

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :-

The Hon'ble Justice PARTHA SARATHI SEN

WPA 2134(W) of 2012

DPSC Ltd And Anr.

- Vs-

E.C.L and Ors.

For the Petitioners:

Mr. Anirban Ray, Sr. Adv.,
Mr. Kaushik Chowdhury, Adv.,
Mr. Bratin Kumar Dey, Adv.,
Ms. Shreya Saria, Adv.

For respondent no.1:

Mr. Tilak Kumar Bose, Adv.,
Ms. Akansha Mukherjee, Adv.,
Mr. Pradipta Bose, Adv.

Hearing concluded on:

22.01.2025.

Judgment on:

27.01.2025.

PARTHA SARATHI SEN, J. : -

1. In this writ petition the writ petitioners have prayed for issuance of an appropriate writ or writs for cancellation and/or revoking and/or rescinding the order dated 19.12.2011 as passed in GR Case no.DPSC-1 K of 2011 by the Ombudsman, West Bengal.

2. For effective adjudication of the instant *lis* the facts leading to filing of the instant writ petition are required to be discussed in a nut shell.

- i. On 31.03.1993 a deed of lease was executed by and between the respondent no.1(lessor) and the writ petitioner no.1

(DPSC) whereby and whereunder thermal power station of the respondent no.1 at Chinakuri Mining Complex was leased out to the writ petitioner no.1 for a term of 20 years commencing from 01.04.1991 for generation of electricity. Subsequently a Memorandum of Understanding ('MOU' in short) was also executed on 04.10.2010 by and between the writ petitioner and the respondent no.1 regarding supply of coal by the respondent no.1 to the writ petitioner no.1 for the aforementioned power station at Chinakuri Mining Complex.

- ii. Post execution of the said MOU a dispute arose between the writ petitioner no.1 and the respondent no.1 with regard to the tariff of electricity as consumed by the respondent no.1 from the month of October 2010, to March, 2011.
- iii. The said dispute centers around the charges of the units of electricity at the rate of Rs.1.61 per unit as charged by the writ petitioner no.1 from the respondent no.1 on account of alleged higher price of coal supplied by the respondent no.1 to the writ petitioner no.1 pursuant to the said MOU dated 04.10.2010.
- iv. For non-payment of the said electricity charges the writ petitioner no.1 served a disconnection notice upon the respondent no.1.
- v. The respondent no.1 approached the Grievance Redressal Forum for ventilating its grievance with regard to the alleged

excess tariff as well as by challenging the notice of disconnection.

- vi. The Grievance Redressal Forum by its order dated 18.08.2011 negated the contention of the respondent no.1 and thus directed the respondent no.1 herein to pay enhanced tariff as levied by the writ petitioner no.1 at the rate of Rs.1.61 per unit for the said period.
- vii. Impugning the said order dated 18.08.2011 as passed by the Grievance Redressal Forum the respondent no.1 approached before the Ombudsman which however set aside the order of the Grievance Redressal officer holding that the claim of electricity charges by the writ petitioner no.1 from October 2010, to March 2011 is not in accordance with the tariff order of the West Bengal Electricity Regulatory Commission (hereinafter referred to as the said 'Commission' in short) and thus set aside the said electric bills for October 2010 to March 2011 holding the same is inadmissible.
- viii. As discussed (supra) the said order of the Ombudsman dated 19.12.2011 is the subject matter of the instant writ petition.

3. In support of the instant writ petition Mr. Anirban Ray, learned Senior Advocate duly assisted by Mr. Koushik Chowdhury, learned advocate for the writ petitioners at the very outset draws attention of this Court to the order dated 19.12.2011 as passed by the Ombudsman. Attention of this Court is also drawn to the aforesaid order as passed by

the Grievance Redressal Forum. Attention of this Court is also drawn to the aforementioned deed of lease and the MOU as entered into by and between the writ petitioner no.1 and the respondent no.1.

4. In course of his submission Mr. Ray submits that from the different clauses of the aforementioned lease it would reveal that the writ petitioner is not only a power generator but also a distribution licensee and in that capacity he is not only duty bound to pay his rent to the respondent no.1 in respect of the electricity generation station as leased out to it but at the same time it is also duty bound to supply electricity to its lessor i.e the respondent no.1. It is further contended by Mr. Ray that when the writ petitioner no.1 supplied electricity as a licensee within the meaning of Section 2 (38) read with Section 14 of the Electricity Act of 2003 (hereinafter referred to as the said Act of 2003 in short) to its lessor i.e. the respondent no.1 herein, the respondent no.1 comes under the purview of 'consumer' within the meaning of Section 2 (15) of the said Act of 2003.

5. In his next fold of submission Mr. Ray draws attention of this Court to Annexure P4 at page no.113 of the instant writ petitioner being a copy of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2007 (hereinafter referred to as the said 'Regulations of 2007' in short). It is argued by Mr. Ray that though in the matter of fixation of tariff by the writ petitioner no.1, the writ petitioner no.1 is governed by Part X of the said Act of 2003 read with the said Regulations of 2007 but the writ petitioner no.1 comes under the purview

of the exception as enumerated in Clause 1.1 (iv) (b) of chapter I of the said Regulations of 2007 on account of direct commercial relationship by and between the writ petitioner no.1 and the respondent no.1 *through supply by a generating station to a consumer*. In course of his argument Mr. Ray contends that while passing the order under challenge the Ombudsman has failed to visualize the true spirit of the said exception of the said Regulations of 2007 in its proper perspective and thus wrongly held that there exists no commercial relationship by and between the writ petitioner no.1 and the respondent no.1.

6. It is further argued by Mr. Ray that the finding of the Ombudsman is perverse inasmuch as the said Ombudsman has assigned no reason at all while coming to its finding. It is further argued by Mr. Ray that it is a fit case for issuance of writ of certiorari since the finding of the Ombudsman is vitiated for non-consideration of the materials as available in the record which affects the decision making process of the Ombudsman. Mr. Ray thus submits that it is a fit case for allowing the instant writ petition by granting relief to the writ petitioners as prayed for.

7. Mr. Ray places his reliance upon the following reported decision namely:-

- i. ***Central Coalfields Ltd. Vs. Jharkand State Electricity Regulatory Commission*** reported in **2006 SCC Online APTEL 35: [2006] APTEL 35;**
- ii. ***S.N Mukherjee vs. Union of India*** reported in **(1990) 4 SCC 594.**

8. Per contra Mr. Bose, learned Senior Advocate, assisted by Ms. Mukherjee, learned advocate appearing for respondent no.1 also draws attention of this Court to the said deed of lease dated 01.04.1991. It is argued by Mr. Bose that from page no.9 of the said deed of lease it would reveal that the writ petitioner no.1 being the lessee of the said power station made itself duty bound to supply electricity to the respondent no.1 at a rate in accordance with the schedule of rates under the Electricity (Supply) Act, 1948 (hereinafter referred to as the said 'Act of 1948' in short). Drawing attention to Section 185 of the said Act of 2003 being the 'Repeal and Saving Sections', it is argued by Mr. Bose that Section 185 (5) of the said Act of 2003 made it clear that the general application of Section 6 of the General Clauses Act, 1897 is held to be not prejudiced and/or affected on account of the effect of repeal of the said Act of 1948. It is further argued that in view of such the rates and/or tariff of electricity as fixed under the old Act of 1948 was not affected by the enactment of Act of 2003.

9. In his next fold of submission Mr. Bose also draws attention of this Court to the MOU dated 04.10.2010 in between the writ petitioner no.1 and the respondent no.1. Attention of this Court is also drawn to various clauses of the said MOU. It is argued by Mr. Bose that pursuant to the said MOU the respondent no.1 had agreed to supply certain quantity of coal of different grades to the writ petitioner no.1 at notified prices, only for the purpose of power plants of the writ petitioner no.1 and not for any other purpose. Mr. Bose submits that nowhere in the said MOU it has

been agreed by and between the writ petitioner no.1 and the respondent no.1 that coal would be supplied to the writ petitioner no.1 *in lieu of* supply of electricity to the respondent no.1 by the writ petitioner no.1.

10. In course of his argument Mr. Bose further draws attention of this Court to the preamble of the said Act of 2003 as well as to different sections of the said Act. It is argued by Mr. Bose that Part X of the said Act of 2003 deals with the regulatory commission namely; Central Commission and State Commission and the said Part X also deals with functions of the State Commission as enshrined in Section 86 of the said Act of 2003.

11. It is thus argued by Mr. Bose that Section 86 of the said Act of 2003 makes it obligatory for a licensee to approach the regulatory commission for determination of the tariff for generation, supply, transmission, etc. It is thus submitted by Mr. Bose that in the order under challenge the Ombudsman has rightly visualized that the writ petitioner no.1 cannot unilaterally fix the tariff for supply of electricity to the respondent no.1 without intervention of the said regulatory commission under Section 86 of the said Act of 2003. Drawing attention to page nos. 60 to 121 of the affidavit-in-opposition as filed by the respondent no.1 it is argued by Mr. Bose that from the said document it would reveal that the writ petitioner no.1 approached the said commission for revision of its tariff for the years 2008-09, 2009-10 and 2010-11 and ultimately implemented the said tariff pursuant to the determination of the said tariff by the said commission under Part VII of the said Act of 2003.

12. It is thus argued by Mr. Bose that the writ petitioner no.1 cannot blow hot and cold at the same breath by taking a plea that for fixation of tariff in respect of the electricity supplied by the writ petitioner no.1 to the respondent no.1 for the period October 2010 to March 2011 the said commission need not be approached.

13. Drawing attention to the order under challenge as passed by Ombudsman it is argued by Mr. Bose that by no stretch of imagination it can be said that the order under challenge is unreasoned and/or there exists a serious error in the decision making process of the Ombudsman.

14. In course of his submission Mr. Bose places his reliance upon the following three reported decision namely:-

- i. ***West Bengal Electricity Regulatory Commission vs. CESC Ltd. reported in (2002) 8 SCC 715;***
- ii. ***State of Karnataka and Anr. vs. N.Gangaraj reported in (2020) 3 SCC 423: (2020) 1 SCC (L&S)547: 2020 SCC OnLine SC 185; and***
- iii. ***Uttar Pradesh Power Corporation Ltd. vs. National Thermal Power Corporation Ltd. and Ors. reported in (2011)12 SCC 400.***

15. In order to arrive at a logical conclusion of the instant case this Court at the very outset proposes to look to some of the provisions of the said Act of 2003 which are as under:-

Section 2(4)

“4. Appropriate Commission” means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be;”

Section 2 (15)

“15. "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”

Section 2(17)

“17. "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;”

Section 2(28)

“28. "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;”

Section 2(39)

“39. “ licensee” means a person who has been granted a licence under section 14;”

Section 14

“Section 14. (Grant of licence): The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person –

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:”

Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided 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.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3)

(4)

(5)

(6)

Section 86

Section 86. (Functions of State Commission): ---

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) ..

(c) ..

(d) ..

(e) ..

(f) ..

(g) ..

(h) ..

(i) ..

(j) ..

(k) ..

16. On perusal of the aforementioned legislative provisions it appears to this Court that the functions of the writ petitioner no.1 comes under the purview of Section 2(17), 2 (28) and 2 (39) since in discharging its duty the writ petitioner no.1 generates electricity at Chinakuri Mining Complex Power Station and at the same time it distributes electricity to the respondent no.1 as well as to other consumers and in that capacity the writ petitioner is also a licensee within the meaning of Section 2 (39) read with Section 14 of the said Act of 2003.

17. It appears to this Court that the writ petitioner no.1 being a distributor as well as a licensee is duty bound to approach the said

Commission under Section 62 of the said Act of 2003 for fixation and/or revision of its tariff.

18. At this juncture the moot question that cropped up is as to whether the writ petitioner no.1 is at all justified to fix the tariff of electricity at the rate of Rs.1.61 per unit as supplied to the respondent no.1 per unit without referring the matter to the said Commission on the plea that there exists a commercial relationship between the writ petitioner no.1 and the respondent no.1 pursuant to Clause 1.1 (iv) (b) of the said Regulations of 2007.

19. In order to arrive at a logical conclusion of the dispute the relevant portion of the said Regulations of 2007 is required to be looked into and the same is reproduced hereinbelow in verbatim:-

“West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2007.

Chapter 1

General

1.1 Short title, commencement and interpretation

These regulations may be called the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2007.

- i. They extend to the whole of West Bengal.*
- ii. They shall come into force on the date of their publication in the Official Gazette.*
- iii. They shall apply to determination of tariff by the Commission in accordance with Section 62 of the Act;*
- iv. They shall not apply to the following types of cases for the purpose of determination of tariff, but shall apply to such*

cases for the purpose of determination of wheeling and/or transmission charges:

a.....

b. In such where there is direct commercial relationship through supply by a generating station to a consumer;

c....

d....

e. In such cases where there is direct commercial relationship through supply by an electricity trader to a distribution licensee.

f..."

20. On perusal of the aforementioned provision it thus reveals that the said Regulations of 2007 extends to the whole of West Bengal and the same applies for determination of tariff by the Commission in accordance with Section 62 of the said Act of 2003 which finds place at part VII of the said Act of 2003.

21. It is undisputed that Clause 1.1 (iv) specifies some exceptions which remain outside the ambit of said Commission for determination of tariff. One of such exceptional clause is that *where there exists direct commercial relationship through supply by a generating station to a consumer (emphasis supplied).*

22. On perusal of the entire materials as placed before this Court including the deed of lease dated 01.04.1991 it appears to this Court that apart from the relationship of lessor and lessee in between the respondent no.1 and the writ petitioner no.1 there exists a relationship of consumer and licensee between them since in Chinakuri Mining Complex Power Station the writ petitioner no.1 generates electricity and a bulk portion of

such electricity is supplied to the different mines of the respondent no.1. The next question that arises for consideration is as to whether such supply by a generating station to its consumer comes under the purview of commercial relationship or not.

23. As rightly pointed out by Mr. Bose that in the MOU dated 04.10.2010 there was no whisper with regard to the supply of electricity as well as with regard to the tariff of electricity charges payable by the respondent no.1 on account of supply of electricity made by the writ petitioner no.1. However, if I look to the deed of lease dated 31.03.1999 as executed by and between the respondent no.1(lessor) and the writ petitioner no.1 (lessee) it appears to this Court that on account of the execution of the said lease the lessee being the writ petitioner no.1 is not only under obligation to pay lease rent but at the same time it is further obliged to provide electricity in various mines of the respondent no.1 which are generated from the different power stations including Chinakuri Mining Complex Power Station which belongs to the respondent no.1. It thus appears to this Court that the relationship between the writ petitioner no.1 and the respondent no.1 is not only a licensee and a consumer but more precisely as a 'generating company' within the meaning of Section 2(8) and a 'consumer' within the meaning of Section 2(15) of the said Act of 2003.

24. It thus appears to this Court that there exists a commercial relationship between the writ petitioner no.1 and the respondent no.1 as otherwise the writ petitioner no.1 was not obliged to supply electricity to

the different mines of the respondent no.1 except by payment of lease rent.

25. This Court thus is of considered view that for the determination of tariff of electricity as supplied by the writ petitioner no.1 to the respondent no.1 from its Chinakuri Mining Complex Power Station, the provisions of the said Regulations of 2007 will not apply in view of the exception of Clause 1.1(iv)(b) of the said Regulations of 2007.

26. Next point which comes for consideration of this Court is as to whether in a judicial review this Court can at all substitute its own view especially when it is settled principle of law that a writ court is not expected to act as an appellate court.

27. At this juncture I propose to deal with the reported decision as cited from the Bar.

28. In the reported decision of **Central Coal Field Limited (supra)** it has been held by the Tribunal that a Commission is not entitled to fix tariff by virtue of an agreement entered between the generator and purchaser of power.

29. In the reported decision of **S.N Mukherjee (Supra)** the Hon'ble Apex Court expressed the view that a quasi-judicial authority is duty bound to record reason in support of its decision so as to enable a party to the dispute to know the grounds on which the authority has rejected its claim.

30. In the reported decisions of **West Bengal Electricity Regulatory Commission vs. CESC Ltd. (supra)** the Hon'ble Apex Court held that a

regulatory commission is an expert body for determination of tariff since the same involves a very highly technical procedure requiring working knowledge of law, engineering, finance, commerce, economics and management and thus will take a different view from the judgment of the High Court. The Hon'ble Apex Court found it fit to remand the matter back to the Commission for fixing the tariff.

31. In the reported decision of ***N.Gangaraj (supra)*** it has been held by the Hon'ble Apex Court that power of judicial review is confined to the decision making process. It further held that the power of judicial review conferred on the constitutional court is not of an appellate authority.

32. In the reported decision of ***U.P Power Corporation Ltd. (supra)*** it has been again held by the Hon'ble Supreme Court that the determination of tariff involves highly technical procedure requiring working knowledge of law, engineering, finance, commerce, economics and management and thus it would be best that the issues with regard to the determination of tariff should be left to the said expert body and the court should not interfere with the determination of the tariff.

33. In the reported decision of ***Central Council for Research in Ayurvedic Sciences vs. Bikartan Das and Ors.*** reported in **2023 SCC Online SC 996** the Supreme Court dealt with the two cardinal principles of law governing exercise of extraordinary jurisdiction under Article 226 of the Constitution more particularly when it comes to issue of writ of certiorari and held thus:-

“51. The first cardinal principle of law that governs the exercise of extraordinary jurisdiction under Article 226 of the Constitution, more particularly when it comes to the issue of a writ of certiorari is that in granting such a writ, the High Court does not exercise the powers of Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The writ of certiorari can be issued if an error of law is apparent on the face of the record. A writ of certiorari, being a high prerogative writ, should not be issued on mere asking.

52. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Courts while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not.”

34. On close scrutiny of the entire materials as discussed hereinabove and on perusal of the aforementioned reported decisions it appears to this

Court that the Ombudsman while passing the order under challenge has miserably failed to consider the true perspective of Clause 1.1 (iv) (b) of the said Regulations of 2007 which in considered view of this Court vitiates the decisions making process of the Ombudsman in coming to finding that there exists no commercial relationship between the writ petitioner no.1 and the respondent no.1. It appears to this Court that the finding of the Ombudsman is thus palpably erroneous which warrants interference of this Writ Court by issuing *writ of certiorari* as rightly pointed out by Mr. Ray that the Ombudsman while passing its order dated 19.12.2011 in GR Case no.DPSC-1K Of 2011 practically did not assign any reason as to why he came to a finding that the relationship between the writ petitioner and the respondent no.1 does not to come under the purview of the exception clauses of Clause 1.1(iv) of Regulations 2007.

35. This Court thus finds serious error of law in the finding of the Ombudsman, West Bengal which is apparent on the fact of record.

36. The writ petition thus succeeds and is thus hereby allowed.

37. Consequently the order dated 19.12.2011 as passed by the Ombudsman in GR Case no. DPSC-1K Of 2011 is hereby set aside.

38. Consequently the order dated 18.08.2011 as passed by the Grievance Redressal Forum in connection with Grievance Case no. 3/2010 /2011 is hereby upheld.

39. With the aforementioned observation WPA 2134 (W) of 2012 is disposed of.

40. All connected pending interlocutory applications, if there be any, stands hereby disposed of.

41. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(PARTHA SARATHI SEN, J.)