

(2009) 12 MAD CK 0125

In the Madras High Court

Case No : W.A. No. 1822 of 2009 and M.P. No. 1 of 2009

Joint Electricity Regulatory Commission for the State of Goa
and Union Territories

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-12-2009

Acts Referred:

Electricity (Supply) Act, 1948 — Section 46, 79
Electricity Act, 2003 — Section 61, 62, 63, 64, 83

Citation : AIR 2010 Mad 51 : (2010) WritLR 477

Hon'ble Judges : H.L. Gokhale, C.J;N. Paul Vasanthakumar, J

Bench : Division Bench

Advocate : Parag Tripathi, Additional Solicitor General of India assisted by Sachin Datta, Aarti Gupta and V. Karthik, for the Appellant; M. Devendiran, SPCCG for R1, T. Murugesan, G.P. for R2 and P.S. Raman, General assisted by Rahul Balaji, for R3 to R16, for the Respondent

Final Decision : Allowed

Judgement

H.L. Gokhale, C.J.—Heard Mr. Parag Tripathi, learned Additional Solicitor General of India appearing with Mr. V. Karthik for the appellant; Mr. P.S. Raman, learned Advocate General appearing for respondents 3 to 16; Mr.T.Murugesan, learned Government Pleader (Puducherry) appearing for the second respondent and Mr. M. Devendiran, learned Senior Panel Counsel for the Central Government appearing for the first respondent.

2. This appeal seeks to challenge the order passed by a learned single Judge on the petition filed by respondents 3 to 16. Respondents 3 to 16 had challenged before the learned single Judge the tariff fixation by the appellant ? Joint Electricity Regulatory Commission, principally on two grounds. Firstly, the Joint Electricity Regulatory Commission can exercise its powers only on appointment of all the members, particularly from Puducherry, in terms of Section 83 of the Electricity Act, 2003 (for short "the Act") and secondly, the determination of the tariff u/s 64 of the Act can take place only after framing appropriate Regulations

u/s 61 of the said Act. As far as the submission on Section 83 of the Act is concerned, the learned single Judge has not given any finding and, therefore, we are not required to go into that aspect at this stage. Based on the submissions with respect to Section 61, the learned single Judge has taken the view in paragraph 6 of his order that before framing the regulations containing the terms and conditions for determination of the tariff, the appellant/third respondent cannot proceed with the issuance of public notice seeking the objections for determination of the tariff. In that view of the matter, the learned single Judge granted an interim stay as prayed for. At the same time, with a view that the tariff be fixed at the earliest, he fixed the petition for early hearing and it was supposed to be notified today. It appears that it has not been so notified.

3. The appellant ? Regulatory Commission is aggrieved by this finding viz., that before framing the Regulations containing the terms and conditions, the appellant ? Commission cannot proceed with the determination of the tariff. The submission is that the provision in Section 61 of the Act is not a condition precedent to what is provided in Section 64 of the Act. For that purpose, reliance is placed on the observations of the Apex Court in U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, and particularly paragraph 7 thereof. In that matter, the Court was concerned with the provisions of Sections 46 and 79 of the Electricity (Supply) Act, 1948 and in paragraph 7, the Supreme Court had in terms held that if there were any Regulations, the grid tariff should be fixed in accordance with such Regulations and nothing more. However, it was also held that the framing of Regulations u/s 79(h) of the Act cannot be a condition precedent for fixing the grid tariff.

4. The learned Additional Solicitor General also drew our attention to the order passed by a Division Bench of the Andhra Pradesh High Court in S. Bharat Kumar and others Vs. Government of Andhra Pradesh and others, . That was a matter where the State Commission had not framed Regulations and the same submission was canvassed there also. The Court relied upon the above referred to judgment in the case of UPSEB v. City Board, Mussoorie (cited supra) and observed that there cannot be any quarrel with the proposition that framing of Regulations as contemplated by the Act is not a condition precedent for enforcing the main provisions of the Act. Mr. Tripathy, has pointed out that an appeal was preferred against the said judgment before the Supreme Court and the judgment of the Division Bench was affirmed by the Supreme Court in Association of Industrial Electricity Users Vs. State of Andhra Pradesh and Others, . This particular plea which was canvassed before the High Court was not even canvassed before the Supreme Court and the Supreme Court observed at the end of paragraph 10 that the High Court had at length considered all aspects of the case and had examined in detail the exercise which was undertaken by the Commission in fixing the tariff and, in the opinion of the Supreme Court, the view expressed by the High Court called for no interference. He also drew our attention to the order of the Full Bench of the Appellate Tribunal in Siel Ltd. v. Punjab State Electricity Regulatory Commission reported in (2007) 5 APTEL 931.

In that matter, this very submission was canvassed that the word "shall" in Section 61 of the Electricity Act, 2003 has to be read in a mandatory way and unless that is done, the tariff cannot be fixed. That submission has been negated by the Appellant Tribunal in paragraphs 13 and 14 of its judgment.

5. It is submitted that all these years, the consumers are being supplied power at a very cheap rate and the suppliers of power are making the grievance and they want the tariff to be fixed correctly. It is high time that they should be protected and the interim order is blocking this entire exercise.

6. Mr. P.S. Raman, learned Advocate General appearing for respondents 3 to 16/ writ petitioners, on the other hand, submitted that the scheme of the Act under Sections 61 to 64 clearly implied that the Regulations have to be made available earlier. They have to be framed for the determination of the tariff, as stated in Section 61(1) of the Act and then only one can proceed to fix the tariff under Sections 62 to 64 of the Act. He submitted that the judgment in *UPSEB v. City Board, Mussoorie* (cited supra) also stated that if there were any Regulations, the grid tariff had to be fixed in accordance with those Regulations. It is in this context that the Supreme Court has observed that framing of Regulations was not a condition precedent. Therefore, the appellant cannot proceed to fix the tariff without having the Regulations, which are necessary. He also drew our attention to the judgment of a Division Bench of the Orissa High Court in *Orissa Consumers' Association and Another Vs. Orissa Electricity Regulatory Commission and Others*, , particularly paragraph 19 thereof, wherein the Division Bench has observed that since the Regulations were not in force the members of the public had no knowledge of the provisions of the Regulations and, therefore, they were not in a position to give their objections and, hence, the impugned notices were quashed by the Division Bench in that matter.

7. We have noted the submissions of both the learned Counsel. One thing is clear that under Sections 61 to 64 of the Act, there is an inbuilt mechanism and the Regulations have to be made available for the citizens to lodge their objections, so that on the basis of their objections based on the terms and conditions contained in the Regulations, tariff could be fixed u/s 64 of the Act. Though we must also note that, it is not specifically provided that the framing of Regulations is a condition precedent as such, nor is there any bar on the procedural part being proceeded simultaneously.

8. Looking to the fact that all these years, power has been supplied to the consumers at quite a cheap rate and the appellant ? Regulatory Commission has an application of the suppliers of power for fixation of tariff pending before it, which is required to be decided at the earliest, in the facts of the present case, the two processes viz., framing of Regulations and fixing of tariff under Sections 61 and 64 of the Act respectively, can be permitted to proceed simultaneously with appropriate safe guards. They will of course be two separate proceedings.

9. As far as the framing of Regulations is concerned, Mr. Tripathy, on instructions,

states that the Draft Regulations will be published on the website of the appellant ? Regulatory Commission within one week from today and the objections thereto can be furnished within four weeks thereafter. The framing of Regulations does not require any prior hearing and only an order is to be passed thereon, after considering the objections, which he states will be passed within three weeks thereafter. If the process starts as indicated by him, the Regulations should be made available by 8th of February, 2010.

10. As far as the tariff fixation is concerned, the initial notice has been published on 6th October, 2009. Section 64 of the Act provides for 120 days period for fixation of the tariff. If it proceeds as it is, the tariff will be finalised by 5th of February, 2010. This will mean that the tariff will be fixed three days before the Regulations becoming available.

11. Mr. Tripathy, therefore, points out that the Draft Regulations will be very much available to the respondents, since, they will be published within one week from today. The proposed terms and conditions for fixation of tariff will be known to the parties and so, on that footing, they can certainly submit their objections to the proposed tariff. Thereafter, the respondents and the objecting consumers will be heard. He submits that this obviates the difficulties that they would face in the sense that they would be knowing what are the proposed Regulations in advance. On that basis, they can submit their objections to the proposed tariff which will be fixed by 5th of February, 2010. The final Regulations will be made available by 8th of February, 2010. He, therefore, makes a statement that in the event the finalised Regulations are different from whatever are proposed initially, the consumers can submit their objections on the basis of the finalised Regulations to the finalised tariff, and their representation will be considered appropriately, in which case, the tariff could be modified depending upon the consideration of objections of the consumers.

12. The learned Advocate General has pointed out that all these years, the Regulatory Commission has not framed the Regulations. It has taken its own time and the question of authority of this Joint Regulatory Commission without the representation of Puducherry, is pending before the learned single Judge. He, therefore, submits that as of now, this exercise should not be permitted.

13. In our view, the procedure to be followed as suggested above, would be subject to the order that would be passed by the learned single Judge and subject again to the remedies that would be available to the parties against the order that the learned single Judge may pass. Any impediment meanwhile on the procedure to be followed will result into delaying the framing of the Regulations, which is certainly prejudicial to the suppliers, who are very much contending that the power is being supplied at a much cheaper rate than whatever is the production and other cost. In our view, an interim order in terms of the above suggestion will meet the ends of justice. We order accordingly. We, however, add further that although the tariff will be finalised by 5th of February 2010 by the process as stated above, it is subject to further objections, if any, which will be

considered by the appellant ? Regulatory Commission. That being so, the tariff finalised on 5th February, 2010 will become operational only two weeks thereafter.

14. The arguments with respect to Section 83 of the Act will be available to both the parties, which they may place before the learned single Judge. We request the learned single Judge to hear and decide the pending writ petition early.

15. The writ appeal stands allowed in these terms. The interim order passed by the learned single Judge is set aside and it will stand substituted by the order, which is passed by us now in this appeal. Consequently, the connected miscellaneous petition is closed. There will be no order as to costs.