

**Before The Appellate Tribunal for Electricity
NEW DELHI
Appellate Jurisdiction**

Appeal No. 42 of 2005

Dated: 9th day of December 2005

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

Sri Vasavi Industries Ltd.

Appellant

Versus

(1) West Bengal Electricity Regulatory Commission
(2) WBSE Board
(3) CESC Ltd

Respondents

For Appellant: Mr. K.P.Ray and Mr. Amit Sharma for Fox Mandal & Co.

For Respondents: Mr. V.R.Reddy, Sr.Advocate, Mr. Shanti Bhushan,
Sr.Advocate, Dr.Sameer Chakravarty, Mrs. Gauri
Rasgotra, Mr. Bhaskar Mitra, Mr. H.K.Puri, Mr. Pratik
Dhar, Advocate

JUDGEMENT

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

1. This appeal is directed against the order of the West Bengal Electricity Regulatory Commission (for short WBERC) dated July 6, 2005 in Re: the petition dated December 28 2004 of M/s Sri Vasavi Industries Ltd.
2. The facts lie in a narrow compass. The Appellant Sri Vasavi Industries Ltd., (SVIL) established a plant for the manufacture of Ferro Alloys at Bishnupur, Bankura, in the state of West Bengal on December 28, 2004. The appellant presented a petition under Sections 42 (2) of the Electricity Act, 2003 (for short the Act) before the WBERC seeking permission to receive power from

PTC/Reliance Energy Trading Ltd.(RETL) or from any other source different from the distribution licensee, the West Bengal State Electricity Board (WBSEB) and for determining wheeling charges and surcharge thereon within the state of West Bengal. The commission accorded hearing to the appellant and the WBSEB on February 2, 2005. Subsequently, on March 9, 2005, the Commission advised the WBSEB to specify the points, it wanted to raise within three weeks with an intimation to Sri Vasavi Industries Ltd. The Commission also permitted M/s. SVIL to file a response, if any, before the next date, but not later than 10 days from the date of receipt of the WBSEB's written submissions. The Commission also informed the parties that further hearing will be given to them after the aforesaid filings and the date of hearing will be communicated to them.

3. While the petition was pending, the commission notified the West Bengal Electricity Regulatory Commission (Phasing Open Access In Distribution/sale of Electricity) Regulations 2004 (for short the Regulations) on June 15, 2004. It appears that after the receipt of the written submissions, the Commission without providing oral hearing to the parties passed the impugned order dated July 6, 2005, whereby the Commission, inter alia, held that the request of SVIL for grant of open access w.e.f. April 1, 2005, was not maintainable in view of the Regulations.
4. Aggrieved by the order of the Commission dated July 6, 2005, the appellant has filed the instant appeal mainly on the ground that Regulation 3 of the Regulations is invalid to the extent that it fixes April 1, 2011, for allowing Open Access to consumers, who require 1 MW or less than 1 MW of Electricity as it is contrary to fifth proviso to Section 42 (2) of the Act, inserted by Amendment Act-57 of 2003 w.e.f. Jan. 27, 2004, which provides that the State Commission shall not later than 5 years from the date of commencement of the Electricity Amendment Act, 2003 provide Open Access to all consumers, who require supply of Electricity where the maximum power to be made available at any time exceeds 1 MW.

5. In order to appreciate the point at issue, it will be necessary to set out the relevant provisions of Section 42 of the Act:

42. Duties of Distribution licensees and open access:

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions,(including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access may be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the Charges for wheeling as may be determined by the State Commission.

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee.

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission.

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity(Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

- (3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory Open Access.
- (4) where the State commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.
6. Thus, according to aforesaid provision, the Commission is required to provide open access to all consumers, who require supply of Electricity where maximum power to be made available at any time exceeds 1 MW, not later than 5 years from the date of commencement of the Electricity (Amendment) Act 2003. The Amendment Act came into force w.e.f. Jan, 27, 2004. Therefore, the State Commissions under the Act are required to permit by 2009, Open Access to all consumers who require more than 1 MW of Electricity. At this stage, it may be necessary to notice Regulation 3 of the Regulations. Regulation 3 reads as follows:

“(3) Phasing of Open Access in Distribution/Sale of Electricity:

Sl. No.	Phase	Category of Consumer	Time frame from which Open Access is allowed
i.	1 st	Power from Co-Generation & Non-Conventional Source of Energy.	1.04.2006
ii.	2 nd	Consumers with connected load of 10 MW and above in single premises.	1.04.2007
iii.	3 rd	Consumers with connected load of 5 MW and above in single premises	1.04.2008
iv.	4 th	Consumers with connected load of 1 MW and above in single premises	1.01.2009
v.	5 th	Consumers with connected load of 1 MW and below.”	1.04.2011

7. The learned representative of the appellant submitted that the aforesaid Regulation violates the mandate of Section 42 of the Act, which requires that the State Commission shall not later than five years from the date of commencement of the Electricity(Amendment) Act by regulation provide open access to all consumers who require supply of electricity. According to the learned representative appearing for the appellant, providing open access from April 1, 2011 as per Regulation 3 of the Regulations will be too late and in any case the Open Access under the Act is required to be provided by 2009. He urged that the Commission is required to advance the process of providing open access to consumers by two years. It was also canvassed that the aforesaid Regulation is invalid.
8. On the other hand, the learned Senior Counsel appearing for the Respondents canvassed that the appellant cannot challenge the Regulation in question in the appeal as the Tribunal has no jurisdiction to go into the question of validity of the Regulations.

9. We have considered the submissions of the learned Counsel. The validity of the Regulation cannot be determined by the Tribunal in an appeal filed under Section 111 of the Act. The power to declare a regulation ultra vires of the provisions of the Act has not been vested by the statute in the Tribunal.
10. In Neyveli Lignite Corporation Ltd., V/s. Tamil Nadu Electricity Board & Others, Appeal nos. 114 & 115 of 2005, decided on November 9, 2005, relying upon the decision of the Supreme Court in West Bengal Electricity Regulatory Commission V/s. CESC Ltd., (2002) 8 SCC 715, we have already held that the Tribunal has no jurisdiction to go into the question of the validity of the Regulations. In this regard, it was observed as follows:

“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 Sections 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.”
11. It was then submitted by the learned representative of the appellant that the impugned order passed by the Commission is contrary to the principles of the natural justice. Elaborating the plea, he pointed out that the Commission by its order dated March 9, 2005 had categorically stated that further hearing shall be provided to the parties after WBSEB specified the points it wanted to raise and after the appellant filed its response thereto, but unfortunately, the Commission did not furnish any opportunity of further hearing to the appellant after the aforesaid filings. In response, the learned Counsel for the respondents submitted that the Commission was not obliged to provide further hearing to the parties after WBSEB specified its points by means of written submission and the response

filed by the appellant. The learned Counsel urged that the order was not violative of the principles of natural justice.

12. We have given our earnest consideration to the submissions of the learned Counsel. It is not in dispute that the Commission by its order dated March 9, 2005 expressly stated that an opportunity of further hearing shall be accorded to both the parties after the WBSEB specified the points and the appellant filed its response. Once the filings were made as per the direction of the Commission, the Commission was bound to furnish an opportunity of hearing to the parties. Contrary to the requirement of its own order and the principles of natural justice, the Commission passed the impugned order.
13. In *Ridge V Baldwin*, (1964) 2 AC 40 which was a landmark in the development of the principles of natural justice, it was held by the House of Lords to the effect that principles of natural justice require that no adverse order ought to be passed against a person without giving him an opportunity of hearing.
14. In *Local Government Vs Arlidge* (1915) AC120, it was held that the right of the parties to be heard orally must be effectuated by the decision making body.
15. It is the basic tenet of the principles of natural justice that an authority must provide an opportunity of hearing to the parties likely to be affected by its order before pronouncing the same. In *Goldberg Vs Kelly* (1970) 397 U.S. 254, it was held that it is a fundamental requisite of due process of law to provide an opportunity of being heard to the affected party and hearing must be at a meaningful time in a meaningful manner.
16. In *Bhagwati V/s. Subordinate Services Selection Board*, 1995 Supple (2) SCC 663, it was held that no order to the detriment of a person can be passed without affording him an opportunity of hearing.
17. The right to be heard is judicially insisted upon as flowing from the guarantee of equal protection of laws comprised in Article 14 of the Constitution. In *Maneka Gandhi V/s. Union of India*, (1978) SCC 248, it was held that requirement to be heard is a part of the fair administrative procedure.

18. The Commission was not justified in curtailing the right of the appellant to be heard especially when it had recognized that right in its order dated March 9, 2005. Though the Commission ought to have given a hearing to the appellant before passing the impugned order, the deprivation of the opportunity of hearing to the appellant has in no way prejudiced the appellant. The representative of the appellant fairly conceded that without holding Regulation 3 to be invalid, no relief can be accorded to the appellant.
19. In the circumstances, we decline to interfere with the order of the Commission. Accordingly, the appeal is dismissed.
20. We, however, grant leave to the appellant to work out its remedies by challenging the Regulations.
21. Before parting with the judgment, we would like to point out that this Tribunal ought to have been conferred with the power to determine the question of validity of the Regulations framed under the Electricity Act, 2003 as otherwise the purpose for which the Tribunal was constituted is being frustrated. In most of the appeals, the questions relating to the validity of the Regulations framed by the various Electricity Regulatory Commissions are involved. Since the Tribunal cannot examine the validity of the Regulations, it may not possible to render relief to the aggrieved parties even though Regulations may be contrary to the provisions of the Electricity Act, 2003. In such a situation, the appeals are liable to be dismissed and the appellants will have to go before the concerned High Courts for challenging the Regulations under Article 226 of the Constitution. Therefore, it is eminently fit and proper to introduce necessary amendments to Article 323(B) of the Constitution and the Electricity Act, 2003 for conferring power on the Tribunal to examine the vires of the Regulations.
22. We also find that the Regulations framed by the various Regulatory Authorities are at variance with each other. There is no uniformity. Even if the regulatory authorities are to continue with the powers to frame Regulations, the Regulations so framed should be subject to prior concurrence of an all India body and only thereafter the Regulations should be notified. This shall also require amendment of the Electricity Act 2003. The amendment will not only bring uniformity in the

Regulations framed by the various Regulatory Authorities but it will also bring the regulations in tune with the statute. We are marking a copy of the order to the concerned Ministry for appropriate action.

(Mr.Justice Anil Dev Singh)
Chairperson

(Mr.Justice E.Padmanabhan)
Judicial Member

(Mr.A.A.Khan)
Technical Member

Dated: 9th day of December 2005