(2019) 08 CAL CK 0036

In the Calcutta High Court

Case No : Writ Petition No. 22129, 22013, 22014, 20383, 20385, 20386, 20384, 20388, 20387, 5074, 1591, 1591, 1595, 1598, 1601, 6954, 6955, 8071, 8074, 8077, 8642, 8643, 8731, 13519, 14501, 14506, 14991, 14992, 14993, 16677, 16678, 17925, 21920 (W) of 2011, 3465, 26

West Bengal State Electricity Distribution Company Limted APPELLANT

Vs

Sudarshan Pahari & Another RESPONDENT

Date of Decision : 21-08-2019

Acts Referred:

Electricity Act, 2003 — Section 2, 14, 14(1), 14(2), 14(3), 14(4), 14(5), 15(1), 15(2), 16, 18(2)(a), 18(2)(c), 29, 32(3), 33, 36, 39(2)(d)(ii), 40(c)(ii), 41, 42, 42(2), 42(4), 42(5), 42(6), 42(7), 43, 43(1), 43(3), 45(2), 47(1), 47(4), 47(5), 50, 51, 52(2), 57, 57(1), 57(2), 57(3), 59(1), 61, 61(g), 62(2), 62(5), 64(1), 64(3), 66, 77, 79, 79(1), 79(1)(f), 84, 85, 86, 86(i), 86(1)(f), 86(f), 91(1), 91(2), 92(1), 94, 95, 96, 97, 111, 125, 126, 127, 127(1), 128(1), 128(5), 128(8), 130, 135, 136, 137, 138, 139, 143, 178, 181, 181(1), 181(2)(za), 181(2)(zb)
Code Of Criminal Procedure, 1973 — Section 100, 345, 346
Indian Penal Code, 1860 — Section 193, 228
Code Of Civil Procedure, 1908 — Order 6 Rule 17
West Bengal Electricity Regulatory Commission (Standard Of Performance Of Licensees Relating To Consumer Services) Regulation, 2010 — Regulation 5.1, 5.1(a), 5.1(b), 5.1(c), 5.1(d), 7.3, 13.18, 13(19), 13. 19, 14, 14(1), 14.1, 14(2), 14.2, 14(3), 14.3, 14(4), 14(5), 14.5, 15, 15.0, 15(1), 15(3)

Citation : (2019) 08 CAL CK 0036

Hon'ble Judges : Rajasekhar Mantha, J

Bench : Single Bench

Advocate : Srijan Nayak, Rituparna Maitra, Sujit Sankar Koley, Raj Kumar Basu, Kanak Kiran Badopadhyay, Arindam Mitra, Pratik Dhar,Rittwik Pattanayak, Samir Haldar, Pappu Adhikary, Cardina Roy, Subhas Chandra Bandopadhyay,Kartik Kumar Ray

Final Decision : Allowed

Judgement

Rajasekhar Mantha, J

1. A Common question is raised by the West Bengal Electricity Distribution Company Limited (WBSEDCL) in these batch of writ petitions challenging the

Constitutional vires of the West Bengal Electricity Regulatory Commission (Standard of Performance of Licensees Relating to Consumer Services) Regulation, 2010 (2010 Regulation) introduced by Notification 46 dated 31st May 2010.

2. The WBSEDCL, a distribution Company under the Electricity Act 2003, (2003 Act) challenges the legality of Regulation 14(1), 14(2), 14(3), 14(4) and 14(5) in the aforesaid 2010 Regulations. The said regulations have been framed by the West Bengal Electricity Regulation Commission (Commission) in exercise of powers conferred under Section 181 Sub- Section 2 Clause (za) and (zb) read with Section 57(1) and 59(1) of the Electricity Act, 2003. The said regulations were published in the Kolkata Gazette on the 31st May, 2010 vide Notification No. 46. The said Regulations are set out herein below.

"14.0 Enforcement Mechanism:

14.1 Every licensee shall register every complaint regarding failure to maintain the standards of performance specified in these regulations and preferred by the consumers / intending consumers affected for the said failure. The licensee shall also communicate a complaint number with date to the consumer/ intending consumer who prefers such complaint as soon as possible, but not later than 7 working days from the date of receipt of the complaint. Moreover, the licensee shall inform the consumers/ intending consumer immediately regarding the action taken by the licensee to mitigate the problem/ grievance of the consumers/ intending consumer. For this purpose the licensees shall maintain all necessary records consisting of all essential information regarding the consumer/ intending consumer concerned, the nature of his complaint and the necessary details of the latter.

14.2 Any consumer/ intending consumer who is affected by any failure of a licensee to meet the standards of performance, specified in these regulations, may submit a complaint to the Grievance Redressal Officer concerned of the licensee in the matter of the said failure of performance excluding the cases under sections 126, 127, 135, 136, 137, 138 and 139 of the Act.

A consumer / an intending consumer may also submit an application to the Grievance Redressal Officer concerned of the licensee claiming compensation for such failure to perform and also for delay in reconnection with reference to the time limits specified in the Supply Code or order of any competent court of law or competent authority or for wrongful disconnection including disconnection under section 135 of the Act if it was wrongful. The Grievance Redressal Officer after receiving such complaint shall dispose of the same as per Regulations made under sub-sections (5) and (7) of section 42 of the Act.

14.3 If the affected consumer/ intending consumer is not satisfied with the order of the Grievance Redressal Officer or does not receive any order from that Grievance Redressal Officer whom he has approached within the time specified in Regulations made under sub-sections (5) and (7) of section 42 of the Act, he may submit a written representation to the Ombudsman for settlement / redressal of his grievance and / or payment of compensation which the licensee is liable to pay to the affected consumer/ intending consumer for failure to meet the standards of performance in terms of these regulations. The working procedure for submitting such representation will be as per the regulations made under subsections (5) and (7) of section 42 of the Act.

14.4 The Ombudsman shall accept such representation and after giving reasonable opportunity to both parties of being heard pass reasoned and speaking settlement order in the matter of the grievance of consumer or affected consumer/ intending consumer and / or payment of compensation which the licensee is to pay to the affected consumer/ intending consumer in terms of these regulations. The working procedure for disposal of such representation will be as per Regulations made under sub-sections (5) and (7) of section 42 of the Act.

14.5 The licensee shall pay the compensation in cash / cheque / demand draft in favour of the affected consumer/ intending consumer as per order of the Grievance Redressal Officer or the order of the Ombudsman, as the case may be, within a period of thirty days from the date of such order. When such payment is made as per order of the Ombudsman the licensee shall send a report of compliance to the Ombudsman within 15 days from the date of compliance. In case of possible delay in complying with the order of Ombudsman, the licensee shall seek permission of the Ombudsman before expiry of thirty days."

3. By a Notification No. 56, dated 26th August, 2013, in purported exercise of powers under Section 181(1) and Section 181(2) Clause (za) and (zb) read with Section 57 Sub-Section 1 and 2 and Section 59 Sub-Section 1 and Section 97 of the Electricity Act, 2003, the WBERC framed and introduced the West Bengal Electricity Regulation Commission (Guidelines for Establishment of Forum for Redressal of Grievances of Consumers and Time and manner of Dealing with such Grievances by the Ombudsman) Regulations 2013. The relevant portions of the said Regulations are set out herein below :-

"3.5 The grievance redressal offices should be headed by appropriately high-ranking officers of the distribution licensee not below the rank of an Executive Engineer, having suitable supervisory roles in running of the organisation. If in the organisation of any distribution licensee, there is no equivalence between the officers it decides to deploy as GRO and the foregoing general description of such officers as Executive Engineers, the said distribution licensee may, with the prior approval of the Commission deploy officers of its choice as GRO at different levels in its organisation.

4. Functions of the Grievance Redressal Officers:

4.1 The functions of the GRO at the level of sub-districts/districts/regions/zones consist of receiving petitions from consumers stating their respective grievances; acknowledging them in writing; consulting superior technical experts, if called for, holding spot inspections, if considered necessary; and hearing the complainants; redressal of such grievances within specific time limits as laid down in this set of Regulations, within the framework of the Electricity Act, 2003, and the Rules of Regulations made thereunder; passing reasoned and speaking orders towards the aforesaid goal stating clearly about redressal of the grievance and awarding of compensation, if any, separately; communicating such orders to the petitioner; maintaining an account of grievance petitions received, disposed of, etc.; submission of reports, returns, statistics as may be asked for by the corporate head quarters; and any other duty in relation to redressal of consumers' grievances as may be assigned to them by the higher authorities.

4.2 The CGRO(s) at the corporate headquarters shall have all the responsibilities of the GRO at the sub-district/ district /region/zone levels in redressing the grievances of consumers. In addition, any one of them specifically identified by the management of each of the distribution licensees shall work as the clearing house of all consumers' grievances pertaining to that distribution licensee as a whole. In that capacity, he shall be responsible for maintenance and collection of all statistics, reports, returns, etc. from all other GRO, including other CGRO, preparation of all reports, returns, etc. in this behalf for the distribution licensee as a whole, submission of such reports, returns, etc. to the Commission and/or any other superior authority, corresponding with all concerned including the Ombudsman in the matter of consumers' grievances, keeping track of individual consumer's grievances that might have been forwarded to the GRO at the sub-districts/districts/regions/zones etc. from the corporate headquarters, etc.

4.3 The Ombudsman shall dispose of all the consumers' grievances on getting representation from the aggrieved consumers against any order of any GRO/ CGRO, irrespective of whether the latter is functioning at the corporate level or a district, sub-district, region or zone level.

5. Dissemination of Information about the Forum for Redressal of Greivances:

5.1 A gist of the grievance redressal procedure and the names as also the official designations of the GRO, CGRO(s) and of the Ombudsman, along with their full office addresses, telephone numbers, FAX numbers, e-mail addresses, working day period, etc. should be prominently displayed along with format at Annexure-I:

a) near the main entrance of the office of the distribution licensee,

b) near the main entrance of the sub-offices of the distribution licensee,

c) at the bill Payment Halls/Centres of the distribution licensee,

d) in the website of the distribution licensee.

5.2 In every bill, it shall be notified specifically that grievance redressal procedure and other details as mentioned in the regulation 5.1 above, will be available at the locations as specified in regulation 5.1 (a) to (d) above.

5.3 Any change in the above mentioned particulars relating to the GRO and/or CGRO(s) and/or Ombudsman should lead immediately to the necessary corrections/updating of the notice board/display board and website mentioned above.

5.4 The distribution licensee shall bring to the notice of its consumers all the above mentioned particulars through an advertisement in at least three widely circulated newspapers one of which shall be in Bengali and another in local language, in January of every year indicating that the information mentioned in regulation 5.1 are available at the locations as specified in regulation 5.1.

7.3 If a grievance, in the considered opinion of the GRO needs either a consultation with a technical expert belonging to the organisation of the licensee, or a spot inspection, or both, the GRO, shall after holding the said consultation and/or the spot inspection and after giving a reasonable opportunity of hearing to both parties, prepare a draft settlement order with analysis of the grievance redressed and details of the compensation, if any, awarded, in writing within a reasonable time, with direction to submit the view of both the parties on the draft order within a period of time to be fixed by the GRO. In this context, the views shall be provided by the licensee through any concerned officer in relation to the grievance other than GRO or CGRO.

7.3.1 On receiving the views on the draft order as referred to in regulation 7.3, if submitted within the limit time by the parties or any of the parties within the time limit, the GRO shall fix up a date giving opportunity of further hearing to both the parties following which he shall pass a reasoned and speaking final order analysing the grievance that has been redressed and compensation, if any, awarded in details in writing disposing of the grievance petition within 60 (sixty) working days from the date of sending the acknowledgement to the petitioner. In case of receiving no view of the draft order as referred to in the regulation 7.3, the GRO based on the draft order and without any further hearing shall pass the reasoned and speaking final order analyzing the grievance that has been redressed and compensation, if any, awarded in details in writing disposing of the grievance petition within 60 (sixty) working days from the date of sending the acknowledgement to the petitioner.

10.3 The Ombudsman shall call for a report with all the relevant details from the concerned distribution licensee on sending to the latter, a copy of the grievance representation/complaint, under intimation to the aggrieved consumer. The Ombudsman shall fix a time limit, to be decided upon by the Ombudsman, by which time, the distribution licensee shall submit the report. The distribution licensee shall be asked to send a copy of the report to the aggrieved consumer/ complaint.

10.4 After perusal of the available records in the form of the grievance petition along with its enclosures, if any, and the report of the distribution licensee with its enclosures, if any, the Ombudsman shall after giving a reasonable opportunity of hearing to both parties, prepare a draft settlement order in details and in writing in connection with only the disputed part of the grievance, on which the GRO's and CGRO's order and/or award of compensation and/or penalty, if any has been challenged by the aggrieved consumer, within a reasonable time with direction to submit the views of both the parties on the draft order within a period of time to be fixed by the Ombudsman."

4. By Notification No. 57 the WBERC amended and called it the WBERC (Standards of Performance of Licensees Relating to Consumer Services) (First Amendment) Regulations, 2013. Regulation 13.19 was introduced delegating the powers of the Commission to award Compensation and Penalty under Section 57(2) to the Grievance Redressal Officer (GRO) including Central Grievance Redressal Officer (CGRO) and to the Ombudsman under Section 42(5) and 42(6) of the 2003 Act. Regulation 14(1) to 14(5) of the 2010 regulations also came to be amended and substituted. The relevant regulations are set out hereunder.

"18. After the regulation 13.18 of the principal Regulations the following regulation shall be inserted:

"13.19 For the purpose of determination of amount to be paid as compensation based on the regulation 15 of these Regulations, the Commission grants the power to the Grievance Redressal Officer(s) (in short 'GRO') including Central Grievance Redressal Officer (in short 'CGRO') appointed by the licensee under sub-section (5) of Section 42 of the Act and to the Ombudsman(s) appointed under sub-section (6) of section 42 of the Act and to compensation by the licensee and for such purpose the Commission delegates its power under sub-section (2) of Section 57 of the Act to GRO(s) and to the Ombudsman(s) for determination of compensation."

19. For the regulation 14 of the principal Regulation the following regulation shall be substituted:

"14.0 Enforcement Mechanism:

14.1 Every licensee shall register every complaint regarding failure to maintain the standards of performance as provided in these Regulations and preferred by the consumers/intending consumers affected for the said failure. The complaint shall be made in writing. The licensee shall also communicate a complaint number with date to the consumer/intending consumer who prefers such complaint as soon as possible, but not later than 7 working days from the date of receipt of the written complaint. Moreover, the licensee shall inform the consumers/intending consumer immediately regarding the action taken by the licensee to mitigate the problem/grievance of the consumers/intending consumer. For this purpose the licensee shall maintain all necessary records consisting of all essential information regarding the consumer/intending consumer concerned, the nature of his complaint and the necessary details of the later.

14.2 Any consumer/intending consumer who is affected by any failure of a licensee to meet the standards of performance, specified in these Regulations, may submit a written complaint to the GRO concerned of the licensee in the matter of the said failure of performance excluding the cases under sections 126, 127, 135, 136, 137, 138 and 139 of the Act. A consumer/an intending consumer may also submit a written application to the GRO concerned of the licensee claiming compensation for such failure to perform and also for delay in reconnection with reference to the time limits specified in the Supply Code or for wrongful disconnection excluding disco0nnectoin under section 135 of the Act if it was wrongful. The working procedure for disposal of such application will be as per Grievance Redressal Regulations.

14.3 If the affected consumer/intending consumer is not satisfied with the order of the GRO or does not receive any order from the GRO whom he has approached within the time specified in Grievance Redressal Regulations, he may submit a written application to the Ombudsman for redressal of his grievance and/or payment of compensation which the licensee is liable to pay to the affected consumer/intending consumer for failure to meet the standards of performance in terms of these Regulations. The working procedure for disposal of such application will be made in accordance with Grievance Redressal Regulations.

14.4 While disposing of the written application under regulation 14.2 and 14.3 of these Regulations, the GRO or the CGRO or the Ombudsman, as the case may be, in their order of disposal shall specifically deal with each and every argument and evidence submitted during the proceedings along with the reasons for acceptance or rejection of such argument and evidence. During hearing of the proceedings both the parties shall provide written submission in support of their hearing. The order of the GRO and ombudsman shall deal with the proceedings only on the basis of written application under regulation 14.2 and 14.3 of these Regulations and written submission during hearing.

14.5 The licensee shall pay the compensation in cash/cheque/demand draft in favour of the affected consumer/intending consumer as per order of the GRO or the order of the Ombudsman, as the case may be, within a period as specified in sub-section (3) of section 57 of the Act. The compliance of order of the GRO or CGRO or Ombudsman will be made in accordance with Grievance Redressal Regulations."

5. The said 2010 Regulations came to be amended for the Second time by Notification 61, published in Kolkata Gazette on 7th of January, 2014 by the West Bengal Electricity Regulatory Commission(Standard of

Performance of Licensees Relating to Consumer Services) (2nd amendment) Regulations of 2013. (2nd amendment of 2013).Regulation 13(19) of the 2013 Regulations was further amended in connection with the power of the CGRO and Ombudsman to award Compensation and Penalty. Clause 2 of the Notification

No.61 is set out hereinbelow.

"2. For the regulation 13.19 of the principal Regulations the following regulation shall be substituted:-

"13.19 For the purpose of determination of amount to be paid as compensation/ penalty based on the regulation 15.0 of these Regulations, the Commission grants the power to the Grievance Redressal officer(s) (in short GRO) including Chief Grievance Redressal Officer (in short "CGRO") appointed by the licensee under sub-section (5) of section 42 of the Act and to the Ombudsman(s) appointed under sub-section (6) of section 42 of the Act for payment of compensation /penalty by the licensee and for such purpose the Commission delegates its own power under sub-section (2) of section 57 and sub-section (3) of section 43 of the Act to GRO(s) including CGRO(s) and the Ombudsman(s) for determination of compensation/penalty."

6. The principal ground for challenge to the legality of the said Regulations of 2010 is that the GRO, CGRO and Ombudsman who have been given the power to settle grievances under Section 42(5) and 42(6) of the Electricity Act of 2003, (2003 Act) have been additionally conferred with powers to award Compensation and Penalty wholly outside the scope of and de-hors the said provisions.

7. Section 42 is set out herein below:-

"Section 42. (Duties of distribution licensee and open access): ---

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that 1[such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced 2[***] in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

3[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5),(6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections."

8. In each of the writ petitions aforesaid the Ombudsman and/or the GRO and CGRO had awarded Compensation and Penalty after being purportedly empowered by reason of the aforesaid 2010 regulations and it is First and Second Amendments. The Distribution Company complains that the Regulations themselves conferring such powers on the GRO, CGRO and also the Ombudsman are itself ultra vires the 2003 Act.

9. The alternative argument advanced is that even assuming for the sake of the

argument that the aforesaid 2010 Regulations are intra vires the procedure prescribed under the said Grievances Redressal Regulations has neither been followed nor has the procedure prescribed under the 2003 Act itself been adhered to by the Ombudsman, GRO and CGRO in the said matters. As a consequence whereof, the petitioner would argue that the orders passed by the Ombudsman, GRO and CGRO are ex facie legal and or even otherwise not sustainable.

10. The first argument of the petitioner is that Section 57(1) empowers the Commission to specify the Standards of Performance by Licensees. Sub-Section 2 of Section 57 empowers the Commission, in addition to ordering penalty and prosecution against the Licensee/Distribution Company, to award Compensation and Penalty to the Consumer for any act or omissions of a Licensee or Distribution Company. Since the award to Compensation and Penalty involves and adjudicatory process and such power under Section 143 is only conferred on the Commission, the same cannot be delegated to GRO, CGRO or Ombudsman under Section 42 of the 2003 Act.

11. Section 57 of the 2003 Act is set out hereunder:-

"Section 57. (Consumer Protection: Standards of performance of licensee): (1) The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees.

(2) If a licensee fails to meet the standards specified under sub-section (1), initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission: Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard.

(3) The compensation determined under sub-section (2) shall be paid by the concerned licensee within ninety days of such determination."

12. It is further argued that Section 57(2) empowers only the Commission to adjudicate, award compensation and penalty. The power to frame regulations under Section 181(2), specifically as per sub-section (za) is only restricted to Section 57(1) and does not extend to Section 57(2). Section 181 of the 2003 Act is set out herein below.

"Section 181. (Powers of State Commissions to make regulations):

--- (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

(a) period to be specified under the first proviso of section 14;

(b) the form and the manner of application under sub-section (1) of section 15;

(c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;

(d) the conditions of licence section 16;

(e) the manner and particulars of notice under clause(a) of subsection (2) of section 18;

(f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;

(h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;

(i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause(d) of sub-section (2) of section 39;

(j) reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section

(2) of section 39;

(k) manner and utilisation of payment and surcharge under the fourth proviso to sub-clause(ii) of clause (d) of sub-section (2) of section 39;

(l) payment of the transmission charges and a surcharge under subclause(ii) of clause (c) of section 40;

(m) reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;

(n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;

(o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(p) reduction 2[***] of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;

(q) payment of additional charges on charges of wheeling under subsection (4) of section 42;

(r) guidelines under sub-section (5) of section 42;

(s) the time and manner for settlement of grievances under sub-section (7) of section 42;

(t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;

(u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;

(v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;

(w) payment of interest on security under sub-section (4) of section 47;

(x) electricity supply code under section 50;

(y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;

(z) duties of electricity trader under sub-section (2) of section 52;

(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;

(zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

1[(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;]

(zd) the terms and conditions for the determination of tariff under section 61;

(ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under subsection(3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zn) the m anner of service and publication of notice under section 130;

(zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

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

Hence the amendment to the 2010 Regulation under Notification 57, in terms of Section 57(2) of the Act of 2003 renders the Notification ultra vires the parent Act.

13. The next argument of the petitioner is that Section 143 confers the power of adjudication for award of penalty only on the Commission. Such adjudication is to be done only by a member who is to be appointed as the Adjudicating Officer. Section 143 of the 2003 Act is set out hereinbelow:-

"Section 143. (Power to adjudicate): --- (1) For the purpose of adjudging under this Act, the Appropriate Commission shall appoint any of its Members to be an adjudicating officer for holding an inquiry in such manner as may be prescribed by the Appropriate Government ,after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry, and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of section 29 or section 33 or section 43, he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections."

14. The Adjudicating Officer is required to hold an enquiry for such purpose of determining penalty and must be a consequence of such enquiry, inter alia for the aforesaid purpose the members of the Commission are required to posses qualification prescribed under Section 84 and 85 of the 2003 Act.

15. Such qualifications are necessary since the Adjudicating Officer/Member of the Commission exercises powers under Section 94, 95 and 96, equivalent to the power that of a Civil Court. The proceedings before the adjudicating officer are Judicial Proceedings within the meaning of Indian Penal Code. Sections 84, 85, 94, 95 and 96 of the 2003 Act are set out herein below.

"Section 84. (Qualifications for appointment of Chairperson and Members of State Commission): --- (1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management. (2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court: Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court.

(3) The Chairperson or any other Member of the State Commission shall not hold any other office.

(4) The Chairperson shall be the Chief Executive of the State Commission.

Section 85. (Constitution of Selection Committee to select Members of State Commission): --- (1) The State Government shall, for the purposes of selecting the Members of the State Commission, constitute a Selection Committee consisting of -

(a) a person who has been a Judge of the High Court.... Chairperson;

(b) the Chief Secretary of the concerned State............ ....Member;

(c) the Chairperson of the Authority or the Chairperson of the Central Commission .... Member:

Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson who is or has been a Judge of the High Court.

(2) The State Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a Member and six months before the superannuation or end of tenure of the Chairperson or Member, make a reference to the Selection Committee for filling up of the vacancy.

(3) The Selection Committee shall finalise the selection of the Chairperson and Members within three months from the date on which the reference is made to it.

(4) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.

(5) Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, as the case may be.

(6) No appointment of Chairperson or other Member shall be invalid merely by reason of any vacancy in the Selection Committee.

Section 94. (Powers of Appropriate Commission): --- (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil

Procedure, 1908 in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) discovery and production of any document or other material object producible as evidence;

(c) receiving evidence on affidavits;

(d) requisitioning of any public record;

(e) issuing commission for the examination of witnesses;

(f) reviewing its decisions, directions and orders;

(g) any other matter which may be prescribed.

(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

(3) The Appropriate Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.

Section 95. (Proceedings before Commission): All proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appropriate Commission shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

Section 96. (Powers of entry and seizure): The Appropriate Commission or any officer, not below the rank of a Gazetted Officer specially authorised in this behalf by the Commission, may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, insofar as it may be applicable."

16. It is argued that given such a responsibility to exercise such powers only a member of the Commission who has been appointed after satisfying the qualifications prescribed under Section 84 and 85 can do so. It is however, admitted that the adjudicatory powers under Section 143 are exercised to decide disputes inter alia like those between Licensees / Distribution Companies and transmission and generating Companies

17. It is however, contented that since the award of compensation must involve a process of adjudication and since GRO and the Ombudsman need not possess qualifications equivalent to those prescribed under Section 84 and 85 they cannot be allowed to exercise such grave and serious powers. The said 2010 regulations are, therefore, according to the petitioner illegal and arbitrary.

18. The next argument of the petitioner is inter alia that the aforesaid 2010 Regulations are ultra vires Section 42(5) and 42(6) of the Parent Act of 2003. It is submitted that Section 42(5) and 42(6) only conferred powers of the GRO, CGRO and Ombudsman to settle disputes between a consumer and a Distribution Company/Licensee and nothing more. The power to settle disputes is more in the nature of Conciliation. Since Section 42 of the Parent Act itself does not confer anything more than the power to settle and the power to award Compensation and Penalty involves the process of adjucation, to confer the power to adjudicate disputes to award Compensation and Penalty in that regard, under the 2010 Regulations, by itself is illegal and ultra vires Section 42 in particular and the other provisions of the 2003 Act, in general.

19. It is also argued that by reason of the 2010 Regulations and delegation of powers of the Commission to the GRO, CGRO and Ombudsman the Commission had abdicated its statutory responsibility under the 2003 Act and cannot be permitted to do so.

20. The petitioner would also argue that the power to frame regulations has been conferred on the Commission under Section 181 of the 2003 Act. Under Clause (za) of Sub-Section 2 of Section 181, the Commission has only been empowered to frame Regulations for setting standards of performance under Section 57(1) of the 2003 Act. At Clause (r) of Sub-Section 2 of Section 181 the Commission has been empowered to frame guidelines for the functioning of the CGRO and the RGRO (to settle disputes only) under Section 42(5) of the 2003 Act. Under Clause (s) Sub-Section 2 of Section 181 the Commission has also been empowered to frame guidelines for the functioning of the Ombudsman.

21. Section 97 of the said Act of 2003 confers powers on the Commission to delegate powers except the power of adjudication. Section 97 is set out herein below.

" Section 97. (Delegation): The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under Section 79 and Section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary."

22. Section 181 read with section 97 therefore cannot confer any power on the Commission to frame regulations to empower the GRO or the Ombudsman to adjudicate any disputes leading to payment of Compensation and Penalty.

23. Since Section 42(5) and 42(6) only conferred the power of settlement of disputes on the GRO, CGRO and Ombudsman no other adjudicatory powers can be conferred on the said GRO, CGRO and Ombudsman. Framing of the Regulations under Notifications 46, 56, 57 and 61 conferring powers on the said GRO, CGRO and Ombudsman is outside the scope of Section 181 of the 2003

Act. Such Regulations are, therefore, ex facie illegal and ultra vires the Parent Act of 2003.

24. It is next argued that the power of delegation has been circumscribed under Section 97 of the 2003 Act. It is specified under the said Section that the power to adjudicate disputes under Section 86(f) cannot be delegated. Hence, conferring powers of deciding Compensation and Penalty on the GRO, CGRO and Ombudsman by reason of the Regulations would amount to a direct violation of Section 97 of the 2003 Act.

25. The next limb of argument of the writ petitioner is that the 2003 Act conceived of a 3-tier hierarchy for the purpose of any adjudication of any disputes under the said Act. The first is to the Commission under Section 143 of the Act. If any party was aggrieved by an order of the Commission it was entitled to prefer an appeal under Section 111 to the Appellate Tribunal constituted to the said Act. Against the order of the Appellate Tribunal an aggrieved party could approach the Hon'ble Supreme Court under Section 125.

26. By reason of the said Regulations a 4th tier was sought to be created in the hierarchy of fora to avail remedies against the Licensee and Distribution Company. The same according to the petitioner was contrary the scheme of the 2003 Act itself. The writ petitioner would submit that such creation of fora by the 2010 Regulations, by a State Commission is not only contrary to the disputes settlement mechanism under the 2003 Act but also indirectly has the effect of amendment of Parent Act by subordinate legislation which is unheard of.

27. It is argued further that a Subordinate Legislation can be made lawfully only within the scope of the four corners of the permissiveness and the scheme of the Parent Act. The CGRO, RGRO and Ombudsman under the Parent Act of 2003 not having any adjudicatory power cannot to be conferred the same by indirect and backdoor method of subordinate legislation.

28. For the reasons stated above the writ petitioner would argue that the said 2010 Regulations are ultra vires the 2003 Act and are liable to be quashed and set aside.

29. The alternative argument advanced by the Distribution Company is that even if one assumes that the said Regulations are intra vires, the same are absurd. By reason of Section 14(1) to 14(5) the RGRO, CGRO and Ombudsman have been conferred with powers which in practice cannot be exercised. The CGRO and RGRO as it has been found in practice are all middle order employees of the Distribution Company/Licensee. By reason of conferment adjudicatory powers they are likely to exercise jurisdiction under Section 94, 95 and 96 of the 2003 Act. The said Sections confer the power of a Civil Court on the said three authorities and the proceedings before them are in the nature of judicial proceedings in terms of Section 193 and 228 of the Indian Penal Code. The said CGRO and RGRO are also Courts with the meaning of Section 345 and 346 of the Cr.P.C.

30. A middle order employee of the Licensee, has thus been granted powers equivalent to that of a Civil Court by reason whereof the said CGRO and RGRO can summon the Chairman and Directors of the Licensee and Distribution Company to depose evidence before them they are conferred with the power of search and seizure of the offices of their superior authorities. It is argued that conferring such serious and far reaching powers on middle order and unqualified employees of a Distribution Company is absurd and it is unlikely that such employees would even think of passing orders against their employers/bosses.

31. The said regulations according to the petitioner, therefore, conferred uncanalised powers to unqualified and unequipped middle order employee of a private company like the Licensee or the Distribution Company and hence absurd and arbitrary.

32. In terms of Section 96 of the said 2003 Act the Adjudicating Officer cannot be below the rank of a Gazetted Officer under the State and Central Government. It is unlikely that any employee or RGRO and CGRO in the present and operating Licensees and Distribution Companies within the State of West Bengal are even remotely close to being Gazetted Officers. The Regulations to this extent are, therefore, violative of Section 96 of the 2003 Act.

33. An Adjudicating Officer is prohibited under the 2003 Act to hold any other parallel office of profit. It is found in practice that the RGRO and CGRO in all cases are themselves employees of the Distribution Company and/or Licensee thereby creating a clear conflict and context. The CGRO and RGRO cannot be expected to pass any orders against their parent employer organisation or act in a unbiased manner.

34. On the facts of each case before this Court certain facts common to all the writ petitions have been pointed out by the writ petitioner. This argument was advanced assuming that the regulations are intra vires. In terms of the amended Regulations of the 2013 at 14(4) it is stipulated that each and every argument of either of the parties has to be considered and specifically addressed by the CGRO/ RGRO and Ombudsman. The same was not adhered to in any matters.

35. It is further stipulated in Regulation 15(1) and 15(3) that the consumer seeking Compensation and Penalty must approach the CGRO and RGRO within 90 days of the accrual of cause of action in most cases claims have been entertained after one year in some cases after two years and in a given case even after eight years and damages have been awarded at the rate of Rs.500/- per day. There was no enquiry held or spot inspection made. There was no evidence recorded and hence proceedings suffered from procedural infirmities and hence the orders are liable to be set aside.

36. It is further argued that nearly all cases were relating to delay in granting electricity connection to Shallow Tube-Wells for agricultural purposes. The Techno Economic Feasibility Reports were not considered and actual loss was not determined by proper trial and evidence. The aforesaid are however, arguments

on the merits of each claim which this Court cannot entertain in such a summary fashion and if the validity of the 2010 Regulations are upheld each individual writ petition must be considered of its own merits.

37. Mr. Pratik Dhar, learned Senior Advocate, in reply to the arguments of the petitioners firstly submitted that in WP No. 15755 (W) of 2016, the WBSEDCL has only challenged the constitutional vires of Regulation 14.1-14.5 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Licensees Relating to Consumer Services) Regulations, 2010 the amended Regulation by notification No. 57/WBERC dated 26th August, 2013 has not been challenged. In addition thereto it is argued that the WBERC guidelines for establishment and redressal of grievances of consumers and time and manner of dealing of such grievances (Ombudsman) Regulation 2013 have not been challenged. It is further argued that notification No. 61 and Regulation 15 of Notification 46 had not been challenged. While there is further challenge available in WP No. 18826 (W) of 2017, WBSEDCL Vs. Amit Batabyas and Ors., it is indeed true that the said notification No. 57 and 61 and Regulation 15 have not been challenged. This Court is of the view that each of the aforesaid notification No. 61, 57 and Regulation 15 of Notification 46 has their genesis in Regulation of 2010 being notification No. 46. It cannot be said that the WBERC has taken by surprise since they themselves have annexed each of the aforesaid notifications to their affidavit-in-opposition.

38. In any event, application for amendment being CAN 5950 in WP 15755 has been filed to incorporate the challenged notification 57. Though not formally allowed, the parties went on asking as if the amend has in fact been allowed by the Court. Hence since the nature and character of the main proceeding is not altered and since CAN 5950 is allowed and the writ petition is allowed to be amended.

39. The main thrust of Mr. Dhar's argument on behalf of WBERC is that argument similar to those advanced by the petitioners in this application which were upheld by the Learned Single Bench of this Court were carried in appeal being FMA No. 3291 of 2015, WBERC Vs. WBSEDCL.

40. In view of the aforesaid pronouncement by the Division Bench that has been followed by two other Single Benches of this Court in cases reported in 2016 SCC Online Cal 3187 WBSEDCL Vs. State of West Bengal and Ors. and 2018 SCC Online Cal 1307 WBSEDCL Vs. Sudarsan Maity, the arguments of the petitioner are no longer res integra.

41. Counsel for the Commission next relied upon the decision of the Hon'ble Supreme Court in the case of Maharashtra Electricity Regulatory Commission Vs. Reliance Energy reported in (2007) 8 SCC 381. At Paragraph 33 and 34 of the said judgment has been relied upon. In addition thereto a series of other judgments of the Hon'ble Supreme Court have been relied upon by the Commission to argue as to why this Court should not entertain the challenge to

the constitutional vires of the Regulation from notification 46, 57 and 61 referred to hereinabove. Such cases are as follows:

"i) (2010) 4 SCC 603 [PTC India Ltd. -Vs- Central Electricity Regulatory Commission, through Secretary] ----Pr. 92 (VI) on the point that principle of generality versus enumeration empowers an authority to make regulation on any residuary item.

ii) (1985) 2 SCC 116---[K. Ramanathan -Vs- State of Tamil Nadu and Another]-Pr. 19 ----- on the point that the word 'regulate' includes and carries with its full power over the thing. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'.

iii) (2011) 3 SCC 363 ---[Krishnavdevi Malchand Kamathia And Others -Vs-Bombay Environmental Action Group and Others.] ---- Pr. 16 & 19 on the point that the specific regulation is required to be challenged.

iv) (20060 12 SCC 583 ---[Ispat Industries Ltd. -Vs- Commissioner of Customs, Mumbai] Pr. 29 --- The Hon'ble Court may go for such interpretations which is intra-vires keeping in mind the object of the statute.

v) (2008) 5 SCC 33...[Hinsa Virodhak Sangh -Vs- Mirzapur Moti Kuresh Jamat and Others.].................Pr. 39 ----------- on the point that presumption of constitutionality of the delegate legislation like any legislation.

vi) (2003) 8 SCC 40 ...[V.K., Majotra -Vs- Union of India & Others.]...Pr.8 & 17 --- on the point that without challenging the specific regulations, relief cannot be granted.

vii) (1981) 1 SCC 397 .....[S.S. Sharma and Others -Vs- Union of India and Others.] ....---Pr. 6. - on the point new plea/point cannot be allowed except the well known process of the amendment.

viii) (2019) 4 SCC 332..........[M. Revanna -Vs- Anjanamma (Dead) by Legal Representative and Others.] ....Pr.7...... on the point of order 6 Rule 17 + once trial has commenced no amendment can be made unless Court is satisfied with "due diligence"

ix) (2016) 12 SCC 1 [Ajendraprasadji N. Pandy and Another -Vs-Swami Keshavprakeshdasji. N. and Others].....Pr. 36 & 43.. on the same proposition in serial No.(ix)."

42. Counsel for the award holder Consumer respondents adopted the arguments of the WBERC and submitted that there have been considerable delays in the granting connections to them and without any good reason. They further placed an advertisement published by the WBSEDCL itself informing the public at large about the Notifications No.47 and had accepted the same. They argued that the WBSEDCL cannot resile from their acceptance of such regulations.

43. This Court is of the view that when a question of Constitutional validity of

any law or rule is raised consent by the affected party cannot cure the illegality in such Rules and Constitutional Courts are not debarred from entertaining such a plea of illegality even after such Rules have been accepted upon.

44. Let us consider the judgment of the Hon'ble Supreme Court in the Maharashtra Commission Case (supra). The facts of the said case were that licensees under the operative in the State of Maharashtra had unilaterally issued bills to various consumers alleging outstanding dues of such consumers passed as also applying a revised rate per unit of electricity. The Maharashtra ERC issued a notice to the licensees and distribution companies asking them to participate in an enquiry to indicate the reasons for issuance of supplementary and amended bills. After hearing the licensees and distribution companies, the said Commission ordered withdrawal of the said supplementary bills and refunded of amount collected from the consumers without interest on certain terms and conditions. The licensees challenged the order of the Commission before the Appellate Authority under Section 111.

45. The Appellate Authority directed the individual consumer to approach Ombudsman under Section 42 (5) of the Electricity Act to see the redressal of the individual grievances with regard to the bills. The principal argument before the Hon'ble Supreme Court was whether the Commission had power to issue general directions to licensees and distribution companies while upholding the authority. The Hon'ble Supreme Court held that since the issue arose out of grievances that can be raised primarily by the consumers before the Commission.

46. The Hon'ble Supreme Court also found the Commission had failed to cause for investigation under Section 128 (1) and 128 (5) of the 2003 Act and hence could not give directions to refund the consumers, on the licensee was inappropriate and that the consumers should have approach the Ombudsman under Section 42 (5) of the 2003 Act. While the Supreme Court held that under Section 86 (1) (f) of the 2003 Act, the Commission has only power to adjudicate the dispute to the licensees and it could not adjudicate the disputes of grievance. At Paragraph 33 & 34 of the said Judgment, the Hon'ble Supreme Court held as follows:-

"33. As per the aforesaid provision, if any grievance is made by a consumer, then they have a remedy under Section 42(5) of the Act and according to sub-section (5) every distribution licensee has to appoint a forum for redressal of grievances of the consumers. In exercise of this power the State has already framed the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2003 (hereinafter referred to as "the 2003 Regulations") and created Consumer Grievance Redressal Forum and Ombudsman. Under these 2003 Regulations a proper forum for redressal of the grievances of individual consumers has been created by the Commission. Therefore, now by virtue of sub-section (5) of Section 42 of the Act, all the individual grievances of consumers have to be raised before this forum only. In the face of this statutory provision we fail to understand how could the

Commission acquire jurisdiction to decide the matter when a forum has been created under the Act for this purpose. The matter should have been left to the said forum. This question has already been considered and decided by a Division Bench of the Delhi High Court in Suresh Jindal v. BSES Rajdhani Power Ltd. [(2006) 132 DLT 339 (DB)] and Dheeraj Singh v. BSES Yamuna Power Ltd.[Ed.: (2006) 127 DLT 525 (DB)] and we approve of these decisions. It has been held in these decisions that the forum and Ombudsman have power to grant interim orders. Thus a complete machinery has been provided in Sections 42(5) and 42(6) for redressal of grievances of individual consumers. Hence wherever a forum/Ombudsman have been created the consumers can only resort to these bodies for redressal of their grievances. Therefore, not much is required to be discussed on this issue. As the aforesaid two decisions correctly lay down the law when an individual consumer has a grievance he can approach the forum created under sub-section (5) of Section 42 of the Act.

34. In this connection, we may also refer to Section 86 of the Act which lays down the functions of the State Commission. Sub-section (1)(f) of the said section lays down the adjudicatory function of the State Commission which does not encompass within its domain complaints of individual consumers. It only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. This does not include in it an individual consumer. The proper forum for that is Section 42(5) and thereafter Section 42(6) read with the Regulations of 2003 as referred to hereinabove."

47. The Hon'ble Supreme court judgment was in the said case related to a billing dispute raised by the consumers. The dispute raised in the instant case is that of Compensation and Penalty. The payment of Compensation and Penalty to the individual consumers, in most cases is for delay in grant of electricity connection. The said decision, therefore, cannot apply in the facts of the instant case. The Hon'ble Supreme Court laid down in the case of Arasmeta Captive Power Co. Ltd. Vs. Lafarge India Pvt. Ltd., reported in (2013) 15 SCC 414 at Paragraph 32-34 & 36 that the ratio of any judgment must be viewed in the facts of the said case and cannot be read dehors the same. The issue of the constitutional vires of the 2010 Regulations and Regulation under notification 46 and consequently 57 and notification No. 61 were neither in issue nor addressed by the Hon'ble Supreme Court. At Paragraph 32-34 & 36 of the said Judgment, the Hon'ble Supreme Court held as follows:-

"32. In Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213] it has been stated (SCC p. 221, para 18) that the ratio of any decision must be understood in the background of the facts of that case. Relying on Quinn v. Leathem [1901 AC 495 (HL)] it has been held that the case is only an authority for what it actually decides, and not what logically follows from it.

33. Lord Halsbury in Quinn [1901 AC 495 (HL)] has ruled thus: (AC p. 506)

"... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

(emphasis supplied)

34. In Krishena Kumar v. Union of India [(1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846] the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to Caledonian Railway Co. v. Walker's Trustees [(1882) LR 7 AC 259 : (1881-85) All ER Rep 592 : 46 LT 826 (HL)] and Quinn [1901 AC 495 (HL)] and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows: (Krishena Kumar case [(1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846] , SCC pp. 226-27, para 20)

"20. ... The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th Edn., Vol. 26, para 573):

'The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear ... it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.'"

(emphasis supplied)

36. In Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697] the Court has made the following observations: (SCC p. 719, para 2)

"2. ... The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."

(emphasis supplied)"

48. However, one needs to look at the judgment of the Division Bench of this Court in the case of WBERC Vs. WBSEDCL reported in AIR 2016 Cal 144 at Paragraph 36 of the said judgment, the Hon'ble Supreme Court held as follows:-

"36. Apparently, constitutionality of 2010 regulations has not been assailed in the instant writ petition however, during the oral arguments across the bar and in the written submissions filed on behalf of the distribution licensee an attempt has been made to contend that 2010 Regulations are inconsistent with the provisions of the Act. As discussed earlier the scope of rule making power under Section 178 of the Act is wide enough to encompass the power of the Commission to delegate any of its powers by way of Regulations provided such delegation is not expressly barred by the provisions of the Act. In the instant situation there is no such embargo on the delegation of power to award Compensation under Section 57(2) of the Act. Hence, the authorization of the Ombudsman to award Compensation under Section 57(2) of the Act for breach of standards of performance as laid down by it under Section 57(1) of the Act thereof cannot be said to be contrary to the provisions of the Act. That apart, such delegation in the 2010 regulations to the Ombudsman is not an uncanalised one and sufficient guidelines have been laid down for exercise of its discretion."

49. The constitutional vires of the said Regulations under notification 46, 57 and 61 were not addressed. In the pleadings of the case, based on the notes of arguments filed by the parties the Hon'ble Division Bench of this Court has upheld the Constitutional Vires of the said Regulations under notification 46 being WBERC Standards of Performance Regulation of 2010 had not adressed in detail the arguments raised by the petitioners

50. The said Division Bench Judgment was carried in appeal to the Hon'ble Supreme Court which was dismissed.

51. Counsel for the Commission would argue in extension that the notes of arguments that had been filed in the said appeal before the Division Bench, had clearly raised most of the points argued by the petitioner in the instant case. The arguments are no longer res integra and that this Court is bound by the order of the Division Bench in the WBERC case reported in AIR 2016 Cal 144.

52. This Court has carefully considered judgment of the Division Bench and notes that the Constitutional vires of the 2010 Regulations has indeed been upheld by the Division Bench in a single paragraph. However none of the issues/arguments as raised by the petitioners hereinabove seem to have been addressed by such

Division Bench. It is true that Hon'ble Division Bench has upheld that the constitutional vires of Notification 46. It is true that repeated challenges to vires of a legislation/Rules on other minor grounds are not entertained at the drop of a hat by Courts, when once there is a detailed pronunciation by a higher forum.

53. However in the WBERC case reported in AIR 2016 Cal 144 it is seen that the vires and delegation of powers to WBERC has been addressed to a very limited extent and only in the context of Section 57 (1) and 57 (2) of 2003 Act. The detailed arguments raised by the petitioners have not been addressed by any Court till date. This Court is also conscious of the arguments raised by the WBERC.

54. This Court in course of arguments being advanced by the petitioner has considered the following decisions rendered by the Hon'ble Supreme Court on the question of ultra vires subordinate legislation. The list of the cases are as follows:

i. Kunj Behari Butail Vs. State of Himachal Pradesh, reported in (2000) 3 SCC 40, Para 14, 13 and 8

ii. A. Manoharan Vs. Union of India, reported in (2008) 3 SCC 641, Para 20, 21 and 22.

iii. Subhash Chandra Vs. Delhi Subordinate Services Selection Board, reported in (2009) 15 SCC 458, Para 69, 70 and 73.

iv. Cellular Operators Association of India Ltd. Vs. TRAI, reported in (2016) 7 SCC 703, Para 34, 36, 37, 78, 79, 42 to 44, 48, 54 to 57, 61, 62 and 97.

v. Kerala State Electricity Board Vs. Indian Aluminium Co., reported in (1976) 1 SCC 476, Para 25.

vi. J. K. Industries Vs. Union of India, reported in (2007) 13 SCC 673, Para 127-133.

vii. Kurmanchal Institute of Degree and Diploma Vs. Chancellor, M.J.P. Rohilkhand University, reported in (2007) 6 SCC 35, Para 20.

viii. Shree Bhagwati Steel Rolling Mills Vs. CCE, reported in (2016) 3 SCC 643, Para 29.

ix. NOVVA ADS Vs. Deptt. of Municipal Administration and Water Supply and Anr., reported in (2008) 8 SCC 42, Para 40.

x. Global Energy Ltd. Vs. Central Electricity Regulatory Commission, reported in (2009) 15 SCC 570, Para 40 and 5.

xi. Union of India Vs. S. Srinivasan, reported in (2012) 7 SCC 683, Para 21 and 32.

55. This Court deems it necessary that the arguments raised by the writ petitioner need to be suitably addressed and hence the following questions are

formulated so that the matter can be placed before the Hon'ble Chief Justice to constitute an appropriate larger Bench to address the same.

56. The points of reference are as follows:-

a) Does not the process of award of Compensation and Penalty" involve adjudication. Section 42, of the Electricity Act, 2003 allows the CGRO and the Ombudsman only to settle disputes albeit between consumers and Licensees/ Distribution Companies. Conferring a power to award Compensation and Penalty under Notification 46, 56, 57 and 61 would tantamount to conferring the power of adjudication. Such power of adjudication, in clear terms, is bestowed only upon the Commission at Central and State level under Section 79 (1) (f) and Section 86 (1) (f) of the Act of 2003 respectively. Hence do the Regulations under the aforesaid notifications survive the doctrine of Ultra Vires the Parent Act of 2003.

b) The power to frame regulation by the State Commission is conferred under Section 181 of the Act of 2003. Clause (za) of Sub-section (2) of Section 181 of the Act of 2003 permits the SERC to frame regulation for setting "standards of performance of a licensee "under section 57(1) of the 2003 Act. It is only Section 57 sub-section 2 which prescribes payment of Compensation and Penalty to the person affected. Such Compensation and Penaltycan be awarded only by the Commission. Sub-section (2), Clause (za) of Section 181 does not empower the Commission to frame regulation towards payment of Compensation and Penalty or adjudication thereof. For that matter no other sub-section of Section 181 empowers the Commission to frame any regulation either for adjudication by a licensee or anybody else or even regulation to award Compensation and Penalty. Therefore, can the Regulations framed under Notification 46, 56, 57 and 61 of 2010, prescribing mode of adjudication by the CGRO/RGRO and/or Ombudsman come within the authority of delegation conferred by the Parent Act, 2003.

c) The power to frame Regulations under Sub Section (za) of Section 181 has been restricted to matters covered under Section 57(1) of the Act of 2003. By the Ombudsman Regulations, regulations were framed by the Commission under Section 57 (2) by invoking purported powers under Section 181(za). Admittedly Sub Section (za) of Section181 does not empower any regulations to be framed under Section 57 (2). Has the Commission therefore acted outside the scope of the authority delegated under parent Act of 2003, while framing the regulations under Notification 56 (The Ombudsman Regulations) and the first amendment to the Standards of performance Regulations of 2010) on 26th August 2013 by Notification 57 and the Second Amendment to the 2010 Regulations under Notification 61 dated 7th January 2014.

d) In terms of the Notification 46 and particularly Regulation 2010 in respect of some orders passed by the Ombudsman an appeal would lie to the Commission. The 2003 Act only conceives of a three-tier hierarchy of appeal under the Section 111 and 125. From the order of the Commission an appeal lies to the Appellate

Tribunal under Section 111 and from the order of the Appellate Tribunal appeals lie to the Supreme Court under Section 125 of the Act of 2003. By reason of permitting some orders of the Ombudsman (adjudicating Compensation and Penalty/penalty claimed by the consumer against the licensee), a fourth-tier therefore, has now been created by reason of regulations framed under the aforesaid regulations, i.e. from the orders of the Ombudsman an appeal may be preferred to the Commission the rest of the appeal process remaining as it is. Is such a fourth tier in accordance with the scheme of the 2003 Act and can the enabling parent Act be amended by way of subordinate legislation ?

e) Assuming for the sake of argument that the regulations are intra-vires, by reason of permitting only some orders of the Ombudsman to be appealable to the Commission and not permitting others orders to be so appealable, there being no difference otherwise in the nature of such orders, are the Regulations not discriminatory creating a special class within the general class of consumers?

f) The process of "Adjudication" involves calling for evidence, examination and cross examination of witnesses. The adjudicator's proceedings are deemed as judicial proceedings under the Act of 2003 which has conferred powers under Section 193 and 228 of I. P. C and Section 345 and 346 of Cr. P. C to the adjudicator under the Act. Given such serious and wide powers the adjudicator under the Act is required to have certain qualification as specified in Section 77 of the Act of 2003.No such qualification is prescribed for appointment of an Ombudsman under the Act. Does the 2003 Act intend conferring of such grave and serious powers on an Ombudsman or a GRO.

g) Grievance Redressal Officers under Section 47 (5) of the Act of 2003 are appointed out of the employees of the Licensee /Distribution Company. Can such employee be expected to be free from bias and pass orders against his employer? Can this possibly be in harmony with the purpose and object sought to be achieved by the Act of 2003?

h) Section 79 (i) empowers only the Commission to specify and 'ENFORCE' the Standards of performance by licensee. Under Section 86 (i) only the Commission is empowered to specify and ENFORCE standards of performance by licensees. The Enforcement of Standards is done only in terms of Section 57(2) of the Act by prosecution and imposition of penalty. Only the Commission is empowered to order prosecution and also Compensation and Penalty. If this be the object and purpose of the Parent Act then can this power be at all be delegated to an Ombudsman /GRO under Section 42 (5) (6) (7) of the Act. Has the Commission abdicated its responsibility by reason of passing on and delegating the power to enforce standards and award Compensation and Penalty to the CGRO/ Ombudsman?

i) Would the prescribing of procedure to be followed by the Commission Cure the defect of excessive delegation in the first place. While a large number of above questions were raised by the licensee in the SLP which challenging the order of the DB in the case reported in AIR 2016 Pg 144. Can it be said that the rejection of the SLP without any of the questions being addressed and specifically dealt with, the same would prevent High Court from considering the same.

j) Has the Hon'ble Supreme Court in the case of MERC vs. Reliance Energy reported in (2007) 8 SCC 381 decided the above questions and the Constitutional vires of the Regulations framed under Notification 46,56,57 and 61 to prevent High Court from entertaining the questions raised by the WBSEDCL.

k) Can the volume of cases filed by the consumers be a determining factor in allowing WBERC to abdicate its responsibility and pass on the duty to CGRO/ Ombudsman and confer powers on WBACRC the power to adjudicate matter

57. Hence, let the matter be placed before the Hon'ble Chief Justice to constitute an appropriate Bench to address the questions set out as above.

58. Urgent Photostat Certified server copy of this judgment, if applied for, be supplied to the parties on urgent basis.