**NON-REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 4510 OF 2006**

PUNJAB STATE POWER CORPORATION LIMITED ... APPELLANT (S)

VERSUS

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION & ORS. ... RESPONDENT (S)

**J U D G M E N T**

**RANJAN GOGOI, J.**



**1.** This appeal, against the judgment and order dated 26.05.2006 and 25.07.2006 passed by the Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as the "Appellate Tribunal") was initially filed by the Punjab State Electricity Board (PSEB). Pursuant to a statutory scheme of transfer, vide notification dated 16.04.2010, the PSEB had

been unbundled and the functions of generation and distribution came to be vested in the Punjab State Power Corporation Limited (Corporation). By order dated 03.09.2014 the Corporation has been substituted as the appellant in place of the PSEB.

**2.** Before the learned Appellate Tribunal the tariff orders of the Punjab State Electricity Regulatory Commission (Commission) dated 30.11.2004 and 14.06.2005 for the financial years 2004-2005 and 2005-2006 were under challenge. Such challenge was both by the present appellant as well as various industrial consumers. By the impugned judgment while the appeals filed by the present appellant have been dismissed, those filed by the industrial consumers have been disposed of with certain directions. Aggrieved, the instant appeal has been filed under Section 125 of the Electricity Act, 2003 (for short "the Act") against the aforesaid common order of the Appellate Tribunal.

**3.** Section 125 of the Act contemplates filing of an appeal to this Court against an order of the Appellate Tribunal on any one or more of the grounds specified in Section 100 of

Code of Civil Procedure, 1908. The scope of an appeal to this Court under the aforesaid provision of the Act was considered in ***DSR (Steel) Pvt. Ltd***. Vs. ***State of Rajasthan***[1] holding, inter alia, that :

> "**14**. An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 CPC in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the courts below, which would in the present case, imply the Regulatory Commission as the court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be reopened before this Court in an appeal under Section 125 of the Electricity Act, 2003. Just as the High Court cannot interfere with the concurrent findings of fact recorded by the courts below in a second appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loath to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to *Govindaraju* v. *Mariamman*[2], *Hari Singh* v. *Kanhaiya Lal*[3], *Ramaswamy Kalingaryar* v. *Mathayan Padayachi*[4], *Kehar Singh*

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1 (2012) 6 SCC 782

2 (2005) 2 SCC 500

3 (1999) 7 SCC 288

4 1992 Supp (1) SCC 712

v. *Yash Pal*[5] and *Bismillah Begum* v. *Rahmatullah Khan*[6] should, however, suffice."

The challenge in the present appeal, therefore, will have to be considered keeping in mind the principles laid down in ***DSR (Steel) Pvt. Ltd***. Vs. ***State of Rajasthan*** (supra) enumerated above.

**4.** Before proceeding any further it would require a mention that though several issues arise from the judgment and order of the learned Appellate Tribunal, counsel for the appellant has confined his arguments to only four of such issues dealing with the specific claims made by the PSEB thereunder in the application for determination of tariff under Section 62 of the Act. The aforesaid four issues are:-

(i) Cost of supply and cross subsidy

(ii) Disallowance of interest cost on account of alleged diversion of funds

(iii) Disallowance of Employees Cost and

(iv) Coal transit losses.

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5 AIR 1990 SC 2212

6 (1998) 2 SCC 226

**5.** Having regard to the issues calling for an answer, at the outset, a reference to the statement of objects and reasons for enactment of the Act would be appropriate. The objects and reasons are self-explanatory as would be evident on a plain reading of para 1.2, 1.3 and paragraph 3 which are reproduced hereinbelow:

> "1.2 The Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The State Electricity Board has the responsibility of arranging the supply of electricity in the State. It was felt that electrification which was limited to cities needed to be extended rapidly and the State should step in to shoulder this responsibility through the State Electricity Boards. Accordingly the State Electricity Boards through the successive Five Year Plans undertook rapid growth expansion by utilizing Plan funds.
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> 1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination

in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State Governments can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating

to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holders and experts."

**6.** Chapter VII of the Act deals with tariff. While Section 61 provides for the principles on basis of which tariff is to be determined, Section 62 contemplates that such determination will be at the point of generation, transmission and wheeling as well as retail supply to the consumers. The basic principles on which tariff is to be determined as laid down in Section 61 of the Act are that generation, transmission and distribution and supply of electricity should

be conducted on commercial principles; factors which would encourage competition, efficiency, economical use of resources, good performance and optimum investments are to be kept in mind. The interests of the consumers are to be safeguarded, and at the same time, balanced with recovery of cost of electricity in a reasonable manner. Of particular significance to the present case would be the principle enshrined in Section 61(g) of the Act (as originally enacted) which provides that the tariff shall progressively reflect the cost of supply of electricity and also reduce and eliminate cross-subsidies within the period to be specified. By Act No.26 of 2007, Section 61(g) has been amended and the word 'eliminate' has been omitted. The significance of the said amendment will be noticed separately.

**7.** Section 62 of the Act provides for determination of tariff at different stages i.e. generation and supply; transmission; wheeling as well as retail sale of electricity. Section 62(3) of the Act, which would also have some significance to the present appeal, visualise that while the Regulatory Commission shall not show any undue preference to any

consumer in fixing the tariff, the Commission may at its discretion differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity, geographical area, nature of supply etc. For a fuller appreciation, the entire of the provisions of Sections 61 and 62 may be quoted hereinbelow:

> "**61. Tariff regulations**.—The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-
>
> (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
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> (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
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> (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
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> (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
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> (e) the principles rewarding efficiency in performance;
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> (f) multi-year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduce cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

**62. Determination of tariff.**—(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for —

(a) supply of electricity by a generating company to a distributing licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity:

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest

equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

**8.** We may now proceed to consider the four issues as enumerated hereinabove which have been raised before us.

## 9. Cost of Supply and Cross Subsidy

The statement of objects and reasons for the enactment of the Act, extracted above, would indicate a legislative realisation that the power sector in the country was in dire straits. This was largely on account of implementation of policy decisions to provide free or highly subsidised power to certain classes of consumers. In a regime wherein tariff was a matter of governmental dictation and directives providing free or subsidised power to one section at the cost of another or others and a host of such related decisions divorced from commercial and prudent practices had plunged the power sector into uncertainty and darkness. To remedy the situation, the Act of 2003 was enacted which, *inter-alia,* vested the power of fixation of tariff in the Regulatory Commissions with the Legislature itself clearly enunciating the principles for such

determination as are to be found in Section 61 details of which has already been noted. Section 61(g), as originally enacted, contemplated a progressive journey to reduce and ultimately eliminate cross-subsidies by identifying the cost of supply to the consumer. The vision of each consumer fully paying for the power drawn by such consumer was to be reached over a period of time. In fact in the tariff policy notified under Section 3 of the Act it was visualised that by the end of the year 2010-2011 tariff should be within ± 20 per cent of the average cost of supply (average cost). The aforesaid National Tariff Policy was published in the year 2006. Clause 2 thereof which deals with the above aspect of the matter is in the following terms:-

> "2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

> For example if the average cost of service is Rs. 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs. 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs.3.60 per unit."

**10.** Section 61(g), as earlier noted, was amended by Act No.26 of 2007. The amended Section omitted the word "eliminate" the effect whereof was that cross-subsidies were destined to remain for the present and the emphasis was on attainment of minimum levels of such subsidy. The determination of "cost of supply" and reduction/elimination of cross-subsidies is closely interlinked. The difference in the intent and purport of Section 61(g) before and after its amendment would not be very relevant. The reduction of cross subsidy was contemplated by the unamended section as the first step leading to elimination. The change of legislative intent to put on hold, if not to abandon, the elimination of cross subsidies occurred during the period of

transition itself. This is so because of the close proximity of time between the original enactment and its amendment. Besides, the road map visualised by the National Tariff Policy itself contemplated the continuance of cross subsidy even in the year 2010-2011 whereas the amendment to Section 61(g) came about in the year 2007.

**11.** The Commission while considering the fixation of tariffs for the years 2004-2005 and 2005-2006 based its determination on the average cost of supply which plainly is to be worked out by taking into account the total volume of electricity produced and the total cost incurred in such production. The industrial consumers in the appeal before the Tribunal contended that the cost of supply should be the voltage cost of supply, namely, the cost at which the consumer receives electricity at a particular voltage as a higher voltage would mean a lower price on account of lesser amount of distribution losses. As the industrial consumer receives supply of electricity at a high voltage, the average cost of supply, according to the industrial consumers, were to their detriment and was thus not

contemplated under the Act. The Appellate Tribunal on an interpretation of Section 61(g) and 62(3) particularly in the absence of any prefix to the expression “cost of supply” in Section 61(g) took the view that it is more reasonable to advance towards a regime of voltage cost of supply which would provide a more actual/realistic basis for dealing with the issue of cross subsidies. However, as the progress to a regime of voltage cost of supply by reduction/elimination of cross-subsidies is to be gradual, the learned Appellate Tribunal held that no fault can be found with the determination of the average cost of supply made by the Commission for the financial years in question. However, keeping in view what the Tribunal understood to be the ultimate object of the Act it had directed that the relevant data with regard to voltage cost should be laid before the Commission and for the future the Commission would gradually proceed to determine the voltage cost of supply.

**12.** We have considered the perspective adopted by the learned Appellate Tribunal in seeking an answer to the issue of cost of supply/cross subsidies that had arisen for decision

by it. The provisions of the Act and the National Tariff Policy requires determination of tariff to reflect efficient cost of supply based upon factors which would encourage competition, promote efficiency, economical use of resources, good performance and optimum investments. Though the practice adopted by many State Commissions and utilities is to consider the average cost of supply it can hardly be doubted that actual costs of supply for each category of consumer would be a more accurate basis for determination of the extent of cross-subsidies that are prevailing so as to reduce the same keeping in mind the provisions of the Act and also the requirement of fairness to each category of consumers. In fact, we will not be wrong in saying that in many a State the departure from average cost of supply to voltage cost has not only commenced but has reached a fairly advanced stage. Moreover, the determination of voltage cost of supply will not run counter to the legislative intent to continue cross subsidies. Such subsidies, consistent with executive policy, can always be reflected in the tariff except that determination of cost of

supply on voltage basis would provide a more accurate barometer for identification of the extent of cross subsidies, continuance of which but reduction of the quantum thereof is the avowed legislative policy, at least for the present. Viewed from the aforesaid perspective, we do not find any basic infirmity with the directions issued by the Appellate Tribunal requiring the Commission to gradually move away from the principle of average cost of supply to a determination of voltage cost of supply.



**13. Disallowance of Interest cost on account of alleged diversion of funds**



The Commission disallowed a total of Rs.100 crores on account of interest paid on borrowed funds on the ground that the loans obtained to meet capital expenditure were diverted by the Board (PSEB) to meet revenue expenditure. The bulk of the interest (except Rs.100 crores) was, however, allowed by the Commission on the ground that the same is a

consequence of the events in force prior to the coming into existence of the Commission and that if the Board is asked to bear the burden of the entire interest it will have a crippling effect on its resources. In considering the issue the Commission further came to the finding that the total assets of the Board would be of the value of Rs.9.431.06 crores out of which the assets created with the funds available from consumers' contribution, grants and subsidy towards capital assets etc. works out to Rs. 1784.48 crores leaving the balance assets at Rs.7646.58 crores. As against this, the PSEB has availed loans and equity amounting to Rs.11828.48 crores upto the period ending March 31, 2004. The Commission accordingly recorded the finding that the Board had availed loan to the extent of Rs.4181.90 crores in excess of its capital assets. Obviously, the entire of the said excess amount was diverted towards meeting revenue expenditure which is against all canons of acceptance. Therefore, the amount on this loan paid by the PSEB cannot be shifted to the consumer. Despite the said findings, for the reasons already noticed, the Commission had disallowed

interest of an amount of Rs.100 crores only allowing the balance to be charged on the consumers through the tariff. The Appellate Tribunal taking note of the facts mentioned above did not interfere with the limited disallowance made by the Commission and instead remanded the issue for a fuller consideration of the Commission, in the determination for the subsequent years, in the following terms :

> "Since the issue of diversion of funds is interlinked with other issues namely RSD cost allocation, subsidy, high rate of interest on Government loans etc., the controversy relating to the extent of interest which can be allowed as a pass through cannot be resolved unless the other issues are also decided by the Commission as directed by us. The resolution of these issues are bound to take time and cannot be decided without relevant data. Therefore, relief can only be given to the consumers for the future years.
>
> In view of the foregoing, we direct that for the year 2006-2007 the issue relating to the extent of

interest which can be allowed as a pass through shall be determined and resolved by the Commission alongwith the determination of the issue relating to RSD cost allocation, subsidy and high rate of interests on Govt. loans. This shall be accomplished during the truing up exercise for the year 2006-2007."

The conclusion of the learned Tribunal being on a consideration of the facts and circumstances noted above, we can only approve the views expressed.

**14. <u>Disallowance of Employees Cost</u>**

The Board had projected employees cost at Rs.1605.40 crores in the ARR for 2004-2005 and at Rs.1700 crores for 2005-2006. The Commission in its tariff order for financial year 2002-2003 had allowed employees cost of Rs.1274.66 crores with the rider that for the next year the employees' cost will be capped. However, the employees cost for financial year 2003-2004 and 2004-2005 had

remained capped. The Commission allowed a cumulative increase of 15.6% for the year 2005-2006 by taking into account the increase in wholesale price index taking the financial year 2002-03 as the base year. The approved level of employees' cost of the Board of Rs.1274.66 crores for the year 2002-2003, consequently, stood allowed to the extent of Rs.1473.63 crores.

**15.** In the appeal before the Appellate Tribunal, the Board contended that the capping of the increase of employees cost for the year 2004-2005 was not justified and that the increase allowed by the Commission for the financial year 2005-2006 is not adequate. The employees of the Board are governed by the Punjab State Electricity Service Regulations 1972 whereunder the employees are given parity with the pay scales of the State Government employees. As the Board had adopted the recommendation of the 5th Pay Commission a higher pay scale was required to be given to its employees. The Board also placed before the Tribunal the details of the efforts made by it to contain the employees cost including reduction in the number of its employees.

**16.** The Appellate Tribunal took the view that what was obligatory on the Board was to provide parity of pay scales of its employees with those of the State Government at the time when the transfer of the Electricity Board took place. Grant of higher pay scale without linking the same to performance would, according to the Tribunal, defeat the provisions of Electricity Act 2003. The Tribunal further held that the measures pointed out by the Board to cut the employees cost were cosmetic. In this regard the Tribunal observed that though the Board had claimed to have reduced its employees from 91224 in the year 2000-2001 to 82494 in the year 2003-2004 appointment on contract basis as well as in the exigencies of service continued to be made on no known basis. The Tribunal found that even the voluntary retirement scheme which could have been a viable option was not adopted on the ground that the State Government was not in a position to provide the expenses. In this regard the Tribunal in its order has specifically found that :

(i) The number of consumers of electricity in the State of Punjab is the least as compared to the other six States referred to in the charts;

(ii) PSEB 0.24 MU per employee, which puts the Board in the second lowest position in the matter of sale of energy per employee;

(iii) Each employee of the PSEB caters to 59 consumers in the State of Punjab. This ranking is the lowest amongst the seven SEBs;

(iv) PSEB has the highest percentage of establishment cost to total cost as it constitutes 56 paise/Kwh cost of energy sold, which is also the highest compared to other six States and

(v) The Boards per employee cable line circuit is the lowest being 2.95 Km/ckt cost against 7.84 Km/ckt in respect of Gujarat State.



**17.** It is in the light of the aforesaid facts that the Appellate Tribunal came to the conclusion that the employees cost computed and claimed by the PSEB at 1700 crores for the financial year 2005-2006 cannot be allowed. However, the Tribunal taking into account the fact that for the previous two years 2003-2004 and 2004-2005 no increase in employees cost have been allowed thought it proper to allow the

cumulative increase permitted by the Commission i.e. 15.61% over and above the employees cost of Rs.1274.66 crores in the year 2002-2003 which, on proper calculation, works out to Rs.1473.63 crores.

**18.** The eventual conclusion of the learned Appellate Tribunal having been arrived at in the manner indicated above and being on due consideration of the facts relevant to the issue we are of the view that no interference in exercise of the limited jurisdiction of this Court under Section 125 of the Act would be justified.

**19. Coal transit losses**

For the year 2004-05 the Tribunal had allowed transit loss of 2% as against 3% allowed in the previous year i.e. 2003-04. The Tribunal also directed the PSEB to bring down the level of transit loss to 1% in the next 3 years with yearly reduction target of 0.33%. For the year 2005-2006, however, the learned Tribunal had approved the allowance of transit loss of 0.8% allowed by the Commission. Though there appears to be a slight inconsistency in the above view

of the Tribunal, as the same has been prompted by the necessity to bring down losses by the utilities by adopting appropriate and prudent measures we do not think that any interference will be justified particularly when what has been allowed is as per the CERC norms (0.8%). The Tribunal had also taken the view that excessive loss reflected inefficiency and must therefore be eliminated. If the Appellate Tribunal, on consideration of the above fact had for the year 2004-2005 allowed transit loss to the extent of 2% as against the prescribed norm of 0.8% and for the year 2005-2006 had kept such allowance at 0.8%, we do not see how interference with the above directions would be justified in the present appeal under Section 125 of the Act.

**20.** For all the reasons stated above we find no ground whatsoever to interfere with the impugned judgment and order dated 26.05.2006 and 25.07.2006 passed by the Appellate Tribunal or any part thereof. The appeal is, therefore, dismissed without any order as to cost.

**.....J.**
**[RANJAN GOGOI]**

**.....**
**J.**
**[R.K. AGRAWAL]**

**New Delhi;**
**February 10, 2015.**