

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

**Civil Writ Petition No.11293 of 2004**

Date of decision:19.02.2015

M/s Satia Paper Mills Limited, Village Rupana, Tehsil and District Mukatsar, through its Personnel and Administrative Officer Shri Janak Raj Sharma.

... Petitioner

versus

Punjab State Electricity Board through its Chairman, The Mall, Patiala, and another.

.... Respondents

**& CWP Nos.5595, 5819, 7699, 7785, 9419, 10505, 10509, 10880, 11753, 12451, 13585, 14234 of 2003; 7383, 7414, 12958 of 2004; 5983, 6405, 12460, 14660, 14662 of 2006; and 568 of 2007.**

**CORAM: HON'BLE MR. JUSTICE K. KANNAN**

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Present: Mr. Puneet Jindal, Senior Advocate,  
with Ms. Sakshi, Advocate,  
for the petitioner in CWP Nos.11293, 12958 and 7414 of 2004.

Mr. Rahul Sharma, Advocate,  
for the petitioner in CWP Nos.5595, 5819, 7699, 7785, 9419, 10505, 10509, 10880, 11753, 12451, 13585, 14234 of 2003; 7383 of 2004; 5983, 6405, 12460, 14660, 14662, 6405 of 2006; and 568 of 2007.

Mr. Vikas Chatrath, Advocate,  
for respondents-PSEB in CWP No.5983 of 2006.

Mr. S.S. Siao, Advocate,  
for the respondents-PSEB in CWP No.13585 of 2003.

Mr. N.S. Boparai, Advocate,  
for respondents-PSEB in CWP Nos.5595 of 2003; 7383 of 2004; 12460, 14662 of 2006; and 568 of 2007.

Mr. Ajay Nara, Advocate,  
for the respondents-PSEB in  
CWP No.11293 of 2004.

Mr. Deepak Sabharwal, Advocate,  
for the respondents in CWP Nos.9419 of 2003 and  
12958, 7414 of 2004.

Mr. Manjit Singh Khaira, Senior Advocate,  
with Mr. Dharminder Singh Randhawa, Advocate,  
for the respondents-PSEB in CWP Nos.7699, 7785,  
10505, 10880, 11753, 12451, 14234 of 2003.

Ms. Vandana Malhotra, Additional Advocate General,  
Punjab.

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1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

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**K.Kannan, J.** (Oral)

1. All these writ petitions are at the instance of the Industrial Consumers who are at once power generators as well, generating power, encouraged by a policy of the Government for a New and Renewable Sources of Energy (NRSE) Policy-2001. The Government of Punjab through the Department of Science Technology Environment and Non-Conventional Energy notified, in exercise of its power conferred under Section 39 of the Electricity Regulatory Commissions Act of 1998 that sugar, paper, fertilizer chemical, textile and other industry had an estimated potential of 220 MW for co-generation and adoption of such a process by these industrial units be recognized not only to augment the State grid

capacity by 220 MW of what they were capable of producing but would also create conducive conditions for improving their financial health and resources. The petitioners would contend that as industries engaged in sugar manufacture and paper, they had adequate agricultural waste which could be used for generation of power. Their activity of power generation by the State, was attempted to be penalized, as it were, through the impugned Commercial Circular issued on 10.06.2002 under the caption “Captive Power Plant Policy & Issues connected with installation of CPP/IPPS & Co-generation Plants” that they shall pay permission fees to install DG/TG sets as standby source of energy and shall also be liable to pay “parallel operation charges” at particular rates as follows:-

- “a. Upto a MVA/MW: Rs.100/- per KVA
- b. Above 1 MVA/MW: Rs.50/- per KVA subject to  
Min. of Rs.1.00 Lac.”

2. The petitioners' challenge is rested on the following grounds:-

- (i) After the coming into force of the Electricity Regulatory Commissions Act of 1998, the determination of tariff shall be done only by the State Commission, as it had been established before the impugned circular was issued. The Electricity Board did not have a competency to exercise the power of what was vested with the

Commission under Section 29 of the Act;

ii) The levy of 'parallel operation charges' was against the State policy to encourage co-generation and hence, not valid;

iii) The Electricity Act of 2003 which came into force on 10<sup>th</sup> June, 2003 provided under Section 9, the power to construct, maintain or operate a captive generating plant and dedicated transmission lines and power generation could not be fettered by any means, except when the person sought for right to open access for the purpose of carrying electricity from his captive generating plant through the Central or State Transmission lines. The power to generate, therefore, was not any longer the exclusive monopoly of the distribution licensee and the levy would run counter to the objects sought to be realized under the Electricity Act of 2003;

iv) The basis of levy was itself arbitrary, for, there was no facility of PSEB which was put to use and there was no *quid pro quo* for such a levy.

3. The Electricity Board itself was aware about its untenability of the levy and although the Punjab State Electricity Regulatory Commission, through its first order dated 30.01.2006

held that all the Co-generation Plant owners/Captive Plant owners, irrespective of the fact that whether they were Board's consumers or not, would be required to pay parallel operation charges, excluded the levy if they intended or actually operated the plant to feed their own load on stand-alone basis. This order which was passed on 30.01.2006 was further expanded on 'suo motu determination of annual revenue requirement and the tariff for the financial year 2007-08' when they had dropped the parallel charges effective from 01.09.2007. The issue for consideration would be only with reference to the period before 30.01.2006 for such of those persons who were still required to pay parallel operation charges if it was not on stand-alone basis and for all other persons to the date before 01.09.2007.

4. The counsel for the respondents would point out that amongst the petitioners, some of them including the petitioner in CWP No.12958 of 2004, had filed civil suits challenging the bill raised on them and a writ petition is, therefore, not competent. The other objection is that the levy was also challenged by some of the petitions before the Punjab State Electricity Regulatory Commission and their petitions were dismissed. According to the respondents, the levy was under regulation of the Electricity Supply Act of 1948, which were still applicable, notwithstanding the enactment of the Electricity Regulatory Commission Act of 1998 and hence, the

impugned levy was justified. As a further justification, the respondents would argue that the Electricity Board gave technical support for co-generation and they had to also re-draw their own facilities to accord with the frequency and the voltage profile of the respective companies and they were therefore justified in imposing the additional levy.

5. If there was a challenge by any of the petitioners before a civil court as regards the original demand, the same cannot, under the normal circumstances, be replicated through a writ petition as well. A slender distinction is sought to be drawn by the senior counsel for the petitioners that what were in challenge before the civil court were merely the demands made through the notices and they did not challenge the Regulations and that the challenge is brought only through the writ petitions. I would find this argument to be merely quibbling in semantics because a suit against a demand ought to be only with reference to the alleged untenability of the Regulations themselves. I am merely setting this out to clear any possible obstructions that might come for adjudication on merits but the petitioners are reported to have already withdrawn the suits, as I have heard the senior counsel for some of the petitioners Shri Jindal say. At any rate, he will cause the suits to be withdrawn if not already done. I take the statement as a binding position for the parties as well and treat these writ petitions as still capable of being

addressed on merits on the contentions raised.

6. Even the disposal of a similar challenge before the Punjab State Electricity Regulatory Commission and the pendency of the appeal in FAO No.3776 of 2004 cannot be a bar, for, an attempt in the said case was to point out that by the coming into force of the Electricity Act, 2003, the continuance of the tariffs by a process other than the regulatory mechanisms provided under the Act of 2003 was impermissible. But the challenge to the impugned regulations through the circular in these instant writ petitions is brought on broadly 4 different grounds, which we have delineated above. Indeed, the Punjab State Electricity Regulatory Commission itself has observed in its order issued on 23.07.2004 that the Regulations had been challenged in the High Court and they would continue to apply unless the revised regulations are put in place before the date or when the State Regulations themselves are set aside by the High Court. Now is therefore the stage to consider where the impugned Regulations could be set aside or not.

7. Admittedly, the commercial circular issued on 10.06.2002 was subsequent to the constitution of the Punjab State Electricity Regulatory Commission. Though the Punjab State Electricity Regulatory Commission was prepared to state in its order dated 23.07.2004 that the circular would continue to apply till the new revised regulations are put in place, I would hold that it is not a

correct statement of law. The Electricity Commission Act of 1998 which allowed for determination of tariff by the State Commission begins with non-obstante clause that reads thus:-

**“29. DETERMINATION OF TARRIF BY STATE COMMISSION. -**

(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the “tariff”), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

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

(a) The principles and their applications provided in Sees. 46, 57 and 57-A of the Electricity (Supply) Act, 1948 and the Sixth Schedule thereto,

(b) In the case of the Board or its successor entities, the principles under Sec. 59 of The Electricity (Supply) Act, 1948;

(c) That the tariff progressively reflects the cost of



supply of electricity at an adequate and improving level of efficiency;

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

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

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

(g) National power plans formulated by the Central Government.

(3) to (6) .....”

Section 29(2) would make it clear that the State Commission would determine the regulations and while doing so, it shall be guided by the principles and their applications provided under the Electricity Act of 1948. It would, therefore, mean that the tariffs already laid down would continue to apply in terms of 1948 Act and the Regulations made thereunder. However, if any fresh levy or a new

application of tariff was contemplated, the source of power can only be through the Electricity Regulatory Commission allowing an Electricity Board to impose a particular tariff. The Electricity Board itself cannot secure a sui juris power under the 1948 Act after the 1998 Act came into force. Any new tariff ought to be done through the State Commission under the Electricity Regulatory Commission Act of 1998. I discard an argument that the 1948 Act would still allow for an Electricity Board to impose a fresh tariff through the Regulatory mechanism provided under the Act and make meaningless the non-obstante clause contained under Section 29 of the 1998 Act. I would hold that from the day when the 1998 Act came, any new tariff regime which is in the nature of new levy must have its powers sourced only through the State Commission established under the 1998 Act. I would hold therefore that the respondents lacked the inherent power to issue the Regulations which is impugned in the writ petitions.

8. The justification which is sought to be given by counsel for the respondents for imposing parallel operation charges is that the PSEB provided a technical support and it is done taking note of the frequency and voltage profile of the manufacturing companies is without any basis. Indeed this novel argument is made by the counsel on the instructions secured across the counter from the respondents and not rooted through the pleadings of the

respondents. It would run counter to the State policy itself that seeks to encourage co-generation. The State that declares that the co-generation would create conducive condition for improving the financial health and resources cannot invoke a new meaning that the additional resources will be garnered by imposing a parallel levy on the persons who generate power without any contribution to such a process by PSEB. I would find that even the scheme of the Electricity Act of 2003 that recognizes captive generation, notwithstanding anything contained in the Act, to allow for a person to construct, maintain and operate a captive generating plant and dedicated transmission lines make possible a levy only when the grid would require to be regulated and the captive generation seeks for a right to open access for the purpose of transmitting electricity. Without any burden on the facilities of the respondents, to impose “parallel operation charges” would be wholly unjustified. The justification for annulling the “parallel operation charges” could even be on the very same grounds as the PSERC itself found, while making the suo-motu determination on Annual Revenue Requirement and Tariff when it chose to withdraw the levy w.e.f. 01.09.2007. I shall reproduce them as follows:-

- “a) Northern Grid is big enough to take on small TG/DG sets without any setback to the system.
- b) The revenue by way of Parallel Operation charges

per annum is less than Rs.3.5 crores which is meagre keeping in view the benefits accruing from encouraging private generation in the State.

c) A Group of the Forum of Regulators has also observed that there is little justification for levy of Parallel Operation charges/Grid Support charges.

d) Cogenerators, like Sugar Mills are faced with bills due to levy of these charges even when they are not running their plants during off season.”

9. There was also an argument made by the counsel Shri Rahul Sharma, appearing on behalf of some of the Sugar Factories which generate their own power that the sugar industry is a seasonal industry and the levy of parallel operation charges on a monthly basis throughout the year was unjustified. I do not propose to examine this in view of the fact that I have held that the levy itself to be not legally tenable.

10. I would therefore uphold the contentions of the petitioners and quash the impugned notices issued on the petitioners for collection of parallel operation charges. The amounts, which had been paid by the respondents, are ordered to be refunded with 6% interest from the date when the amount was paid by the petitioners till the date of payment by the respondents or at the option of the petitioners themselves, which they shall exercise within 2 weeks, a

right of readjustment against the future bills on the liabilities which the petitioners may incur by consumption of electricity supply from the respondents.

11. All the writ petitions are allowed. However, there shall be no direction as to costs.

**(K.KANNAN)**  
**JUDGE**

19.02.2015  
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