

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 77 OF 2014

Dated: 13th May, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

Hooghly Chamber Of Commerce & Industry
3rd Floor, R. No. 307,
81, Netaji Subhash Road,
Kolkata - 700001

..... Appellant/Petitioner

VERSUS

1. West Bengal Electricity Regulatory Commission
FD-415A, Poura Bhawan, 3rd Floor,
Sector - III, Bidhannagar,
Kolkata - 700106.

2. West Bengal State Electricity Distribution Company Ltd
Vidyut Bhawan, Block - DJ,
Sector - II, Bidhannagar,
Kolkata - 700091.

..... Respondents

Counsel for the Appellant ... Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s)... Mr. Pratik Dhar, Sr. Advocate
Mr. C.K. Rai for R-1

Mr. Anand Kumar Shrivastava
for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by Hooghly Chamber Of Commerce & Industry (in short, the '**Appellant**'), against the Impugned Order, dated 26.12.2013,

passed by the West Bengal Electricity Regulatory Commission (in short, the '**State Commission**')/Respondent No.1 herein, in Case No. TP/53/11-12, whereby the State Commission has determined the tariff applicable to the retail supply consumers of the West Bengal State Electricity Distribution Company Limited/Respondent No. 2 herein, for the Financial Year 2013-14.

2. The main grievances of the Appellant, as regard the impugned order, as are follows:

- (a) that the impugned order has been passed by the State Commission in gross violation of the principles of natural justice, without any notice or opportunity to the stakeholders and the public at large to represent their views.
- (b) that the State Commission has passed the impugned order after expiry of about 10 months of the tariff period in issue of the total of 12 months and, further, given retrospective effect to the tariff.
- (c) that the impugned order has been passed by the State Commission without following the basic principles of tariff determination and the manner in which the cost details have to be considered for determination of tariff.
- (d) that the State Commission has not considered the inefficiencies of the Respondent No.2/distribution licensee and merely proceeded on tariff determination considering all the costs and expenses of the Respondent No.2 and without putting the Respondent No.2 to terms for its inefficiencies. The State Commission has covered up all the costs and expenses of the Respondent No.2 on average basis for all tariff categories of consumers, without any distinction between the various categories of consumers and the cost of supply for various classes and voltages being different. Further, the State

Commission has failed to appreciate that one of the principles settled by this Appellate Tribunal that for determination of tariff based on voltage wise cost of supply should also be determined. The State Commission merely has continued to determine the tariff in the manner previously adopted by the State Commission, which is violative of the basic principles of judicial discipline.

3. The Appellant is an association of industrial and commercial consumers, registered under Section 25 of the Companies Act, 1956 with the objective of promoting the interest of industry, trade and commerce and more particularly the members of the Appellant association.

4. The Respondent No. 1, State Commission, is the Electricity Regulatory Commission for the state of West Bengal exercising powers and discharging functions under the provisions of the Electricity Act, 2003. The Respondent No. 2, West Bengal State Electricity Distribution Company Limited, is a distribution licensee in the state of West Bengal and the successors in interest of the erstwhile Electricity Board with regard to the distribution and retail supply activities.

5. The distribution and retail supply activities including the tariff to be charged from the retail supply consumers of the Respondent No. 2 is regulated by the State Commission under the provisions of the Electricity Act, 2003

6. The relevant facts, for the purpose of deciding this Appeal, are as under:

- (a) that for the purposes of determination of tariff, the State Commission has framed and notified the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 (in short, the **'Tariff Regulations,**

2011') (as amended in 2012) which came into effect from 25.4.2011.

- (b) that the Tariff Regulations, 2011 are applicable for the multi-year tariff period 2011-12 to 2013-14. The Respondent No. 2 was required to file its tariff application providing all necessary data and information as required for determination for the said multi-year period in accordance to the provisions of the Tariff Regulations, 2011.
- (c) that the first tariff application/petition was filed by the Respondent No. 2 under the provisions of the Tariff Regulations, 2011 only on 30.3.2012, for approval of the annual revenue requirements and determination of its tariff for the third control period comprising three years from 2011-12 to 2013-14. The said tariff application was published in newspapers and also made available on the website of the State Commission. After perusing the objections and hearing objections/representations of the stakeholders, the State Commission passed the Multi Year Tariff (MYT) order, dated 1.12.2012, for the said period namely; 2011-12 and 2012-13 on the basis of average cost of supply for determination of tariff without considering or referring to the objections of the Appellant. The tariff order, dated 1.12.2012, was passed by the State Commission even without referring to the decision of this Appellate Tribunal regarding determination of tariff based on voltage wise cost of supply. Thus, the MYT order, dated 1.12.2012, was passed for the aforesaid 20 months period when only three months of the total of 24 months were left. Thus, the tariff order, dated 1.12.2012, was passed determining the tariff with retrospective effect.
- (d) that the tariff order, dated 1.12.2012, was passed by the State Commission on account of delays caused by the Respondent No.2 in timely filing the tariff petition. This Appellate Tribunal

in its judgment, dated 11.11.2011, in O.P. No. 1 of 2011, in exercise of powers under Section 121 of the Electricity Act, 2003, had directed all the Regulatory Commissions to strictly adhere to the timelines for determination of tariff and to ensure that the tariff comes into force prior to the financial year.

- (e) that for the year 2013-14, the State Commission entered into the exercise for determination of tariff, much after the tariff period 2013-14 had begun. There was no public hearing, public notice or any form of opportunity given to the consumers and the public at large to represent themselves or even be aware of the process of tariff determination being undertaken by the State Commission. By the impugned order, dated 26.12.2013, the State Commission has determined the tariff as stated above, which is under challenge before us in the instant Appeal.

7. We have heard Mr. Anand K. Ganesan, the learned Counsel for the Appellant, Mr. Prteek Dhar, the learned Sr. Counsel and Mr. C.K. Rai, learned Counsel for the Respondent No.1 and Mr. Anand Kumar Shrivastava, the learned Counsel for the Respondent No.2. We have gone through the written submissions filed on behalf of the Appellant and both the respondents including the impugned order and other material available on record.

8. The only issue arising for our consideration is that the Respondent No.2/distribution licensee had filed the tariff petition under the provisions of Tariff Regulations, 2011 for approval of ARR and determination of tariff for the MYT control period 2011-12, 2012-13 and 2013-14. The said tariff application was published in newspapers and also made available in the website of the Commission. After inviting the objections and hearing the objections/suggestions of the stakeholders, the State Commission passed the MYT order, dated 1.12.2012, approving ARR for MYT control period comprising of three years i.e. FYs 2011-12, 2012-13 and 2013-14 but determined the tariff only for two years i.e. FY 2011-12 and 2012-13. **Is**

the State Commission mandated to re-undergo or readopt the procedure provided under Section 64 of the Electricity Act, 2003 while entering into the exercise for determination of tariff for the year FY 2013-14, which is the last year of the aforesaid MYT period in the said petition being Case No. TP/53/11-12?

9. The following submissions have been made by the Appellant:
- (a) that the Appellant has no grievance regarding tariff rate as the tariff remains the same as fixed in the previous tariff order, dated 1.12.2012, and the impugned order dated 26.12.2013. Each tariff determination is a fresh exercise to be followed by the principle of natural justice and public hearing.
 - (b) that according to the provision of Section 64 of Electricity Act, 2003, application moved by the distribution licensee for determination of tariff for FY 2013-14 was not decided within 120 days.
 - (c) that the previous tariff order, dated 1.12.2012, determining the tariff for the financial years 2011-12 and 2012-13 was passed by the State Commission for the period 1.4.2011 to 31.3.2013 after about 20 months of the 24 months in issue had been elapsed.
 - (d) that in the MYT order, dated 1.12.2012, the State Commission estimated the expenses of the distribution licensee for the years 2011-12, 2012-13 and 2013-14, but the State Commission determined the tariff only for the two years period namely; 2011-12 & 2012-13. No tariff order was passed by the State Commission at that time for FY 2013-14 under Section 64 of the Electricity Act, 2003.
 - (e) that the impugned order is illegal and passed in complete violation of the principle of natural justice and the procedure prescribed under section 64 of the Electricity Act. Section 64 of

the Electricity Act requires the tariff application to be published inviting objections and suggestions from the public at large. An opportunity of hearing is also one of the basic tenets of the principle of natural justice.

- (f) that the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission vs. CESC Limited, (2002) 8 SCC 715, para 40 held that the appropriate Commission, under Electricity Act, should ensure transparency while exercising its powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons. The statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission. The statute does not give individual rights to every one of the consumers and the same is controlled by the Regulations. When a statute confers a right in conformity with principle of natural justice, the same cannot be negative by a court on an imaginary ground that there is a likelihood of an unmanageable hearing before the Commission concerned. Such a right of hearing cannot be denied on the ground of practical inconvenience.
- (g) that this Appellate Tribunal in its judgment, dated 22.8.2014, in Appeal No. 295 of 2013, in the matter of ;Tata Motors Ltd. vs. Maharashtra Electricity Regulatory Commission, has held that the tariff Regulations of the Electricity Act do not exempt the State Commission from complying with the mandatory procedure like public hearing. Once the right of opportunity for submitting the suggestions or objections has been provided to the Consumers by the Electricity Act as well as by the tariff Regulations, the same cannot be thrown away just like that on account of any urgency by passing an order passing on additional burden on the Consumers. The same view had

earlier been reiterated in the Judgment, dated 4.4.2011, in Appeal No. 173 of 2010, by this Appellate Tribunal.

- (h) that this contention of the Respondents that since the tariff has been determined for FY 2013-14 at the same level as was for FY 2011-12 & 2012-13 and that no prejudice has been caused to the Appellant and the consumers at large, is misconceived.
- (i) that for the determination of tariff for each year, a separate exercise is required to be done by the State Commission irrespective of the fact that tariff could be higher or lower than the tariff of the previous year. The opportunity of hearing to the stakeholders should be provided before that exercise is done because then the tariff may have been reduced in favour of the consumers. The Respondents could not speculate that even if an opportunity of hearing was given, the tariff would have been the same. It is a well-settled principle of law that when the statute provides for a particular thing to be done in a particular manner, it has to be done in that matter and in no other manner as held by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v. Essar Power Limited, (2008) 4 SCC 755.
- (j) that in the present case, a particular methodology provided under section 64 of the Electricity Act, 2003 should have been followed before passing the impugned tariff order. In this case, the methodology provided under the said provision has not been followed by the State Commission for determining the tariff for third/last year of the control period of the multi-year tariff.
- (k) that Section 86(3) of the Electricity Act, 2003 also mandates the State Commission to ensure transparency while exercising its powers and discharging its functions and the basic principle of

transparency involves the principles of natural justice to be followed to arrive at considered and reasoned decision.

- (l) that the Respondents have tried to justify the impugned order based on the MYT Regulations of the State Commission. On the other hand, the MYT Regulations specifically provide for tariff to be determined for each ensuing year and not for all years together. In a MYT framework, the Revenue Requirements may be approved for all years, but is subject to adjustment on a yearly basis in the Annual Performance Review. Further, the tariff is determined on a yearly basis based on the Revenue Requirements finalized. There may be changes in the Revenue Requirements. In this regard, Regulations 2.5.1(i) and (ii) specifically provide for the tariff to be determined on a yearly basis. There is no provision in the MYT Regulations to provide for tariff to be determined in one go, or that if public hearing is held in the first year, it is not required for subsequent years.
- (m) that regarding delay in passing of the impugned order, this has been a consistent practice of the State Commission of the West Bengal to cause unreasonable delay in passing the tariff orders. For the period from 1.4.2011 to 31.3.2013, the State Commission passed the tariff order on 1.12.2012. Similarly, for the period from 1.4.2013 to 31.3.2014, the impugned order has been passed by the State Commission determining tariff only on 26.12.2013, when almost 9 months had already expired. Basic purpose of the tariff order, being passed in advance, is that the consumers ought to know the tariff in advance to enable them to plan their affairs. The National Tariff Policy also provides for the tariff petition to be filed by the licensees well in advance. Section 64 of the Electricity Act, 2003 also requires the tariff petition to be filed by the 30th of November of the previous year to give the State Commission a period of 4 months (120 days) to

finalize the tariff and notify it before 31st of March of the year and to make it applicable from 1st of April.

- (n) that this Appellate Tribunal has also repeatedly directed that the tariff petition is to be filed in time and upon the failure of the distribution licensee to file the same in time, the State Commission to initiate suo-motu proceedings for determination of tariff so that the tariff is determined in a timely manner. The same had been held by the full bench of this Tribunal, in its judgment, dated 11.11.2011, in OP No. 1 of 2011. Further, regarding the data for tariff determination not maintained by the State Commission, this Appellate Tribunal had directed that the State Commission should maintain the basic data for the determination of tariff including the roadmap for cross subsidy determination and reduction in terms of the Electricity Act and the National Tariff Policy. The distribution licensee is required to maintain and furnish the data/information with the State Commission regarding details of the voltage wise cost of supply for the consumers. This is required for determining and ensuring a trajectory for reduction of cross subsidies and determination of tariff based on costs of supply.
- (o) that there is no finding or discussion in the impugned order of the State Commission with regard to cross subsidy trajectory, road map for reduction of cross subsidies, voltage wise cost of supply etc. The State Commission does not have any such roadmap available showing the tariff within $\pm 20\%$ of the average cost of supply at the end of 2010-11. No information is available with the State Commission showing the average tariff for supply of different classes of consumers. There is also no details of the quantum of electricity delivered at various voltage levels. The State Commission has also not even conducted any cost audit to verify the prudence of the cost and expenses of the distribution licensee, on the pretext that it is not provided for in

the Regulations. These bottlenecks only hide the inefficiencies of the distribution licensee and levy a very high loss levels on the high tension consumers. This Appellate Tribunal, in various judgments, has also held that the tariff shall progressively reflect the voltage wise cost of supply and the determination of tariff based on average cost of supply for the time being may not be faulted-with in all cases.

10. **Per contra**, the Distribution Licensee/Respondent No.2 has replied to the contentions of the Appellant as under:

- (a) that the challenge in the present appeal is to the impugned order of the State Commission on the grounds, firstly, that the Impugned order has been passed in a non-transparent manner, in violation of the principle of natural justice and secondly, the State Commission has not considered the Appellant's submissions relating to determination of tariff on voltage wise cost of supply basis.
- (b) that the present appeal has been filed with the oblique purpose of challenging the findings of the State Commission in the Multi Year Tariff Order, dated 1.12.2012, ("MYT Order") that had not been challenged by the Appellant at any time, and attained finality.
- (c) that the grievance of the Appellant on the merits of the impugned order, namely; failure of the State Commission to determine tariff after working out the cost of supply on voltage-wise level, has already been addressed by the State Commission in relation to the control period in question (i.e. FY 2011-12, 2012-13 & 2013-14) vide MYT Order, dated 1.12.2012, and, therefore, the grievance stands concluded.
- (d) that the Appellant having not challenged the findings of the State Commission in the MYT Order, dated 1.12.2012, is seeking to raise these issues by raising a bogey of violation of

principle of natural justice and the same amounts to an abuse of the process of court.

- (e) that Section 64 of the Electricity Act, 2003 provides that the appropriate commission has to consider the suggestions and objections received from the public while considering the tariff petition filed by the utility. There is no requirement specified in the Act for granting an opportunity of hearing to the stakeholders. Hearing as mandated under Section 64 to be given to the applicant in case the commission decides to reject the tariff application. Hence, the manner of application of the principle of natural justice is already provided in Section 64 of the Act namely, in form of written suggestions/ objections. The Act provides for calling of suggestions and objections from the public and such opportunity of hearing is not required to be given to individual customer for tariff determination. Providing for an opportunity of hearing is only required in case the tariff application is to be rejected and no public hearing is contemplated for determination of tariff. Hence, the Court is not required to go beyond the express provision of the statute namely; Section 64 of the Electricity Act, 2003, dealing with the principle of natural justice.
- (f) that the Hon'ble Rajasthan High Court in Jetha Ram & Anr vs. State of Rajasthan (1984 WLN 580) held that providing an opportunity to the person whose rights are likely to be affected to represent his case is necessary, but the objector may not necessarily be given an opportunity of making oral submission in such and every matter. In some matters, an opportunity to file representations in writing and consideration of the written representations may be sufficient compliance with the principle of natural justice. The 'audi alteram partem' rule is a very flexible, malleable and adaptable concept of natural justice. The

principal facets of the rule of 'audi alteram partem' are as under:

- (i) *the party likely to be affected should have notice of the case it is required to meet; and*
 - (ii) *such party should have an opportunity to explain its side of the matter or to present its side of the picture.*
- (g) that, further, the Hon'ble Supreme Court in Chairman, Board of Mining Excavation and Chief Inspector of Mines and Anr. vs Nanjee in [1977] 2 SCR 904 observed that natural justice cannot be locked as a mere artifact nor we can fit natural justice into a rigid mould. The concept of reasonable opportunity is that the authority taking the final decision should not act mechanically and without applying its own mind, but must give an opportunity to the person affected to have his say.
- (h) that the Appellant's contention with respect to violation of principle of natural justice is that "For the year 2013-14, the State Commission has passed the impugned order dated 26.12.2013 determining the tariff payable by the consumers at large in the State of West Bengal. **According to the Tariff Regulations of the State Commission, a composite application for the control period shall be made and the stakeholders comments and suggestions are to be invited against such composite application for tariff determination. The Appellant has also chosen to not disclose the fact that TP-53/11-12 was filed as a composite application for determination of ARR and Tariff for each ensuing year of 3rd control period and the stakeholders comments/objection in TP-53/11-12 were invited vide publication, dated 10.04.2012, itself. The Appellant had thereon submitted its comments on 14.5.2012 to the Respondent Commission. Thus, a mere glance of**

publication, dated 10.4.2012, establishes beyond doubt that the requirement under Section 64 of the Electricity Act, 2003 and Regulation 2.5 of the State Commission's Regulations, 2011 were satisfied by the distribution licensee and the tariff determination process was conducted by the State Commission in a transparent manner. Thus, the Appellant had submitted its objections to the composite tariff application, being TP-53/11-12, and the State Commission had considered the objections of the Appellant while passing the MYT Order, dated 1.12.2012, which has attained finality. However, in the MYT Order, dated 1.12.2012, the Petition was erroneously noted as TP 53/12-13, which was subsequently corrected by the State Commission vide its corrigendum, dated 5.12.2012. Therefore, there was no occasion for the State Commission to seek further objections from the stakeholders.

- (i) that the State Commission, vide impugned order, dated 26.12.2013, has merely provided the **tariff design** for which the petition was already filed in March 2012, and objections/comments were invited on 10.04.2012, which fact is clear from the publication, dated 10.4.2014.
- (j) that the same figures have been adopted by the State Commission for determining the tariff for the 3rd/last year of the MYT period in the impugned order, figures have been derived from the earlier tariff (MYT) order, dated 1.12.2012. Therefore, the Appellant cannot now challenge the tariff determination on merits, which essentially gives effect to the findings in the MYT order, dated 1.12.2012, wherein the State Commission had also worked out the amounts to be allowed as per ARR of 2013-14 on the terms indicated therein. This Appellate Tribunal, vide its judgment, dated 26.2.2009, in Appeal No. 106 of 2008, had already settled the law observing

that the structuring of tariff is the prerogative of the Commission for which, no notice is required to be issued to stakeholders. The Tribunal had also held that “the Commission has power to design the tariff as per its own wisdom and the Commission need not issue the actual order publicly announcing the tariff it proposes and call for public comments.”

- (k) that the Tariff Determination under MYT framework is a two part process, first part comprises of determination of ARR and second part is tariff designing and, therefore, the tariff determination cannot be considered separate from determination of ARR. Determination of ARR is part of the tariff determination process prescribed under section 64 of the Electricity Act, 2003 and, accordingly, the State Commission in case in hand, had invited objections/suggestions from the stakeholders at the time of determination of ARR. Thus, the Impugned Order is a mere tariff designing exercise undertaken by the State Commission as part of the same proceedings, wherein ARR was determined after inviting objections/suggestions.
- (l) that even assuming but not admitting that the principles of natural justice have been violated in passing the impugned order, the law is well settled that mere infraction of the principles of natural justice does not by itself cause a ground for interference by the court unless some actual grievance is shown to have been caused by such infraction. In the present matter, no detriment has been caused to the Appellant under the Impugned Order, the ARR considered by the State Commission is the same as that was determined under the MYT Order, dated 1.12.2012, and the tariff is also the same as was provided for the year 2012-13.
- (m) that the Appellant has not raised any new issues that were not before the State Commission, while issuing the MYT Order,

dated 1.12.2012. The Hon'ble Supreme Court, in Ashok Kumar Sonkar vs. Union of India & Others (2007) 4 SCC 54 held that violation of natural justice has to be coupled with some actual grievance and the actual prejudice must be shown.

- (n) that regarding determination of tariff on voltage wise cost of supply basis, the Appellant has not disclosed before this Appellate Tribunal the fact that the issue of voltage-wise cost of supply was in fact raised by the Appellants in their objection to the composite tariff petition, which was already dealt with by the State Commission at para 3.29 of the MYT Order, dated 1.12.2012. Since, no appeal against the said MYT order was filed by the Appellant, the same issue stands concluded between the parties and the Appellant accordingly is barred from raising this issue again.
- (o) that the State Commission, in the MYT order, dated 1.12.2012, duly considered the distribution licensee's petition and stakeholders comments in accordance with the Regulatory framework and, accordingly, determined tariff by trying to limit the cross-subsidy levels $\pm 20\%$ of the average cost of supply in accordance with the State Regulations.
- (p) that Regulation 2.2.1(vii) of the Tariff Regulations categorically provides for average cost of supply. The said Regulation is reproduced as under
- "That the tariff progressively reflects the cost of supply of electricity and also reduces cross subsidies within three years so that for any class of consumers the average tariff for that class does not go either below 80% of the average cost of supply or above 120% of the average cost of supply;"*
- (q) that, thus, under the statutory framework of the State Commission, there is no provision that require the State Regulatory Commission to determine the cost of supply at respective voltage level. The State Regulations clearly require tariff to be worked out considering average cost of supply,

therefore, determination of cost of supply at respective voltage level is inconsonance with the express provisions of the State Tariff Regulations.

- (r) that in the present Appeal, the Appellant is trying to challenge the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 before this Appellate Tribunal for which the Appellant should approach the appropriate forum i.e. the Writ Court.

OUR DISCUSSION AND CONCLUSION:

11. Without adverting to the rival contentions and in order to avoid repetition, we directly proceed to discuss the issue involved in this Appeal.

12. First of all, we deem it necessary to mention that the Appellant has no grievance regarding the rate of tariff determined by the impugned order because the tariff rate remains the same by the previous tariff order, dated 1.12.2012, and the impugned order, dated 26.12.2013. It is the admitted case of the Appellant that the previous tariff order, dated 1.12.2012, was not challenged by the Appellant and the same attain finality. The grievance of the Appellant in short is that on the same basis on which the first tariff order, dated 1.12.2012, was passed, the same basis has been adopted by the State Commission in the impugned order determining the tariff for the retail supply consumers for FY 2013-14.

13. For the purposes of determination of tariff, the State Commission has framed and notified the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 with effect from 25.4.2011. This Tariff Regulations are applicable for the multi-year period 2011-12 to 2013-14 (3 years).

14. The first tariff application/petition, being Case No. TP/53/11-12, was filed by the Respondent No. 2, a Distribution Licensee herein, under the said

Tariff Regulations, 2011 on 30.3.2012, for approval of the annual revenue requirements and determination of the tariff for the period 2011-12 and 2012-13. The said tariff application was published in newspapers and also made available on the website of the State Commission. The State Commission, after perusing the objections/representations of the stakeholders, passed the Multi Year Tariff (MYT) order, dated 1.12.2012, for the two Financial Years namely; FYs 2011-12 and 2012-13 on the basis of average cost of supply for determination of tariff. No appeal was filed by the Appellant or by any stakeholder against the MYT Order, dated 1.12.2012, and the same became final having attained finality.

15. The learned State Commission proceeded to determine revenue recoverable through tariff by the Respondent No.2/distribution licensee during the year 2013-14 as also the tariffs of distribution licensee for 2013-14 on the basis of ARR determined for 2013-14 in the tariff order, dated 1.12.2012, for the years 2011-12 and 2012-13 and adjustments, if any, in accordance with the Tariff Regulations, 2011.

16. The learned State Commission, vide MYT order, dated 1.12.2012, determined the ARR of the distribution licensee separately for each of the three years of the third control period covering the years 2011-2012, 2012-2013 and 2013-2014 in the tariff order for 2011-2012 based on the analyses and findings recorded in that order, dated 1.12.2012 in the same application/petition, being Case No. TP/53/11-12. The State Commission, in the tariff order, dated 1.12.2012, considered for adjustment of the amounts as detailed in paragraph 6.2(i) and 6.3 of the order, dated 1.12.2012, in connection with determination of the revenue recoverable through tariff for the year 2013-14. The State Commission decided to continue with the adjustment of the said amount in determination of revenue recoverable through tariff for 2013-14. Thus, the State Commission, by the impugned order, decided the tariff for FY 2013-14 adopting the same figures as decided in the MYT order, dated 1.12.2012.

17. The main thrust of the argument of the Appellant is that the State Commission passed the impugned order, dated 26.12.2013, without following the procedure laid down under Section 64 of the Electricity Act, 2003. The State Commission, before passing the impugned order, did not publish in the newspaper and did not invited objections and did not provide opportunity for hearing to the stakeholders and in violation of principle of natural justice, passed the impugned order.

18. It is clearly the contention of the Appellant that in a MYT framework, the Revenue Requirements may be approved for all years, but is subject to adjustment on a yearly basis in the Annual Performance Review. Further, the tariff is determined on a yearly basis based on the Revenue Requirements finalized and there may be changes in the Revenue Requirements. There is no provision in the MYT Regulations to provide for tariff to be determined in one go, or that if public hearing is held in the first year, tariff determination exercise, the public hearing is not required for subsequent years. The reply to the main contention of the Appellant has made by the Respondent No.2 is that Section 64 of the Electricity Act, 2003 provides that the appropriate commission has to consider the suggestions and objections received from the public while considering the tariff petition filed by the utility. There is no requirement specified in the Act for granting an opportunity of hearing to the stakeholders. Hearing as mandated under Section 64 to be given to the applicant in case the commission decides to reject the tariff application. Hence, the manner of application of the principle of natural justice is already provided in Section 64 of the Act namely, in form of written suggestions/ objections. The Act provides for calling of suggestions and objections from the public and such opportunity of hearing is not required to be given to individual customer for tariff determination. Providing for an opportunity of hearing is only required in case the tariff application is to be rejected and no public hearing is contemplated for determination of tariff. Hence, the Court is not required to go beyond the express provision of the statute namely; Section 64 of the Electricity Act, 2003, dealing with the principle of natural justice.

19. We find that according to the Tariff Regulations, 2011, a composite application for the control period shall be made and the stakeholders comments and suggestions are to be invited against such composite application for tariff determination. The distribution licensee filed the petition being Case No. TP-53/11-12 as a composite application for determination of ARR and Tariff for each ensuing year of 3rd control period and the stakeholders comments/objection in the said petition were invited vide publication, dated 10.04.2012, itself. The Appellant then had submitted its comments on 14.5.2012 to the State Commission. Thus, the State Commission had considered the objections of the Appellant while passing the MYT Order, dated 1.12.2012, which attained finality. We, further, hold that the State Commission, vide impugned order, dated 26.12.2013, has merely provided the tariff design for which the petition was already filed in March 2012, and objections/comments were invited on 10.04.2012, and the procedure provided under Section 64 of the Electricity Act, 2003, was completely followed. The same figures have been adopted by the State Commission for determining the tariff for the 3rd/last year of the MYT period namely; 2013-14, in the impugned order, which have been derived from the MYT order, dated 1.12.2012. Therefore, the Appellant cannot now legally challenge the tariff determination on merits, which essentially gives effect to the findings recorded in the MYT order, dated 1.12.2012, wherein the State Commission had also worked out the amounts to be allowed as per ARR of 2013-14.

20. The impugned order assailed before us by the Appellant is just and legal one and inconsonance with the observation made by this Appellate Tribunal in its judgment, dated 26.2.2009, in Appeal No. 106 of 2008, holding that the structuring of tariff is the prerogative of the Commission for which, no notice is required to be issued to stakeholders and the appropriate Commission has power to design the tariff as per its own wisdom.

21. We, further, hold that the Tariff Determination under MYT framework is a two part process, first part comprises of determination of ARR and second part is tariff designing and, therefore, the tariff determination cannot be

considered separate from determination of ARR. Further, determination of ARR is part of the tariff determination process prescribed under section 64 of the Electricity Act, 2003 and, accordingly, the State Commission in this case, had invited objections/suggestions from the stakeholders at the time of determination of ARR for 3rd control period comprising three years i.e. 2011-12, 2012-13 and 2013-14. Thus, the Impugned Order is a mere tariff designing exercise undertaken by the State Commission as part of the same proceedings, wherein ARR for the MYT period was determined after inviting objections/ suggestions from the stakeholders. Though, the stakeholders, including the Appellant/petitioner, had filed their objection/suggestions at the time of determination of ARRs before passing of the MYT order, dated 1.12.2012, and after publication of the tariff petition/application, making the same available on the website of the State Commission and inviting objections/suggestions from the stakeholders, including the Appellant, and having heard the stakeholders after giving opportunity of hearing to them, and adopting the methodology provided under Section 64 of the Electricity Act, 2003, the State Commission passed the MYT order, dated 1.12.2012, whereby, the State Commission had determined the ARR for each tariff year of three years control period namely; 2011-12, 2012-13 and 2013-14 and determined the tariff for the first two years of the MYT period. In the present case, no determination or prejudice had been showed to have been caused to the Appellant so far as the impugned order is concerned. The ARR determined by the State Commission in the impugned order is the same as the same was determined under the MYT order, dated 1.12.2012, and the tariff is also the same as was provided for FY 2012-13. The Appellant/petitioner tried to raise certain grievances against the MYT order, dated 1.12.2012, under the garb of challenging the impugned order in this Appeal, which merely provides the tariff design for the next FY 2013-14, which the Appellant cannot legally do because the tariff order, dated 1.12.2012, had already become final as not challenged by any of the stakeholders including the Appellant/petitioner before this Appellate Tribunal or any other higher Forum.

22. In view of the above, we find that there is no violation of the principle of natural justice in passing the impugned order. No fresh public notice or fresh opportunity of hearing was required to be given by the State Commission. A composite application/petition was filed by the distribution licensee for MYT period of three years namely; 2011-12, 2012-13 and 2013-14 and the learned State Commission, vide the MYT order, dated 1.12.2012, had determined the ARR for each year of the MYT period and determined the tariff for the first two years. By the impugned order, the learned State Commission having adopted the same facts and figures as determined in ARR for 2013-14, has provided tariff design and determined the tariff for the next tariff year namely; FY 2013-14 of the MYT period. In such situation, the State Commission is not mandated to re-undergo or readopt the methodology provided under Section 64 of the Electricity Act, 2003 while adopting the same norms and figures particularly when the tariff remains the same. **In view of the above, the sole issue is decided against the Appellant and this Appeal is liable to be dismissed.**

ORDER

In view of the above, we do not find any merits in the Appeal and the instant Appeal, being Appeal No. 77 of 2014, is hereby dismissed without any order as to costs. The impugned order, dated 26.12.2013, passed by the West Bengal Electricity Regulatory Commission in Case No. TP/53/11-12, is hereby affirmed

PRONOUNCED IN THE OPEN COURT ON THIS 13TH DAY OF MAY, 2015.

**(T Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ **REPORTABLE/NON-REPORTABLE**

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