

(2005) 02 CAL CK 0042

In the Calcutta High Court

Case No : F.M.A.T. 3704 of 2002 and C.A.N. 10170 of 2002

West Bengal Rolling Mills Association and Others	APPELLANT
Vs	
West Bengal Electricity Regulatory Commission and Others	RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Electricity (Supply) Act, 1948 — Section 57A
Electricity Regulatory Commission Act, 1998 — Section 27, 29(1), 29(2), 59
West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 — Regulation 18, 19, 32

Citation : AIR 2005 Cal 326 : (2005) 2 CALLT 104 : (2005) 2 CHN 357

Hon'ble Judges : Altamas Kabir, Acting C.J.; Asit Kumar Bisi, J

Bench : Division Bench

Advocate : S. Pal, N. Patheria and V. Meharia, Suresh Agarwal, for the Appellant; Pratik Dhar, for the Respondent

Final Decision : Dismissed

Judgement

Altamas Kabir, A.C.J.

1. This appeal has been filed by the West Bengal Rolling Mills Association, a society duly registered under the West Bengal Societies Registration Act, 1961, together with a member of the said association along with a partner of such member, u/s 27 of the Electricity Regulatory Commission Act, 1998, in respect of two orders dated 11th November, 2002 and 16th December, 2002, passed by the West Bengal Electricity Regulatory Commission with regard to the electricity tariff for the years 2000-01 and 2001-02 to be charged by CESC Ltd. from its consumers. In fact, the appeal has been argued on behalf of the appellants by Shri Suresh Agarwal, the appellant No. 2 and the honorary General Secretary of the petitioner association.

2. Appearing in support of the appeal, Mr. Agarwal submitted that prior to 1948 tariff determination was done by a Rating Committee under the Electricity (Supply) Act, 1948, wherein the consumers had no role to play. The provisions

for such Rating Committee contained u/s 57A of the aforesaid Act, 1948, was replaced by the Electricity Regulatory Commission Act, 1998, whereunder the Commission was empowered to determine the tariff of any Utility. According to Mr. Agarwal, by the said Act of 1998 the consumer was for the first time given a right to participate and represent in the proceedings before the Commission for the purpose of determining the tariff u/s 29(2) of the 1998 Act. Section 27 of the 1998 Act provides for a right of appeal to the High Court against determination of tariff by the Commission and as indicated hereinabove, the instant appeal has been preferred against the decision of the Commission determining the tariffs for the years 2000-01 and 2001-02.

3. Mr. Agarwal submitted that for determining the tariff for the said two years the Commission issued newspaper notices under Regulation 18 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulation, 2000, inviting objections from the general public for fixing the tariff for the said two years to be charged by CESC Ltd. from its consumers. Mr. Agarwal submitted that pursuant to the said notice the appellants filed their objection and after conducting a public hearing the Commission fixed the tariff for the years 2000-01 and 2001-02 by an order dated 7th November, 2001. Being aggrieved by such fixation, the CESC Ltd. preferred an appeal before this Court u/s 27 of the 1998 Act and the same was numbered as FMA 190 of 2002. Mr. Agarwal submitted that on 17th April, 2002, the appellants herein filed an application for being added as parties in the appeal but the same was rejected and by its judgment dated 14th May, 2002 this Court fixed the tariff for the years 2000-01, 2001-02 and 2002-03, to be charged by CESC Ltd. from its consumers. It was urged by Mr. Agarwal that in its judgment of 14th May, 2002, this Court held that the Rules and Regulations framed by the Commission under 1998 Act was ultra vires. This Court also held that the consumer had no locus standi to participate in the hearing before the Commission or before the High Court.

4. Being aggrieved by the said judgment and order dated 14th May, 2002, the appellants filed a Special Leave Petition, being SLP (Civil) No. C.C. 4860-61 of 2002, before the Hon'ble Supreme Court which was admitted and numbered as Civil Appeal No. 4050-51 of 2002. The Hon'ble Supreme Court upheld the contention of the appellants and allowed the appeal and by its said judgment dated 3rd October, 2002 remanded the matter to the Commission to redetermine the tariff for the years 2000-01 and 2001-02 and to fix the tariff for the years 2002-03 upon an application to be made by the respondent No. 2, CESC Ltd. Mr. Agarwal submitted that in its said judgment and order dated 3rd October, 2002, the Supreme Court categorically held that the consumer had locus standi to appear and oppose the tariff application made by the Utility before the Commission as well as before the High Court and that if aggrieved by the fixation of tariff by the Commission, the consumers had right to prefer an appeal before the High Court. Mr. Agarwal urged that despite the clear finding of the Hon'ble Supreme Court with regard to the above, the Commission refused to hear the appellants and even refused to accept the application made by the appellants

before the Commission on 22nd October, 2002. Mr. Agarwal contended that on such refusal the application was sent to the Commission by Speed-post on 5th November, 2002, but in spite of repeated requests the Commission refused to consider or dispose of the said application filed by the appellants with the intention of bypassing the objection made by the appellants and to pass an ex parte order in favour of the Utility.

5. Being aggrieved by the conduct of the Commission the appellants filed a writ petition, being W.P. No. 17660(W) of 2002, before this Court on 13th November, 2002. During hearing of the said petition it was disclosed by CESC Ltd. that the Commission had already determined the tariff by its order dated 11th November, 2002. On such consideration this Court dismissed the writ petition with liberty to the petitioners to file an appeal against the tariff order dated 11th November, 2002 passed by the Commission. Mr. Agarwal submitted that on 25th November, 2002 the appellants preferred the instant appeal against the said order dated 11th November, 2002 passed by the Commission and also filed an application for injunction therein on 28th November, 2002, being CAN No. 10170 of 2002. During the course of hearing of the said injunction application the Commission passed final orders on 16th December, 2002, fixing tariff for the years 2000-01 and 2001-02. This Court thereupon granted leave to the appellants to amend the injunction application as well as the Memorandum of Appeal. Mr. Agarwal submitted that as would be evident the Commission was determined to pass ex parte orders behind the back of the appellants in favour of CESC Ltd. Mr. Agarwal submitted that the appellants thereupon requested the Commission to supply certified copies of the order dated 16th December, 2002. Thereafter, on 30th December, 2002, the CESC Ltd. filed its tariff petition before the Commission for fixing the tariff both for the years 2002-03 and 2003-04. Inasmuch as, the Commission refused to supply the copies of the tariff petition filed by CESC Ltd. for the said two years, the appellants had filed a writ petition, being W.P. No. 276(W) of 2003, in which orders were passed to give inspection of the documents in question and to supply copies thereof to the appellants as applied for. Subsequently, on 31st January, 2003, the appellants filed their objection to the tariff petition filed by CESC Ltd. for determination of the tariff for the year 2002-03 and 2003-04.

6. The main thrust of Mr. Agarwal's submission was with regard to the refusal of the Commission to give a hearing to the appellants in the remand proceedings from the Hon'ble Supreme Court with regard to the fixation of tariff for the years 2000-01 and 2001-02. With the change in law the other question relating to right of the consumers of being heard during fixation of tariff for the years 2002-03 and 2003-04 were separated from the instant appeal and this appeal was confined to the tariff fixed by the Commission only for the years 2000-01 and 2001-02.

7. Mr. Agarwal urged that the main question of law to be decided in the instant appeal is whether under the 1998 Act and the regulations framed thereunder it

was mandatory on the part of the Commission to give the appellants a rehearing while redetermining the tariff to be charged by CESC Ltd. for the years 2000-01 and 2001-02 in order to ensure transparency in the proceedings relating to such redetermination. Mr. Agarwal submitted that connected with the aforesaid question was the fundamental question whether in such proceedings a right of participation has been ensured to the consumers and whether denial of such hearing was in violation of the provisions of the 1998 Act and the Regulations of 2000 as also the principles of natural justice.

8. In order to substantiate his aforesaid contention Mr. Agarwal took us through the judgment of the Hon"ble Supreme Court in the appeal preferred by the Commission against the judgment of the Division Bench of this Court in FMA No. 190 of 2002 decided along with several other appeals including that of the appellants herein, reported in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., . Mr. Agarwal urged that in the judgment, after discussing the changes which had been affected in the law relating to determination of tariff to be charged by a Utility from its consumers, the Hon"ble Supreme Court decided the important issues involved under separate headings. Mr. Agarwal submitted that the principle concerning the locus standi of the consumers before the Commission and also before the High Court in appeal was taken up first for consideration and on analysis of the relevant rules and in particular Regulation 18 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000, the Hon"ble Supreme Court held that the Commission could permit an association or body corporate or any group of consumers to participate in any proceeding before the Commission, on such terms and conditions, including the nature and extent of the participation as the Commission might consider appropriate. Under Regulation 19 the Commission was also empowered to notify a procedure to different groups for the purpose of representation before the Commission. Mr. Agarwal submitted that the Hon"ble Supreme Court also took note of the fact that under Regulation 32 the manner of hearing before the Commission is also provided for. Since the Rules and Regulations framed by the State Government and the Commission would have to be placed before the State Legislature u/s 59 of the 1998 Act, they would have statutory force.

9. Mr. Agarwal submitted that the Hon"ble Supreme Court had observed in no uncertain terms that a combined reading of the provisions of the Act, Rules and Regulations, clearly show that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right has to be regulated by the Commission, The Hon"ble Supreme Court was, however, quick to add that the manner of exercise of such right is neither indiscriminate nor unregulated and that the statute does not give individual right to everyone of the consumers and the same is controlled by the Regulations. Therefore, the question of indiscriminate hearing would not arise. The Supreme Court went on to observe further that that apart when a statute confers a right which is in conformity with the principles of natural justice the same could not be negatived by a Court on a supposition that there is every likelihood of an

unmanageable hearing before the forum concerned. Furthermore, while the requirement of principles of natural justice can be taken away by a statute, such a right when given under the statute cannot be taken away by the Court on the ground of practical inconvenience even if such inconvenience does, in fact, exist.

10. Mr. Agarwal contended that when the Hon''ble Supreme Court had interpreted the rules and regulations and the statute to hold that the consumers had a right to be heard in the matter of fixation of tariff by the Commission in a regulated manner, the Commission acted erroneously in publicly declaring that no further hearing would be given to any of the parties in regard to fixation of the tariff payable by the consumers for the years 2000-01 and 2001-02.

11. Mr. Agarwal then pointed out that the Hon''ble Supreme Court had gone into the question relating to tariff determination and had come to the conclusion that not only Schedule VI of the 1948 Act but also the procedure incorporated u/s 29(1) and the principles enumerated in the guidelines found in Clauses (b) to (g) of Section 29(2) of the 1998 Act would have to be taken into consideration while determining the tariff. Mr. Agarwal submitted that the Commission had proceeded solely on the basis of Schedule VI of the 1948 Act without taking into consideration the principles and guidelines enumerated in Clauses (b) to (g) of Section 29(2) of the 1998 Act while determining the tariff for the two years in question and had, therefore, taken recourse to a procedure different to that suggested by the Hon''ble Supreme Court. Mr. Agarwal submitted that on such ground also the tariff determined by the Commission for the years 2000-01 and 2001-02 was erroneous and was liable to be set aside with a direction to the Commission to redetermine the same after giving an opportunity of hearing to those who wished to avail of such hearing before the Commission.

12. In relation to the fixation of tariff for the said two years, Mr. Agarwal also laid stress on the costs incurred by the different plants of the Utility and contended that the determination of tariff had not been done in relation to the Plant Load Factor whereunder the costs for generation of electricity per unit would have come down considerably. Mr. Agarwal referred to certain facts and figures which, in our view, is required to be gone into by technical persons having the expertise to do so.

13. Mr. Agarwal also referred to transmission and distribution losses and other expenses, including cross subsidy, in support of his submission that the tariff for the two years in question had not been properly determined and required redetermination.

14. Mr. Agarwal concluded on the note that the Hon''ble Supreme Court while disposing of the appeals had given certain directions to the Commission which included the right to take part in the proceedings before the Commission on being permitted to do so in terms of the Regulations framed by the Commission.

15. In the course of his submissions Mr. Agarwal relied on the decision of the Hon''ble Supreme Court in S.N. Mukherjee Vs. Union of India, , wherein on the

question of the application of the principles of natural justice it was observed by the Hon''ble Supreme Court that in view of the expanding horizon of such principle, the requirement to record reasons can be recorded as one of the principles of natural justice which governed exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction had been conferred on the administrative authority. Mr. Agarwal urged that since in the instant case the rules and regulations themselves embodied the principles of natural justice, it was all the more reason for the Commission to give effect to such principles and to proceed in the matter in accordance with law.

16. Appearing on behalf of the West Bengal Electricity Regulatory Commission, Mr. Pratik Dhar submitted that Mr. Agarwal and other objectors had been duly heard by the Commission when it initially fixed the tariff for the years in question. There had, therefore, been no denial of the right to be heard and the Commission had fixed the tariff earlier after hearing all concerned. According to Mr. Dhar, since the matter had been sent back on remand by the Hon''ble Supreme Court to the Commission with certain directions, the Commission felt that for the two years in question no further hearing was required to be given to any of the parties. Mr. Dhar drew the attention of the Court to paragraph 34 of the judgment of the Hon''ble Supreme Court which reads as follows;

34. "At one point of time we thought it appropriate to decide the legal issues pertaining to interpretation of the statute alone and to remit the matter back to the Commission to reconsider the factual issues to be determined by the commission in the light of our findings on the legal issues. However, after hearing the parties at length, we thought that the ends of justice would be served if we could finally decide all the important issues arising in these appeals and thereafter to remit the matter to the Commission only, to apply those principles and recalculate the tariff on the basis of our findings and directions given in these appeals. It is in this light that we will now endeavour to settle the questions involved in these appeals."

17. Mr. Dhar submitted that after making the aforesaid observation the Hon''ble Supreme Court went on to decide all the various issues and left the matter of recalculation of the tariff for the two years in question to the Commission on the basis of such findings and directions given in the appeals.

18. Mr. Dhar submitted that the appeals at the instance of the association and its General Secretary were misconceived and was liable to be dismissed.

19. Mr. Samaraditya Pal, learned Senior Counsel, who appeared for the CESC Ltd. contended that the appellant, Shri Agarwal had proceeded under the misconception that the Hon''ble Supreme Court had directed the Commission to give the representatives of the consumers a further hearing before re-determination of the tariff for the years 2000-01 and 2001-02. Mr. Pal submitted

that what had been decided by the Hon"ble Supreme Court was the principle that the representatives of the consumers had a right to be heard before the Commission in such manner as was decided by the Commission. Mr. Pal submitted that the said findings of the Hon"ble Supreme Court had been wrongly interpreted on behalf of the appellants to mean that even in the instant case the Hon"ble Supreme Court had directed the Commission to give the concerned parties a further hearing before redetermining the tariff for the years in question. Mr. Pal submitted that it had been very clearly stated by the Hon"ble Supreme Court that in order to decide the matter relating to tariff the Commission was only required to apply the principles decided and to recalculate the tariff on the basis of the findings and the directions given in the appeals. Referring specifically to paragraph 101 of the judgment Mr. Pal pointed out that while observing that the right of Audi Alteram Partem is a valuable right recognised under Indian Constitution the Supreme Court indicated that in the instant case since all the parties had been duly heard on the merits of the case any prejudice on the ground of violation of the said principle stood obliterated and did not require any further consideration. Mr. Pal submitted that the Supreme Court was deciding a principle and in doing so had observed that such principle had already been complied with.

20. Mr. Pal went on to contend that the information as given by Mr. Agarwal with regard to Plant Load Factor of the different generating units had been duly taken into consideration by the Commission in fixing the tariff and the Plant Load Factor of the Mulajore Plant in particular had been wrongly shown to have a much higher generating capacity than its actual capacity. Mr. Pal submitted that all the other questions relevant to the determination and fixation of tariff had been gone into in detail by the Hon"ble Supreme Court which observed that no further consideration was required to be given in that regard and that it was only left to the Commission to apply the principles as decided to recalculate the tariff on the basis of the findings and directions given in the appeals.

21. Mr. Pal urged that the appeal was misconceived and was liable to be dismissed.

22. We have given our anxious consideration to the issues raised in these appeals and while we appreciate the submissions made by Mr. Agarwal appearing in person, we are unable to agree with his submission that the Supreme Court intended a fresh hearing to be given to concerned associations and bodies before redetermining the tariff for the years 2000-01 and 2001-02. It is no doubt true that the Hon"ble Supreme Court has recognised the right of an association or consumers to be heard before the Commission while determining the tariff to be charged by a Utility for a particular year, but in the instant case the Hon"ble Supreme Court in several portions of its judgment made it clear that only a recalculation was required to be done by the Commission for the two years in question on the basis of the findings of the Hon"ble Supreme Court on the different issues raised at the time of hearing of the appeals in which the

appellants herein also participated.

23. Apart from paragraph 34 of the judgment which was referred to by Mr. Dhar and has also been quoted hereinabove, in paragraph 106 of the said judgment the Hon''ble Supreme Court also sounded a note of caution and made it clear that the fact that many of the appellants had been heard by the Supreme Court did not ipso facto confer a right of representation on them in the future proceedings either before the Commission or before the High Court.

24. Having gone into the various issues in detail, the Hon''ble Supreme Court appears to have felt that no further hearing was required to be given by the Commission while redetermining the tariff for the years in question, since the Commission was only required to act in terms of the directives of the Hon''ble Supreme Court. After the decision of the Hon''ble Supreme Court there was no scope for any further hearing to be given to any of the parties for the purpose of redetermination of the tariff for the years in question.

25. Apart from the above, even on the factual aspects it has been shown that the Commission did not rely only on Schedule VI of the 1948 Act but also on the provisions of Section 29(2)(b) to (g) of the 1998 Act and, in any event, its decision was in keeping with the National Power Plans formulated by the Central Government. Even the allegation relating to submission of documents by CESC Ltd. to the Commission after remand from the Hon''ble Supreme Court has not been substantiated. Moreover, the Commission had heard all the parties at the initial stage and the appellants before us were also given complete hearing by the Hon''ble Supreme Court which possibly felt that all the questions raised in the appeals had been gone into and only the matter of calculation was left to the Commission.

26. The tariff for the years in question appears to have been determined by the Commission in keeping with the findings and observations of the Hon''ble Supreme Court on the various issues raised, including the Plant Load Factor which appears to have been assessed on the high side by the appellants.

27. No interference, in our view, is, therefore, required with the tariff as re-determined by the Commission for the years 2000-01 and 2001-02 and the appeal accordingly fails and is dismissed.

28. There will, however, be no order as to costs.

29. If an urgent xerox certified copy of this judgment is applied for, the same is to be supplied to the applicant expeditiously, subject to compliance with all the required formalities.

Asit Kumar Bisi, J.

30. I agree.