THE HON'BLE SRI JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

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WRIT APPEAL Nos. 115, 116, 118, 219, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 256, 264, 265, 266, 267, 268, 271, 274, 277, 283, 284, 285, 287, 288, 289, 290, 292, 293, 295, 296, 300, 301, 302, 303, 305, 310, 311, 312, 315, 316, 317, 325, 326, 328, 329, 330, 331, 334, 336, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 552, 557, 613, 620, 627, 628, 657, 660, 670, 671, 672, 676, 681, 691, 699, 700, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 953, 954, 955, 976, 977, 978, 979, 980, 981, 1008, 1119, 1122, 1123, 1124, 1125, 1359, 1360 of 2014; and WA(SR).Nos.5289, 5312, 26452, 26467, 26474, 26484, 26495, 26521, 26522, 26523, 26526, 26527 and 26534 of 2014.

% 01.05.2015

APERC, SCY, Hyderabad and others.

…Petitioners

vs.

$ CPDCL,M.D,HYD, and others.

… Respondents

!Counsel for the Petitioners : Sri Srinivasa Rao Putluri

^Counsel for the Respondents : Sri Manohar Reddy

(SC for AP TRANSCO)

<Gist :

>Head Note :

? Cases referred

1. 2015 (3) SCALE 546

2. (1986) 4 SCC 198

3. AIR 1984 SC 657

4. 2011 (5) ALT 188

5. 2014 (3) L.S. 129

6. (2011) 14 SCC 337

7. JT 2003 (Suppl.2) SC 376

8. (2011) 11 SCC 34

9. (1990) 3 SCC 223 : AIR 1990 SC 1277

10. (2009) 16 SCC 659

11. (1983) 4 SCC 508

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WRIT APPEAL Nos. 115, 116, 118, 219, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 256, 264, 265, 266, 267, 268, 271, 274, 277, 283, 284, 285, 287, 288, 289, 290, 292, 293, 295, 296, 300, 301, 302, 303, 305, 310, 311, 312, 315, 316, 317, 325, 326, 328, 329, 330, 331, 334, 336, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 552, 557, 613, 620, 627, 628, 657, 660, 670, 671, 672, 676, 681, 691, 699, 700, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 953, 954, 955, 976, 977, 978, 979, 980, 981, 1008, 1119, 1122, 1123, 1124, 1125, 1359, 1360 of 2014; and WA(SR).Nos.5289, 5312, 26452, 26467, 26474, 26484, 26495, 26521, 26522, 26523, 26526, 26527 and 26534 of 2014.

COMMON JUDGMENT: (per the Hon'ble Sri Justice A.Ramalingeswara Rao)

These Writ Appeals are being disposed of by this common judgment with the consent of the parties appearing before us at the admission stage.

2. W.P.No.4330 of 2012 and batch was disposed of on 06.12.2013 by a common order by the learned single Judge. Based on the said common order dated 06.12.2013, another learned single Judge disposed of another batch of cases in W.P.No.31478 of 2013 and others on 02.01.2014, 24.1.2014 and 28.1.2014 and the present Writ Appeals are filed against all the said orders. These Writ Appeals are filed by the Andhra Pradesh Electricity Regulatory Commission, Hyderabad (for short, the Commission), as well as by the Distributing Companies in Andhra Pradesh and Telangana States. All these Writ

Appeals are based on common questions of fact and law.

3. The Writ Petitions were filed by the HT consumers of the Licensees of the Commission. The consumers are subjected to twin tariff system under which they have been paying two types of charges viz., maximum demand charges and energy charges. The tri-vector HT meters installed in the premises of the consumers record the above two factors. The maximum demand is measured in terms of kilo volt amperes per hour (Kvah) and the energy is measured in terms of kilo watts per hour (Kwh). One kilo Watt is one unit.

4. While so, the Commission issued a Tariff Order on 30.03.2011 effective for the years 2011-2012 approving the proposal for Kvah based billing instead of Kwh based billing. It was made applicable to all HT consumers and LT consumers for whom the tri-vector meters have been provided. For example, in respect of industries, the tariff approved is as follows:

" A) INDUSTRY – GENERAL

DEMAND CHARGES & ENERGY CHARGES		
Voltage of Supply	Demand Charges Rs/Kva/month of Billing Demand	Energy Charges Paise/ Kvah
132 kV and above	250	297
33 kV	250	325
11 kV	250	352
*Rs.1.00/Kvah Time of Day Tariff is leviable on energy consumption during the period from 06:00 PM to 10:00 PM, in addition to the normal energy charges at respective voltages		

IMPORTANT

The billing demand shall be the maximum demand recorded during the month or 80% of the contracted demand whichever is higher.

Energy charges will be billed on the basis of actual energy consumption or 50 Kvah per Kva of billing demand whichever is higher.

FSA will be extra as applicable as notified by the Commission from time to time."

5. The said policy continued for 2011-12, 2012-13 and 2013-14. The same was challenged by the petitioner in W.P.No.20403 of 2012 for the year 2011-12 initially and when the same was pending, another Writ Petition No.20387 of 2012 was filed challenging the Tariff Order for the year 2012-13. Several other Writ Petitions as stated above were also filed challenging the Tariff Order for the year 2013-2014. When the said Writ Petitions were pending, the Commission issued Regulation No.7 of 2013, amending Regulation 2(c) enabling computation of the consumed energy in Kvah and Kwh also. As a result of such amendment, the consumption charges defined in A.P.Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2004 (for short, Electricity Supply Code) was amended and the amended provision reads as follows:

"2(c) "Consumption Charges" means energy charges for consumption of electrical energy (calculated on the basis of Kwh or Kvah rate as applicable), and includes Demand/Fixed charges, Fuel Surcharge Adjustment (FSA) charges, customer charges, wherever applicable."

6. The Commission filed a counter-affidavit raising a preliminary objection that the Writ Petitions challenging the Tariff Order were not maintainable and an appeal would lie before the Appellate Tribunal for Electricity within 45 days from the date on which a copy of the order is made available by the Commission as per Section 111 of the Electricity Act, 2003 (for short, the Act of 2003). While narrating the history leading to the decision of the Commission, by placing reliance on the provisions of the Electricity Supply Code, it was stated that nowhere it was definitely provided that the energy supplied to the consumer should be measured in a particular definite mode only. The concept of active power and reactive power was explained as under:

"In the power triangle, the horizontal vector represents Active Power (KW). The vertical vector represents Reactive Power (KVAR). The resultant vector, i.e., Hypotenuse is known as Apparent Power (KVA). The power drawn by a consumer is Apparent Power which is most of the times greater than Active power. At present, billing is done for Active Power (VI Cos θ – Horizontal vector) and the effect of reactive power is not considered in the billing."

7. While explaining as above, the Commission stated that the consumption and billing is being done for active power and the effect of reactive power is considered in the form of power factor penalty. Therefore, the Commission considered that it is appropriate to dispense with power factor penalty by changing the mode of billing procedure from “Kwh based billing” to “Kvah based billing” as Kvah based billing is the correct way of billing and is being implemented in some other States viz., Delhi and Uttaranchal. It is also stated that the reliance on the provisions of the A.P.Electricity Duty Act, 1939 (for short, the Act of 1939) is of no avail to the petitioners, as it is meant for levy of duty by the State Government and has nothing to do with the billing of energy supplied to the consumers by the Distribution Companies. It is a duty levied on the Generator who has generated electricity and sold it to a seller (including DISCOM) who pays the tax on such generation. The counter-affidavit also indicated the reasons and the basis for levying the tariff based on Kvah.

8. All those Writ Petitions came up for consideration before the learned Single Judge. The learned Single Judge, after hearing the contentions of the counsel on either side, negatived the contentions of the learned counsel for the petitioners that the Commission is not empowered to determine the Tariff under the Act of 2003 as the A.P.Electricity Reforms Act, 1998 (for short, the Act of 1998) prevails and the Tariff has to be determined under the said Act. The learned Single Judge opined that determination of the Tariff is a matter involving highly technical aspects which should be ordinarily left to the Commission and it is not for this Court to sit in appeal over the decision of the Commission as to which of the two billing methods safeguard the interest of the consumers and the Discoms. He held that this Court would presume that the Commission had determined the billing methodology to be adopted in keeping with the statutory mandate. While holding so, he examined whether the Commission complied with the due procedure while introducing and implementing the new billing methodology. After holding that the Writ Petitions were maintainable, he held that the Tariff Orders of 2011-12, 2012-13 and 2013-14, insofar as they provide for implementing the change in billing methodology, are invalid mainly on the ground that the Commission did not choose to amend

the other regulations or provisions, framed or approved, which spoke to the contrary insofar as the base component for billing, expressed in terms of kilowatt-hours, was concerned. Challenging the order of the learned Single Judge, the present Writ Appeals are filed as aforesaid.

9. The learned Senior Counsel Sri B.Adinarayana Rao, appearing for the Commission, reiterating the contention raised before the learned Single Judge, submitted as follows:

(i) When there is a statutory remedy of appeal in Sec.111 of the Act of 2003, the petitioners cannot challenge the Tariff Orders in Writ Petitions and hence the Writ Petitions are not maintainable and

(ii) The Tariff Orders of the Commission are valid as the Commission passed the Tariff Order only after following due procedure and the reliance placed by the petitioners on other provisions have nothing to do with the passing of the Tariff Order in the manner that was done by the Commission.

He placed reliance of **Union of India v. Major General Shri Kant Sharma.**

10. The said argument of the learned Senior Counsel for the Commission was adopted by Sri K.Ramakrishna Reddy, the learned Advocate General appearing for the Distributing Companies in the State of Telangana. He placed reliance on the decision in **Kerala State Electricity Board v. M/s.S.N.Govinda Prabhu**. In the said case, the Supreme Court was deciding the question of the extent of the authority of the Board to increase the electricity tariff under the Electricity Supply Act, 1948. At that time, the Electricity Commission has not come into existence. The Supreme Court quoted with approval the following passage from **Rohtas Industries v. Bihar State Electricity Board.**

> "The position was again clarified in **Rohtas Industries v. Bihar State Electricity Board:**
>
> As pointed out by this Court in **Prag Ice and Oil Mills v. Union of India** ((1978) 3 SCC 459: AIR 1978 SC 1296), in the ultimate

analysis, the mechanics of price fixation is necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of persons, the procedural basis of price fixation is to be accepted in the generality of cases as valid."

11. By placing reliance on the above extracted portions in the judgment, he submitted that price fixation is a legislative power and the same cannot be interfered without strong grounds.

12. On the other hand, Sri D.V.Nagarjuna Babu, the learned counsel appearing for the Writ Petitioners, justified the order passed by the learned Single Judge by drawing our attention to other Regulations, where the measurement of energy on Kwh basis was indicated, and submitted that he is not challenging the rate fixed by the Commission, but he is challenging only the billing methodology indicated in the Tariff Orders. He reiterated the argument advanced by him before the learned Single Judge and submitted that without making consequential amendments in other Regulations, the billing methodology cannot be changed. He also submitted that by virtue of Regulation No.7 of 2013 making amendment to Electricity Supply Code by substituting the definition of "consumption charges" in Clause 2(c) thereof, the objections raised by the petitioners are deemed to have been accepted and without making such amendment for the years under challenge the billing methodology cannot be changed by the Commission.

13. In order to appreciate the above contentions advanced by learned Counsel on both sides, we frame the following points for consideration:

a. Whether the Writ Petitions, as held by the learned Single Judge, are maintainable even though there is a provision for appeal against the Tariff Order in Section 111 of the Act of 2003?

b. Whether the introduction of change in billing methodology by the Commission for the years 2011-12, 2012-13 and 2013-14 is valid and enforceable?

MAINTAINABILITY:

14. The Commission was constituted as per the provisions of the Act of 1998 by notification dated 03.04.1999 and the said Commission was continued to be a Commission within the meaning of the Act of 2003 also. The Act of 2003 was enacted by Parliament and it came into force with effect from 10.06.2003. Section 82 of the Act of 2003 enables the State Government to constitute a State Commission to be known as the State Electricity Regulatory Commission and its functions under Section 82 thereof include determining the Tariff for generation, supply, transmission and wheeling electricity, wholesale, bulk or retail, as the case may be, within the State. It also got advisory functions under sub-section (2) of Section 86. Sub-section (3) of Section 82 ordains that the State Commission shall ensure transparency while exercising its powers and discharging its functions.

15. Section 61 of the Act empowers the Commission to specify the terms and conditions for the determination of tariff. While doing so, it shall be guided by the principles mentioned in Section 61. Section 62 enables the Commission to determine the tariff in accordance with the provisions of the Act for (a) supply of electricity by a generating company to a distribution licensee; (b) transmission of electricity; (c) wheeling of electricity and (d) retail sale of electricity. Sub-section (2) thereof enables the Commission to require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff. Section 64 details the procedure for issuance of tariff order. As per the said provision, an application for determination of tariff under Section 62 shall be made by the generating company or a licensee.

16. It is not the case of the Writ Petitioners that the Commission has not followed due procedure while issuing the Tariff Order. Section 111 of the Act of 2003 says that any person aggrieved by an order made by the Commission under the Act may prefer an appeal to the Appellate Tribunal for Electricity. A reading of the above provision makes it clear that the Tariff Order made under

Section 62 is appealable under Section 111 of the Act of 2003. But, here the Writ Petitioners, while accepting the Tariff Order as such, challenged the billing methodology as opposed to the provisions of other Regulations made by the Commission and did not target their attack on fixation of rate. An examination of this point does not involve any investigation into the facts, but involves examination of the provisions on which reliance was placed by the learned counsel for the parties. The learned counsel for the Writ Petitioners placed reliance of a decision of this Court in **India Cements Ltd. v. Chairman, APSERC, Hyderabad.** The learned Senior Counsel for the Commission relied on **Major General Shri Kant Sharma** (supra) in support of his contention that these Writ Petitions are liable to be dismissed as not maintainable. In **India Cements Ltd**. (supra) when a challenge was made to the Fuel Surcharge Adjustment (FSA) determined and approved by the Commission and a stand was taken by the Commission that the Writ Petitions were not maintainable, this Court held as follows:

> "From the above, it is clear that writ petition under Article 226 of the Constitution of India against an order passed by a statutory authority can be entertained despite availability of alternative remedy against it in the following cases:
>
> i. if the alternative remedy is not efficacious,
>
> ii. if the writ petition has been filed for the enforcement of any of the fundamental rights or
>
> iii. where there has been a violation of the principles of natural justice or
>
> iv. where the order or proceedings are wholly without jurisdiction or
>
> v. the *virus* of an Act or Regulations framed thereunder are challenged."

The said decision of this Court in **India Cements Ltd**. (supra) was followed by one of us (ARLRJ) in **Sri Dhanalakshmi Cotton & Rice Mills Pvt. Limited v. Southern Power Distribution Company of A.P.** In **Major General Shri Kant Sharma**'s case (supra), the Supreme Court was considering a case relating to Armed Forces. In the said case the Supreme Court was dealing with the following question:

> "In these appeals the question raised is whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the 'Act'), against an order of Armed Forces Tribunal (hereinafter referred to as the 'Tribunal') with the leave of the Tribunal under Section 31 of the Act or leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces."

In that context, while analysing the provisions of the Armed Forces Tribunal Act, 2007, vis-à-vis the powers of the High Court under Articles 226 and 227 of the Constitution of India and the theory of basic structure of the Constitution, the Supreme Court summarised the propositions as follows:

> "34. The aforesaid decisions rendered by this Court can be summarised as follows:
>
> i. The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High court under Article 226 of the Constitution of India. (Refer: *L.Chandra and S.N.Mukherjee*).
>
> ii. The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act. (Refer: *Mafatlal Industries Ltd.*).
>
> iii. When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: *Nivedita Sharma).*

The High Court will not entertain a petitioner under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: *Nivedita Sharma).”*

While summarising the said principles, the Supreme Court quoted with approval the previous decision in **Nivedita Sharma v. Cellular Operators Association of India**, wherein it was held as follows:

“13. In **Titaghur Paper Mills Co. Ltd. v. State of Orissa,** (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

“11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in **Wolverhampton New Waterworks Co. v. Hawkesford**, 141 ER 486 in the following passage: (ER p. 495)

‘… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.’

The rule laid down in this passage was approved by the House of Lords in **Neville v. London Express Newspapers Ltd.,** 1919 AC 368 and has been reaffirmed by the Privy Council in **Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.,** 1935 AC 532 (PC) and **Secy. of State v. Mask and Co.,** AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.”

14. In **Mafatlal Industries Ltd. v. Union of India,** (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> "77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

> 15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in **Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad** AIR 1969 SC 556**,** it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

> 16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in **Thansingh Nathmal v. Supt. of Taxes** AIR 1964 SC 1419 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field."

17. The learned single Judge held that the Writ Petitions are maintainable on the ground that availability of alternate remedy would not by itself be a bar to a Writ Petition under Article 226 of the Constitution of India. Violation of statutory rule would be reason enough for this Court to entertain a Writ Petition notwithstanding the availability of an alternate/appellate remedy. He also observed that in the present case, the challenge is not to the actual tariff rate, but to the basis for determination of such tariff and that the new billing methodology is inconsistent with the existing statutory regulations/provisions. He held that ground is enough to justify examination and interference, if warranted, by this Court in exercise of its extraordinary jurisdiction despite the statutory appeal provided under the Act of 2003 and accordingly held that the Writ Petitions were maintainable.

18. It is settled principle of law that denial of exercise of jurisdiction is a matter of prudence and in appropriate cases, this Court can exercise its powers under Article 226 of the Constitution of India. We noticed that there is no need for investigation into facts while deciding the issue raised in the Writ Petitions and the challenge is only to the billing methodology, and hence we are of the opinion that, in the facts and circumstances of the case, this Court can exercise its jurisdiction without relegating the parties to the appellate remedy as urged by the learned Senior Counsel for the Commission. Accordingly we hold that the Writ Petitions are maintainable and uphold the view taken by the learned single Judge. We, thus, hold point No.1 against appellants.

LEGALITY OF CHANGING OF BILLING METHODOLOGY:

19. The sheet anchor of the argument of the learned counsel for the Writ Petitioners is that the billing methodology was changed from Kwh to Kvah without making consequential amendments in the Regulations framed by the Commission and it affects the relationship between the consumers and Discoms on the one hand and the Discoms and Government on the other hand. It is also his submission that the subsequent amendment made by the Regulation 7 of 2013 fortifies his arguments. In the light of the above, we have to examine the validity of the decision taken by the Commission.

20. Even according to the Writ Petitioners, the Commission, while issuing the Tariff Order, had followed the procedure. It is not the case of the Writ Petitioners that the Commission violated the procedure contemplated under Section 64 of the Act of 2003 and thus, the decision was vitiated. Section 61 of the Act of 2003 deals with Tariff Regulations. It enables the Commission to specify the terms and conditions for the determination of tariff and while specifying so, it was stated that the guiding principles mentioned therein shall be followed. It is useful to refer to Section 61 in this context.

> "**61 Tariff regulations.-** The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:--

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

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

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multiyear tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;.

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy"

21. The tariff had to be determined under Section 62 of the Act of 2003. Section 62(1) states that the Commission may require a licensee or a generating company to furnish separate details in respect of generation, transmission and distribution for determination of tariff. The procedure for issuance of tariff order is provided under Section 64 of the Act.

22. In this context, it is relevant to extract the portion of the "Tariff Order" for the year 2011-12 discussing the introduction of Kvah billing and it reads as follows:

"**Introduction of Kvah based billing**

93. The Licensees proposes Kvah billing in place of Kwh billing for computation of energy charges and remove the present applicable factor penalty clause for FY2011-12.

Objections/Suggestions: The Railways represented by the South Central Railway and the East coast railway, objected for the following reasons, viz., (a) In the Tariff Order of 2009-10, the Commission implemented Kwh billing for all HT consumers, with penalties of 0.5% to 3% of energy charges for every 0.01 fall in P.F. The Railways have invested huge amounts for Power Factor correction equipment for maintaining high power factor of 0.96 to 0.98 (b) Other State Electricity Boards / Commissions have provided incentives for HT consumers, maintaining power factor above 0.95. The proposal, now levies a charge on them even though they maintain PF above 0.95. They pleaded that

the Commission that the existing tariff based on Kwh consumption may be restored or otherwise the tariff may be fixed at Rs.4.00 per unit as per National Tariff Policy.

The Ferro Alloys Units represented requested to exempt them from Kvah billing, stating that all Ferro Alloy industries are meeting the requirement of 0.95 Power Factor. They submitted that once Kvah billing is introduced, the consumer tends to overcompensate the reactive power requirement to make doubly sure that Kwh is as close to Kvah and any over

compensation brings the PF to leading and the lead energy will be pumped to the Grid and in turn the DISCOMs may have to introduce reactors to compensate the lead energy. This will increase the fixed cost to the licensee and the system will end up with more losses.

FAPCCI (The Federation of Andhra Pradesh Chamber of Commerce and Industry) stated that at present no penalties are levied for the categories, maintaining PF between 0.95 to 1.00; with the proposed Kvah billing, all the consumers, except those who maintain power factor at unity, will get penalized with an additional tariff. Thus, it is an indirect heavy increase in the financial burden of presently disciplined consumers who are maintaining PF at 0.95 or above. Further, they stated that the Licensees appear to have considered only such part of the Grid Code, which supports their argument while ignoring the overall intention of the Code. They pointed out that once Kvah billing is introduced, to block the lead component, consumers tend to over compensate the reactive power requirement, (to doubly ensure that Kvah is nearer to Kwh) and such over compensation may incidentally bring down the recorded MD. Secondly, as a result of over compensation by consumers, the lead energy is pumped into the network of Licensees and the Licensees may have to compensate the lead reactive energy by installing reactors or allow it to flow to compensate for their transmission requirements. If the first option is chosen, Licensees have to increase the fixed costs and in the second option, Licensees may end up in more system losses. It was further stated that, in spite of these objections, if Commission is convinced of implementing the Kvah based billing against grid standards of 0.95 power factor, a 5% relief in tariff may be allowed, to compensate the additional financial burden on consumers.

M/S Trion Properties Pvt ltd and M/e Raheja IT park hyd (p) ltd stated that Kvah based billing would increase their tariff by 5.3%.They stated that for 1 unit of active power (1Kwh), the consumer would consume at the specified normative power factor of 0.95 ,apparent power(Kvah) of 1.053 units i.e 5.3% more than what the consumer is supposed to pay. Thus, it was stated that it has an indirect impact on billing. This is a clear discrimination among customers which is not justified.

Sri BV Raghavulu and Sri M Venugopala Rao suggested that it should be confined to massive consumers of power like HT and other industries and HT commercial categories only.

Replies of Licensees: The objective in introducing this measure was to ensure reduction in line losses which occur due to the low power factor. The present three part tariff structure for HT consumers would be replaced by two part tariff with forfeiture of power factor surcharge. The Kvah based billing calculates accurately the energy charges for the contracted load. The licensees therefore expect the consumers to have Unity Power Factor. In case of overcompensation of the power factor by the consumer and in case a leading power factor situation arises, there might be some impact on the line loss. Finally, Kvah based billing is for encouraging the consumers to maintain near-unity power factor.

Commission's View: The history of this provision to switch over to Kvah based billing needs a bit recapitulation. The proposal originated to reduce the reactive power drawl from the system which is undesirable for better system management. The system efficiencies improve and losses are reduced if unity power factor is achieved.

In the ARR and tariff proposals for 2010-11, M/s EPDCL proposed Kvah based billing. The detailed reasons are available in its ARR filing for 2010-11. A directive was then given by the APERC in the last year tariff order 2010-11 to the four DISCOMS to file suitable proposals in their ARR and tariff proposals for 2011-12. The DISCOMS have accordingly proposed the Kvah based billing now. In the meanwhile, the proposal to switch to Kvah based billing with complete technical details was also put on the APERC website on 18/10/2010 and public opinion was invited.

Thus the proposal was in public domain for quite some time and is nothing new. It is also illustrative to point out that many States have already switched over from Kwh based billing to Kvah based billing. The Kvah based billing drives the consumer to reach unity power factor. As a result the PF will reach to near unity. This would result in less consumer demand and less demand charges for the consumer. This in turn will lead to reduced demand on the system, reduction in

I^2R losses, improves the system voltages, increases the available transmission capacity and enhances the margin to voltage collapse. It is a win-win situation for Distribution Company, Transmission Company and Consumers. The present meters are capable of recording Kvah readings and there are no operational issues.

The Commission hereby, approves the proposal for Kvah based billing instead of Kwh based billing. The Kvah billing shall be applicable for all

> HT Consumers and LT Consumers for whom trivector meters have been provided for. No power factor penalty shall be levied when the energy billing is done based on Kvah. The Commission has accordingly made suitable changes in the present tariff schedule."

23. A reading of the above extract shows that the Commission, while taking the decision, had taken into consideration the interest of the Discoms as well as the consumers. The introduction of billing methodology as was done by the Commission is not new and it is already in vogue in some States.

24. The word "tariff" was not defined in the Act of 2003. However, the Supreme Court had an occasion to consider it in **BSES Limited v. M/s.Tata Power Co. Ltd.,** wherein it was stated as follows:

> "18. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff…"

In **Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Private Limited,** the Supreme Court had an occasion to consider the powers of the State Electricity Regulatory Commission in relation to fixation of tariff and its effect on concluded contracts (PPAs). In that connection, the Supreme Court made the following observations which are relevant:

> "36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Section 11(1)(c)&(e) is expected to fix the tariff as well as the terms of licence.

37. There are three different legislations in course and the Regulatory Commission has been constituted under the Reform Act, 1998 which in turn would be the Commission as contemplated under the Electricity Regulatory Commission Act, 1998 and the Electricity Act, 2003. In terms of first proviso to Section 82(1) of the Electricity Act, 2003 the State Electricity Regulatory Commission established by the State Government under Section 17 of the Electricity Regulatory Commission Act, 1998 and the enactment specified in the schedule shall be the State Commission for the purposes of this Act. Even in terms of Section 185(3) of the Electricity Act, 2003 the said authority would be deemed to be an appropriate Commission for all purposes and intent as the Reform Act, 1998 has been specifically mentioned in entry 3 of the Schedule to the Electricity Act, 2003. In other words, as already noticed the Regulatory Commission constituted by the said notification would be the appropriate Commission under all these Acts and is required to perform the functions as contemplated under Sections 11, 17 and 82 of the respective Acts.

38. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the Courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies. We would prefer to leave this question open to be considered by the appropriate authority at the appropriate stage.

39. We do not consider it appropriate to go into the merit or de-merit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the Courts refrain from adverting into this arena.

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was

illegal, arbitrary or ultra virus the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscious of the Court making it necessary for the Court to intervene. Even in these cases the scope of jurisdiction is a very limited one.

41. This Court in **Association of Industrial Electricity Users v. State of Andhra Pradesh** [(2002) 3 SCC 711], while dealing with the provisions of tariff fixation in terms of the provisions of the Reform Act, 1998, observed that even where the Act did not envisage classification of consumers according to the purpose for which electricity is used, Sub-Section(9) of Section 26 of that Act does state that the tariff rate relatable to classification of consumers would be permissible, of course, depending upon various factors stipulated in Section 26(7) of the Act. The Court finally held as under: (SCC p.717, para 11)

> "11. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an Appellate Authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

42. Similarly, in **West Bengal Electricity Regulatory Commission v. CESC Ltd.** [(2002) 8 SCC 715], this Court was concerned with determination of tariff by the State Commission, the applicability of principles of natural justice and the scope of interference by the High Court in distinction to the power exercisable by the appellate authority. Stating it to be a function in the nature of legislative power, the Court felt that the principles of natural justice were not attracted and the power of judicial review could hardly be invoked. The Court held as under: (SCC pp. 736 & 739, paras 39 & 44)

> 39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable (see Shri Sitaram Sugar Co. Ltd. v. Union of India SCC, para 45), the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned. Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

> 44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the Regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore they have become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power."

25. In the said decision, the tariff was also considered and it was held as follows:

> "61. Under the Electricity Act, 2003 "tariff" has neither been defined nor explained in any of the provisions of the Act. Explanation (b) to Section 26 of the Reform Act, 1998 states what is meant by 'tariff'. This provision states that 'tariff' means a schedule of standard price or charges or specified services which are applicable to all such specified services provided to the type or types of customers specified in the 'tariff' notification. This is an explanation to Section 26 which deals with licenses, revenues and tariffs. In other words, this explanation may not be of greater help to the Court in dealing with the case of generating companies. Similarly, the expression 'purchase price' has neither been defined nor explained in any of the afore-stated Acts.

> 28. Therefore, in the absence of any specific definition in any of these Acts we will have to depend upon the meaning attached to these expressions under the general law or in common parlance. The expression 'tariff' has been explained in the *Law Lexicon with legal Maxims, Latin terms and Words & Phrases* (2nd Edn., 1997) as

> > "determination, ascertainment, a table of rates of export and import duties, in which sense the word has been adopted in English and other European languages and as defined by the law dictionaries the word 'tariff' is a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by the authority or agreed between the several princes and States that hold commerce together."

It has also been explained as a schedule, system, or scheme of duties imposed by the Government of a country upon goods imported or exported; published volume of rate schedules and general terms and conditions under which a product or service will be supplied; a document approved by the responsible regulatory agency listing the terms and conditions including a schedule of prices, under which utility services will be provided."

26. The nature of the power to fix tariff is no longer *res integra*. In **Sitaram Sugar Company Ltd. v. Union Of India**, a Constitution Bench of the Supreme Court considered the nature and power of Central Government, which was delegated to determine price of levy for calculating the amount payable to seller under the Essential Commodities Act, 1955. In that context, while analysing such power, the Supreme Court observed as follows:

"32. Judicial decisions are made according to law while administrative decisions emanate from administrative policy. Quasi-judicial decisions are also administrative decisions, but they are subject to some measure of judicial procedure, such as rules of natural justice. To distinguish clearly legislative and administrative functions is "difficult in theory and impossible in practice. Referring to these two functions, Wade says:

"They are easy enough to distinguish at the extremities of the spectrum : an Act of Parliament is legislative and a deportation order is administrative. But in between is a wide area where either label could be used according to taste, for example where ministers make orders or regulations affecting large numbers of people....."

Wade points out that legislative power is the power to prescribe the law for people in general, while administrative power is the power to prescribe the law for them, or apply the law to them, in particular situations. A scheme for centralising the electricity supply undertakings may be called administrative, but it might be just as well legislative. Same is the case with ministerial orders establishing new towns or airports etc. He asks : "And what of 'directions of a general character' given by a minister to a nationalised industry?. Are these various orders legislative or administrative?" Wade says that the correct answer would be that they are both. He says: ..... "there is an infinite series of gradations, with a large area of overlap, between what is plainly legislation and what is plainly administration". [Ibid] Courts, nevertheless, for practical reasons, have distinguished legislative orders

from the rest of the orders by reference to the principle that the former is of general application. They are made formally by publication and for general guidance with reference to which individual decisions are taken in particular situations.

33. According to Griffith and Street, an instruction may be treated as legislative even when they are not issued formally, but by a circular or a letter or the like. What matters is the substance and not the form, or the name. The learned authors say : "..... where a Minister (or other authority) is given power in a statute or an instrument to exercise executive, as opposed to legislative, powers as, for example, to requisition property or to issue a licence and delegates those powers generally them any instructions which he gives to hi delegates may be legislative"*4. Where a authority to whom power is delegated is entitled to sub-delegate his power, be legislative, executive or judicial, then such authority may also give instructions to hi delegates and these instructions may be regarded as legislative. However, as pointed out by Denning, L.J., (as he then was) a judicial tribunal cannot delegate its functions except when it is authorised to do so expressly or by necessary implication : See **Barnard v National Dock Labour Board** (1953) 2 QB 18 at p. 40.

34. Kenneth Culp Davis says : "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity". Justice Holmes' definition, which is what is called the "time test" and which Davis describes as one which has produced many unsatisfactory practical results reads :

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial ....."

35. The element of general application is often cited as a distinct feature of legislative activity. In the words of Chief Justice Burger "rule-making is normally directed towards the formulation of requirements having a general application to all members of a broadly identifiable class". Bernard Schwartz says : "An adjudication, on the other hand, applies to specific individuals or situations. Rule-making affects the rights of individuals in the abstract and must be applied in a further

proceeding before the legal position of any particular individual will be definitely affected; adjudication operates concretely upon individuals in their individual capacity" [Ibid]. According to Schwartz, the "time test" and the "applicability test" are workable in most cases, although in certain situations distinctions are indeed difficult to draw.

36. A statutory instrument (such as a rule, order or regulation) emanates from the exercise of delegated legislative power which is the part of the administrative process resembling enactment of law by the legislature. A quasijudicial order emanates from adjudication which is the part of the administrative process resembling a judicial decision by a court of law. This analogy is imperfect and perhaps unhelpful in classifying borderline or mixed cases which are better left unclassified.

37. If a particular function is termed legislative rather than judicial, practical results may follow as far as the parties are concerned. When the function is treated as legislative, a party affected by the order has no right to notice and hearing, unless, of course, the statute so requires. It being of general application engulfing a wide sweep of powers, applicable to all persons and situations of a broadly identifiable class, the legislative order may not be vulnerable to challenge merely by reason of its omission to take into account individual peculiarities and differences amongst those falling within the class.

38. In **Union of India v. Cynamide India Ltd.** (1987) 2 SCC 720 at pp. 734-35, Chinnappa Reddy, J. referring to the earlier decisions of this Court states:

> "..... legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation , the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing..... But where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity .....
>
> ...It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi judicial decisions tend to merge in legislative activity, and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity".

Stating that rule-making is of general application to all members of a

broadly identifiable class while adjudication is applicable to specific individuals or situations, the learned Judge observes (at pp. 1806-1807 of AIR):

> "A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligations of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application, the prospectiveness of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity".

The learned Judge emphasises (at p. 1807 of AIR):

> "Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character".

39. These observations have been cited with approval by one of us (Sabayasachi Mukharji, J., as he then was) in **Renusagar** (AIR 1988 SC 1737) (supra).

40. In **Saraswati Industrial Syndicate Ltd. v. Union of India** (1975) 1 SCR 956 at, p. 961, this Court states:

> "Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price".

In **Prag Ice & Oil Mills v. Union of India** (1978) 3 SCR 293 at p. 317, Chandrachud ,J., as he then was, speaks for the majority:

> "We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes, or cases, it is really legislative in character in the type of control order which is now before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class".

See also the observation of Megarry, J., as he then was, in **Bates v. Lord Hailsham of St. Marylebone** (1972) 3 All ER 1019 at p. 1024."

27. The learned counsel for the Writ Petitioners advanced his arguments based on the definition in Regulation 2(c) of Regulation No.5 of 2004 framed in exercise of powers conferred under Section 50 of the Act of 2003, which is called as "Electricity Supply Code". Regulation 2(c) as it stood then reads as follows:

> "(c) "consumption charges" means charges payable for the consumption of electrical energy in Kwhrs multiplied by appropriate tariff rates and also includes Demand/Fixed charges, Fuel Surcharge Adjustment (FSA) and customer charges etc., wherever applicable."

28. His argument is merely based on the word "kilowatt-hours" mentioned in the said Regulation and submits that when the definition indicates the consumption charges in kilowatt-hours multiplied by appropriate tariff rates, without amending the said definition portion in the Electricity Supply Code, the billing methodology cannot be changed. When his attention was drawn to Regulation No.3.1 of the said Code, which enables the distribution licensee to recover the electricity charges for the electricity supplied to the consumer as per the tariff determined by the Commission from time to time in accordance with the provisions of the Act of 2003, the learned Counsel for the Writ Petitioners

submitted that the tariff mentioned therein is different. When a specific question was put by this Court whether the tariff mentioned therein does not include the tariff methodology, he was unable to take a specific stand. He then tried to justify the challenge to the decision by relying on General Terms and Conditions of Supply of Distribution and Retail Supply Licenses issued by the Commission under proceedings dated 06.01.2006. He relied on Condition No.2.2.54 and submits that "units" means the Kwhs indicated by the energy meter meant for billing, and without making an amendment to the said definition the billing methodology cannot be changed. Then his attention was drawn to para 5.3.5.2 of the said terms and conditions which says that tariff and other charges for the supply of electricity shall be as specified by the Commission in the Tariff Orders issued from time to time. He reiterated the argument that unless the definition is amended, the billing methodology cannot be changed. It is necessary to point out that the terms and conditions of the said conditions deal with the relationship between the licensee and the consumer for distribution of retail supply of energy. The "Tariff Order" is defined in para 2.2.49 of the said terms and conditions and "tariff schedule" is also defined in 2.2.50 and they read as follows.

> "2.49: "Tariff Order" in respect of the Company is the most recent order issued by the Commission for that Company indicating the tariffs/charges to be charged by the Company from various categories of consumers for the supply of electrical energy and services.
>
> 2.2.50: "Tariff Schedule" is the most recent schedule of charges for supply of electricity and services issued by the Company as per the provisions of the Tariff Order for that Company."

The "tariff schedule" is thus defined as the most recent schedule of charges for supply of electricity and services issued by the company as per the provisions of the Tariff Order for that company.

29. Hence, a combined reading of Regulation 5 of 2004 read with Terms and Conditions of Supply issued by the Commission on 06.01.2006 makes it clear that the distribution companies are bound by the tariff schedule mentioned in the Tariff Order issued by the Commission for collection of charges for supply

of electricity and services. Hence, any change in the billing methodology or tariff rates provided in the tariff schedule is within the jurisdiction of the Commission and the distribution companies (licensees) are bound by that Tariff Order. Thus, the billing methodology, which is a part of tariff schedule contained in a Tariff Order, is not beyond the powers of the Commission. When it is not beyond the powers of the Commission, it cannot be contended that the said tariff schedule violates the definition contained in some other Regulations.

30. The learned single Judge, for allowing the Writ Petitions, took into consideration that the changed billing methodology introduced by the impugned Tariff Orders was contrary to the unaltered norms in the provisions of the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, Condition No.2.2.54 of the General Terms and Conditions of Supply of Distribution and Retail Supply Licenses approved by the Commission on 06.01.2006 under Section 16 of the Act of 2003, Section 3 of the Act of 1939 and the Andhra Pradesh Electricity Regulatory Commission (Security Deposit) Regulation, 2004. He allowed the Writ Petitions on the ground that the unit for measuring mentioned in those provisions indicate only kilowatt-hours and not Kvah. While dealing with the same, he concluded as follows:

> "…Though it is for the APERC to decide in its wisdom as to which is the better methodology for billing consumption of electricity, it is necessarily has to follow the due procedure for effecting such a change in methodology so that there is consistency and uniformity in this regard in all the applicable statutory regulations and provisions."

He also held as follows:

> "…As the existing regulations conflict with the impugned Tariff Orders in this regard, this Court necessarily has to hold that the new billing methodology adopted by the APERC, which is inconsistent with the existing statutory regulations, is invalid. The APERC went about effecting and implementing a change in the billing methodology losing sight of the fact the same was inconsistent with the regulations already put in place, be it by itself or by the Central Regulatory Commission. Wisdom having dawned of late, the APERC set in motion Regulation No.7 of 2013, but the same has not been notified as yet and would therefore not come into effect. In the absence of an amendment of Regulation No.5 of 2004 and without effecting similar amendments in the other regulations and the General Terms and Conditions of Supply, it is not open to the APERC to give effect to the changed methodology of billing."

31. In **Tata Power Co. Ltd. v. Reliance Energy Ltd.,** the Supreme Court was considering statutory appeals under Section 125 of the Act of 2003 as against a common judgment and order dated 06.05.2008 passed by the Appellate Tribunal for Electricity, New Delhi, whereby and whereunder a judgment and order passed by the Maharashtra Electricity Regulatory Commission (MERC) was set aside. The appeals arose out of a finding recorded in the order as to whether the Commission has the power to disapprove PPA and allocate the power of a generating company amongst the distribution licensees by regulating supply in terms of Section 23 of the Act of 2003. In that context, the word "Supply" occurring in Section 23 as well as in Sections 2(70), 86(1) (a), 10(2), first proviso to Section 14 and Section 62 (2) of the Act of 2003 was considered and held as follows:

> "97. However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words "unless there is anything repugnant to the subject or context". [See Whirlpool Corporation v. Registrar of Trade Marks, { (1998) 8 SCC 1; *Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency* {(2008) 6 SCC 732} and *National Insurance Co. Ltd. v. Deepa Devi*, [(2008) 1 SCC 414 }].
>
> 98. Accordingly the word "supply" contained in Section 23 refer to "supply to consumers only" in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) "supply" refers to both consumers and licensees. In Section 10(2) the word "supply" is used in two parts of the said Section to mean two different things. In the first part it means "supply to a licensee only" and in the second part "supply to a consumer only". Further in first proviso to Section 14, the word "supply" has been used specifically to mean "distribution of electricity". In Section 62(2) the word "supply" has been used to refer to "supply of electricity by a trader".
>
> 99. To assign the same meaning to the word "supply" in Section 23 of the

> Act, as is assigned in the interpretation section, it is, in our opinion, necessary to take recourse to the doctrine of harmonious construction and read the statute as a whole. Interpretation of Section indisputably must be premised on the scheme of the statute. For the purpose of construction of a statute and in particular for ascertaining the purpose thereof, the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word. {*See Reserve Bank of India, v. Peerless General Finance and Investment Co. Ltd*, [(1987) 1 SCC 424]; *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, [(1992) 2 SCC 343] and *National Insurance Co. Ltd. v. Swaran Singh*, [(2004) 3 SCC 297]}.
>
> 100. Thus, in a case where interpretation of a Section vis-à-vis the scheme of the Act, the purport and object of the legislation, particularly having regard o the mischief it seeks to remedy; the chapter heading as also the marginal note, in our opinion, are relevant.

32. Thus, it is clear that the tariff should be contained in the Tariff Order and should be read in the context in which it was made, but not in relation to other units of measurement mentioned in other provisions of the Regulations. The reference to a particular provision or methodology stated in Tariff order in comparison with other provisions or methodologies contained in other Regulations lead to anomalous situation. A provision cannot be held to be bad merely because it is in conflict with or is not in consonance with the definitions contained in other provisions. Hence, the approach made by the learned single Judge, in our opinion, is not correct.

33. The issue before this Court is not with regard to any procedure violated by the Commission while issuing the Tariff Order, as it is the admitted case of the Writ Petitioners also that due procedure was followed while issuing the Tariff Order. The only point raised by the learned counsel for the Writ Petitioners is that the change in methodology of billing is in conflict with the existing units of measurement obtaining in various other Regulations. Our enquiry is confined only to the issue whether the determination of tariff schedule by the Commission includes not only rates, but also methodology of billing. If the Commission is held to be having power to indicate the methodology of billing

while determining the rates, which are included in the tariff schedule, the petitioners cannot challenge the Tariff Order as bad when the Commission has followed the procedure. It is not for this Court to see how and in what manner the other regulations operate with the existing units of measurement indicated therein and in the tariff order. It is for the concerned authorities to take stock of the situation. When the Commission is empowered to take a decision on tariff, it includes billing methodology as well as fixation of rates by duly following the procedure. We accordingly hold that there is nothing wrong in Commission fixing a particular methodology for billing while fixing the rates in the tariff schedule. We cannot hold that billing methodology is bad merely on the basis that the units of measurement existing in other Regulations are different.

34. In **M/s.Jagdamba Paper Industries (Pvt.) Ltd. v. Haryana State Electricity Board**, a challenge was made by a consumer of electric energy which entered into a contract with the Haryana State Electricity Board to the enhancement of security unilaterally made by the Board both in respect of meter as also for the payment of the energy dues. Clause 22 of the standard contract enables the Board to collect the security deposit, whereas clause 31 provides for revision of schedules of tariffs and charges and conditions of supply. In the light of the above Clauses, the Supreme Court held as follows:

> "We are of the view that the Board has been conferred statutory power under Section 49(1) of the Act to determine the conditions on the basis of which supply is to be made. This Court in **Bisra Stone Lime Company Ltd. v. Orissa State Electricity Board** ((1976) 2 SCC 167 : AIR 1976 SC 127), took the view that enhancement of rates by way of surcharge was well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. What applied to the tariff would equally apply to the security, that being a condition in the contract of supply. Each of the petitioning consumers had agreed to furnish security in cash for payment of energy bills at the time of entering into their respective supply agreements. There was no challenge in these writ petitions that the demand of security at the time of entering into supply agreements has to be struck down as being without jurisdiction. Section 49(1) of the Act clearly indicates that the Board had initially introduced the condition regarding security and each of the petitioners had accepted the term.

35. In **Sitaram Sugar Company Ltd.**'s case (supra), the Supreme Court held

as follows:

> “48. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles: **Maneka Gandhi v. Union of India** (1978) 1 SCC 248, 314-315.

49. Where a question of law is at issue, the Court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the Court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the Court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the Court would have come to as a trier of fact. Whether an order is characterised as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated -as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law : See **Rochester Tel. Corp. v. United States**, (1938) 307 US 125: 83 Law Ed. 1147. See also **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** (1948) 1 KB 223.

50. As stated. by Lord Hailsham of St. Marylebone L. C., (H.L.) in **Chief Constable of the North Wales Police v. Evans** (1982) 1 WLR 1155:

> "The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law .....The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court"

In the same case Lord Brightman says:

> "Judicial review, as the words imply, is not an appeal from a

> decision, but a review of the manner in which the decision was made".

51. A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. See **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** (1948) 1 KB 223. In the words of Lord Machaghten in **Westminster Corporation v. London and North Western Railway** (1905) AC 426, 430:

> ".....It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first ....."

In **The Barium Chemicals Ltd. v. The Company Law Board** (1966) Supp. SCR 311, this Court states (at p. 323 of AIR):

> ".....Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts".

In **Renusagar** (1988) 4 SCC 59, 104, Mukharji, J. as he then was, states

> "The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on

the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated".

52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it. (See the observation of Lord Russel in **Kruse v. Johnson** (1898) 2 QB 91 and that of Lord Greene, M. R. in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation**, (1948) 1 KB 223. See also **Chertsey UDC v. Mixnam Properties Ltd.** (1965) AC 735; **Commissioners of Customs and Excise v. Cure and Deeley Ltd.** (1962) 1 QB 340)."

36. We do not consider that the change in billing methodology is in conflict with the provisions of Act of 2003 or Constitution. Its rationality was thoroughly examined before introduction and hence cannot be held to be arbitrary. It is in vogue in some states. We accordingly hold point No.2 in favour of appellants.

37. In the circumstances, in view of the above clear legal position, the order of the learned single Judge is not correct and is accordingly set aside and the Writ Appeals are allowed. Miscellaneous petitions, if any, pending in these Writ Appeals shall stand disposed of.

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DILIP B.BHOSALE, J

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A.RAMALINGESWARA RAO, J

Date: 01.05.2015

Note: LR copy to be marked:Yes

B/o.

TJMR