

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal 78 of 2007

Dated this 11th day of *September*, 2007

Coram: Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member

IN THE MATTERS OF:

Himachal Pradesh State Electricity Board ... Appellant

Versus

1. **M/s. Himalya International Ltd.**
Subh Khera, Poanta Sahib – 173 025
Himachal Pradesh.
2. **Himachal Pradesh Electricity Regulatory Commission**
Keonthal Commercial Complex,
Khalini, Shimla – 171 002. ... Respondents

Counsel for the appellant : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri, Advocates

Counsel for respondents : Mr. V. Shankara and
Mr. Sanjay Sen, Advocates

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is directed against the order of the Himachal Pradesh Electricity Regulatory Commission (herein referred to as 'Commission') in Case No. 242 and 243 of 2003 whereby the Commission referred a dispute raised by the respondent No.1 against the appellant to arbitration. The facts in the case are as under :

(2) The appellant is a deemed licensee for electricity transmission, distribution and trading in the State of Himachal Pradesh. The respondent No.1 is carrying on business of growing mushrooms and processing other vegetables and fruits in controlled climatic conditions. The respondent No.1 had obtained load of 990 KW with a contract demand of 1100 kVA. The respondent No.1 filed two applications, registered as 242 and 243 of 2003, before the Commission claiming compensation from the appellant for the alleged loss suffered by it on account of violation of standards of performance by the appellant. The appellant, referring to the provisions of Section 42(5) and Section 42(6) of The Electricity Act 2003, herein after referred to as the Act, disputed the jurisdiction of the Commission to entertain the complaints. The Commission vide an order dated 17th February, 2007 observed that the Commission has the jurisdiction to deal with the complaints in terms of HPERC

(distribution licensees Standards of Performance) Regulations 2003 and Section 86(1)(i) of the Act. The respondent No.1 asked for appointment of an arbitrator. By the impugned order dated 24th March, 2007, the Commission directed that the complaints filed by respondent No.1 be referred to an arbitrator, to be appointed by the State Commission, and the award passed by the arbitrator would be treated as one passed under the provisions of Arbitration and Conciliation Act 1996. Hence the present appeal. The sole ground in the appeal is that the Commission has no power to refer the complaints of respondent No.1 to arbitration.

(3) The Commission, in the impugned order, held that Regulation 53 of HPERC (CB) Regulation 2005, a dispute falling within the jurisdiction of the Commission could be adjudicated by an arbitrator. The Commission observed that the case involved adjudication of material question of facts and law, and determination of compensation amounting to crores of rupees. It also observed that more than four years had been spent in pursuing the matter before the IEDRM and that taking it further to the forum or an Ombudsman would consume more time. The Commission then proceeded to refer to the case of *M/s. Afcons Infrastructure Ltd. & another Vs. M/s. Cherian Varkey Construction Ltd. AIR 2007 (NOC) 233 KER* in which the Hon'ble High Court of Kerala had concluded that the Court can compulsorily refer parties to arbitration even without their consent and against their volition. It then directed

that the dispute be referred to the arbitration of a retired Judge of the High Court to be nominated by the Commission.

(4) We have heard the counsel for the parties and have examined their respective contentions and we have given our anxious consideration to the point in issue. To begin with, we may refer to the judgment of the High Court of Kerala, relied upon by the Commission. The full text of the judgment has been submitted to us by Mr. M. G. Ramachandran, learned counsel appearing for the appellant. The point in issue before the High Court has been mentioned in the very introduction of the judgment. It was like this:

“Does the law, even after introduction of amended Section 89 into the Code of Civil Procedure, permit, tolerate or enable the Court to compulsorily refer the parties to arbitration even without their consent and against their volition. This is the question that is mooted for consideration in this revision.”

(5) The conclusion arrived at by the learned Judge is as under:

“having considered all the contentions raised for and against the proposition that Courts have the power even if the parties do not agree to make the reference for arbitration. I do certainly sail to the conclusion in favour of the plain and apparent tenor of Section 89 that in an appropriate case the option of referring unwilling parties to an arbitration is certainly available with the Court.”

(6) The High Court of Kerala was concerned with the power of Civil Court under Section 89 of the Civil Procedure Code. The Commission cannot be equated with the Court. Nor could the Commission apply the judgment of the High Court of Kerala on Section 89 of the Civil Procedure Code to the proceedings pending before it. Therefore, the Commission erred in placing reliance on the judgment of the High Court which did not apply to the case before it.

(7) But the moot question is whether the Commission at all has the power to refer the dispute pending before it to arbitration? The following provisions of the Act have been brought to our notice; Section 79(1)(f) and Section 86(1) (f) which are extracted below:

“79. Functions of Central Commission.- (1) *The Central Commission shall discharge the following functions, namely:-*

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) *to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

(g)

“86. Functions of State Commission. – (1) *The State Commission shall discharge the following functions, namely:-*

(a)

(b) ...

(c) ...

(d) ...

(e) ...

(f) *adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;”*

(8) The two provisions, Section 79(1)(f) that gives power to the Central Commission and Section 86(1)(f) that gives power to State Commission to refer a dispute to arbitration relate to disputes between licensees and distribution companies or between the generating companies and transmission licensees. The present dispute is between a deemed licensee and a consumer. The words “any dispute” has to be read in the light of “disputes” appearing in the earlier part of the sub section. There can be no dispute that the words “any dispute” cannot be read independently of the words “dispute between the licensees and generating companies” appearing in Section 86 (1)(f). The subsection (f) means that the State Commission would have the power to adjudicate the disputes between licensees and generating companies and any such dispute can be referred to arbitration by it. The words “any dispute” has to take colour from the earlier words “disputes between the licensees and generating companies”. We are of the opinion that the words “any dispute” appearing in subsection (f) of Section 86 or in

subsection (f) of Section 79 cannot be given such wide meaning as to include dispute between a licensee and a consumer. The dispute raised by a consumer cannot be dealt with under any of these two provisions.

(9) Our attention has also been drawn to Section 160(3) of the Act. So far as Section 160(3) is concerned, the same relates to operators and not to the ordinary consumers of electricity. The operators are those who generate, transmit, distribute, supply or use electricity and for that purpose may need to construct, lay down or place his electrical lines, electrical plant or other works in working his system. Section 160 prescribes that such operators shall not injuriously affect the work of any wire or line in the telegraphic, telephone or electrical signaling communication, or currents in such wire or lines. The Section also deals with the dispute that may arise between the operator and the telegraph authority and prescribes that the disputes can be referred to Central Government. It also prescribes that the Central Government may direct the operator to make alterations or additions to his system as may be necessary in order to comply with the provisions of the Section and the “operator shall make such alterations, additions accordingly.” Section 160(3) prescribes as extracted below:

“160. Protection of telegraphic, telephonic and electric signaling lines:

(1) ...

- (2) ...
- (3) *Where the operator makes default in complying with the requirement of this section, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.”*

(10) Thus this subsection merely states that the operator shall make full compensation for any loss or damage and in case of any dispute arising as to the amount of the compensation the matter shall be determined by arbitration. This provision also does not apply to the respondent No.1 who is not an operator. Nor is the nature of dispute raised in this case similar to one that is stipulated in Section 160 of the Act.

(11) The impugned order purports to draw its power from Regulation 53 of HPERC (Conduct of Business) Regulations 2005. Regulation 53 is as under :

53. Arbitration: *(1) The arbitration of disputes which under the Act are within the scope of the jurisdiction of the Commission may be commenced on an application accompanied by fees specified in the Schedule made by any of the parties to the dispute.*

(2) The Commission shall issue notice to the concerned parties to show cause as to why the disputes between the parties should not be adjudicated and settled through arbitration.

(3) The Commission may, after hearing the parties to whom notices have been issued and if satisfied that no reason or cause has been shown against the arbitration request, pass an order directing that the disputes be referred for adjudication and settlement through arbitration either by the Commission or by a person or persons to be nominated by the Commission.

(12) Mr. Sanjay Sen, Advocate appearing for the Commission submits that Regulation 53 permits the Commission to refer to arbitration all disputes which falls within the jurisdiction of the Commission to decide. Mr.M.G.Ramachandran on the other hand likes this court to read the provision of this regulation as merely providing the procedure for appointment of an arbitrator rather than providing the substantive power for making a reference. Carefully read the Regulation provides how an arbitration can commence. It says that the arbitration may commence on an application accompanied by fees specified in the schedule. The substantive provision of sub regulation (2) & (3) of Regulation 53 also indicate the procedure to be followed after the application is made. The procedure prescribed is for a notice to the other party and opportunity for hearing before an arbitrator is appointed. None of the sub regulation of Regulation 53 actually prescribes in what situations the arbitrator can be appointed.

(13) It would be wrong to read sub regulation 1 as one laying down that all disputes which the Commission has to decide within the afore said sections of the Act can be referred to arbitration. In fact,

such a regulation would be contradictory to the provisions of the Act. Section 181 of the Act under which the regulations have been framed gives power to the State Commission to “make regulation consistent with this Act and the regulations generally to carry out the provisions of this Act”. Since the Act does not give an omnibus power to refer all disputes required to be adjudicated upon by the Commission to arbitration, a regulation saying so would be inconsistent with the Act. The only way to interpret Regulation 53 is to read it as one providing for the procedure for appointment of an arbitrator and not the provision giving substantive power for appointment of an arbitrator. To hold that Regulation 53 confers power on the Commission to refer all disputes require to be adjudicated upon by the Commission to arbitration would be contrary to the very power under which the regulation has been framed. Mr. M.G.Ramachandran submits that if the Regulation 53 actually intends to do so then the same needs to be ignored by the court and in his support refers to a judgment of Supreme Court in the case of *Bharathidasan University Vs. All India Council for Technical Education 2001 8 SCC 676*. Paragraph 14 of the judgment says as under:

“14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow

in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have “constitutional” and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions.”

(14) We have said above that Regulation 53 actually intends to provide for a procedure for appointment of an arbitrator and that does not actually confer a power for making a reference to arbitration. Any other interpretation to the Regulation will be contrary to the intention of 181 of the Act and liable to be ignored following the judgment of *Bharathidasan University* (supra).

(15) The learned counsel for the respondent No.1 made a last effort to justify the impugned order by referring to Section 97 of the Act which is as under :

*“97. **Delegation.** – The Appropriate Commission may, by general or special order in writing, delegate to any member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under section 79 and section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary.*

(16) The delegation of power is entirely different from appointment of an arbitrator. Normally delegation of power is done for administrative purposes. The judicial function cannot be performed by delegation. Even in Section 97 the function of adjudication falling under Section 79 and 86 of the Act have been excluded from the power of delegation. Moreover, when an arbitrator is appointed the arbitrator does not enjoy the delegated authority of the appointing authority. The arbitrator acts on the authority given unto him either by agreement of the parties to a dispute or by an order of appointment by the Court. The arbitration proceedings are governed by the law prescribed for the purpose namely the Arbitration and Conciliation Act 1996. The powers and functions of the arbitrator cannot be compared to the powers and functions of the delegatee.

(17) In view of the above analysis, we are constrained to hold that the Commission did not have power to refer the dispute between the appellant and the respondent No.1 relating to compensation for violation of Standards of Performance to arbitration. The appeal is accordingly allowed and the impugned order set aside.

(18) The Commission may proceed with the cases 242 and 243 of 2003 from the stage immediately before the passing of the impugned order. We clarify that the decision of the Commission that the Commission had the jurisdiction to adjudicate upon a dispute has not been challenged in this appeal and we have not ruled either way on the same.

Pronounced in open court on this *11th* day of *September*, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member