

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal Nos. 43, 44 & 45 of 2006

Dated this 28th day of April 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

Appeal No. 43 of 2006

M/s Tata Power Trading Company Limited
Corporate Centre, Block A
34, Sant Tukaram Road, Carnac Bunder
Mumbai

.....Appellant

Versus

The Central Electricity Regulatory Commission
6th Floor, Core 3, Scope Complex
Lodhi Road, New Delhi – 110003

.....Respondent

Appeal No. 44 of 2006

M/s Reliance Energy Trading Limited
3rd Floor, Reliance Energy Centre
Santacruz East, Mumbai

.....Appellant

Versus

The Central Electricity Regulatory Commission
6th Floor, Core 3, Scope Complex
Lodhi Road, New Delhi – 110003

.....Respondent

Appeal No. 45 of 2006

M/s PTC India Limited
2nd Floor, Bhikaji Cama Place, New Delhi – 110066

.....Appellant

Versus

The Central Electricity Regulatory Commission
6th Floor, Core 3, Scope Complex, Lodhi Road,
New Delhi – 110003

....Respondent

Counsel for the Appellant in all
in all the appeals

M/s Amit Kapoor, M G Ramachandran and a
Prabjot Singh, Advocates

Counsel for the Respondent
in all the appeals

Mr. A N Haksar, Senior Advocate with
Mr. Udayan Jain. Ms. Nirmala Krishnamoorthy,
Dy Chief (Law)

JUDGMENT

Heard M/s Amit Kapoor, M G Ramachandran, P S Bhullar and Shailendra Kumar Singh Advocates appearing for the appellants in all the appeals and Mr. A.N. Haksar, Senior Advocate along with Mr. Udayan Jain, Advocate for the Respondent in all the appeals.

2. In Appeal No. 43 of 2006, the appellant M/s Tata Power Trading Company Limited has prayed for the following reliefs:-

- “(i) Pass an order setting aside the Impugned Order and Impugned Regulations, taking into account the facts and grounds set out herein in this Appeal Petition.
- (ii) Adjudicate issues which the Commission has failed to adjudicate.”

3. In Appeal No.44 of 2006, the appellant M/s Reliance Energy Trading Limited has prayed for the following reliefs:-

- “(i) Pass an order setting aside the Impugned Order and Impugned Regulations, taking into account the facts and grounds set out herein in this Appeal Petition.
- (iii) Adjudicate issues which the Commission has failed to adjudicate.”

4. In Appeal No.45 of 2006, the appellant M/s PTC India Limited has prayed for the following reliefs:-

- “(i) Set aside the Order dated 23 January 2006 passed by the Central Electricity Regulatory Commission as being null and void and of no effect;
- (ii) Quash the Central Electricity Regulatory Commission (fixation of trading margin) Regulations 2006 as being null and void and of no effect;
- (iii) Restrain the Respondent Commission from taking any action pursuant to the Impugned Order and the impugned Regulations.”

5. In effect the reliefs prayed for in all the three appeals is a challenge to the validity of the Regulations framed by The Central Electricity Regulatory Commission, which is the sole Respondent

6. Before making the Regulations which are impugned, there was a previous publication of draft Regulations in terms of Section 178(3) with respect to fixation of trading margin and the appellants were afforded an opportunity of stating their stand so also other stakeholders like the appellants were afforded opportunity. There is no quarrel that Sub-Section (3) of Section 178 has been followed before framing the impugned Regulations. The first Respondent initially proposed to fix ceiling on trading margin at 2 paise/KWh. The representations / objections received from these appellants and others were considered by the first Respondent. Though it is not necessary for the Respondent to set out or recorded the reasons before making the Regulations, the Respondent recorded reasons for fixing the limit of trading margin.

7. Following the same on 23.1.2006, in exercise of powers conferred under Sections 178, the first Respondent framed The Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2006. The validity of the said Regulations is the subject matter of challenge in these appeals.

8. The learned counsel appearing for the appellant in all the three appeals strenuously contended that this Appellate Tribunal has the jurisdiction under Section 111 (1) and (6) as well as Section 121 of The Electricity Act 2003 to entertain the appeals and examine the validity of the impugned Regulations and the Regulations impugned could be quashed by this Appellate Tribunal. All the three learned counsel relied upon various pronouncements and they also tried to distinguish the full bench judgment of this Appellate Tribunal rendered in Appeal Nos. 114 and 115 of 2005 Neyveli Lignite Corporation Limited Vs Tamil Nadu Electricity Board & Others dated 9.11.2005. The said judgment was rendered by a full bench of this Appellate Tribunal and both of us (Mr. H L Bajaj, Hon'ble Technical Member and Mr. Justice E Padmanabhan, Judicial Member) were parties to the said full Bench Judgment.

9. Without admitting the appeals this Appellate Tribunal called upon Mr.Dhingra, Chief (Law), CERC who was present before this Appellate Tribunal to take notice in these three appeals on behalf of the CERC and CERC may arrange for making presentation of its side in respect of the appeals in the next hearing on 4.4.2006. Thereafter, detailed submissions were made by the counsel for the appellants in all the three appeals as well as by Mr. A N Haksar, Senior Advocate appearing for the Respondent CERC. After hearing the counsel on either side with respect to the maintainability and on the jurisdictional issue, we reserved orders.

10. In the meanwhile, a third party has moved the Hon'ble High Court of Gujarat at Ahmedabad in Special Civil Application of 5757 of 2006 Adani

Exports Limited Vs Union of India & Others and certain interim order has also been passed. In the said proceedings before the Gujarat High Court, this Appellate Tribunal has also been impleaded as the third Respondent.

11. The substantial points that arise for consideration in all the three appeals are:-

- A Whether this Appellate Tribunal constituted under The Electricity Act 2003 has the jurisdiction to examine the validity of The Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2006 framed in exercise of power conferred under Section 178 of The Electricity Act 2003?
- B Whether appeals challenging the Regulations framed by third Respondent in the nature of Subordinate Legislation are maintainable?

12. Both the points could be considered together. Before taking up the points for consideration, it is but essential to extract the very impugned Regulations for immediate reference. The impugned Regulations read thus:

“Central Electricity Regulatory Commission
Notification
New Delhi, the 23rd January 2006

No.L-7/25(5)/2003-CERC-Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-state trading of electricity.

Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Central Electricity Regulatory Commission hereby makes the following regulations, namely :-

1. Short title and commencement- (1) These regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

2. Trading Margin- The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses.

Explanation:- The charges for the open access include the transmission charge, operating charge and the application fee.

A.K. SACHAN, Secy
[ADVT-III/IV/Exty/150/2005]”

13. There is no doubt in our mind that these Regulations have been framed by the Respondent in exercise of powers conferred under section 178 of The Electricity Act 2003 and it is Part of the statute Book. The learned counsel appearing for the appellants sought to contend that the trading margin of a trading licensee could be well determined in the light of the earlier CERC (procedure, terms and conditions for grant of trading license and other related matters) Regulations 2004 as well as the license conditions wherein statutory rules provide for fixation of trading margin. However, to avoid the challenge such Regulation has been framed. Though such an argument is attractive we are not persuaded to accept the same as the very preamble of the impugned Regulations without doubt would show that it is a Subordinate Legislation and not a mere determination of rate of trading margin with respect to single licensee.

14. In respect of a statutory Regulation framed by the Respondent, in Appeal Nos. 114 and 115 of 2005 Nevely Lignite Corporation Limited Vs Tamil Nadu Electricity Board & Others, a full bench of this Appellate Tribunal, while following the dicta laid down by their Lordships of the Supreme Court in the West Bengal Electricity Regulation Commission Vs CESC Limited 2002 (8) SCC 715 held thus:-

“9. In view of the aforesaid decision of the Supreme Court, which is directly on the point, we have no hesitation in holding that the Regulations framed under Section 61 & 178 of the Electricity Act 2003, are in the nature of subordinate legislation and we have no jurisdiction to examine the validity of the regulations in exercise of our appellate jurisdiction under Section 111 of the Act of 2003. Even, under section 121, which confers on the Tribunal supervisory jurisdiction over the Commission, we cannot examine the validity of the regulations framed by the Commission, as we can only issue orders, instructions or directions to the Commission for the performance of its statutory functions under the Act. It is not a case, where the Commission has failed to perform its statutory functions.

At this stage we may also refer to the submission of Mr. Reddy that Regulation 16 (i) (c) of the Regulations applies to the appellant alone and therefore the same cannot be in the nature of subordinate legislation. It needs to be noted that sub Clauses (a) (b) and (c) of Sub regulation (i) of Regulation 16 apply to various entities. Regulation 16(i) (c) undoubtedly applies to the appellant alone but this is in view of the special nature of the generating unit established by the appellant. It is well settled that a legislation can be framed for a single unit, entity or a person. The same principle would apply to the framing of subordinate legislation in respect of a single unit or entity or body, provided it can be distinguished from others on the basis of its peculiar or distinctive features. In any event we are bound by the decision of the Supreme Court rendered in the West Bengal Electricity Board case (Supra) as it directly deals with the nature of the Regulations notified by the Regulatory Commission in exercise of its power conferred by Section 58 of the Electricity Regulatory Commissions Act, 1998, a provision similar to sections 67 and 178 of The Electricity Act, 2003. None of the other decisions cited at the bar deal with the Regulations framed under the provisions of the Act of 1998 or the Act of 2003.

Accordingly, on the first point we hold that the Regulations framed under Electricity Act 2003, are in the nature of subordinate legislation and on second point we hold that the

challenge to their validity falls outside the purview of the Tribunal.”

15. The said judgment has been rendered by the full bench of this Appellate Tribunal to which both of us were parties. The full bench has followed the dicta laid down by the Hon’ble Supreme Court. It is represented that as against the full bench judgment in Appeal Nos. 114 and 115 of 2005, the appellant therein has already taken up the matter further and the Hon’ble Supreme Court is seized of the matter. As of today we are bound by the said full Bench Judgment.

16. The Hon’ble Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Limited in 2002 (8) SCC 715 held thus:

““42. The question for our consideration is whether the High court sitting as an appellate court under Section 27 of the Act has the jurisdiction to go into the validity of the Regulations framed under the Act and if so, factually the Regulations as found by the High Court are contrary to the statute.

43. The High Court while considering the validity of the Regulations came to the conclusion that the 1998 Act does not contemplate hearing of the consumers, and also that the Commission’s Regulations have conferred an indiscriminate right of hearing on the consumers. We do not think that these findings of the High Court can be justified. While discussing the right of the consumer to be heard (locus standi), we have already held that the 1998 Act has both expressly and impliedly conferred such right of hearing on the consumers. Proceeding on that basis we now consider whether the Regulations framed by the Commission, in any manner, confer an indiscriminate right of hearing. The Commission in exercise of its power under Section 58 of the 1998 Act has framed the Regulations keeping in mind, the mandate of the Act. In Regulations 18,19,24,25 and 31(4) the Commission has evolved a procedure by which it could restrict the number of representations as also the method to be followed in the proceedings before it which includes the restriction on

hearing. Regulations 18 and 19 require the Commission to recognize such associations or other bodies of consumers which in its opinion, should be permitted to appear before the Commission. The said Regulations also empower the Commission to regulate the nature and extent of participation by such groups. Regulations 31(4) (ii) and (iii) also empower the Commission to control the proceedings before it. From the above Regulations, it is clear that the Commission has the necessary power to regulate the proceedings before it and the apprehension of the High Court that by granting such power the Commission may have to hear all the 17 lakhs of consumers of Calcutta is wholly imaginary. That apart, on the facts of the instant case there is no such allegation that the Commission has in fact given indiscriminate hearing to the consumers. As a matter of fact, the respondent Company which was the appellant before the High Court has not even raised this issue and the High Court has suo motu gone into this issue. On the basis of provisions found in the Regulations framed by the Commission, we are of the opinion that there is no room for any indiscriminate hearing before the Commission. Therefore, the finding of the High Court that the Regulations do leave room for such indiscriminate hearings is erroneous.

44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High court has proceeded to declare the Regulations contrary to the Act in proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature; therefore they have become a part of the statute. That being so, in our opinion the High court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power.

45. This Court in the case of K.S.Venkataraman & Co. (P) Ltd. V/s State Of Madras (AIR 1966 SC 1089:(1966) SCR 229 after discussing the judgement of the Calcutta High court in the cases of (i) Raleigh Investment Co. Ltd., V/s Governor General in Council (ILR (1944) 1 Cal. 34) , (ii) United Motors (India) Ltd., V/s State of Bombay ((1953) 55 Bom LR 246), and (iii) M.S.M.M. Meyyappa Chettiar V/s ITO (1964) 55 ITR 151 (Mad) held: (SCR pp. 251 H-252 A).

“There is, therefore, weighty authority for the proposition that a tribunal, which is a creature of a statute, cannot question the vires of the provisions under which it functions.”” (Emphasis supplied)

17. No other subsequent pronouncement taking a different view by The Hon’ble Supreme Court or a larger Bench has been brought to our notice by the counsel for the appellant. The senior counsel appearing for the Respondent also contended that this Appellate Tribunal has to act within the four corners of The Electricity Act 2003, namely, Part XI, i.e., Sections 110 to 123 of The Electricity Act 2003 and rightly pointed out that no authority or power or jurisdiction is conferred on this Appellate Tribunal to examine the validity of the impugned Subordinate Legislation. We find there is force in this submission advanced by the learned counsel for the Respondent. Though the learned counsel for the appellants referred to two other pronouncements, since in our considered view they have no application. We are not referring to the same. The decision which governs the field has been rightly relied upon by the counsel for Respondent. It is not necessary to refer to the pronouncements relied upon by the counsel for the appellants, which are not on the point.

18. There is no doubt that this Appellate Tribunal is a special forum constituted under Section 110 of The Electricity Act 2003. Being a creature of the Statute, it is not open to this Appellate Tribunal to travel beyond the provisions of The Electricity Act 2003. Our attention is drawn to the dictum of

the Hon'ble Supreme Court in D. Ramakrishna Reddy v. Addl. Revenue Divisional Officers 2000 (7) SCC: AIR 2000 SC 2723. In the said pronouncement their Lordships held thus:

“The Tribunals are creatures of the Act and it is not open to them to travel beyond the provisions of the statute. The High Court while examining the correctness or otherwise of the order passed by the Tribunal or any action taken by an officer under the Act is also to be guided by the provisions of the statute.”

19. The decision of the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Limited has since been affirmed by a latter three judges bench of the Supreme Court in M/s Clariant International Limited and another Vs Securities & Exchange Board of India reported in 2004 (8) SCC 524. In the said pronouncement it has been held thus:

“78. In Cellular Operators Assn. of India v. Union of India²⁵ this Court observed: (SCC p.211, para 27)

“TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law.”

79. The Court noticed the celebrated book *Judicial Review of Administrative Law* by H.W.R. Wade and C.F. Forsyth and held: (SCC pp. 212-13, paras 31-33)

“31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert Tribunal. It may not be the function of a court exercising power of judicial review to act as a supermodel as has been stated in *Administrative Law* by Bernard Schwartz, 3rd Edn., in para 10.1, at p. 625; but the same would not be a case where an expert Tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT’s jurisdiction is not akin to a court issuing a writ of certiorari. The Tribunal although is not a court, it has all the trappings of a court. Its functions are judicial.”

20. In *Associated Cement Companies Ltd. V. P. N. Sharma* reported in AIR 1965 SC 1595, as well as in *J.K. Iron & Steel Co. Ltd. V. Mazdoor Union* reported in AIR 1956 SC 231 the Hon’ble Supreme Court it has been laid down that tribunals are created in the strict sense of the term and they have to discharge quasi-judicial functions and their powers are derived from the statute that creates them and they have to function within the limits imposed there and to act according to its provisions.

21. It is the settled law that when jurisdiction upon the Court or a Tribunal is conferred by a statute the same is to be construed there in and not there of. The powers of the Tribunal are no doubt limited and its jurisdiction is clearly defined. Within the bounds of its jurisdiction the Tribunal has all the powers expressly and impliedly granted. It, therefore, follows that a Tribunal can only have such powers as are truly incidental and ancillary for doing of such acts employing all such means as are reasonably necessary to make the grant

effective. The jurisdiction of this Appellate Tribunal as seen from Section 111 and 121 is limited to the matters enumerated there in.

22. Section 111 (i) reads thus:-

“Any person aggrieved by an order made by an adjudicating officer or an order of Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.”

Section 111(3) reads thus:-

“On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.”

Section 111 (6) reads thus:-

“The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

23. The entirety of power as spelt out in Section 111 could be exercised by this Appellate Tribunal only as against an “order” passed by the Appropriate Commission or adjudicating officer. The word “order” as appearing in Section 111 definitely means a decision or adjudication on certain right or liability or claim or regulatory act or adjudication by the specified authority and only against such order an appeal is provided for in the Act. Therefore, as against the Regulation framed by Respondent, which framing is a legislative function as a subordinate Legislative authority, no appeal is provided for in terms of Section 111.

24. Section 121 of the Act which is being relied upon is of no assistance as this Section enables the Appellate Tribunal could issue directions to Appropriate Commission to perform its statutory functions. It is clear that this Appellate Tribunal has neither jurisdiction nor authority to examine the validity of Regulations framed as a subordinate rule making authority.

25. In Cellular Operators Association of India Vs Union of India reported in 2003, Volume-III, Page 186, Sinha J held thus:-

“37. There cannot be any doubt whatsoever that when jurisdiction upon a court or a tribunal is conferred by a statute, the same has to be construed in terms thereof and not otherwise. The power of judicial review of this Court as also of the High Court, however, stand on a different footing. The power of this Court as also the High Court although is of wide amplitude, certain restrictions by way of self-discipline are imposed. Ordinarily, the power of judicial review can be exercised only when illegality, irrationality or impropriety is found in the decision-making process of the authority.”

26. In Central Bank of India Vs Vrajlal Kapurchand Gandhi reported in 2003 (6) SCC 573, then Lordships of the Supreme Court (Hon’ble Shivaraj V. Patel and Arijit Pasayat JJ. held thus:

“Now, it is fairly settled position in law that a court or a tribunal constituted under a statute cannot adjudicate upon the constitutional validity.”

This pronouncement applies on all fours.

27. We hasten to add that neither Section 111 nor 121 nor any other sections of The Electricity Act confers powers of judicial review such as a power to examine the validity of the legislative enactment or statutory Regulations framed by way of subordinate legislation, which is the subject matter of challenge in these three appeals. It is also to be pointed out that this Appellate Tribunal, called a specialized forum, it cannot like an ordinary Court of law

entertain suits on various matters, including the matters relating to vires of legislation. This Appellate Tribunal is bound by and has to act within the four corners of The Electricity Act 2003 and it is required to determine the **list** brought before it in accordance with the provisions of The Electricity Act 2003.

28. It is to be pointed out that this Appellate Tribunal being not a substitute of High Court and not being a Tribunal formed under Article 323 A. of The Constitution, not being a Tribunal constituted by legislation under the 323 B, in our considered view, has neither the jurisdiction nor authority to examine the validity of a subordinate legislation. In the light of the above discussions we hold that this Appellate Tribunal, being bound by the full Bench Judgment and the pronouncement of The Supreme Court hold that these appeals challenging the validity of impugned Regulations is not maintainable and liable to be dismissed in.

29. Before parting, we would like to express our anguish once again and emphasize the need for uniformity, practical approach, a thorough study, application of mind and check is warranted while framing the Rules / Regulations under Sec 177 or 178; or 180 of The Electricity Act 2003. It is essential to have prior approval of appropriate government before the framing of Rules / Regulations, which may work as a check and as mere previous publication has not served the purpose.

30. We have come across Rules / Regulations framed by various state Regulators without unanimity and at times some rules / Regulations ex-facie run counter to the Principal Act. It is noticed that certain Regulators have conferred inherent powers upon themselves. Further The Electricity Act 2003 being a Legislation by Parliament, the provisions of State General clauses are being adopted, while it is The General clauses Act 1897 (Central Act 10 of 1897) which applies. Very many instances which are still worst could be cited.

31. Further in the absence of conferment of power on the Appellate Tribunal for Electricity, by appropriate legislative measure, it is unavoidable for the aggrieved party to invoke the writ jurisdiction under Art 226 of The Constitution, while on merits simultaneously challenge the order before the Appellate Forum leading to delay and duplication. This requires to be addressed by the Central Government authorities at the appropriate level.

32. We direct The Registry of this Appellate Tribunal to forward a copy of this Judgment to the Secretary to Government, Ministry of Power, Government of India for appropriate action.

33. In the light of our discussions we are unable to sustain the contentions advanced by the learned counsel for the appellants. Both the points are answered against appellants and in favour of Respondent. We hold that appeals are not maintainable and accordingly we dismiss all the three appeals as not maintainable. It is needless to add that it is well open to the appellants in each of the appeal to invoke the jurisdiction of the competent forum, if they are so advised.

Pronounced in open court on this 28th day of April 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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