

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 25028 of 2023

**Rajadhiraj Tirupani Vinayak
Natraj Pvt. Ltd.**

Vs.

The State of West Bengal & Ors.

For the petitioner	:	Mr. Swatarup Banerjee, Mr. Nirmalya Das Gupta, Mr. M.S. Tiwari, Ms. Shweta Poddar
For the State	:	Mr. Sk. Md. Galib, Mr. Abu Siddique Mallik
For the WBSEDCL	:	Mr. Joydip Kar, Mr. Debanjan Mukherjee
For the WBERC	:	Mr. Pratik Dhar, Mr. Ritwik Pattanayak
Hearing concluded on	:	25.04.2024
Judgment on	:	01.05.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner-Company is a consumer of electricity from the respondent no. 2-West Bengal State Electricity Distribution Company Limited (WBSEDCL), located in Post Office – Bishnupur, District – Bankura, West Bengal. The writ petition has been filed seeking a revision in the electricity tariff imposed on the petitioner and other consumers in the area outside the DVC command area.

- 2.** Learned counsel for the petitioner argues that the petitioner has been consuming electricity all along from the WBSEDCL. Initially, the command area where the petitioner was enjoying electricity was a multi-licensee area, both the Durgapur Project Limited (DPL) and the WBSEDCL supplying electricity in the said area. In the adjacent area both in West Bengal and outside, the WBSEDCL and the Damodar Valley Corporation (DVC) supply electricity.
- 3.** Subsequently, the DPL merged into the WBSEDCL. On November 16, 2019, the WBSEDCL issued a notification fixing maximum tariff for the command area where the petitioner is enjoying electricity.
- 4.** Learned counsel for the petitioner argues that the tariff in the DVC Command Area is lower than the area where the petitioner is enjoying electricity, which is discriminatory. It is argued that the petitioner had originally been enjoying electricity in a multi-licensee area and had no say in its area of coverage being unilaterally converted to a monopoly area of the WBSEDCL. It is argued that the WBSEDCL, in the multi-licensee command area where the DVC is operating, is charging less tariff than the petitioner's area. Such discrimination, it is argued, is patently violative of Article 14 of the Constitution of India.
- 5.** It is argued that although the respondents have contended that the petitioner has not challenged the proviso to Section 62(1) of the Electricity Act, 2003 (hereinafter referred to as, "the 2003 Act"), the writ court can mould reliefs as the present challenge covers a wider

spectrum of the discriminatory application of the proviso to Section 62(1) of the 2003 Act.

6. Learned counsel appearing for the petitioner, in support of the contention of the tariff being discriminatory, cites *E.P. Royappa v. State of Tamil Nadu and another*, reported at (1974) 4 SCC 3.
7. The action taken by the respondents in taking shelter of the proviso to Section 62(1), it is argued, is discriminative and illegal. In support of his arguments, learned counsel cites *Vashist Narayan Kumar v. State of Bihar and others*, reported at 2024 SCC OnLine SC 2.
8. Learned counsel next contends that the word “may” in Section 62(1), proviso has to be read in the context as “shall”, since the same confers powers on the Appropriate Commission for fixation of maximum ceiling of tariff, which is a mandatory direction upon the Commission for retail sale of electricity. It settled law, learned counsel submits, that, if a mandatory direction or power is conferred on an authority, the word “may” should be read as a mandatory “shall”. It is argued that there has been no fixation of maximum ceiling limit for electricity tariff for the sale of electricity in the petitioner’s area, thereby permitting the WBSEDCL to charge a higher rate in a monopoly area than a multi-licensee area, particularly the area covered by the DVC.
9. In support of his proposition in respect of the term “may”, learned counsel cites *State of Uttar Pradesh. v. Jogendra Singh*, reported at AIR 1963 SC 1618 and *Ramji Missar and another v. State of Bihar*, reported at AIR 1963 SC 1088.

- 10.** Learned counsel next argues that in the present case, WBSEDCL, in its opposition, has referred to a letter dated July 25, 2014 addressed by the West Bengal Electricity Regulatory Commission (WBERC) to its Chairman and Managing Director. In paragraph 3(a) of the same, the onus of introduction of non-competitive tariff has been shifted upon the State of West Bengal. It is argued that under Section 62(1), proviso of the 2003 Act, the Appropriate Commission is the only authority empowered to regulate such rate or fixation of ceiling tariff. Such delegation of authority of the Commission to the State is, thus, unlawful.
- 11.** Learned counsel for the petitioner contends that no argument by way of affidavit has been filed by the Regulatory Commission or the State Government to show how the State Government is empowered to discharge the function which has been authorized to be exercised by the Commission. Further, no document has been produced by the Commission to show how the Government of India has made policy with regard to tariff and/or the basis of the determination of tariff.
- 12.** It is argued that due to such non-filing of affidavit by the State Government or the Commission, the principles of non-traverse clearly applies.
- 13.** It is next contended by the petitioner that the loss suffered by the WBSEDCL by offering lesser electricity tariff in the DVC Command Area is being compensated by charging higher rates in its monopoly area, which is adversely affecting the petitioner and creating a discrimination.

14. It is argued that the State Government should accordingly provide subsidy to operators consuming electricity in the command area where the WBSEDCL is operating as a monopoly.
15. Under Section 62(6) of the 2003 Act, it is argued, if any licensee or generating company recovers a price or charges exceeding the tariff determined under the Section, the excess amount shall be recoverable by the consumer along with interest equivalent to bank rate without prejudice to any other liability incurred by the licensee.
16. Learned senior counsel appearing for the WBSEDCL, in reply, argues that Article 14 of the Constitution of India applies only between persons who stand on an equal footing. The petitioner's factory is admittedly not located in an area where multiple licensees operate and, as such, the question of extension of competitive tariff to the petitioner cannot arise.
17. Similar rates are applicable in the command area where the petitioner's factory is located for the same categories of consumers. For example, the petitioner is a consumer of electricity at the 132 KV range. All consumers in the area consuming electricity of the same range are charged the same price at the same rate as fixed by the WBERC. Thus, there is no discrimination.
18. Determination of tariff, it is argued, is a function assigned legislatively to the WBERC and falls in the domain of legislative activity. The jurisdiction of the writ court to review such a decision is limited. The High Court has merely to be satisfied that the Commission has followed proper procedure. In support of such proposition, learned

senior counsel cites *Transmission Corporation of Andhra Pradesh Limited and another v. Sai Renewable Power Private Limited and others*, reported at (2011) 11 SCC 34.

19. In a judgment rendered by a co-ordinate Bench of this Court in *Rana Udyog (P) Ltd. and another v. State of West Bengal and others*, reported at 2015 SCC OnLine Cal 3901, a similar issue was decided by the court which held that the petitioner in that case was not similarly situated to the consumers in the Asansol-Durgapur belt and thus could not seek the rate applicable to such consumers where multiple licensees exists.
20. Learned senior counsel appearing for the WBSEDCL next argues that the facts and figures in the charts given in the writ petition with regard to WBSEDCL and DVC are incorrect. The WBSEDCL is charging competitive tariff as per prescribed limit fixed by the WBERC. Electricity charges for non multi-licensee areas are also as per tariff fixed by the Commission.
21. Learned senior counsel for the WBERC submits that under the 2003 Act, there exist two different mechanisms - multi-licensee and single licensee areas. In multi-licensee areas, because of the proviso to Section 62(1), the Commission may fix maximum ceiling of tariff of the individual licensee. So a licensee in that area only can charge tariff anything less than the maximum ceiling of tariff.
22. However, in other places where there is only a single distribution licensee, exact tariff is determined which is required to be paid by the respective consumers as in the present case.

- 23.** It is argued that the grievance of the petitioner is that its tariff, when compared with the tariff of a different area, that is, the DVC Command Area is higher. However, the distinction is arbitrary because admittedly the petitioner is not taking supply in the DVC Command area. However, there is no distinction among the consumers in the area of the writ petitioner or in any area where there is only one licensee operating.
- 24.** It is submitted that the Commission, and not the State, has determined tariff for the area concerned which has been annexed to the writ petition at pages 149 to 277, the relevant tariff being at page 265.
- 25.** The competitive tariff in the DVC Command Area was allowed by the Commission by an order dated November 8, 2019, a copy of which has been handed over in Court.
- 26.** Under the 2003 Act, Section 108 empowers the State to give directions to the Commission on policy matters. As such, consent sought from the State by the Commission was relatable to transfer of assets of DPL to WBSEDCL, which may be seen from the order dated November 8, 2019. The ceiling tariff of WBSEDCL in the area-in-question has been fixed by the Regulator only and not by the State.
- 27.** It is argued that the orders of the Commission, including that dated November 8, 2019, are available on the official website of the WBERC. The petitioner also referred in page 25 to a notice by the WBSEDCL dated November 16, 2019 regarding competitive tariff and another notice dated February 28, 2023 at page 144. Admittedly, it was the

third time such notice was given. Thus, the petitioner was aware at all times about the existence of competitive tariff in the DVC Command area where there are more than one licensees operating.

28. On the other hand, the petitioner's manufacturing unit is in Dwarika, Bishnupur, Bankura which is a single licensee area. The order of the Commission dated November 8, 2019, in any event, is appealable under Section 111 of the 2003 Act. The petitioner has not filed any such appeal.
29. The first proviso to Section 61(1) of the 2003 Act permits the classification made by the WBERC. Moreover, Clause 2.2.2(xvi), third proviso of the Tariff Regulations, 2011 also provides for such classification with a rider that for such competitive tariff, that is lesser tariff, a licensee cannot pass on the loss to the consumers. The petitioner, having not challenged the *vires* of Section 61(1), first proviso nor Regulation 2.2.2(xvi), third proviso, the present challenge is not maintainable.
30. Learned senior counsel for the WBERC argues that presumption lies in favour of constitutionality of legislations as well as delegated legislations. In support of such arguments, learned senior counsel cites the following judgments:
 - i) *People's Union for Civil Liberties and another v. Union of India and others*, reported at (2004) 2 SCC 476;
 - ii) *People's Union for Civil Liberties v. Mirzapur Moti Kuresh Jamat and others*, reported at (2008) 5 SCC 33;

iii) *H.P. Electricity Regulatory Commission v. H.P. State Electricity Board*, reported at (2006) 9 SCC 233;

iv) *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and others*, reported at (2006) 3 SCC 434.

- 31.** For adjudication of the above disputes, certain provisions of the 2003 Act are required to be looked into.
- 32.** Section 61 of the 2003 Act confers powers on the Appropriate Commission (here the State Commission) to specify the terms and conditions for the determination of tariff, guided by the principles stipulated therein. Clause (b) thereof provides that the generation, transmission, distribution and supply of electricity are conducted on commercial principles. Clause (c) stipulates that the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments should be looked into. Clause (d) provides that safeguarding of consumers' interest, and at the same time, recovery of the cost of electricity in a reasonable manner are also to be adhered to.
- 33.** In such perspective, the proviso to Section 62(1) provides that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.
- 34.** Learned counsel for the petitioner has cited *Jogendra Singh (supra)* and *Ramji Missar (supra)*, for the proposition that "may" in the proviso to Section 61(1), should be read as mandatory or "shall". In *Jogendra*

Singh (supra), the Supreme Court held that “may” generally does not mean “must” or “shall” but is capable of so meaning in the light of the context. In the context of the said case, it was held that the whole purpose of the Rule would be frustrated if “may” was construed to be the same as the other Rule. The Rule under consideration was Rule 4(2) of the concerned Rules, which cast an obligation on the Governor to grant the request of gazetted government servants to be tried by the Tribunal.

- 35.** The facts of the said case are entirely distinguishable, as is the application of the ratio, from the present case.
- 36.** As held by the Supreme Court, in the event a government servant requested to be tried by a Tribunal, if such request was not granted by the Governor, the option given to the gazetted government servant would be rendered nugatory. Thus, the power on the Governor to grant such request was a corollary to the option given to the government servants. If not granted, the option would lose existence. Thus, in such context, the Supreme Court held that the Governor was obliged to grant such request, if made, to give meaningful effect to the option available to the gazetted government servants. In the said context, it was held that sometimes the Legislature uses the expression “may” out of deference to high State Authorities (there, the Governor) on whom power and obligation is conferred.
- 37.** As opposed to the said case, the proviso to Section 62(1) of the 2003 Act does not confer any corresponding option either on the consumer or the licensee. The said proviso confers a power exclusively on the

Commission, being the statutory authority, to fix maximum ceiling of tariff for retail sale of electricity in multi-distribution licensee areas. The exercise of such power, however, is supplemented by a discretion conferred by the use of the word “may”.

38. Such discretion cannot be exercised arbitrarily due to the checks and bounds implicit in the proviso itself. The circumstances and yardsticks of such exercise have also been stipulated in the proviso, as per which the Appropriate Commission, *for promoting competition among distribution licensees*, may fix only maximum ceiling of tariff.
39. Thus, the Commission has been granted the discretion, if it deems fit on a consideration of the circumstances that fixation of maximum limit of tariff is necessary for promoting competition among licensees, to so fix. As such, there is no scope of the “may” being read as “shall”, since as opposed to the fact-situation in the cited judgments, reading the “may” here as mandatory would take away the very discretion which has been conferred on the Commission (under certain specific circumstances), which would be robbing the proviso of its very purpose. If so interpreted, the proviso itself would be rendered nugatory. Hence, it is entirely on the discretion of the Commission to exercise such power keeping in view the promotion of competition among licensees in a multi-licensee area.
40. In *Ramji Missar (supra)*, the Supreme Court held only that “may” was not unfettered but to be used under the legal parameters provided in the statute, and not that “may” has to be read in every case as “shall”. The said principle applies here as well, since the “may” in the proviso

to Section 62(1) is to be exercised as per the parameters prescribed in the proviso itself, that is, for promotion of competition among distribution licensees. The very discretion conferred by the proviso is sought to be challenged by the petitioner, which would tantamount to challenging the *vires* of the proviso without any such challenge being actually preferred here. In fact, the petitioner's stand is contradictory since in the same breath the petitioner challenges the discretion, which is the very basis of the proviso to Section 62 (1), and also relies on the same to argue that the same has not been adhered to in discriminating against the petitioner.

- 41.** It is also to be noted that by its very nature, the proviso, for the purpose of promotion of competition, can be applicable only to multi-licensee areas, as there would not be any competition in single licensee command areas in the first place, for the Commission to invoke the proviso.
- 42.** The arguments on alleged contravention of Article 14 of the Constitution of India made by the petitioner are entirely misplaced. *E.P. Royappa (supra)*, cited by the petitioner, provides that Article 14 strikes at the arbitrariness in State action and ensures fairness and equality of treatment. In the present case, the distinction provided in the statute is itself the safeguard sought by the petitioner.
- 43.** If the action of the Commission is to be set aside, the same would tantamount to contravention of principles of fairness and equality of treatment as well as take away the discretion statutorily conferred on the Commission.

- 44.** The premise of Section 62(1), proviso, is that the statute makes an exception for multi-licensee areas where, in order to promote fair competition and extend the benefit of such competition to consumers, only a maximum ceiling limit of tariff is fixed. The licensees operating in such areas do not have the liberty to exceed such maximum limit but, in order to compete with each other, may very well cut their prices, of course, with the approval of the Commission.
- 45.** As opposed to such areas, in single licensee command areas, there is no option of competition at all, as a single operator distributes electricity. Hence, in such areas, the Commission has to fix specific tariff by exercise of its powers under Sections 61 and 62 of the 2003 Act. In the event only the upper limit of tariff was fixed for single-licensee areas as well, it would depend on the mercy of the licensee to discriminate between consumers of the same category, thereby conferring an unfair bargaining handle on the licensee. The statutory distinction between multi-licensee and single licensee areas in that respect is, thus, deliberate.
- 46.** The other argument made by the petitioner is that the loss suffered by the WBSEDCL in multi-licensee areas is shifted to consumers of command areas where the WBSEDCL operates solely. However, such argument is also belied by Clause 2.2.2(xvi), third proviso of the Tariff Regulations, 2011 framed by the WBERC. Such proviso clearly stipulates that in case of multi-licensee areas where there is a maximum ceiling tariff, a licensee cannot pass on a competitive (lesser) tariff loss to other consumers. Thus, the very apprehension of

the petitioner is misplaced as, in terms of the said proviso, the WBSEDCL is debarred from passing on its losses in multi-licensee command areas to consumers in single licensee command areas such as the petitioner.

- 47.** The WBSEDCL has cited *Sai Renewable Power Private Limited (supra)*, where the Supreme Court held that it is not proper for the court to examine fixation of tariff rates/revision since those are parameters outside the purview of judicial intervention. As exceptions, the Supreme Court held that when tariff fixation is illegal, arbitrary or *ultra vires* the Act, such interference may occur. “Illegal” has been observed to mean if, while fixing tariff, statutorily prescribed procedure is not followed or the tariff is so perverse and arbitrary that it hurts the judicial conscience, when it becomes necessary for the court to intervene. The jurisdiction to interfere, however is a limited one.
- 48.** Thus, ordinarily, tariff fixation by the Appropriate Commission is not justiciable. The petitioner, in any event, has not challenged the tariff on merits but argues on principle that the same is violative of Article 14 of the Constitution of India. Since the petitioner itself operates in a single licensee area, there cannot be any possibility of competitive maximum ceiling tariff being fixed in its command area, as the proviso to Section 62(1) of the 2003 Act is not applicable at all. The comparison between a multi-licensee area and a single licensee area is, thus, on an unequal footing. Such comparison between unequals

does not come within the purview of Article 14 of the Constitution of India.

49. As held by the learned co-ordinate Bench in similar circumstances in *Rana Udyog (P) Ltd. (supra)*, since the petitioner is situated in a monopoly area, it cannot seek tariff rates in consonance with a multi-licensee area. As in the said case, the writ petition is not maintainable on such ground.
50. The WBERC cites *People's Union for Civil Liberties (supra)*, where the Supreme Court decided that any statute carries the presumption of constitutionality. It was also held that the said doctrine extends to law enacted for imposing reasonable restrictions to fundamental rights. It was held that there is a further presumption, as a corollary of the above, that a statutory authority would not exercise the power arbitrarily.
51. In *People's Union for Civil Liberties's* case, such presumption was extended by the Supreme Court to delegated legislation, which can be declared unconstitutional only when there is a clear violation of a constitutional provision or the parent statute beyond reasonable doubt.
52. The other two judgments cited by the WBERC also observed that substantive law as well as delegated legislation raises presumption of constitutionality. Attempt of the courts, thus, is required to be made to uphold such legislations. There is no reason why the said principle should not be applied in the present case as well.

- 53.** Insofar as the heavy stress laid by learned counsel for the petitioner on the alleged delegation of the power of the WBERC to the State is concerned, the said argument is also misconceived. Section 108 of the 2003 Act provides that in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Sub-section (2) of Section 108, importantly, leaves it to the decision of the State Government to take a final call if any question arises as to whether any such direction relates to a matter of policy involving public interest.
- 54.** In the said backdrop, when DPL was merged with the WBSEDCL in the command area where the petitioner is running its factory, the WBERC rightly approached the State Government regarding introduction of competitive tariff as proposed by the WBSEDCL. The WBERC clearly indicated that before introduction of any such competitive tariff for industrial consumers of the categories of energy as stipulated therein, where multiple licensees were functioning for effective disposal of surplus power and for increasing business interest, the WBERC also referred to Regulation 2.2.2 of the Tariff Regulations of 2011. The entire context of the said communication was in such perspective.
- 55.** The counsel sought from the State Government was, thus, merely guidance under the contemplation of Section 108 of the 2003 Act. Insofar as the tariff is concerned, however, the same was fixed by none

other than the WBERC itself, which tariff order has also been produced by learned senior counsel for the WBERC.

- 56.** The non-user of any affidavit-in-opposition by the WBERC or the State, contrary to the argument by the petitioner, cannot be fatal, since the arguments are entirely on law and no facts are required to be brought in. Affidavits are not supposed to contain legal arguments but are factual pleadings, which are more or less admitted in the present case.
- 57.** The tariff orders of the WBERC are public records available on the official portal of the Commission. Even without such tariff order being looked into, the fact remains that the State never fixed any tariff, even as per the allegations made in the writ petition.
- 58.** The argument of the petitioner that the State should provide subsidy is entirely misplaced, since as discussed above, Clause 2.2.2(xvi), third proviso of the Tariff Regulations of 2011, clearly debar the WBSEDCL from passing its loss in multi-licensee areas to any other consumer, irrespective of the command area where the said consumer is enjoying electricity. Hence, there is no question of such loss being transferred to the petitioner or for that matter to any other consumer. The very premise of comparison between a single licensee and a multi-licensee area, which is the plinth of the writ petition, is erroneous and, thus, cannot but be discarded. Moreover, the petitioner cannot claim any right to get subsidy with State largesse which can be said to have infringed.

59. In view of the above discussions, WPA No. 25028 of 2023 is dismissed on contest without, however, any order as to costs.
60. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)