

A PTC INDIA LTD.
V.
CENTRAL ELECTRICITY REGULATORY COMMISSION
THR. ITS SECRETARY
Civil Appeal No. 3902 of 2006

B MARCH 6, 2009

[DR. ARIJIT PASAYAT, HARJIT SINGH BEDI AND
ASOK KUMAR GANGULY, JJ.]

C *Electricity Regulatory Commission Act, 1998 – s. 27 –*
Appellate court under – Jurisdiction – Scope of – Order of
Central Electricity Regulatory Commission and Central
Electricity Regulatory Commission (Fixation of Trading
Margin) Regulations, 2006 – Challenge to – Order of appellate
tribunal that it has no jurisdiction, relying on West Bengal
D *Electricity Regulatory Commission v. CESC Ltd. case – On*
appeal, held: Matter referred to larger Bench as regard
applicability of West Bengal Electricity case to matters under
the 2003 Act; and jurisdiction of tribunal to decide the validity
E *of the Regulations – Electricity Act, 2003 – Central Electricity*
Regulatory Commission (Fixation of Trading Margin)
Regulations, 2006.

F *West Bengal Electricity Regulatory Commission v. CESC*
Ltd. 2002 (8) SCC 715; Clariant International Ltd. and Anr. v.
Securities and Exchange Board of India 2004 (8) SCC 524;
Cellular Operators Association of India and Ors. v. Union of
India and Ors. 2003 (3) SCC 186; National Sewing Thread
Co. Ltd. v. James Chadwick and Bros. Ltd. 1953 SCR 1028 –
referred to.

G **Case Law Reference**

2004 (8) SCC 524 Referred to. **Para 7**

2003 (3) SCC 186 Referred to. **Para 8**

1953 SCR 1028

Referred to.

Para 9

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2002 (8) SCC 715

Referred to.

Para 10

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 3902
of 2006

From the Judgement and Order dated 28.04.2006 of the
Appellate Tribunal for Electricity, New Delhi, inter alia, in Appeal
No. 45 of 2006.

WITH

Civil Appeal Nos. 4354/2006, 4355/2006, 2875/2007,
Civil Appeal D. 9870/2007, SLP (C) No.22080/2005, Civil
Appeal Nos. 7437/2005, 7438/2005, 2073/2007, 1471/2007,
2166/2007.

Manish Singhvi, AAG, Harish N. Salve, Vikas Singh, P.S.
Narasimha, Shanti Bhushan, Amit Kapur, Apporva Misra, Vibha
Dutta Makhija, Shri Venketesh Singh, Meenakshri Grover,
Mansoor Alo Shoket, Anupam Verma, A.G. Sharma, Poonam
Verma, Shreshth Sharma, Sanjeev Kumar, Abhinash Menon,
Kumar Mihir, Vishal Gupta (M/s. Khaitan & Co.) Sridhar Potaraju,
Prakeik Dhar, C.K. Rai, Julius, D.K. Sinha, M.G. Ramachandran,
K.V. Mohan, Anand K. Ganesm, S. Sheshdari, Ajit Bhasme,
Varun Thakur, Brajesh Kumar, Vivek Kishore, Ruchi Gaur Narule,
Sangeeta Bharti Rakesh K. Sharma, G. Umaphathy, Vibhu Tiwari,
Rakesh K. Sharma, Nikhit Nayyar, T.V.S. Raghvendra Sreyas,
Ambuj Agrawal, Pradeep Misra, Daleep Dhyani, Suraj Singh,
Mayur Kumar, K.R. Sasiprabhu, K.V. Mohan, H.K. Puri, R.
Nedumaran, Suresh Chandra Tripathy, Sharmila Upadhayay,
Ashish Kumar, Shibhashish Misra, for the appearing parties.

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

1. In these appeals and special leave petition, challenge
in each case is to the order passed by the Appellate Tribunal
for Electricity (in short the 'Tribunal'). Challenge before the

A Tribunal was to the order/decision dated 23.1.2006 of the Central Electricity Regulatory Commission (in short the 'CERC') and the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 (in short the 'Regulations') published in the Gazette of India on 27.1.2006. The Tribunal by the impugned judgment held that it has no jurisdiction to deal with the matter. For this purpose the Tribunal placed reliance on a three-Judge Bench decision of this Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd.* (2002 (8) SCC 715). The conclusion in the said decision was to the effect that the High Court sitting as an Appellate Court under Section 27 of the Electricity Regulatory Commission Act, 1998 (in short '1998 Act') has no jurisdiction to go into the validity of the Regulations. It was ultimately held that there is weighty authority for the proposition that a Tribunal which is a creature of the statute cannot question the vires of the provisions under which it functions.

2. Questioning correctness of the said view the present appeals have been filed. It has been contended that the decision in *West Bengal Electricity case* (supra) has no application to the present case. The Regulations have been framed under Section 178 of the Electricity Act, 2003 (in short '2003 Act'). It is pointed out that there is conceptual difference between the provisions which have relevance, as contained in 1998 Act and 2003 Act. Section 121 of 2003 Act gives ample power to the Tribunal to deal with the matter. The fixation of tariff is conceptually and contextually different from fixation of trading margin. With reference to Sections 61 and 62 of 2003 Act it is pointed out that the former relates to "tariff regulations" and later relates to "determination" of tariff.

3. Therefore, there is no question of dealing with trading margin. Section 66 deals with the issue of development of market including trading. Section 79 deals with functioning of CERC. Section 111 deals with appellate Tribunal. Section 121 confers supervisory powers on the Tribunal of statutory functions. Section 121 has power to issue orders, instructions and

directions. It is not only in a sense revisional but also supervisory in character. Its jurisdiction encompasses all aspects relating to statutory functions under the Act. Section 79(1)(j) deals with fixation of trading margin. It is the stand of the appellants that this can be done by an order and not by a Regulation. With reference to Section 178(2)(y) it is submitted that power is given to prescribe the manner by which development of market in power sector including trading can be prescribed. Said provision has to be read alongwith Sections 60, 61 and 62. There is significantly no reference to Section 79.

4. Learned counsel for the respondents on the other hand submitted that the Tribunal is a creature of the statute and therefore cannot go into the validity or legality of the Regulations and, therefore, the view of the Tribunal is correct.

5. At this juncture, it is to be noted that sub-section (3) of Section 79 talks of transparency. Section 79 deals with functioning of CERA and Section 178 deals with power to make Regulations. In terms of Section 179, the Regulations have to be placed before the Parliament and, therefore, have statutory flavor.

6. It is also to be noted that in West Bengal Electricity case (supra) in para 102 the need for having an expert body was highlighted and that appears to be the basis for enacting Section 121 in the 2003 Act.

7. In *Clariant International Ltd. and Anr. v. Securities & Exchange Board of India* (2004 (8) SCC 524) certain observations have relevance. Paras 27, 33, 34, 42, 51 and 52 read as follows :

“27. In *Kruger v. Commonwealth of Australia* (1997)146 Aus. L.R. 126) it is stated:

“Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be

A determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention....”

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B **33.** In *Black's Law Dictionary*, the word “compensation” has been defined as under:

“money given to compensate loss or injury”.

C **34.** In a given case where the liability arises during pendency of a litigation, doctrine of restitution can be invoked. In *South Eastern Coalfields Ltd. v. State of M.P (2003 (8) SCC 648)* it was observed: (SCC pp. 662-63, para 26)

D “In law, the term ‘restitution’ is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See *Black's Law Dictionary*, 7th Edn., p. 1315.) *The Law of Contracts* by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that ‘restitution’ is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

F ‘Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.’ ”

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42. While determining the cases of commercial transaction also, fall in rate of interest has been taken note of by this Court in *Citi Bank N.A. v. Standard Chartered Bank 2004 (1) SCC 12* (SCC para 62) and *Citibank N.A. v. Standard Chartered Bank 2004 (6) SCC 1* (SCC para 54).

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51. In *Palmer's Company Law*, 23rd Edn. at p.154, para 12-07, it is stated:

"12-07. *Subscribers as members.*—The subscribers of the memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members [1948 Act, Section 26(1)]."

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It is further stated:

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"49.04. *Other members.*—In the case of members other than the subscribers to the memorandum two essential conditions have to be satisfied to constitute a person a member:

(1) an agreement to become a member; and

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(2) entry in the register.

These two conditions are cumulative: unless they are both satisfied, the person in question has not acquired the status of member.

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Thus, an agreement to become a member alone does not create the status of membership; it is a condition precedent to the acquisition of such status that the shareholder's name should be entered in the register. Conversely, the company is not entitled to place a person's name on the register without his having agreed to become a member; a person improperly registered without his assent is not bound thereby and may have his name removed from the register."

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A **52.** In *Howrah Trading Co. Ltd. v. CIT* 1959 Supp (2) SCR 448) the law is stated thus: (SCR p.456)

B “The question that falls for consideration is whether the meaning given to the expression ‘shareholder’ used in Section 18(5) of the Act by these cases is correct. No valid reason exists why ‘shareholder’ as used in Section 18(5) should mean a person other than the one denoted by the same expression in the Indian Companies Act, 1913. In *Wala Wynaad Indian Gold Mining Co., In re* (1882) 21 Ch D 849) Chitty, J., observed:

C ‘I use now myself the term which is common in the courts, “a shareholder”, that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register.’ ”

D (See also *Balkrishan Gupta v. Swadeshi Polytex Ltd* 1985 (2) SCC 167))

E 8. Similarly in *Cellular Operators Association of India and Ors. V. Union of India and Ors.* (2003 (3) SCC 186) in paras 27, 33 and 34 it has been observed as follows:

F “27. 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 a 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

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amplitude of its jurisdiction and thus misdirected itself in law. A

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33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsicly, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees. B

34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise Parliament thought of creating an independent expert tribunal which, if an occasion arises therefor, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the authority. Succinctly stated, the jurisdiction of the Tribunal is not circumscribed in any manner whatsoever." C D

9. There are also certain observations in *National Sewing Thread Co. Ltd. v. James Chadwick and Bros. Ltd.* (1953 SCR 1028) which have relevance. It was inter alia observed as follows: E

"The second error lies in the assumption that the appellate jurisdiction exercised by the High Court of Calcutta is much more limited than that possessed by the other High Court. The matter has been discussed at length in an earlier part of this judgment. F

We have also not been able to appreciate the emphasis laid to negative the applicability of clause 15 of the Letters Patent by reference to the provision of Section 77 of the Act. The provision of that section are merely enabling provisions and, as already pointed out, it is open to the High Court to make use of them or not as it likes. There is nothing in the provisions of that section which debars H

- A the High Court from hearing appeals under Section 76 of the Trade Marks Act according to the rules under which all other appeals are heard, or from framing rules for the exercise of that jurisdiction under Section 108 of the Government of India Act, 1915, for hearing those appeals
- B by Single Judges or by Division Benches. Even if Section 77 had not been enacted it could not be said that the High Court would then have no power to make rules for the hearing of appeals under Section 76. There are a number of legislative enactments which have conferred appellate jurisdiction on the High Court without more and the High
- C Court exercises appellate jurisdiction conferred by these enactments by framing its own rules under the powers it already possesses under its different charters and under the various statutes which have conferred power on it.”
- D 10. In the background of what has been stated above and considering the importance of the matter we feel it necessary to refer the matter to a larger Bench to consider whether the West Bengal Electricity case (*supra*) can have application to the cases coming under 2003 Act, where the parties go before
- E the Tribunal in terms of Section 121 of the 2003 Act. The other important question would be whether the Tribunal has jurisdiction to decide the question as to the validity of the Regulations framed by the CERC. The matter may be placed before Hon’ble the Chief Justice of India for necessary orders. It is open to the
- F parties to move the Hon’ble Chief Justice for fixing date for taking up the interim relief prayers.

N.J.

Matter referred to Larger Bench.