

(2021) 09 CAL CK 0033
In the Calcutta High Court
Case No : MAT No. 501, 502 Of 2020

West Bengal State Electricity Transmission Co. Ltd. & Ors.	APPELLANT
Vs	
West Bengal State Electricity Board Engineers Association & Ors.	RESPONDENT

Date of Decision : 17-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 309
West Bengal State Electricity Distribution Company Limited (ROPA) Rules, 2009 — Rule 4, 6, 7, 8, 9, 10, 11, 12
Central Civil Services (Pension) Rules, 1972 — Rule 48
Electricity Act, 2003 &mdash Section 131(4)

Citation : (2021) 09 CAL CK 0033

Hon'ble Judges : Soumen Senm, J;Saugata Bhattacharyya, J

Bench : Division Bench

Advocate : Kishore Dutta, Biswaroop Bhattacharyya, Sandip Dasgupta, S.S. Siddiqui, Victor Chatterjee, Soumya Majumder

Final Decision : Dismissed

Judgement

Soumen Sen, J

These two appeals raise an identical issue of enforceability of the dearness allowance under the Revision of Pay and Allowances Rules 2009 at the instance of the employees. The learned Single Judge, in deciding the writ petitions, has, on consideration of the provision relating to dearness allowance, held that the employer is obliged to extend the dearness allowance to its employees at such rate, on and from 1st January, 2009, as may be notified by the Central Government from time to time and that under no circumstances the said facilities can be denied, even if the management of the two companies, i.e. the appellants herein can demonstrate poor financial condition.

Before we advert to the submissions made on behalf of the parties, we state the facts in a nutshell.

The members of the respondent no.1 in both the writ petitions are the erstwhile employees of the West Bengal State Electricity Board (in short 'WBSEB'). Pursuant to a scheme dated 25th January, 2007 the said board was bifurcated into West Bengal State Electricity Transmission Company Limited (in short 'WBSETCL') and the West Bengal State Electricity Distribution Company Limited (in short 'WBSEDCL'). The scheme was duly notified in exercise of powers under Section 131(4) of the Electricity Act, 2003. By reason of the said scheme, all properties, interests, rights and liabilities of West Bengal State Electricity Board were transferred to and vested in the State Government, and re-vested thereof by the State Government in the two Companies, namely, WBSETCL (or "the electricity transmission company) and WBSEDCL (or "the electricity distribution company").

The two clauses of the said scheme, namely, clause 3 and clause 5(a) relating to transfer of property to the State and transfer of personnel are relevant to the present appeal. The said clauses 3 and 5 (a) read as follows:

"Clause 3. On such transfer and subject to the provisions of the Act and provisions of this scheme, the personnel shall form a part of the services of WBSEDCL and the rank, scale of pay and inter-seniority as existing in WBSEB on the effective date of transfer shall be maintained."

"Clause 5. The transfer of personnel shall be further subject to the following conditions, namely: -

(5)(a) That the terms and conditions of service applicable to the personnel on the effective date of transfer shall not, in any way, be less favourable than those applicable to them immediately before the said effective date of transfer."

The two newly-created government companies were empowered by the Government to independently decide issues relating to, inter alia, the service conditions of employees, keeping in view the corresponding compensation(s) available in similar public sector companies in the country, with a further specific condition that such compensation packages of the employees will not cause the successor entities to require any financial support from the government. The order issued by the Principal Secretary to the Government of West Bengal dated 5th March, 2008 empowering the two newly-created government companies to take such independent decision is reproduced below:

"Government of West Bengal

Department of Power & NES

New Secretarial Buildings (7th Floor)

1. Kiran Shankar Roy Road Kolkata-700 001

No.79/PO/O/Cell-III/3R-29/2006 Wednesday, March 05, 2008

ORDER

Whereas State Government in a meeting of the Cabinet held on 24th January 2007, approved this Department's proposal for the restructuring of the West Bengal State Electricity Board (WBSEB) into 2 Government-owned corporate successor entities viz. West Bengal State Electricity Transmission Company Ltd. (WBSETCL) comprising the Transmission and State Load Despatch Centre functions of WBSEB and West Bengal State Electricity Distribution Company Ltd. (WBSEDCL) comprising the Distribution and Hydel Generation functions of WBSEB; And

Whereas in pursuance to this decision, both Companies have been incorporated as Government Companies under the provisions of Companies Act 1956 and have commenced functioning from 1st April, 2007; and

Whereas State Government in the above referred meeting of the Cabinet, also approved this Department's proposal for empowering the aforesaid successor entities viz. WBSETCL and WBSEDCL to decide independently issues of personnel recruitment and selection, objective performance assessment and performance linked promotion, compensation and incentives subject to the said successor entities keeping in view that corresponding compensation packages available in similar Public Sector Companies in the Country while determining the compensation packages for their respective employees and subject further, to a specific condition that this empowerment shall in effect, not cause the successor entities to require any financial support from Government with proviso for this empowerment being withdrawn in the event of its breach.

Therefore, the Governor is pleased to empower the successor entities viz. WBSETCL and WBSEDCL to decide independently issues of personnel recruitment and selection, objective performance assessment and performance linked promotion, compensation and incentives subject to the said successor entities keeping in view, the corresponding compensation packages available in similar Public Sector companies in the country while determining the compensation packages for their respective employees and subject further to a specific condition that this empowerment shall in effect, not cause the successor entities to require any financial support from Government with proviso for this empowerment being withdrawn in the event of its breach.

This order will take retrospective effect from 1st April, 2007 i.e. the date of respective commencement of functioning of WBSETCL and WBSEDCL.

By order of the Governor,

Sd/-

(Sunil Mitra)

Principal Secretary to the

Government of West Bengal"

(emphasis added)

The revision of pay and allowances of employees of the two electricity companies thus formed was finalised by an order dated 25th February, 2009 keeping in view the necessity to bring in some structural and procedural changes appropriate for achieving the vision and mission of the company. The said Rules were commonly known as the West Bengal State Electricity Distribution Company Limited (ROPA) Rules, 2009 and the West Bengal State Electricity Transmission Company Limited (ROPA) Rules 2009 respectively. Both the rules hereinafter shall be referred to as "the said Rules of 2009."

In the present appeal, we are concerned with clause 9 of the scheme.

which is reproduced below:

"Dearness allowance (DA)

The Dearness Allowance admissible to all categories of employees of the Company shall be payable on Basic pay + Grade Pay + Non practicing allowance (NPA), if any, from the dates mentioned below at the following rates: -

Date from which payable

Rate of Dearness Allowance per month

From 1.1.2006

No Dearness Allowance

From 1.7.2006

2% of basic Pay+NPA, where applicable

From 1.1.2007

6% of the basic Pay+NPA, where applicable

From 1.7.2007

9% of the basic Pay+NPA, where applicable

Henceforth, Dearness Allowance will be applicable to the employees of the Company at such rate and from such date as may be notified by the Central Government from time to time." (emphasis supplied)

There is no dispute that the employees of both the companies received dearness allowance in terms of the said Rules of 2009, both arrears as well as current payments, until the year 2016. To be more precise and specific, the Central Government rates of dearness allowance were paid until 2016 to the said employees which was higher than the rates the employees of the State Government used to receive during the aforesaid period. However, after 2016 the company continued to pay 125 per cent of the basic pay as dearness allowance and post July 2019, the employees were paid dearness allowance at 135 per cent of the basic pay. In spite of demand for release of the differential amount both

the companies refused and/or neglected to pay the balance amount.

This refusal to pay dearness allowance at the Central Government rate has resulted in two writ petitions being filed by the employees' association of the two respective electricity companies.

Mr. Kishore Dutta, the learned Advocate General, appearing on behalf of the appellants submitted that the contract is not enforceable in writ jurisdiction. The writ of mandamus cannot be issued directing the appellant to pay DA which is a non-justiciable claim. The writ petitioners have no legal right to claim DA as a matter of right. It is in the nature of an ex-gratia payment and not justiciable. It imposes no duty on the appellants to grant it at the Central Government rate. In this regard, reliance is placed on *State of M.P. v. C. Mandawar*, reported in 1955(1) SCR 599: AIR 1954 SC 493 (paragraphs 1,2,4,5 and 9) and *State of Karnataka v. Karnataka State Patels Sangha*, reported in 2007(4) SCC 207 (paragraph 4). The learned Advocate General has taken us through the said Rules of 2009 to demonstrate that while some Rules mandatorily require the appellants to pay certain sums, the other Rules creating obligation to make payment are not mandatory. In this regard, the learned Advocate General has referred to Rule 4, 6, 7, 8 and 9 and submitted that while Rule 6, 7 and 8 are mandatory in nature as they use the verb 'shall' instead of the verb 'will' and oblige the employer to pay the amounts under the said Rules of 2009, namely, fixation of initial pay in the reformed pay structure, property tax and grade pay. The wordings in clause 9 are differently worded as opposed to words in other clauses which are mandatory in nature like basic salary etc. The payment of DA is based on various factors. It is submitted that the payment of DA, House Rent Allowance and Medical Allowance mentioned in Rules 9, 10 and 12 are merely advisory and are in nature of allowances as opposed to salary. It is submitted that the learned Single Judge erred in holding that the expression 'admissible' in Rule 9 must be treated as synonymous with the expression 'applicable'.

The learned Advocate General submits that while the government companies can, under no circumstances, deny the payment of basic salary or basic wages they may withdraw or refuse to pay any allowance in the nature of ex gratia if there are justiciable reasons. These are all additional benefits which the government company can withdraw or refuse to pay. The right to claim such benefits is extremely weak as opposed to a claim for salary and, accordingly, this right to claim dearness allowance is not a legal right vested by any statute upon the writ petitioners.

The learned Advocate General submits that protection of pay and grade pay are the other two obligations which are attached to the salary and what the government is expected to do and has done is securing the protection of pay and grade pay along with fixation of initial pay. It is submitted that the observation of the learned Single Judge that the dearness allowance cannot be denied to the writ petitioners even if the management of two companies can demonstrate poor financial conditions is a tall order unsustainable in law. It is also submitted that

the employer can restructure the dearness allowance to the disadvantage of employees, albeit it has to prove to the tribunal that the wage structure is above the minimum level and the management is financially not in a position to bear the burden. In support of his submission, reliance is placed on *Workmen v. Reptakos Brett. & Co. Ltd.*, reported in 1992 (1) SCC 290 at paragraph 28, *Crown Aluminium Works v. Workmen*, reported in AIR 1958 SC 30 at paragraph 1, and *Ahmedabad Millowners Assocn. v. Textile Labour Assocn.*, reported in AIR 1966 SC 497 at paragraphs 31, 70-72. The learned Advocate General points out that the Central government, in view of the current pandemic, vide circular no. 131 dated 28th April, 2020 has decided to freeze the additional instalment of DA payable to Central Government employees till July, 2021. Mr Dutta states that a judgment of the Delhi High Court in WP (C) No. 3308 of 2020 (*Hitesh Bharadwaj vs. Ministry of Finance, Union of India & Ors.*) dated 1st June, 2020 has negated a challenge to the said circular. He also makes reference to the office memorandum dated 28th August, 2020 on the Periodic Review of Central Government Employees for amending Rule 56 of the Fundamental Rules and Rule 48 of the CCS (Pension), 1972, whereby a government servant may be required to retire in the public interest after 30 years of qualifying service. Therefore, it cannot be contended that the terms and conditions of service of an employee working with the appellants ought never to be varied to their disadvantage.

The learned Advocate General has further submitted that there is no justification on the part of the writ petitioners in claiming dearness allowance at Central Government rates which would place its members or the employees of the appellant at par with Central Government employees. The appellant's employees are not comparable with Central Government employees. The appellant and the Central Government are not comparable entities/concerns in terms of financial resources, nature and extent/volume of business or other activities, standing, strength of employees and labour force, presence or absence and the extent of reserves, and on several other aspects.

Mr. Dutta submits that it is well settled that fixation of wages and dearness allowance is based on industry-cum-region formula. Under this formula, stress should be laid on the industry part of the formula if there are a large number of concerns in the same region carrying on activities in the same industry; in such a case in order that production cost may not be unequal and there may be equal competition, wages should generally be fixed on the basis of the comparable industries, that is, if industries of the same kind in a particular region is small it is the region part of the industry-cum-region formula which assumes importance. Since the appellant can never be compared to the Central Government for fixing dearness allowance, the industry-cum-region formula cannot be applied for fixing dearness allowance. At the same time to give effect to the demand for payment of dearness allowance, adjudication must always take into account the problem of the additional burden which such dearness allowance structure would impose upon the appellant and whether the appellant can reasonably be called upon to bear such burden. In this regard reliance is placed on *Bengal Chemical and*

Pharmaceutical Works Ltd. v. Workmen & Anr., reported in AIR 1969 SC 360, Precision Bearings India Ltd. v. Baroda Mazdoor Sabha & Anr., reported in 1978 (1) SCC 235, Tamil Nadu Electricity Board v. Tneb-Thozhilalar Aykkiya Sangam reported in 2019 (15) SCC 235, Workmen of Gujarat Electricity Board, Baroda v. The Gujarat Electricity Board, Baroda, reported in 1969 (1) SCC 266, Officers & Supervisors of I.D.P.L v. Chairman & M.D. I. D. P.L & Ors., reported in 2003 (6) SCC 490, Kamani Metals & Alloys Ltd. v. Workmen, reported in AIR 1967 SC 1175, Mihiai Lal Passi vs. C.E.S.C. Ltd. & Ors., reported in 2003 (3) CHN 357.

The learned Advocate General has submitted that dearness allowance is an ex-gratia payment and the only purpose of dearness allowance is to enable a worker in the event of rise in cost of living to basic necessities as before. In other words, dearness allowance neutralise rise in prices as far as possible and practicable. It is an additional financial burden on the employer which the court needs to asses before allowing the claim for dearness allowance. It is submitted that the learned Single Judge, without considering the financial capacity of the employer to bear such burden has made a sweeping observation that under no circumstances, dearness allowance can be denied to the petitioners. Mr. Dutta submits that the Trial Court was not equipped to factor in the various living cost indices to work out the necessity of dearness allowance and the capability of the appellants to pay the said allowance. It is submitted that it is axiomatic that the state is obliged to grant dearness allowance only to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, and it would be impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance and, more so, in the case of the middle classes. Dearness allowance should ordinarily be on a sliding scale and provide for an increase due to rise in the cost of living and decrease due to a fall in the cost of living.

In order to demonstrate that the financial condition of the two companies may not permit payment of dearness allowance at the Central Government rate reference is made to the affidavit-in-opposition filed in WP No. 3292(W) of 2019 (West Bengal State Electricity Board Engineer's Asscn. & Ors. v. State of West Bengal & Ors.). The learned Advocate General has referred to the following paragraphs from the affidavit-in-opposition:

"It is relevant to state here that in the Clause 5.4.1(e) of the Tariff order of the respondent no.2 for the year 2017-2018, as fixed and issued by the West Bengal Electricity Regulatory Commission (in short, WBERC), it has been specifically discussed to the effect that for the projection of terminal benefits expenditure same was calculated on the actual value of pension, gratuity and leave encachment benefits. The WBERC considered that the compound annual growth rate (CAGR) with regard to terminal benefit expenditure for 2017-2018 would be 3.23% higher to the rate for 2016-2017. It has been further mentioned therein that the Respondent no.2 proposed to the WBERC for a hike of 15% on such projection during the financial year 2016-2017 over 2015-2016 but the WBERC did not allow such hike on projection and directed to resubmit the proposal

during turning up for the financial year 2017-2018.

In clause 5.4.3 of the Tariff order in question the WBERC approved increment of 3% on basis with relevant hike of Dearness Allowance (DA) for the year 2016-2017 over the actual for the year 2015-2016.

Photocopies of the relevant pages of the Tariff order for the year 2017-2018 is annexed herewith and marked with the letter R-1.

With regard to the statements made in paragraphs 8, 9 and 10 to the said petition I do not admit anything beyond what would appear from admitted records.

It is most humbly submitted that the employees of the Respondent no.2 authority cannot or may not claim the disbursement of dearness allowance at the central Government rate as a matter of right. There are some other relevant factors to be considered while claiming the dearness allowance as Central government rate and it does not confer any right to the employees to establish their demand lawfully.

Moreover, with regard to the point taken as violation of the ROPA 2009, I submit that entitlement of dearness allowance at par with the Central Government employees may not be considered as legitimate right. It is pertinent to indicate that may other factors like financial constraints of the Respondent no.2 should be taken into consideration while demanding the Dearness allowance at par with Central Government employees by the petitioner."

It is submitted that it would appear from the above-mentioned paragraphs that although the appellants have prayed for 15% hike in the tariff for the financial year 2016-17 over 2015-16 but the WBERC did not allow such hike and directed resubmission of the proposal during turning up for the financial year 2017-18. The learned Advocate General, however, has submitted that there are further details which were not brought on record favouring financial difficulty and thereby justify non-payment of dearness allowance at the Central Government rates.

In view of the aforesaid submission and having regard to the affidavit-in-reply filed by the writ petitioners disclosing materials in justification of the dearness allowance at the Central Government rate, we felt that an opportunity should be given to the writ petitioners to file an affidavit dealing with the averments made by the writ petitioners in paragraph 7 to 12 of the affidavit in reply. Accordingly, by an order dated 18th September, 2020 we directed the appellants to file an affidavit dealing with paragraphs 7 to 12 of the affidavit in reply, wherein the writ petitioners submit various documents to justify the said claim.

In the affidavit-in-reply, the writ petitioners have disclosed the annual report and accounts for the relevant years along with documents to show that the appellants were ensuring compliance of Corporate Social Responsibility as a profit making company.

For the sake of comprehensiveness, the said paragraphs are reproduced below:-

8. I further say that the Annual Report and Accounts of 2017-18 (page 249) mentions that for the financial year 2017-18. Dearness Allowance of Rs.341.81 crores was booked in the accounts against salary of Rs.255.03 crores (Basic + Grade Pay) which is approximately of 134% of the Basic + Grade Pay.

A copy of the relevant page 249 of the annual report and accounts for 2017-18 is annexed and marked as "P-10".

From page 283 of Annual Report and Accounts of the respondent Company for 2017-18 it is seen that WBSEDCL is ensuring GAP of 4 paise by selling one unit of electricity. From the note No.29.4 at page 244 of annual report and accounts for 2017-18, it is also seen that WBSEDCL did not receive any revenue subsidy/ grant during the financial year 2016-17 and 2017-18.

From note No.15.2 (page 219) of the Annual Report and Accounts for 2017-18 it is seen that the Company repaid its debt of loans in time.

WBSEDCL is ensuring Corporate Social Responsibility activities as a profit making Company and the same will appear from page 261 of the Annual Report and Accounts of 2017-18.

Copies of the aforesaid page nos.219, 244, 261 and 263 of the annual report and accounts for the year 2017-18 are annexed and marked as "P-11", "P- 12", "P-13"and "P- 14".

9. I say that for a substantial long period of time, the respondent No.2 has been earning profit and the same will appear from a summarized table herein below:-

Year

Profit (Rupees in Crores)

2013-14

19.07

2014-15

19.82

2015-16

22.51

2016-17

32.27

2017-18

43.77

I say that in reply to a query made under the R.T.I. Act, 2005, the State Public Information Officer of WBSEDCL has answered that a sum of Rs.4.80 crores per month will be required to pay dearness allowance at the Central Government rate. Presently, the expenses incurred towards payment of dearness allowance to the employees of WBSEDCL is Rs.24.93 crores per month. Therefore, there is sufficient fund to absorb the additional liability towards Dearness Allowance at the Central Government rate.

I say that Dearness Allowance at the Central Government rate was paid for the last time in 2016 when the respondent company employed 14,678 employees. The Dearness Allowance related expenditure in July 2016 was Rs. 28.12 crores per month. The profit after tax in 2015-16 was Rs. 22.51 crores. In April 2019, the total number of employees eligible to get Dearness Allowance at the Central Government rate is 13410. The expense borne in this account by the respondent company was Rs.24.93 crores. If the Central Government rate of Dearness Allowance is paid, there will be an additional monthly expenditure of Rs.4.8 crores. In 2017-18, the profit after tax has increased to Rs.43.77 crores.

The aforesaid facts will appear from the Annual Accounts of the respondent company for the relevant year as uploaded on the official website of the company as well as the reply given by the company dated 03.01.19 to an application filed under the Right to Information Act, 2005, copies of such Annual Accounts and the RTI reply dated 03.01.19 are annexed and collectively marked as Annexure "P-15".

Thus the decision to curtail the existing right of employees to get Dearness Allowance at the Central Government rate under ROPA, 2009 is not based on objective criteria; rather with increasing profit, there has been an adverse affectation of the rights of the employees.

A copy of the office memorandum reflecting the current rate of Dearness Allowance paid to the employees of respondent no.2 is annexed and marked as Annexure "P- 16".

11. I say that the contention of the answering respondents is contrary to records, if not misleading. During the period from Feb, 2017 to Feb, 2019 the respondent company has notified for recruitment of 2319 permanent employees and during this period 983 nos. Permanent employees have joined in the organization. This will appear from copies of employment notifications dated 20.02.17, 10.3.17, 21.4.17, 26.10.18, 22.12.18 and 25.02.19.

Copies of the employment notifications are annexed and marked as Annexure "P-17".

12. With reference to paragraph 7 of the said Opposition, I reiterate the contentions in paragraph 11 of the writ petition as well as those contained hereinbefore and anything contrary thereto and/or inconsistent therewith is denied.

As per ROPA 2009, the respondent company had continued to make payment of dearness allowance at the Central Government rate as and when the same had been enhanced. I say that up to January, 2016, the Respondent Company had given the Central Government rate of dearness allowance to the employees, paid in July 2016. That was for the period of 2016-17 covered by tariff order. The revised rate of dearness allowance effective from July, 2016 has not been paid; rather the same has been frozen. Every year, the change in the rate of dearness allowance is declared twice. The answering respondents have not explained as to why for the period 2016-17 they had implemented the ROPA 2009 in respect of Central Government rate of dearness allowance for part of the year, and stopped implementing the same for the remaining part. The answering respondents are estopped from doing so. In any event, it is the admission of the answering respondents in the paragraph under reply, that in the tariff orders for 2017-18, dearness allowance had been considered at the rate of 139% and consumers have been charged with that tariff even for the year 2018-19 and are continued to be charged till date." (emphasis added)

Pursuant to our order dated 18th September, 2020, the electricity transmission company and the electricity distribution company have filed affidavits. In the affidavit of the electricity transmission company, in justifying the denial of dearness allowance by the transmission company to its employees at the Central Government rates, the following averments have been made:

"It is submitted that at present the appellant is paying to its employees dearness allowance at the rate 10% over and above the State Government employees.

Without prejudice to the above, I beg to place on record the method of tariff fixation and resource generation and outgoings of the appellant for gracious consideration of this Hon'ble Court:

- i. The appellant, 120 days before the start of a control period, which may be one year or two years or three years, furnishes before the West Bengal State Electricity Regulatory Commission (hereinafter referred to as 'WBERC' for short) its projected tariff for the next control period. Based on such projected tariff, a tentative tariff order is issued by the WBERC.
- ii. This tentative tariff order is applied by the appellant for recovering its project costs from the distribution companies during the control period.
- iii. After completion of each year, in the month of September/October of the following year, Annual Performance Review (based on its audited accounts) is filed by the appellant with the WBERC. Considering such Annual Performance Review, WBERC issues the Annual Performance Review order, which is the final fixation of tariff.
- iv. In respect of the appellant the last Annual Performance Review order was issued for the year 2013-14. Since then no other Annual Performance Review which has been finalised.

v. The appellant does not deal with individual consumers. They deal with distribution licencees. The appellant does not generate electricity. It is engaged in transmission of electricity to the distribution companies/licencees.

vi. For transmitting electricity, the appellant executes projects for such transmission based on requirement of distribution companies/licencees.

vii. On the requisition/requirement of distribution companies/licencees Project Investment Proposal is filed by the appellant with the WBERC. WBERC grants approval to the Project Investment Proposal whereupon tenders are floated and contractors are engaged by the appellant for executing the projects.

viii. After execution of the Project, the Project cost is recovered by the WBSETCL from the distribution companies/licencees through levy of Transmission Charges over a period varying from 25 to 35 years depending upon the nature of equipment/project.

ix. Therefore, the amount invested by the appellant for executing a project from its own resources and borrowings is recovered over a period spread over 25 to 35 years.

x. The profit earned by the appellant is used in the execution of projects and the shortfall is brought in through borrowings.

xi. The appellant does not receive any government assistance/subsidy and have to depend entirely on its own funds for running its day to day affairs. The entire profit which is earned is utilized for future projects with some amount of borrowings. The borrowings are repaid from the profit earned by the appellant in the subsequent years.

xii. Without these Projects, uninterrupted power supply across the State will be badly affected. The profit which is earned is ploughed back for investment in capital expenses and investment in capital expenditure is required for uninterrupted power supply."

In the affidavit filed by the electricity distribution company, the following averments have been made in justification for denial of dearness allowance to its employees at the Central Government rates:

"It is submitted that at present the appellant is paying to its employees dearness allowance at the rate of 10% over and above the State Government employees.

The appellant, 120 days before the start of a control period, which may be one year or two years or three years, furnishes before the West Bengal State Electricity Regulatory Commission (hereinafter referred to as WBERC for short) its projected tariff for the next control period. Based on such projected tariff, a tentative tariff order is issued by the WBERC. The appellant raises its bills on its consumers based on such tentative tariff order during the control period.

After completion of each year, in the month of September/October of the

following year, Annual Performance Review ('APR' for short) and Fuel and Power Purchase Cost Adjustment ('FPPCA' for short) (both based on its audited accounts) is filed by the appellant with the WBERC. Considering such APR and FPPCA, WBERC issues the Annual Performance Review order, which is the final fixation of tariff which is finally recovered from its consumers in the subsequent years.

In respect of the appellant the last Annual Performance Review order was issued for the year 2012-13. The revisions for the years 2011-12 and for 2012-13 are also pending and last APR order was issued for the year 2012-13. Since then no other Annual Performance Review which has been finalised. Consequently, the appellant has not recovered its actual costs since 2011 which has accumulated to Rs.15,519.14 crores as on date.

The appellant recorded Book Profit since its inception i.e. 2007-08 to 2019-20 considering the regulatory receivables as per Regulations. However, the appellant is incurring significant amount of operating loss during the last five years which is evident from the Profit & Loss statement of the appellant as enumerated below:-

Year

2015-16

2016-17

2017-18

2018-19

2019-20

Operating Loss

-2134.25

-1267.13

-982.50

-1275.76

-1788.61

Regulatory Receivables

2135.63

1243.80

942.20

1230.54

2378.42

Re-measurement of post

employment benefit

33.78

71.98

97.52

112.94

504.24

Tax

13.6

17.32

16.37

19.78

22.44

Book profit after tax

21.57

31.33

40.85

47.93

63.13

The reason for such huge operating loss is mainly due to delay in issue of Regulatory orders. The Tariff order was last issued for the year 2017-18. The present Tariff as being recovered from the consumers is as per tariff fixed by the Regulator for the financial year 2016-17. Further the Annual Performance Review order (APR) are pending since 2013-14. Under the circumstances there is huge accumulation of Regulatory receivables considered in the accounts of the appellant as per regulations which are supposed to be passed on through Regulatory orders. The accumulated Regulatory receivables at the end of F.Y. 2019-20 is stated as Rs.15519.14 crores. Total net profit of last five years was Rs.204.81 crores, whereas the requirement of fund for arrear DA (as per Central Government Rate) with interest upto 01.01.2020 was Rs.212.22 crores. This is pertinent to mention that the appellant company has suffered operating loss amounting to Rs.-7,448.25/- crore from the F.Y. 2015-16 to 2019-20. Accordingly, the appellant company had to obtain a significant amount of working

capital loan which was Rs.7573 crore as on 31st March, 2020.

All power utilities in the State of West Bengal (including the appellant) submits Multi Year Tariff (MYT) application indicating Projected Aggregate Revenue Requirement (ARR) and expected Revenue from Charges at proposed tariff for the ensuing years before Hon'ble West Bengal Electricity Regulatory Commission (WBERC).

Based on the application and considering objections/suggestions received from all stake holders, Hon'ble WBERC approves the ARR and fixed year wise retail tariff of consumers of the appellant.

After completion of a financial year, WBSEDCL submits Fuel and Power Purchase Cost adjustments (FPPCA) for adjustment of actual variable cost and Annual Performance Review (APR) application for adjustment of fixed cost based on actual expenditure and income as per Audited Annual Accounts against the approved ARR for the financial year.

Annual Performance Review Order (APR) of WBSEDCL is pending before Hon'ble WBERC since 2013-14 upto 2017-18. Total outstanding amount as per APR application pending before the WBERC is Rs.16740 crores. This amount has already been spent by the appellant but not yet ordered for recovery from its consumers.

Although huge amount is recoverable against APR order and review application, but the appellant has to continue the power supply to its consumers. The appellant has to take heavy amount of short term working capital loan from different financial Institution to pay bills of generators, transmission agencies and other agencies whose service is utilised in providing services to consumers.

As a result of such huge operating loss there was continuous requirement of borrowings from banks and financial institutions for the purpose of both working capital and capital projects. The total borrowing at the end of F.Y 2019-20 was Rs.14062.46 crores.

Since the appellant has no internal generation of fund from its operation, such requirement of fund is arranged either from Central/State Government grant or through borrowing. Further the revenue deficit due to operating loss, is funded through borrowing to meet up the requirement of operating expenses.

In addition to the above scenario, during the current year the appellant had to incur substantial expenses due to the impact of super cyclone AAMPHAN. The appellant had to restore the damaged infrastructure on war footing basis to restore the electricity supply at the earliest. The estimated cost of such restoration may be around Rs.1224.46 crore which has significant impact on the financial health of the appellant.

Moreover, the effect of the Pandemic COVID -19 situation has also caused significant reduction of electricity demand, mainly amongst industrial/commercial

consumers. It is estimated that during the F.Y. 2020-21 there will be revenue shortfall of around Rs.3500 crores.

From the above status it is obvious that to manage the entire operation of the appellant, there will be acute crisis of working capital during the F.Y. 2020-21 and onwards.

Further due to the present borrowing level and status of pending regulatory orders causing huge accumulation of Regulatory assets amounting Rs.15519 crore, the arrangement of fund for both working capital and capital projects will be a concern for the appellant since banks/financial institutions are expressing reluctance to provide further loans considering the financial health of the appellant.

Under the circumstances, any further financial burden cannot be sustained by the appellant.

Per contra, Mr. Soumya Majumdar, the learned Counsel appearing on behalf of the writ petitioners/respondents in this proceeding, has submitted that the writ petition was filed to enforce ROPA, 2009 framed for the Company and for arrears of dearness allowance at the Central Government rate after January, 2016 as payable in terms of the said Rules 2009. Both the companies, it is argued, paid dearness allowance at Central Government rates up to January, 2016. Thereafter, dearness allowance was paid @ 125%, that is to say, at the State Government dearness allowance rate. For the tariff period 2017-18, when Central Government rate of dearness allowance was 139%, the WB Tariff Commission allowed 139% DA, however, only 125% DA was paid to the employees. From July 2019, DA has been paid @ 135% up to 31.12.2019. By that time the Central Government rate of DA was increased to 154%.

By a statutory notification, and in implementation of the Transfer Scheme dated 25th January, 2007, WBSEB was bifurcated into WBSEDCL and WBSETCL. The scheme provides that the terms and conditions of service of the employees would not be less favourable than those applicable before the effective date of transfer. Accordingly, as dearness allowance was all along a condition of service for the employees of the erstwhile power companies WBSEB the Rules of 2009 provisions have been made in fixing dearness allowance at the Central Government rate with effect from 1st January, 2006. It is submitted that as per Rules, 2009, the specified rate of dearness allowance in the said Rules was also at the Central Government rate, for the retrospective period admissible to all employees.

The scheme clearly holds out a promise that from 25th February, 2009 dearness allowance at Central Government rate as may be notified from time to time by the Central Government would be paid to the said employees. The companies in fact paid at such rate till January, 2016. After January 2016, dearness allowance at various Central Government rates revised and notified from time to time was not paid. Mr. Majumdar has referred to pages 117 to 122 of the writ petition to

show the increase in the dearness allowance rate of the Central Government employees. It is submitted that though Tariff Commission allowed Central Government dearness allowance rate for 2017-2018 @ 139%, the said two companies paid only 125% dearness allowance.

It is submitted that the said Rules of 2009 had two parts for dearness allowance, namely,

- a) Arrears from 1st January, 2006 to 31st December, 2008, and
- b) From 25th February, 2009 onwards.

The question of "admissibility" is only with regard to employees for the retrospective period from 1st January, 2006 to 31st December, 2008. Prospectively, from implementation of the said Rules 2009 there is no question of "admissibility".

Dearness Allowance is a condition of service and the rate was fixed by the said Rules 2009. This cannot be altered unilaterally by the two companies. The question is not of fixation or entitlement, but it is about payment of dues in terms of the service conditions already fixed. The writ petition sought enforcement of a crystallized right and not creation of a right and the learned Single Judge has only followed such principle.

It is submitted that the arrears of dearness allowance at the Central Government rate may be directed to be released with 10% interest in terms of the order dated March 3, 2020 passed by the Appeal Court earlier.

In India, the word 'Pay' in relation to public services has a technical connotation of its own depending upon the provisions providing for the same and its contextual interpretation thereof. It is evident from the definition of 'Pay' contained in various Service Rules that these definitions have certain common characteristics.

Under most of those service Rules, Dearness Allowance is basically a component of 'Pay' which is a fixed percentage of basis pay, aimed at hedging the impact of inflation.

In the year 1939, the World War II engulfed the world which completely overhauled the consumer pattern and prices of essential commodities.

Dearness Allowance was introduced to meet increase in the cost of living which was initially known as 'Food Allowance'. It is a concept peculiar to India, Ceylon, Pakistan and Bangladesh. While dealing with the concept of Dearness Allowance to find out neutralisation formula for industrial workers in Hindustan Lever Limited vs. Hindustan Lever Employees Union & Ors. reported in 1995 AIR (SCW) 602, the Apex Court observed as follows:

"11. The concept of dearness allowance, the second most important element in a worker's wage-plan next to the basic wage, was introduced during the second

world war to meet the increase in the cost of living caused by inflation. It was either linked to the cost of living index or was given by way of flat increases. When linked to the former, it was granted to all the income groups at a flat rate or was graded on a scale admissible to different income groups diminishing with rise in income. Basically, the concept of dearness allowance was designed to combat inflation and protect real wages and therefore it would appear that there should be cent per cent neutralization. This is a concept peculiar to India, Ceylon, Pakistan and Bangladesh." (emphasis supplied) (See. W.P.S.T. No. 45 of 2017 Confederation of State Government Employees, West Bengal & Ors. vs. The State of West Bengal & Ors.)

The issues raised in these appeals turn on the interpretation of Rule 9 of the said Rules of 2009. If the said Rule truly means that the two companies are mandatorily required to pay dearness allowance at Central Government rates, then a right accrues in favour of the employees of the two companies and a writ of mandamus can be issued to ensure payment of dearness allowance at Central Government rates, for it is a proposition of law requiring no citation of authority that a writ may be issued to secure and enforce a legal right. However, if the nature of the said Rule is, properly speaking, permissive and does not depend on the terms of employment with regard to the payment of dearness allowance, then no right accrues and a writ of mandamus cannot be issued in favour of the petitioners, as held in *State of M.P. v. C. Mandawar*, reported in AIR 1954 SC 493 at paragraphs 5-6.

Both sides have advanced various interpretive factors in support of either mandatory or permissive interpretation. The task of the Court shall be to weigh these factors and decide towards which kind of interpretation the balance tilts. As stated by Lord Denning M.R., writing extra judicially: 'Let the advocates one after the other put the weights on to the scales- the "nicely calculated less or more"- but the judge at the end decides which way the balance tilts, be it ever so slightly.' (The Due Process of Law (1980) at p. 60, See also: Bennion on Statutory Interpretation (5th Edn.) at p. 524. There are various interpretive factors that have been stacked on the juristic scales by both sides. Favours a permissive interpretation, we have, firstly, the learned Advocate General's point that Rule 9 only makes the dearness allowance 'admissible' which is to be paid according to the formula provided therein. His point is buttressed by the fact that other Rules like Rule 8 state that grade pay "shall" be drawn. To the learned Advocate General, the use of the word "admissible" in Rule 9 instead of the word "shall" which is found in other Rules, proves that rule 9 is non-mandatory. In rebuttal to this, Mr. Majumdar states that Rule 9 is actually divisible into two parts. He states that indeed for the first part, which deals with arrears of dearness allowance from 1st January, 2006 to 31st December, 2008, the question of dearness allowance is merely admissible. But for the second part, which deals with the payment of dearness allowance from 25th February, 2009 onwards, the Rule is clear that payment has to be made in accordance with Central Government rates.

The second interpretive factor advanced in favour of a permissive interpretation is the general context of the said Rules of 2009. The learned Advocate General illuminates the general nature of dearness allowance as an ex gratia payment as opposed to, say, fixation of pay or basis pay. He asserts that payment of dearness allowance is predicated on various general factors such as the financial health of the company, the status of the employees as State/Central Government employees, the fact that under the order dated 5th March, 2008 (see above), the companies do not receive State support, the industry cum region formula, the relative wealth or poverty of the employees, and so on. He implies that so construe Rule 9 as mandatorily requiring payment of dearness allowance would go against the grain of all of these factors and the context in which the said rules of 2009 were composed. On the other hand, Mr. Majumdar adds weight to his preferred interpretation by stating that dearness allowance at Central Government rates was paid till January, 2016 and was contemplated to be so paid after the two companies were created under Clause 5(a) of the Transfer Scheme (see above), which stated that the terms and conditions of service of the employees of the two companies would not be any less favourable than they were immediately before the said Scheme was implemented. To Mr. Majumdar Rule 9 is the crystallisation of the earlier promise that the dearness allowance would be paid at Central Government rates, and therefore, the implication is that the general factors sought to be asserted by the learned Advocate General are irrelevant.

Putting the two sets of interpretive factors side by side, we are inclined to tilt in favour of Mr. Majumdar. In regards the first set of interpretive factors, we notice that Rule 9 is truly split into two components. The first part states that dearness allowance is "admissible" for employees to be paid according to a certain formula up to 31st December, 2008. Undoubtedly, the use of word "admissible" makes the payment of dearness allowance up to the said date to be non-mandatory. But then, the next sub-paragraph of the Rule clearly states: "Henceforth, Dearness Allowance will be applicable to the employees of the Company at such rate and from such date as may be notified by the Central Government from time to time." This signals a clear break from the earlier sub-paragraph, as evidenced by the word "henceforth", which means that post the last period mentioned in the table appurtenant to the earlier sub-paragraph, dearness allowance "will be applicable to the employees of the Company at such rate and from such date as may be notified by the Central Government from time to time."

We do not see reason to quibble over whether the use of the word "will" instead of "shall" indicates that the said sub-paragraph is non-mandatory in nature. Indeed, the use of the verb "will" usually gives us a narrative of the future when it is used in the future tense and in the third person, instead of giving us an obligation that has to be fulfilled by the third person in the future.

Due to the use of the auxiliary verb "be" right after the word "will" in the said subparagraph of the said Rule 9, the use of the said word "be" changes the tense

of the said subparagraph to the future perfect tense. When the word "will" is used along with the word "be" to give us a sentence in the future perfect tense, we give both a narration of future events whilst also creating an expectation that they will occur. Analogously, when it is stated that dearness allowance will be applicable to employees of the two companies at Central Government rates, it means that they are to expect such allowance at Central Government rates and not merely to know that such allowance is applicable to them. Therefore, the said sub-paragraph of the said Rule clearly states that the two companies are bound to pay such dearness allowance at Central Government rates.

The second set of interpretive factors, upon analysis, only supports such a textual interpretation. The judgments cited by the learned Advocate General on the nature of dearness allowance are based on different statutes, making them *ex facie* inapplicable in the context of interpreting Rule 9. His arguments on the financial condition of the companies, the kind of workers to whom dearness allowance is given, and so on, are not relevant in understanding the particular object and purpose of the said Rule 9, and the judgments cited thereto merely provide the jurisprudence on how the wage structure is to be determined (or revised) in the first place. They do not provide authority on how the wording of the said Rule 9 should be legally construed. So, they simply lack force in moving us away from what we see is the plain meaning of the said Rule 9.

We have already summarised the facts at the beginning. The record would unmistakably show that the employees of both the companies received dearness allowance in terms of the ROPA 2009 both arrears as well as current until January, 2016 at the Central Government rates. It cannot be disputed that the ROPA Rules applicable to the power companies have been framed in exercise of power conferred by Article 309 of the Constitution of India and it is statutory in nature. In fact, the rate of dearness allowance paid for the period of 1st April, 2007 till 1st July, 2008 was at the Central Government rates. The last sentence of the said clause, namely, "Henceforth, Dearness Allowance will be applicable to the employees of the company at such rate and from such date as may be notified by the Central Government from time to time" makes it clear that the rate of dearness allowance for the future period would be at such rate as may be notified by the Central Government from time to time. The reference of the Central Government in the aforesaid sentence makes it abundantly clear that the power companies would be obliged to pay the DA at the rate as may be notified by the Central Government from time to time. In fact, DA for the subsequent periods till 2016 was paid at the Central government rates only. However, there cannot be any doubt that in the event, the financial condition of the said companies deteriorate and the financial condition does not permit DA to be paid at the rate notified by the Central Government, the power companies can refuse to pay DA at such rate depending upon the various factors on which the DA can be reduced as the DA is distinguished from Basic Pay. At the same time, if all other parameters justify payment of DA at the rate at which the Central Government employees are being paid, the power companies cannot refuse

payment of DA at such rate as may be notified by the Central Government from time to time. The word 'admissible' in clause 9 does not in any way dilutes the claim of the writ petitioners in claiming DA at the Central Government rate. The word 'admissible' in the context means 'applicable' and does not control the rates at which DA would be payable to the employer. It plainly states the components to be considered in computing DA for all categories of employees of the appellant companies.

Once the power companies have accepted that its employees would be entitled to DA at rates that are applicable to the Central Government employees, it creates a legally enforceable right on its employees to get the DA.

Moreover, we accept the point made by Mr. Majumdar that that dearness allowance at Central Government rates was paid till January, 2016 and that it was contemplated to be so paid after the two companies were created under Clause 5(a) of the Transfer Scheme. The said Clause 5(a) states that the terms and conditions of service of the employees of the two companies would not, at the effective date of transfer, be any less favourable than they were immediately before the said Scheme was implemented. Indeed, that does not preclude variation of the terms and conditions of service post transfer, but the fact that dearness allowance was paid till January 2016 under the said Rule 9 at Central Government rates indicates that the said Rule 9 did not present a departure from the pre-transfer status quo and that, manifestly, the said Rule was intended to be treated as (and has been treated as) mandatory post 25th February, 2009.

Thus, the inexorable conclusion is that the said Rule 9 of the said Rules of 2009 confers a right on the petitioners to payment of dearness allowance at Central Government rates. A writ of mandamus can be issued for enforcement of rights created by statute. The respondents have prayed for enforcement of statutory rates. Dearness Allowance is a condition of service recognised by ROPA 2009. However, given our writ jurisdiction under Article 226 is a discretionary jurisdiction, it is necessary to consider if a discretion is to be exercised in favour of the writ petition.

The annual accounts for the period subsequent to January, 2016 shows that the appellants have made substantial profits and the payment of DA at the Central Government rate would cause an insignificant erosion in the profit after tax which was estimated by WBSETCL in the financial year 2017-18 at Rs.43.77 crores and WBSET at Rs.63.13 crores. Even for the earlier periods when the power companies were earning profits much less than the subsequent years DA was paid for such periods at the Central Government rates. The affidavits filed by the power companies does not justify avoidance of the contractual terms towards payment of DA at the Central Government rates that were paid till January, 2016. When there has been a significant rise in the profit earned by the companies the financial inability to make payment towards DA which is a benefit required to be extended to the respondents in terms of ROPA 2009 at the Central Government rate cannot be denied. The financial inability not being established

we are of the view that the learned Single Judge was justified in allowing the writ petition. We reiterate that the appellants have not been able to establish its incapability or inability to pay DA at the Central Government rates. We, however, accept the submission on behalf of the learned Advocate General that in the event the companies are able to demonstrate poor financial condition the DA may not be payable at the Central Government rate. The observation of the learned Single Judge to the effect that the DA cannot be denied to the writ petitioners even if the management of two companies can demonstrate poor financial condition has to be read in the context of the observation made in the other paragraphs of the said judgment and not in isolation. However, if it means that irrespective of the financial condition the two companies were obliged to pay DA at the Central Government rate in terms of Clause 5(a) the same would be contrary to law as the DA cannot be equated to basic pay or basic wages. The phrase in Clause 5 that the terms and conditions of service of transfer shall not, in any way, be less favourable than those applicable to them immediately before the said effective date of transfer has to be assessed on the financial ability of the companies after the transfer. DA is a part of the larger component of salary. Salary is bifurcated into basic salary and other allowances of which DA is one to make good of the hardship caused due to rise in prices. DA is introduced to neutralise inflation and the percentage of DA is related to cost of living index or on any acceptable rational basic like AICPI and cannot be fixed arbitrarily by the employer. It must have a nexus to the deprivation of benefits in terms of money suffered due to rise in the cost of living. The appellants also did not say that DA is not payable at all. In the facts and circumstances of these cases having regard to the materials on record we are of the view that the appellant companies are capable of paying DA to the writ petitioners at the Central Government rates under ROPA 2009.

For the aforesaid reasons the appeals are dismissed.

The impugned judgment and order of the learned Single Judge is upheld.

However, there shall be no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.