

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 154 OF 2014**  
**APPEAL No.156 OF 2014**  
**AND**  
**APPEAL NO.157 OF 2014**

**Dated :30th November, 2014**

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**Appeal No. 154 OF 2014**

**In the matter of :**

**North Eastern Electricity Supply Company of Odisha Ltd.,  
(NESCO)  
Plot No.N1/22, IRC Village, Nayapalli,  
Bhubaneswar**

**... Appellant**

**Versus**

- 1. Odhisha Electricity Regulatory Commission  
Bidyut Niyamak Bhawan,  
Unit-VIII,  
Bhubaneswar,  
Distt-Khurda, Odisha-751 012**
- 2. Commissioner & Secretary,  
Department of Energy  
Government of Orissa  
Odisha Secretariat  
Bhubaneswar-751 001**

3. **Odisha Consumers' Association,  
Balasor Chapter, AT/PO: Rudhunga  
Via/PS:Simulia, Distt-Balasore-756 126**
4. **The Secretary,  
PRAYAS Energy Group,  
C/O Amrita Clinic  
Athawale Corner, Karve Road,  
Deccan Gymkhana, Pune-411 004**
5. **Central Electricity Supply Utility of Odisha,  
2<sup>nd</sup> Floor, IDCO Towers,  
Bhubaneswar-751 022**

**.... Respondent(s)**

Counsel for the Appellant(s) : Mr.Buddy A Ranganadhan  
Mr. Hasan Murtaza  
Mr.Aditya Panda

Counsel for the Respondent(s): Mr. Prashanto Chandra Sen  
Mr. Rutwik Panda  
Mr. Anushruti

**APPEAL No.156 OF 2014**

**In the matter of :**

**Southern Electricity Supply Company of Odisha Ltd.,  
Plot No.N1/22, IRC Village, Nayapalli,  
Bhubaneswar-751 015**

**... Appellant**

**Versus**

- 1. Odhisha Electricity Regulatory Commission  
Bidyut Niyamak Bhawan,  
Unit-VIII,  
Bhubaneswar,  
Distt-Khurda, Odisha-751 012**
- 2. Commissioner & Secretary,  
Department of Energy  
Government of Orissa  
Odisha Secretariat  
Bhubaneswar-751 001**
- 6. Grahak Panchayat  
Friends Colony,  
Paralakhemundi  
Distt-Gajapati-761 200**
- 7. The Secretary,  
PRAYAS Energy Group,  
C/O Amrita Clinic  
Athawale Corner, Karve Road,  
Deccan Gymkhana, Pune-411 004**
- 8. Central Electricity Supply Utility of Odisha,  
2<sup>nd</sup> Floor, IDCO Towers,  
Bhubaneswar-751 022**

**.... Respondent(s)**

Counsel for the Appellant(s) : Mr.Buddy A Ranganadhan  
Mr. Hasan Murtaza  
Mr.Aditya Panda

Counsel for the Respondent(s): Mr. Prashanto Chandra Sen  
Mr. Rutwik Panda  
Mr. Anushruti

**APPEAL NO.157 OF 2014**

**In the matter of :**

**Western Electricity Supply Company of Odisha Ltd.,  
(WESCO)  
Plot No.N1/22, IRC Village, Nayapalli,  
Bhubaneswar**

**... Appellant**

**Versus**

- 1. Odhisha Electricity Regulatory Commission  
Bidyut Niyamak Bhawan,  
Unit-VIII,  
Bhubaneswar,  
Distt-Khurda, Odisha-751 012**
- 2. Commissioner & Secretary,  
Department of Energy  
Government of Orissa  
Odisha Secretariat  
Bhubaneswar-751 001**
- 9. Sambalpur, Distric Consumer's Federation,  
Balaji Mandir,  
Bhavan,  
Khetrajpur,  
Sambalpur-768 003**

10. **Sundargarh District Employee Association,  
AL-1, Basanti Nagar,  
Rourkela-769 012**
11. **The Secretary,  
PRAYAS Energy Group,  
C/O Amrita Clinic  
Athawale Corner, Karve Road,  
Deccan Gymkhana, Pune-411 004**
12. **Central Electricity Supply Utility of Odisha,  
2<sup>nd</sup> Floor, IDCO Towers,  
Bhubaneswar-751 022**

**Respondent(s)**

Counsel for the Appellant(s) : Mr.Buddy A Ranganadhan  
Mr. Hasan Murtaza  
Mr.Aditya Panda

Counsel for the Respondent(s): Mr. Prashanto Chandra Sen  
Mr. Rutwik Panda  
Mr. Anushruti

**JUDGMENT**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. The Appellants are the North Eastern Electricity Supply Company of Odisha Ltd ,Southern Electricity Supply Company

of Odisha Ltd and Western Electricity Supply Company of Odisha Ltd.,

2. Challenging the Impugned Order dated 26.4.2014, these Appeals have been filed.
3. At the time of admission, this Tribunal noticed in the Appeals that the main ground raised in these Appeals is that the directions and finding given by this Tribunal in various judgments have not been complied with by the State Commission. On noticing that while admitting these Appeals, we felt that it would be appropriate to direct the State Commission to give explanation as to why the findings and directions have not been complied with.
4. The judgments giving various findings and directions are as follows:

- i) Appeal No.77,78, 79 of 2006 dated 13<sup>th</sup> December, 2006;
- ii) Appeal Nos.52, 53, 54 of 2007 dated 8<sup>th</sup> November, 2010;
- iii) Appeal Nos 26-28 of 2009, 160-162 of 2010, 147-149 of 2011, 193-195 of 2012, 196 of 2012 dated 3<sup>rd</sup> July, 2013
- iv) Appeal No.112-114 of 2013 dated 11<sup>th</sup> February, 2014.

5. Accordingly we directed the Registry to call for the explanation from the State Commission as to why the directions earlier given in various judgments have not been complied with.

6. Pursuant to the said order, the State Commission sent the explanation and filed an Affidavit before this Tribunal on 27.8.2014. The copy of the Affidavit as well as the

explanation was served on the Appellant. The Appellant pointed out that the State Commission in their explanation clearly admitted that the directions given in the various judgments of this Tribunal have not been complied with by the State Commission due to some difficulties.

7. According to the Appellant the four judgments of this Tribunal which have not been admittedly complied with are as follows:

- a) Judgment dated 13.12.2006 in Appeal No.77,78, 79 of 2006;
- b) Judgment dated 8.11.2010 in Appeal Nos.52, 53, 54 of 2007;
- c) Judgment dated 03.7.2013 in Appeal Nos. 26-28 of 2009, 160-162 of 2010, 147-149 of 2011, 193-195 of 2012, 196 of 2012.

d) Judgment dated 21.2.2014 in Appeal No.112-114 of 2013.

8. The Appellant referred to the Affidavit as well as the Written Submissions filed by the State Commission admitting the said non compliance.
9. Some of the portions of the said Affidavits and submissions are extracted herein below:

**(1) Affidavit dated 21.7.2014 page 9 para 8.**

*“That the State Commission has complied the directions given by the Hon'ble Tribunal except the issue of distribution losses/notational sale. That is due to practical difficulties and statutory constrain.”*

**(2) Affidavit dated 21.7.2014 page 15 para 9 (i) and 10.**

*“9 (i) Due to practical difficulties and constrain of Statutory Rules and Regulations, and the State Commission for the interest of Electricity Consumers in the State of Odisha has filed a Civil Appeals before the Hon'ble Supreme Court, which are already being admitted and pending for final adjudications.”*

*“10. That the State Commission is a statutory body and it has an obligation/duty to protect the electricity sector of the State as well as all its stake holders and general electricity consumers.”*

**(3) Written submissions filed on 15.9.2014 page 3 first bullet point:**

“The issue of difficulties in compliance of some of the directions of this Hon'ble Tribunal has therefore been directed to be finally heard by the SC in three months time. In deference to the above order, it is being requested that this Hon'ble Tribunal may be pleased to await the outcome of the pending appeal in the Supreme Court where the issue of the difficulties in compliance of the order of this Hon'ble Tribunal are also at large.”

**(4) The status of compliance annexed to submission dated 15.9.2014, para 8: -**

*“ The difficulties in implementing the orders of Hon'ble Appellate Tribunal for Electricity consequent to revision of past orders from 2006-07 onwards are as follows:-*

- 1. The numbers of consumer have changed considerably from 23 lakh during 2006-07 to 53 lakhs during 2013-14 most of them are LT and BPL consumers category. On the other hand may HT and EHT industries have left the system due to*

*establishment of their own CGP Open Access and global recession (Pg 97-98/CA 3858-60/2014).*

*2. If there is any tariff hike due to revision of past year ARR that will be borne by the existing LT and new consumers who would be carrying the burden of the past consumers many of whom have already left the system.*

*3. It is estimated that the amounts to be recovered after implementation of Hon'ble Appellate Tribunal for Electricity orders from the consumers would be approximately Rs.4200 Cr from 2006-07 to 2012-13. It would be difficult to pass through such a huge amount in one-year tariff. In this regard the Commission may treat it as a Regulatory Asset to be recovered from tariff within a three years as per Para 8.2.2 of Tariff Policy Pg. C/CA 3858-60/2014).*

*4. Moreover in case such huge regulatory asset is amortized to tariff then the tariff will go beyond a 20% of the average cost of supply in violation of tariff policy.*

*5. The implementation would also require detailed public hearing to resolve all issues since the public at large would be affected by the decision (Pg 90-91/CA 3858-60/2014).*

*6. It is therefore important that this is done after the order of the Supreme Court is passed. This is*

*because if the orders of the ATE are implemented and thereafter the Supreme Court overturns the order of ATE, it would result in it situation where the Commission would be unable to recover. Consumers would have already paid for the excess arrears and it would be impossible for the Commission to ensure that the very same consumers are refunded the said amount. It would complicate the matters considerably.”*

10. Subsequent to the filing of the Written Notes by the Appellant, the Commission filed a reply on 8.10.2014 putting the blame on the Appellant in conducting Energy Audit due to which some of the directions have not been complied with.

The relevant portion is as follows:

*“The Commission has by its earlier written submissions dated 15.09.2014 and the present written submissions, sought to bring out the difficulty and the huge financial implication which would involve if the contentions of the appellant are accepted. It is well established that in cases where an appeal is pending and where huge civil consequences are involved, then in that event it is better to await the outcome of the appeal.*

*The matter is likely to come up by November, 2014 when the entire issue would be taken up by the Hon'ble*

*Supreme Court. These very issues of implementation are at large before the Hon'ble Supreme Court. The appellants are therefore prematurely insisting on the implementation of the orders of this Hon'ble Tribunal despite having been informed of the difficulty.”*

11. The affidavit dated 21.7.2014, Written Submission dated 14.9.2014 and the reply dated 8.10.2014 clearly indicate that the State Commission admitted that they have failed to implement the directions given in various judgments of this Tribunal.
12. As mentioned above, the main issue that arises for consideration is relating to the refusal or failure to comply with the directions and implement the judgment of this Tribunal.
13. It is well settled that when a subordinate authority refuses to implement the judgment of the Appellate authority, the situation is akin to anarchy and will result in complete breakdown of the judicial stem. While dealing with the issue

with reference to the non compliance of the findings and directions issued by the Tribunal, it would be worthwhile to refer to the various judgments of the Hon'ble Supreme court referring to the principles laid down with regard to the necessity for the lower authority to comply with the directions given by the Appellate Authority. Those decisions are as under:

- (a) (2004) 5 SCC 1-Tirupati Balaji Developers (P) Ltd V State of Bihar;
- (b) (1992) Supp (1) SCC 443-Smt Kausalya Devi Bogra and Ors V Land Acquisition Officer, Aurangabad an Anr;
- (c) (1984) 2 SCC 324 –Union of India v Kamalkshi Finance Corporation
- (d) (2013) 2 SCC 398-Kishore Samrite Vs State of UP and Ors;

14. The principles laid down in these judgments are as follows:

- (a) There are two important postulates of constituting the appellate jurisdiction: (i) the existence of the relation of superior and inferior court; and (ii) the power in the former to review decisions of the latter. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against. In the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand.
  
- (b) The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of the latter to carry out such directions or show disrespect to

or to question the propriety of such directions would – it is obvious – be destructive of the hierarchical system in the administration of justice.

- (c) The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not “acceptable” to the subordinate authority cannot and should not be the ground for not following the said directions.
- (d) The direction of the appellate court is certainly binding on the courts subordinate thereto. Judicial discipline required and decorum known to law warrants that appellate directions should be taken as binding and followed.

(e) willful refusal to implement the judgments of this Hon'ble Tribunal not only subvert the rule of law but also constitute judicial impropriety .

(f) Judicial discipline and propriety are two significant facets of administration of justice. Every court is obliged to adhere to these principles to ensure hierarchal discipline on the one hand and proper dispensation of justice on the other.

15. In the light of the mandatory principles, we are to consider the issue relating to the non compliance of the directions and findings given in the judgments of this Tribunal by the State Commission.

16. The learned Counsel for the Appellant has pointed out the following aspects which have not been taken note of by the

State Commission while passing the Impugned Order.

Those aspects are as follows:

(a) The State Commission has persistently fixed loss level targets without taking into account the ground realities contrary to the four earlier judgments of this Hon'ble Tribunal. As a result the tariffs based on approved loss levels do not cover even the OERC approved costs forcing the Distribution Companies into financial distress.

(b) The State Commission has not implemented the Tribunal's Orders from FY 07 to FY 14 regarding reassessment of unrealistic loss level targets.

(c) This Tribunal made a specific observation in Appeal No.52, 53 and 54 of 2007 with regard to the additional expenses incurred. The same is as follows:

*“ As regards the additional expenses incurred on taking energy audit, the energy audit had been undertaken by the Appellants since the revocation proceedings had been initiated against the Appellants on that ground. Thus, on the one hand the licenses of the Appellants were sought to be revoked on the ground that spot billing was not introduced and not taking full energy audit and on the other hand, when the Appellants introduced the same, the State Commission had chosen to disallow the additional expenditure on these activities. This finding is wrong.”*

(d) The perusal of the observation made by the Tribunal would indicate that the Tribunal specifically held that in the absence of a favorable situation, which would have enabled the Distribution Companies towards smooth undertaking of the energy audit exercise on a full scale which has not happened.

(e) Despite the above finding of this Tribunal, the State Commission even subsequent to that, did not

permit the cost of energy audit in the ARR of the Discoms and is seeking to capitalize on the Discoms for not carrying out the energy audit.

(f) Sec 61 empowers the State Commission for tariff determination. It is only after the ARR is computed on realistic loss levels that the gap is ascertained that measures to bridge such gap which could be either through RST hike, or decrease in BST, or Govt. subsidy or a combination of all measures is worked out. The State Commission never quantified the amount of gap and its queries pertaining to subsidy support from the Govt which was general in nature.

(g) In fact, the State Commission in case No. 107 of 2011 in the order dated 29.3.2012 had directed GRIDCO that after retaining assets of the value of

Rs.250 Cr release remaining assets to Discoms for hypothecation. However, GRIDCO did not adhere to the order of the Hon'ble OERC and did not release the balance-hypothecated assets to the Discoms.

(h) As a matter of fact, the 3rd July 2013 Judgment again categorically held that the requisite funds necessary to reduce distribution losses never materialized. Hence the question of reducing distribution losses never really arose.

17. The Appellant has cited several situations like this, in order to show that this was total non compliance of the directions given by this Tribunal.
18. The Appellant has pointed out some of the portions of the judgment in Appeal No.112-114 of 2013 by this Tribunal. Some of the portions of the judgments are as follows:

***“(C) Issue No.3: Administrative and General Expenses:***

*The Orissa Commission has disallowed A&G expenses observing that the Distribution Losses are controllable. However, certain expenses such as Spot Billing and Energy Audit are fully covered by the Full Bench Judgment dated 08.11.2010 of this Tribunal in Appeal No.52-54 of 2007 and also by the Judgment dated 03.07.2013 of this Tribunal in Appeal Nos. 112,113 and 114 of 2013”*

19. This Hon'ble Tribunal in Appeal No.26-29 of 2009 and batch in appeals pertaining to FY 2009-10 and batch had held as under:-

*“The State Commission had noted the findings of this Tribunal in judgment dated 8.11.2010 in Appeal Nos. 52 of 2007 and batch but decided not to implement the same as it had preferred a Civil Appeal against the above judgment. The relevant findings of the State Commission are as under:-*

*“430. The Hon'ble ATE in appeal No.52, 53 and 54 of 2007 filed by WESCO, NESCO and SOUTHCO aggrieved over the approval of their ARR and for determination of Retail Supply Tariff in respect of FY 2007-08 have pronounced following judgment*

*dated 8th November, 2010 with regard to issue of Administrative and General Expenses. The extract of the same judgment is reproduced below:*

*“37. (v) xxxx In regard to Administrative and General Expenses, the State Commission has also disallowed the additional costs on account of distribution of spot billing on consumers conducting of energy audit. These activities were initiated by the Appellants as non introduction of the spot billing and not conducting energy audit were some of the grounds for seeking revocation of the license of the Appellants by the State Commission. However, the expenditure on carrying out their activities was not allowed in the ARR for FY 2007-2008 even though the Appellants had submitted details of the expenditure to the State Commission.”*

*Therefore, finding of the State Commission on this issue cannot be held valid. Accordingly, this point is also answered in favour of the Appellants.”*

The State Commission had inter alia, held that

*“*  
*..*

*431. The Commission has taken note of the observation made by the Hon'ble ATE in the said order while approving the ARR of Licensee for FY 2011-12. The Commission in this regard has however preferred Civil Appeal against the above judgment of the Hon'ble*

*ATE before the Hon'ble Supreme Court in the Appeal CA No. D4688 of 2011.*

20. The explanation offered by the Commission for non compliance was that the Commission has filed various Appeals before the Hon'ble Supreme Court against the judgment of Tribunal and the same are pending.
21. That apart, it is pointed out that there are some difficulties in implementation of the orders.
22. As indicated above, the Hon'ble Supreme Court in the various decisions held that the orders of the superior authority have to be followed by the Inferior authority unless the same is suspended or stayed. Admittedly, the Hon'ble Supreme Court had not granted any stay in any of the Appeals filed against our findings and directions.
23. We need not refer to all the judgments in respect of the findings especially when the State Commisison itself

admitted that those directions have not been complied with due to some difficulties. The ground for non compliance is because of the fact that the Appeals are pending in the Supreme Court in which no stay is granted and there are some difficulties for non compliance. These grounds cannot be the valid ground for not following our directions.

24. Thus, it is crystal clear that the State Commission has violated our directions and refused to pass the consequential orders. In this context, with anguish, we have to observe that the Orissa Commission, over the several years has been deliberately violating our directions in the various judgments.

25. Recently in our judgment dated 29.11.2014 in Appeal No.317 of 2013 we have held that the Orissa Commission has not only violated our directions but deliberately refused

to pass the consequential orders which is nothing but judicial indiscipline. Further, we have observed as under:

*“22. ....We are pained to observe that the Impugned Order rather reflects incompetence, impertinence as well as insubordination indicating that the State Commission’s attitude that it was not inclined to follow the directions issued by the Appellate Tribunal.*

*23. This is purely insubordination. We can even condone the inefficiency and advise them for improvement but, not insubordination to the Tribunal.*

*24. In this context, with great anguish, we have to observe that we have been watching for several years, the unfair conduct of this Commission through its various orders which bent upon violating all our directions given in our every judgment.*

*25. There is an indication in the Impugned Order justifying for not following our directions and indirectly holding that the Order of the Tribunal was wrong. This conduct reflects utter indiscipline on the part of the quasi judicial authority which is expected to know law and judicial propriety.*

*26. Some of the decisions which are quite relevant with regard to judicial discipline which have to be followed by the Subordinate authorities. They are as follows:*

(a) *AIR 1961 SC 182 (Bhopal Sugar Industries Limited vs ITO)*

(b) *(1988) 3 SCC 579 (Jain Exports Private Limited Vs Union of India)*

(c) *1992 Supp (1) SCC 443 (Union of India Vs Kamlakshi Finance Corporation Ltd)*

(d) *(2011) 3 SCC 573 (RBF Rig Corporation Vs Commissioner of Customs)*

27. *The crux of the principles which have been laid down in those judgments are as under:*

*(a) The quasi judicial authority who is subordinate to the Tribunal cannot sit in the Appeal over the judgment of the Tribunal. It was not open to the judicial authority to say that the order of the Tribunal was wrong.*

*(b) In the hierarchy system of the Courts which exists in the Court, it is necessary for each lower tier to accept loyally the decision of the higher tiers.*

*(c) The orders of the Tribunal is binding on the lower authorities who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the Appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the Appellate authority is not “acceptable” to the lower authority; it cannot*

*be the ground for not following the directions of the Appellate authority. If this healthy rule is not followed, the result will only be undue harassment to the parties and chaos in administration of laws.*

28. *In yet another recent judgment of the Hon'ble Supreme Court in Civil Appeal No.3415 of 2007 in the case of Oil & Natural Gas Corporation Limited Vs Western Geco International Limited, Hon'ble Justice T S Thakur heading the Bench of Hon'ble Supreme Court has made following observations about the necessity for the judicial authority to adopt judicial approach while deciding the issue. The relevant observations are as follows:*

*“The first and foremost is the principle that in every determination, whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a ‘judicial approach’ in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. **What must be remembered is that the importance of judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in***

***an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision”.***

29. *The above observations made by the Hon’ble Supreme Court would squarely apply to the present case.*

30. *In this matter, there is total lack of judicial approach on the part of the State Commission. In fact, in the judgment of the Hon’ble Supreme Court that importance of the judicial approach in the quasi judicial determination lies in the fact that the Court or Tribunal while exercising the powers that may affect the rights of the parties shows fidelity to judicial approach, the quasi judicial authorities cannot act in an arbitrary, capricious or whimsical manner. The judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner. The decision of the Quasi judicial authority should not be actuated by extraneous consideration”.*

27. Even though we find that there is deliberate violation on the part of the State Commission, we would like to give one more opportunity to the State Commission to comply with

our judgments at least now. Accordingly, it is directed that the State Commission should initiate the proceedings after following the procedure and pass orders. We hope that the State commission will decide the matter without being influenced by its earlier orders and the various allegation made by the Appellant.

28. Accordingly, the Appeals are allowed and order Impugned is set aside. The matter is remanded to the State Commission to pass consequential orders after hearing the parties, without giving any room for further complaint of violation of our earlier direction. We expect that the State Commission would correct their approach towards the proper path in future without forgetting the maxim “**Justice is not only to be done but also seen to be done**”.

29. No Order as to costs.

30. Pronounced in the Open Court on this 30<sup>th</sup> day of  
November, 2014.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

**Dated:30<sup>th</sup> November, 2014**

**REPORTABLE/~~NON-REPORTABLE~~**