

(2005) 08 KAR CK 0053
In the Karnataka High Court
Case No : Writ Petition No. 13521 of 2005

Karnataka Power Transmission Corporation Limited	APPELLANT
Vs	
R.K. Powergen Private Limited	RESPONDENT

Date of Decision : 26-08-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Electricity Act, 2003 — Section 111, 111 (2), 112, 113
Karnataka Electricity Reforms Act, 1999 — Section 25

Citation : (2005) ILR (Kar) 5468 : (2006) 2 KarLJ 608 : (2005) 4 KCCR 2471

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : Sundaraswamy Ramdas and Anand, for the Appellant; Uday Holla, for the Respondent

Final Decision : Dismissed

Judgement

Ajit J. Gunjal, J.—This petition under Articles 226 and 227 of the Constitution of India is presented to set aside the order passed by the Karnataka Electricity Regulatory Commission in O.P. No. 3/05. The following reliefs are sought by the petitioner.

"a) Setting aside order dated 7.4.2005 passed by the Karnataka Electricity Regulatory Commission in O.P. No. 3/2005 (Annexure-N) and dismiss the said petition;

b) Grant of costs of proceedings;

c) Pass such other orders as this Hon"ble Court may deem fit in the facts and circumstances of the case."

2. Facts which are germane for disposal of this petition can be summarised as follows:

The petitioner and the respondent company entered into a Power Purchase

Agreement (for short TPA") dated 8.10.2001 for putting up 20 MW power generation unit. The PPA was approved by the Karnataka Electricity Regulatory Commission (for short "Commission") by the order dated 12.10.2001 u/s 25 of the Karnataka Electricity Reforms Act, 1999. A copy of the PPA is produced at Annexure- A. It is the case of the petitioner that in terms of PPA the respondent has to fulfill certain conditions as provided under Article 2 of PPA. According to the petitioner, the respondent has to achieve a financial closure within 12 months from 18.10.2001 and the said project has to be completed within one and half years from the effective date. The respondent failed to comply with the said condition. In the circumstances, the petitioner issued letter dated 3.1.2003 to the respondent seeking certain details regarding financial closure and other related issues. Suffice it to say since there was considerable delay, according to the petitioner, in completion of the project, there was a breach of the PPA. In view of the said breach, the petitioner terminated the said PPA as provided under Article 2.2. A copy of the said termination of the PPA is produced at Annexure-D. It appears, aggrieved by the said termination of the agreement, the respondent has failed a writ petition before this Court in W.P. No. 45077/03. The said writ petition is still pending adjudication. this Court has granted an interim order staying the operation of termination of Annexure-D. The petition averments disclose justifying the stand of the petitioner in terminating the said agreement. It appears certain correspondence has taken place inter se between the parties and also the Commission in respect of the petitioner receiving the power supply to the system contained under Clause 4.2 (iii) it is to be noticed that the Electricity Act, 2003 came into force on 10.6.2003. In these circumstances the respondent filed an original petition before the Commission in O.P. No. 3/05. A copy of which is produced at Annexure-K. The reliefs sought for by the respondent in the said petition is (i) to adjudicate the dispute between the petitioner and respondent and further to set aside the letter dated 5.7.2003 issued by the General Manager (Technical) KPTCL; (ii) to direct the respondent herein to pay to the petitioner tariff as set out in the PPA dated 18.10.2001 entered into between the parties. Since the termination of the agreement was challenged by the respondent in the aforesaid writ petition, an application for amendment of the petition was filed. By the said amendment, the respondent wanted to delete the first prayer, namely, regarding notice dated 5.7.2003 terminating the agreement which is produced at Annexure-D. The original petition was confined only to the second prayer, namely, to pay all arrears of tariff along with interest in terms of the PPA. In pursuance of the notice issued by the Commission, the petitioner entered appearance and has contested the proceedings on the ground that the relief which is sought for by the respondent herein cannot be granted, inter alia, contenting that in view of the fact that the writ petition has been filed by the respondent questioning the termination, the Commission does not have jurisdiction to consider the request made in the petition. Notwithstanding such objection, the Commission went ahead and proceeded to dispose of the matter directing the petitioner to give effect to the order and release the amount payable to the petitioner within a period of 30

days, which is quantified at Rs. 35,79,439/-. The said order of the Commission which is produced at Annexure-N is questioned in this petition.

3. It is significant to extract para 12 of the petition which is as follows:

"Aggrieved by the same, the petitioner has filed the present petition. Although Section 111 of Electricity Act, 2003 provides for an appeal against an order passed by Commission, the Appellate Authority has not been constituted as on date. In view of the same, having left with no other remedy the petitioner has invoked the extraordinary jurisdiction of this Hon"ble Court. The petitioner has no other alternate or efficacious remedy."

4. The respondent has entered caveat the filed their objections to the main petition. Apart from factually denying all the averments made in the writ petition, they have taken a specific contention that after coming into force of the Electricity Act 2003, an appeal is provided u/s 111 of the Act against the order passed by the Commission. To buttress their contention, they have also produced a copy of the notification issued by the Govt. of India, Ministry of Power. In view of the formation of the Appellate Tribunal under the Act, the main contention is that the writ petition under Articles 226 and 227 of the Constitution of India itself is not maintainable. They would further contend that since there is an alternate and efficacious remedy for redressal of the grievance of the petitioner by way of an appeal, the petition is liable to be rejected. They would also further submit that the subject matter of the dispute inter se between the petitioner and the respondent is one of the highly technical in nature and the courts do not have the required technical assistance to decide the controversy in question. On these among other grounds they would contend that the writ petition is liable to be rejected in limine.

5. Mr. Nagananda, Learned Senior Counsel appearing for the petitioner submits that as on the date when the writ petition was presented before this Court, the Appellate Tribunal was not as yet formed. He would further reiterate his contention that even assuming that an Appellate Tribunal is formed and functioning, the petition presented under Articles 226 and 227, is maintainable and an alternative remedy by itself will not disentitle the petitioner from getting the relief. According to him, the writ petition is maintainable. To buttress his contention, he has relied on a few decisions to show that notwithstanding there is an alternate and efficacious remedy, the Courts shall not hesitate to exercise their powers under Articles 226 of the Constitution.

6. Mr. Uday Holla, Learned Senior Counsel appearing for the respondent would reiterate what has been stated in the statement of objections. He would inter alia contend that an identical issue was before the Apex Court in the case of West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., wherein the Apex Court has observed that whenever an expert body is constituted under the Act it is desirable that the controversy be decided by the said expert body.

7. I have given my anxious consideration to the rival submissions of both the

Counsel.

8. The only question which would fall for consideration in the present petition is that whenever there is an alternate remedy constituted under a special enactment whether a writ petition under Article 226 could be entertained?

9. The Apex Court in the case of U.P. State Bridge Corporation Ltd. and Others Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh, . Examining the scope of Article 226 the Apex Court held thus:

"It would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner. When the dispute relates to the enforcement of a right or an obligation created under an Act, then the only remedy available to the claimant is to get adjudication under the Act".

10. In the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, the Apex Court held that:

"...an alternative remedy under Article 226 cannot be invoked to short-circuit or circumvent statutory procedures, it is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute."

11. In the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, the Apex Court has held that where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. The supervisory jurisdiction conferred on the High Courts under Article 226 of the Constitution is confirmed only to see whether an inferior Court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record. The decisions are legion to the effect that whenever there is an alternate remedy the Court exercising its writ jurisdiction under Article 226 would be slow to step in and exercise its power.

12. Section 111 of the Electricity Act, 2003, would deal with constitution of the Appellate Tribunal. Section 112 would deal with composition of the Appellate Tribunal. Section 113 would deal with qualifications for appointment of Chairperson and Member of Appellate Tribunal. A reading of these provisions would make it abundantly clear that an Appellate Tribunal is provided which would necessarily mean that there is an alternate and efficacious remedy for the petitioner to challenge the order passed by the Commission.

13. In so far as the decisions which are relied on by Mr. Nagananda, learned Counsel appearing for the petitioner are concerned, they would relate to cases

where the impugned orders are passed without notice and in violation of the principles of natural justice and where the Courts or the Tribunal do not have inherent jurisdiction to try the proceedings. In the circumstances, these decisions are not at all applicable to case on hand. Apparently a reading of the statement or objections before the Commission as well as the impugned order passed by the Commission does not disclose that at any point of time the question of jurisdiction was raised. Even otherwise it is to be noticed that once the petitioner having subjected himself to the jurisdiction and has taken an order on merits it is certainly not open for him to raise the question of jurisdiction at a later point of time. I am fortified by a Division Bench ruling of this Court Shaikabdul Rahim v. Chintamanarao Madha Varao and Anr. 1964 My.L.J. 721 wherein this Court has clearly stated that:

" a party invoking power under Articles 226 and 227 of the Constitution cannot now raise the question of jurisdiction when a decision has been taken before the Tribunal whose order is being challenged. The power of jurisdiction is a discretion one and when a party who has not challenged the jurisdiction of a Tribunal but submitted to it and took the chance of a decision in his favour, later turns round when the decision goes against him and challenges the jurisdiction of the very Tribunal, the High Court will not exercise its discretionary power in favour of such a party".

It is not open for the petitioner now to contend that the Commission did not have jurisdiction to try the petition of the respondent before the Commission. Even otherwise it is not brought to my notice as to how the Commission does not have jurisdiction. Consequently, I am of the considered view that the Commission did have jurisdiction to try the issue on hand.

14. The next question which requires consideration is assuming that this Court can entertain the Writ Petition notwithstanding there being an alternate and efficacious remedy by way of an appeal before the Tribunal, the Courts are empowered or for that matter have enough machinery to deal with a situation like this. The Apex Court in the case of W.B. Electricity Regulatory Commission v. Cesc Ltd., (Supra) has observed as follows:

"The Commission constituted u/s 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, 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 appellate stage also. 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. Neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealings with this type

of factual and technical matters. Therefore, it is recommended 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."

It is brought to my notice that a Appellate Tribunal as contemplated u/s 111 of the Act has already been formed and is functioning. A notification to that effect is also produced. It is also brought to my notice that all three members of the Appellate Tribunal have already been appointed and assumed the office on 13.5.2005. In the circumstances the question of entertaining this petition when there is an alternate and efficacious remedy for redressal of the petitioner's grievance is available there is no reason as to why this Court should exercise its powers under Articles 226 and 227 of the Constitution and deal with the technical matter. In my considered view the grievance of the petitioner should be decided by the Appellate Tribunal consisting of experts.

15. Another reason as to why this Writ Petition cannot be entertained is because, as stated in the body of the Writ Petition itself, since there is no appellate Tribunal as yet formed, the present Writ Petition is filed. But however during this interregnum, the Appellate Tribunal has already come into effect and is functioning.

16. It is no doubt true that u/s 111(2) of the Act, a limitation is provided that an appeal will have to be preferred within 45 days from the date of receipt of the copy of the order. Proviso to Sub-section (2) of Section 111 also provides that the Tribunal can entertain an appeal after expiry of the said period of 45 days if it is satisfied that there is sufficient cause for not filing the appeal in time. Apparently the petitioners were prosecuting this writ petition in this Court as the Appellate Tribunal was not as yet constituted. Taking into consideration the fact that the writ petition was pending in this Court, the Tribunal shall take this fact into consideration as and when an appeal is presented with an application seeking for condonation of delay.

17. Consequently, for the reasons stated above, I am of the considered view that this petition is laible to be rejected on the ground that there is an alternate and efficacious remedy available to the petitioner by way of an appeal to the Tribunal.

Petition stands rejected.____