Introduction to Law on Electricity
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Lecture 32
Appellate Tribunal

Welcome to all the learners. We have studied in detail about the powers and functions of the regulatory commission. And we have also tried to understand that how the regulatory commissions through their independence and autonomy, are promoting the power sector, how they are bringing a certainty for the investors. And also, how the law ensures transparency in their transactions.

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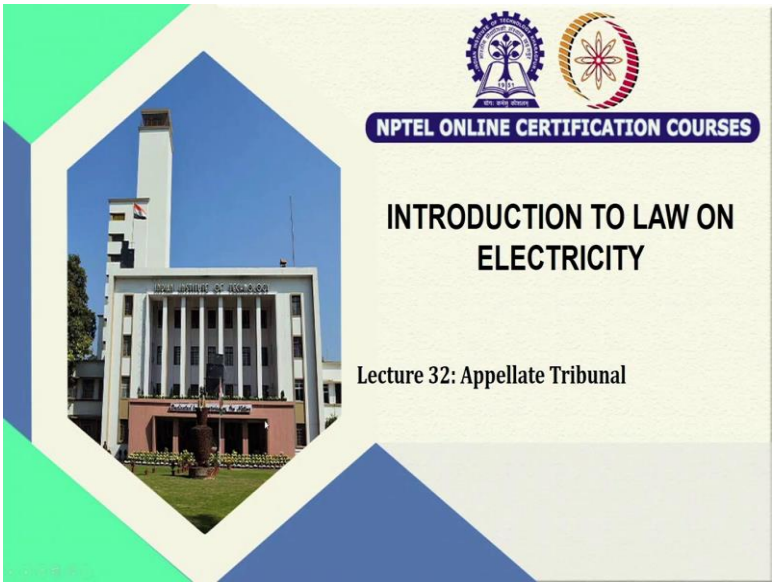

Now, let us look at the new institution which has been established under the 2003 Act, which hears the appeal against the order of the regulatory commission.

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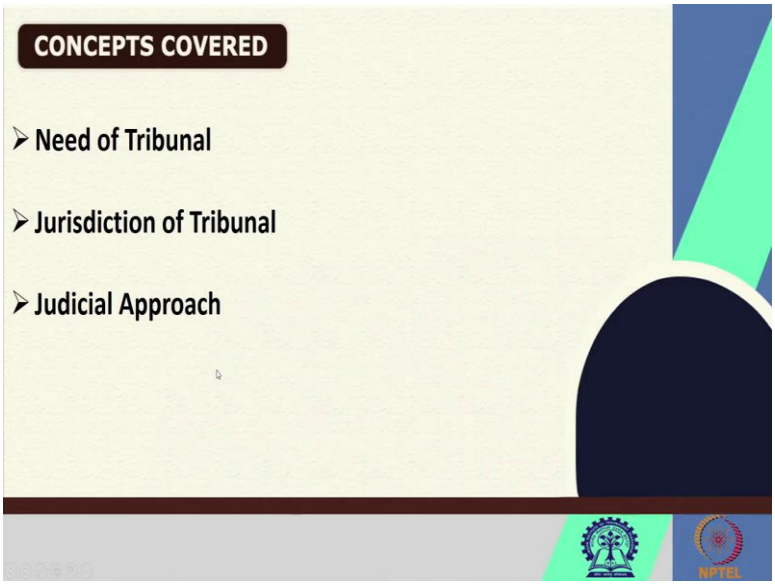

So, in today's session, we will be talking about the tribunal which has come into existence; what are the jurisdictions? What is the procedure of this tribunal? And we will also try to look at the approach of the court while dealing with the issues pertaining to the powers of the tribunal.

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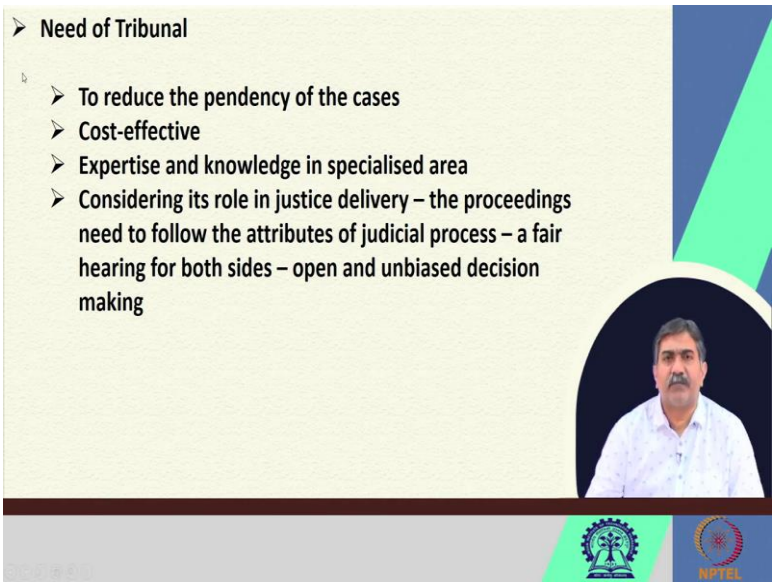

Now, why do we need tribunal? Obviously, the history of the establishment of tribunals dates back to the 18th century. And one for India, the first tribunal was of pre-independence time when there was a tribunal established for resolving the issues related to tax laws. The very need of having a tribunal to address certain sets of cases got further approval through the 42nd constitutional amendment.

Wherein a new part was introduced in the constitution giving the constitutional sanction to the administrative tribunals under Article 323 capital A, and Article 323 capital B. So, one can very well build an argument that tribunal as an institution for delivering justice has got a constitutional approval in India. Now, tribunal is basically needed for reducing pendency of the cases which are there in the traditional courts, and it is very difficult for the traditional courts to manage the dockets in such a way so that quicker remedies should be given.

Certain disputes and certain lists require quicker resolution. And in that category, you would agree with me that list related to infrastructural issues certainly falls. Because investment is involved, public service is promised. And therefore, the same cannot be delayed for delivering and the same cannot be postponed for unreasonable period.

The other factor which drives the reason for establishment of tribunal is having the expertise on technical issues involving in the disputed matter. Because of the newer rights which are getting evolved in today's time, we need to address those issues with the help of domain experts. So, emergence of those rights also gives us a reason, also justifies the creation of a tribunal.

Additionally, the cost-effective benefit of taking up the matter before the tribunal in resolving a dispute is also works as a contributing factor for the establishment of tribunal. Tribunal, though, enjoys all the trappings of the court, but then at the same time, tribunals do have the necessary flexibility, which enables the justice delivery system quicker, effective. And also, it does not get into the all or nothing approach of the traditional courts, that either you get the relief, or you do not get the relief. Because tribunals can very well look into the overall interest of the stakeholders and accordingly try to balance the interest. And because of all these reasons, there was a viewpoint that the traditional court system needs to be supplemented with the tribunals. One for the electricity sector.

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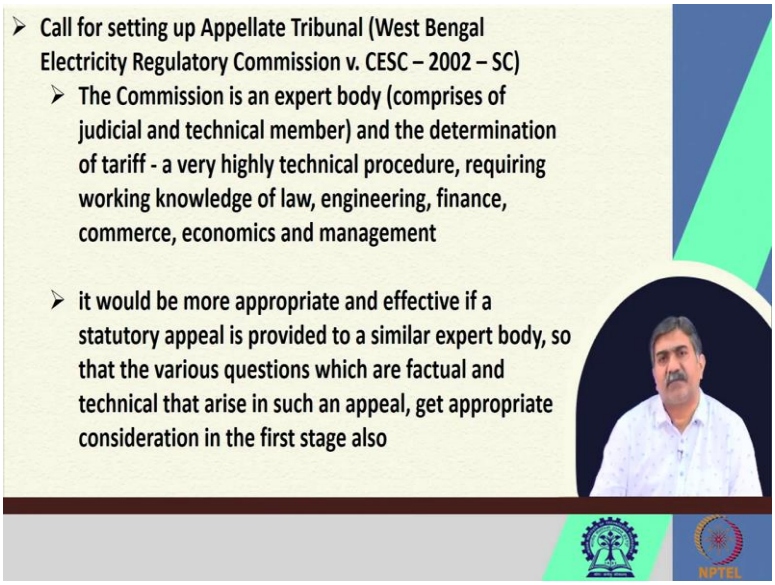

There was no provision to establish tribunal prior to 2003. So, the High Court was considering the appeal against the order of the commission. Now, while taking up an issue on a decision given by the regulatory commission, the Supreme Court in 2002 indicated the need to establish a tribunal comprising of technical experts along with the judicial members to resolve the complex issues, complex matters involved in the electricity sector.

Justice Santosh Hegde, in his judgment in West Bengal Electricity Regulatory Commission versus CESC highlighted this very fact that when Regulatory Commission has been entrusted with important issues of tariff fixation when it has been given the responsibility of ensuring fair play between the players, it is desirable to make the appellate forum which is having similar experience to examine the complex issues which the commission is handling.

So, the Supreme Court observed that without denigrating the, without devaluing the High Courts or its competence. The court said that the appeal from the commission shall lie before the body which shall have similar expertise of what has been entrusted upon the commission. So, that is what was the observation Supreme Court in 2002. In 2003, when Electricity Act came into existence, repealing all earlier laws, the preamble clearly spelled out the need to establish the tribunal to take up the issues related with the Act.

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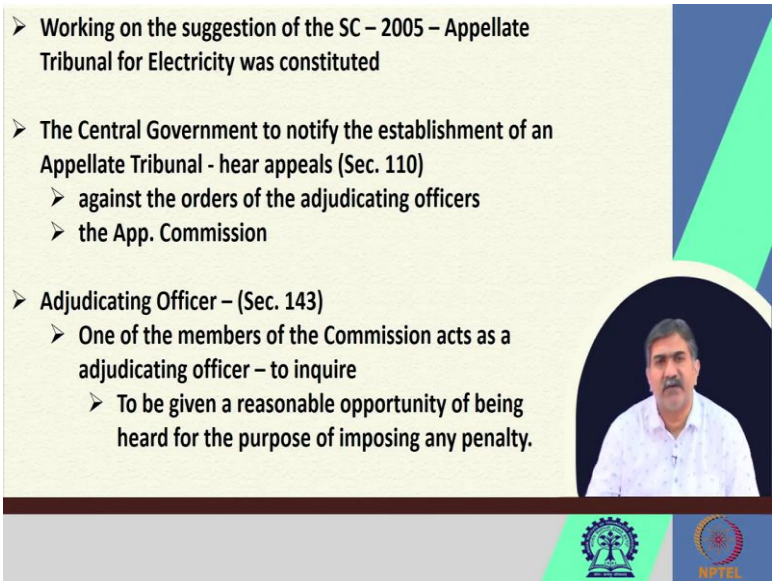

And tribunals, for that matter, came into existence in the year 2005. Let me now take you through different statutory provisions which deal with the establishment, power and functioning of the tribunal. Section 110 of the Act empowers the central government to establish a tribunal. And this tribunal shall be hearing the appeals against the order of the adjudicating officers or the appropriate commission.

Who is adjudicating officer? Section 143 says that adjudicating officer can be any of the members of the regulatory commission, who shall be entrusted with the task to enquire on the issues of compliance of the regulations or compliance of the directions. For example, we have studied under section 29, section 33 and section 43; necessary directions can be given by the load despatch centre and the government to the distribution utilities.

So, whether the directions are being complied with or not, adjudicating officer can very well inquire into the same. That is how when you look at the language of section 29, 33, or 43. Now, section 143 says that any of the member of the commission can act as an adjudicating officer. And section 143 very briefly also indicates that if the adjudicating officer is imposing a penalty on the wrongdoer, then before imposing the penalty in order to comply with the principles of natural justice, an opportunity to be heard be given to the parties. That is what is the mandate of the law, which has been given.

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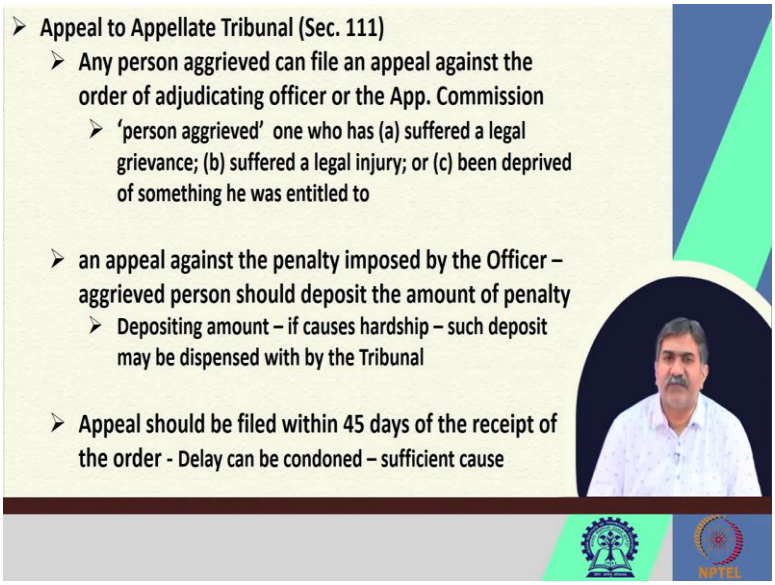

So, section 110 talks about the establishment of the tribunal. Section 111 talks about the matter which shall come before the appellate court and who shall file the matter, who shall approach the appellate tribunal. So, section 111 says that any person who is aggrieved against the decision of the adjudicating officer or the commission can approach the appellate tribunal.

Now, please do appreciate that by the plain reading of section 111. The law on locus standi is laid down. What is that? That the person who is filing an appeal must establish before the tribunal that he is an aggrieved person. And how do you define aggrieved person? Where a person has a legal grievance, whether he has suffered a legal injury or the person has been deprived of his legal rights, which is entitled under the law.

So, appeal is to be entertained only when a person who is aggrieved approaches the tribunal. Please do understand the limitation which has been introduced here by the lawmaker. What is the limitation? That if a person is not aggrieved, that person shall not have any locus standi. Meaning thereby that public interest kind of issues cannot be raised before the tribunal or consumer who is not directly aggrieved may not be able to knock at the door of the tribunal.

And at this stage, let me also tell you that the fee prescribed is so high under the rules of the tribunal, that small consumers cannot or small consumers will be deterred in approaching the tribunal. And that is what even the statistics says that tribunal is either being approached by the licensees, generating companies, or large consumers. If I have to draw a comparison between public participation in case of regulatory commission and tribunals, then I would say that the participation is better designed in relation to the functioning of the Commission.

If you can recall, we have discussed it that the Commission invites suggestions from the public. Before notifying the regulation, the draft is being placed in the public domain. So, possibly tribunal also needs to relook at its functioning. And emphatically, I would say, because of the very nature of subject which is being dealt by the tribunal. That is electricity, which is, as I said, and as I have been arguing is not only about the luxury, but it is about better living.

It says that if there is a penalty imposed by the adjudicating officer, then the appeal shall lie only when the amount of the penalty is deposited. However, the law creates an exception that if the depositing of the amount causes hardship to the party, then the same can be dispensed with. But then the tribunal has to look into this very fact that how the money would be recovered from the wrongdoer, from the offender, if it is not been deposited before entertaining the appeal under section 111 of the Act.

As I said that the tribunal is generally being established for speedier disposal of the case. 45 days' timeline is being given to the aggrieved party to approach the appellate tribunal from the date when the order is received. So that quicker you move to the appellate tribunal, the appellate tribunal will give you speedier trial or speedier relief. Now, this limitation period which has been suggested, which has been indicated as 45 days, can very well be condoned if there is sufficient reason for the same. That is what the laws give the sort of exception.

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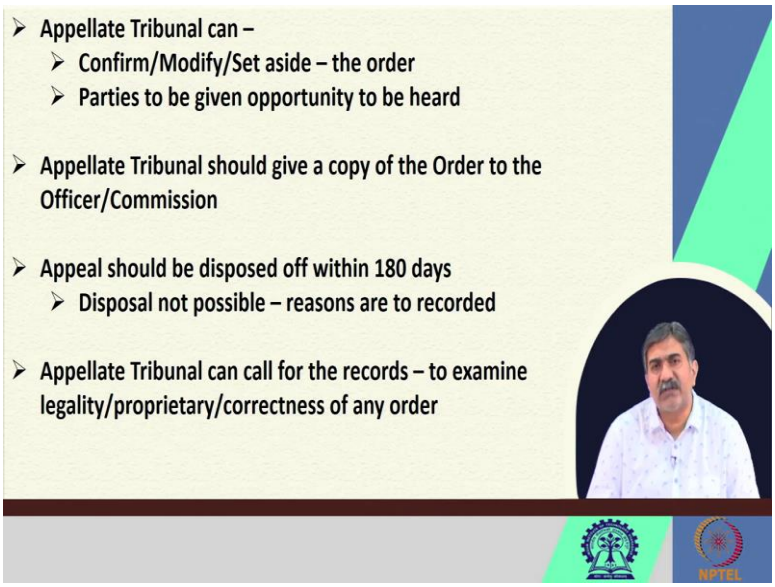

What appellate tribunal can do? Appellate order can confirm the order of the adjudicating officer or the appropriate commission, and it can modify; it can set aside the order. And because of the very fact that it is a body entrusted with the responsibility to deliver justice, all

the tenets of principles of natural justice need to be followed. And that is why the law categorically says that parties are to be heard before determining the issue and deciding on the appeal.

And the order of the appellate tribunal should be handed over to the adjudicating officer or the commission for necessary compliance. And also, it says that the appellate tribunal must dispose of the appeal within 180 days, a timeline has been given. And look at the intention of the lawmaker. It says that if, within 180 days, the appellate tribunal finds, it is very difficult to settle to decide the issue, then it can extend the timeline, but then it should be backed by the reason.

The tribunal needs to spell out the reason that what were the refraining circumstances for not disposing the appeal within the statutory timeline indicated in the Act. That is what it categorically says. In order to give effective relief, in order to appreciate the transactions which have taken place, either before the adjudicating officer or before the commission, the law empowers the appellate tribunal to call for records.

Because by examining the record, the tribunal will come to the conclusion on the legality of the approach adopted by the commission or the adjudicating officer. It will try to understand that how meticulously the issues are being addressed. And whether the order passed is correct in the eyes of law or not.

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Now, look at the composition which is being dealt under section 112. It says there shall be a chairperson and there shall be three members. And there is an additional member also, which

is there for petroleum and gases. Now, what you find, that the law says that the tribunal can sit in benches. And the chairperson shall decide the same, what shall be the composition of the bench, what matter will go to which bench. The law also authorizes the chairperson to transfer the matter from one bench to another bench.

The law also provides that there can be circuit branches of the tribunal. But as on date, no circuit branch is operational, and they have only one office, which is at Delhi. It has been also said that in the bench, there shall always be one judicial member and one technical member. So, you can very well make out looking at the composition, and there can always be only two benches because there is a chairperson and three members.

So, the chairperson, as indicated in section 113, will be either a judge of the Supreme Court or the Chief Justice of the High Court. I mean, who has served the High Court, and then there is a judicial member. So, there shall always be two benches. Also, we need to take note of this very fact that under the 1998 Act, which brought the regulatory commission into existence, High Courts were given the necessary jurisdictions to take up the matter against the decision of the Commission.

Now, under the 2003 Act, the jurisdiction of the High Court has been done away with, and the same is being conferred upon the appellate tribunal. Now, when you look at the subject matter, expertise appears to be furthering the interest of the sector, as it was observed by Justice Hegde, in the West Bengal Electricity Regulatory Commission case. But then, when you look at the very issue of the distance between the litigant and the tribunals, it raises a concern. Because earlier, the aggrieved party was having the choice of approaching the High Court.

Now, one has to approach the tribunal, which is situated only in Delhi. So, how do you look at it? It certainly raises a question to be inquired and investigated. Now, who shall be qualified to become the chairperson and the member? Section 113 says that a judge of the Supreme Court, sitting or retired, shall be considered or the Chief Justice of a High Court.

And central government shall be making the appointment in consultation with Chief Justice of India, and this is for maintaining independence of judiciary. Because as we have discussed, that tribunal has all the trappings of the court, and therefore, independence of judiciary is non-negotiable attribute to be followed. For judicial members, it says that a person who shall be considered must be eligible to become a judge of a High Court.

And for technical members, it says that one person can be a secretary for at least one year dealing with economic matters. And then it says that there can be an expert on the related areas of the electricity sector. For example, may be connected with generating companies, transmission or distribution, and experts may be connected with economics, commerce, law, or management background. So, that is what is the composition it says.

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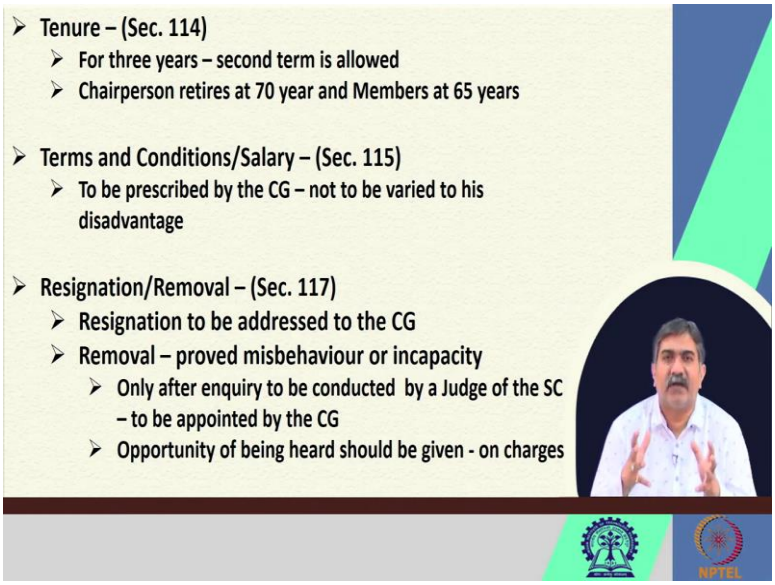

Section 114 talks about the tenure, and it says that the tenure shall be three years. But then, unlike the central commission, where reappointment is not possible, for tribunal members can or chairperson can be reappointed. Now, whether the clause related to reappointment raises a question on propriety is to be looked at.

And further, it says the chairperson shall retire at the age of 70 years, and the member shall retire at the age of 65. And that is how you always find that the chairperson is a retired judge from the Supreme Court. But it is not that it is always a case that retired judge of the Supreme Court becomes. Because the retirement age for judges of the Supreme Court is 65 and for the High Court is 62.

So, anyone who gets appointed gets 5 year tenure as the chairperson of the tribunal. What shall be the terms and conditions? Section 115 says to be prescribed by the central government. But then, for mentioning independence and autonomy, it says that the terms and conditions, salary, and all is not to be varied to the disadvantage of the holder of the office.

Otherwise, as a law student, we can very well infer that if the same is allowed, then it would be a case of taking a punitive action. How the member of the chairperson can be removed, or

whether they should be allowed to submit resignation or not? When it comes to resignation, it categorically says that they are allowed to submit the resignation to the central government. They can very well bring it to the notice of central government that they are no more interested to carry on their responsibilities as a member or the chairperson.

When it comes to removal, it says that they can be removed on the grounds of proved misbehaviour or incapacity. But then removal shall happen only when there is an inquiry conducted by a judge of the Supreme Court and inquiry officer is to be appointed by the central government. For carrying out the inquiry, procedural requirements are laid down that charges are to be framed, it is to be informed to the judges, and then it is to be informed to the member or the chairperson.

And they must be given a reasonable opportunity to present their case. Now, there is one important aspect which, as a law student, we can look at, and we can deliberate. This is particularly relevant for the chairperson. The qualification to become a chairperson is a person, either a judge or a retired judge of the Supreme Court.

Now, if you consider the aspect of seniority, the person who has become the chairperson of the tribunal will always be senior to a judge who is inquiring on the reference of the central government. So technically, a judge who has got elevated to the Supreme Court at a later point of time, on a later date, he has been entrusted with carrying out the inquiry or investigation against a judge who has occupied the office of the judgeship prior to the inquiring judge. Now, how this relation would work is something to be deliberated and discussed.

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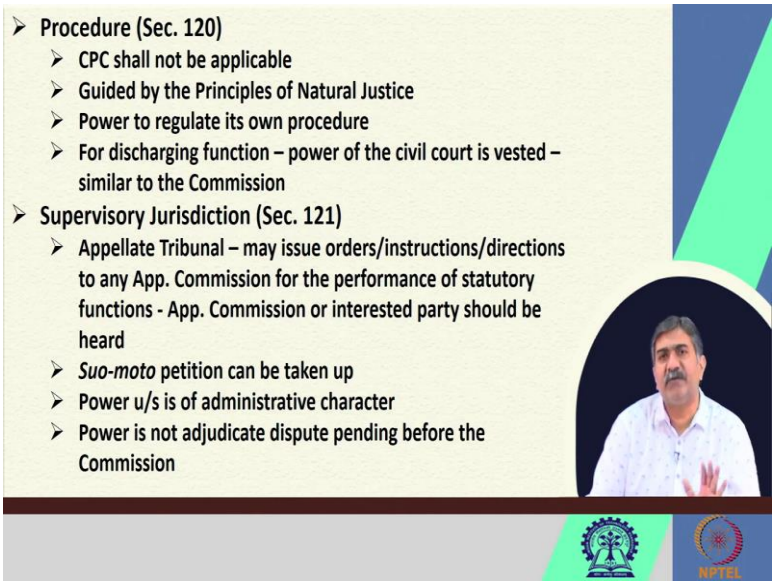

So, removal is possible, resignation is possible. Because it is a tribunal it says that tribunals should not unnecessarily get entangled in the procedural laws, and that is why CPC shall not be applicable. But then it says that natural justice must be followed. And tribunal has been allowed to regulate its own procedure.

And at the same time, it has been said that for discharging the function, the necessary power which is there with the civil court shall also be read for the tribunal. For example, summoning the witness, asking for the record, and taking evidence on affidavits; all these powers are there also with the tribunal.

Section 121 is a unique provision which you would not find with many of the laws which establish the tribunal. This confers an original jurisdiction or supervisory jurisdiction on the tribunal. This is with regard to issuing orders and directions to the commission to comply with the statutory duties which are being entrusted upon them.

So, tribunals can very well exercise the supervisory jurisdiction if they find that the commissions are not carrying out, commissions are not executing the responsibility under section 121, necessary orders and directions can be issued. So much so that suo moto cognizance can also be taken by the tribunal. Even if interested parties have not approached. And then, because it is a sort of order or direction to the appropriate commission to carry out the statutory responsibility, the nature of order will be administrative.

Why am I highlighting on administrative? Because there is no need to get into the merits, there is no need to take into the evidences and decide that what is wrong. Just what is to be

evaluated is that whether there is responsibility entrusted and whether the commission has failed to discharge the same or not. The administrative character is being used only for that purpose.

So, power given under section 121 is not to adjudicate any dispute which is pending before the commission. It is not about calling back and deciding the issue on merit. That is not what is the objective of section 121. Because to adjudicate is the responsibility of the Commission, and tribunal can only hear the appeal.

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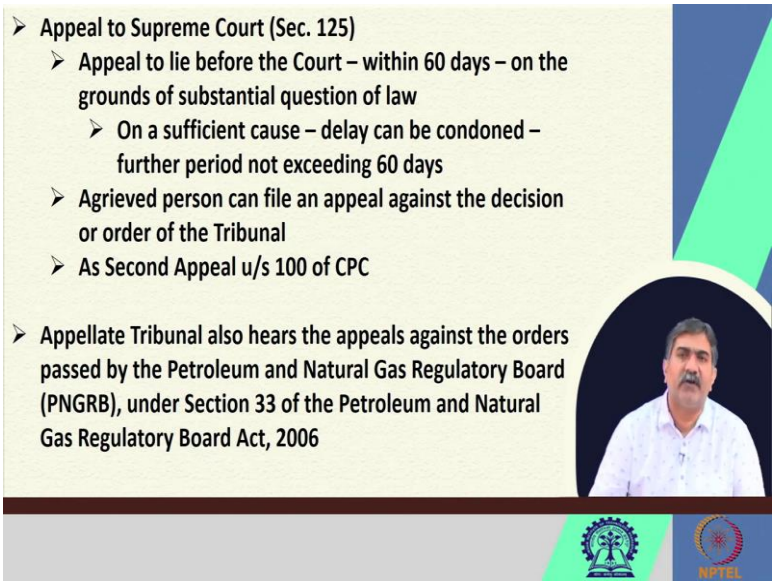

From the tribunal, the appeal can directly go to the Supreme Court under section 125. It has been debated that whether this kind of appellate provision bypassing the High Court satisfies the constitutional requirement, answer is yes. If the appellate tribunal is being conferred with all the necessary attributes equivalent to the High Court, then such kind of bypassing the jurisdiction and conferring the appellate power to the Supreme Court as second appeal is absolutely as per the constitutional scheme.

Appeal before the Supreme Court shall lie within 60 days. And then appeal shall lie only on the grounds of substantial question of law. And what a substantial question of law has been clearly spelled out under section 100 of CPC, where rights are not settled, where there is no binding precedent to guide the court, then only the court can entertain the appeal.

An aggrieved person can file an appeal against the decision or the order of the tribunal. You look at it; the law says that if the appeal is not filed within 60 days, then further extension can be given, but then that shall also be for next 60 days, not for infinite period. And as I said that

this tribunal is also now empowered to hear an appeal under Petroleum And Natural Gas Regulatory Board Act also. So, it is now a comprehensive tribunal to look into the matter to hear the appeals on all the issues pertaining to energy sector.

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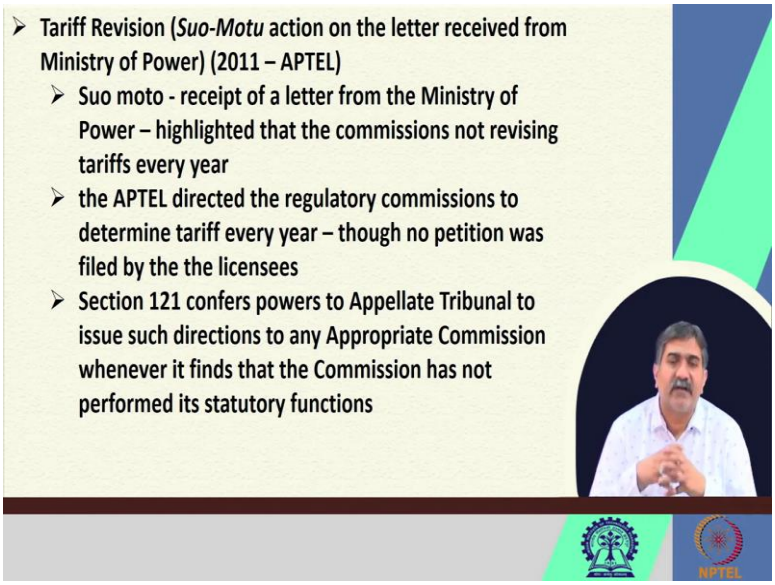

Now, two cases which are important here. One is the exercise of power by the court under section 121. On a Suo moto basis, in 2011, a letter was written by the ministry to look into the conduct of the Commission where regular tariff revision is not taking place. The letter was considered by the tribunal, and tribunal converted that letter into Suo moto petition and directed the Regulatory Commissions to determine the tariff every year.

In this case, no separate petition was being filed by the licensees for tariff determination on an annual basis. But because that is what was the responsibility entrusted upon the regulatory commission under the Electricity Act. The tribunal said that the Commissions do have a responsibility, and tribunal said that necessary power is flowing out of section 121 to give the instruction. That is what is the important finding the tribunal has made in 2011.

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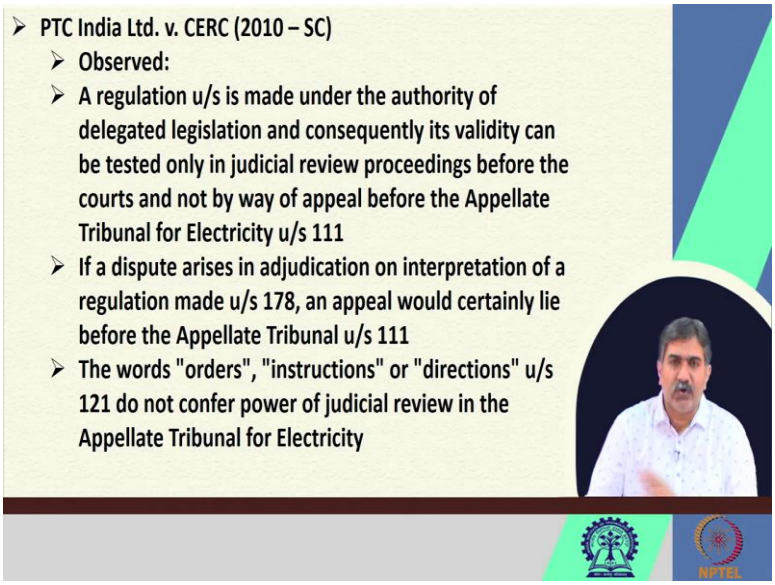

PTC India Limited versus CERC, we have discussed this case also to understand the power and function of the regulatory commission. Here, in this case, for the purpose of the discussion on the tribunal, what is important to read that, can the tribunal examine the validity of the regulation made by the Commission under section 178. The Supreme Court, in 2010, said that tribunals can only look into the interpretation of the regulation. Tribunals cannot exercise judicial review, and it does not have a power to judicially review the validity of the regulation.

If the regulation is in question, and if the validity of the regulation is questioned that whether it is being passed as per the scheme of the Act or not, or whether it is ultra-bias. Then such matters should be taken up only before the court, which is empowered to review, and entrusted with power to judicial review. So, either matter can go under section 226 or under Article 32. In PTC case, the court has said tribunal should not get into the validity question because tribunal itself is a creation of the statute.

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These are the references for this session. Thank you very much.