

(2016) 04 BOM CK 0134
In the Bombay High Court
Case No : Writ Petition No. 2474 of 2013

Reliance Infrastructure Limited

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 226
Electricity Act, 2003 — Section 112, 14

Citation : (2016) 4 BCR 423

Hon'ble Judges : S.C. Dharmadhikari and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Ms. Anjali Chandurkar, i/b Mulla and Mulla and C.B.C, for the Appellant; Ms. Madhubala Kajale, AGP, Mr. Ratnakar Singh, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Kulkarni, J.—Rule made returnable forthwith. By consent of the parties and at their request, heard finally.

2. By this petition under Article 226 of the Constitution of India, the Petitioners assail Regulation 44.2(d) of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 (for short "the Regulations") which inter alia provides for the Gross Station Heat Rate (SHR) being a norm in operation of the Thermal Generation Station of the Petitioners situated at Dahanu.

3. In short the facts are : The 1st Petitioner has set up a thermal power station namely the "Dahanu Thermal Power Station", generating 500 Mega Watt (mw) electricity through two units of 250 MW and thus is a generating as well as a transmission and distribution licensee, under a licence issued to it under Section 14 of the Electricity Act, 2003. (for short "the EA, 2003"). The 1st Petitioner commenced the operation of its first 250 MW unit on 1st July, 1995 and the second unit on January, 1996. The 2nd Respondent the Maharashtra Electricity Regulatory Commission is constituted under the Maharashtra Electricity

Regulatory Commission Act, 1998 and is empowered to fix electricity tariff which was earlier fixed under the Electricity (Supply) Act, 1948. However, after the Electricity Act, 2003 came into force with effect from 10th June, 2003 repealing the provisions of Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 consolidating the laws inter alia relating to generation, distribution etc. and other variety of aspects concerning the electricity, the 2nd Respondent stands governed under the Electricity Act, 2003 and is discharging functions inter alia under Section 86 of the Electricity Act which includes determination of tariff for electricity generation within the State. Section 86(4) provides that the State Electricity Regulatory Commission in discharging its function shall be guided by the National Electricity Policy and the Tariff Policy.

4. The 2nd Respondent had framed the Maharashtra Electricity Regulatory Commissions (Terms and Conditions for Determination of Tariff) Regulations, 2005 (for short "2005 Tariff Regulation") for the period Financial Year 2005 to 2010-11, based on which the tariff for generation of electricity was fixed. These Regulations provided for a separate determination of tariff for generation, transmission, wheeling and retail sale of electricity. So also norms for operation of Thermal Generating Stations were fixed under these Regulations as contained in Regulation 33.1.3. As regards Gross Station Heat Rate (for short ?SHR?), the Regulation provided as under:

"33.1.3 Gross station heat rate

(a) Gross station heat rate for coal based generating stations

200/210/250 MW sets

500 MW and above sets

During stabilization period

2600 kCal/k Wh

2550 kCal/k Wh

Subsequent period

2500 kCal/k Wh

2450 kCal/k Wh

Note 1

In respect of 500 MW and above Units where the boiler feed pumps are electrically operated, the gross station heat rate shall be 40 kCal/k Wh lower than the station heat rate indicated above.

Note 2

For generating stations having combination of 200/210/250 MW sets and 500

MW and above sets, the normative gross station heat rate shall be the weighted average station heat rate."

The Petitioners state that the above Regulation provided for norms for Gross SHR inter alia for 250MW without any distinction between different generators operating in various power stations in the State and are made applicable across the board for all generators. The Petitioners state that the above regulation prescribed a Station Heat Rate which is a ratio between the heat input and the energy output, that is input to the boiler in the form of fuel which generates electricity. In the event of heat rate being higher, the same reflects the inefficiency of the generating set and if the heat rate is lower, the same reflects the efficiency of the generating set. Notwithstanding the design of the generating set which would give common parameters for all those using similar sets, the operational efficiency or inefficiency of the generator reflects in its performance being better or worse than the norm which is prescribed by the regulator namely the Central Electricity Regulatory Commission (for short "CERC") or the State Electricity Regulatory Commission. It is stated that this efficiency or inefficiency results in monetary gains or loss to the generator, who would share such gains or loss with the consumer as provided for in the Tariff Regulations. It is stated that these norms are the behaviour of the industry as a whole and are to be prescribed for a group or an industry. Accordingly, the Tariff Regulations specifically prescribed norms for operation of generating stations relating to the Station Heat Rate (SHR). Any variation in the SHR was a controllable factor and any gain or loss as may be approved by the 2nd Respondent is required to be shared with the consumer in accordance with Regulations.

5. The 2005 Tariff Regulations were in force till the financial year 2010-11 and the next Multi Year Tariff (MYT) period was thus to commence from 2011-12 and which would end in Financial Year 2015-16. For that purpose in August 2009, the 2nd Respondent published a draft approach paper which was prepared by one ABPS Infrastructure Advisory Pvt.Ltd. inviting comments from the various stakeholders. This draft approach paper in relation to the Gross Station Heat Rate took the average heat rate achieved during the financial year 2004-05 to 2007-08, as the opening level of the heat rate and applied a degradation factor of 0.2% per annum, for specifying the norms for the next control period. According to the Petitioners, this was without any basis. As regards the Petitioners Dahanu Thermal Power Station, the Station Heat Rate norms was prescribed as under:

FY

Station Heat Rate(kcal/kWh)

2010-11

2295

2011-12

2300

2012-13

2304

2013-14

2309

2014-15

2313

6. It is the Petitioner's case that the above draft approach paper indicated that the 2nd respondent had made a departure from the tariff required which had provided Station Heat Rate (SHR) of 2500 Kcal / Kwh for all generating stations and to provide separate Station Heat Rates (SHR) for coal based power stations in the State. The Petitioners by their letter dated 23rd October, 2009 submitted their suggestions to the draft approach paper inter alia objecting to the categorisation made by the second Respondent in relation to different generating stations being contrary to the Tariff Policy as also the principle adopted by various other Regulatory in the category.

7. The 2nd respondent for the multi year tariff period-Financial Year 2011-12 to 2015-16, issued another draft approach paper in July 2010, discarding the earlier draft approach paper. In this draft approach paper, the Station Heat rate (SHR) for different power plants namely coal based power plants of the Maharashtra State Power Generation Corporation (MSPGCL), and Tata Power Company (TPC) and for DTPS i.e. the Petitioner's power station at Dahanu came to be fixed. According to the Petitioners, the earlier Draft Approach Paper of August, 2009 and this Draft Approach Paper of July, 2010 did not have much difference in the Station Heat Rate. On 30th August, 2010, the Respondent No.2 issued a public notice inviting comments and suggestions on the draft MYT Regulations so published. The Petitioners submitted their comments by their letter dated 26th October, 2010 inter alia stating that the norms should be fixed for groups similarly situated which would define "industry standards" for plants of similar size and vintage, as they would be equitable as also rational.

8. The second Respondent thereafter issued the impugned Regulations, 2011 on 4th February, 2011. It is the Petitioners' case that their objections were not considered in notifying the impugned Regulations. The Petitioners are aggrieved by Regulation 44.2(d) by which Gross Station Heat Rate for thermal generating station of the Petitioners was fixed as under:"

44.2 Gross Station Heat Rate ? For existing Generating Stations.

a) Existing Coalbased Thermal Generating Stations, other than those covered under clauses (b), (c) and (d), below:

200/210/250 MW sets

500MW and above sets

2450 kcal/kWh

2425 kcal/kWh

Note 1

In respect of 500 MW and above Units, where the boiler feed pumps are electrically operated, the gross Station Heat Rate shall be 40 kcal/kWh lower than the gross Station Heat Rate indicated above.

Note 2

For Generating Stations having combination of 200/210/250 MW sets and 500 MW and above sets, the normative gross Station Heat Rate shall be the weighted average station heat rate.

b) Thermal Generating Stations of Maharashtra State Power Generation Company Ltd. (MSPGCL):kcal/kWh

Year

Koradi

Khaperkh

Chandrapur

Nasik

Bhusawal

Paras excluding Unit No.3

Parli excluding Unit No.6

FY 2010-11

2965

2560

2617

2722

2734

3186

2745

FY 2011-12

2975

2568

2626

2731

2742

3199

2753

FY 2012-13

2985

2575

2635

2740

2751

3212

2762

FY 2013-14

2873

2424

2539

2664

2671

3225

2679

FY 2014-15

2881

2429

2544

2670

2677

3237

2684

FY 2015-16

2889

2433

2549

2677

2683

3250

2690

Provided that the Commission may revise the norms for the heat rate for the above mentioned Generating Stations in case of Renovation & Modernisation undertaken for the Generating Station.

c) Thermal Generating Units of the Tata Power Company Ltd.

Generation Business (TPCG):

kcal/kWh

Year

Unit 4

Unit 5

Unit6 With Oil & Gas mix in proportion of 50/50

FY 2011-12

2570

2575

2519

FY 2012-13

2576

2583

2524

FY 2013-14

2581

2591

2529

FY 2014-15

2586

2573

2534

FY 2015-16

2591

2581

2539

In case variation in Oil and Gas mix is more than +/-5%, the Heat Rate for Unit 6 shall be approved considering the actual Oil and Gas Mix.

d) Thermal Generating Station of Reliance Infrastructure Ltd. Generation Business (RinfraG):

kcal/kWh

Year

Dahanu TPS

FY 2011-12

2350

FY 2012-13

2355

FY 2013-14

2360

FY 2014-15

2365

FY 2015-16

2370

9. The case of the Petitioners is that the Station Heat Rate (SHR) for existing coal based Thermal Generating Stations other than those covered under Clauses (b), (c) and (d) of Regulation 44.2 (supra) was 2450 kcal/kWh inter alia in respect of 250MW sets as installed at the Petitioners' power station. However, as regards the Petitioners' Dahanu Thermal Power Station, the same was granted a separate norm of Station Heat Rate, which was much lower than the norm of 2450 kcal/kWh set out in Regulation 44.2(a) of the impugned Regulations as compared to the norm set out in Regulation 44.2(b) or (c) for the Maharashtra

State Power Generating Corporation Ltd(MSPGCL) and Tata Power Company Ltd. (Generation Business). The Petitioners were thus aggrieved by the implementation of the Regulation 44.2(d) approached the Maharashtra Electricity Regulatory Commission (for short "MERC") by an application under Section 95 of the Electricity Act being Case No.45 of 2011 praying for deferment of implementation of the impugned Regulation. The Maharashtra Electricity Regulatory Commission disposed of the said case of the Petitioners by an order dated 2nd September,2011, inter alia, directing that the applicability of the impugned Regulation was deferred by one year taking into consideration the Petitioners' contention regarding operational difficulties and permitted the Petitioners to file petition for determination of tariff for the Financial Year 2011-12 within two months.

10. The Petitioners thereafter filed an application being Case no.156 of 2011 before the MERC for approval of business plan for the Multi Year Tariff Rate for the F.Y. 2011-12 to F.Y.2015-16 on the basis that Station Heat Rate to be considered at 2450 kCal/kWh for their Dahanu Thermal Power Station for each year from F.Y.2012-13 to F.Y.2015-16 and prayed before the MERC to consider its submissions made out in the said case as also in the earlier case (Case no.45 of 2011) and revise the Multi Year Tariff norms (MYT). The MERC passed an order dated 25th October,2012 whereby maintaining Station Heat Rate appearing in MYT Regulations for the F.Y. 2012-13 to FY 2015-16 inter alia giving the following reasons in paragraph 4.5.6 :

"The Commission is of the view that norms can be fixed station wise based on the historical performance of the plant. The SHR of the plant is dependent on the age of the plant, the technology used, the capital expenditure incurred overhauling the plant, regular repair & maintenance expenditure incurred and various other factors. Hence, there could be wide variations in SHR across plants. Further, if the Commission derives the benchmark considering only the industry-wide performance and does not consider the past performance of the generating plant, including the capital and operating expenditures incurred, the generating company may not have sufficient motivation to continue to operate as efficiently as it had been in the past. Therefore, a balanced approach is to provide a target which will adequately motivate the generating plant to perform at existing levels or better and still have rooms for earning incentives. Moreover, the MYT Regulations, 2011 have been finalised after following appropriate regulatory process after considering and deliberating on the views of all stakeholders on various issues. Considering all the facts discussed above, the Commission does not find any merit in altering the MYT norms for SHR. Therefore, though RInfraG has proposed a SHR of 2,450 kCal/kWh, the Commission has considered the SHR as per the MYT Regulations, 2011."

11. The Petitioners being aggrieved by the order dated 25th October,2012 (supra) approached the Appellate Tribunal for Electricity by filing Appeal No.4 of 2013 as per the provisions of Section 111 of the Electricity Act,2003 as the

norms were not revised and maintained by the said order. The said Appeal is admitted and is pending hearing.

12. Though an appeal is pending before the Appellate Tribunal for Electricity, the Petitioners have filed this petition under Article 226 of the Constitution of India on the ground that the validity of the impugned Regulation cannot be challenged before the Respondent No.2 (MERC) which is a Regulatory body or before the Appellate Tribunal for Electricity under the Electricity Act. The Petitioners contend that the challenge as raised to the impugned Regulation is on the ground that same is ultra vires the Electricity Act, 2003 and in violation of Articles 14 and 19(1)(g) of the Constitution of India.

13. The principal contention as urged on behalf of the Petitioners is that the impugned Regulation though prescribe Station Heat Rate for existing coal based thermal generating stations other than those covered under clauses (b), (c) and (d) is fixed at 2450 kcal/kWh for 250 MW sets, however, for the Petitioners Thermal Power Station, a separate norm of Station Heat Rate is fixed which is much lower than the norm of 2450 kcal/kWh as set out in Regulation 44.2(a) and also as compared to the norms set out in the Regulation 44.2(b) and (c) in respect of other power stations. Thus, the Petitioners' case is that the Regulation 44.2(a) ought to have been applied to the Petitioners Thermal Power Stations when higher norms are fixed for ?Parali? and ?Paras? Thermal Power Stations as conducted by the Maharashtra State Power Generation Company Ltd. It is the Petitioners' case that the Petitioners' performance is considered applying separate norms which is not the correct criteria. In fact the Petitioners' efficient performance has been treated to be a penalty in fixing the said norms under the impugned Regulation. Petitioner's better performance of the Thermal Power Project should be a reward to the generation Station which would be shared by the generating Station with the consumers, which ultimately results in not only an incentive/receivable to the generator but also results in reduction of tariff since the same is passed on to the consumer. The Regulations ought to have been framed on the principles and methodologies specified by the Central Electricity Regulatory Commission (CERC), as Section 61 of the Electricity Act would provide. A specific reference is being made by the Petitioners to Section 61(a) and (e) of the Act. Several grounds are raised in the petition on these lines to contend that the impugned Regulations do not comply with the norms set out by the Central Electricity Authority and Central Electricity Regulatory Commission in prescribing the norms for the period 2012-13 to 2015-16, in the impugned Regulations.

14. The 2nd respondent?Maharashtra Electricity Regulatory Commission responding to the Writ Petition, has filed a counter deposed by Shri.Dhorabjit Ghosh, Deputy Director (Legal) of the 2nd Respondent. The 2nd Respondent has raised an objection to the maintainability of the Petition on the ground that the Petitioners have failed in pointing out as to how the impugned Regulation is contrary to the Electricity Act, 2003 and onerous to the Petitioners and much less

violating any of the fundamental rights as alleged by the Petitioners. It is also contended that the issue as raised by the Petitioners is also sub judice before the Appellate Tribunal of Electricity in Appeal no.3 of 2013 which is pending and, therefore, on this ground also the Writ Petition need not be entertained. Respondent No.2 submits that the impugned Regulations are statutory in nature made in exercise of power inter alia conferred under Section 181 of the Electricity Act, 2003 and are framed in consonance with the provisions of Section 61(c) of the Electricity Act. It is stated that the aim of the Act and the Tariff Regulations is to encourage efficiency, economical use of the resources, good performance and optimum investment and, thus, the Tariff Regulations are focused on the concept of Availability Based Tariff (ABT), which is based on the principle of recovery of fixed costs and variable costs separately. As regards the Station Heat Rate (SHR) it is stated that the Tariff Policy notified by the Ministry of Power, Government of India is taken into consideration in framing Regulation 42.2. Respondent No.2 in that regard has relied upon Clause 5.3(f) of the Tariff Policy of the Government of India, which would state that the operating norms be efficient, relatable to past performance, capable of achievement and progressively reflecting increased efficiencies. It is contended that the Station Heat Rate (SHR) norm, for the Petitioners Thermal Power Station is based on historical performance of the said Power Station as the Station Heat Rate could vary from station to station based on the age of the Station, technology, regular maintenance of the Station and other factors. It is stated that if the 2nd Respondent derives the benchmark considering only the industry-wide performance and does not consider the past performance of the generating Station, the generating Company may not have sufficient motivation to continue to operate as efficiently as it had been in the past. Thus, a balanced approach is to provide a target which will adequately motivate the Generating Station to perform at existing levels or better and still have room for earning incentives. It is stated that the same approach was adopted even by the Central Electricity Regulatory Commission, where it had approved operating norms for some of the generating stations of National Thermal Power Corporation's (NTPC) station-wise based on the past performance of each of the stations. The 2nd Respondent has stated that the Appellate Tribunal For Electricity in its judgment dated 10th April, 2008 in Appeal No.8687 of 2007, which was inter alia in the context of Station Heat Rate of the Maharashtra State Power Generation Company Ltd. (MSPGCL), had directed that the Commission should engage appropriate independent agency, which can carry out a study in a time bound schedule (preferably within three months) to reasonably assess the achievable Station Heat Rate (SHR) of the plants owned by MSPGCL as also there was a direction that the Agency also be asked to suggest measures to improve the SHRs over a period of time. It is stated that in compliance of the said directive, the Commission had conducted an inquiry and awarded the assignment of "Determining the achievable performance parameters of the thermal plants" of MSPGCL, R?Infra and TPC to the Central Power Research Institute (CPRI), an autonomous expert technical organisation under the Government of India. Accordingly, studies were

undertaken by CPRI in respect of Unit 1 and 2 of the Petitioners Dahanu Thermal Power Station in 2010 and recommendations of CPRI gave the trajectory of Achievable Heat Rate of the petitioners Dahanu Thermal Power Station till FY 2015. This report of the CPRI was considered by the Commission and the following findings were given:

Year

Station Heat Rate(SHR)Rinfra Submission in Petition

kcal/kWh)

MERC Approved

DTPS Achieved

FY 2006-07

2315

2500

2278

FY 2007-08

2500

2500

2279

FY 2008-09

2500

2500

2300

FY 2009-10

2500

2500

2293

Likewise the Station Heat Rate in respect of other power stations belonging to the Maharashtra State Power Generating Corporation Ltd. as also the Tata Power Company Ltd. were taken into consideration by the Commission. It is, therefore, submitted that an appropriate exercise by way of a technical study has been undertaken in fixing Station Heat Rate as regards petitioner's Dahanu Thermal Power Station. The 2nd Respondent has therefore prayed for dismissal of the Writ Petition.

15. The submissions as urged by the learned counsel for the petitioner as also set out in the petition and noted by us above are principally of a discrimination in fixing the impugned norms of SHR as contained in Regulation 44.2(d) for the Petitioners Power Station, which is being criticized being different from the norms in respect of other power stations of MSPGCL and the Tata Power Company (TPCG). The contention is that the efficiency of the power station of the Petitioners has been held against them by the impugned norms and, thus, the Regulations becomes ultra vires Articles 14 and 19(1)(g) of the Constitution, as also they are rendered ultra vires the provisions of the Electricity Act for the reasons as we have noted above.

16. On the other hand, the learned Counsel appearing for the 2nd Respondent submits that the Petitioners have miserably failed to make out any case of breach of statutory rights or any discrimination violating the rights of the Petitioners under Article 14 and 19(1)(g). The learned Counsel for the 2nd Respondent submits that the impugned Regulation has been framed on the basis of the recommendations of the CPRI which is a autonomous body of Government of India. The Commission had deliberated on the report of the CPRI which has taken into consideration all technical material in regard to the performance of the Petitioners' Thermal Power Station as also the other power stations and accordingly, fixed the norms of the Station Heat Rate under Regulation 44.2(d). It is submitted that several many factors are taken into consideration by the CPRI in regard to each of the power stations and the Commission has also undertaken technical studies in that regard. It is submitted that the Petitioners are required to be non suited only on the ground that they have already approached the Appellate Tribunal for Electricity by filing Appeal No.3 of 2013 on the same issue as raised in the present Writ Petition and which is pending. It is submitted that even otherwise taking into consideration the submissions as made in the counter affidavit, no indulgence is required in the present Writ Petition.

17. We have heard the learned counsel for the parties and with their assistance, we have gone through the impugned regulations and the other relevant material as placed in the paper book. As regards the challenge as raised by the Petitioners the principal submission is that the Petitioners rights guaranteed under article 14 and 19(1)(g) stand violated by the impugned regulation , as urged by the petitioners and noted by us above. We may observe that the impugned Regulations are statutory Regulations made in exercise of power conferred inter alia by Section 181 of the Electricity Act. The 2nd Respondent Commission has followed a procedure and has undertaken an appropriate exercise by granting a complete opportunity to the Petitioner and all stakeholders by publishing a draft approach paper on the basis of the report of CPRI. The Petitioners were granted an opportunity to make a representation in that regard and after due consideration of the report of the CPRI which is on technical studies, undertaken by CPRI in respect of each of the thermal power stations has fixed the norms under Regulation 44(d) of the Regulations including in respect of the Petitioner's Thermal Power Station. The case of the Petitioner, however, is that there is

discrimination in fixing different norms in respect of different power stations under Regulation 44.2, and thus the guiding principle to frame Tariff Regulation as provided under Section 61(a) and (e) stands violated at the hands of Respondent No.2.

18. Having noted the facts in detail in the foregoing paragraphs we are not impressed with these submissions. The norms were set out in pursuance of order dated 25th October, 2012 passed by the Appellate Tribunal in case No.153 of 2011. Accordingly, the 2nd Respondent appointed CPRI to undertake a study and submit a report to fix the norms of Station Heat Rate (SHR) of different power stations in the State of Maharashtra. The report which was submitted by the CPRI was deliberated upon and the Petitioners and all other stakeholders were put to appropriate notice in publishing draft approach paper. Only after such technical material was considered and reviewed, the impugned Tariff Regulations came to be notified prescribing different norms of the Station Heat Rate for different power stations.

19. The 2nd Respondent considered the technical studies as undertaken by the CPRI to determine the achievable performance parameters of the thermal power plant of the petitioner more particularly unit 1 and unit 2. The recommendations of the CPRI gave a trajectory of achievable heat rate of the power station of the petitioners. The Commission considered these expert recommendations as also applied the norms under the Electricity Tariff policy namely that the operating norms should be efficient, relatable to the past performance, capable of an achievement and progressively reflecting increased efficiencies. The historical performance of the petitioners power station was taken into consideration. This is followed in respect of all the thermal power stations which are set out in the impugned regulation and it is not that a separate procedure is followed for the petitioner's power station. This is not disputed by the petitioners. The grievance of the petitioners is in regard to the actual fixing of the norms as set out in the impugned regulation which according to the petitioners ought to have been at a higher rate. This submission cannot be accepted for two fold reasons. Firstly, if this submission is accepted then the whole exercise of undertaking an expert analysis, the working of each of the thermal power station to determine the SHR by studying various factors including the past performance would be rendered nugatory. Secondly the tariff standards are required to be fixed on realistic data and its consideration, as public interest is directly involved in fixation of the electricity tariff. The contention of the petitioner if accepted it would also result in a situation that the realistic standards are deviated to fix unrealistic or a camouflage norms. This is surely not permissible and is fundamentally against public interest being against the interest of the consumers of electricity. The submission of the petitioner is only from the sole consideration of profits of the petitioner, while disregarding the norms and standards required to be followed by the 2nd Respondent in determination of the electricity tariff. It is for this reason an independent study of the performance of the Petitioner power station was undertaken to arrive at the impugned norm of the SHR. We thus, do not find that

in fixing these norms the 2nd Respondent Commission, has violated any provisions of the Act or violated any of the Petitioners rights as alleged by the Petitioners. The fundamental right to carry on business guaranteed by Article 19(1)(g) of the Constitution of India is not violated only because of an apprehension in the reduction of profits or returns and earnings. In the case of "Nazeeria Motor Services v. State of Andhra Pradesh & Anr., reported in AIR 1970 Supreme Court 1864", the Hon"ble Supreme Court held as under:

"7. This is sufficient to dispose of the challenge under Article 19(1)(g) as well. We may in this connection refer briefly to the conclusion of the High Court which was reached on a consideration of the affidavits filed before it. It has been found that there is no material which would warrant the conclusion that the increase in the surcharge of the fares and freight contemplated by the impugned Validating Act would constitute an impediment to the trade. The utmost that could be said was that it would result in the diminution of profits. Even on the assumption that the profits would be diminished or greatly reduced it cannot be held that there is any infringement of Article 19(1)(g)."

20. The contention of the Petitioner that there is a discrimination, is also without any substance, taking into consideration the necessity as pointed out in the report of the CPRI as also the material placed on record which shows that it would be imperative to fix different Station Heat Rate for the different power stations on their past performance and taking into consideration several other factors. Apart from this, it would not be the jurisdiction of this Court to decide on any technical parameters and come to a conclusion that the norms fixed by the 2nd Respondent are inappropriate and for that reason quash the same. This is completely within the realm of consideration of the expert bodies and under the mechanism as created under the Electricity Act.

21. There is another significant facet which also cannot be overlooked namely that the power to frame Tariff Regulation is conferred on the 2nd Respondent inter alia under Section 181 of the Electricity Act. It is an established position in law that power to frame regulations bears a legislative character. The Regulations constitutes a subordinate legislation. The counter affidavit discloses that appropriate procedure under 2003 Act has been followed by Respondent No.2 in framing the impugned Regulation. Further we have come to a conclusion that only because the SHR for the Petitioners power station has been fixed at a different rate below its peers and that too on the basis of a scientific study and materials there is no reasonable cause for the Petitioners to contend that the regulations are bad or discriminatory and that too only for the reason that it would adversely affect the profitability of the Petitioners. Profitability cannot be the sole consideration qua the SHR being fixed by following the statutory procedure. The regulations are framed in the interest of the consumers of electricity and by no standard their interest can be overlooked in considering such submissions as canvassed by the Petitioners. The object behind framing these regulations as evident in the statutory scheme and in the national

Electricity Policy cannot be allowed to be defeated on such specious pleas as urged by the petitioners. We are therefore of the clear opinion that the case of the petitioners that there is breach of the petitioners rights guaranteed under article 14 and 19(1) (g) of the Constitution is wholly unfounded and deserves to be rejected.

22. We cannot resist ourselves in observing yet another aspect and that is whether a petition under article 226 of the Constitution would be maintainable in the present facts and cause as raised in the writ petition. In this regard at the very outset we may observe that it was not appropriate for the Petitioners to have filed the present Petition when already the very issue as raised by the Petitioners was a subject matter in an appeal filed by the Petitioners under Section 111 of the Electricity Act before the Appellate Tribunal for electricity. The challenge is to the impugned tariff order on the very issue as raised in this petition. Section 111 of the Electricity Act, provides for a specific remedy to challenge the decision of the appropriate Commission. Section 111 of the Act reads as under:

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

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

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

(2) Every appeal under subsection (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty five days if it is satisfied that there was sufficient cause for not filing it within that period.

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

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

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

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

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

23. Section 112 provides for composition of the Appellate Tribunal. The Tribunal under Section 113 of the Act is required to be headed by a Chairperson who has been a Judge of the Supreme Court or the Chief Justice of a High Court. The powers of the Tribunal as provided under Section 120 of the Act are extensive which includes power of summons and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of documents, receiving evidence on affidavits, reviewing its decisions etc. Section 121 provides for hearing to the Appropriate Commission or other interested party as regards performance of the statutory functions by this Commission. Under Section 125 of the Act a decision of the Appellate Tribunal is subjected to an appeal before the Supreme Court.

24. If this is the scheme of the Act and the issue as raised by the Petitioners purporting to assail the Tariff Regulations, and as noted by us above, involves such technical issues/parameters for which the Legislature has specifically provided for a hierarchy of statutory remedies including an Appeal before an appropriate Authority created under the Act then, it was not proper for the Petitioners to approach this Court on the same issue and more particularly, when already an appeal was preferred by them before the Appellate Tribunal. It is clearly a case where the Tribunal was in a position to provide an adequate relief to the petitioners also in regard to the challenge as raised by the Petitioners in the present Petition. It cannot be said that the challenge could not be gone into by the Tribunal which is basically on technical considerations which attributes to the validity of Clause 44.2(d) as is clear from the contentions as raised by the Petitioners. If such a Writ Petition which raises a dispute involving technical considerations relating to electricity tariff, is entertained, when there is an alternative remedy provided by the Statute which is wholly efficacious and effective, then the statutory machinery which is created to redress such grievance would be rendered absolutely nugatory. Further any deviation from this statutory path and more particularly when such technical issues are involved, would also create an adverse impact on the citizens resulting this Court being repeatedly approached by such petitions, when in reality the remedy for them is

provided in the statute, this is definitely not the intention of the Legislature in framing the appeal provision under the Electricity Act. Looking at the facts of the case, we are of the clear opinion that the cause as raised by the petitioners is not of such a overwhelming nature which would make us deviate from the normal rule, not to entertain a writ petition when a equally efficacious and effective remedy is available which is already availed by the petitioners.

25. In the present case we follow the settled principles of law laid down in catena of decisions, while exercising appropriate restraint in exercise of our power under Section 226 of the Constitution of India, as we do not find that the present case is of a nature which would fall within a category of cases where we would unhesitatingly exercise our jurisdiction under Article 226 of the Constitution for protection of the statutory or fundamental rights of a litigant. In fact the verbose grounds as set out in the petition are nothing but issues which would be required to be raised in appeal before the appropriate Appellate Authority. We may thus observe that it is high time that such litigants who have means to approach the Court are appropriately cautioned in regard to such proceedings which they would adopt. This Writ Petition is a classic case where despite filing an appeal, the Petitioners have approached this court in this Writ Petition under the garb of violation of statutory and constitutional rights. Such tendencies of abusing the process of law are, therefore, required to be taken a serious note. We have, therefore, no hesitation to observe that the Writ Petition also deserves to be dismissed on this count.

26. In view of the foregoing reasons, the Writ Petition fails and is accordingly rejected with costs quantified at Rs. One lakh to be deposited by the Petitioners with Maharashtra State Legal Services Authority within two weeks from today.