

(2004) 10 OHC CK 0036

In the Orissa High Court

Case No : Writ Petition (C) No. 7160 of 2004

Orissa Consumers' Association and Another

APPELLANT

Vs

Orissa Electricity Regulatory Commission and Others

RESPONDENT

Date of Decision : 08-10-2004

Acts Referred:

Electricity Act, 2003 — Section 179, 181, 181(3), 182
General Clauses Act, 1897 — Section 23, 23(2), 23(5)
Information Technology Act, 2000 — Section 2(1), 4, 8
Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 — Regulation 2
Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Regulations, 2004 — Regulation 2

Citation : AIR 2005 Ori 11 : (2004) 2 OLR 673

Hon'ble Judges : A.K. Patnaik, J; A.K. Parichha, J

Bench : Division Bench

Advocate : K.N. Jena, D.K. Mohapatra, M. Ganguly, B.P. Bal and S.N. Panda, for the Appellant; Samareswar Mohanty, for No. 1, B.K. Mahanti, General and D. Mohanty, Government Advocate for No. 2, Sanjeet Mohanty, B.K. Patnaik, P. Sinha, P.K. Sahu and R.K. Nayak for Nos. 3 and 6, N.C. Panigrahi, G.S. Dash, N.K. Tripathy and S.R. Panigrahi for No. 4 and B.K. Nayak and D.M. Mohanty for Nos. 5 and 7, for the Respondent

Judgement

A.K. Patnaik, J.—The petitioner No. 1 is a Society registered under the Societies Registration Act, 1860 with the object of protecting the right, interest and welfare of consumers in the State of Orissa. The petitioner No. 2 is, a consumer of electricity. The Grid Corporation of Orissa Limited (for short, "GRIDCO") has been procuring, transmitting and making bulk supply of electrical energy to four distribution companies, namely, Central Electricity Supply Company Limited (for short, "CESCO"), Western Electricity Supply Company Limited (for short, WESCO), Northern Eastern Electricity Supply Company of Orissa Limited {for short, "NESCO") and Southern Electricity Supply Company Limited (for short, "SOUTHCO"), and the said four distribution companies have been carrying on the business of distribution and retail supply of electricity to the consumers in their

respective areas in the State of Orissa. Under the Orissa Electricity Reforms Act, 1995 (for short, "the 1995 Act"), the Orissa Electricity Regulatory Commission . (for short, "the Commission") has been fixing the. tariff for such bulk and retail supply of electricity. The petitioners have alleged in the writ petition that the Commission and the State Government have miserably failed "to protect the interest of consumers of electricity in the State of Orissa, particularly those consumers who belong to the lower income groups while fixing tariff for retail supply of electricity. They have alleged that consumers in the State of Orissa have been burdened every year with increase in the price of unit of electricity and since 1997 while the average tariff has increased by 267 per cent., the earning capacity of the consumers in the State of Orissa has not increased in the same proportion. The petitioners have relied on the report of the Sovan Kanungo Committee which states that there has been considerable increase in the average tariff at cumulative rate of 15.5% annually over the last 9 years without any perceptible improvement in customer service. In December, 2003, GRIDCO filed an application before the Commission under the 1995 Act indicating its annual revenue requirement for transmission and bulk supply of electricity for the purpose of determination of tariff for transmission and bulk supply for the year 2004-2005. In December, 2003, the four distribution companies, namely, CESCO, WESCO, NESCO and SOUTHCO filed applications before the Commission under the 1995 Act indicating their revised annual revenue requirements for the purpose of determination of tariff for distribution and retail supply of electricity for the year 2004-2005. The Electricity Act, 2003 (for short, "the 2003 Act") came into force on 10-6-2003. The grievance of the petitioners in the writ petition as was originally filed was that the Commission has not framed Regulations under the 2003 Act and yet the Commission has issued pubic notices annexed to the writ, petition as Annexure-1 series inviting objections from inter alia consumers and their organisations to the said applications of GRIDCO and, the four distribution companies for fixation of tariff for the year 2004-2005. Aggrieved the petitioners filed this writ petition contending, inter alia. that: the Commission cannot determine the tariff without first framing and publishing the Regulations and praying to quash the said five public notices annexed to the writ petition as Annexure-1 series and to declare the proceedings initiated on the applications of GRIDCO and the four distribution companies (hereinafter referred .to. as "the "licencees") as illegal, invalid and without authority of law. The petitioners also prayed for a writ of mandamus directing the Commission to frame Regulations and directing the State Government to make the rules under the 2003 Act and to furnish relevant information to the petitioner No. 1 u/s 6 of the Freedom of Information Act.

2. On 20-7-2004, the Court issued notices to the opposite parties and in response to the said notices the opposite parties have entered appearance through their respective counsel. The Commission has filed a counter-affidavit stating, inter alia, that the Commission has already framed different Regulations and in particular, the Orissa Electricity Regulatory Commission (Terms and

Conditions for Determination of Tariff) Regulations, 2004 and the Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. Thereafter the petitioners amended the writ petition and prayed for quashing the Regulations framed by the Commission under the 2003 Act and for declaring the said Regulations invalid and inoperative and as having no force of law.

3. Mr. K. N. Jena, learned counsel for the petitioners, submitted that the 2003 Act enacted by Parliament came into force with effect from 10-6-2003 and Section 61 thereof provides that the Commission shall, subject to the provisions of the Act, specify the terms and conditions for determination of tariff and Section 181 empowers the Commission to make Regulations and sub-section (2)(zd) of Section 181 provides that such Regulations may provide for the terms and conditions for determination of tariff u/s 61. He pointed out that sub-section (3) of Section 181 further provides that all Regulations made by the Commission shall be subject to the condition of previous publication. He vehemently argued that although it now appears that the Commission has framed various Regulations including the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004, such Regulations have not been subjected to previous publication as provided in S, 181(3). He next submitted that Section 182 of the 2003 Act further provides that the Regulations made by the Commission shall be laid, as soon as may be after It is made, before the House of the State Legislature, but the Regulations have not been laid before the State Legislative Assembly for a period of 14 days in accordance with Section 24-A of the Orissa General Clauses Act, 1937. He argued that the Regulations framed by the Commission including the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 (sic) therefore invalid. For the proposition that a law made without previous publication was not a valid law, he cited the decision of the Supreme Court in *The Municipal Corporation Bhopal, M.P. Vs. Misbahul Hasan and Others*, and for the proposition that a subordinate legislation has to be laid before the House of Legislature, before it becomes effective, he cited the decision of the Supreme Court in *M/s. Atlas Cycles Industries Limited v. State of Haryana* AIR 1979 SC 1149. Mr. Jena further submitted that the Regulations made by the Commission affect the rights of the consumers and confer duties on the licensees and also provides for remedies and must therefore be published for the knowledge of all concerned. He cited the decisions of the Supreme Court in *Harla Vs. The State of Rajasthan*, and *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, In support of this contention. He also relied on the decisions of the Supreme Court in *Collector of Central Excise Vs. New Tobacco Co. Etc. Etc.*, in which it has been held that mere printing of a Central Excise notification in the Gazette would not be enough and unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published. He also cited the decision in *Garware Nylons Ltd. Vs. Collector of Customs and Central Excise, Pune*, , in which the Supreme Court has held that the effective date of a

notification published in the Gazette is the date on which the Gazette containing the notification after printing became available for public sale. He argued that the Gazette notifications containing the Regulations framed by the Commission under the 2003 Act were not made available for sale to the public before the impugned public notices were issued and the Regulations not having been made in accordance with the provisions of the 2003 Act are Invalid and inoperative and no action could have been taken under the said Regulations.

4. Mr. Jena next submitted that the licencees had filed the applications for fixation of tariff, u/s 26 of the 1995 Act, but the said applications were not disposed of by the: Commission in time and in the meanwhile the 2003 Act came into force with effect from 10-6-2003. He pointed out that Section 61 of the 2003 Act provides that the Commission shall, subject to the provisions of the Act, specify the terms and conditions for determination of tariff and Section 62 provides for determination of tariff by the Commission for supply of electricity by a generating company to a distribution licensee transmission of electricity, wheeling of electricity and retail sale of electricity and S, 64 stipulates the procedure for a tariff order and the Commission cannot act in accordance with the said Sections 61, 62 and 64 of the 2003 Act until and unless valid Regulations are made by the Commission specifying the terms and conditions for determination of tariff and specifying the manner in which the business of the Commission is to be conducted. He argued that even though valid Regulations have not been made specifying the terms and conditions for determination of tariff and specifying the manner in which the business of the Commission is to be conducted under the 2003 Act, the Commission has gone ahead and published the impugned notices on 10-6-2004 inviting objections to the applications of the licencees indicating therein their revised annual revenue requirements for the year 2004-2005. He further submitted that though notices have been published on 10-6-2004 by the Commission inviting objections, the applications of the licencees have not been published despite a clear provision in sub-section (2) of Section 64 of the 2003 Act that every applicant shall publish the application in such abridged form and manner as may be specified by the appropriate Commission, He vehemently submitted that in *Narbada Prasad Vs. Chhaganlal and Others*, , the Supreme Court has held that it Is a well settled rule of law that if a thing is to be done in a particular manner, it must be done in that particular manner or not at all and all other modes of compliance are excluded. He argued that since mandatory provisions of Section 64 of the 2003 Act have not been followed, the impugned notices dated 10-6-2004 in Annexure-1 series issued by the Commission are liable to be quashed.

5. Mr. Jena finally submitted that the 2003 Act has been enacted with the object to consolidate all the laws relating to generation, transmission, distribution, trading and use of electricity and for protecting the interests of the consumers by ensuring supply of electricity to all areas in efficient and uninterrupted manner and by rationalization and determination of electricity tariff in a transparent manner. He submitted that to effectuate these objects the State Government and

the Central Government have been given duties under the 2003 Act to frame Rules and Regulations and to do all things as are required to carry out the various provisions of the Act, but the State Government and the Central Government have not performed the said statutory duties of framing the rules under the 2003 Act. He further submitted that similarly Section 86 of the 2003 Act enumerates the wide range of functions to be performed by the Commission and the Commission must perform the said functions in a transparent manner keeping in mind the interest of the consumers, but the experience in Orissa since 1997 shows that the Commission is functioning by adopting bureaucratic attitude and cumbersome procedures on account of which the common man is unable to approach the Commission for redressal of his grievances against the licencees. In this regard, he submitted that the Commission is working throughout the year only for fixation of tariff and allowing the revenue requirements of the licencees every year. He submitted that, u/s 61 of the 2003 Act, the Commission has to be guided by multi-year tariff principles, which means tariff for more than one year, but the Commission is now trying to fix tariff for one year only and this shows total non-application of mind to the provisions of the 2003 Act. He submitted that appropriate direction should be given to the State Government, the Central Government and the Commission to perform their respective statutory duties under the 2003 Act.

6. In reply to the aforesaid submission of Mr. Jena, Mr. Samareswar Mohanty, learned counsel appearing for the Commission (opposite party No. 1), submitted that the draft Regulations were published in the Website of the Commission and by the public notices published in the Indian Express dated 30-1-2004, The Samaj dated 5-4-2004, The Indian Express dated 5-4-2004. The Indian Express dated 16-5-2004 and The Samaj dated 16-5-2004, copies of which have been annexed to the counter-affidavit of the opposite party No. 1 to the rejoinder filed by the petitioners as Annexures-B1/, B/2, B/3 and B/4, suggestions/opinions on the different draft Regulations were invited and as per the said public notices, the suggestions/opinions were to be given to the Secretary of the Commission within 15 days of the publication of the notices and in response to the said public notices some suggestions were received and considered and only thereafter the Regulations were made by the Commission. He submitted that it is therefore not correct that the condition of previous publication in Section 181(3) of the 2003 Act was not complied with before the Regulations were finally framed by the Commission. He also submitted that sub-section (5) of Section 23 of the Central General Clauses Act, 1897 provides that the publication in the Official Gazette of a rule or a bye-law purported to have been made in exercise of a power to make rule or bye-law after previous publication shall be conclusive proof that the rule or bye-law has been duly made and since the Regulations made by the Commission u/s 181 of the 2003 Act have been published in the Official Gazette, such publication is conclusive proof that the Regulations have been duly made and it is not open to the petitioners at this stage to re-open the question of previous publication. In this context, he submitted that the O.E.R.C. {Conduct of

Business) Regulations, 2004 were published in the Official Gazette (Extraordinary) on 28-5-2004 and the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 were published in the Official Gazette (Extraordinary) on 10-6-2004 and even if the Gazettes are alleged to have been received in the Sales Depot on 26-6-2004 and 5-8-2004 respectively, members of the public would be deemed to have known of the said Regulations on the dates on which the Regulations were published in the Official Gazette. He submitted that there was no evidence to show that the Gazettes were not made available to the general public before they were received in the Sales Depot of the aforesaid Directorate. He further submitted that it is for the authorities of the Directorate of Printing, Stationery and Publication, Orissa, to send the Gazettes to the Sales Depot promptly and the Commission is not responsible for the delay, if any, in sending the Gazettes to the Sales Depot. Hence, the enforceability of the Regulations should not depend upon the fortuitous circumstance of the Gazettes being sent to the Sales Depot for sale on a particular date. He pointed out that the Regulations were put on the Website of the Commission on the next day after their publication and the licencees, generating companies and members of the public had actual notice of the Regulations published in the Gazettes and put on the Website. Mr. Samareswar Mohanthy submitted that Section 181(1) of the 2003 Act provides that the Commission may "by notification" make Regulations and the word "notification" has been defined in Section 2(43) of the: 2003 Act as "a notification published in the Official Gazette," and accordingly, the moment the O.E.R.C. (Conduct of Business) Regulations, 2004 were published in the Official Gazette (Extraordinary) on 28-5-2004 and the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 were published in the Official Gazette (Extraordinary) on 10-6-2004 they came into force. He brought to our notice that Section 8 of the Information Technology Act, 2000 provides inter alia that where notification is published in the Official Gazette, then such requirement shall be deemed to have been satisfied if such notification is published in the Official Gazette or Electronic Gazette. He pointed that Section 4 of the Information Technology Act, 2000 further provides that where any law provides that an information or any other matter shall be in writing or in a typewritten or in printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is (a) rendered or made available in an electronic form, and (b) accessible so as to be usable for a subsequent reference. He submitted that since the Regulations have also been put on the Website, they will be deemed to have been published for the knowledge of all concerned in accordance with the said provisions of the Information Technology Act, 2000. He argued that the decisions of the Supreme Court in *Harla Vs. The State of Rajasthan*, ; *The Municipal Corporation Bhopal, M.P. Vs. Misbahul Hasan and Others*, ; *Collector of Central Excise Vs. New Tobacco Co. Etc. Etc.*, and *Garware Nylons Ltd. Vs. Collector of Customs and Central Excise, Pune*, cited by Mr. Jena do not apply to the facts of the present case.

7. Mr. Samareswar Mohanty next submitted that Section 182 of the 2003 Act only provides that every rule made by the State Government and every regulation made by the Commission shall be laid as soon as may be after it is made, before the House of the State Legislature. This is in contrast to Section 179 of the 2003 Act which provides that a rule made by the Central Government or a regulation made by the Central Commission shall be laid as soon as may be after it is made, before each House of the Parliament for a total period of 30 days and if both Houses agree in making the modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have the effect only in the modified form or be of no effect, as the case may be. He submitted that there is thus a difference between a regulation made by the Commission u/s 181 of the 2003 Act on which the House of the Legislature has no control and does not adopt resolutions agreeing, modifying or annulling the provision of the regulation and a rule or regulation made under Sections 176, 177 and 178 of the 2003 Act by the Central Government or by the Central Commission on which the Houses of the Parliament may adopt resolutions agreeing, modifying or annulling a provision therein. Accordingly, the Regulations or the rules laid before the House of the Legislature u/s 182 of the 2003 Act acquire validity and are enforceable even if they are not laid before the Legislative Assembly of the State Legislature. In support of this contention, Mr. Samareswar Mohanty cited the decisions of the Supreme Court in *M/s. Atlas Cycles Industries Limited v. State of Haryana* AIR 1979 SC 1149 (supra) and *The Quarry Owners Association Vs. The State of Bihar and Others*, .

8. Mr. Samareswar Mohanty next submitted relying on the counter-affidavit filed on behalf of the Commission that the tariff applications from GRIDCO and CESCO together with their annual revenue requirements for the year 2004-2005 were received by the Commission on 31-12-2003 and similarly tariff applications together with the annual revenue requirements for the year 2004-2005 from "WESCO, NESCO and SOUTHCO were also received on 31-12-2003, but subsequently WESCO, NESCO and SOUTHCO revised their annual revenue requirements and submitted revised tariff applications on 23-6-2004, 24-6-2004 and 24-6-2004 respectively. He further submitted that though the 2003 Act came into force on 10th June, 2003 when the aforesaid tariff applications together with annual revenue requirements of the licencees were originally received on 31-12-2003, the provisions of the Electricity Supply Act, 1948, Electricity Regulatory Commission Act, 1998 and the Orissa Electricity Reforms Act, 1995 were in force by virtue of the proviso to Section 61 of the 2003 Act. These tariff applications of the licencees were to be disposed of by the Commission in accordance with Section 26 of the Orissa Electricity Reforms Act, 1995 within 90 days of receipt of all information from the licencees, but this provision for disposal of the tariff application within 90 days of receipt of all information from the licencees is not mandatory but directory. He submitted that from 10th June, 2004 the provisions of the Electricity Supply Act, 1948, Electricity Regulatory Commission Act, 1998 and Orissa Electricity Reforms Act, 1995 ceased to have

any force and instead the 2003 Act became operative and the annual revenue requirements and the tariff applications of the aforesaid licencees were required to be dealt with in accordance with the 2003 Act and accordingly, public notices were issued of the tariff applications u/s 64(2) of the 2003 Act read with Regulations 53(1) and 53(4) of the O.E.R.C. (Conduct of Business) Regulations, 2004. He submitted that Section 64(3) of the 2003 Act provides that the Commission shall within 120 days from the date of receipt of the applications under sub-section (1) of Section 64 and after considering all objections received from the public issue the tariff order accepting the application with such modification or such conditions as may be specified in the order or rejecting the application for reasons to be recorded in writing. He explained that the said period of 120 days will have to be counted from 1st June, 2004 when the filing of the annual revenue requirements along with the tariff applications of the licencees were complete and so counted, the said period of 120 days will expire sometime in October, 2004. He submitted that this time limit of 120 days provided in Section 64(3) of the 2003 Act is also directory and not mandatory and the proceedings for fixation of tariff cannot become void after expiry of the said time limit.

9. Mr. Samareswar Mohanty finally submitted relying on the counter-affidavit filed by the Commission that it is not correct that the Commission at the instance of the licencees has miserably failed to protect the interest of the consumers, more particularly the domestic low income group consumers. He argued that since its inception the Commission has been acting as a Regulator protecting and balancing the interest of the consumers while fixing the tariff and as a matter of fact, there has been no increase in tariff during the last three years. Regarding the provision in Cl. (f) of Section 61 relating to multi-year tariff principles, he submitted that this provision implies that the Commission shall fix a control period exceeding one year during which certain basic parameters shall remain fixed based on data provided by the licencees, but this does not mean that tariff shall not be fixed from year to year. He submitted that the objections filed in response to the impugned public notices shall be considered and order will be passed by the Commission on the applications of the licencees for revision of tariff only after hearing and it will be open for the petitioners to make their respective submissions before the Commission at such hearing.

10. Mr. Nirmal Chandra Panigrahi, learned counsel appearing for the GRIDCO, submitted that the petitioners have filed this writ petition under an erroneous impression that the Commission has not framed the Regulations and in particular, the Regulations relating to the terms and conditions for determination of tariff and for the conduct of business of the Commission, but actually the Commission has framed the Regulations, including the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004. He further submitted that GRIDCO which is the Bulk Supply and Transmission Licencee submitted, its application before the Commission on 31-12-2003 for its annual revenue Requirement as well as

fixation of tariff for the period 1 -4-2004 to 31 -3-2005 and similarly the distribution companies have submitted their applications for fixation of retail supply tariff and the Commission issued the impugned public notices on 14-6-2004 inviting objections to the said applications, He pointed out that at the time when the said applications were filed on 31-12- 2003, the Electricity Supply Act, 1948, Electricity Regulatory Commission Act, 1998 and Orissa Electricity Reforms Act, 1995 were applicable for determination of tariff up to 9-6-2004 by virtue of the proviso to Section 61 of the 2003 Act. He submitted that u/s 26(4) of the Orissa State Electricity Reforms Act, 1995, the tariff applications are to be disposed of within 90 days from the date of receipt of all information from the licencees but this provision is not mandatory but directory. He submitted that the 2003 Act came into operation on 11-4-2004 and the said tariff applications will now have to be disposed of within 120 days from the date on which the licencees have furnished all information that the Commission required. He stated that the application of GRIDCO was complete with all information on 14-6-2004 and the period of 120 days counted from 14-6-2004 will expire only on 14-10- 2004. He argued that the requirement of disposal of the tariff application within 120 days in sub-section (3) of Section 64 of the 2003 Act is also not mandatory but directory. He submitted that the expenses for the impugned public notice which relates to the application of the GRIDCO for fixation of tariff were to be borne by GRIDCO and this amounts to substantial compliance of the provisions of sub-section (2) of Section 64 of the 2003 Act. Mr. Sanjeet Mohanty, learned counsel appearing for NESCO and WESCO, submitted that in sub-section (2) of S, 64 of the 2003 Act, every applicant is required to publish the application in such abridged form and in the manner as may be "specified by the Commission. ""He submitted that the impugned notices in Annexure-1 series have been published in the form and manner specified by the Commission as provided in sub-section (2) of Section 64 of the 2003 Act. He submitted that the period of 120 days within which the application is to be disposed of u/s 64(3) of the 2003 Act has not yet expired. He further submitted that the provisions in Section 182 of the 2003 Act requiring Regulations made by the Commission to be laid before the House of the State Legislature is a simple provision for laying before the House of the Legislature and nothing more and cited the decision of a learned single Judge of this Court in Indian Aluminium Co. Ltd. Vs. State of Orissa and Others, in which it has been held that even if rules framed had not been laid before the Assembly, the same will remain valid if no condition is attached to the laying of the rules and no penalty has been provided for in the Act itself if the rules are not laid before the Legislative Assembly. Mr. B. K. Nayak, learned counsel appearing for CESCO and SOUTHCO, also reiterated the aforesaid arguments of Mr. Panigrahi and Mr. Mohanty and submitted that the period of 90 days as provided in Section 26(4) of the 1995 Act and the period of 120 days as provided in Section 64(3) of the 2003 Act for disposal of a tariff application has not expired as yet and for this reason, the writ petition is premature.

11. Mr. B. K. Mohanti, learned Advocate General appearing for the State of

Orissa, referred to the statement of objects and reasons of the 2003 Act to show that the object of the 2003 Act is 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. He submitted that the statement of objects and reasons thus indicates a drastic change in the law relating to electricity and precedents and case laws on the subject are of little assistance for Interpretation of the 2003 Act. He referred to Section 172 of the 2003 Act to show that it provides for transitional provisions. He submitted that the said transitional provisions will apply until the State Government takes different steps for fully implementing the 2003 Act in the State of Orissa. He stated that the State Government has already started taking steps and in due time will take all the steps required to be taken under the 2003 Act. He vehemently argued that the petitioners have not shown the prejudice that the consumers have suffered as yet and so long as the consumers have not suffered any prejudice, they have no grievance to approach this Court under Article 226 of the Constitution.

12. The first question which arises for decision in this writ petition is whether the Regulations and in particular, the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 are invalid for non-compliance of the provisions of sub-section (3) of Section 181 of the 2003 Act read with Section 23 of the Central General Clauses Act, 1897. The said sub-section (3) of Section 181 of the 2003 Act and Section 23 of the Central General Clauses Act, 1897 are quoted herein below :

Sub-section (3) of Section 181 of the 2003 Act

"(3) All regulations made by the State Government under this Act shall be subject to the condition of previous publication."

Section 23 of the Central General Clauses Act. 1897

"23. Provisions applicable to making of rules or bye-laws after previous publications.- Where, by any Central Act or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely :-

(1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws, for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in

such manner as the Government concerned prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or bye-laws, and, where the rules or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

5) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made."

Thus, sub-section (3) of Section 181 of the 2003 Act provides that all Regulations made by the Commission under the Act shall be subject to the condition of previous publication and Section 23 of the Central General Clauses Act provides the procedure which is to be followed in case of a provision which is subject to the condition of previous publication. As per the procedure in Section 23 of the Central General Clauses Act quoted above, the draft of the proposed provision has to be published for information of persons likely to be affected thereby, with a notice specifying a date on or after which the draft will be taken into consideration and thereafter the authority making the provision shall consider any objection or suggestion which may be received before the date so specified in the notice.

13. But Section 23 does not stipulate the manner in which the draft provision is to be published and instead provides in Section 23(2) that the publication of the draft provision shall be In such manner as the authority making the provision may deem to be sufficient. It appears from the counter -affidavit filed on behalf of the Commission to the rejoinder filed by the petitioners that public notices were issued in the Indian Express dated 30-1-2004, The Samaj dated 5-4- 2004, The Indian Express dated 5-4-2004, and The Samaj dated 16-5-2004, copies of which have been annexed to the said counter-affidavit as Annexures-B, B/1, B/ 2, B/3 and B/4 stating therein that the Commission in exercise of its powers under a different provisions of the 2003 Act has prepared a draft Regulations on different matters including the O.E.R.C. (Terms and Conditions for Determination of Tariff for Retail Sale of Electricity) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 and also stating therein that the draft Regulations are available in the Commission's Website "www.orierc.org" and that the copies of the Regulations may also be obtained from the Commission" office by payment of necessary fees and interested parties may furnish their suggestion/opinion on the draft Regulations to the Secretary of the Commission within 15 days of the publication of the notice. Thus, the draft Regulations including the O.E.R.C. (Conduct of Business) Regulations, 2004 and the O.E.R.C.

(Terms and Conditions for Determination of Tariff for Retail Sale of Electricity) Regulations, 2004 have been published for information of all persons who are likely to be affected thereby and notice has been given that after 15 days of the said publication the draft Regulations will be taken into consideration and objections or suggestions may be sent to the Secretary of the Commission to the draft Regulations within 15 days of the publication. The publication of the draft Regulations, however, has been made in the Website of the Commission. Section 4 of the Information Technology Act, 2000 states that where a law provides that any information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for a subsequent reference. Section 2(1)(r) states that "electronic form" means "with reference to information means any information generated, sent, received or stored in medial, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device." Thus the publication of the draft Regulations by putting the same in the Website of the Commission and issuing public notices in the two newspapers that copies of the draft Regulations may be obtained from the Commission's office would be a publication of the draft Regulations within the meaning of Section 23 of the Central General Clauses Act, 1897 because Section 23(2) of the said Act provides that the publication shall be made in such manner as the authority making the Regulations deems to be sufficient.

14. Section 23(5) makes it clear that the publication in the Official Gazette of the provision made in exercise of the power to make the provision after previous publication shall be conclusive proof that the provision has been duly made. A similar provision as in Section 23(5) of the Central General Clauses Act was dealt by the Supreme Court in *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, The procedure for imposition of tax by the Municipal Board was provided in Sections 131 to 135 of the U.P. Municipalities Act. Section 131(3) provides that the Municipal Board shall publish the proposals in the manner prescribed in Section 94 along with a notice in the form set out in Schedule III. Section 132 provides that any inhabitant of the Municipality within a fortnight of the publication of the notice could submit an objection in writing to all or any of the proposals and the Board had to take the proposal into consideration and pass orders thereon by a special resolution and if it thinks necessary it would modify the proposal. Section 135(3) provides that a notification of the imposition of the tax under sub-section (2) shall be conclusive proof that a tax had been imposed in accordance with the provisions of the Act. Two points which arose, inter alia, for consideration before the Supreme Court were as to whether the provision in Section 131(3) of the Act requiring publication was mandatory; and as to whether there was no publication as provided by Section 131(3) read with Section 94(3) of the Act. The Supreme Court found that Section 131 (3) had two parts, the first part which laid down that the Municipal Board shall publish

proposals and draft rules along with a notice inviting objections to the proposal for draft rules so published within a fortnight from the publication of the notice and the second part which provided for the manner of publication and that manner is according to Section 94(3). The Supreme Court held that while the first part requiring publication of the proposals and the draft rules was mandatory because the object of this first part was to invite objections from the inhabitants of the Municipality who had to pay the tax and to further the democratic process and to provide a reasonable opportunity of being heard to those who were likely to be affected before imposition of the tax, but the second part relating to the manner of publication of the proposals and the draft rules only required a substantial compliance. With regard to the provision in Section 135(3) of the aforesaid Act that the notification made u/s 135(3) of the Act shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act, the Supreme Court held relying on its earlier decision in *The Berar Swadeshi Vanaspathi and Others Vs. The Municipal Committee, Shegaon and Another*, that once there is substantial compliance of the provision relating to publication, the provision of Section 135(3) of the effect that a notification made u/s 135(2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act will come to the help of the Municipality. In this case, as we find, the draft Regulations had in fact been published in electronic form through the Website of the Commission and public notices have also been issued in the newspapers stating that copies of the draft Regulations may be obtained from the Commission's office and objections can be submitted. It is also stated in the counter-affidavit filed on behalf of the Commission to the rejoinder filed by the petitioners that after considering all suggestions of the general public on the draft Regulations, the Commission finalised the draft Regulations and published the same in the Orissa Gazette. There is thus a substantial compliance of the provisions of sub-section (3) of Section 181 of the Electricity Act, 2003 and Section 23 of the Central General Clauses Act, 1897 and after such substantial compliance; the Regulations have been published in the Official Gazette. Section 23(5) of the Central General Clauses Act, 1897 therefore comes to the aid of the Commission and such publication in the Official Gazette of the Regulations is conclusive proof that the Regulations have been duly made. :

15. The next question is whether the Regulations and in particular the O.E.R.C. (Conduct of Business) Regulations, 2004 and the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 are invalid for non-compliance of the provisions of Section 182 of the 2003 Act. Consideration of this question requires a comparison of Section 179 and Section 182 of the 2003 Act which are quoted herein below :

"179. Rules and regulations to be laid before Parliament-

Every rule made by the Central Government, every regulation made by the Authority, and every regulation made by the Central Commission shall be laid, as

soon as may be after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under part rule or regulation.

182. Rules and regulations to be laid before State Legislature-

Every rule made by the State Government and every regulation made by the State Government shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House."

A plain comparison of the aforesaid two provisions would show that a rule made by the Central Government or a regulation made by the authority or by the Central Commission has to be placed before each House of the Parliament u/s 179 for a total period of thirty days and before the expiry of the said period of both Houses agree in making any modification in the rule or the regulation or agree that the rule or regulation should not be made, the; rule or regulation shall have effect thereafter only in such modified form or be of no effect, as the case may be, but a rule made by the State Government or a Regulation made by the a State Government is required to be only laid before the House of the State Legislature u/s 182 and there is no provision in Section 182 for the House of the State Legislature for agreeing with the rule or the regulation or for making any modification in the rule or the regulation or for taking a view that such rule or regulation should not be made at all. Section 182 also does not provide that if the rule or regulation is not laid before the House of the Legislature the rule or regulation will be invalid.

16. In the *The Quarry Owners Association Vs. The State of Bihar and Others*, , the Supreme Court had the occasion to compare sub-sections (1) and (3) of Section 28 of the Mines and Minerals (Regulation and Development) Act which contained similar provisions as Sections 179 and 182 of the 2003 Act and after such comparison of the two provisions, the Supreme Court held that since the language of the two sub-sections of the same section is different, they have to be differently interpreted. The Supreme Court explained that in the case of major minerals which play an important role in the national growth and wealth and where the delegatee is the Central Government, Parliament retained its full control under sub-section (1) of Section 28 of the Mines and Minerals (Regulation and Development) Act, but in the case of minor minerals Parliament felt that the subject is of local use and the State Government being Well versed to deal with it in the historical background, mere placement of rules and notifications framed by it before the State Legislature would a sufficient check on the exercise of its

legislative powers by the delegatee. In *M/s. Atlas Cycles Industries Limited v. State of Haryana* (AIR 1979 SC 1149) (supra), the Supreme Court further held (para 32) :

"From the foregoing discussion, it inevitably follows that the Legislature never intended that non-compliance with the requirement of laying as envisaged by subsection (6) of Section 3 of the Act should render the order void. Consequently nonlaying of the aforesaid notification fixing the maximum selling prices of various categories of iron and steel including the commodity in question before both Houses of Parliament cannot result in nullification of the notification. Accordingly, we answer the aforesaid question in the negative....."

Following the aforesaid decision of the Supreme Court in *M/s. Atlas Cycles Industries Limited v. State of Haryana* (supra), this Court has held in *Indian Aluminium Co. Ltd. Vs. State of Orissa and Others*, that where a statute directs that the rules shall be laid before the legislature, whether such direction is mandatory or directory depends upon several considerations notwithstanding the use of the expression "shall" and the requirement can be held to be directory where no penalty has been attached under the statute for non-laying of the rules before the Legislature. Considering all these authorities on the point, we are of the view that the Regulations cannot be held to be invalid even if the same have not been laid before the Legislative Assembly.

17. We may now take up the next question as to whether the Regulations framed by the Commission and in particular the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 have come into force and if so, when. Section 18(1) of the 2003 Act provides that the State Commission may, by notification, make regulations consistent with the Act and the Rules generally to carry out the provisions of the Act. The word "notification" has been defined in Section 2(46) of the 2003 Act to mean, "notification published in the Official Gazette". The word "published" means "made known to the persons likely to be affected by the notification". To this view, we find support in *Collector of Central Excise Vs. New Tobacco Co. Etc. Etc.*, in which the Supreme Court has held (Para 12) :

".....a Central Excise notification can be said to have been published, except when it is provided otherwise, when it is so issued as to make it known to the public. It would be a proper publication if it is published in such a manner that persons can, if they are so interested, acquaint themselves with its contents. If publication is through a Gazette then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published:"

The aforesaid law laid down by the Supreme Court in *Collector of Central Excise v. New Tobacco Co.* (supra) was applied in *M/s. Garware Nylons Ltd. v. The Collector of Customs and Central Excise, Pune* (AIR 1996 SC 844) (supra) and it was held that the effective date of notification is the date when the notification

after printing became available for public sale. Para 4 of the said judgment of the Supreme Court in *M/s. Garware Nylons Ltd. v. The Collector of Customs and Central Excise, Pune* (supra) which is relevant for our purpose is quoted herein below (para 4 at p. 845 of AIR) :

"In view of the law laid down in the said decision, the notification dated 30-9-1985 can be said to have been duly published when it is made known to the public. In the present case, the letter from the Assistant Collector (Periodicals) dated 2-1-1986 Indicates that copy of the Gazette containing the notification dated 30-9-1985, after printing, became available for public sale only on 11-1-1985. It must, therefore, be held that the effective date of the notification dated 30-9-1985 was 1-11-1985."

We find from Volume-I of the Regulations 2004 made by the Orissa Electricity Regulatory Commission furnished to the Court that the Regulations have already been published in the Orissa Gazette (Extraordinary) on different dates. We find from page 77 of the said Volume that the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 have been made by a notification dated 9th June, 2004 published in the Orissa Gazette (Extraordinary) No. 796 dated 10th June, 2004 and from page. 97 of the said Volume that the O.E.R.C. (Conduct of Business) Regulations, 2004 have been made by a notification dated 21st May, 2004 published in the Orissa Gazette (Extraordinary) No. 712 dated 28th May, 2004. We, also find from the communication dated 11-8-2004 from the Deputy Director (Publication) , Printing, Stationery and Publication, Orissa to the Assistant Secretary of the petitioner No. 1 Association that Extraordinary Gazette Notification No. 796 dated 10-6-2004 and Extraordinary Gazette Notification No. 712 dated 21-5-2004 were received by the Publication Store of the Directorate for sale on 5-8-2004 and 26-6-2004 respectively. Since the Extraordinary Gazette Notification No. 796 dated 10-6-2004 containing the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 was received for sale at the Publication Store of the Directorate of Printing, Stationery and Publication, Orissa on 5-8-2004 the notification containing the said Regulations can be held to have been published only on 5-8-2004. Similarly, since the Extraordinary Gazette Notification No. 712 dated 28-5-2005 containing the O.E.R.C. (Conduct of Business) Regulations, 2004 was received at the Publication Store of the Directorate of Printing. Stationary and Publication, Orisaa on 26-6-2004, the notification containing the said Regulations can be held to have been published only on 26-6-2004? Therefore the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 came into force on 5-8-2004 and 26-6-2004 respectively.

18. The provisions in the Information Technology Act, 2000 and in particular Sections 2(1)(s) and 8 thereof cannot in any way make a difference to our aforesaid conclusion that the two Regulations came into force on 5-8-2004 and 26-6-2004 respectively Sections 2(1)(s) and 8 of the said Act are quoted herein

below :

"2. Definitions

(1) In this Act, unless the context otherwise requires,-

XX XX XX XX (s) "electronic gazette" means official gazette published in the electronic form;

XX XX XX XX 8. Publication of Rules, Regulation, etc., in Electronic Gazette

Where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette;

Provided that where any rule, regulation, order, bye-law , notification or any other matters published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form."

The aforesaid provisions in the Information Technology Act, 2000 inter alia provide that if a notification is published in the Electronic Gazette, the notification is deemed to have been published in the Official Gazette. The Proviso to Section 8 of the Act also makes it clear that where the notification is published both in the Official Gazette and the Electronic Gazette, the date of publication shall be deemed to be the date of Gazette which was first published in any form. u/s 181 of the 2003 Act, the Regulations can be made only by a "notification" and Section 2(46) of the said Act defines "notification" as a notification "published" in the Official Gazette. As we have held above on the authority of the decisions of the Supreme Court in Collector of Central Excise v. New Tobacco Co. etc. etc., and Garware Nylons Ltd. Vs. Collector of Customs and Central Excise, Pune, , the word "published" means "made known to the persons likely to be affected by the notification". The persons likely to be affected by the notifications containing the Regulations are not just the licencees who have filed the tariff applications, but all consumers of electricity in the State of Orissa including the consumers of low income group and consumers of remote rural areas who as yet do not have the means to collect information from the Website of the Commission. There is no provision in the 2003 Act or the Information Technology Act, 2000 similar to Section 23(2) of the Central General Clauses Act that the publication of the Regulations may be in such manner as the Commission may deem sufficient. There is also no provision in the said two Act similar to Section 23(5) of the Central General Clauses Act to the effect that publication in the Official Gazette or Electronic Gazette is conclusive proof that the notification containing the Regulations has been "published".

19. This takes us to the question as to whether the Commission could have issued the public notices in Annexure-1 series on 14-6-2004 in Cases Nos.

175/2003 and 176/2003 on the tariff applications of GRIDCO and CESCO and on 24-6-2004 in Cases Nos. 177/2003 178/2003 and 189/ 2003 on the tariff applications of SOUTHCO, NESCO and WESCO. The 2003 Act came into force on 10th of June, 2003 and in Sections 61, 62 and 64 thereof detailed provisions have been made on tariff regulations, determination of tariff and procedure for tariff order. The proviso to Section 61 of the 2003 Act, however, reads as follows :

"Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948}, the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff arc specified under this section, whichever is earlier."

By virtue of the aforesaid proviso to Section 61 of the 2003 Act, the terms and conditions for determination of tariff under the Electricity Supply Act," 1948, the Electricity Regulatory Commissions Act, 1998 and the Orissa Electricity Reforms Act, 1995 specified in the Schedule to the 2003 Act continued to apply for a period of one year up to 10th June, 2004. Hence, when the tariff applications were filed by the licencees in December, 2003, Sections 26 and 27 of the Orissa Electricity Reforms Act, 1995 stipulating the detailed provisions relating to the licencee's revenues and tariffs and the finances of the licencees were in force and the said tariff applications of the liceneecs were u/s 26 of the said 1995 Act. As we have held above, the O.E.R.C. (Terms and Conditions for Determination of Tariff} Regulations, 2004 came into force only on 5-8-2004 and the O.E.R.C. (Conduct of Business) Regulations, 2004 came into force only on 26-6-2004. On a reading of the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004, we find that in Chapter II thereof the principles for determination of tariff u/s 62(1) for (A) Supply of powers from a generating company to a distribution company, (B) Transmission of electricity and (C) Wheeling of electricity have been given. Thus, any application by GRIDCO filed u/ s 64 for determination of tariff, for supply of power to distribution companies, transition of electricity and wheeling of electricity has to be in accord with the said Chapter II. Chapter III of the O.E.R.C, (Terms and Conditions for Determination of Tariff) Regulations, 2004 contain detailed provisions relating to the principles for determination of tariff u/s 61(d) for retail sale of electricity. Hence, the applications of CESCO, WESCO, NESCO and SOUTHCO u/s 64(1) have to be in conformity with the said provisions in Chapter III. The O.E.R.C. (Conduct of Business) Regulations, 2004 in Chapter VIII have also made provisions relating to tariffs. Regulation 53 in Chapter VIII provides for filing of tariff applications by the licencees. The applications of the licencees will have to be in conformity with the said provisions in Regulation 53 under Chapter VIII of the O.E.R.C. (Conduct of Business) Regulations, 2004. Further, sub-section (2) of Section 64 of the 2003 Act requires that such applications, in such abridged form and manner, as may be specified by the Commission, shall be published by the applicant. This provision has been made with a view to ensure that suggestions/

objections can be given by the public in response to such application published by the applicant in abridged form. Before 5-8-2004 when the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 were published and before 26-6-2004 when the O.E.R.C. (Conduct of Business) Regulations, 2004 were published, the said two Regulations were not in force and the members of the public had no knowledge of the provisions in the said Regulations and therefore were not in a position to give their suggestions/objections to the tariff applications of the licencees. We also find that by the impugned public notices dated 14-6-2004 and 24-6-2004, such objections were required to be filed on or before 12-7-2004 in Cases No. 175/2003 and 176/2003 and on or before 20-7-2004 in Cases No. 177/2003, 178/2003 and 189/2003 even though by 12-7-2004 and 20-7-2004 the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations had not been made available for sale for the public and had not been "published" for their information. The members of the public therefore were not in position to find out whether the applications of the licencees were in accord with the O.E.R.C. (Terms and Conditions for Determination of Tariff) Regulations, 2004 and file their objections by 12-7-2004 and 20-7-2004.

20. For the aforesaid reasons, we quash the impugned notices dated 14-6-2004 and 24-6-2004 in Annexure-1 series and direct the State Government and the Commission to perform their respective statutory duties under the 2003 Act as expeditiously as possible. The writ petition is allowed to the extent indicated above, but considering the facts and circumstances of the case, the parties shall bear their own costs.

A.K. Parichha, J.

21. I agree.