

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

**I.A.No.1 of 2018 in WP.No.36090 of 2016**

**&**

**I.A.No.1 of 2018 in WP.No.36103 of 2016**

**And**

**WP.Nos.36090 and 36103 of 2016**

**COMMON ORDER :**

Both these Writ Petitions are filed by the same petitioner which has two separate consumer service numbers, viz., (i) SDP-893 with contracted maximum demand for 20,000 KVA and drawing power on 33 K.V. line; and (ii) consumer service number RRN-620 with contracted maximum demand for 3,500 KVA, which is also being drawn on 33 K.V. line.

2. The petitioner, in both the Writ Petitions, challenges order dt.23.06.2016 passed by the Telangana Electricity Regulatory Commission (for short, 'the Commission') in O.P.No.6 of 2016 in respect of Southern Power Distribution Company Limited of Telangana State with regard to levy of cross-subsidy charges on open access power being utilized by the petitioner for 2016-17. It seeks (a) to set aside the consequent demand and (b) to direct the respondents to refund the cross-subsidy charges already collected.

3. The Electricity Act, 2003 (for short, 'the Act') contains provisions (Sec.42) which provide for payment of surcharge by a consumer when a consumer avails power under open access. Under Section 42(2) of the said Act, the surcharge is to be determined by the

Commission and it should be utilized to meet the requirements of current level of cross-subsidy within the area of supply of distribution licensee.

4. Petitions were filed before the Commission on 08.03.2016 under Sections 38 to 40, and Sections 42(2) and 42(4) of the Act by the 2<sup>nd</sup> respondent for determination of cross-subsidy surcharge and additional surcharge for Financial Year 2016-17.

5. The Commission issued a public notice on 10.03.2016 making the general public aware of the filings made by the 2<sup>nd</sup> respondent and invited objections thereto by 30.03.2016.

6. The petitioner is a member of Federation of Telangana and Andhra Pradesh Chambers of Commerce and Industry (for short 'the Federation') with a Membership No.D-171 along with several other industries in the States of Telangana and the State of Andhra Pradesh.

7. Through the said organization, objections were filed on 29.03.2016 to the petition filed by 2<sup>nd</sup> respondent before the Commission for determination of cross-subsidy surcharge.

8. Petitioner contends that these objections were neither adverted to nor considered by the Commission in the order dt.23.06.2016, passed by it.

9. Though this contention was not initially raised by the petitioner in the affidavit filed in support of the Writ Petition, subsequently, I.A.No.1 of 2018 has been filed by it in both the Writ Petitions raising the said contention.

10. Since this goes to the root of the matter, both the I.A.s filed in both the Writ Petitions are allowed, and the petitioner is permitted to raise the said contention.

**Counter-affidavit by respondents :**

11. Counter-affidavit has been filed by the respondents in both the Writ Petitions.

12. The 1<sup>st</sup> respondent in its counter denied the allegation of the petitioner that its objections filed through the Federation were not considered. A stand is taken in the counter that the 1<sup>st</sup> respondent had summarized the various objections, considered the same and taken a view in the order passed by it.

13. A further plea is raised that the petitioner has a remedy of appeal under Section 111 of the Act before the Appellate Tribunal for Electricity, and since the determination of the cross-subsidy surcharge in respect of the open access by the Commission involves technicalities, this Court should not entertain the Writ Petition, and it should direct the petitioner to avail the remedy of appeal.

**14.** Reliance is placed on the decision of the Supreme Court in **West Bengal Electricity Regulatory Commission v. C.E.S.L.<sup>1</sup>** and **Uttar Pradesh Power Corporation Limited v. N.T.P.C. Limited and others<sup>2</sup>**.

#### **THE CONSIDERATION BY THE COURT**

**15.** During the course of hearing of Writ Petitions, the Court went through the objections specifically filed through the Federation before the Commission, and asked Sri J. Aswini Kumar, the Standing Counsel for Commission to point out from the impugned order dt.23.06.2016, the consideration of these objections by the Commission, but the Counsel for Commission was unable to do so.

**16.** In the impugned order passed by the Commission, only the objection of the Railways and that of M/s.Kamineni Hospitals is referred to and considered at paras.2.9 and 2.14 though in para no.2.6 of the order, the Commission states that objectors were heard and suggestions also considered.

**17.** The Court also, after examining the objections filed by petitioner through the Federation, and the order passed on 23.06.2016 by Commission, found that there is no consideration of the objections filed by the Federation at all by the Commission.

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<sup>1</sup> (2002) 8 SCC 715

<sup>2</sup> (2011) 12 SCC 400

**18.** Therefore, the plea of Commission in the counter filed by it in both the Writ Petitions that it had considered the objections raised, is found to be incorrect.

**19.** Admittedly, sub-Section (3) of Section 86 of the Act, the 1<sup>st</sup> respondent has to ensure transparency in exercise of its power and discharge of its functions. Such transparency entails consideration of the objections raised by the objectors and giving of reasons for not accepting them.

**20.** The Telangana State Electricity Regulatory Commission, Hyderabad (Conduct of Business) Regulations, 2015, have been framed by the State of Telangana in exercise of its power conferred on it under Section 92(1) and 181 of the Electricity Act, 2003.

**21.** Regulation 9 thereof enables the Commission to hold hearings and lays down the manner in which it should conduct hearings.

**22.** Regulation 12 permits the Commission to initiate proceedings either *suo moto* or on a petition filed by an affected person.

**23.** Regulation 17 directs the Commission to serve notices or process by various modes including publication in the newspaper.

**24.** Regulation 18 permits replies / opposition / objections to be filed to petitions filed before the Commission. Clauses (5) to (7) of Regulation 18 state as under :

*“Regulation 18:*

*(1) ... ..*

*(2) ... ..*

*(3) ... ..*

*(4) ... ..*

*(5) Every person who intends to file objection or comments in regard to a matter pending before the Commission, pursuant to the advertisement and publication issued for the purpose (other than the persons to whom notices, processes, etc., have been issued calling for reply) shall deliver to an Officer designated by the Commission for the purpose the statement of the objection or comments with copies of the documents and evidence in support thereof within the time fixed for the purpose.*

*(6) The Commission may permit or invite such person or persons including the associations, forums and bodies corporate as it may consider appropriate to participate in the proceedings before the Commission if, the Commission considers that the participation of such person or persons will facilitate the proceedings and the decision in the matter.*

*(7) The Commission shall be entitled to take into account the objections and comments filed after giving such opportunity to the other parties to the proceedings as the Commission considers appropriate to deal with the objections or comments.”*

**25.** Regulation 23 requires the Commission to record reasons in support of its orders.

**26.** Thus, the regulations permit filing of objections to petitions filed by licensees, consideration of the said objections by the Commission by allowing participation of associations apart from individuals in its proceedings, and enjoin it to pass a reasoned order.

**27.** This indicates that the Commission functions as a *quasi* judicial Tribunal when it is considering petitions filed by licensees before it. So it cannot ignore the objections filed by the Federation to the filing made by 2<sup>nd</sup> respondent under Sec.42(2) before it.

**28.** When a body such as the Federation containing a large number of Industries, who are likely to be affected by its orders, files objections to the petition filed under Section 42(2) by the 2<sup>nd</sup> respondent, it is incumbent on part of the Commission to consider the same .

**29.** In **West Bengal Electricity Regulatory Commission** (1 supra), the Supreme Court no doubt held as pointed out by the Counsel for respondents that the Commission is an expert body and the High court, exercising appellate power, should not interfere with the order of the Commission unless it is perverse, not based on evidence or on misreading of evidence.

**30.** But the said decision also considered the question whether the Electricity Regulatory Commission of West Bengal was obligated to provide a hearing to affected parties. The High Court had held that since there are a large number of consumers, they need not be heard. The Supreme Court set aside this view and held that once the regulations framed under the Statute unequivocally provided a right of hearing/ representation to the consumers, which is in conformity with principles of natural justice, the Commission cannot avoid following

principles of natural justice on the ground of inconvenience, even if such inconvenience does in fact exist, since it has the power to regulate the manner of exercise of the right of hearing. It held that the right of a hearing is a vested right, compliance with which is mandatory.

31. In view of the said decision, not only is the Commission obliged to invite objections of affected persons and provide them a hearing, but is also obligated to consider the same as mandated by regulation 18 (7) supra.

32. Existence of technicalities in the subject matter cannot absolve the Commission of the responsibility of considering the objections and cannot also prevent this Court from checking whether they are referred to and considered.

33. In regard to the contention raised by Commission that petitioner has a remedy of appeal under Section 111 of the Act, and that this Court ought not to entertain the Writ Petition, I am of the opinion that when there is non-consideration of the objections filed by the petitioner through the Federation, there is in effect a violation of natural justice. In such circumstances, the existence of an alternative remedy would not bar the exercise of jurisdiction by this Court under Article 226 of the Constitution of India. (See **Whirlpool Corporation v. Registrar of Trade Marks**<sup>3</sup>).

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<sup>3</sup> (1998) 8 SCC 1

**34.** I therefore hold that the order dt.23.06.2016 passed by the Telangana Electricity Regulatory Commission in O.P.No.6 of 2016 in respect of Southern Power Distribution Company Limited of Telangana State, is unsustainable on the ground of non-consideration of the objections filed by the Federation.

**35.** Accordingly, the Writ Petitions are allowed; the order dt.23.06.2016 passed by the Telangana Electricity Regulatory Commission in O.P.No.6 of 2016 is set aside; the Commission is directed to provide a hearing to the petitioner and to the Federation, consider their objections to the levy of cross-subsidy surcharge proposed by the 2<sup>nd</sup> respondent for Financial Year 2016-17, and then pass a fresh reasoned order after considering all the objections contained in the objection petition dt.29.03.2016 filed by the said Federation within two (02) months from the date of receipt of copy of this order. Adjustments / refund of the levy towards cross-subsidy surcharge which are already collected from the petitioner shall be done by the 2<sup>nd</sup> respondent depending on the fresh order it would pass. No order as to costs.

**36.** As a sequel, miscellaneous petitions, pending, if any, in both the Writ Petitions shall stand closed.

**JUSTICE M.S.RAMACHANDRA RAO**

Date: 31.08.2018

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