

[2024] 9 S.C.R. 971 : 2024 INSC 768

Kerala State Electricity Board Ltd.

v.

Jhabua Power Limited and Others

(Civil Appeal Nos. 10046-10047 of 2024)

30 September 2024

**[Dr Dhananjaya Y Chandrachud, CJI,
J.B. Pardiwala and Manoj Misra, JJ.]**

Issue for Consideration

Whether the Appellate Tribunal for Electricity (APTEL) was right in passing the impugned judgment holding that the Kerala State Electricity Regulatory Commission (KSERC) was not bound by the directives of the State Government issued under Section 108 of the Electricity Act, 2003 and it exceeded its review jurisdiction under Section 94.

Headnotes[†]

Electricity Act, 2003 – s.108 – Scope – State Electricity Regulatory Commissions, if ‘bound’ by the directions issued by State Government u/s.108 – Kerala State Electricity Regulatory Commission (KSERC) allowed the review petition filed by the appellant and approved the Power Supply Agreements in view of the public interest highlighted in the policy directions issued by the State Government u/s.108 holding that KSERC was bound by the directions of the State Government – Order set aside by APTEL by way of the impugned judgment – Correctness:

Held: Correct – State regulatory commissions are not ‘bound’ by the directions of the State Government or the Central Government – Under Section 108, the State Commission shall only be ‘guided’ by the directions issued by the State Government and is not automatically bound by them – s.108 does not control the exercise of quasi-judicial power by the State Commissions based on directions issued by the State Government. [Paras 17, 18]

Code of Civil Procedure, 1908 – Or. XLVII, r.1 – Electricity Act, 2003 – s.94(f) – Review – Limited scope – Review petitions filed by the appellant against the order of KSERC declining

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to grant approval for the Power Supply Agreements (PSAs) were allowed by KSERC and it approved the PSAs in view of the public interest highlighted in the policy directions issued by the State Government – Order set aside by APTEL:

Held: An order cannot be made the subject of an appeal under the garb of a review – While reviewing an order, the court or tribunal must be satisfied that there was an error apparent in its previous order, which warrants review – However, while allowing the review petitions, KSERC did not point out any errors in its previous order instead, sole reliance was placed on the subsequent directions of the State Government which highlighted the purported ‘public interest’ that would be served by approving the PSAs – APTEL rightly set aside the order of KSERC on the ground that it exceeded its jurisdiction u/s.94 – Original appeal restored to the file of APTEL. [Para 19]

Case Law Cited

A.P. TRANSCO v. Sai Renewable Power (P) Ltd. [\[2010\] 8 SCR 636](#) : (2011) 11 SCC 34 – referred to.

List of Acts

Electricity Act, 2003; Code of Civil Procedure, 1908.

List of Keywords

Section 108 of the Electricity Act, 2003; Section 94 of the Electricity Act, 2003; State Electricity Regulatory Commission; Kerala State Electricity Regulatory Commission; APTEL; Competitive bidding process; Tender, Tariff; Bidders; Power Supply Agreements; Power procurement; Distribution licensees; Generating companies; Generators; Public interest; Directions of the State Government/ Central Government; ‘bound’; Mandatory; Quasi-judicial power; Review; Error apparent; Jurisdiction exceeded.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10046-10047 of 2024

From the Judgment and Order dated 26.07.2024 of the Appellate Tribunal for Electricity in Apl. No. 38 and 47 of 2024

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Appearances for Parties

V. Giri, Sr. Adv., Prabhas Bajaj, Ms. Rao Vishwaja, Priyanshu Tyagi, Harsh Chauhan, Rahul Narang, Harshed Sunder, Nihar Dharmadhikari, R.K. Nayyar, Advs. for the Appellant.

Dr. Abhishek Manu Singhvi, Sajan Poovayya, C. Aryama Sundaram, Sr. Advs., Mrs. Sanjanthi Sajan Poovayya, Matrugupta Mishra, Amit Bhandari, Nipun Dave, Ms. Raksha Agrawal, Harshwardhan Sharma, Ms. Divya Roy, Ms. Swapna Seshadri, Nikunj Dayal, Pramod Dayal, Zafar Inayat, Ms. Harsha Rao, Ms. Aishwarya Subramani, Biju Mattam, Ms. Ankita Bafna, Gaurav Prakash Pathak, Nishant Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

1. These appeals arise from a judgment of the Appellate Tribunal for Electricity¹ dated 26 July 2024.
2. Kerala State Electricity Board Limited, the appellant, floated two separate tenders for the procurement of power through a competitive bidding process under Section 63 of the Electricity Act 2003.² The first was for procuring 450 MW of power and the second was for 400 MW.
3. Two entities emerged as L1 bidders in respect of the two tenders which were floated. However, the L1 bidders did not bid for the entire tender quantum. The L1 bidder in the first bid offered to supply only 200 MW out of the total quantum of 450 MW. Similarly, the L1 bidder in the second bid offered to supply only 100 MW as against the 400 MW for which the bid had been invited. The appellant invited the other bidders to match the tariff quoted by the L1 bidders for the remaining quantum. None of the other bidders in the first bid were willing to match the tariff quoted by the L1 bidder therein. However, in relation to the second bid, the L2 to L5 bidders conveyed their willingness to match the tariffs quoted by the L1 bidder.
4. With regard to the first bid, despite the L2 bidder refusing to match the tariff of the L1 bidder, the appellant accepted its tariff for 115 MW

1 "APTEL"

2 "Act"

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and justified it on the ground that the tariff was competitive and less than the tariff quoted by the L1 bidder in the second bid. Since the tariff quoted by the remaining bidders in the first bid was either equal to or more than the tariff derived in the second bid, the appellant did not consider their offers. Therefore, in the first bid out of the tendered quantity of 450 MW, the appellant accepted offers for a quantum of 315 MW and issued letters of acceptance to L1 and L2 for 200 MW and 115 MW, respectively.

5. With regard to the second bid, the appellant accepted the offers of the L2, L3, L4 and L5 bidders, who matched the tariff quoted by the L1 bidder. As against the tendered quantity of 400 MW, the appellant accepted offers for a total quantum of 550 MW. The appellant justified this decision in view of the “likely power shortages in the forthcoming years” and on the ground that the tariff offered was competitive.
6. Seven Power Supply Agreements³ were accordingly executed with the various generators for a total quantum of 865 MW of power. The appellant sought the approval of the Kerala State Electricity Regulatory Commission⁴ to adopt the tariff laid down in the respective PSAs. The KSERC *prima facie* observed that the appellant had deviated from the standard bidding guidelines issued by the Ministry of Power, Government of India⁵ and failed to obtain prior approval from the KSERC or the Central Government in relation to these deviations. Accordingly, by an Order dated 30 August 2016, the KSERC approved the PSAs with the L1 bidders in both bids, but with regard to the remaining PSAs, it deferred the decision to obtain the approval of the Central Government and the views of the Government of Kerala with respect to the process of bidding which was adopted by the appellant.⁶
7. In view of the critical need for power procurement in the state, KSERC passed orders in 2016-2017 permitting the appellant to provisionally procure power from the generators and, as a consequence, the appellant states that it has been procuring power under the four PSAs since then till 2023.

3 “PSAs”

4 “KSERC”

5 “standard bidding guidelines”

6 OP No. 13 of 2015

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8. In 2020, the appellant moved the KSERC seeking approval of the fuel surcharge rate under some of the unapproved PPAs in the second bid. The KSERC did not approve the fuel surcharge rate and directed the appellant to limit payment at the rate of the L1 bidder in the second bid until the PSAs were approved. The case travelled to the APTEL and in parallel, the appellant filed a petition before the KSERC seeking final orders on the approval of the PSAs. The order of the APTEL was challenged before this Court, and KSERC was called upon to decide the petition for final approval expeditiously, in no later than three months.⁷
9. By an order dated 10 May 2023, KSERC declined to grant approval for the PSAs and concluded that the tariff determined by the appellant did not follow a transparent process and grossly deviated from the standard bidding guidelines. KSERC further held that the deviations were against public interest and created long-term financial implications for the consumers and the state.⁸ The appellant moved the APTEL in appeal.
10. On 10 October 2023, while the appeal was pending before the APTEL, the Government of Kerala invoked the provisions of Section 108 of the Act⁹ and issued policy directions highlighting the public interest that would be served by approving the PSAs. The state government opined that the non-approval of the PSAs would compel the appellant to purchase power at higher rates, resulting in immense financial implications and a power crisis in the state. The liability of higher rates of power procurement would, it was opined, be passed on to the consumers, increasing the cost of power in the state. Alternative means, it was opined, should have been sought earlier and the public should not be held liable for procedural flaws. The Government of Kerala, accordingly, directed as follows:

“NOW THEREFORE, after detailed examination of the matter, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without

7 Civil Appeal No. 41/2021

8 OP No. 05 of 2021

9 S.108, Electricity Act 2003. [Section 108. (Directions by State Government): ---- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final]

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ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, Government hereby **direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by Kerala State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.**”

(emphasis supplied)

11. In view of the above directive, the appellant withdrew its appeal before APTEL. While allowing the request for withdrawal, APTEL by its order dated 31 October 2023, directed as follows:

“We consider it appropriate, in such circumstances, to permit the Appeal to be withdrawn, with liberty to the Appellant to invoke the review jurisdiction of the Commission. It is made clear that the order now passed by us shall **not disable the Appellant, if need be later, from availing their appellate remedy against the original order passed by the Commission dated 10.05.2023.**”

(emphasis supplied)

12. The appellant moved a petition before the KSERC seeking a review of its order dated 10 May 2023. On 29 December 2023, KSERC allowed the review petition and approved the four PSAs in view of the public interest highlighted in the policy directions issued under Section 108 by the State government. The KSERC held that it was bound by the directions of the state government. Further, it was held that the subsequent directions issued by the state government fell within the ambit of “any other sufficient reasons” to review a previous order, as required by Order XLVII Rule 1 of the Code of Civil Procedure 1908¹⁰ read with Section 94 of the Act.
13. Two of the generators who are now respondents before this Court, moved the APTEL in appeal. They contended that the above order of the KSERC violated Order XLVII Rule 1 of the CPC read with

¹⁰ “CPC”

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Section 94 of the Act as it was passed solely on the ground that a subsequent direction issued by the State Government under Section 108 is binding on the KSERC.

14. By its impugned judgment, APTEL allowed the appeals and set aside the order of KSERC. The findings of the APTEL are summarized below.
 - a. After recapitulating the decisions of this Court pertaining to the scope of the phrase “any other sufficient reasons” in Order XLVII Rule 1 of the CPC, the APTEL held that the threshold was not satisfied in the present case. The KSERC failed to point out any error in its previous order and instead relied solely on the subsequent directions issued by the state government under Section 108 to review its earlier order. None of the grounds which weighed with the KSERC in its previous order were even referred to, thereby, defeating the purpose for which the power of review is exercised;
 - b. The APTEL traced the decisions of this Court and its own decisions pertaining to the scope of Section 108 of the Act and held that the KSERC was not bound by the directives of the state government. The state government could not have issued a directive to compel the KSERC to exercise its quasi-judicial powers in a particular manner. Such powers are to be exercised independently by the KSERC in accordance with the Act; and
 - c. APTEL held that Section 86(1)(b) of the Act expressly confers the function of regulating the price at which electricity should be procured by distribution licensees from generating companies to the KSERC. Under the Act, this power must be exercised solely in terms of Sections 62 and 63 of the Act. While approving the tariff under Section 63 of the Act, the KSERC can only adopt the tariff if it has been determined through a transparent process of bidding and is in accordance with the standard bidding guidelines. The KSERC had, in the exercise of its power under Section 86(1)(b) read with Section 63, already passed an order, declining to adopt the tariff, since it was satisfied that the process of bidding was not in accordance with the standard bidding guidelines. A policy directive could not, therefore, override the statutory functions already exercised by the KSERC.
15. We have heard Mr V Giri, senior counsel appearing on behalf of the appellant. Mr Aryama Sundaram, senior counsel appears for

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the first respondent (Jhabua Power Limited) and Dr Abhishek Manu Singhvi, senior counsel for the second respondent (Jindal India Power Thermal Limited).

16. We are in agreement with the judgment of APTEL insofar as it holds that the directive which was issued by the State government under Section 108 could not have displaced the adjudicatory function which was entrusted to KSERC. The State government while issuing a policy directive in the exercise of its power under Section 108 cannot impinge on the adjudicatory discretion which is vested in an authority under the Act. In this regard, we may helpfully refer to the observations of this Court in [A.P. TRANSCO v. Sai Renewable Power \(P\) Ltd.](#),¹¹ in the context of a similar provision in the erstwhile Andhra Pradesh Electricity Reforms Act 1998 (which was repealed by the Electricity Act 2003). A two-judge bench of this Court, speaking through Justice Swatanter Kumar, observed:

“59. Section 12 of the Act vests the State Government with the power to issue policy directions on matters concerning electricity in the State including the overall planning and coordination. All policy directions shall be issued by the State Government consistent with the objects sought to be achieved by this Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers. The State Government is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters. Thus the scheme of these provisions is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. This provision also clearly implies that fixation of tariff is the function of the

11 [\[2010\] 8 SCR 636](#) : (2011) 11 SCC 34

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**Regulatory Commission and the State Government
has a minimum role in that regard.”**

17. That the state regulatory commissions are not ‘bound’ by the directions of the state government, or the Central Government is also evident from the text of Section 108. The provision reads: “In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy ...”. This indicates that the state commission shall only be ‘guided’ by the directions issued by the state government and is not automatically bound by them. This interpretation is strengthened by the divergence in the language used in other provisions of the Act, such as Section 11 of the Act which reads as follows:

“Section 11. (Directions to generating companies): ---
(1) Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. - For the purposes of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

...”

18. The above provision uses mandatory language and provides that the generating company “shall ... operate and maintain any generating station in accordance with the directions of that Government” in extraordinary circumstances. This can be distinguished from the language in Section 108, which merely requires that the state commission “be guided by” the directions of the State Government. The provision, in no manner, seeks to control the exercise of quasi-judicial power by the state commissions based on directions issued by the state government.
19. Similarly, the findings of the APTEL on the limited scope of the review are also consistent with settled law. Section 94(f) of the Act provides that the state commission has the same powers as vested in a civil court under the CPC in respect of reviewing its decisions, directions and orders. Order XLVII Rule 1 of the CPC provides for review on limited grounds. An order cannot be made the subject of an appeal

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under the garb of a review. While reviewing an order, the court or tribunal must be satisfied that there was an error apparent in its previous order, which warrants the exercise of its power to review. While allowing the review petitions, the KSERC failed to explain how this threshold was met and did not point out any errors of that nature in its previous order. Instead, sole reliance was placed on the subsequent directions of the State Government, which highlighted the purported 'public interest' that would be served by approving the PSAs. Therefore, there is no infirmity in the decision of the APTEL to set aside the order of KSERC on the ground that it exceeded its jurisdiction under Section 94 of the Act.

20. We are in agreement with the judgement of the APTEL on the above aspects. However, having said so, it emerges from the earlier order of APTEL dated 31 October 2023, that while permitting the appeal filed by the appellant to be withdrawn, APTEL had permitted the appellant to invoke the review jurisdiction of KSERC. APTEL, however, expressly made it clear that "the order now passed ... shall not disable the appellant, if need be later, from availing their appellate remedy against the original order passed by the Commission dated 10.05.2023".
21. Consequently, while we do not find fault with the impugned order of APTEL insofar as it set aside the order passed by KSERC, at the same time, the appropriate course of action would be to allow for restoration of the original appeal filed against the order of KSERC dated 10 May 2023. This appeal, being Appeal No 518 of 2023, shall stand restored to the file of APTEL.
22. We, however, clarify that issues which are covered by the impugned order of APTEL shall not be re-agitated. The appeal which has been restored to the file of APTEL shall, in other words, be considered on any other grounds that were raised before APTEL prior to the withdrawal of the appeal.
23. The appeals shall stand disposed of accordingly.
24. Pending applications, if any, stand disposed of.

Result of the Case: Appeals disposed of.