

Introduction to Law on Electricity
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Lecture 30
Regulatory Commissions

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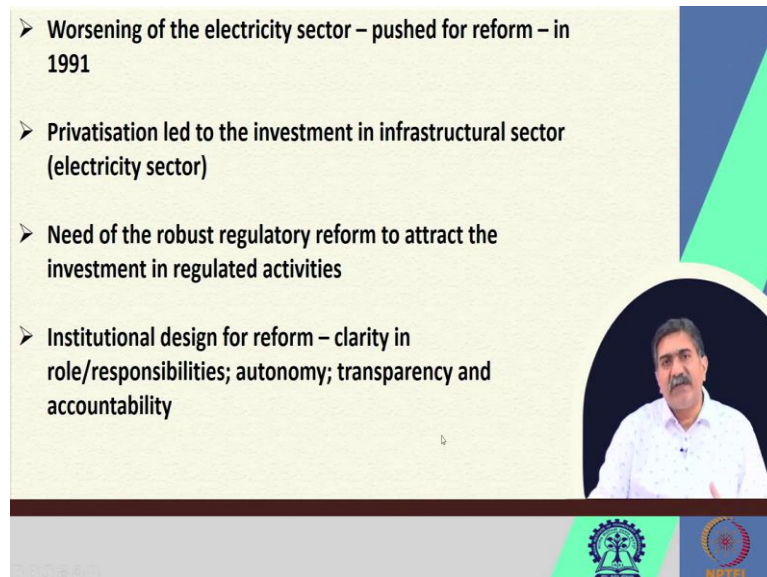
Greetings to all the learners. So, in today's session, we will be discussing about the regulatory commissions. As we know that the 2003 Act has further cemented the position of the regulatory commission, which has come into existence through the 1998 Act. So, we will discuss what the powers are, what the positions are. And how the independence and autonomy of the commission is being maintained.

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So, in today's session, we will be discussing about the need of regulatory commissions and why the need was felt. We will also look into the various provisions to understand that how the commission is given the independent status and to what extent they enjoy autonomy because these facets are very important for effective discharge of the responsibility entrusted upon the commissions. And also, in order to understand this will look into the legal provisions which are being ingrained there.

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- Worsening of the electricity sector – pushed for reform – in 1991
- Privatisation led to the investment in infrastructural sector (electricity sector)
- Need of the robust regulatory reform to attract the investment in regulated activities
- Institutional design for reform – clarity in role/responsibilities; autonomy; transparency and accountability

Now, when you look at the very development of the electricity sector, as we have discussed in previous sessions. Due to the monopoly of the state in delivering the public service, in this case, electricity, somehow, the sector has not seen the desired growth. And in order to bring the efficiency in the sector, it has been thought, and it has been given a considerate thought, that let there be involvement of private players, let there be involvement of private sectors in the sector.

But then, for attracting the investment from the private sector, it is desirable to have an independent regulatory institution which shall infuse confidence in such investors. And this is what has started unfolding with the implementation of new economic policy in 1991. 1991 is considered to be bringing in a new era altogether in India, wherein many of the sectors were being opened for the private players. Privatization was the kind of buzzword, and no doubt, electricity being one of the core of infrastructural sectors, also rightfully targeted by the government for privatization.

And thus, what we experience is that, once the sector has been liberalized, the huge interest was displayed by the investors, particularly in the generating units. Now, as I said that, once

it has been decided to liberalize the highly regulated activities, like electricity sector, what is needed that a very structured, very well designed, regulatory institutions are to be brought in.

And that is needed for bringing in clarity, that is needed for minimizing the governmental interference, that is needed for carrying out the responsibilities, and carrying out the activities in a professional manner in the interest of all the stakeholders. And that is the reason in the 1998 Act; the regulatory commissions are being given a statutory status. And the idea was to spell out the role and responsibilities very clearly, to make the commissions autonomous so that political influences should not play any role in decision making.

And at the same time, the commission should not start asserting power in an arbitrary manner. It was desired that the functioning of the commission shall be in a transparent manner. And one way of ensuring transparency is to make the institution accountable. So, that is what was the kind of design thought for the newly created commission under the Regulatory Commissions Act of 1998.

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- Due to the concurrent subject, single regulatory body was not acceptable
- In 1998, independent regulatory bodies – at the central and state levels were established
- No hierarchical relations between CERC and SERC
- Distancing of Government from regulation – tariff determination

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Now, because the electricity is in the concurrent list, it was very difficult to have or implausible to have only one institution at the central level to be completely governed by the central government's directions. And therefore, two commission, one at the central level and the other at the state level, was envisaged.

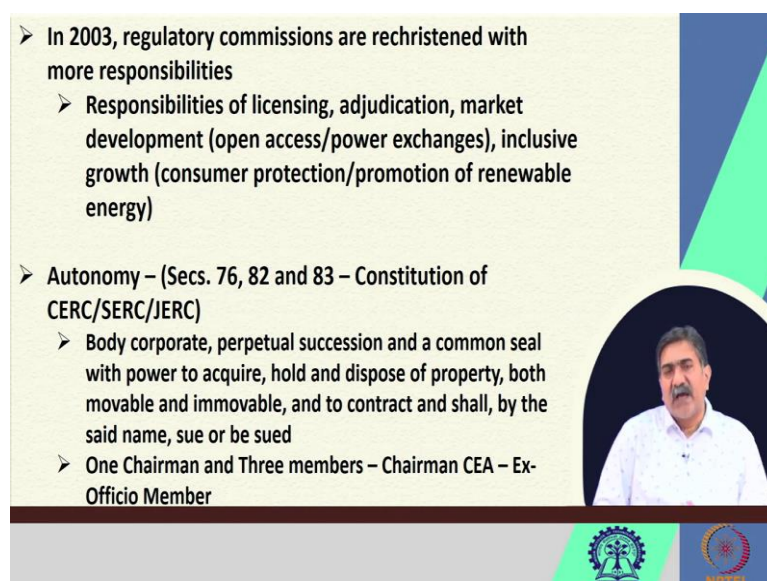
Now, as per the scheme of the law, there was no hierarchy decided between the Central Electricity Regulatory Commission and the State Electricity Regulatory Commission. And the reason for not drawing any hierarchy was the concurrent jurisdiction over the subject

matter by both the central government and the state governments. Having said that, there is no heretical relation.

It is important to take note that the State Electricity Regulatory Commission must get all necessary guidance by the regulations framed by the Central Electricity Regulatory Commission. Any action or omission which is completely contrary to the regulations framed by the central commission may not stand the scrutiny of the law. And the reason is very obvious that certainty is the key feature of regulatory practices.

Now, Regulatory Commission, under the 1998 Act, has been entrusted with a very important task to distance the government from tariff fixation, which was earlier the monopoly of the government. It was decided that let it be done in a professional manner by considering the interest of the market, by considering the interest of the consumer. All these are possible only when the formulation is done and the fixation is done in a professional way, without getting prejudiced, without getting biased by factors which are completely external to the growth of the market.

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- In 2003, regulatory commissions are rechristened with more responsibilities
 - Responsibilities of licensing, adjudication, market development (open access/power exchanges), inclusive growth (consumer protection/promotion of renewable energy)
- Autonomy – (Secs. 76, 82 and 83 – Constitution of CERC/SERC/JERC)
 - Body corporate, perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued
 - One Chairman and Three members – Chairman CEA – Ex-Officio Member

Now, the 2003 Act has introduced this electricity commission in a new author with the responsibility which was there under the 1998 Act, but additional responsibilities were also entrusted upon the commissions. The commissions were asked to look into the issues of licensing as we have discussed under Section 12, that transmission, trading and distribution continue to be a licensing activity, whereas generation has become a delicensed activity.

So, commission decides on the licensing that which entity shall be given the license, what shall be the format for inviting the applications and what shall be the criteria for determining the eligibility. And another important task which was entrusted on the commission was to adjudicate the disputes between the generating companies and the licensees. And commission has also been entrusted with the task to promote the power market.

And we have studied that how the same has been done by making open access a reality and also encouraging the trading of electricity through power exchanges. So, that is also the responsibility of the commission to come up with the regulation in order to indicate the rules of the game to the players. Commission has also been entrusted to ensure inclusive growth, whereby the production of the consumer is to be taken into account.

And also, the renewables are to be promoted. Because electricity is an important commodity, important source for accelerating economic growth of the country. But such growth cannot be made sustainable and cannot be considered to be sustainable if it is backed by unclean energy. And that is the reason, briefly, the Act refers to the renewable energy and vests the responsibility on the commission to promote the sale.

Now, Section 76, 82, and 83 talk about the constitution of the Central Electricity Regulatory Commission, State Electricity Regulatory Commission, and Joint Electricity Regulatory Commission. Now, before I come to Central and State, Joint is something where more than one state is involved, or where the territories are involved, there can be a Joint Electricity Regulatory Commission to be constituted.

When you look at the language given under section 76, or section 82, you would find that the identity of the commission has been made independent and autonomous from the holder of the office. And that is why it says that the commission shall be body corporate, it shall have perpetual succession and a common seal with a power to acquire, hold and dispose of property, both movable and immovable, and it can enter into a contract, and it can sue or be sued.

Now, this is a very standard expression in the law to give independent juristic status to a non-natural person in the eyes of law. Primarily, this provision establishes that the commission is having all the legal status in legal sense. As a student of law, we know that the legal status comes with rights, duties and liabilities, and all these are applicable upon the commission. Composition of the commission says that there shall be one chairperson, and there shall be three members.

And then, we will have chairman of Central Electricity Authority as ex-officio member of the Central Electricity Regulatory Commission. And you have the similar composition for the state one. Obviously, at the state level, chairman of Central Electricity Authority is not part of the commission.

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- Appointment of the Chairperson and Members – (Secs. 77 and 84)
 - By the Central or State Governments based on the recommendation by the Selection Committee
 - Selection Committee – Senior Government Officials
 - Chairperson and Members – from different disciplines – engineering /law/economics/commerce/finance/management
 - Chairperson – may be – a judge of the SC or CJ of the HC – after consultation with CJI
 - Chairperson and members shall not hold any office
 - No conflict of interest – to be considered - the post of Chairperson and members
- Composition of the Selection – possibility of the influence of the government – final selection to be made by the Ministry

Now, when you look at how the appointment takes place, Section 77 and Section 84 of the Act talks about the appointment of the chairperson and the members for Central Electricity Regulatory Commission and State Electricity Regulatory Commission respectively. It says that central or the state government shall form a selection committee.

For the central government, it says that the selection committee shall generally be comprised of government officials, secretaries of the necessary departments, chairman of public sector enterprises. And then, it says that chairperson and the members are to be drawn from different disciplines that could be engineering, law, economics, commerce, finance, and management.

But then, it says that as far as the members is concerned, it is important to ensure that the members are from all the disciplines. There need not be more than one member in one discipline; that is what is the mandate which is given under Section 77 or Section 84. The Act also enables that the chairperson can be a judge of the Supreme Court, or Chief Justice of the High Court.

But then, if the central government decides to appoint a judge as the chairperson, let us say then the government needs to consult the Chief Justice of India. It is important to take note

that in the case of the consideration of a judge as a chairperson, selection committee will not have any role to play. For such appointments, it is the consultation with the Chief Justice of India who shall guide the government.

And why this exception? Because of the high position judges occupy and the evaluation which is needed to be done for examining the suitability of the candidature, Chief Justice would be the right person to give the opinion in relation to the judges of the Supreme Court or Chief Justice of the High Court.

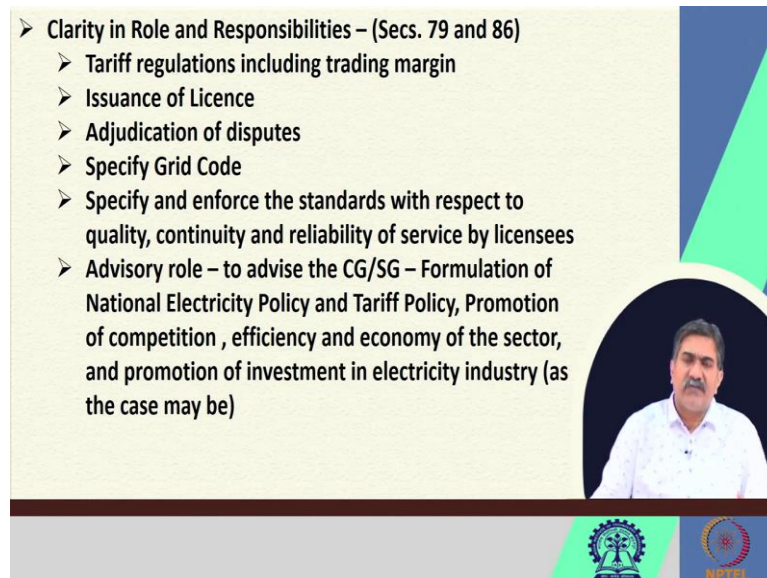
Possibly, the opinion of the Chief Justice shall be binding on the government. Because if the government has been given a discretion to accept or not to accept, then it would dilute the essence of the consultation. Further, it says that chairperson shall not hold any office or the member shall not hold any office when they are occupying the position in the commission.

And also, they shall not be any conflict of interest. The one who is being considered for the position of chairperson and member, they should not have any conflict of interest. And conflict of interest is to be examined and evaluated by looking into the commercial interest in any of the entities which are involved in the power sector. So, if you look at the provisions, it clearly gives the framework, and it clearly talks about how the appointment shall happen.

But there is a matter of concern. The matter of concern is whether the autonomy is compromised or susceptible to compromise. Considering the composition of the selection committee, selection committee largely comprises of the government officials. And therefore, one may argue that government may influence the whole process.

And not only that, selection committee is required to submit two names to the ministry, Ministry of Power, which is the nodal ministry and out of that, one is to be ticked by the Ministry. Now, one may argue now, and one may build a case that how this power with the ministry creates a sort of situation where autonomy is to be maintained.

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➤ **Clarity in Role and Responsibilities – (Secs. 79 and 86)**

- **Tariff regulations including trading margin**
- **Issuance of Licence**
- **Adjudication of disputes**
- **Specify Grid Code**
- **Specify and enforce the standards with respect to quality, continuity and reliability of service by licensees**
- **Advisory role – to advise the CG/SG – Formulation of National Electricity Policy and Tariff Policy, Promotion of competition, efficiency and economy of the sector, and promotion of investment in electricity industry (as the case may be)**

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When you move further and look at the functioning of the commission, it is important that the regulatory body must be entrusted with the responsibility in clear terms so that they need not time and again approach the government for soliciting the views on the powers and the functions. Look at the language of Section 79 and 86; you find that the lawmakers have taken all necessary steps to bring in clarity on this issue.

Tariff fixation is the responsibility given. We have already studied about it in earlier session. Issuance of license is the responsibility of the commission. Adjudication of dispute is the responsibility. Specifying grid code is a responsibility given. What shall be the standards of performance? That is also the responsibility given.

And in addition, there is an advisory role also which has been given where the commission advises the central government in the formulation of electricity policy or tariff policy. Obviously, these policies are to be notified by the central government. So, such advisory role is there with the central government alone, but when it comes to efficiency economy of the sector, the state commission also advises the state government.

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- Participation – (Secs. 80 and 87)
 - Commission to establish Central Advisory Committee
 - Not more than 31 members
 - To represent the interests of commerce, industry, transport, agriculture, labour, consumers, non-governmental organisations and academic and research bodies in the electricity sector
 - Advisory Committee shall render advise –
 - Policy questions
 - Quality of service by licensees
 - Compliance with the licence requirements
 - Protection of consumer interest
 - How effective is the participation needs to be examined?

For a rational exercise of power, the law also suggests participation. Participation so that stakeholder's views are to be considered accommodated before carrying out the responsibility, and that is what Section 80 and 87 with Central Electricity Regulatory Commission and State Electricity Regulatory Commission refers to. The law says that the central commission shall establish Central Advisory Committee, and the same is for the state commission, which shall constitute the State Advisory Committee.

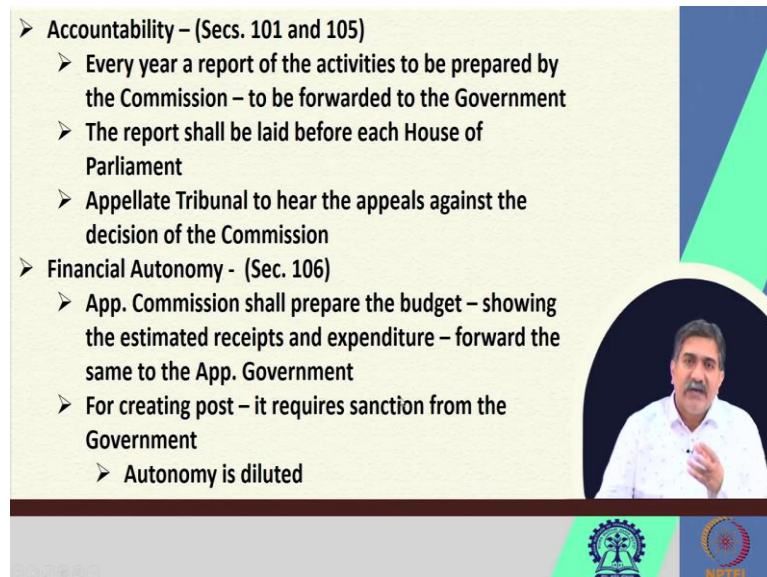
So, please take note that whatever I am discussing parametric, it applies also to the State Regulatory Commission. It says that the advisory committee shall not be of more than 31 members and look at the representative character of the committee. It shall have a body, and it shall have the individual's representing commerce, industry, transport, agriculture, labor, consumers, non-governmental organizations, academic and research institutions.

So, wide range is being covered so that the regulatory commission shall have inputs from all the concerned on improving the market or bringing efficiency in the market. And this advisory committee is required to render advice on policy questions. It is required to render advice on quality of service by licensees, or the issue of compliance with the license requirements, which is laid down by the commissions, and also to cater the interest of the consumer.

Now, question which generally comes to one's mind is that how effective these advisory committees are in representing the stakeholders and to what extent the voice is being heard by the commission? How academic and research institutions are participating in this process? To what extent workforce, labor is participating in this whole process is something to be

examined? Because law has set the rules, but are these rules getting implemented at the ground level? And in turn, the sector is getting benefited from the inputs of all is an important question to inquire or to investigate.

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- **Accountability – (Secs. 101 and 105)**
 - Every year a report of the activities to be prepared by the Commission – to be forwarded to the Government
 - The report shall be laid before each House of Parliament
 - Appellate Tribunal to hear the appeals against the decision of the Commission
- **Financial Autonomy - (Sec. 106)**
 - App. Commission shall prepare the budget – showing the estimated receipts and expenditure – forward the same to the App. Government
 - For creating post – it requires sanction from the Government
 - Autonomy is diluted

On accountability aspect, you would find that the regulatory commission is required to prepare a summary of the report, and the report has to be forwarded to the government. It must also be laid down, and it must be also presented before each house of the parliament. Now, this appears to be a very situational approach to ensure accountability of the institutions which are replacing the ministries.

Please do appreciate this point that earlier, what was being entrusted to the ministry has now been handed over to the regulatory bodies, which is being made independent and autonomous. But then, this has been done in the interest of public. So, how the public interest has been addressed is to be reviewed, and regular evaluation is needed.

The measures are being designed to address this, where it says that the commission should prepare a report indicate that what all activities the commission has done and forward it to the government. So that ultimately, it is to be presented before the Members of Parliament because Members of Parliament symbolize the voice of the people of the country.

And considering the electricity sectors importance in guaranteeing better living, in accelerating economic growth, the accountability must be ensured before the people's representative. And that is why this provision is very important. On the issue of financial autonomy, section 106 says that the commission shall prepare a budgetary requirement

showing the estimated receipts and expenditure, and that shall be forwarded to the appropriate government.

And for creating posts, it requires sanction from the appropriate government. Now, this is something where one may argue that the autonomy is diluted because if there is financial dependence upon the government to run the office of the commission then there is a possibility that the government may employ arm twisting as and when it feels so. So, financial autonomy needs to be worked out so that the commission discharged the responsibility in a very free set of an environment.

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The slide contains the following text:

- Transparency –
 - Publication of the regulations - public domain
 - Schedule of hearings and consultation documents – public domain
 - Affected parties are having right to represent
- Independence and Autonomy – (Secs. 89 and 90)
 - Tenure is of five years or 65 years whichever is earlier
 - No reappointment
 - Salary, allowances and other terms as prescribed by the Government
 - Shall not to varied to disadvantage
 - Not to take up any commercial employment for a period of two years – from the date he ceases the office

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When it comes to transparency, it has been said that while making the regulation, the commission shall publish the same before notifying the same. And also, it suggests that there shall be hearing and consultation and the same should be there in the public domain. And affected parties must be given opportunity to be heard.

So that way, the transactions which are taking place are transparent. It has been attempted to make transparent so that the public would know that what were the reasons for taking a particular decision, or the aggrieved party will have a right to present the case before the commission decides on the rights and responsibilities.

On independence and autonomy, as I indicated, that selection committee is largely of the government officials, but then looking at the provisions given under Section 89 and 90 where you find that tenure is given for 5 years tenure or 65 years of age, whichever is earlier, where it says that no reappointment shall happen of the chairperson and the members.

And then where it says that salary allowances and other terms as prescribed by the government, but then shall not be varied to disadvantage. So, this gives a security, and this establishes a point that once a person becomes a chairperson or a member, the government cannot take a regressive step in relation to the terms and condition of the services.

Additionally, it also says that the chairperson or the members are not supposed to take any employment with a commercial interest before the completion of two years from the date when the chairperson or the member ceases the office. So, cooling off period has also been provided there in order to ensure that the trust, the faith of the investors of the licensees is being maintained in the commission.

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➤ **Removal**

- in case of adjudged insolvent
- in case of conviction – moral turpitude
- Incapability – mental or physical
- Acquires financial interest – prejudicial to his functions
- Abuse of power – prejudicial to the public interest
- Guilty of proved misbehaviour
 - On the last three grounds – an enquiry from the Chairperson of APTEL – on a reference being made by the Government

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When you look at the removal process, it says that chairperson or the members can be removed when they are being adjudged insolvent, when they are being convicted for committing moral turpitude, which may be a case of misappropriation of money or when they have been found incapable physically or mentally, then they can be removed.


If it has been learned at any point of time that they have acquired a financial interest or they are abusing the power which is not in alignment with the public interest or they are being found guilty of proved misbehaviour. Proved misbehaviour becomes very important because it has to be established.

For these three grounds of acquiring financial interest, abuse of power, and proved misbehaviour. It is important that an inquiry should be done by the chairperson of the

appellate tribunal. And there has to be reference to be made by the government. That is what the requirement is.

This is again, you can very well take note of that the very cumbersome process of removing also, in a way, gives security to the members and the chairperson. The chairperson and the members cannot be removed whimsically by the government. And this also establishes independence of the Commission.

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The slide contains the following text:

- Anil Soni v. Union of India (2013 – Delhi HC)
 - Sec. 77(2) – appointment of Judge of the SC or CJ of HC as a Chairperson of CERC
 - Argued that the Chairperson shall always be a judge
 - ‘May’ should be read as ‘Shall’ – one of main functions is to adjudicate
 - Held:
 - Considering the nature of functions to be discharged by the Commission – it is not only about adjudication
 - Legislative and adjudicatory functions are to be discharged
 - Technical expertise is required
 - No violation of Separation of Power

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Now, this is an interesting case, which has come before Delhi High Court, where the question was raised, that when you have a provision of the appointment of a judge of the Supreme Court or Chief Justice of the High Court as a chairperson, whether in all cases, such appointment shall take place in the office of the chairperson. Because section 77 subsection 2, read as notwithstanding anything.

So, whether this non-offset clause has got a kind of overriding effect over section 77(1), which talks about the appointment of chairperson and members from other disciplines as well. The court looked into the scheme of the Act. And Court has said that section 77(2) which allows the judge to become a chairperson is just an enabling provision because of the use of the word “may”, so “may” shall not be read as shall here.

“May” is a possibility, “may” here is all about an alternate mechanism that has been suggested. And it should not be read that in every case, a judge of the Supreme Court, or Chief Justice of the High Court should be appointed. And looking at the function of the

Commission, the court said that commission is not only into adjudicatory function, but it is also into regulation making, it is also into tariff fixation and all.

And for all these, a judge is not required to be a chairperson. Because for all these functions, you need to have a technical person at the helm of affairs. And on this premise, the court has said that it is not needed to have a judge as the chairperson, the word “may” under section 77(2) must not be read as shall; it is just an enabling clause.

And therefore, there is no violation of separation of powers. It is not that the judicial function has been entrusted upon the administrative body or quasi-judicial, or the person who does not belong to the law background. And on this premise, the court has clarified the scope and ambit of Section 77 subsection 2 (section 77(2)). So, this is about the regulatory commission, the independence, and autonomy of the regulatory commission. Thank you.