

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**W.P.A. No. 9857 of 2022
H.P. Ispat Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory
Commission & Ors.**

**With
W.P.A. No. 10069 of 2022
H.R. Ispat Pvt. Ltd. & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.**

**With
W.P.A. No. 10107 of 2022
Sumangal Ispat Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.**

**With
W. P. A. No. 10315 of 2022
Ruhr Ispat Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.**

**with
W.P.A. No. 10654 of 2022
Purulia Metal Casting Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.**

**With
W.P.A. No. 10700 of 2022
IA No: CAN 1 of 2022
East India Holdings Private Limited & Anr.
Vs.
Damodar Valley Corporation & Ors.**

With
W.P.A. No. 10962 of 2022
IA No: CAN 1 of 2022
Supersmelt Industries Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 10963 of 2022
Surya Alloy Industries Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 10967 of 2022
Metsil Exports Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 11196 of 2022
M/s. Sonic Thermal Private Limited & Anr.
Vs.
Damodar Valley Corporation & Ors.

With
W.P.A. No. 11200 of 2022
M/s. Ispat Damodar Private Limited
Vs.
DVC & Ors.

With
W.P.A. No. 11268 of 2022
M/s. SBIW Steels Private Limited & Anr.
Vs.
Damodar Valley Corporation & Ors.

With
W. P. A. No. 11691 of 2022
Haldia Steels Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 11913 of 2022
Jaishree Steels Private Limited & Anr.
Vs.
Damodar Valley Corporation & Ors.

With
W. P. A. No. 12060 of 2022
Jai Venktesh Concast Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 16133 of 2022
Calstar Sponge Limited & Anr.
Vs.
**West Bengal Electricity Regulatory
Commission & Ors.**

With
W.P.A. No. 16136 of 2022
XPRO India Limited & Anr.
Vs.
**West Bengal Electricity Regulatory
Commission & Ors.**

With
W.P.A. No. 16834 of 2022
Maha Gauri Strips Private Limited & Anr.
Vs.
**West Bengal Electricity Regulatory
Commission & Ors.**

With
W. P. A. No. 17227 of 2022
Arjan Dass and Sons Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W. P. A. No. 17234 of 2022
Amit Ferro Alloys and Steel Private Limited and another
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
WPA No. 22993 of 2022
Shreevardhana Metaliks Pvt. Ltd and another
Vs.
West Bengal Electricity Regulatory Commission and others

with
W.P.A. No. 9861 of 2022
HMB Ispat Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 9869 of 2022
Expandable Enterprise Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 9872 of 2022
Shreesatya Steel and Power Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 9892 of 2022
Shree Waris Piya Steel Company Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 9897 of 2022
Shree Ramdoot Rollers Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 9902 of 2022
Debeanjana Hard Coke Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 9933 of 2022
Jai Ambey Metals Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

with
W.P.A. No. 9938 of 2022
Venky Hi-Tech Ispat Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 9942 of 2022
Alishan Steels Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 9947 of 2022
Arjan Dass and Sons Private Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

With
W.P.A. No. 15255 of 2022
IA No: CAN 2 of 2022
CAN 3 of 2022
Nilkanth Ferro Limited & Anr.
Vs.
West Bengal State Electricity Regulatory Commission & Ors.

With
W.P.A. No. 17114 of 2022
Srinivasa Ferro Alloys Limited & Anr.
Vs.
West Bengal Electricity Regulatory Commission & Ors.

For the petitioners in
W.P.A. No.9857 of 2022 : Mr. Partha Sarathi Sengupta,
Mr. Tanoy Chakraborty,
Mr. Gautam Shroff,
Mr. Shayak Mitra
Mr. Siddharth Shroff,

For the petitioners in
W.P.A. No. 9861 of 2022 : Mr. Surajit Nath Mitra,
Mr. Tanay Chakraborty,
Mr. Gautam Shroff,
Mr. Siddharth Shroff,
Mr. Shayak Mitra,

For the petitioners in
WPA 10107 of 2022
WPA 10315 of 2022
WPA 10963 of 2022
WPA 10967 of 2022
WPA 12060 of 2022
WPA 16133 of 2022
WPA 16136 of 2022
WPA 9861 of 2022
WPA 9869 of 2022
WPA 9872 of 2022
WPA 9892 of 2022
WPA 9897 of 2022
WPA 9902 of 2022
WPA 9933 of 2022
WPA 9938 of 2022
WPA 9942 of 2022
WPA 9947 of 2022 : Mr. Tanoy Chakraborty,
Mr. Gautam Shroff,
Mr. Shayak Mitra,
Mr. Siddhartha Shroff

For the petitioners in
WPA 11196 of 2022 and
WPA 11200 of 2022 : Mr. Sagar Bandopadhyay,
Mr. Kausik Chatterjee,
Ms. Sofia Nesar

For the petitioners in
WPA 11268 of 2022 : Mr. Sagar Bandopadhyay,
Mr. Tapas Saha,
Mr. Subhamay Dewanji

For the petitioners in WPA 10700 of 2022	:	Ms. Sanchari Chakraborty, Mr. Deepan Sarkar, Ms. Akanksha Chowdhury
For the petitioners in WPA 17227 of 2022, WPA 17234 of 2022	:	Mr. Kumarjit Banerjee, Ms. Sanchari chakraborty, Mr. Sourojit Dasgupta, Ms. Akanksha Chowdhury
For the petitioners in WPA 10069 of 2022 WPA 16834 of 2022	:	Mr. Tanay Chakraborty, Mr. Shayak Mitra, Mr. Abhijit Sarkar
For the petitioners in WPA 11691 of 2022, WPA 22993 of 2022 WPA 17114 of 2022	:	Mr. Tanay chakraborty, Mr. Debsoumya Basak
For the petitioners in WPA 10962 of 2022	:	Mr. Srijan Nayak, Mr. Palash Mukherjee, Ms. Monideepa Banerjee
For the petitioners in WPA 10654 of 2022		Mr. Abhrajit Mitra, Mr. Suchayan Banerjee, Ms. Sanjana Sinha, Mr. S.K. Banerjee, Mr. Souradeep Banerjee
For the Damodar Valley Corporation	:	Mr. M.G. Ramachandran, Mr. Prasun Mukherjee, Mr. Deepak Agarwal, Ms. Anushree Bardhan
For the WBERC in WPA 9857 of 2022 WPA 9861 of 2022	:	Mr. Pratik Dhar, Ms. Sharmistha Shosh, Mr. Amit Ghosh

For the WBERC in
 WPA 10069 of 2022,
 WPA 10107 of 2022,
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 WPA 9897 of 2022,
 WPA 9902 of 2022,
 WPA 9933 of 2022,
 WPA 9938 of 2022,
 WPA 9942 of 2022,
 WPA 9947 of 2022

: Mr. Victor Chatterjee,
 Ms. Sharmistha Ghosh,
 Mr. Amit Ghosh

For the WBERC in
 WPA 22993 of 2022

: Mr. Raja Saha,
 Mrs. Arpita Saha,
 Mr. Sanjay Mukherjee

Hearing concluded on : 13.01.2023

Judgment on : 17.02.2023

Sabyasachi Bhattacharyya, J:-

1. This batch of writ petitions has been filed by electricity consumers of the Damodar Valley Corporation (DVC), challenging the tariff order for the financial year 2017-18, published on May 5, 2022.
2. Consequently, the subsequent 2-year tariff order for 2018-19 and 2019-20, published on June 17, 2022 has also been challenged since, according to the petitioners, the tariff order for 2017-18, in view of being in a Single Year Tariff (SYT) framework, is violative of the Multi Year Tariff (MYT) structure contemplated by the Electricity Act, 2003 (for short, “the 2003 Act”) and the West Bengal Electricity Regulatory Commission Tariff Regulation No. 48 dated April 25, 2011.
3. Learned counsel for the petitioners primarily place reliance on Sections 3, 61 and 181 of the 2003 Act. It is argued that the National Electricity Policy (NEP) and National Tariff Policy (NTP), as per Section 3(5) of the said Act, are formulated once every five years.
4. Again, Section 61 provides that the Appropriate Commission (here the WBERC) shall specify the terms and conditions for determination of tariff and, in doing so, shall be guided by certain factors. Clause (f) of Section 61 stipulates MYT principles as one of the factors which shall guide such tariff determination. The expression “shall be guided”, it is argued, signifies that the Commission is bound to take into consideration all the said factors and, at best, can decide the weight which should be placed on each, but cannot altogether overlook one of the said components. In the present

case, since the WBERC framed SYT for the financial year 2017-18, the same is violative of Section 61(f) of the 2003 Act.

5. Learned counsel for the petitioners cite Section 181 of the 2003 Act, which confers powers on State Commissions to make Regulations, which have to be consistent with the Act and the Rules, generally to carry out the provisions of the Act.
6. Such language, it is contended, indicates that the Regulations framed by the State Commissions have to be not only consistent with the 2003 Act and Rules but generally designed to carry out the provisions of the Act itself and cannot be in derogation of any provision of the said Act.
7. It is argued that in the present case, despite having initially declared the Control Period to be 2017-18 to 2019-20 (3 years) on May 4, 2016, *vide* Order dated December 14, 2016, the WBERC, in supersession of the May 4, 2016 Order, declared that the financial year 2017-18 would be a one-year Control Period, thereby resorting to a SYT instead of MYT framework. The present impugned tariff order of May 5, 2022 is an implementation of such order and is effective for 2017-18. Such tariff order is the immediate cause of action for the challenge preferred by the petitioners in the present set of writ petitions.
8. Learned counsel for the petitioners argue that as per Section 64(3) of the 2003 Act, the tariff order is to be published within 120 days from accepting any application for tariff determination by a generating company or licensee. In the present case, although DVC filed such application in the year 2016, the determination took place in 2022, that is, after about six

years' lapse. Such delay is also one of the grounds of challenge in the present writ petitions.

9. It is next submitted that Regulation 48/WBERC of 2011, in Clause 2.5.1, refers to MYT framework. Hence, even the Regulations contemplate an MYT Framework and not an SYT system.
10. Again, Clause 5.3(h) of the National Tariff Policy of 2006, which was framed in consultation with all stakeholders, including the WBERC, fixed the Control Period at five years. The said policy was enacted on June 6, 2006 and for about 16 years, till the month of May, 2022, such policy was never deviated from by the WBERC.
11. Again, it is argued that when a decision affects public interest or is quasi-judicial in nature, reasons in writing have to be furnished for the same. In support of such contention, learned counsel for the petitioners cite primarily the following judgments:
 - i) *M.L. Jaggi Vs. Mahanagar Telephone Nigam Limited and others* [(1996) 3 SCC 119],
 - ii) *Charan Singh Vs. Healing Touch Hospitals and others* [(2000) 7 SCC 668];
 - iii) *S.N. Mukherjee Vs. Union of India* [(1990) 4 SCC 594]; and
 - iv) *Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others* [(2010) 9 SCC 496].
12. It is next contended that, to understand legislative intent of a statute, all its provisions are to be seen harmoniously. In support of such proposition, the petitioners cite:

- i) *Poppatlal Shah, Partner of Messrs Indomalayan Trading Company Vs. State of Madras, Represented by Deputy Commercial Tax Officer, Sowcarpet, Madras [AIR 1953 SC 274];*
 - ii) *University of Allahabad and others Vs. Amrit Chand Tripathi and others [(1986) 4 SCC 176]; and*
 - iii) *D. Sanjeevayya Vs. The Election Tribunal, Andhra Pradesh and others [AIR 1967 SC 1211].*
- 13.** It is also sought to be argued, by placing reliance on Clauses 2.1.15 and 2.2.1(vi) of the 2011 Regulations, that it is the responsibility of the State Commission to determine tariff. However, the WBERC is abdicating such responsibility by foisting the determination of “fuel surcharge” on the DVC itself, thereby permitting the DVC to determine its own price, which is in contravention of the Scheme of the 2003 Act as well as the 2011 Regulations.
- 14.** Learned counsel for the petitioners then argue that a statute is to be prospective if it contains substantive provisions imposing penalty.
- 15.** Regulation 2.10.2 of the 2011 Regulations clearly provide that the tariff is normally to be revised from a prospective date unless there is compelling reason otherwise - if so, detailed justification in writing is required to be given for deviating from the said norm, which is utterly absent from the decision taken by the WBERC and the subsequent implementation of the same by introducing a tariff order for a single year control period. However, the WBERC accorded no reason, compelling or otherwise, for doing so.
- 16.** The petitioners also seek to argue that the policy is not pragmatic since it has a strong financial impact on consumers. Since 2017 onwards, tariff

was never determined by the WBERC. Whatever rates prevailed in the interregnum, were either as per various orders of different forums or as per the previous rates of DVC. In view of the impugned decision of the WBERC, there will be adverse financial impact on consumers now, since the tariff increases substantially.

17. By placing reliance on *BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission*, reported at (2022) SCC OnLine SC 1450, learned counsel for the petitioners contend that the concept of 'truing up', which has to be done for the second ensuing year onwards in MYT structure, is not on the same footing as amendment of tariff order under Section 64 of the 2003 Act. Hence, there is no parity between a single year and a multi year tariff inasmuch as the former leaves no scope for such truing up. Hence, without bringing about such a specific amendment to the tariff order, the tariff would be determined every single year which would create utter uncertainty.
18. Since the licensees adjust the extra payments to be made by them with the price of power/electricity, the burden would ultimately be shifted on the consumers.
19. Thus, it is contended that the single year tariff order for the financial year 2017-18 ought to be struck down.
20. Learned senior counsel appearing for the WBERC and the DVC argue that the cardinal principles of an MYT framework are not changed despite the SYT structure of 2017-18.
21. It is argued that, just as in an MYT structure, the so called SYT structure contemplates the year before the commencement of the tariff order as the

“Base Year” and the first year of the control period to be the first “Ensuing Year”.

- 22.** That apart, the ARR and ERC are determined for each ensuing year of the Control Period. The initial determination of tariff is only for the first ensuing year and not at a flat rate for all the ensuing years. From the second year onwards in an MYT structure, there is a truing up/adjustment of tariff after taking into account the ARR of the ensuing year as determined in the first ensuing year. Under the MYT framework, the generating company and licensee files composite applications with projection of ARR and ERC without a tariff structure proposal for each ensuing year, which is for the purpose of ARR determination for each ensuing year, tariff determination for the first ensuing year and amendment of tariff of the first or any subsequent ensuing year for fixation of tariff of any ensuing year, after ARR adjustment.
- 23.** Therefore, tariff of each year of the control period is projected and/or determined separately and not all together at the inception of the Control Period. Hence, it is argued that there is no difference in principle between the SYT and MYT tariff structures as such.
- 24.** It is further argued that Section 61 contemplates guidelines which are to be considered at the preliminary stage of framing the Regulations and not for each control period decision.
- 25.** It is submitted that, under Clause 2.2.3 of the 2011 Regulations, the Commission has the sole discretion to follow the MYT principles stipulated in Section 61 and suitably apply the same. It is the prerogative of the

Commission to determine the extent to which reliance is to be placed on any one principle.

26. The parameters take into consideration complex calculations and various components, which is best done by an expert authority, that is, the Commission and, as such, it cannot be said that the Commission erred in law by placing less reliance on the MYT framework stipulated in Section 61(f) of the 2003 Act. Chapter 8, Clause 8.2 (a) of the Tariff Regulations of 2011 confers discretion solely on the Commissioner to fix norms/limits. Again, Clause (b) of the same confers power on the Commission to vary or modify the Regulations.
27. Learned senior counsel for the WBERC places reliance on *Tata Power Commission Vs. Maharashtra Electricity Regulatory Commission*, reported at (2022) SCC OnLine 1615. It was held therein, *inter alia*, that the National Tariff Policy law cannot bind or affect the interpretation of the expression “shall be guided” as used in Section 61. It was further observed that the determination of tariff and framing of Regulations is within the exclusive domain of the Appropriate Commission. In the present case, it is argued that the only said exercise had been undertaken by the WBERC. It is contended that Section 61 of the 2003 Act can at best specify the general terms and conditions and guiding factors. Section 86, on the other hand, stipulates that the State Government is to determine tariff.
28. Learned senior counsel for the WBERC next cites *Reliance Infrastructure Limited Vs. State of Maharashtra and others*, reported at (2019) 3 SCC 352 wherein it was held that courts can interfere in judicial review in cases where the Commission has arrived at a decision only where manifest

unreasonableness or arbitrariness occurred. It was held by the Supreme Court that the Commission weighs numerous factors and its decision in carrying out complex exercise cannot be constrained. Moreover, the Regulation-framing powers are legislative in nature.

29. The decision taken by the WBERC on December 14, 2016, that the next Control Period would be for the single year 2017-18, was never challenged for six years thereafter.
30. As such, the writ petitions ought to be dismissed on such score alone, it is argued.
31. It is further argued by the WBERC that there is uniformity in the decision of introducing single year tariff for a single financial year by the Commission inasmuch as the tariff for all other licensees have also been determined on single year basis for the same period. Setting aside of the impugned SYT tariff order shall affect the entire tariff structure for other licensees too, whose tariff determinations have already been acted upon by the concerned parties.
32. It is argued on behalf of the WBERC that tariff determination is equivalent to price fixation, which has been declared by the Supreme Court to be a legislative function. For such proposition, learned senior counsel for the WBERC cites:
 - i) *Shri Sitaram Sugar Company Limited and another Vs. Union of India and others* [(1990) 3 SCC 223];
 - ii) *Union of India and another Vs. Cynamide India Limited and another* [(1987) 2 SCC 720];

iii) *ESSAR Steel Limited Vs. Union of India and others [(2016) 11 SCC 1];*
and

iv) *PTC India Limited Vs. Central Electricity Regulatory Commission*
[(2010) 4 SCC 603].

- 33.** It is further contended that the right of a consumer is very little in price fixation. In support of the said proposition, learned senior counsel relies on an unreported Division Bench Judgment in *WBERC Vs. Impex Ferro [FMA 4319 of 2014]*.
- 34.** Moreover, it is argued that a co-ordinate Bench decision dated January 9, 2017 of Harish Tandon, J., in *DVC Vs. WBERC [WP 26442(W) of 2016]* contained a direction for making investment proposal. However, the DVC never made the same, due to which the delay occasioned in proceeding thereon was inevitable. Only when a connected matter came up before Amrita Sinha, J., a direction was given on January 13, 2022 for determining the tariff for the relevant period, pursuant to which the WBERC formulated the tariff order for 2017-18 and for the next control period of 2018-19 to 2019-20.
- 35.** The consumers, it is argued, shall not be prejudiced in any manner by the impugned order of the WBERC. It is argued that the “useless formality” theory comes into play. As both in SYT and MYT tariff structures, different tariff is determined for different ensuing years and the same is determined on the basis of base year for the first ensuing years, there is no difference in principle between the SYT and MYT structures.

- 36.** On the score of prejudice and non-interference by courts if there is no violation of natural justice, learned senior counsel for the WBERC places the following judgments:
- i) *Ashok Kumar Sonkar Vs. Union of India and others* [(2007) 4 SCC 54];
 - ii) *Canara Bank and others Vs. Debasis Das and others* [(2003) 4 SCC 557];
 - iii) *Sohan Lal Gupta (Dead) Through LRS. and others Vs. Asha Devi Gupta (Smt.) and others* [(2003) 7 SCC 492]; and
 - iv) *S.L. Kapoor Vs. Jagmohan and others* [(1980) 4 SCC 379].
- 37.** It is also contended by the WBERC that the writ petitions are not maintainable inasmuch as Section 111 of the 2003 Act provides sufficient efficacious alternative remedy to the petitioners. Such an appeal has a limitation period of 45 days. However, instead of preferring an appeal, the petitioners have taken out the present writ petitions.
- 38.** Moreover, there is no appeal against the May 5, 2022 tariff order as such. On the score of maintainability and alternative remedy, learned senior counsel for the WBERC places reliance on *West Bengal Electricity Regulatory Commission Vs. CESC Limited*, reported at (2002) 8 SCC 715 and *H.P. Electricity Regulatory Commission Vs. H.P. State Electricity Board*, reported at (2006) 9 SCC 233.
- 39.** The Regulations themselves having not been challenged as such, no Constitutional point has been questioned in the present case, it is argued. Accordingly, in the light of the existing Regulations as indicated above, which have never been challenged by the petitioners, no Constitutional point is raised in the present matters.

40. In order to properly appreciate the issues involved in the present writ petitions, certain terms are required to be looked into.
41. The expression 'Control Period' is defined in Clause 1.2.1(xxx) of the 2011 Regulations. As per the said definition, control period is a period consisting of a number of year(s) fixed from time to time under the MYT framework.
42. Clause 1.2.1(xviii) defines "Base Year" as the year preceding the first year of the control period.
43. "Ensuing Year", as defined in Clause 1.2.1(xlviii), is year(s) in a control period for which the tariff is determined. 'One', 'two', etc. in reference to ensuing year means respectively the first, second, etc. year immediately subsequent to the base year. A careful perusal of the above definitions indicates that the term "base year" signifies a single year prior to the first year of control period whereas the expressions "control period" and "ensuing year" refer to "year(s)". The use of plural in parentheses indicates that both definitions may contemplate either a single or several years.
44. Hence, there is nothing in the definitions to preclude an MYT Framework having only a single year of control period.
45. Secondly, even in case of an SYT Framework, there can be a base year and at least one ensuing year.
46. In our present example of SYT determination for the financial year 2017-18, the base year would be 2016-17 and first ensuing year would be 2017-18.
47. As such, even a 'Single Year Tariff' takes within its fold the consideration of at least two years, that is, the preceding year (base year) and the single year of control period (ensuing year). Thus, although we loosely refer to the

2017-18 tariff order as having a single year format, the minimum number of years which have to be taken into consideration in that case also are two, that is, 2016-17 and 2017-18.

- 48.** That apart, Clause 2.5 of the 2011 Regulations provides for Multi Year Tariff Framework. It is clear from the opening paragraph of Clause 2.5.1 that MYT Framework shall be based on certain elements, for calculation of ARR (Aggregate Revenue Requirement) and ERC (Expected Revenue from Charges) of each ensuing year. The determination of tariff is done only for the first ensuing year. From the second year onwards, there is amendment of tariff after adjustment with ARR of the ensuing year as determined in the first ensuing year. Under the MYT Framework, generating companies and licensees file composite applications with projection of ARR and ERC and tariff structure proposal for each ensuing year for the following purposes:
- a) ARR determination for each ensuing year,
 - b) Tariff determination for first ensuing year.
 - c) Amendment of tariff of first or any subsequent ensuing year for fixation of tariff for any ensuing year after ARR adjustment.
- 49.** As per the language of Clause 2.5 above, the tariff of each year of the control period is projected and/or adjusted and determined separately, as opposed to determination of tariff for entire control period at the inception.
- 50.** Hence, there is sufficient flexibility within the multi year tariff system itself to determine tariff for one ensuing year at a time.
- 51.** In any event, since the control period in the present case is a single year, the ARR and ERC calculations will remain valid only for the said period, as opposed to a control period of several years, in which case also each

ensuing year's tariff would have to be determined individually and not at a flat rate at the outset of the first ensuing year.

52. Hence, I do not find any cardinal difference insofar as calculations are concerned between an MYT and an SYT system.
53. Clause 5.3(h) of the National Tariff Policy contemplates Multi Year Tariff on the basis of Section 61 of the 2003 Act. It speaks about the MYT 'framework', which may also accommodate a control period of a single financial year, as discussed above.
54. It mentions that the framework should feature a five year control period and the initial control period may be of three years if deemed necessary by the Regulatory Commission on account of data uncertainty and other practical considerations. In cases of lack of reliable data, the Appropriate Commission may state remissions in MYT for the first control period and a fresh control period may be started as and when more reliable data becomes available. Section 61(i) of the 2003 Act mentions the National Electricity Policy and National Tariff Policy as two of the guiding factors for determination of tariff. We must read the said Clause in proper perspective. The multi year framework and the initial suggestion of a five year control period is not a sole and exclusive binding factor on the State Commission and the weightage to be given to the said component of the guiding factors, which are about nine (09) in number, depends on the Commission itself.
55. Although the National Tariff Policy is a factor to be considered, a particular expression or clause used in the National Tariff Policy cannot be so sacrosanct that it would transcend the component of guidance which it is

supposed to provide, along with other components under Section 61 of the 2003 Act.

56. In fact, Sections 61 and 62 of the 2003 operate in different fields. Whereas Section 61 speaks about tariff regulations to be formulated by the Appropriate Commission, Section 62 deals with the actual determination of tariff.
57. For the purpose of testing the legality of the Single Year Tariff under challenge, we are to look into the provisions of the 2003 Act and the 2011 Regulations.
58. Since the tariff regulations, as reflected in the Clauses of the 2011 Regulations discussed above, read in conjunction with Section 61 of the 2003 Act, do not preclude the formulation of a control period of one year specifically, in the absence of any such bar, it cannot be said that the WBERC acted *de hors* the law in framing the 2017-18 control period.
59. Under Clause 8.2(a) of the 2011 Regulations, the Commission is empowered, at its sole discretion, to fix suitable norms/limits for any or all the items of expenses.
60. Sub-clause (b) of the Clause provides that the Commission may, at any time, at its sole discretion, vary, alter, modify, add or amend any provision of the Regulations.
61. However, in the present case, sub-clause (a) is not applicable at all, since it is not a question of the Commission fixing norms/limits of expenses.
62. Insofar as sub-clause (b) is concerned, there is no change in the Regulations, as such, in the present case to attract the said provision.

63. It is seen clearly that the WBERC acted within the ambit of its existing Regulations while fixing the tariff for the period 2017-18.
64. As long back as on December 14, 2016, the 2017-2018 control period was declared by the WBERC by its order. Such order was not challenged over a period of six years prior to the tariff order itself being made effective for 2017-18 *vide* the impugned order dated May 5, 2022.
65. Thus, it does not now lie in the mouth of the petitioners to say that the fixation of one-year control period was itself bad. The determination of tariff in 2022 was merely a consequence and incidental to the said fixation of one-year control period on December 14, 2016.
66. Again, if we read Clause 2.2.3 of the 2011 Regulations, it is the Commission's sole discretion to follow the MYT principles and suitably apply those principles and also to choose the extent to which reliance on any one principle would be placed.
67. In the present case, it is the MYT principles which are under consideration. Since the MYT Framework as contemplated in the 2011 Regulations themselves accommodate single year control period, there is no reason why the exercise of discretion under Clause 2.2.3 of the WBERC has to be faulted on the ground of statutory violation.
68. Insofar as *Tata Power Company (supra)* is concerned, it is clearly observed that the National Tariff Policy cannot bind interpretation of the expression "shall be guided" under Section 61 of the 2003 Act. Determination of tariff and framing Regulations was held to be within the exclusive domain of the Appropriate Commission. As per Section 61, it is the State Commission which has to specify the terms and conditions for determination of tariff

and, as such, the impugned exercise was within the jurisdiction of the WBERC.

69. However, *Reliance Infrastructure (supra)*, cited by the WBERC, does not have any direct relevance since it was held there that the Commission weighs numerous factors and its decision in carrying out complex exercise cannot be constrained. The Court in judicial review can interfere in such a discretionary exercise only where there is manifest unreasonableness or arbitrariness, it was held. In the present case, however, the challenge is not directed against any Regulation framed by the Commission but concerns mere interpretation of an order of the WBERC in the context of existing Law and Regulations.
70. It is seen that the tariff determined for the financial year 2017-18 is uniform for all licensees including the DVC.
71. As such, there is no discrimination between the licensees *inter se*. In fact, the Commission is justified in arguing that in the event the tariff determination for the said financial year is interfered with at this juncture, it shall affect the entire tariff structure for other licensees as well, whose tariff determination exercise is long over and has been acted upon.
72. It is evident from the judgments cited by the WBERC in the cases of *Shri Sitaram Sugar Company Limited and another (supra)*, *Cynamide India Limited and another (supra)*, *ESSAR Steel Limited (supra)* and the unreported judgment of this Court in *WBERC Vs. Impex Ferro* in FMA 4319 of 2014 that price fixation and tariff determination are legislative functions.
73. In the present case, as such, the question of passing a reasoned order does not arise at all. First, since the order determining the control period, which

is substantially under challenge, was passed in the year 2016 and attained finality over the next six years. Secondly, there is no contravention of any law or Regulation on the part of the WBERC in consequentially fixing tariff for the financial year 2017-18.

- 74.** Insofar as the alleged delay on the part of the WBERC in passing the tariff order for 2017-18 in the year 2022 is concerned, one of the factors to be considered was that the order passed by the co-ordinate bench of Harish Tandon, J. in *WP 6442(W) of 2016* dated January, 9, 2017 incorporated a specific direction for making investment proposal.
- 75.** Insofar as the DVC is concerned, no such tariff determination proposal was given. Only on January 13, 2022 another co-ordinate bench of Amrita Sinha, J., specifically directed the WBERC to determine the tariff, although no investment proposal came over the years.
- 76.** Hence, there is sufficient reason for the WBERC delaying the tariff determination awaiting investment proposal as per the order of Harish Tandon, J.
- 77.** As far as maintainability of the present challenge is concerned, it has been rightly argued on behalf of the WBERC that Section 111 of the 2003 Act provides for appeal by any person aggrieved by an order made by an adjudicating officer under the 2003 Act or an order made by the Appropriate Commission under the Act before the appellate tribunal for electricity. In the present case, if aggrieved by the order of the Commission dated December 14, 2016, whereby the control period was determined as one year for the financial year 2017-18, the present petitioners could very well have preferred a challenge within the limitation period of 45 days as

stipulated in sub-section (2) of Section 111 of the 2003 Act. Having not done so, the said order has attained finality and the tariff determination of 2022 is clearly an exercise under Section 62 of the 2003 Act consequential to the said order of 2016.

- 78.** Hence, the judgments of *WBERC Vs. CESC (supra)* and *H.P. ERC Vs. H.P. SEB (supra)* cited by the WBERC are apt in this regard.
- 79.** Inasmuch as the challenge to the alleged retrospectivity of the tariff determination of 2017-18 is concerned, the said argument does not stand on firm ground.
- 80.** In fact, the arguments advanced of such score refer primarily to the retrospectivity of statutes. In the present case, however, there is no question of any statute being retrospective. Insofar as the tariff determination itself is concerned, the stipulation of 120 days after the filling of the application for determination of tariff by the DVC in 2016, it was the DVC itself which delayed the matter by failing to honour the co-ordinate Bench direction of filing an investment proposal which was the reason for the entire delay in ascertaining the tariff. Moreover, the tariff for the period of 2017-18 was never decided before the year 2022.
- 81.** The first time it was determined was by the impugned determination in the year 2022. Whatever tariff was paid in the meantime in consonance with the orders of Courts/forums and/or Central Regulations prevailing from time to time, if any, were subject to the final determination of tariff by the WBERC, which is the State Commission.
- 82.** Since the tariff for 2017-18 has been determined by the WBERC for the first time in 2022 with effect from the year 2017-18, the same is not a

“retrospective” determination but a late/subsequent determination of tariff. It would, no doubt, be a retrospective determination in the true sense in the event a tariff had been determined previously for the relevant period of 2017-18 and subsequently another imposition of tariff was made for a previous period. The present determination, however, covers the period after 2016, till when the determinations had last been made. Therefore the retrospective argument fails.

- 83.** Insofar as the requirement of giving reasons in writing is concerned, as per the judgments cited by the petitioners, the same pertains primarily to quasi-judicial or judicial orders. In the present case, the exercise undertaken by the WBERC, which is impugned herein, was of a legislative nature and not a quasi-judicial or adjudicatory function relating to disputes of particular individuals. Hence, the said judgments do not apply as well in the present case.
- 84.** The argument that WBERC is foisting the determination of fuel surcharge on the DVC, thereby abdicating its own responsibility of determining tariff, is neither here nor there. The same is divorced from the entire challenge preferred in the present batch of writ petitions.
- 85.** If we look into the relevant Clauses of the 2011 Regulations, which have been cited by the petitioners, we do not find corroboration of the said argument of the petitioners. The calculation of fuel surcharge is in its very nature an additional charge to be imposed by the licensee itself, in the present case the DVC and does not have anything to do with the determination of tariff by the Regulatory Commission.

- 86.** Inasmuch as the alleged financial impact on consumers is concerned, such argument does not find favour with this Court, since the WBERC determined tariff for the period of 2017-18 for the first time in 2022 by the impugned tariff order. The consumers were well aware that the tariff charged from them would ultimately be that determined by the WBERC. The charges previously paid were in terms of the orders of different forums and/or the previous rates of the DVC, passed from time to time, and were to be ultimately adjusted with the tariff to be determined by the WBERC.
- 87.** There is nothing on record to indicate that if the investment proposal was given by the DVC and taken into consideration, the Commission would not have increased the tariff instead of decreasing the same for the consumers.
- 88.** Moreover, the impact, if any, is not universal but only applies to the consumers to the DVC.
- 89.** There is nothing to show that there would be adverse impact on the consumers, sufficiently to afford a cause of action to the consumers to challenge the impugned tariff order.
- 90.** Inasmuch as *BSES Rajdhani Power Limited (supra)* judgment is concerned, the same does not acquire relevance in the present context. It was held there that 'truing up' is not amendment of tariff order under Section 64, which has no application in the facts of the instant case. In the present case, however, the MYT framed for 2017-18 took into consideration the base year of 2016 and the ensuing year of 2017, which falls entirely within the MYT Framework itself and does not violate any of the definitions in the 2011 Regulations and/or any concept therein.

91. Accordingly, there is no scope of interference in the present writ petitions.

Hence the following writ petitions are dismissed without any order as to costs:

- i) WPA No.9857 of 2022 with
- ii) WPA No.10069 of 2022 with
- iii) WPA No.10107 of 2022 with
- iv) WPA No.10315 of 2022 with
- v) WPA No.10654 of 2022 with
- vi) WPA No.10700 of 2022 with IA No. CAN 1 of 2022 with
- vii) WPA No.10962 of 2022 with IA No. CAN 1 of 2022 with
- viii) WPA No.10963 of 2022 with
- ix) WPA No.10967 of 2022 with
- x) WPA No.11196 of 2022 with
- xi) WPA No.11200 of 2022 with
- xii) WPA No.11268 of 2022 with
- xiii) WPA No.11691 of 2022 with
- xiv) WPA No.11913 of 2022 with
- xv) WPA No.12060 of 2022 with
- xvi) WPA No.16133 of 2022 with
- xvii) WPA No.16136 of 2022 with
- xviii) WPA No.16834 of 2022 with
- xix) WPA No.17227 of 2022 with
- xx) WPA No.17234 of 2022 with
- xxi) WPA No.22993 of 2022 with
- xxii) WPA No.9861 of 2022 with

- xxiii) WPA No.9869 of 2022 with
- xxiv) WPA No.9872 of 2022 with
- xxv) WPA No.9892 of 2022 with
- xxvi) WPA No.9897 of 2022 with
- xxvii) WPA No.9902 of 2022 with
- xxviii) WPA No.9933 of 2022 with
- xxix) WPA No.9938 of 2022 with
- xxx) WPA No.9942 of 2022 with
- xxxi) WPA No.9947 of 2022 with
- xxxii) WPA No.15255 of 2022 with IA No. CAN 2 of 2022, CAN 3 of 2022
with
- xxxiii) WPA No.17114 of 2022.

- 92.** Urgent certified copies, if applied for, be issued to the applicants subject to compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)