

SUPREME COURT OF INDIA

Binani Zinc Limited

Vs.

Kerala State Electricity Board

C.A.No. 3492 of 2006

(S.B. Sinha, Asok Kumar Ganguly and Rajendra Mal Lodha JJ)

19.03.2009

JUDGEMENT

S.B. SINHA, J.

1. Correctness or otherwise of an observation made by a two Judge Bench of this Court in BSES Ltd. and others v. Tata Power Company Ltd., [(2004) 1 SCC 195] having been doubted, this matter has been referred to a Larger Bench.

2. Kerala State Electricity Board (KSEB), respondent No.2 is constituted and incorporated under the provisions of the Electricity (Supply) Act, 1948 (for short 'the 1948 Act'). Indisputably the first respondent is entitled to frame and revise tariff for electrical energy in exercise of the powers conferred upon it by Sections 49, 59 and clause (j) of Section 79 of the 1948 Act.

3. The Parliament enacted Electricity Regulatory Commissions Act, 1998 (for short 1998 Act) which received the assent of the President of India on or about 2nd July, 1998. It was, however, deemed to have come into force with effect from 25th April, 1998.

4. By order dated 13th May, 1999, KSEB revised its tariff with effect from 15th May, 1999. A writ petition was filed by an Association questioning the said order.

5. Subsequently on 3rd May, 2001 the Government of Kerela effected an increase of tariff for all categories of consumers except old age homes, schools and hostels of mentally retarded persons etc. The revised tariff was made effective from August 10, 2001. According to the 2 governmental order, KSEB was incurring a deficit of Rs. 160.44 crores per month and in order to make up for the said deficiency the tariff hike was necessitated. Pursuant to the said policy decision the KSEB later on issued a detailed tariff order.

6. The Power Department of the Government of Kerala issued G.O.

(MS) No. 23/2001/PD on 17th August, 2001 inter alia declaring that the Government of Kerela had tentatively decided to enter into a MOU with the Government of India with a view to affirm the joint commitment of the two parties to reform the power sector in Kerela in a time bound manner. The said MOU in the relevant para stated :- "8. Kerala will constitute an independent State Electricity Regulatory Commission by October, 2001 and file tariff petitions by March 2002.

Tariff orders issued by SERC will be implemented fully unless stayed or set aside by Court orders."

7. On or about 11th October, 2001 a Government Order was issued by the Government of Kerala further enhancing the tariff by 50 paise per unit for all industrial consumers 3

8. KSEB revised tariff under Sections 49, 59 and sub-section (j) of Section 79 of the 1948 Act by issuing an order known as 'The Kerala State Electricity Board Extra High Tension Tariff Revision Order 2002'

(for the sake of brevity '2002 Order'). The said order came into force with effect from 1st October, 2002 in terms whereof revision in the tariff for extra high tension industrial units was effected.

9. The Kerala State Electricity Commission (KSERC) was constituted by the State of Kerala on 14th November, 2002 in exercise of its power conferred by Section 17 of the 1998 Act

10. Appellant questioning the validity of the said 2002 Order filed a writ petition before the Kerala High Court which was marked as OP 9798 of 2003. As in the meanwhile the KSERC came into force, the High Court permitted the appellant to approach the Commission within 30 days noting that it would be entitled to examine whether the revision conforms to Section 29 of the 1998 Act or not.

11. The Parliament enacted the Electricity Act, 2003 which came into force with effect from 10th June, 2003.

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12. The KSERC in terms of its order dated 30th April, 2004 inter alia held :- a) On the day the notification dated 24.10.2002 was issued, the Board was empowered to determine the tariff since the [Electricity \(Supply\) Act, 1948](#) was still applicable.

b) No ground for re-determining tariff for HT and EHT consumers.

c) Cross subsidy for tariff for HT and EHT categories was around 43&percent;."

13. The appeal was preferred thereagainst before the High Court in terms of Section 27 of the 1998 Act whereupon by an order dated 2nd July, 2004 it was directed :- "(a) Though the Tariff Revision Order, 2002 was issued on 24th October, 2002, i.e. subsequent to coming into force of the ERC Act, 1998, the Board was empowered to issue the notification as the Regulatory Commission had not been constituted.

5 (b) With respect to issue of cross subsidy, matter remanded to the Commission for fresh determination."

14. A special leave petition was filed thereagainst. This court by an order dated 13th September, 2004 passed an interim order directing the KSEB not to disconnect appellant's electricity supply subject to its paying the demand as per the tariff before its revision on 24.10.2002.

Appellant was also asked to deposit Rs.1 crore with the KSEB.

15. Before the court it was contended by the appellant that the Electricity Act, 2003 having come into force with effect from June 10, 2003, the KSERC functioning as such prior thereto continues to function as the State Commission under the 2003 Act and thus it must be held to have considered the appellants' petition in terms of the provisions thereof. It was furthermore argued that the 1998 Act having been repealed by the 2003 Act, the appeal preferred by the appellant before the Kerala High Court was not maintainable.

This Court, however, while disposing of the appeal held that the issues raised by the appellant could be more effectively considered and 6 disposed of by the appellate tribunal under the 2003 Act, being an expert body.

16. Pursuant to or in furtherance of the said order the Appellate Tribunal upon hearing the parties has passed the impugned judgment inter alia opining that the respondent-KSEB had the jurisdiction to revise the tariff framed on 24th July, 2006, stating :- "26.Therefore, till the Commission was constituted by the State of Kerala the power remained vested in the Board to determine the tariff."

17. Mr. K.K. Venugopal, learned counsel appearing on behalf of the appellant would urge:- (i) Upon coming into force of 1998 Act the State was obligated to constitute the Electricity Commission within a reasonable period.

(ii) On coming into force of the 1998 Act Respondent-Board and/or the State of Kerala had no authority to revise the 7 tariff in terms of the provisions of the 1948 Act or otherwise.

(iii) In any event the principles laid down in 1998 Act should have been kept in mind while revising the tariff, particularly in respect of the cross subsidy, which had specially been dealt with in the Statement of Objects and Reasons of 1998 Act.

18. Mr. M.T. George, learned counsel appearing on behalf of the Board, on the other hand, would urge :- (i) Section 17 of the 1998 Act does not impose any legal obligation upon the State to constitute the Commission ;

(ii) So long the Commission is not constituted, the Board would have jurisdiction to frame and/or revise tariff as the statute does not contemplate a vacuum ;

(iii) The 1998 Act having not repealed the 1948 Act, the power to frame tariff in terms of Section 49 of the 1948 Act continued to remain in the Board ;

8 (iv) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India could not have issued a writ or order in the nature of mandamus directing the State to constitute the Commission.

19. We may at this stage notice the relevant provisions of the 1998 Act.

Section 2(c) of the 1998 defines 'Commission' to mean the Central Commission or the State Commission or the Joint Electricity Regulatory Commission, as the case may be. Section 2(j) of the 1998 defines 'State Commission' to mean the State Electricity Regulatory Commission established under sub-section (1) of Section 17.

Section 3 provides for establishment and incorporation of Central Commission, sub-section (1) whereof read thus :- "3. (1) The Central Government shall, within three months from the date of the commencement of this Act by notification in the Official Gazette, establish a body to be known as the Central Electricity Regulatory Commission to exercise the 9 powers conferred on, and the functions assigned to, it under this Act."

(Emphasis supplied) Section 17 of the Act provides for establishment and incorporation of State Commission, sub-section (1) whereof reads as under :- "(1) The State Government may, if it deems fit, by notification in the Official Gazette, establish, for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission.

(Emphasis supplied) Section 22 deals with the functions of State Commission.

Section 28 provides for determination of tariff by the Central Commission.

Section 29 provides for determination of tariff by the State Commission, relevant part of sub-sections (1) and (2) whereof read as under :-
(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the tariff), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

Provided that in States or Union territories where Joint Electricity Regulatory Commission has been constituted, such Joint Electricity Regulatory Commission shall determine different tariff for each of the participating States or Union territories.

(2) The State Commission shall determine by regulations the terms and conditions for the fixation to tariff, and in doing so, shall be guided by the following, namely:--

(c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;

1 1 (e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government;

Sections 51 and 52 read as under :- "Section 51 - Amendment of Act 54 of 1948 - With effect from such date as the Central Government may, by notification, in the Official Gazette appoint, sub-section (2) of section 43A of the [Electricity \(Supply\) Act, 1948](#) shall be omitted:

Provided that different dates may be appointed for different States.

Section 52 - Overriding effect Save as otherwise provided in section 49, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act."

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20. The 1998 Act indisputably was enacted inter alia for the purpose of implementing reforms pertaining to fundamental issues facing the power sector, namely, lack of rational retail tariff, high level cross subsidies, poor planning and operation, inadequate capacity and for safeguarding the interest of the consumers Jurisdiction of the Commission vis-`-vis the Board in the context of the provisions of the 1998 Act and 1948 Act must be determined having regard to a large number of factors.

21. Section 3 of the 1998 Act mandates the Central Government to establish Central Electricity Regulatory Commission. If the said provision is contrasted with Section 17 of the 1998 Act, it would be evident that no such mandate has been imposed on the State Government to constitute such a Commission. The Parliament advisedly used the words 'may' and 'if it deems fit' in Section 17 of the Act while using the word 'shall' in Section 3 thereof. Establishment of a State Commission by the State Government, therefore, is directory. It confers some discretionary power on the State Government to constitute a State Commission. The State, for sufficient and cogent reasons, may refuse to constitute such a Commission or fail or neglect to do so within a reasonable time. For the aforementioned purpose the Central Government can take recourse to certain measures but the same would not mean that the court can in exercise of its power of judicial review, issue a writ or order in the nature of mandamus directing the State to constitute such a Commission.

22. In fact in this case itself the Central Government was able to persuade the State Government to establish a Commission by entering into a Memorandum of Understanding on 17th August, 2001 in terms whereof the State of Kerala made itself bound to constitute the Commission by October, 2001.

If the contention of Mr. Venugopal is accepted and taken to its logical conclusion, the superior courts would be entitled to direct to Government to implement even conditional legislations. We, therefore, are of the opinion that the same is not legally permissible.

23. The provisions of 1998 Act vis-`-vis 1948 Act are required to be construed harmoniously. For the said purpose it is required to bear in mind that the law does not contemplate a vacuum in its operation. The 1948 Act has not been repealed or replaced by the 1998 Act. Section 61 merely replaced the Ordinance.

24. Thus, it would be one thing to say that upon coming into force of the 1998 Act the provisions contained in 1948 Act which are found to be inconsistent with the former shall give way thereto but it is another thing to say that although no Commission is constituted, the Board would have no jurisdiction at all to frame a tariff.

25. The State Electricity Board is a 'State' within the meaning of Article 12 of the Constitution of India. It is a statutory authority. If the Board has the power to frame or revise the tariff as contained in Section 49 and other provisions of the 1948 Act which is plenary in nature, unless a statutory provision is brought into force interdicting exercise of such power, it cannot be held to become

denuded thereof.

26. The power to make tariff would bring within its folds the power to revise the same. Exercise of such powers from time to time would depend upon the exigencies thereof.

27. The powers/guidelines under the provisions of 1998 Act were to be exercised by the Central Commission or the State Commission. It must come into existence for the said purpose.. A non obstante clause contained in Section 29 or Section 52 of the 1998 Act would be attracted only when the Commission comes into force and not prior thereto. The provisions of the said Act are to be exercised by the Commission for the purposes of the Act. It must, therefore, come into existence before it can exercise its power.

28. It is, therefore, difficult for us to persuade ourselves that that the factors enumerated in clauses (c) to (g) contained in sub-section (2) of Section 29 of 1998 Act providing for the principles required to be followed by the Commission were binding on the State Electricity Boards also.

The State Electricity Boards are entitled to frame tariff in terms of the provisions contained in the 1948 Act. The tariff so framed is legislative in character. The Board as a statutory authority is bound to exercise its jurisdiction within the four-corners of the statute. It must act in all fields including the field of framing tariff by adopting the 1 6 provisions laid down in 1948 Act or the Rules and the Regulations framed thereunder. It is one thing to say that while framing tariff it can only take into consideration the provisions laid down in the Schedule appended the Act and/or the directions contained in the policy decisions issued by the State as also other statutory principles governing the same but then a tariff framed by it cannot be held to be ultra vires only because it did not take into consideration certain principles laid down in clauses (c) to (g) of sub-section (2) of Section 29 of the 1998 Act. It is of some significance to note that the Commission in terms of clauses (a) and (b) of sub-section (2) of Section 29 of the 1998 Act are required to follow the principles provided for under Sections 46, 56 and 57 of the 1998 Act as also the Sixth Schedule appended thereto. The 1998 Act, therefore, recognises the principles contained in the 1948 Act also.

29. The provisions of Section 52 of 1998 Act, therefore, are required to be read in the light of the other provisions contained therein. It is also a well settled principle of law that a statute does not envisage doing anything which is impossible to be done. *Lex non cogit ad impossibilia* *Gausa ommiss Gausa ommiss* is a well known principle.

1 7 It would be absurd to suggest that the principles required to be adopted by the Commission were per force required to be adopted by the Electricity Boards despite the fact that the Commission did not come into existence.

30. The Commission has been empowered to frame tariff. It is, however, not been empowered to frame tariff with retrospective effect so as to cover a period before its constitution. The matter might have been different if such a power has been conferred on the Commission. It is now a well settled principle of law that the rule of law inter alia postulates that all laws would be prospective subject of course to enactment an express provision or intendment to the contrary.

31. On the aforementioned factual backdrop we may notice that in the case of BSES (supra) the Electricity Commission was constituted on 5th August, 1999. A dispute arose in regard to payment

of standby charges by and between the licensee (Tata Power) and the appellant therein (BSES) for the period 1st December, 1998 to 31st March, 1999. We may notice the fact of the said case :- 1 8 "....On account of the notice given by TPC for increasing the charges of standby supply of 275 MVA, a dispute arose and a meeting was convened on 4-3-1999, wherein the Deputy Chief Minister, Government of Maharashtra and representatives of both the sides were present. The Deputy Chief Minister, though advised both the parties to settle the issue amicably between themselves without referring to the Government, at the same time issued certain directions, namely, that BSES should share Rs 9 crores out of Rs 22 crores additional standby charges levied by MSEB upon TPC for the period 1-12-1998 to 31-3-1999 and the issue regarding sharing of standby charges for the period 1-4-1999 onwards be referred to a Committee to be constituted by the State Government. The Government of Maharashtra thereafter constituted a Committee on 27-5-1999 to study certain issues including that of standby charges to be paid by BSES to TPC and to submit a report. Shortly thereafter, a notification was issued on 5-8-1999 constituting the Maharashtra Electricity Regulatory Commission (for short "the Commission"). The Committee constituted by the Government of Maharashtra on 27-5-1999 in its meeting held on 2-5-2000 resolved that in view of the constitution of the Commission, the question of payment of standby charges could only be determined by the Commission and accordingly resolved that the said issue be referred to the Commission for determination. An intimation in this regard was also sent to the respective parties. However, the Government of Maharashtra passed an order on 22-3-2000 whereby BSES was directed to pay standby charges to TPC at the rate of 50 per cent of the amount of standby charges payable by TPC to MSEB. This was done on the basis that MSEB was providing standby facility of 550 MVA to TPC and as TPC was providing standby facility of 275 MVA to BSES, it should pay half of the said amount. The order further provided that for the period 1-12-1998 to 31-3-1999 BSES should pay Rs 9 crores as standby charges to TPC. BSES was not satisfied with the aforesaid order of the Government and made repeated requests for review of the same and lastly on 6-10-2000, it sent a detailed letter to the Government requesting for reconsideration of the matter."

1 9 In the aforementioned fact situation obtaining the Division Bench held as under:- "19. Shri Nariman has submitted that TPC gave a notice on 30-9-1998 of their intention to enhance the charges of standby facility provided to BSES from Rs 3.5 crores to Rs 15.125 crores per month and this notice having been given under the Sixth Schedule (para I, third proviso) of the [Electricity \(Supply\) Act, 1948](#), the enhanced charges became effective and operative after the expiry of 60 days of notice i.e. with effect from 1- 2-1998. The submission is that by operation of law the charges for standby facility stood revised and enhanced with effect from 1-12-1998. In our opinion, the contention raised has no substance.

The legal position has undergone a complete change with the enforcement of the Electricity Regulatory Commissions Act, 1998. In view of Section 29 of the Act, the tariff for intra-State transmission of electricity and tariff for supply of electricity in wholesale, bulk or retail has to be determined by the Electricity Regulatory Commission of the State and a licensee cannot by its unilateral action enhance the charges. The provisions of the Act have an overriding effect by virtue of Section 52 of the Act and, therefore, any provisions of the [Electricity \(Supply\) Act, 1948](#), which are inconsistent with the Act would cease to apply and consequently, the provisions of the Sixth Schedule of the said Act can have no application now. The Sixth Schedule has been made by virtue of Sections 57 and 57-A of the [Electricity \(Supply\) Act, 1948](#) and Section 57-A contemplates constitution of a Rating Committee by the State Government to examine the licensee's charges for the supply of electricity. Section 29(6) of the Act specifically lays down that notwithstanding anything contained in Sections 57-A and 57-B of the [Electricity \(Supply\) Act, 1948](#), no Rating Committee shall be constituted after the date of the commencement of the Act.

The effect of Section 29 and the Regulations framed thereunder is that it is no longer open to a 20 licensee or utility to unilaterally increase the tariff.

The tariff can be enhanced only after approval of the Commission and charging of an enhanced tariff which has not been approved by the Commission will amount to commission of an offence. Therefore, the notice to enhance the charges given by TPC, which was subsequent to the enforcement of the Act, can have no legal effect."

32. BSES (supra) must be held to have been determined on its own facts. Sub-section (6) of Section 29 of the 1998 Act bars constitution of a rating committee. In 'BSES' a Committee was constituted by the State of Maharashtra. In that case when the Regulatory Commissions had been set up by the State government under the ERC Act, no other authority including the Board, would obviously have the power to determine the tariff. It is presumably on that premise that the provisions of the 1998 Act must be given effect to even for the period during which it had not come into force, must be understood.

33. We must also notice that the Electricity (Supply) Act, 1998 was not repealed by the ERC Act, 1998. It was only under Section 185 of the Electricity Act of 2003 that the provisions of the Indian Electricity Act 1910, [Electricity \(Supply Act 1948\)](#) and the ERC Act 1998 were repealed.

But at the same time anything done or any action taken under the Acts of 1910 or 1948 or 1998 Act have been saved in so far as they are not inconsistent with provisions of the 2003 Act.

34. We have, however, no hesitation in finding that the State Electricity Board had the requisite jurisdiction to revise a tariff till such time as the Commission was constituted and the purposes of the 1998 Act could be achieved through it. Till the time the Regulatory Commission was not constituted by the state of Kerala, the power to determine tariff remained with the Board under the Electricity (Supply) Act 1948 as it was not repealed by the Electricity Regulatory Commission Act 1998. The Parliament could not have intended to bring about a situation where no authority would be empowered to determine the tariff between the date of coming into force of the ERC Act, 1998 and the constitution of the commission. It is only after the Regulatory commission is constituted that it will be the sole authority to determine the tariff.

35. We are, therefore, of the considered opinion that this clarification in regard to the decision rendered by a two Judge Bench of this Court in BSES (supra) would be sufficient to answer the reference.

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36. Mr. Venugopal would, however, submit that other contentions/substantial questions of law have been raised in the appeal.

Such questions may be determined by an appropriate 2 Judge Bench.

37. This reference is answered accordingly.

38. The matter may now be placed before an appropriate Bench.