the Reforms Act provided for the audit of a licensee which is not a local authority by such person as the State Government may appoint or approve in this behalf, DERC in the exercise of its powers, also under Section 20(6), has modified the same to what is reproduced hereinabove.

The licence aforesaid in Clause 10 is also found to providing as under:

"**10. Capital Investments and Project Implementation**

10.1 **The Licensee shall not make any investment under any scheme or schemes except in an economical and efficient manner and it terms of this Licence and in accordance with the Regulations, Guidelines, Directions and Orders, the Commission may issue from time to time.**

10.2 The Licensee shall notify the Commission of any schemes pertaining to the Distribution System that the Licensee from time to time proposes to implement together with relevant details, including the estimated cost or such schemes, with requisite break-up, source of funding and proposed investment plans. The Licensee shall specifically detail, as part of the Investment Scheme, an Implementation Plan and the time required to implement the Scheme. **The Licensee shall furnish to the Commission such further details and clarifications as to the schemes proposed, as the Commission may require from time to time.**

10.3 The schemes proposed may be implemented by Licensee, subject to the following conditions:

a. If the scheme does not involve major investment as defined hereunder, without the need for any specific approval from the Commission but subject to any direction or condition which the Commission may give or impose during the implementation of the scheme;

b. **If the scheme involves major investment, after taking specific prior written approval of the Commission as provided in Clause 10.4;**

c. The Licensee shall implement the scheme in an efficient manner within the specified time.

10.4 **The Licensee shall make an application to the Commission for obtaining prior approval of the Commission for schemes involving major investments as per the procedure which the Commission may specify from time to time and demonstrate to the satisfaction of the Commission that:**

a. there is a need for the major investment in the Distribution System which the Licensee proposes to undertake;

b. the Licensee has examined the economic, technical and environmental aspects of all viable alternatives to the proposal for investing in or acquiring new Distribution System assets to meet such need; and

c. the Licensee has explored all possible avenues and is sourcing funds in the most efficient and economical manner.

10.5 **The Licensee shall invite and finalise tenders for procurement of equipment, material and / or services relating to such major investment, in accordance with a transparent, competitive, fair and reasonable procedure as may be specified by the Commission from time to time.**

10.6 For the purposes of Clause 10, the term **"major investment" means any planned investment in or acquisition of Distribution facilities, the cost of which, when aggregated with all other investments or acquisitions (if any) forming part of the same overall transaction, equals or exceeds Rs.2,00,00,000.00 (Rupees two crore only) or such other amount as may be notified by the Commission from time to time.**

10.7 The Licensee shall submit to the Commission, along with the "Expected Revenue Calculation" filed in terms of Clause 24, an Annual Investment Plan – consisting of those schemes that have been approved by the Commission; schemes submitted before the

Commission for approval; and all schemes not requiring approval of the Commission planned for the ensuing financial year – and shall make investment in the said financial year in accordance with the said investment plan:

Provided that the **aggregate cost of all schemes not requiring an approval from the Commission shall not exceed Rs.20,00,00,000.00 (Rupees twenty crore only) in any financial year or such other amount as may be notified by the Commission** from time to time:

Further provided that if any unforeseen contingencies require reallocation of funds within the schemes listed in the annual investment plan, the Licensee may do so after intimating the Commission. However, such reallocation in respect of individual projects shall not exceed Rs.1,00,00,000.00 (Rupees one crore only) and on an aggregate basis shall not exceed Rs.10,00,00,000.00 (Rupees ten crore only) in any financial year or such other amounts as may be notified by the Commission from time to time:

Also provided that if on account of any unforeseen circumstances, the Licensee is required to make investments in a scheme that does not find a place in the annual investment plan, the Licensee may do so subject to the condition that such investment in respect of individual projects shall not exceed Rs.1,00,00,000.00 (Rupees one crore only) and on an aggregate basis shall not exceed Rs.10,00,00,000.00 (Rupees ten crore only) in any financial year or such other amounts as may be notified by the Commission from time to time. Also, the Licensee shall satisfy the Commission, within 30 days thereof, that such investment was the result of a prudent decision warranted by compelling

circumstances."

68. The aforesaid takes care of the allegations of DISCOMs, by inflating their procurement costs becoming entitled to a higher tariff. The DERC, under the terms of licence and the laws, rules and regulations is entitled to control the said costs and no costs can be incurred without approval of DERC. We really wonder as to how, after the DERC has approved of such costs, the report of CAG can be of any help. Section 51 of the Reforms Act, requires the DERC to prepare its annual report giving account of its activities in the previous years and to forward the same to the Government. The Government i.e. the Administrator, if dissatisfied therewith, can take appropriate action with respect thereto.

69. Supreme Court in ***Transmission Corporation of Andhra Pradesh Limited Vs. Sai Renewable Power Private Limited*** (2011) 11 SCC 34 held that fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws by the expert bodies to whom the job is assigned under the law. It was held that the Regulatory Commissions have been constituted and notified and are expected to fix the tariff as well as terms and conditions of licence. It was further held that the specialized performance of functions that are assigned

to Regulatory Commission can hardly be assumed by any other authority. It was yet further held that the essence of restructuring was to achieve the balance required to be maintained in regard to the competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other; though the State Government has been empowered to issue policy directions on matters concerning electricity in the State including the overall planning and co-ordination but such directions have to be consistent with the objects sought to be achieved by the Act and accordingly to not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers. The State Government was held to be expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and to duly take into account the recommendations by the Regulatory Commission on all such matters. It was held that the scheme of the provisions of the various statutes is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. It

was yet further held that State Government has a minimum role in the matter of fixation of tariff. On an examination of the various provisions it was further held that the Regulatory Commission only is vested with the power to revise tariff and conditions in relation to licences. Accordingly, it was held that the Regulatory Commission having approved the regulated purchase price could not have re-fixed the regulatory purchase price by resorting to tariff fixation and held that a special provision would exclude the application of the general provisions. It was further held that the Regulatory Commission has no executive or plenary power and / or to interfere in the statutory agreements as a power purchase agreement.

70. Reference in this regard may also be made to ***BSES Limited Vs. Tata Power Company Limited*** (2004) 1 SCC 195 holding that the Court should not adopt any interpretation so as to oust the jurisdiction of the Regulatory Commission as it would defeat the very object of enacting the Act.

71. Supreme Court in ***Avishek Goenka Vs. Union of India*** (2012) 5 SCC 275 held that the concept of regulatory regime is expected to fully regulate and control the activities in all spheres to which the particular law relates and the scope of interference by the Court has to be confined to direct the regulatory / technical body to consider the matter in accordance with law.

Finding that the matter with respect to which directions were sought in the writ petition was in the domain of the Telecom Regulatory Authority of India and not of Union of India, the Court restrained from issuing such directions to Union of India.

72. In ***PTC India Limited Vs. Central Electricity Regulatory Commission*** (2010) 4 SCC 603 it was held that the Electricity Act is an exhaustive code on all matters concerning electricity which besides providing for unbundling of State Electricity Boards into separate utilities for generation, transmission and distribution also entrusts the regulatory regime to the State Electricity Regulatory Commissions which are given wide range responsibility. It was further held that the said Act has distanced the government from all forms of regulations including tariff regulation which is now specifically assigned to the State Electricity Regulatory Commissions. Following the same, in ***Jharkhand State Electricity Board Vs. Laxmi Business & Cement Co. P. Ltd.*** (2014) 5 SCC 236 it was held that the State Electricity Boards, after the Electricity Act were left with no power whatsoever to frame tariff which is under the exclusive domain of the State Electricity Regulatory Commissions. The same view, in our opinion, would apply to the State Government also. Thus, the State Government

after having the accounts of DISCOMs audited and which we have held it is entitled to do under Section 20 of the CAG Act and even if finding anything as is alleged therein, would on the basis thereof not be able to lower the tariff and with which motive the entire exercise has been undertaken.

73. Supreme Court as far back as in ***Ram Jawaya Kapur Vs. State of Punjab*** (1955) 2 SCR 225 held that though it is not necessary that there must be a law already in existence before the Executive is enabled to function and that the powers of the Executive are limited merely to the carrying out of those laws but if there is a statutory Rule or an Act on the matter, the Executive must abide by that Act and cannot in exercise of executive power ignore or act contrary to that Rule or Act. Following the said principle, a Division Bench of this Court recently in ***Travelite (India) Vs. UOI*** MANU/DE/1793/2014 held that Section 74A of the Finance Act, 1994 having prescribed a special audit when certain circumstances are fulfilled, the intent that every assessee could not be subjected to general audit on demand and the attempt to include provision for such a general audit was held to be *ultra vires.*

74. The Electricity Act and the Reforms Act having re-enacted the law relating to the electricity and having substituted the State Government with

the Regulatory Commissions constituted under the new law, we are unable to find any purpose which the report of the CAG under directions of the GNCTD in exercise of powers under Section 20 would serve. We repeat that all the powers of the State Government relating to electricity now stand vested in the DERC. Upon such vesting, the power which the State Government earlier on under the Schedule of the 1910 Indian Electricity Act, 1910 to have the accounts of a licensee, which is not a local authority, audited by such person as the State Government may appoint or approve also stands transferred to the DERC. Clause 10 of the Licence supra also nullifies the only argument raised for the need of an audit by the CAG, of the inflation of expenditure by the DISCOMs with an intent to have the tariff fixed at a higher rate also stands nullified. Once the DISCOMs before incurring any expenditure above a certain limit are required to obtain the prior approval of the DERC therefor and once the DERC has approved the said expenditure, we fail to see as to how the CAG can be allowed to arrive at any different conclusion. The said conclusion would in our view be of no avail. Once by law a regulatory body has been constituted with powers *inter alia* have the accounts of the DISCOMs audited, there can be no other audit at the instance of the State Government. Moreover the said law as well as

the Regulations made thereunder and the terms and conditions on which license has been granted by the DERC to the DISCOMs are found to contain and provide the same powers, if not wider, in the DERC in relation to the accounts of DISCOMs. We are unable to decipher anything, which DERC cannot and which CAG can unearth. DERC is neither found to be helpless nor dependent on the balance sheet filed by DISCOMs.

75. The principle of issue preclusion as recently applied by the United States Supreme court in judgment dated 24th March, 2015 in ***B&B Hardware, Inc. Vs. Hargis Industries, Inc.*** would also be attracted. It was held that when the Trademark Trial and Appeal Board refuses federal registration of a trademark because it is likely to be confused with an already registered mark this determination will preclude the same parties in a later District Court infringement suit involving the same marks from re-litigating the likelihood of confusion question. It was reasoned that even though the Board is not a Court created under Article 3 of the American Constitution, the principle of issue preclusion would apply because congress' creation of an elaborate registration scheme with many important rights attached and backed up by plenary review confirms that registration decisions can be weighty enough to ground issue preclusion. It was reiterated that issue

preclusion is not limited to those situations in which the same issue is before two Courts because the issue preclusion is so well established at common law that when an administrative agency is acting in a judicial capacity and resolving disputed issues of fact by it which the parties have had an adequate opportunity to adjudicate the Courts have to apply *res judicata* to enforce repose. It was further held that an agency's determination has preclusive effect. On further examination, it was held that there was no reason why determination of the same issue by the Board would not bar the determination by the Court specially when the standards of proof and determination were not found to be different. It was held that the mere fact that the Board and the District Courts use different procedure for determination would not make any difference when there was no reason to doubt the quality, extensiveness or fairness of the procedure before both.

76. We thus hold that once a specialized body constituted by law has been created to determine a particular issue, the said issue is no longer open for adjudication in another fora. Reference in this regard may also be made to ***West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd.*** (2002) 8 SCC 715 holding that though tariff fixation by the State Electricity Regulatory Commission is in the nature of a legislative action and no rule of

natural justice is applicable but where the statute itself has provided a right of representation and / or a right of hearing to the consumers, the consumers will have such a right though such right is to be regulated by the Commission. It was further held that the said State Electricity Regulatory Commission is the sole authority to determine the tariff.

77. Difficulty involved in implementing a law is no ground to apply the provisions of law in a manner different from what the law means. Law Enforcer cannot nullify the provision of the very law sought to be enforced in the guise in effectively implementing the law. Once a rule has come into force, no one can be permitted to challenge the same on the ground of inconvenience and difficulty in its implementation. Reference in this regard can be made to the judgments of the Division Benches of this Court in ***Parmanand Katara Vs. Union of India*** AIR 1998 Delhi 2000, ***Amit Bhagat Vs. Govt. of NCT of Delhi*** (2014) SCC Online Delhi 7020 and to the judgment of the Supreme Court in ***Avishek Goenka Vs. Union of India*** (2012) 5 SCC 321. CAG though undoubtedly an important pillar of our Constitution is not the remedy or panacea for all ills in the society, as appears to be the illusion in the minds of people.

78. We are also of the view that merely because the DERC has not

equipped itself with the wherewithal to exercise the powers which have been vested in it under the laws, rules, regulations licence aforesaid is no reason to fall back to the procedures and modalities prescribed in the pre-regulator regime. Such an exercise under the powers under the earlier state of affairs, would today be a useless exercise. It is also not as if DERC is not capable of equipping itself with the wherewithal for digging into the accounts, particularly expenses of DISCOMs which the DISCOMs are accused of inflating. We find DERC to have, in exercise of its Regulation making power, framed the DERC (Appointment of Consultants) Regulations, 2001. DERC thus, if does not have an internal mechanism in this regard, though is required to have, can appoint appropriate accountants as consultants to investigate the allegations against the DISCOMs.

79. We may notice that a Single Judge of this Court in ***National Dairy Development Board Vs. Union of India*** MANU/DE/0224/2010 was also concerned with a challenge by the National Dairy Development Board (NDDB) to the audit by the CAG under Section 14(2) of the CAG Act of DISCOMs *inter alia* on the ground that NDDB Act, 1987 establishing NDDB was a special Act and the *non obstante* Clause in Section 47 thereof prevented its audit by the CAG under Section 14(2). Reference was made to

Section 22 of the NDDB Act providing for audit by an auditor appointed by the NDDB Act. It was held that Section 28 of the NDDB Act is not in conflict with Section 14(2) or Section 15 of the CAG Act; the said provisions operate in different fields and serve different purpose or object with Section 28 of the NDDB Act dealing with normal financial audit each year and audit by the CAG under Section 14(2) enabling the CAG to examine whether the corporation has acted in conformity with the prescribed law, rules and procedures and whether there are any improper, extravagant and infructuous expenditure. Accordingly, the petition was dismissed. The matter does not appear to have been taken up further. However the present matter is distinct. Here not only are the DISCOMs required to be audited in accordance with the law of the land i.e. the Companies Act but function under a regulatory regime and which regime has been expressly vested with the powers of audit of the accounts of the DISCOMs if so required.

80. We therefore in continuation of our discussion hereinabove under Section 20 of the CAG Act hold that audit by the CAG of the accounts of an entity under the regulatory regime even though possible owing to such entity satisfying the test of a body or authority but would be a futile exercise and not be in public interest. The failure if any of a statutory / regulatory body to

perform its statutory duties cannot set in motion the regime prevalent prior to the constitution of such a regulatory body.

81. The GNCTD, instead of strengthening the DERC, we are constrained to observe, has undertaken a misguided exercise by issuing a direction to the CAG to audit the accounts of the DISCOMs when the report of such audit would not have any sanctity in law for achieving the desired result. The directions for audit of DISCOMs by CAG, when the report of the CAG cannot impact the tariff, would not also serve any public interest. It may be noticed that already four years have elapsed in the process, when what is sought to be achieved could have very well been achieved by invoking the powers of DERC under the Reforms Act and the Regulations framed thereunder and the terms and conditions of the licence issued to the DISCOMs. Such populist measures, without considering the ultimate advantage thereof, not only end up being contrary to public interest but also put unnecessary burden on the Courts.

82. Once it is found that audit of accounts of DISCOMs by CAG, even if were to find the allegations against the DISCOMs to be true, cannot under the prevalent legal regime serve the avowed object of bringing down the tariff, the question of this Court, in the PIL issuing a direction for such audit, whether under Section 20 or under any other provision of the CAG Act does

not arise.

83. In the light of the view taken by us, need for going into the correctness of the direction to CAG to audit accounts of DISCOMs since inception, does not arise.

84. We clarify that we have not considered the matter from the perspective of Sections 13 to 16 of the CAG Act. Though the Supreme Court in ***Association of Unified Tele Services Providers*** supra after noticing the provisions of the TRAI Act, the rules / regulations framed thereunder and the terms of licences issued to the Tele Services Providers found therein also a power in TRAI to seek all information relating to the accounts as may be required and a provision as to the manner in which the accounts would be maintained, as we have found in the present case but nevertheless upheld Rule 5 under challenge therein and the power of the CAG under Section 16 of the CAG Act for the reason that the Parliament as an obligation to ascertain whether the receipt by way of license fee, spectrum charges has been realised by the Union of India and credited to the Consolidated Funds of India. It was held that the power of the CAG under Section 13 of the CAG Act to audit all transactions of Union would include a transaction of conducting business. It was further held that Section 13 read with Section 16 empowering the CAG to audit all transactions empowers the CAG to

audit all transactions which Union or the States have entered into which have nexus with consolidated fund, especially when the receipts have direct connection with the revenue sharing. On the contrary, in the present case, the nexus, if any of the transaction of GNCTD with DISCOMs was in the matter of transfer scheme and the power of the CAG, if any was to examine the said transfer scheme in exercise of powers under Sections 13 & 16 of the Act and which the CAG as aforesaid refused to do. The reason for which CAG audit has been directed is not to examine the transaction but on the suspicion of the tariff having not been properly determined and which is in the exclusive domain of DERC. The tariff is not shown to have any nexus with the CFI.

85. We thus summarise our findings as under:

A. The words "body or authority" in Article 149 of Constitution of India and in the CAG Act are of wide amplitude and not confined to "body or authority" which satisfy the test of 'State' within the meaning of Article 12. They extend to "private body or authority also" and would cover the DISCOMs.

B. The direction of the Administrator of Delhi for audit of DISCOMs in exercise of power under Section 20 of the CAG Act has to be on the aid and advice of the Council of Ministers,

GNCTD and not eo nomine.

C. Though the opportunity to represent against the proposal for audit, under Section 20(3) of the CAG Act, given to the DISCOMs, cannot be faulted on the ground of insufficiency of time but was not reasonable, having been given without disclosing the public interest in which audit of accounts of DISCOMs was deemed expedient and having been given before consultation with CAG and before the terms and conditions of audit were agreed between the GNCTD and the CAG. Such consultation and agreement are essential components of the proposal for audit, opportunity to represent whereagainst is required by Section 20(3) to be given.

D. Audit under Section 20(1), for the reasons stated i.e. for determination of tariff is not expedient in public interest as the determination of tariff is on the sole domain of DERC which is well empowered to itself conduct the same or have the same conducted and the report of CAG of audit of DISCOMs has no place in the Regulatory Regime brought about by the Electricity Act and the Reforms Act.

E. Thus, the impugned direction for audit of DISCOMs under Section 20(1) of the CAG Act is quashed / set aside.

86. We therefore allow the petitions of the DISCOMs by quashing the impugned directives of the GNCTD and dismiss the PIL. Needless to state, all actions undertaken in pursuance to impugned directive are also rendered inoperative and to no effect. However no costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

OCTOBER 30, 2015
'sd/rita/bs/gsr/pp'