SUPREME COURT OF INDIA

Star Wire (India) Vidyut Pvt. Ltd

Vs.

Haryana Electricity Regulatory Commission

C.A.No. 5139 of 2019

(A.M.Khanwilkar and Ajay Rastogi,JJ.,)

02.07.2019

JUDGMENT

A.M. Khanwilkar,J.,

SLP (C) No.8432 of 2017

1. Leave granted.

2. This appeal takes exception to the judgment and order of the High Court of Punjab and Haryana at Chandigarh passed in C.W.P. No.25337 of 2015 (O & M) dated 23rd November, 2016. The appellants had challenged the fourth amendment to Haryana Electricity Regulatory Commission (Terms and Conditions for termination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 (for short, "principal Regulations") published vide notification dated 12th August, 2015 (for short, "impugned Amended Regulations") which sought to amend the principal Regulations. The appellants had also challenged the order passed by the respondent-Commission dated 4th August, 2015, in furtherance whereof, the impugned Amended Regulations were framed by the appropriate authority for revision of norms for determination of generic tariff for the second control period beginning from 1st April, 2013.

3. The appellants had set up a 9.90 MW independent Biomass Power Plant, which was declared commercially operational on 3rd May, 2013. The principal Regulations were notified on 3rd February, 2011, providing for the norms and parameters for determination of tariff for various renewal energy project developers. As per Regulation 4 of the principal Regulations, the first control period of three years was to end on 31st March, 2013. The third proviso of Regulation 4 posits that in case, the regulations for the next control period were not notified after the expiry of the first control period, the tariff norms as per these regulations (principal Regulations) would continue to apply until notification of the revised regulations, subject to adjustments as per the revised regulations. As the first control period had already ended, the appropriate authority initiated suo motu proceedings for revision of tariff and issued draft fourth amendment to the principal Regulations, seeking to amend

Regulation 4 and including Regulation 5 of the principal Regulations. This draft amendment was issued on 29 th December, 2014. Pursuant thereto, the concerned parties submitted their response. After giving opportunity to all concerned, the Commission proceeded to pass an order dated 4th August, 2015, which attempts to analyse and adjudicate all the issues raised by the concerned parties. On the basis of the said order, the impugned Amended Regulations came to be notified. The effect whereof was to deny the applicability of tariff norms adjustments to the appellant No.1, which had commenced its commercial operations on 3rd May, 2013. The said amendment has been given prospective effect qua the appellants. It has made classification between the projects commissioned/to be commissioned in financial years 2013-14 on the one hand and 2014-15, 2015-16 and 2016-17 on the other, without any intelligible differentia or any rational basis therefor. Neither the principal Regulations nor the impugned Amended Regulations envisage classification on the basis of commissioning of renewable energy projects in a particular financial year during the same control period. Similarly, the regulations do not envisage determination of separate tariff on such differentiation. Indeed, the authority has been invested with power to determine project specific tariff under Regulation 6. In the present case, however, the power exercised by the Commission is indisputably with reference to Regulation 4 namely, to determine a generic tariff for the control period commencing from 1st April, 2013 and ending with financial year 2016-17 i.e. 31st March, 2017, for a period of 4 years.

4. In this back drop, the appellants filed writ petition and prayed for the following reliefs:

> "PRAYER
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> It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:
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> a. Issue an appropriate writ under Article 226/227 of the Constitution of India for issuance of, order or direction in the nature of Certiorari for setting aside the Impugned Notification dated 12.08.2015 (Annexure P- 1) and the Impugned Order dated 04.08.2015 (Annexure P-2) passed by the Respondent to the extent the same seeks to apply the revised regulations with effect from the date of the Impugned Notification; and
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> b. Issue an appropriate writ under Article 226/227 of the Constitution of India for issuance of, order or direction in the nature of Mandamus directing the Respondent to apply the revised regulations on and from the date of commencement of the Second Control Period i.e. with effect from 01.04.2013; and
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> c. Issue an appropriate writ under Article 226/227 of the Constitution of India for issuance of, order or direction in the nature of Mandamus directing the Respondent to publish the revised tariff after adjusting the same as per the revised regulations from the first day of the Second Control Period i.e. 01.04.2013, and to further allow carrying cost on the overdue amounts; and

d. Issue an appropriate interim direction granting ad- interim ex-parte stay of operation of the Impugned Notification dated 12.08.2015 (Annexure P-1) and the Impugned Order dated 04.08.2015 (Annexure P-2) passed by the Respondent; and

e. Dispense with serving advance notice upon the Respondent; and

f. Costs of the Writ Petition be awarded to the Petitioners; and

g. Dispense with filing of certified copies/true typed copies of Annexures P-1 to P-10, and the photo/typed copies of the Annexures may kindly taken on record and the requirement of filing typed/certified copies thereof be dispensed with; and

h. Pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts of the case."

5. The appellants raised almost thirty grounds as articulated in the writ petition, in support of the reliefs claimed by them. They have attempted to demonstrate as to how the amended regulations were arbitrary, unreasonable, capricious and discriminatory. The respondent refuted the stand taken by the appellants by filing elaborate counter affidavit and mainly relied on the order passed by the Commission dated 4th August, 2015, which was the foundation for the amendment of the relevant provisions of the principal Regulations. The reply affidavit filed by the respondents before the High Court runs into about 60 typed pages (forming part of volume II of the paper book). Accordingly, the writ petition proceeded before the Division Bench of the High Court. The High Court in the impugned judgment has noted that the appellants had raised only two contentions, as can be discerned from paragraph 6 of the impugned judgment. The same reads thus:

"6. The grievance of the petitioners is two fold. Firstly with the issuance of notification of the Amended Regulations on 12.8.2015, there would be different treatment for the persons operating in the same control period; namely, who had commissioned their projects in the year 2013-14 and the persons, who had commissioned thereafter, the control period being same i.e. for the years from 2013-14 to 2016-17. Further, it was submitted that out of the control period prior to the date of notification of the Amended Regulations only financial year 2013-14 has been isolated for different treatment, which is discriminatory. How any of alleged Regulation is affecting the petitioner was not specifically pointed out."

We would proceed on the basis that this was the limited argument canvassed before the High Court during the hearing of the writ petition. However, what is intriguing to note is that even these two points have been disposed of by the Division Bench of the High Court in a most cursory manner without analysing the issues in proper perspective, as can be discerned from the discussion in paragraph Nos.13 to 15 of the impugned judgment. The same reads thus:

"13. It is not in dispute that exercise for revision of the 2010 Regulations was not started six months before the expiry of the existing control period on 31.3.2013.

The exercise was started only in the year 2015. Public hearing was held in which even the petitioner-company was represented. Vide order dated 4.8.2015, the Commission approved the proposed amendments in the 2010 Regulations. The Amended Regulations in terms of the order passed by the Commission were notified on 12.8.2015. Regulation 1(2) of the Amended Regulations provides that the Regulations shall be applicable to all the Renewable Energy Projects Commissioned/to be commissioned from Financial Years 2013-14 to 2016-17, as the control period of four years was provided. Regulation 1(3) of the Amended Regulations provides that for the existing projects commissioned from Financial year 2013-14 onwards, the revised norms shall be applicable prospectively from the date of notification of the Amended Regulations unless otherwise provided in the Amended Regulations. For the period prior to the date of notification, existing norms as per the 2010 Regulations shall continue to be applicable. The Amended Regulations were to come into force from the date of publication in the official gazette. The Amended Regulation (4) provides that the second control period shall be of four years commencing from Financial year 2013-14. 3rd proviso thereto provides that in case revised regulations for the next control period are not notified on or before the commencement of that period, the tariff norms as per the Amended Regulations shall continue to remain applicable, until notification of the revised regulations and the second control period shall be deemed to have been extended upto the date of notification of the regulations for the next control period.

14. The contention raised by learned counsel for the petitioners that there is discriminatory application of regulations qua the petitioners' company only because it started operation in the Financial year 2013-14, as compared to the other projects, which started functioning after Financial year 2013-14 is merely to be noticed and rejected. Though the control period is from the Financial Years 2013-14 to 2016-17, however, the Amended Regulations clearly provide that for the existing projects from Financial year 2013-14 onwards, the revised norms shall be applicable prospectively, from the date of notification of the Amended Regulations.

15. As far as the second contention raised by learned counsel for the petitioners regarding application of the Amended Regulations in terms of 3rd proviso to Regulation 4 of the 2010 Regulations is concerned, it clearly provides that the existing norms, even for the period subsequent to the expiry of control period, shall be applicable till such time revised Regulations are notified. However, the same shall be subject to adjustments as per revised regulations. That would mean, adjustments, if any, are to be specifically provided for in the Amended Regulations for the period prior to the notification of Amended Regulations. Wherever special conditions have been provided for in the Amended Regulations for different years, learned counsel for the petitioners did not point out how that prejudiced the petitioners. It is all matter of calculations for which facts were examined by the Commission while passing the order on 4.8.2015, on the basis of which, the Regulations were amended."

As a matter of fact, paragraph 13 of the impugned judgment merely notices some factual aspects. The reason which weighed with the High Court to negative the issues agitated by

the appellants can be noticed only from paragraph Nos.14 and 15, which ex facie to so the least is cryptic.

6. Resultantly, the appellants have approached this Court by way of present appeal. The main argument of the appellants is that the principal Regulations which indeed, applied to the control period from 3rd February, 2011 until 31st March, 2013, but envisaged that the same would continue to remain applicable until notification of the revised regulations is issued, subject to adjustments as per revised regulations. These regulations make no distinction on the basis of commissioning of project on financial year basis during the same block period or thereafter until its application during the extended period. Rather, the control period referred to in Regulation 4 encompasses all the projects commissioned during that block period and including extended period and must be treated alike. In other words, the same generic tariff must apply to all the projects commissioned during the relevant block period i.e. from 3rd February, 2011 to 31st March, 2013 and until the issue of revised regulations, subject to adjustments as per revised regulations. Therefore, the amended regulations must be read in light of the principal Regulations. However, the amended regulations entail in denying the applicability of the revised regulations to R.E. projects commissioned in FY 2013-14. Such as the appellant, which was commissioned on 3rd May, 2013. The amended regulations are for the second control period commencing from 1st April, 2013 and ending on 31st March, 2017 for a period of four years, of which the first year has been defined as FY 2013-14. Despite this position, the amended regulation 1(3) makes exception to the applicability of the revised regulations to the projects commissioned during FY 2013¬14, by making it applicable prospectively from the date of notification of the impugned Regulations on 12th August, 2015. Whereas, the projects commissioned during 20014-15 and onwards during the selfsame second control period referred to therein would get the benefit of the revised regulations for the entire period from the date of commissioning commercial production, without there being any intelligible differentia. In other words, the appellants have been denied benefit of the revised regulations for the period between 3rd May, 2013 to 12th August, 2015. The effect of such a provision is to take away the benefit which had enured to the appellants in terms of Regulation 4 of the principal Regulations, which predicates that the tariff norms as per the principal Regulations shall continue to remain applicable until notification of the revised regulations, subject to adjustments as per the revised regulations. Resultantly, the impugned Amended Regulations suffer from the vice of hostile discrimination between persons similarly placed namely, projects commissioned during the block of second control period governed by the Amended Regulations, without any intelligible differentia. We need not elaborate on other arguments which are either to buttress the above-mentioned points or if we may say so, in the nature of another shade of the same argument with reference to factual aspects relevant for examining the same. The sum and substance of the argument is that the appellants have been denuded of their right to get adjustments in the same manner as extended to projects commissioned in the same control period and despite the stipulation in the third proviso of the Regulation 4 of the principal Regulations. Inasmuch as, the impugned Amended Regulations were notified on 12 th August, 2015, therefore, the rights accrued to the appellants in terms of Regulation 4 would take effect from commissioning of their project on 3rd May, 2013 because the principal Regulations were still applicable and in force. Taking away that fructified right, is impermissible in

law. Further, the impugned Amended Regulations, ex facie, discriminates between the projects commissioned during the same control period i.e. second control period from 1st April, 2013 till 31st March, 2017, by singling out the projects commissioned in FY 2013-14. It is not open to make such classification in respect of projects commissioned during the same control period. Further, there can be no two tariffs operating during the same control period. In that, no express provision to prescribe two sets of tariffs concerning the same control period is found in the principal Regulations or the impugned Amended Regulations. Therefore, classification sought to be done in the impugned Amended Regulations, cannot be countenanced.

7. Indeed, the respondents have vehemently supported the impugned decision of the High Court and would contend that the provisions engrafted in the impugned notification are manifestation of the order passed by the Commission dated 4th August, 2015. The Commission had elaborately analysed all aspects of the matter before passing the said order. In other words, the respondents have drawn support from the analysis done by the Commission in the suo moto proceedings initiated by it for revision of norms (for tariff operation for the second control period commencing from 1st April, 2013). That order runs into over 100 typed pages and has analysed the necessity of revision vis-a-vis each head to be reckoned for determination of tariff. The appellants had participated in the said proceedings. However, the stand taken by the appellants did not commend to the Commission, as can be discerned from the discussion in the order passed by it on 4th August, 2015. Further, it was open to the appellants to approach the Commission by way of a review if they had any reservation with regard to the view taken by Commission in the said order. It was also open to the appellants to file appeal against the said order. However, without resorting to such remedies, the appellants chose to file writ petition and have raised grounds which are untenable in light of the discussion recorded by the Commission in its order dated 4th August, 2015. It is certainly not a case of hostile discrimination considering the fact that Commission has recorded tangible reasons as to why the applicability of the revised regulations was required to be made prospective in respect of projects commissioned during FY 2013-14. It is urged that the exercise of power in framing regulations - be it principal Regulations or impugned Amended Regulations - in terms of Section 61 read with Section 181 of the Electricity Act, 2003 permits classification on the basis of the date of commissioning of the project during the relevant period and which may inevitably result in providing for two sets of tariffs during the same control period. It is submitted that even though the impugned judgment of the High Court is brief, the conclusions reached therein are unexceptionable and therefore, this appeal ought to be dismissed.

8. After perusing the impugned judgment, we have no hesitation in taking the view that the High Court has committed manifest error or so to speak, failed to exercise jurisdiction vested in it for adjudicating the relevant issues raised by the appellants. For, there is hardly any intelligible discussion in the impugned judgment in that regard. If we may say so, it is cryptic and cannot stand the test of judicial scrutiny. We say so because, up to paragraph 9 of the judgment the High Court has only reproduced the rival stand. Paragraph 11 refers to the relevant provisions. Paragraph 12 is mere narration of some facts concerning this case. Paragraph 13, broadly refers to the purport of the provisions in the principal Regulations

and the impugned Amended Regulations. The discussion with regard to the merits of the challenge, can be discerned only from paragraph Nos.14 and 15 reproduced hitherto. Paragraph 14 even if fairly analysed, merely adverts to the argument of discriminatory application of regulations qua the appellant company and proceeds to reject the same. No logic can be deduced as to why the Court was persuaded to reject the argument despite the multifaceted issues raised by the appellants. The second sentence in the said paragraph then proceeds to record that the control period may be from FY 2013-14 onwards, however, the impugned Amended Regulations envisage application of revised norms to projects commissioned in FY 2013-14 prospectively from the date of notification of the impugned Amended Regulations. In other words, the High Court has not analysed the grounds of challenge regarding the validity of the impugned Amended Regulations and including the competency to frame such a regulation, appropriately. Strikingly, the High Court then straightaway proceeds to examine the second contention raised by the appellants in reference to the third proviso in the principal Regulations providing for adjustments as per revised regulations. The Court merely noted that the appellants failed to point out any prejudice caused to them because of exclusion from the benefit flowing from the principal Regulations. The appellants, on the other hand, have invited our attention to the specific grounds taken by the appellants in the writ petition and also noted in the order of the Commission dated 4th August, 2015 and additionally articulated in the ground No. B of the special leave petition, giving comparative chart indicating substantial disparity regarding the norms applicable as per principal Regulations and the impugned Amended Regulations. In other words, the argument of prejudice was raised by the appellants to the detail but the High Court has failed to deal with the same, to say the least satisfactorily. Similarly, the detail arguments regarding the validity of the impugned Amended Regulations and the competency to frame such a regulation has not been analysed by the High Court.

9. Suffice it to observe that the discussion in two paragraphs (para 14 and 15), to say the least, is one of disposing of the writ petition in a most casual and cavalier manner. That cannot be countenanced. Having said this, we are of the considered opinion that it would be appropriate to relegate the parties before the High Court for fresh consideration of the writ petition on its own merits in accordance with law. We refrain from expressing any opinion either way on the merits of the controversy or the grounds of challenge regarding the impugned Amended Regulations. In other words, the High Court must consider all relevant aspects of the matter agitated by the appellants and deal with the same appropriately in accordance with law.

10. For completion of the record, we must note the decision of the Constitution Bench of this Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission, Through Secretary \ which has held that the challenge to the validity of the regulations can be decided only in judicial review proceedings before the courts and not by way of appeal or review. The appellants having invoked such a remedy before the High Court, all contentions available to the appellants in that regard ought to have been adjudicated in proper perspective. We agree with the appellants that the nature of elaborate order passed by the Commission on 4th August, 2015, which culminated with the framing of Amendment Regulations the only remedy available to challenge the same is by way of a

writ petition under Article 226/227 of the Constitution of India.

11. Accordingly, this appeal is allowed. The impugned judgment and order is set aside. The CWP No.285337 of 2015 (O&M) is restored to the file of the High Court to its original number, for being considered afresh by the High Court on its own merits in accordance with law. All pending applications are disposed of. No order as to costs.

Judgment Referred.

[1]*(2010) 4 SCC 0603*