

14. It is therefore evident that EA2003 vests legislative and regulatory power in the Central Commission (also State Commissions) in respect of open access, licensing, tariff, Grid Code, Market Development. In respect of these, no such power has been vested in the Central Government or State Government. This is on account of the objective of the EA2003 to distance the regulatory responsibilities from the Government and vesting in the Regulatory Commission.

15. In the case of *Indian Council of Legal Aid & Advice and Others Vs Bar Council of India* [(1995)1 SCC 732], Rule 9 was framed by Bar Council of India in exercise of its powers under Section 49(1)(ag) of the Advocates Act, 1961 which provides for "the class or category of persons entitled to be enrolled as advocates". In exercise of the said power, Rule 9 provided that "a person who has completed the age of 45 years on the date on which he submits his application for his enrolment as an advocate to the State Bar Council shall not be enrolled as an advocate". The functions of Bar Council of India has been set out in Section 7 which include the laying down of standards of professional conduct and etiquette for advocates and for safeguarding their rights, privileges and interest. Hon'ble Supreme Court noted that Bar Council of India has been vested with the power to make rules "for discharging its functions" under the Act and in particular, such rules may prescribe the class or category of persons entitled to be enrolled as advocate. After noting that the functions of the Bar Council of India enumerated in Section 7 do not envisage a stipulation disqualifying persons otherwise qualified for entering into legal profession merely because they have completed the age of 45 years, the Hon'ble Supreme Court held the said rule as ultra vires of the Advocates Act, 1961. Thus, if the rule-making power is not supported by the substantive provisions in the function of the delegate, making rules in exercise of such power is ultra vires of the parent Act.

16. In the case of *Gadde Venkateswara Rao Vs. Government of Andhra Pradesh & Others* [(1966)2SCR172], Hon'ble Supreme Court was considering whether the Rules made by the Government of Andhra Pradesh under Section 69 of the Andhra Pradesh Panchayat Samithis and Zila Parishads Act, 1959 was consistent with the provisions of the said Act. The Rules provided for shifting of Primary Health Centre from one place to another within a block on the recommendation of the Panchayat Samithi. Hon'ble Supreme Court noticed that under Section 18 of the Act, establishing and maintaining Primary Health Centre and Maternity Centre is vested in the Panchayat Samiti, and not in the State Government. Hon'ble Supreme Court held as under:

"10.....But a scrutiny of the relevant provisions of the Act shows that the said rules are inconsistent with the provisions of the Act and they cannot possibly override the statutory power conferred on the Panchayat Samithi. Under Section 18(1) of the Act, subject to the provisions of the Act, the administration of the Block shall vest in the Panchayat Samithi; and under sub-section (2) thereof the Panchayat Samithi shall exercise the powers and perform the functions specified in the Schedule. When we refer to the Schedule, it will be seen that the following entry is found under the heading "Health and Rural Sanitation", "Establishing and maintaining Primary Health Centres and Maternity Centres". It is manifest that under the Act the statutory power to establish and maintain Primary Health Centres is vested in the Panchayat Samithi.

There is no provision vesting the said power in the Government. Under Section 69 of the Act, the Government can make rules for carrying out the purposes of the Act; it cannot, under the guise of the said rules, convert an authority with the power to establish a Primary Health Centre into only a recommendatory body. It cannot, by any rule, vest in itself a power which under the Act vests in another body. The rules, therefore, in so far as they transfer power of the Panchayat Samithi to the Government, being inconsistent with the provisions of the Act, must yield to Section 18 of the Act."

17. The above judgements of the Hon'ble Supreme Court lays down the principle that the Government or an authority in the guise of carrying out the purposes of the Act cannot make rules on a subject which is vested in another body or authority.

18. Hon'ble Supreme Court in PTC Judgement supra after examining the various provisions of the EA2003 has made the following observations with regard to delegated legislation:

"28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and State Legislatures, as the case may be, under Section 179 and 182. Parliament has the power to modify the rules/regulations. This power is not conferred on the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and they are made for carrying out the provisions of the Act."

19. The subjects covered under the draft Rules at Serial No.(a) and Serial No.(c) and partly at Serial No.(b) (with regard to transmission access, charges and losses) are covered under the substantive functions of the Central Commission (also State Commissions), satisfy the twin conditions as enumerated by Hon'ble Supreme Court and therefore the Central Commission (also State Commissions) have the jurisdiction to make regulations. As these subjects are not covered under any of the substantive functions of the Central Government and therefore, making of rules in exercise of rule making power under Section 176 to carry out the provisions of the EA2003 will be against the letter and spirit of EA2003.

20. The Central Government is vested with the power to make the National Electricity Policy and Tariff Policy in consultation with the State Governments and Central Electricity Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. The Central Commission and State Commissions, while specifying the regulations

on terms and conditions of tariff under Section 61 and discharging their functions under Section 79 and 86 respectively, are to be guided by such policy. Therefore, the statutory route available to the Central Government to influence the legislative and regulatory functions of the Central Commission is through the policies issued under Section 3 of the EA2003.

21. In light of above, the Ministry of Power is advised under Section 79(2) of the EA2003 not to proceed with the framing of rules on these subjects. The EA2003 envisages coordination between the Central Government and the Central Commission through various provisions. Under Section 79(2) of the EA2003, the Central Government can refer any matter for advice of the Central Commission. Further, Section 3 of EA2003 provides for formulation of National Electricity Policy and Tariff Policy by the Central Government and Section 79(4) provides that the Central Commission in discharge of its functions under EA2003 shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3 of the EA2003. It would, therefore, be in the larger interest of the sector that the Central Government and the Central Commission work in harmony by honouring the respective jurisdiction carved out in the EA2003.

22. This issues with the approval of Chairperson, CERC.

With regards,

Yours Sincerely,


(Sanoj Kumar Jha)
15/10/2018

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