(2018) 12 CHH CK 0078

In the Chhattisgarh High Court

Case No : Writ Petition (C) No. 826, 488, 489, 490, 2693 Of 2017

R K M Powergen Private Limited	APPELLANT
Vs	
Chhattisgarh State Electricity Regulatory Commission And Ors	RESPONDENT

Date of Decision : 13-12-2018

Acts Referred:
Electricity Act, 2003 — Section 61, 62, 66

Citation : (2018) 12 CHH CK 0078

Hon'ble Judges : Ajay Kumar Tripathi, CJ;Parth Prateem Sahu, J

Bench : Division Bench

Advocate : Ankit Singhal, Shobhit Banerjee, Aditi Singhvi, Animesh Tiwari, Abhishek Sinha, S. Harshita, Prasoon Bhaduri

Final Decision : Allowed

Judgement

Ajay Kumar Tripathi, CJ.

1. Heard learned counsel for the parties.

2. In all these writ applications, a common question of law has been raised. Challenge has been made to the first proviso to clause 14.2.11 of the Tariff Order dated 30.04.2016 (Annexure P/2) to be ultra vires the Regulation 4.59 of the Chhattisgarh State Electricity Supply Code, 2011. Since the tariff notification unilaterally converts a permanent connection into temporary connection, it is pleaded that such a notification is illegal, arbitrary, discriminatory, lacks competence and jurisdiction, if not unconstitutional and also ultra vires the provisions of the Electricity Act, 2003 (for short 'the Act, 2003')

3. To appreciate the submissions and the contentions, we would like to reproduce Regulation 4.59 of the Chhattisgarh State Electricity Supply Code, 2011 (for short 'the Supply Code'), which reads as under:

"CHAPTER 4: PROCEDURE FOR RELEASE OF NEW CONNECTION AND CHANGE IN

EXISTING CONNECTION.

4.59 Temporary Power Supply for LT and EHT/HT connection:

(i) Any person requiring supply of electricity for a purpose that is temporary in nature, and for a period of one year or less, may apply for temporary power supply in the prescribed form (Annexure- 1 or 2) along with documents prescribed in clause 4.16 and 4.17 of this Code. The applicant shall also furnish the proof of occupation of premises or NOC from owner of premises as the case may be. If the supply is required at a place owned by local authority, NOC from local authority is required. A temporary supply shall be initially for a period maximum up to one year subjec to extension based on technical feasibility at the time of extension.

(ii) Release of temporary connections is not a matter of right. It can be given only when it is technically feasible and subject to compliance of safety requirements as specified in CEA Safety Regulation, 2010.

(iii) In case temporary supply is required for construction purposes, where permanent connection will be required subsequently, feasibility of permanent connection shall first be examined prior to sanction of temporary connection. The feasibility of subsequent permanent connection shall be informed to the applicant before serving temporary connection.

(iv) The grant of temporary connection does not create a right in favour of the applicant for claiming a permanent connection, which should be governed by provisions of the Act and Regulations.

(v) If extension work is involved and is to be executed by the license at the request of the consumer then the licensee shall intimate to the applicant the charges to be paid for laying and also dismantling the extension work, meter rent together with the charges for the estimated monthly consumption and the rental of equipment and material.

Provided the consumer shall have the option either to take back the material used for temporary connection or receive credit of the depreciated value, as per prevailing rules, for materials dismantled and returned to stores, in good condition, after disconnection of supply. Licensee may recover security deposit from consumer for line or plant as per clause 6.3 of this Code.

(vi) An amount equal to estimated bill for three months or for the period of temporary connection requisitioned whichever less is payable before serving temporary connection, subject to replenishment from time to time and adjustment in the last bill after disconnection. In case the consumer fails to pay the bills in time and the advance with the licensee does not cover the charges for the balance period, the supply is liable for disconnection.

(vii) The licensee shall release the supply maximum within 3 working days of payment of charges and compliance of other requirements by the consumer, where extension of distribution mains is not required. Where extension of distribution mains is required, the supply shall be released within the 30 days in case of LT consumers, 60 days in case of HT/EHT consumers.

(viii) The consumer shall be responsible for upkeep of the line from the distribution mains to the point of supply.

(ix) The regular readings of the meter may be taken during the period of the temporary connection to ensure that the charges payable for actual consumption do not exceed the advance payment received. A month for the purpose of billing of temporary supply shall mean 30 days from the date of connection or part thereof.

(x) For extension of the period of temporary supply, the consumer shall apply to the licensee in writing at least 7 working days before the date of expiry of temporary supply.

(xi) After, the period of temporary supply is over and supply has been disconnected, the licensee shall prepare the final bill and send it to the consumer within 30 days from the date of disconnection of supply and return the balance amount, if any, within 90 days after disconnection of supply or within 60 days of submission of original money receipt or indemnity or declaration in case of loss of receipt by the consumer whichever is latter. The licensee will be liable to pay simple interest @ 1% per month or part thereof on the amount of refund outstanding from the due date of refund. The consumer may mention the desired mode of refund in application form."

4. From reading of clause 4.59 of the Supply Code, it is evident that the said clause envisages grant of temporary power supply to LT and EHT/HT consumers and the circumstances under which such connections are required to be given, with the obligations.

5. Clause 4.59 (iii) specifically states that in case temporary supply is required for construction purpose and where permanent connection will be required subsequently, feasibility of permanent connection will first be examined prior to sanction of temporary connection. In other words, according to counsel for the Petitioners that even though a temporary connection is required to be authorised for construction purposes but the Supply Code does envisage grant of permanent connection and in all these cases, permanent connections were granted after applications were made, though, admittedly, for construction purposes.

6. Learned counsel for the Petitioners submits that if a tariff notification is issued and categorization is provided for different kinds of connections, then the Supply Code cannot be overlooked and it cannot be in conflict with the said Code.

7. The other argument is that once a permanent connection has already been granted by the Power Distribution Company by virtue of the Supply Code, the same cannot be converted into a temporary connection.

8. Let us have a look as to what the Tariff Order dated 30.04.2016 provides for. The relevant tariff provision is clause 14.2.11, which reads as under:

"14.2 TARIFF SCHEDULE FOR HIGH VOLTAGE (HV) CONSUMERS

14.2.11 Temporary Connection at HV Applicability This tariff is applicable to all HV connections (other than the consumers availing Start up power Tariff (HV-8), of temporary nature at 220/132/33/11 KV.

Provided that for construction purpose, a consumer shall be given a temporary connection only.

Temporary supply cannot be demanded by a prospective consumer as a matter of right but will normally be arranged by the Licensee when a requisition is made subject to technical feasibility.

Tariff:-

One and half times of the normal Tariff applicable for the corresponding category of consumer for demand and energy charge."

9. This Tariff Notification or Order came into force w.e.f 01.04.2016 and was to remain in force for a period upto 31.03.2017 or till the issue of next Tariff Order, whichever is latter.

10. The stand of the Respondents, however on behalf of the Commission as well as the Power Distribution Company is that they do not see any conflict in Regulation 4.59 of the Supply Code of 2011 and the Tariff Order dated 30.04.2016. The Supply Code of 2011 broadly lays down the policy as well as the broad framework mechanism in place, governing matters covered under the Electricity Act, 2003.

11. The tariff making power which has been conferred upon the Electricity Commission is a statutory power granted to them under the Act, 2003 and the ambit of tariff making is part of Part VII of the Act, 2003 starting with Section 61 till Section 66 of the Act, 2003.

12. Section 62 of the Act, 2003 grants power to the appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Tariff Order dated 30.04.2016 is part of the said exercise of power by the Commission.

13. It is argued that due process and procedure laid down under the Act, 2003 has been followed which is a public notice followed by hearing. It is only thereafter that the Commission has approved and notified the tariff applicable for the year in question. It is not that such a decision has been taken unilaterally, as has been pleaded.

14. It is further argued that the power which has been conferred under Section 62 of the Act, 2003 is a statutory power and the same is not amenable to judicial review as has been repeatedly held by the Hon'ble Apex Court in many a decisions.

15. One of the very recent decision brought to the notice of this Court is the case of Waryam Steel Castings Pvt. Ltd. v. Punjab State Power Corporation Ltd. & Another; (2017) 8 SCC 190. Para 24 of the said decision has significance because the ratio in such matters under challenge has been laid down by the Apex Court, which reads as under:

"24. The nature of the power under the 2003 Act and the scope of interference with orders passed by the statutory/ appellate authorities thereunder has been dealt with by this Court in A.P. TRANSCO v. Sai Renewable Power (P) Ltd {(2011) 11 SCC 34}. The view expressed in paras 36 to 40 of the report in the said case, quoted below, may require to be specifically noticed: (SCC pp. 56-57)

"36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is as signed under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Sections 11(1)(c) and (e) is expected to fix the tariff as well as the terms of licence.

(emphasis supplied)

37. There are three different legislations in course and the Regulatory Commission has been constituted under the Reform Act, 1998 which in turn would be the Commission as contemplated under the Electricity Regulatory Commission Act, 1998 and the Electricity Act, 2003. In terms of first proviso to Section 82(1) of the Electricity Act, 2003 the State Electricity Regulatory Commission established by the State Government under Section 17 of the Electricity Regulatory Commission Act, 1998 and the enactment specified in the Schedule shall be the State Commission for the purposes of this Act. Even in terms of Section 185(3) of the Electricity Act, 2003 the said authority would be deemed to be an appropriate Commission for all purposes and intent as the Reform Act, 1998 has been specifically mentioned in Entry 3 of the Schedule to the Electricity Act, 2003. In other words, as already noticed the Regulatory Commission constituted by the said notification would be the appropriate Commission under all these Acts and is required to perform the functions as contemplated under Sections 11, 17 and 82 of the respective Acts.

38. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialised performance of functions that are assigned to the Regulatory Commission can hardly be assumed by any other authority and particularly, the courts in exercise of their judicial discretion. The Tribunal

constituted under the provisions of the Electricity Act, 2003, again being a specialised body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialised bodies. We would prefer to leave this question open to be considered by the appropriate authority at the appropriate stage.

(emphasis ours)

39. We do not consider it appropriate to go into the merit or demerit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the courts refrain from adverting into this arena.

(emphasis ours)

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/ revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one."

(emphasis supplied)

16. Attention was also drawn to the Constitution Bench decision rendered in the case of PTC India Ltd. v. Central Electricity Regulatory Commission; (2010) 4 SCC 603, which laid down the law in following terms:

"50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi -judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject- matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow.

51. In Narinder Chand Hem Raj v. Lt. Governor, HP {(1971) 2 SCC 747}, this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other Authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if Courts cannot so direct, much less the Tribunal, unless power to annul or modify is expressly given to it.

52. In Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India {(1985) 1 SCC 641}, this Court held that subordinate legislation is outside the purview of administrative action, i.e., on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation - otherwise known as secondary, subordinate or administrative legislation - is enacted by the administrative branch of the government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms - rules, regulations, by-laws etc; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as "enabling provisions". They demarcate the extent of the administrator's legislative power, the decision-making power and the policy making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and ultra vires.

53. Applying the abovementioned tests to the scheme of 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories - mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependant upon making of regulations under Section 178 by the Central Commission. Therefore, functions of Central Commission

enumerated in Section 79 are separate and distinct from function of Central Commission under Section 178. The former is administrative/adjudicatory function whereas the latter is legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1) (g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the

regulation under Section 178."

17. Keeping in mind the limitation on the powers of judicial review, in such matters, coupled with the statutory power which has been vested in the Commission under Section 62 of the Act, 2003, we do not feel that the Tariff Order dated 30.04.2016 can be struck-down to be violative of the clause 4.59 of Supply Code, 2011. The two operate in two different areas. In addition to that, we also hold that there is no conflict between clause 4.59 of the Supply Code which does deal with temporary power supply, where a supply is required to be made for construction purpose. It is evident that in terms of clause 4.59 of the Supply Code, 2011, application for construction purpose has to be treated as a temporary supply. If a separate tariff has been provided for, by the statutory Commission, the same cannot be interfered or struck-down to be violative of any of the provisions of the Act, 2003 or the Supply Code, 2011.

18. All these writ applications are therefore dismissed being devoid of merit.

19. It is made clear that during the pendency of these writ applications, the Bench allowed payment of one-half of the arrears outstanding on the basis of demands dated 29.12.2016 and for the rest, bank guarantee was required to be provided by the Petitioners. We make it clear that those interim orders will now merge into the final order passed today and the obligations created on the basis of their demand and difference between the payments made and the outstanding dues will be required to be paid by all these Petitioners forthwith.