

(2016) 05 MP CK 0026

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10036 of 2013

Jaiprakash Associates Ltd.

APPELLANT

Vs

Madhya Pradesh Electricity Regulatory Commission

RESPONDENT

Date of Decision : 23-05-2016

Acts Referred:

Citation : (2016) AIR(MP) 152 : (2017) 1 JabLJ 72 : (2016) 3 MPLJ 349

Hon'ble Judges : Sanjay Yadav, J.

Bench : Single Bench

Advocate : Shri Aditya Adhikari, learned Senior Counsel with Shri Satish Chaturvedi, Advocate, Shri Avinash Zagar, Advocate, Shri Mihammad Siddique, Advocate, for the Appellant; M.P. Electricity Regulatory Commission :- Shri M.L. Jaiswal, learned Senior Counsel with

Final Decision : Disposed Off

Judgement

Sanjay Yadav, J.—On 28.4.2016 taking note of the fact that a co-ordinate Bench of this Court on 12.8.2015 had deferred the hearing of these batch of Miscellaneous Appeals and Writ Petitions for a period of three months, because of the challenge to the order passed by High Court of Andhra Pradesh, before the Supreme Court in a similar matter. That, order-dated 12.8.2015 was questioned in an Intra-Court Appeal No.831/2015; wherein, the Division Bench on 4.11.2015 observed that the statutory remedy of Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as "2003 Act"), being available, exercise of writ jurisdiction is not required; the matters were directed to be posted on 9.5.2016, as it was informed that, the Writ Appeal No.831/2015 was coming up for hearing on 5.5.2016.

2. When these matters are taken up today, it is informed by learned counsel for the petitioners/appellants that Writ Appeal No.831/2015 is adjourned and posted after ensuing summer vacation; accordingly, adjournment was sought. The respondents, however, have vehemently opposed the adjournment. It is urged on behalf of respondents that taking into consideration the existing statutory

provision, neither an Appeal under Section 41 of Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (for brevity "2000 Adhiniyam"), nor the Writ Petition against the order of Madhya Pradesh Electricity Regulatory Commission (for short "State Commission") is maintainable, because of the statutory remedy provided under Section 111 of 2003 Act. The respondent's counsel, therefore, insisted for hearing the matter on preliminary objection as to maintainability of these proceedings and for vacating of stay order. It is contended that there is no stay of proceedings of these Misc. Appeals and Writ Petitions by the Division Bench.

3. The matter is, therefore, heard on the preliminary objection, as to whether these proceedings emanating from the order passed by the State Commission are tenable, and whether the petitioners/appellants can be directed to avail the remedy under Section 111 of 2003 Act.

4. These proceedings, as evident from material on record, emanates from the order-dated 31.12.2012 passed by the State Commission in a suo motu Petition No.73/2012 and the consequential action of recovering the dues.

5. The State Commission on receiving the Petition No.50/2010 from M.P. Power Transmission Co. Ltd. in the matter of determination of parallel operation charges in case of intra-state generating units, had decided to cause study for determination of parallel operation charges. The work was contracted out to Electrical Research and Development Association (ERDA). The said Agency submitted "Evaluation of Parallel Operation Charges" study, concluding that due to harmonic generation, negative phase sequence currents, reactive power from grid etc., the captive power plants (CPPs) loads are harmful for smooth and efficient operation without the help of utility grid. The ERDA, accordingly, suggested that grid support charges/parallel operation charges without the help of utility grid and worked out the parallel operation charges (grid support charges) @ 53.32 per KVA.

6. The State Commission, after placing ERDA report in public domain and considering the comments received from various stakeholders, including these appellants and writ petitioners, registered a suo motu petition for determination of parallel operation charges (grid support charges) and after hearing the stakeholders, concluded.

"5. On considering the submissions of the respondents, the Commission is of the view that:

(a) The parallel operation charges shall not be applicable if the CPPs are not connected with the grid.

(b) The purposes of levying supply affording charges and standby charges are different. These are not related to the parallel operation of the CPPs with the grid.

(c) Parallel operation charges cannot be made a part of transmission charges as these charges cannot be levied on all consumers.

(d) Auxiliary consumption of captive generating plants as a parameter may be deducted from the installed capacity of the plant for computation of parallel operation charged.

6. The Commission also finds that the object of the Electricity Act, 2003, is to delicense generation and to freely permit CPPs. In order to promote CPPs and looking to the facility being availed by CPPs from the grid, the Commission has come to the conclusion that it would be appropriate that parallel operation charges be levied at the rate of Rs. 20/- per KVA per month on the capacity of CPP (after deducting load pertaining to auxiliary consumption) connected to the grid."

7. It is this order which is being challenged by way of an Appeal under Section 41 of 2000 Adhiniyam. Whereas, some of the stakeholders have challenged it by way of writ petition under Article 226 of the Constitution of India.

8. Justifying the challenge under Section 41 of 2000 Adhiniyam and countering the preliminary objections that an Appeal under Section 111 of 2003 Act would lie, it is urged on behalf of the Appellants that, "Electricity" being mentioned at Entry 38 of List III-Concurrent List of Schedule 7 of the Constitution of Indian, enabling both the parliament and the State Legislature competent to enact laws on the subject and that M.P. Vidyut Sudhar Adhiniyam, 2000 enacted by the State Legislature was reserved for the consideration of the President and has received his assent on 12.2.2001 and by virtue of sub-section (3) of Section 185 of 2003 Act, the provisions of 2000 Adhiniyam, not inconsistent therewith, being saved, and that Chapter III of 2000 Adhiniyam provides for creation of M.P. Electricity Regulatory Commission and also defines its functions and powers. And, that powers under Section 9(r) of 2000 Adhiniyam and under Section 181(2) (zp) of 2003 Act, covers the residuary powers. And, the thrust of Appeal is that the MPSERC has no jurisdiction to pass the impugned order as parallel operation charges is neither a charge nor tariff and the State Commission being entitled to determine tariff and these charges are not tariff, it is beyond its jurisdiction to determine. And, being beyond its power and jurisdiction, an Appeal before Central Appellate Tribunal under Section 111 of 2003 Act, would be a futile exercise, as it being a creation of 2003 Act, cannot look into the validity of the order passed by the State Commission on the issue of parallel operation charges.

9. The Respondents on their turn have embedded to the objection as to maintainability of these Misc. Appeals and Writ Petitions contending inter alia that an Appeal under Section 111 of 2003 Act lie before the Appellate Tribunal.

10. Considered the rival submissions.

11. 2003 Act is an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies

regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

12. Section 82 of 2003 Act provides for "Constitution of State Commission" [as defined under Section 2(64)]. Sub-Section (1) and its provisos, which we are presently concerned with, stipulate :

(1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85 be allowed to opt for the terms and conditions under this Act by the concerned State Government."

13. Furthermore, sub-section (3) of Section 185 of 2003 Act, which is a repeal and saving clause, mandates :

"(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable."

14. Thus, provisions of Adhiniyam 2000 listed at Serial No.8 of the Schedule appended with 2003 Act is saved to the extent they are not inconsistent with the provisions of 2003 Act.

15. Now, coming back to first proviso to sub-section (1) of Section 82 of 2003 Act, it says that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act; meaning thereby that, State Electricity Regulatory Commission, though established under Adhiniyam, 2000, a State Legislation, but when discharging function under Section 86 and exercising powers under Section 181 of 2003 Act, it shall be the Commission under 2003 Act and not under the State Legislation i.e. Adhiniyam, 2000.

16. In the case at hand, the appellants and the petitioners do not dispute that the impugned order passed by the State Commission is purportedly under 2003 Act and not under Adhiniyam, 2000. Though, it is contended that the State Commission has exceeded the jurisdiction vested in it under 2003 Act; it is, however, not the case of the appellants and petitioners that the powers and functions exercised by the State Commission is traceable to Adhiniyam, 2000. If the action is not traceable to Adhiniyam 2000, it is beyond comprehension as to how an Appeal under Section 41 of Adhiniyam, 2000 would lie. Because said section provides for an Appeal to the High Court when a decision is taken by the State Commission under said Act i.e. Adhiniyam, 2000. In other words, it cannot be said that the person is aggrieved of any decision or order of the State Commission passed under Adhiniyam, 2000. When such forum under Section 41 of Adhiniyam 2000 is not available, even a petition under Article 226/207 of the Constitution of India will not be tenable in view of specific statutory appellate provision i.e. Section 111 of 2003 Act, which stipulates :

"111. Appeal to Appellate Tribunal. - (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

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

Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit."

17. Pertinent it is to note that necessity of such an expert statutory Appellate Body as is now provided vide Section 111 of 2003 Act, was expressed by the Supreme Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd.* (2002) 8 SCC 715, wherein their Lordships were pleased to observe :

"102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective."

18. That, the Appellate Tribunal established under Section 110 of 2003 Act consists a Chairperson and three members. As for the qualification, Section 113 envisages : -

113. Qualification for appointment of Chairperson and Members of Appellate Tribunal:- (1) A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he-

(a) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a judge of the Supreme Court or the Chief Justice of a High Court; and

(b) in the case of a Member of the Appellate Tribunal, -

(i) is, or has been, or is qualified to be, a Judge of a High Court; or

(ii) is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or

(iii) is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.

....."

19. In view whereof, since there is a Statutory Expert Appellate Tribunal to hear the Appeal from the order passed by the State Commission, this Court refrain from entertaining an appeal under Section 41 of Adhiniyam, 2000 or a Writ Petition under Article 226/227 of the Constitution of India.

20. There is one more reason why the forum under Section 41 of Adhiniyam 2000 is not available to the appellant. Subsection (3) of Section 185 of 2003 Act mentions that only such provisions of the enactments specified in the Schedule, not inconsistent with its (i.e. 2003 Act's) provision, shall apply to the States in which such enactments are applicable. In the present case, the State Commission though constituted under Adhiniyam 2000, has purportedly exercised the powers in discharge of its function under 2003 Act. That being so, against its order, an Appeal under Section 111 of 2003 Act would lie, rather under Adhiniyam 2000, as otherwise the inconsistency clause will bar the forum under Section 41 of Adhiniyam, 2000.

21. The reliance placed on the decision in *M. Karunanidhi v. Union of India* (1979) 3 SCC 431 and more particularly, the proposition carved out in paragraph 35, wherein it is laid down:-

"35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:-

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

22. The said proposition in given facts of present case is of no assistance to the appellant to overcome the aspect of the availability of forum under Section 111 of 2003 Act, rather under Section 41 of Adhiniyam, 2000.

23. Similarly, decisions in *Dharappa v. Bijapur Coop. Milk Producers Societies Union Ltd.* (2007) 9 SCC 109 and *Bank of India v. Lekhimoni Das* (2000) 3 SCC 640 turns on their own facts and are of no assistance to the appellants to overcome the preliminary objections.

24. The decision in *PTC India Limited v. Central Electricity Regulatory Commission* (2010) 4 SCC 603; wherein the larger Bench was concerned with the following question of law, viz.

(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of 2003 Act ?

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act ?

(iii) Whether capping of trading margins could be done by the CERC (the Central Commission) by making a Regulation in that regard under Section 178 of the 2003 Act ?

- their Lordships were pleased to hold :

"92.(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "Generality v. Enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.

(vii) Section 121, as amended by Electricity (Amendment) Act 57 of 2003, came into force with effect from 27.1.2004. Consequently, there is no merit in the contention advanced that the said section is not yet been brought into force.

Conclusion:

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

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

25. Present being not a case wherein validity of Regulations framed by the Central Electricity Regulatory Commission under Section 178 of 2003 Act, the Authority of PTC (supra) is of no help either to the appellants, nor to the petitioners.

26. These are the reasons which lead this Court to uphold the preliminary objection as to maintainability of Appeal under Section 41 of Adhinyam, 2000.

27. Now coming to the maintainability of writ petition under Article 226/227 of the Constitution of India, besides the reasons for non-maintainability of Appeal under Section 41 of Adhinyam 2000, reference can be had of decision in W.B. Electricity Regulatory Comm. v. CESC Ltd. (supra) wherein it is held:

"44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High

Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore it has become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power.

...

50. From the above observations of this Court in the said judgment extracted herein above, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition. In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers."

28. Similarly, in *Union of India v. Major General Shri Kant Sharma* (2015) 6 SCC 773, it has been held -

"34. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India. (Refer: *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 and *S.N. Mukherjee v. Union of India* (1990) 4 SCC

594).

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act. (Refer : Mafatlal Industries Ltd. v. Union of India (1997) 5 SCC 536).

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma v. Cellular Operators Assn. of India (2011) 14 SCC 337).

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

(Refer: Nivedita Sharma (supra))."

29. In the case at hand, since the constitutional validity of a Regulation is not questioned, it is only the order passed by the State Commission which is being challenged; the remedy, in the considered opinion of this Court, lies under Section 111 of 2003 Act.

30. Having thus considered, the objection as to maintainability of Appeal under Section 41 of Adhinyam 2000 and Writ Petition under Article 226/227 of the Constitution of India, is upheld.

31. Consequently, the appeals and petitions are disposed of finally with liberty to avail efficacious statutory remedy of Appeal under Section 111 of 2003 Act.

32. Interim orders passed in any of the above matter stand vacated. There shall be no costs.