

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 154 of 2005**

Dated: July 24, 2006

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson  
Hon'ble Mr. A.A. Khan, Technical Member

**IN THE MATTER OF:**

Binani Zinc Limited,  
Binanipuram,  
Cochin, Kerala  
Represented by Mr. George Thomas  
Director

.... Appellant

Vs.

1. Kerala State Electricity Board,  
Vidyuthi Bhavanam,  
Pattom Palace,  
P.O. Thiruvananthapuram,  
represented by its Secretary.
2. The Special Officer (Revenue),  
Kerala State Electricity Board,  
Vidyuthi Bhavanam,  
Pattom Palace,  
P.O. Thiruvananthapuram,
3. State of Kerala,  
Represented by the Commissioner & Secretary,  
Power Department,  
Government of Kerala,  
Secretariat,  
Thiruvananthapuram.

4. Kerala State Electricity Regulatory Commission,  
Thiruvananthapuram,  
30, Parameswara Bhavan,  
Belhaven Garden, Kowdiar PO,  
Thiruvananthapuram-695 003  
Through its Secretary                      ....                      Respondents

Counsel for the appellant :                      Mr. Sudhir Gupta, Mr. Amarjit  
S. Bedi

Mr. George Thomas & Mr. T.V.  
Sunil Kumar (Reps.)

Counsel for the Respondents: Mr. K. Radhakrishnan, Sr.  
Adv.,  
Ms. Bina Madhavan & Mr.  
Hemal Shetti for KSERC  
Mr. M.T. George for KSEB  
Mr. Ramesh Babu for Kerala  
State.

## **JUDGMENT**

### **Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson**

This Appeal is directed against the Orders of the Kerala State Electricity Regulatory Commission (for short KSERC) dated April 30, 2004 and August 11, 2004. The facts giving rise to the Appeal are as follows:

2. The appellant is a company having a Zinc plant in Binanipuram in the State of Kerala and it falls in the category of extra high tension industrial consumers of electricity. The

appellant is supplied power by the first respondent Kerala State Electricity Board (for short KSEB).

3. On May 13, 1999, the KSEB revised the tariff w.e.f. 15.5.1999. This order was challenged by the appellant before the Kerala High Court by way of a writ petition. Subsequently, on August 3, 2001, the Govt. of Kerala effected an increase of tariff by 25% for all categories of consumers except old age homes, orphanages, homes for polio stricken, Cheshire homes, schools and hostels of mentally retarded, deaf and dumb, physically handicapped persons and Indian railways. The revised tariff was made effective from August 10, 2001. According to the aforesaid govt. order, KSEB was incurring deficit of Rs. 160.44 crores per month and in order to make up for this deficiency, tariff hike was necessitated. Pursuant to the orders of the Government, KSEB issued a detailed tariff order. The Govt. of Kerala further enhanced the tariff by 50 Paise/unit for all industrial consumers by its order dated October 11, 2002.

4. Thereafter, on October 24, 2002, the KSEB in exercise of the power conferred by Section 49, 59 and sub section (i) of Section 79 of the Electricity (Supply) Act, 1948 and other enabling provisions issued the Kerala State Electricity Board Extra High Tension Tariff Revision Order 2002 (for short Tariff Revision Order 2002), whereby with effect from Oct. 1, 2002 a

revision in the tariff for extra high tension industrial units was effected.

5. On November 14, 2002, the State Government in exercise of power conferred by Section 17 of the Electricity Regulatory Commissions Act, 1998 (for short ERC Act, 1998), which came into force from April 25, 1998, constituted State Electricity Regulatory Commission.

6. On March 24, 2003, the appellant challenged the Tariff Revision effected by the KSEB by way of a writ petition before the Kerala High Court.

7. On May 28, 2003, the Kerala High Court permitted the appellant to approach the KSERC within 30 days by means of a representation to ventilate its grievances against the Tariff Revision Order. At the same time the Kerala High Court observed that the Commission will be entitled to examine as to whether or not the revision of tariff conforms to parameters laid down in Section 29 of the ERC Act, 1998. The parties were allowed to raise such pleas before the Commission as may be available to them under the law and after decision by the Commission, the aggrieved party was at liberty to seek its remedy before an appropriate forum. With these liberties, the writ petition was disposed of by the Kerala High Court.

8. Pursuant to the order of the Kerala High Court dated May 28, 2003, the appellant approached the Commission by means of a petition, being petition no. DP 4/2003. Two other petitions by TCM Limited and Kerala High Tension/Extra High Tension Industrial Electricity Consumers Association, Kalamessery, being petition nos. DP-7 and DP-8 respectively, were also filed against the Tariff Revision Order, 2002. On receipt of the petitions, the Commission called upon the KSEB through notice dated July 3, 2003, to file para-wise replies to the points raised in the petitions. The Commission finally heard the matters on December, 2, 2003. It was contended by the appellant before the Commission that the KSEB had no jurisdiction to revise the tariff on October 24, 2002 as after the coming into force of the ERC Act, 1998 with effect from April 25, 1998, it was the Commission alone which was empowered to revise the tariff for electricity under Section 29 thereof, and no other authority was vested with such a power. It was also submitted that there was no justification for increasing the tariff. Besides, the appellant questioned the action of the Board in imposing burden of cross subsidy on the HT and EHT consumers.

9. The Commission by its order dated April 30, 2004 disposed of the petitions by holding that on the day the notification dated October, 24, 2002 was issued the board was empowered to determine the tariff as the provisions of the

Electricity (Supply) Act, 1948 were applicable. Therefore, the action of the Board in revising the tariff was held to be legally sustainable. The Commission also found that there was no valid ground for re-determining the tariff for EHT and HT consumers as requested by the appellant and other petitioners. It was also of the view that cross subsidy element in tariff for EHT and HT categories was around 43%.

10. Aggrieved by the order of the Commission, the appellant preferred an appeal under Section 27 of the ERC Act, 1998 before the High Court of Kerala on May 21, 2004. Along with the appeal, an application for interim relief was also filed by the appellant. Pending the disposal of the appeal, the Kerala High Court stayed the disconnection of electricity to the premises of the appellant for non payment of disputed electricity charges resulting from hike in the tariff.

11. The High Court of Kerala by its order dated July 2, 2004 held that even though the Tariff Revision Order, 2002 was issued on October 24, 2002, subsequent to the coming into force of the ERC Act, 1998, the Board was empowered to issue such a notification as by then the Regulatory Commission had not been constituted. In so far as the issue of cross subsidy was concerned the same was remanded to the Commission for fresh determination.

12. Pursuant to the order of the Kerala High Court dated July 2, 2004, the Commission by its order dated Aug., 11, 2004 reiterated that the cross subsidy provided by the EHT and HT consumers was 43%.

13. Not satisfied with the order passed by the High Court of Kerala dated July 2, 2004, the appellant filed a special Leave Petition before the Supreme Court. Along with the SLP, the appellant also filed an application for interim relief. The Supreme Court on September 13, 2004 passed an interim order directing the board not to disconnect the electricity of the appellant subject to the condition that the appellant shall continue to pay the demand raised in accordance with the tariff before it was revised w.e.f. Oct., 24, 2002. The appellant was also required to deposit an amount of Rs. 1 crore with the KSEB.

14. Before the Supreme Court it was argued by the appellant that the Electricity Act, 2003 having come into force with effect from June 10, 2003, the KSEB functioning as such before this date continued to function as the State Commission under the 2003 Act and thus it must be held to have considered the said petition of the appellant under the 2003 Act. It was further argued on behalf of the appellant that the 1998 Act was repealed by sub-section (1) of Section 185 of the 2003 Act and the appeal preferred by the appellant before the

Kerala High Court was not maintainable. The submissions advanced on behalf of the appellant were contested by the respondent.

15. The Supreme Court by its order dated September 8, 2005, while disposing of the appeal, held that the questions raised by the appellant can more effectively be considered and disposed of by the Tribunal. The Supreme Court was also of the view that the interest of justice shall be subserved if the appellant was given an opportunity to prefer an appeal against the order of the KSERC dated April 30, 2004 before this Appellate Tribunal constituted under Section 110 of the Act of 2003. Therefore, the Supreme Court directed that the Memo of Appeal filed by the appellant before the Kerala High Court against the order of the KSERC dated April 30, 2004 be filed before the Appellate Tribunal for Electricity within a period of two weeks.

16. In accordance with the order of the Supreme Court, the appellant has filed the instant appeal before us.

17. The learned counsel for the appellant vehemently argued that the KSEB had no authority to issue the notification dated October 24, 2002, whereby the electricity tariff was revised, in as much as the ERC Act, 1998 came into force on April 25, 1998 and after that date it was only the Commission which



was vested with the power to determine the tariff. Learned counsel submitted that under Section 22 of the ERC Act, 1998, it was the function of the Commission alone to determine tariff. He further pointed out that under Section 29 of the ERC Act, 1998 the tariff for inter State transmission of electricity and the tariff for supply of electricity grid, bulk or retail was to be determined by the State Commission in accordance with the provisions of the Act.

18. It was also emphasized that Section 29 of the ERC Act, 1998 opens with a non-obstante clause. Taking a cue from the non obstante clause, the learned counsel submitted that it was only the Commission which was empowered to determine the tariff and the provisions of the Electricity (supply) Act, 1948 vesting the board with the power to determine tariff was not applicable at all as Section 29 (1) overrides other provisions of law.

19. In support of his submissions, the learned counsel for the appellant relied on the decisions of the Supreme Court in WBERC Vs CESC Ltd. (2002) 8 SCC 715 and BSES Ltd. Vs Tata Power Company Ltd. (2004) 1 SCC 195.

20. The learned counsel for the appellant also urged that Section 52 of the ERC Act, 1998 specifically provides that provisions of the ERC Act shall have effect notwithstanding

anything inconsistent therewith contained in any enactment other than the ERC Act save as otherwise provided in Section 49 thereof, which only saves the Consumer Protection Act 1986 and the Atomic Energy Act 1962 from its operation.

21. On the other hand, it was highlighted by the learned counsel for the respondent that when the Tariff Revision Order dated October 24, 2002 was issued by the board, the Regulatory Commission had not been constituted by the State of Kerala. It is also pointed that electricity Regulatory Commission Act, 1998 only repealed Electricity Regulatory Commission Ordinance 1998. In so far as the Electricity (Supply) Act, 1948 was concerned, the same was not repealed and was in existence and continued to remain in existence even after coming into force of the Electricity Regulatory Commission Act 1998. According to the learned counsel, the Board was free to issue the tariff notification under the provisions of the Electricity (Supply) Act, 1948 before the constitution of the Regulatory Commission. In so far as non obstante clause occurring in Section 29 of the ERC Act, 1998 is concerned, it was submitted that the same was to apply subject to the other provisions of the ERC Act, 1998 including Section 17 thereof, which confers discretionary powers on the Govt. to establish a Regulatory Commission for the State. Consequently, it was urged by the learned counsel for the respondent that it was not mandatory for the State to

constitute a Regulatory Commission and unless and until the Regulatory Commission was constituted Section 29 of the ERC Act, 1998 did not come into play and the board was free to fix/revise tariff.

22. We have considered the submissions of the learned counsel for the parties. In order to resolve the controversy basically Sections 17(1) and 29(1) of the ERC Act, 1998 need to be looked at. Section 17(1) reads as under:

**STATE ELECTRICITY REGULATORY COMMISSION**

**17. Establishment and Incorporation of State Commission :-**

(1) The State Government may, if it deems fit, by notification in the Official Gazette, establish, for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission.

23. Section 17(1) of the ERC Act, 1998 makes provision for establishment and incorporation of a State Regulatory Commission. It empowers the State Govt. to establish a Regulatory Commission for the State. As is apparent from a perusal of Section 17 (1) of the ERC Act, 1998, the Parliament by use of the words 'if it deems fit' has conferred discretion on the State Government to establish or not to establish State Electricity Regulatory Commission (for short the 'Commission'). Section 17(1) of the ERC Act, 1998 is an enabling provision. It is for the State to decide whether the Commission is to be constituted or not. The option is with the

State Govt. In case the State Government constitutes the Commission, the tariff for supply of electricity is to be determined by the Commission and not the Board or any other agency under Section 29(1) of the ERC Act, 1998.

24. Section 29(1) of the ERC Act, 1998 opens with a non obstante clause. But logically it can operate only after the State Government constitutes a Regulatory Commission. Once the Regulatory Commission is constituted no authority other than the Regulatory Commission is empowered to determine the tariff. Section 29(1) of the ERC Act, 1998 has to be examined and interpreted in the context of Section 17 thereof. It could never be the intention of the Parliament to denude the board of its power to fix or revise the tariff without the constitution of the Regulatory Commission, especially when under Section 17(1) of the ERC Act, 1998, it was discretionary on the part of the State govt. to constitute or not to constitute the Regulatory Commission. The provisions of Section 29(1) of the ERC Act, 1998 would operate only after the Commission is constituted.

25. Section 29(1) of the ERC Act, 1998 envisages determination of tariff by the State Commission in accordance with and subject to the provisions of the Act. This is borne

out from the language of Section 29(1), which reads as under:-

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

26. Thus, the tariff can be determined subject to and in accordance with the provisions of the ERC Act, 1998. In other words, first the Commission is to be constituted and only then the tariff is to be determined by it. In case the Commission is not constituted under Section 17 of the ERC Act, 1998, the tariff cannot be determined under section 29(1) thereof. Operation of Section 29(1) of the ERC Act, 1998 is dependent upon the Constitution of the Regulatory Commission under Section 17(1). If there is no Commission, the non obstante clause in Section 29 (1) of the ERC Act, 1998 will not operate as it is subject to other provisions of the Act. Therefore, till the Commission was constituted by the State of Kerala the power remained vested in the Board to determine the tariff.

27. Reliance placed by the learned counsel for the appellant on the decisions of the Supreme Court in WBERC Vs CESC (supra) and BSES Ltd. Vs. Tata Power Co. Ltd. (supra), are of no avail to the appellant. It appears to us that in both the cases the observations of the Supreme Court to the effect that

under the ERC Act, 1998 the Regulatory Commissions alone were authorized to determine the tariff, were made in the backdrop of the fact that Regulatory Commissions had been set up by the respective State Governments under the ERC Act, 1998 and therefore, after their constitution, the power to determine tariff no longer vested with any other authority. However, in the instant case when the board revised the tariff the Regulatory Commission had not been constituted. Till such time the Regulatory Commission was not constituted by the State of Kerala, the power to determine tariff remained with the Board under the Electricity Supply Act, 1948, as it was not repealed by the Electricity Regulatory Commission Act, 1998. The Parliament could not have intended a situation where no authority would be empowered to determine the tariff, between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the tariff.

28. The learned counsel for the appellant at the end of the oral arguments presented compilation of decision dealing with the principles for interpretation of statutes, including the principles governing interpretation of non obstante clause, we do not see how the judgments placed in the compilation advance the case of the appellant.

29. It is significant to note that the Electricity (Supply) Act, 1948 was not repealed by the ERC Act, 1998. It was only under Section 185 of the Electricity Act of 2003 that the provisions of the Indian Electricity Act 1910, Electricity (Supply) Act, 1948 and Electricity Regulatory Commission Act, 1998 were repealed. But anything done or any action taken under the Acts of 1910 or 1948 or 1998 has been saved in so far as it is not inconsistent with the provisions of the Act of 2003.

30. In view of the aforesaid discussion, we find that the Regulatory Commission was right in holding that there was no provision in the 1998 Act which prevented the Board from revising the tariff before the constitution of the Commission.

31. Therefore, we do not find any reason to differ with the view of the Regulatory Commission that the Board on October 24, 2002 was empowered to revise the tariff since the Regulatory Commission had not been constituted by the State by that date.

32. The next question for our determination is whether the Commission ought to have re-determined the tariff for EHT consumers. As already pointed out the Board on Oct., 24, 2002 had the jurisdiction to revise the tariff. Since the Kerala High Court by its order dated May 28, 2003 had directed the

Regulatory Commission to examine whether or not the tariff revision effected by the Board by its order dated Oct., 24, 2002 conformed to the parameters laid down in Section 29 of the ERC Act, 1998, the Regulatory Commission was bound to determine that question. Accordingly, the determination was made by the Commission on April 30, 2004 after considering various submissions of the appellant and the Board. It needs to be noted that by the order dated May 28, 2003, the Kerala High Court nowhere gave the direction that the Commission shall re-determine the tariff even if the tariff revision by the Board conformed to the parameters laid down in Section 29 of the ERC Act, 1998. In appeal against the order of the Commission dated April 30, 2004 the Kerala High Court by its order dated July 2, 2004 clearly held that the Board was empowered to issue tariff revision notification. Since most of the provisions of the Electricity Act, 2003 came into force on June 10, 2003 and the representation/petition of the appellant was decided by the Regulatory Commission on April 30, 2004, the Supreme Court in the appeal against the order of the Kerala High Court dated July 2, 2004 was of the view that the Commission must be held to have considered the matter in terms of Electricity Act, 2003. Since the order passed by the Regulatory Commission was treated as an order passed by it under the provisions of the Electricity Act, 2003, the Supreme Court directed the appellant to file memo of appeal, which was earlier filed before the Kerala High Court,



before us. We are required to dispose of the appeal of the appellant under Section 111 of the Electricity Act, 2003.

33. The grievance of the appellant before the Commission and before us has been that certain categories of consumers have been cross-subsidized at the expense of EHT categories and the tariff be re-determined. In order to ascertain the cost of service to EHT consumers, relevant information was sought by the Commission from the Board. According to the Board, the cost of service to EHT consumers was Rs. 2.51/kWh. The Board however, failed to furnish separate details of the cost of service to HT consumers. But the Commission on its own carried out an exercise to assess the cost of service to various categories of consumers. It found that the cost of service to EHT and HT consumers was Rs. 2.51/kWh and Rs. 2.80/kWh respectively. It also found that according to the data supplied by the KSEB, the average realization for EHT and HT consumers, worked out to 3.59/kWh and Rs. 3.84/kWh respectively. The Commission on the basis of the analysis made by it in connection with the scrutiny of ARR and ERC of the KSEB for the year 2004-05, came to the conclusion that the average realization for EHT and HT consumers came to Rs. 3.60/kWh and Rs. 4.0/kWh respectively. As per the order of the Commission dated April 30, 2004, these figures implied that the present level of cross subsidization by the EHT and HT consumers was about 43%. It was submitted by the

appellant that the extent of cross subsidy on an EHT consumer was not merely 43% but well over 100%. According to the learned counsel for the appellant this view of the Commission runs contrary to the view of the Commission expressed in the tariff order for the year 2004-05, where the Commission has observed that the extent of cross-subsidy ranges between 118% to 159% as per the figures furnished by the Board. The Commission in compliance with the order of the Kerala High Court dated July 2, 2004, again considered the question of cross-subsidy in its order dated August 11, 2004. It is pointed out by the Commission that the revenue realization from the subsidizing categories of consumers varied from 118% to 159% of the cost of service to these categories of consumers resulting in cross subsidization levels varying from 18% to 59%. Explaining the inconsistency, the Commission also pointed out that in para 6.3 of the tariff order for the year 2004-05, it was inadvertently stated that the cross subsidies provided to the subsidizing categories varied from 118% to 159%. The Commission reiterated its earlier view that the cross subsidy provided by the EHT consumers is 43%. No material has been placed before us by the appellant to show that the Commission was not right in coming to the conclusion that the cross-subsidy provided by the EHT consumers is more than 43%. It has also not been shown by the appellant that the tariff revision made by the Board was not as per the provisions of Section 59 of the Electricity

Supply Act, 1948, under which the Board was entitled to adjust its tariff so as to ensure that the total revenue in any year, after meeting all expenses, was not exceeding a surplus of 3%.

34. The learned counsel for the appellant submitted that the order of the Board dated April 30, 2004 was violative of the principles of natural justice as after the conclusion of the hearing, the Commission sought information from the Board, which was furnished to it by the Board on April 15, 2004 and the appellant was not given any opportunity to controvert the information furnished by the Board.

35. While we do not approve of the action of the Commission in securing information from the Board after conclusion of the hearing without giving an opportunity to the appellant to controvert the information, we find that the appellant had an opportunity to controvert it when the matter was remanded to the Commission by the Kerala High Court on the question of cross-subsidy. In any event the appellant had an opportunity to controvert the information before us and to show that the information furnished by the Board to the Commission on April 15, 2004 was incorrect. The appellant was not able to point out that the cross subsidy which was being paid by the EHT category was more than 43%.

36. In a group of appeals M/s. Siel Ltd. Vs. Punjab State Electricity Regulatory Commission & Ors. (Appeal No. 4 of 2005), PHD Chamber of Commerce & Industry vs. State of Punjab through Secretary-Power, Punjab Civil Secretariat & Ors. (Appeal No. 13 of 2005, Punjab State Electricity Board vs. Punjab State Electricity Regulatory Commission & Ors. (Appeal No. 55 of 2005) etc., the full Bench of the Tribunal has taken a view that cross-subsidy between the consumers has to be tolerated for some time and it has to be reduced step by step and by degrees. In this regard, it was held as follows:

*“While keeping in view, this perspective, the poor of the country cannot be forgotten. Poorer sections of society have to be pulled up from life of deprivation and they shall not be denied access to electricity on the ground that they cannot afford the same. For some time in our democratic set up, some sections need socio-economic support and the support wholly and solely cannot come from the Government alone in the form of subsidy. The well to do sections of the society need to contribute for making electricity available to the poor and certain other weak sectors. This can be achieved either by the method of cross subsidization or by imposition of electricity duty by the State.*

*The cross subsidies have to be brought down by degrees without giving tariff shock to the consumers. Though it is desirable that cross subsidies are reduced through every tariff order but in a given situation, it may not be possible. As long as cross subsidy is not increased and there is a roadmap for its gradual reduction in consonance with Section 61(g) of the Act of 2003 and the National Tariff Policy, the determination of tariff by the Commission on*

*account of existence of cross subsidy in the tariff can not be flawed”.*

37. In view of the aforesaid discussion, we do not find any ground to interfere with the order passed by the Kerala State Electricity Regulatory Commission. Accordingly, the appeal is dismissed.

**(Justice Anil Dev Singh)**  
**Chairperson**

**(A.A.Khan)**  
**Technical Member**

**July 24,2006**