

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

**W.P.(C) Nos.17656, 17659, 17660, 17662, 17665,
17667, 17670, 17672, 16195 of 2012**

In the matter of applications under Articles 226 & 227 of the
Constitution of India.

M/s. Maa Laxmi Steels Private Ltd. - **(In W.P.(c) No.17656/2012)**
M/s. Sri Radha Krishna Pvt.Ltd. - **(In W.P.(c) No.17659/2012)**
M/s. Sri Radha Raman Alloys Ltd. - **(In W.P.(c) No.17660/2012)**
M/s. Attitude Alloys Pvt. Ltd. - **(In W.P.(c) No.17662/2012)**
M/s. Bajrang Steel & Alloys Ltd. - **(In W.P.(c) No.17665/2012)**
M/s. D.D. Iron & Steel (P) Ltd. - **(In W.P.(c) No.17667/2012)**
M/s.21st Century Ferro & Alloys Ltd.- **(In W.P.(c) No.17670/2012)**
M/s. Maa Girija Ispat Pvt. Ltd. - **(In W.P.(c) No.17672/2012)**
M/s. Shree Salasar Casting Pvt. Ltd.- **(In W.P.(c) No.16195/2012)**

... Petitioners
(in all the cases)

-Versus-

Odisha Electricity Regulatory Commission
(OERC) & another

... Opp. Parties

For Petitioners : Mr. J. Patnaik, Sr. Advocate
M/s. B.Mohanty, T.K. Patnaik,
R.P. Roy, A. Patnaik,
S. Patnaik & M.S. Rozvi

For Opp. Parties : M/s. Pradipta Ku. Mohanty,
D.N. Mohapatra,
Smt. J. Mohanty, P.K. Nayak &
S. N.Das (for O.P. 2)

Mr. B.K. Nayak (for O.P. 1)

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Order : 19.10. 2012

B.N.MAHAPATRA,J.

In all these writ petitions the common prayer is to quash the order dated 23.8.2012 passed under Annexure-1 by opposite party No.1-Odisha Electricity Regulatory Commission (for short, "OERC") on the ground that the same is void ab initio. Except W.P.(c) No.16195 of 2012 in all other writ petitions further prayer is made to quash the 'take or pay' tariff in reducing the special rebate i.e., 50 paisa to 30 paisa per unit and restrain opp. Party no.2 from recovering the special rebate from the bill of the petitioners showing it as arrear. In W.P.(c) No. 16195 of 2012, a further prayer is made to quash the letter dated 27.8.2012 passed under Annexure-3 issued by the Executive Engineer (Electrical), RED, WESCO, Rajgangpur requesting the petitioner to submit his consent along with the undertaking to opt for the revised 'take or pay' Tariff Scheme latest by 30.8.2012.

2. Since the relief claimed in all these writ petitions is similar in nature they are dealt with together by this common order.

3. Mr. Jagannath Patnaik, learned Senior Advocate appearing on behalf of the petitioners submits that the suo motu review order dated 23.8.2012 passed in Case No. 48/2012 under Annexure-1 is not sustainable in law. Suo motu review power is not available to the Commission under the statute. Section 94 of the Electricity Act, 2003 (for short, "the Act, 2003") provides that the appropriate Commission shall, for the purpose of any enquiry or proceeding under the Act, 2003, have the same power as are vested in a Civil Court under the Code of

Civil Procedure, 1908 in respect of matters enumerated in Section 94 of the Act. Under clause (f) of sub-section (1) of Section 94, the Commission has the power of reviewing its decisions, directions and orders. According to Mr. Patnaik, Section 94 (1)(f) does not authorize suo motu review of decisions/directions or orders. Power of review is a creature of statute. It is confined to the four corners of Sec.94(1)(f) of the Act, 2003. The provision imports the Code of Civil Procedure, 1908 in respect of review. The relevant provisions of the said Code are Sec.114 and Order 47, Rule 1. None of these provisions admit of suo motu review. A review by a Civil Court can only be moved by an application by an aggrieved party. Therefore, to the extent that Regulation 70 of Business Regulations provides for suo motu review, the said Regulation is ultra vires Sec. 94(1) (f) of the Act, 2003. Consequently, the suo motu revision order passed under Annexure-1 is void. Moreover, the order under Annexure-1 which retrospectively takes away the petitioner's right and benefits under its subsisting scheme formulated in paragraph 262 of the Retail Supply Tariff Order dated 23.3.2012 in Case No.93-96 of 2011 for financial year of 2012-13 in regard to 'take or pay' tariff for HT and EHT industries with guaranteed load factor, five months after such promulgation is entirely arbitrary and mala fide. The tariff proceedings of opp. Party nbo.1 are governed by Sections 61, 62, 63, 64 and 65 and 86 (1) (a) and (b) of the Act, 2003. Nothing in these provisions or any other provision of the Act, 2003 authorizes a suo motu proceeding in relation to tariff. A proceeding

for determination of tariff can only be initiated by an application by a licensee or generating company, vide Sec. 64(1) and that being so, a proceeding for amendment of a tariff order must also be moved by an application for the purpose and facts necessitating amendment must be established before opp. Party no.1. The petitioners come under HT/EHT category in the current tariff for financial year 2012-13 and subject to a special 'take or pay' scheme optionally available to it. The petitioners shall be liable to pay slab rate of energy charges as per the tariff notified in order dated 23.3.2012. The Commission after due consideration of suggestions of DISCOMs and views of the HT/EHT industries decided to implement the 'take or pay' scheme for financial year 2012-13 with certain stipulations. Neither any of the DISCOMs nor the petitioners or any other HT/EHT consumer has appealed against the said tariff order. Thus the said part of the tariff order has become final. Therefore, the suo motu review order dated 23.8.2012 is contrary to law. Finality of a tariff order at least for whole financial year is a salutary policy of the law. It promotes stability in cost of production of goods and services and conduces to rational economic growth of industrial and other large consumers through proper planning, and this leads to increase in demand for electricity in the long run. This is the rationale behind Section 62(4) which permits no more than a single amendment to the tariff in a financial year and that amendment should be demonstrably necessary and not fanciful or whimsical. Without stability there can be

no development of the market as enjoined in Sec. 66 of the Act, 2003.

4. Opposite Party No.1 passed the impugned order on 23.8.2012 under Annexure-1 completely abolishing the existing load factor formula for the 'take or pay' scheme of concessional tariff for HT and EHT consumers replacing it by a novel, untried formula by a cryptic, arbitrary order without discussing and having inputs from any stakeholder regarding its nature, efficacy and impact and without showing how it better serves the purpose of the scheme. Opp. Party no.1 has taken everyone by surprise by introducing a novel formula in two cryptic and unspeaking paragraphs. Such tariff has been passed specially for HT and EHT consumers. In paragraph 22 of Annexure-1, it has been directed that those consumers who opt for revised 'take or pay' as earlier ordered shall avail a special rebate of 30 paisa per unit for the entire consumption of energy. Thus the rebate has been reduced from 50 paisa to 30 paisa per unit without explaining why and without determining whether 30 paisa per unit is good enough incentive. The appellate Tribunal for Electricity has no jurisdiction to deal with and determine these issues as it is a creature of the Electricity Act, 2003. Therefore, the petitioners invoke the extraordinary jurisdiction of this Court under Articles 226 & 227 of the Constitution of India.

5. Mr. Patnaik, learned Senior Advocate submits that introduction of concept of assured energy is unknown to the Statute. Under Section 181, the Commission has to make regulation in consistent

with the Act, 2003. Placing reliance on the decision of this Court in the case of *TISCO v. State of Orissa*, 170 (25) STC 171, it is submitted that alternative remedy is not a bar to invoke the writ jurisdiction of the High Court. Mr. Pattnaik also relied upon the judgment of Hon'ble Supreme Court in the case of *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and another v. Sri Seetaram Rice Mill*, (2012) 2 SCC 108, *Union of India and others. Vs. Tania Construction Private Limited*; (2011) 5 SCC 697, and *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others*, (1998) 8 SCC-1. Opposite party No.1 lacks inherent jurisdiction to redesign the 'take or pay tariff' scheme 2012-13 in midway by introducing a concept of assured energy which is very much patent to the statute and the regulation at large. Opposite parties committed gross illegalities by effectuating revised pay tariff retrospectively with effect from 1st July, 2012. Since there is no error in the RST order dated 23.3.2012 passed by the Commission for which the review proceeding of the order dated 23.3.2012 by opp. Party no.1 is not maintainable and liable to be quashed. Regulation 70(1) postulates that the Commission may on its own motion, or on the application of any of the person or parties concerned, within 90 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit. But in the instant case, the Commission has not reviewed the order dated 23.3.2012 within 90 days.

6. In the bill for the month of July, 2012 issued by opposite party No.2 to the petitioner there was a concept of rebate, but in the bill for the month of August, 2012 there was no concept of rebate and now opposite party No.2 in a whimsical manner is trying to recover the special rebate from the petitioner showing it as arrear which is illegal, unreasonable and thus the same is liable to be set aside. The action of opposite parties to recover the special rebate from the bill of the petitioner-company showing it as arrear is per se unreasonable, illegal in the eye of law. In the bill issued for the month of August, 2012, there is no rebate of 30 paisa which speaks about the whimsical attitude of the opposite parties and therefore, the same is liable to be set aside. Mr. Patnaik further submitted that in the interest of justice the recovery of rebate from the bill of the petitioners'-Companies and 30% of the bill amount be stayed till disposal of the writ petition.

7. Mr. P.K. Mohanty, learned counsel appearing for opp. Party no.2-WESCO filed a memo enclosing copy of letter No.7729(3) dated 27.8.2012 issued by opp. Party no.2-WESCO to the petitioner asking as to whether it opts to continue in "Take or Pay" Tariff Scheme and also so revised as per impugned order under Annexure-1. Petitioners' industry in replying to the above letter, declined and said not to continue any further the 'Take or Pay' Tariff Scheme.

8. Mr. Mohanty, learned counsel for opposite party No.2 submits that as per the special agreement executed between the

petitioner and opp. Party no.2, the previous take or pay tariff will operate as per Clause No.1 until expiry of the present RST Order, i.e., order dated 23.3.2012. As per Clauses 2.2 and 2.3 of the said special agreement it has been accepted by the parties that the OERC can review the initial take or pay scheme after three months. Thus, the impugned review order is wholly justified and binding on the parties and the petitioner is estopped by law of estoppel to challenge the same. If the industrial consumer does not agree or opt to continue in the scheme, it can pay as per the general tariff for its category which have also been provided in the RST Order dated 23.3.2012 for the financial year 2012-13. Implication of the terms of the Special Agreement for 'take or pay' privilege has already expired as its duration was till the passing of the impugned review and/or amended order. The main tariff order dated 23.3.2012 involves highly technical, financial and commercial aspects which can also be amended even normally once in a year as per Sec. 62(4) of the Act, 2003. Any Order passed by the appropriate Commission i.e. OERC is appealable to the Appellate Tribunal for Electricity under Sec. 111 and ultimately against order of the Appellate Tribunal appeal is to be preferred under Section 125 of the Act, 2003 to the Hon'ble Supreme Court. Mr. P.K. Mohanty further submitted that WESCO has filed appeal before the Appellate Tribunal of Electricity challenging RST order dated 23.03.2012 passed by the OERC wherein amongst other issues, the issue of "Take or Pay Tariff" scheme has also been challenged

and the matter is pending before the learned Tribunal. No interim order can be given like final order.

9. Placing reliance upon the decision of the Hon'ble Supreme Court in the case of *West Bengal State Electricity Regulatory Commission v. CESC Ltd.* in 2003 (8) SCC 715, it was submitted that the writ petition is not maintainable and proper remedy available to the petitioner is appeal. In support of his contention, Mr. Mohanty also relied upon the judgment dated 14.09.2011 of the Hon'ble apex Court in Civil Appeal Nos.5775/5780 of 2007, *U.P. Power Corporation Ltd. V. NTPC Ltd. and others* with C.A. Nos. 725-730/2008.

10. Mr. B.K. Nayak, learned counsel appearing for OERC submitted that the present writ petitions are not maintainable as alternative remedy is available under the statute. Further, referring to Rule 9 of the General Rules Concerning the Proceeding before the Commission, Mr. Nayak submitted that while issuing the notice, the Commission may, in suo motu proceedings and in appropriate cases, designate an Officer of the Commission or any other person whom the Commission considers to be appropriate to present the matter in the capacity of the petitioner in the case. It is further submitted that under Rule 70(1), the Commission may on his own motion, or on the application of any of the persons or parties concerned, review such decision, directions or orders and pass such appropriate orders as the

Commission thinks fit. Therefore, there is no illegality in passing the impugned order.

11. On the rival contentions of both parties, the following questions fall for consideration by this Court:

- (i) Whether Regulation 70(1) is ultra vires Sec. 94(1)(f) of the Act, 2003 ?
- (ii) Whether the present writ petition is maintainable on the ground of availability of statutory alternative remedy?
- (iii) Whether the order passed by opp. Party no.1-OERC under Annexure-1 dated 23.8.2012 is sustainable in law?

12. Question No.(i) is whether Regulation 70(1) is ultra vires Sec. 94(1)(f) of the Act, 2003. The petitioners have neither pleaded in the writ petitions nor made a prayer to the effect that Regulation 70 (1) is ultra vires the Act, 2003. Law is well settled that a party has to plead the case and produce/adduce sufficient evidence to substantiate his statement made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. (See *Bharat Singh and others v. State of Haryana and others*, AIR 1988 SC 2181.)

As stated above, since there is no pleading or any prayer to the effect that Regulation 70 is ultra vires Section 94(1)(f) of the Act, 2003, the argument advanced in that regard to declare Regulation 70 of

Business Regulations ultra vires Sec. 94(1)(f) of Act, 2003 is not entertained and rejected.

13. So far question no.(ii) is concerned, the petitioners are consumers under the Electricity Act, 2003 and Rules made thereunder. They also come under HT/EHT category. They are challenging the legality and validity of the suo motu review order dated 23.8.2012 passed by opp. Party no.1-OERC under Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004. Under Regulation 70(1) power is vested with OERC to exercise power of suo motu review. Therefore, it cannot be said that OERC –opp. Party no.1 lacks inherent jurisdiction to exercise the power of suo motu review. It is contended by the petitioners that such suo motu review has been exercised after 90 days from the date of original tariff order dated 23.3.2012. The stand of opposite party Nos. 1 and 2 is that in the original tariff order 23.3.2012 a condition was stipulated to review the order after three months and that tariff order has been accepted and acted upon by the petitioners. In any event, it cannot be said that OERC lacks inherent jurisdiction to pass such order as contended by the petitioners.

14. Section 110 provides establishment of Appellate Tribunal. The said section envisages that any person aggrieved by an order made by an adjudicating officer under the Act, 2003, (except under Section 127) or an order made by the appropriate Commission under the Act may prefer an appeal to the Appellate Tribunal for Electricity. Section

112 provides composition of Appellate Tribunal which envisages that the Appellate Tribunal shall consist of a Chairperson and three other Members. Section 113 provides qualification for appointment of Chairperson and Members of Appellate Tribunal as under:

A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he –

- (a) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a judge of the Supreme Court or the Chief Justice of a High Court; and
- (b) in the case of a Member of the Appellate Tribunal;
 - (i) is, or has been, or is qualified to be, a Judge of a High Court, or
 - (ii) is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or
 - (iii) is, or has been, a person of ability and standing having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.”

15. The above provisions clearly demonstrate that the Tribunal is consisting of Judicial Member and Technical Member having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management or is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure. Thus, the Tribunal is an expert body and determination of tariff made by the Commission involves a very highly technical procedure requiring

knowledge of law, engineering, finance, commerce, economics and management which can be effectively adjudicated by the Tribunal for electricity.

16. The Hon'ble Supreme Court in the case of **Chhatisgarh State Electricity Board v. Central Electricity Regulatory Commission and others**, AIR 2010 SC 2061, held as under :

“11. The brief analysis of the scheme of the Electricity Act shows that it is a self-contained comprehensive legislation, which not only regulates generation, transmission and distribution of electricity by public bodies and encourages public sector participation in the process but also ensures creation of special adjudicatory mechanism to deal with the grievance of any person aggrieved by an order made by an adjudicating officer under the Act except under Section 127 or an order made by the appropriate commission. Section 110 provides for establishment of a Tribunal to hear such appeals. Section 111(1) and (2) lays down that any person aggrieved by an order made by an adjudicating officer or an appropriate commission under this Act may prefer an appeal to the Tribunal within a period of 45 days from the date on which a copy of the order made by an adjudicating officer or the appropriate commission is received by him. Section 111(5) mandates that the Tribunal shall deal with the appeal as expeditiously as possible and endeavour to dispose of the same finally within 180 days from the date of receipt thereof. If the appeal is not disposed of within 180 days, the Tribunal is required to record reasons in writing for not doing so. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal.”

17. The Hon'ble Supreme Court in the case of ***W. B. Electricity Regulatory Commission v. C.E.S.C. Ltd. etc. etc.***, AIR 2002 SC 3588, held as under:

“101. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission.....”

18. A Division Bench of this Court vide judgment dated 30.03.2012 in the case of *Keonjhar Navanirman Parisad and others vs. State of Odisha and others (in W.P.(C) No.8409 of 2011)*, held as under:

“5. We are of the view that in a matter of fixation of tariff, this Court should not exercise its jurisdiction under Articles 226 and 227 of the Constitution of India, and, therefore, we are not inclined to entertain the writ application, so far as the correctness of the fixation of tariff is concerned and it is open to the petitioners to raise the same before the appropriate statutory forum.”

19. Mr. P.K. Mohanty, learned counsel also submitted that WESCO has filed appeal before the Appellate Tribunal for electricity (I.A. No.274 of 2012 in DPR No.1078 of 2012) challenging the RST Order dated 23.03.2012 passed by the OERC wherein amongst other issues, the issue of "Take or Pay Tariff" Scheme has also been challenged.

20. In view of the above, this Court is not inclined to entertain these writ petitions. It is open to the petitioners to approach the Appellate Tribunal for electricity challenging the legality and validity of the impugned order passed under Annexure-1 dated 23.8.2012.

21. In view of the answer to question nos.(i) and (ii) as stated above, there is no need to answer question no.(iii).

22. The writ petitions are accordingly disposed of. There shall be no order as to cost.

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B.N.Mahapatra, J.