West Bengal Electricity Regulatory ... vs C.E.S.C. Ltd. Etc. Etc. on 3 October, 2002

Equivalent citations: AIR2002SC3588, [2003(1)JCR194(SC)], JT2002(7)SC578, 2002(7)SCALE217, (2002)8SCC715, AIR 2002 SUPREME COURT 3588, 2002 AIR SCW 4212, (2002) 7 JT 578 (SC), (2003) 1 JCR 194 (SC), 2002 (6) SLT 53, 2002 (10) SRJ 232, 2002 (7) JT 578, 2002 (7) SCALE 217, 2002 (4) LRI 289, 2002 (8) SCC 715, (2002) 7 SUPREME 206, (2003) 1 CIVLJ 256, (2002) 2 ORISSA LR 311, (2002) 94 CUT LT 168, (2002) 4 CURCC 135, (2002) 7 SCALE 217, (2003) 1 WLC(SC)CVL 37

Bench: N. Santosh Hegde, B.N. Agarwal, B.P. Singh

JUDGMENT

Santosh Hegde, J.

1. Leave granted in SLP (SIC) No. CC 6293/02 & SLP (SIC) No. CC 6307/02. In the connected appeals, leave has already been granted. All these matters raised common question of law and facts, hence, have been clubbed together.

2. The West Bengal Electricity Regulatory Commission (the Commission) by an order dated 7.11.2001 determined the tariff for the sale of electricity by the Calcutta Electricity Supply Company Ltd. (the Company) for the year 2000-2001 and 2001-2002. Being aggrieved by the said determination of tariff, the Company preferred an appeal before the High Court of Calcutta under Section 27 of the Electricity Regulatory Commissions Act, (the 1998 Act). The High Court by the impugned judgment has allowed the appeal of the Company by itself re-determining the tariff and enhancing the same. It is against this judgment of the High Court the above civil appeals are preferred.

3. C.A. No. 4037 of 2002 is preferred by the Commission specifically contending that the Commission is not challenging the tariff fixed by the High Court in its appellate jurisdiction. It contends that it was aggrieved by the interpretation by the High Court of some of the provisions of the 1998 Act as also the High Court's finding in regard to the validity of the Regulations and the procedure to be followed in fixing the tariff which findings, according to the appellant, would make the Commission nugatory and defeat the very object of the 1998 Act.

4. C.A. No. 4047 of 2002 is filed by the Bharat Chamber of Commerce against the order made by the High Court dated 23.4.2002, whereby the High Court rejected the application filed by the appellant, seeking the refusal of the Judges from hearing the appeal on the ground of bias.

5. C.A. No. 4048 of 2002 is filed by the same appellant as in C.A. No. 4047/02, against an order made by the High Court on 7.5.2002, whereby the High Court declined to hear the arguments of the appellants on merits, on the ground that the said appellants were not entitled to the heard by the High Court, because of the objections raised by the said appellants attributing bias to the Judges.

6. C.A. No. 4049 of 2002 and other connected appeals are filed by the appellants who are aggrieved, not only by the order of their non impleadment, but also by the final order of the High Court dated 7-14/5/02, by which the High Court set aside the tariff fixed by the Commission and re-fixed and enhanced the tariff.

7. The first argument addressed on behalf of most of the appellants before us was in regard to bias. It was seriously contended on behalf of these appellants that the Learned Judges who constituted the Appellate Bench ought to have reused themselves from hearing the appeal, since the appellants had a reasonable apprehension of bias being entertained by those Judges who constituted the Bench. They also contended that their apprehension as to the bias of the Bench stands established from certain observations made in the impugned judgment of the High Court. The learned counsel representing the respondent company, have with equal vehemence opposed the argument of the appellants in regard to bias. Be that as it may, all parties before us have unanimously contended that the basic issues involved in these appeals would arise frequently not only between the parties to this case and in the Calcutta High Court, but also all over India and since as of now there is no authoritative pronouncement of this Court on the questions which arise in these appeals, therefore, we should finally decide these issues, whatever be our findings on the question of bias.

8. In this background, we have decided to consider the question of bias as the last question to be decide, that too, only if need be.

9. For deciding the issues that arise in these appeals, it is necessary to have a look at the various enactments which have direct bearing on these issues.

10. The Indian Electricity Act, 1910 (the 1910 Act), was enacted with a view to make an improvement on the then existing legislation controlling the generation, transmission and supply of electricity in this country. Out of the various provisions of this Act, we need only refer to Clause II of the Schedule to the 1910 Act, which read with Section 3(2)(f) of this Act, makes it obligatory for the licensee to follow the procedure as to the audit of the licensee's accounts which, inter alia, requires the same to be audited by such persons as the State Government may appoint or approve in that behalf. Thus, the 1910 Act has made the auditing of the accounts of a licensee a statutory requirement. This statutory requirement continues to operate inspite of subsequent enactments.

11. By the introduction of the 1948 Act, the legislature has sought to rationalise the provisions pertaining to supply of electricity and to take measures conducive to electrical development. While enacting the same, the legislature was of the opinion that within the framework of 1910 Act, it was not possible to have a coordinated development of electricity in India on a regional basis. Hence, it was necessary that the appropriate Government should be vested with the necessary legislative powers, to link together the supply and transmission of electricity to various parts of the country, by

introducing a system known as the "grid system". With this view the 1948 system known as the "grid system". With this view the 1948 Act in Section 57 mandated that the provisions of Schedule VI shall be deemed to be incorporated in the licence of every licensee subject to the exception provided therein. Section 57A has provided for the constitution of a "Rating Committee" to oversee the procedure adopted by the licensee while fixing the tariff. Schedule VI to the 1948 Act lays down the principles to be followed in fixing the electricity tariff so far as the licensee is concerned. It is to be noticed herein that the said Schedule provides for self-assessment of the tariff by the licensee himself, following the principles laid down in the said Schedule. These are the principal Sections in the 1948 Act which have a bearing on the question of fixation of tariff by the licensee.

12. By the introduction of the 1998 Act, the Parliament brought about some important changes from that which was provided in the 1948 Act. It is seen from the Statement of Objects and Reasons of the 1998 Act that the Parliament noticed that there was lack of a rational retail tariff. It also noticed that among other defects there were high level cross subsidies, lack of power planning and operation, inadequate capacity, neglect of the consumer, limited involvement of the private sector's skill and resources and the absence of an independent regulatory authority.

13. Section 3 of the 1998 Act provides for the establishment and incorporation of a Central Electricity Regulatory Commission, while Section 17 of the said Act provides for a similar Commission for the State. This section provides that the State Commission should consist of not more than 3 members including the Chairperson. It also provides that the Chairperson and the members of the State Commission, among other things, shall be persons who have adequate knowledge of, and capacity in dealing which problems relating to engineering, finance, commerce, economics, law or management. These members of the State Commission are to be selected by a Selection Committee constituted by the State Government under Section 18 of this Act. The members of the said Selection Committee consists of, a person who has been a Judge of the High Court, the Chief Secretary of the State concerned and the Chairperson or a member of the Central Electricity Regulatory Authority. The said section also fixes a time schedule by which the vacancy in the office of the State Commission should be filed up. Section 19 of this Act provides for term of office and service conditions of the members of the State Commission, while Section 20 provides for a special procedure for the removal of members of the State commission which will have to be done by the Government on the ground of proved misbehavior, after the High Court on reference being made to it by the Governor, has reported that the member concerned ought to be removed on such ground of proved misbehavior. The qualification of the members of the State Commission as required under the Act, as also the method of their appointment and conditions of their service, including the protection given to them in reference to their removal and disqualification from holding subsequent office, clearly shows that the State Commission under the Act is constituted as a high power expert committee with autonomous authority and is expected to function independently.

14. Section 22 of the Act enumerates the functions of the Commission. The most important function to be noticed in this Section, at least so far as these appeals are concerned, is the power of the Commission to determine the tariff for electricity, be it wholesale, bulk, and grid or retail. This determination of tariff under the Act will have to be made in the manner provided in Section 29 of the said Act. Section 22(1)(d) obligates the Commission to promote competition, efficiency and

economy in the activities of the electricity industries to achieve the objects and purposes of this Act.

15. Section 26 empowers the Commission to authorise any person as it deems fit to represent the interest of the consumer in all the proceedings before it.

16. Section 27 of the 1998 Act provides for an appeal to the High Court, by any person aggrieved by any decision or order of the State Commission. It lays down that no appeal or revision would lie to any other court.

17. Section 29 provides for determination of the tariff by the State Commission. Since the interpretation of this Section is a major bone of contention between the parties in these appeals, it is necessary for us to reproduce the same in its entirety.

> "29. Determination of tariff by State Commission.--(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the "tariff"), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.
>
> (2) The State Commission shall determine by regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the following, namely:-
>
> (a) the principles and their applications provided in Sections 46, 57 and 57-A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto;
>
> (b) in the case of the Board or its successor entities, the principles under Section 59 of The Electricity (Supply) Act, 1948 (54 of 1948);
>
> (c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;
>
> (d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purposes of this Act;
>
> (e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;
>
> (f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;
>
> (g) national power plans formulated by the Central Government.

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy 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) The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

(5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this Section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licensee or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in Sections 57-A and 57-B of the Electricity (Supply) Act, 1948 (54 of 1948 no rating committee shall be constituted after the date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licences regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance without the provisions of this Act."

18. It is to be seen that this Section provides for the methodology to be followed by the Commission in determination of the tariff.

19. Section 37 of the Act requires the Commission to ensure transparency while exercising their powers and discharge of their functions.

20. Section 49 of the Act gives overriding effect over this Act to only two other enactments, namely, the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962. While Section 52 gives overriding effect to the provisions of the 1998 Act, notwithstanding anything inconsistent therewith, in any enactment other than this Act.

21. Section 57 empowers the State Government to make rules which will have to be notified in the Official Gazette.

22. Section 58 empowers the Commission to make Regulations, which also have to be notified in the Official Gazette and the Regulations have to be consistent with the Act and the Rules. Sub-section

(2) of Section 58 in Clause (d), specifically provides that the Commission is empowered to make Regulations, providing for the manner in which charges for energy may be determined under Sub-section (2) of Section 29.

23. Section 59 obligates that the rules and regulations made under this Act have to be placed before the Houses of the Legislature. It is not in dispute that the rules framed by the State of West Bengal, as also the regulations framed by the State Commission have been placed before the legislature as required under Section 59 of the Act.

24. The State of West Bengal exercising the power under Section 57 of the 1998 Act enacted the West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999 (hereinafter called the Rules). Rule 4 of the said Rules provides for the procedure to be adopted by the Commission in the proceedings before it. Sub-rule 1(SIC) of the said Rule mandates that before fixing the tariff, the Commission shall notify its intention in this behalf in leading newspapers of West Bengal and shall hold public hearing for the purposes.

25. In exercise of its power under Section 58 of the 1998 Act, the State Commission herein has framed the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 (the Regulations). Regulation 18 thereof provides for the Commission to permit an association or other bodies corporate, or any group of consumers to participate in any proceeding before the Commission. It also empowers the Commission to control the nature and extent of participation of these groups before the Commission. Regulation 9 thereof provides for recognition of associations, groups, forums or body corporate or registered consumer associations for the purpose of representation before the Commission.

26. Regulation 24 provides for the coram at the meeting of the Commission. Regulation 30 provides for service of notices which in Sub-clause (d) includes the service of notice through publication in newspapers.

27. Regulation 31 and 32 provides for the manner in which the Commission could regulate the filing of the pleading as also the method of hearing.

28. Having noted the various salient features of the 1998 Act, we will now consider the manner in which the impugned tariff has been determined by the State Commission in the instant case.

29. The Commission while fixing the tariff for the years 2000-2001 and 2001-2002, called for objections/ representations from persons concerned, through newspaper publications. Pursuant to the same, it heard the Company, association or group of consumers in the proceedings before it. It had also appointed the Administrative Staff College of India (ASCI) as its Consultant.

30. The Commission before which the Company had filed its application for fixing of tariff for the year 2002-2003, did not entertain the said application, on the ground that the same was belated. But on the Company's application for the year 2000-01, the Commission after hearing the parties

and taking into consideration other materials on record, including the report of the consultants, fixed the tariff for the said year @ Rs. 3.39 per unit, which is an increase of 1.15 per cent on the rate of tariff of the Company for the previous year. The Commission also fixed Rs. 3.41 per unit for the year 2001-2002. While so determining the tariff, the Commission followed the provisions of the 1998 Act and the regulations framed by it.

31. Being aggrieved by the said determination of tariff, the Company, as stated above, preferred the statutory appeal before the High Court, making the Commission alone the respondent. The High Court while rejecting the impleadment application of the appellant-organisations, proceeded to re-fix the tariff by only following the principles of Schedule VI to the 1948 Act and to the exclusion of other requirements of Section 29 of the 1998 Act. In the said process it re-fixed the average tariff for the year 2000-01 at Rs. 3.96 per unit and at Rs. 4 per unit for the year 2001-02. In the course of its judgment, the High Court also came to the conclusion that the regulations framed by the Commission, especially the ones pertaining to the right of the consumers to be heard in the proceedings, as also applications of the principles to be followed in determining the tariff, were contrary to law and directed in no uncertain terms that these regulations will have to be modified to bring them in conformity with its observations in the judgment, and further stated that failure to do so might result in the invocation of the High Court's power under the Contempt of Courts Act. In deciding the validity of the regulations, the High Court proceeded on the basis that while entertaining the power of appeal under Section 27 of the 1998 Act, it also has the power vested in it under Article 226 and 227 of the Constitution of India. It also held that the non-obstante clause found in Section 29 of the 1998 Act and the other overriding provisions found in the 1998 Act could not come in the way of the application of the VI Schedule to the 1948 Act alone, while determining the tariff by the Commission. On factual aspects, it reversed many of the findings of the Commission to which separate reference will be made by us when we take up those issues for consideration.

32. It is against this judgment of the High Court, various appeals have been filed.

33. In these appeals the appellants have questioned each and every finding of the High Court, both in regard to the interpretation of the provisions of the 1998 Act and the 1948 Act, as also the factual findings given by the High Court in regard to various heads of accounts either accepted or rejected by the High Court in the process of re-determining the tariff.

34. At one point of time we thought it appropriate to decide the legal issues pertaining to interpretation of the statutes alone and to remit the matter back to the Commission to reconsider the factual issues, to be determined by the Commission in the light of our findings on the legal issues. However, after hearing the parties at length, we thought that the ends of justice would be served if we could finally decide all the important issues arising in these appeals and thereafter to remit the matter to the Commission only, to apply those principles and recalculate the tariff on the basis of our findings and directions given in these appeals. It is in this light that we will now endeavour to settle the questions involved in these appeals.

Locus standi:

35. One of the important issues which arises for our consideration in these appeals is as to the locus standi of the consumers before the Commission in its proceedings, as also before the High Court in an appeal under Section 27 of the 1998 Act. The Commission in the proceedings before it, issued a newspaper publication calling upon the persons to appear and file objections in case they were interested in the proceedings before it. Pursuant to the said publication, it is stated that a number of organisations including some of the appellants herein, representing sections of the consumers, appeared and filed their objections and submitted their arguments which were taken note of by the Commission in the proceedings before it. This was not objected to by the respondent company. As noticed above, the respondent company being aggrieved by the final order of fixation of tariff by the Commission preferred the statutory appeal before the High Court. To the said appeal, may be for reasons of convenience, the respondent company impleaded only the Commission as a party respondent, but the High Court in the initial stage thought it appropriate to issue a public notification of the filing of the appeal and called upon the interested parties to represent themselves before it. Pursuant to the said publication, some of the organisations representing consumers sought impleadment before the High Court. However when the matter camp up for final hearing the applications of these consumer organisations were rejected by the High Court holding that the Commission does not have the power to issue indiscriminate notice to the consumers or for hearing them. It also held that the advertisements published in this regard as per the Commission's regulations as also the advertisements issued by the High Court in the appeal were all on an erroneous view that the 1998 Act envisages such procedures.

36. The question, therefore, for our consideration is whether the consumers have a legal right or not to be heard in the proceedings before the Commission under Section 29(2) of the 1998 Act, as also in an appeal under Section 27 of the said Act. The High Court in the course of its judgment has negatived this right to the consumers, primarily on the ground that permitting a large number of consumers who in the instant case are to the extent of 17 lacs would amount to an indiscriminate representation. It observed that permitting such large scale interference in the proceedings would lead to absurdity. It also held that normally a rate payer i snot heard before such a rate is fixed on the basis of public policy. In support of this conclusion, the High Court relied upon the procedure for fixing the rate of income-tax wherein a tax-payer had no such say in such fixation of the rate of income-tax. It also observed in the course of the judgment that the rates to be fixed cannot be opposed by consumers by observing as follows:

> "...The rates of the consumers cannot be affected by a general public clamour of the sort, that the rates are too high, that the CESC accounts are in no way reliable, that they cannot be losing money, wen they are earning so much. That, this organisation in Bombay, or that concern of the Tatas, is doing so much better, that in the same State in another area of supply, another Company is managing with such low rates; this sort general 'newspaper' objection has no place in any court of law or a Tribunal which does something to affect the legal rights and liabilities of Companies and citizens."

37. Such objections according to the learned Judges are irrelevant for the purpose of granting a right of hearing to the consumers. While discussing this question, the High Court also came to the

conclusion that since the procedure laid down in Schedule VI to the 1948 Act is the sole consideration for the purpose of fixation of tariff and Schedule VI not having contemplated any role to be played by the consumers, the same procedure should be followed even in regard to fixation of tariff under the 1998 Act, which would mean that the consumers have no say whatsoever in the fixation of tariff. The court also held that if at all any representation of the consumers is permissible, the same should be done only in accordance with Section 26, by the Commission recognising a particular consumer association to represent them. Even in this regard, the High Court expressed some doubt because an organisation chosen to represent the consumers by the Commission may not be acceptable to another section of the consumers and, therefore, in reality, such recognition of a particular organisation by the Commission would also be futile.

38. Learned counsel appearing for the appellants have very strenuously contended that this view of the High Court is wholly unsustainable. They contend that under the various provisions of the Act, rules and regulations, the Parliament either directly or by subordinate legislation has conferred the right of representation on the consumers and it is not open to the High Court to negative such statutory right. Though, learned counsel representing the respondent company had stated before the High Court that the company had no objection to the impleadment of the consumers either before the Commission or before the High Court, still tried to justify the finding of the High Court before us.

39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable, (See Shri Sitaram Sugar Company Ltd. and Anr. etc. v. Union of India and Ors.), the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned. Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

40. While considering his question, it is relevant to notice that so far as the 1948 Act is concerned, the consumers had no such specific right. But we notice that the 1998 Act brought about a substantial change in the manner in which the determination of tariff has to be made. It not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission. This was done because one of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it deems fit to represent the interest of the consumers in all proceedings before it. If the above provision of the Act is read in conjunction with Sections 22 and 29 read with Section 28(2)(d) of the Act 1998 Act, it is clear that the Commission while framing the regulations must keep in mind the interest of the consumers for the purpose of determining the tariff. At this stage, it may be worthwhile to notice the mandate of the Parliament in Section 37 of the 1998 Act to the Commission that the Commission 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. That apart, the State of West Bengal in exercise of its power under Section 57 of the Act has enacted the West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999. In the said rule under Rule 4(SIC) the State Government has provided that the Commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading newspapers of West Bengal and hold public hearing for the said purpose (emphasis supplied). Even the Commission under the power conferred on it in Section 58 of the Act, has framed the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 as amended by Regulations dated 3.2.2000, wherein, under Regulation 18 the Commission, can permit an association or other body corporate or any group of consumers to participate in any proceedings before the Commission, on such terms and conditions, including, in regard to be nature and extent of participation as the Commission may consider appropriate. The Commission under Regulation 19 is also empowered to notify a procedure to association, groups, forums or body corporate or registered consumer associations, for the purpose of representation before the Commission. These Regulations also provide for the procedure for the filing of affidavits, pleadings, service of notice and the right of participation. Under Regulation 32 of the manner of hearing before the Commission is also provided for. These rules and regulations framed by the State Government and the Commission will have to be placed before the State legislature under Section 59 of the 1998 Act. Thus, these rules and regulations have the necessary statutory force. A combined reading of these provisions of the Act, rules and regulations, clearly shows that 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. This right of the consumer is neither indiscriminate nor unregulated as erroneously held by the High Court. It is true that in Calcutta the respondent company supplies energy to nearly 17 lacs consumers, but the statute does not give individual rights to every one of these consumers. The same is controlled by the Regulations. Therefore, the question of indiscriminate hearing as held by the High Court will not arise. That apart, when a statute confers a right which is in conformity with the principles of natural justice, in our opinion, the same cannot be negatived by a court on an imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned. As noticed above, though normally price fixation is in the nature of a legislative function and the principles of natural justice are not normally applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory. While the requirement of the principles of natural justice can be taken away by a statute, such a right when given under the statute cannot be taken away by courts on the ground of practical convenience, even if such inconvenience does in fact exist. In our opinion, statute having conferred a right on the consumer to be heard in the matter pertaining to determination of the tariff, the High Court was in error in denying that right to the consumers. Consequently, the right of the consumer of prefer an appeal under Section 27 of the 1998 Act to the High Court is similar, if they are in nay manner aggrieved by any order made by the Commission. Alternatively, if the company is an aggrieved party and if it prefers an appeal, then it has to make such of those consumers who have been heard by the Commission, as party respondent, and such consumers will have the right of audience before the appellate court. In the instant case, none of the consumers/consumer organisations were allowed to participate in the proceedings by the Commission have been made parties to the appeal. Therefore, the High Court ought to have impleaded and heard the

consumer-appellants herein.

Vires of the Regulations:

41. The High Court in the course of its judgments has held that the Commission by framing Regulations 25 and 31(4) has permitted indiscriminate representation of the consumers before it which is not contemplated under the Act. In the said view of that matter, it had directed the Commission to suitably amend these regulations to bring them in conformity with its judgment. There is also a threat to the Commission that if it fails to do so, it may have to face contempt of court proceedings.

42. The question for our consideration is whether the High Court sitting as an appellate court under Section 27 of the Act has the jurisdiction to go into the validity of the Regulations framed under the Act and if so, factually the Regulations as found by the High Court are contrary to the statute.

43. The High Court while considering the validity of the Regulations came to the conclusion that the 1998 Act does not contemplate hearing of the consumers, and also that the Commission's Regulations have conferred an indiscriminate right of hearing on the consumers. We do not think that these findings of the High Court can be justified. While discussing the right of the consumer to be heard (locus standi), we have already held that the 1998 Act has both expressly and impliedly conferred such right of hearing on the consumers. Proceeding on that basis we now consider whether the Regulations framed by the Commission, in any manner, confer an indiscriminate right of hearing. The Commission in exercise of its power under Section 58 of the 1998 Act has framed the regulations keeping in mind the mandate of the Act. In Regulations 18, 19, 24, 25 and 31(4) the Commission has evolved a procedure by which it could restrict the number of representations as also the method to be followed in the proceedings before it which includes the restriction on hearing. Regulations 18 and 19 require the Commission to recognise such associations or other bodies of consumers which in its opinion, should be permitted to appear before the Commission. The said Regulations also empower the Commission to regulate the nature and extent of participation by such groups. Regulation 31(4)(ii) and (iii) also empower the Commission to control the proceedings before it. From the above Regulations, it is clear that the Commission has the necessary power to regulate the proceedings before it and the apprehension of the High Court that by granting such power the Commission may have to hear all the 17 lacs of consumers of Calcutta is wholly imaginary. That part, on the facts of the instant case there is no such allegation that the Commission has in fact given indiscriminate hearing to the consumers. As a matter of fact, the respondent Company which was the appellant before the High Court has not even raised this issue and the High Court has suo motu gone into this issue. On the basis of the provisions found in the Regulations framed by the Commission, we are of the opinion that there is no room for any indiscriminate hearing before the Commission. Therefore the finding of the High Court that the Regulations do leave room for such indiscriminate hearing is erroneous.

44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has

proceeded to declare the regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore it has become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power.

45. This Court in the case of K.S. Venkataraman & Co. v. State of Madras after discussing the judgment of the Calcutta High Court in the cases of (i) Raleigh Investment Co. Ltd. v. The Governor General in Council (1944 1 Cal. 34), (ii) United Motors (India) Ltd. v. The State of Bombay and (iii) M.S.M. Meyappa Chettiar v. Income-tax Officer, Karaikudi (1964 54 ITR 151) held:

> "There is, therefore, weighty authority for the proposition that a tribunal, which is a creature of a statute, cannot question the vires of the provisions under which it functions."

46. From the above decision, we hold that the High Court while exercising its statutory appellate power under Section 27 of the 1998 Act could not have gone into the validity of the Regulations which are part of the statute itself.

47. While deciding the above issue, the High Court also held that while exercising the appellate power by it under any particular statute, it also simultaneously exercises its constitutional power of writ under Articles 226 and 227 of the Constitution of India. In this process, this is what the High Court said:

> "From the above provisions it is clear that we are not hearing any proceedings which is akin to a constitutional writ matter. No doubt the High Court remains the High Court and its constitutional powers are not taken away and cannot be taken away even if it is designated as an appellate forum in a particular Act. Our constitutional powers we continue to possess. The additional strength that those constitutional powers render to our judgment is always present."

48. We do not think that the High Court was correct in this view of its.

49. In the case of Dhulabhai and Ors. The State of Madhya Pradesh and Anr. , a Constitution Bench of this Court held:

> "Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals continued under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals." (emphasis supplied)

50. From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition. In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers.

Tariff Determination:

51. The next question which arises for our consideration is under the 1998 Act who determines the tariff. The Commission proceeded on the basis that under the 1998 Act i.e. under Section 22 read with Section 29, it was the Commission which had the authority to determine the tariff. As per this understanding, the Commission had also laid down the terms and conditions under which it had to determine the tariff. However, the High Court proceeded on the basis that inspite of the said Sections viz., Sections 22 and 29, it is the licensee which in the first instance had to determine the tariff which subsequently had to be scrutinised and approved by the Commission. The High Court was thereby of the opinion that the role of the Commission in determining the tariff was only supervisory. In these appeals learned counsel appearing for the appellants contended that the above view of the High Court is wholly erroneous and contrary to the statute. They also argued that if the view of the High Court in regard to determination of tariff is to be accepted, then the primary object viz., creation of the Commission under the 1998 Act itself would become nugatory. Learned counsel strongly relied upon the provisions of Sections 22, 27, 29, 30, 49, 50 and 58 of the Act in support of their contention. Per contra, the learned counsel appearing for the respondent company supported the judgment of the High Court and contended that the primary duty of the determination of tariff is that of the licensee and the Commission under Section 29 had only to frame the necessary regulation in this regard and thereafter it only had the power of supervising the tariff determined by the licensee.

52. For deciding this question we will have to first notice the objects and reasons of enacting the 1998 Act. A perusal of the same shows that the Parliament felt that in spite of the existing enactments, it was necessary to bring about a new law which would facilitate the implementation of reforms contemplated by it, which reforms pertained to fundamental issues facing the power sector, namely, lack of rational retail tariff, high level cross subsidies, poor planning and operation, inadequate capacity, neglect of consumer, limited involvement of private sector's skills and

resources and the absence of an independent regulatory authority. The view of the Administrative Staff College of India (ASCI) which strongly recommended the creation of an independent electricity regulatory Commission both at the center and the State are also noticed. It is with the above object, an Ordinance was promulgated on 25th April, 1998 which later came to be replaced by the 1998 Act. We also notice that while promulgating the said Ordinance it was mentioned that one of the salient features of establishing the Central and State Electricity Commissions was to determine the tariff for electricity, wholesale, bulk, grid and retail, apart from determining the tariff payable for use of the transmission facilities. Therefore, it is to be seen that in spite of the fact that the 1948 Act was in existence, the Parliament thought that it was necessary to constitute a regulatory authority both at the center an the State, which was to be an autonomous independent body. We have earlier noticed the composition of this body and the statutory provisions made in the Act to protect the autonomy of this Commission. Therefore from the Objects and Statements of this Act, as also from the provisions of this Act, it is clear that this is an enactment specially to provide for a procedure for determining the tariff for electricity, as also to confer the power of determination of tariff on an expert body like the Commission. In this regard we take note of Section 22(1)(a) of the 1998 Act, which in specific terms lays down that the Commission shall discharge the function of determining the tariff for electricity in the manner provided in Section 29. A plain reading of this Section leaves no room for doubt that so far as the State Commission is concerned, the Act has solely entrusted the responsibility of determining the tariff to it. Section 29 firstly requires the Commission to determine the tariff in accordance with the provisions of that Act. It then requires the Commission to frame Regulations providing for the terms and conditions for fixation of tariff. In exercise of this latter power of framing the Regulations, the Commission is mandated to be guided by the factors mentioned in Clause (a) to (g) of Sub-section (2) of Section 29. Thereafter Sub-section (3) of Section 29 mandates the State Commission not to show any undue preference while determining the tariff to any consumer of electricity subject, of course, to the exceptions found in the said sub-section. Sub-section (4) mandates the holder of a licence or other person to distribute or supply electricity, by observing the methodologies and procedures specified by the State Commission from time to time while supplying electricity and in collecting the revenue. Sub-section (5) of that Section provides if the State Government wants any subsidy to be given to any class of consumer in the tariff determined by the Commission, then the State Government is obligated to pay such subsidy in the manner in which the State Commission may direct. Sub-section (6) lays down that notwithstanding anything contained in Section 57 A and B of the 1948 Act no Rating Committee shall be constituted after the date of commencement of the 1998 Act, which is a natural consequence of the creation of the Commission. It also further lays down that the Commission should ensure that the licensees comply with the provisions of their licences, regarding the charges for sale electricity in accordance with the provisions of the 1998 Act. Section 30 of the 1998 Act provides that if the Commission wants to depart from the factors specified in Clauses (a) to (d) of Section 28 or (a) to (f) of Sub-section (2) of Section 29, the Commission shall record reasons for such departure in writing. A collective reading of these Sections namely 22, 29 and 30, in our opinion, leaves no room for doubt that under the 1998 Act, it is the Commission and the Commission alone which is authorised to determine the tariff and in our opinion the State Commission in this case rightly understood its statutory obligation. However as noticed above we find that the High Court took a totally contrary view. It proceeded on the basis that in view of the reference made to Schedule VI to the 1948 Act and reference to Sections 46, 57 and 57A of the 1948 Act in Clause (a) of Section 29(2) of the 1998 Act

and in view of the language of Section 57 of the 1948 Act, the primary right to determine the tariff lies with the licensee or the utility concerned and it is only when the concerned licensee or the utility has erred on a matter of principle in so fixing the tariff, the role of the Commission comes into play in correcting the same. This is evident form the following observations of the High Court:

> "Once, however, a determination has been made an the time and nature of such determination indicates the final and supervening nature of it, the licensee must obey such tariff decision. If after the accounts of the financial year are finalized, it appears to the Commission that the accountants have erred on a matter of principle, then and in that event, it is within the power of the Commission to correct that matter and to compel the licensee to make an adjustment in that regard." (copied in verbatim)

53. It is in this context that the High Court in the operative portion of its judgment held:

> "For future years, the CESC shall adjust its rates as per the Sixth Schedule of the 1948 Act without the necessity of any prior approval of any authority but subject to the conditions laid down in the Sixth Schedule; it shall not alter its rates in any form or manner more than once every financial year. However, the final authority for correction of any revenue collected in excess, if shown to be so even after accounts, will lie as per the 1998 Act with the Commission and the High Court."

54. This view of the High Court is strongly supported by learned counsel for the respondent company. It is submitted by them that Section 22 of the 1998 Act enumerates only the functions of the State Commission and the actual power to determine the tariff under the 1998 Act is traceable to Section 29 of the said Act. Learned counsel for the respondent company further contend that even the exercise of power of determining the tariff under Section 22 and 29 is subject to Section 29(2) of the 1998 Act, which mandates that the determination of the tariff shall be made by framing the Regulations, which according to learned counsel, will have to be in conformity with Sections 46, 57 and 57A as well as Schedule VI to the 1948 Act. If that be so, they contend it is evident that the above provisions of the 1948 Act especially the Sixth Schedule empower only the licensee to determine the tariff and that the Schedule having been retained in the 1998 Act, none else than the licensee can determine the tariff. They also contend that Clauses (b) to (g) of Sub-section (2) of Section 29 only reiterate the principles already found in Schedule VI and, therefore, do not have any specific significance in the context of the framing of the Regulations. Learned counsel also relied upon Sub-clause (4) of Section 29 which, in their opinion, clearly states that the determination of tariff is to be made by the holder of each licence, though in a manner specified by the State Commission.

55. We have already read Sub-section (4) of Section 29 hereinabove to mean that that sub-section requires a licensee to recover and to collect revenue by following the methodologies and procedures specified by the State Commission. In our opinion, though the language of Sub-section (4) leaves much to be desired, looking into the scheme of the Act, we have no doubt that Sub-section (4) of Section 29 does not contemplate a determination of tariff by the licensee itself. Even Sub-section (6) of Section 29 on which reliance is also placed by learned counsel for the respondent company, in our opinion, odes not in any manner support the contention that it is the licensee which will have to first

determine the tariff exclusively. If Section 29 were to be interpreted in a manner as it is presented to us by learned counsel appearing for the respondent company, then we have no doubt that the contention of the appellants that the role of the Commission under the 1998 Act becomes almost redundant, has to be accepted which is not, what is contemplated by the 1998 Act. We are also unable to inter from Section 29 or for that matter from any other Section in the 1998 Act that the role ascribed to the Commission is only supervisory. Here we do take support of the non obstante clause found in Section 29(1) and (6) read with Section 49 which refers to inconsistency in laws. These Sections provide that the provisions of the 1998 Act override or prevail over any other inconsistent provision found in any other enactment except those mentioned in Section 49 of that Act. The High Court has found, which is supported by the learned counsel for the Company, that there is a non obstante provision in Clause I of Schedule VI to the 1948 Act which, if given its due weight, would override the provisions of the 1998 Act. We will now consider that argument. For this purpose it is necessary to extract the relevant portion of Clause I of Schedule VI to the 1948 Act which reads : "Notwithstanding anything contained in the Indian Electricity Act, 1910 (9 of 1910) x x x the licensee shall so adjust his x x x" Taking advantage of this part of the provisions which contains the obstante clause, it is argued that since Section 57, 57A and Schedule VI to the 1948 are protected under Sub-section (2) of Section 29 of the 1998 Act, and the said non obstante clause prevails over the non obstante clause found in Section 29 of the 1998 Act as well as the provisions of Sections 49 and 52 of the 1998 Act. With respect to the learned counsel for the Company as well as to the High Court, we are unable to accept this contention.

56. First of all the non obstante clause in Schedule VI to the 1948 Act refers only to the provisions of the Indian Electricity Act, 1910. Schedule VI which is found in the Act of 1948, the legislature could not have contemplated a subsequent enactment containing a non obstante clause coming into force, nor does it say that this non obstante clause applies to or is in preference to all other enactments including future enactments. Therefore this ground itself is sufficient to reject the argument of the learned counsel for the respondent as to the prevailing effect of the non obstante clause in Schedule VI to the 1948 Act. That apart, a reading of the 1998 Act vis-a-vis the 1948 Act with reference to Schedule VI, or with special reference to Section 57 and 57A of the 1948 Act. It is seen that Sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to determination of tariff. Consequently, because of the accepted principle in law that a general law yields to a special law, the provisions of the 1998 Act must prevail. As a matter of fact, this is the view taken by another Division Bench of the Calcutta High Court in regard to this principle in law, as could be seen from the impugned judgment itself, but surprisingly after noticing the same, the impugned judgment proceeds to take a contrary view without either distinguishing the previous judgment of a Coordinate Bench or referring the matter to a larger Bench. Be that as it may, this question is no more res integra. This Court in the case of Allahabad Bank v. Canara Bank and Anr. after following an earlier judgments of this Court held:

> "40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the later special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. v. State

> Industrial and Investment Corporation of Maharashtra Ltd. where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the "1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one."

Therefore, in view of the Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts."

57. We are, therefore, of the considered opinion that we cannot accept the view of the High Court as well as the arguments advanced by learned counsel for the respondents in this regard.

58. Having carefully considered the provisions of the Act as also the arguments advanced in this regard, we are of the opinion that under the 1998 Act, it is the Commission concerned and in the instant case the State Commission of West Bengal, which is the sole authority to determine the tariff, of course as per the procedure in the said Act.

Procedure to be followed for determination of tariff:

59. While considering the question as to the determination of tariff, we will also have to consider the question as to what is the procedure to be followed in such determining. This arises for the following reasons:

60. Under Section 29(2) of the Act as noticed hereinabove, the Commission has to determine the tariff by framing regulations, providing for terms and conditions for fixation of tariff. There is a further mandate to the Commission, that while so framing the regulations, the Commission shall be guided by the guidelines laid down in Sub-clauses (a) to (g) of Section 29(2). Sub-clause (a) of Section 29(2) states that the principles and their application provided in Sections 46, 57 and 57A of the 1948 Act and Schedule VI thereto will be some of the principles which are to be borne in mind along with other principles enumerated in Sub-clauses (b) to (g) of the said Section. We have noticed that the Commission in exercise of its power under Section 58 of the 1998 Act has framed the regulations. Regulation 42 in Chapter IV directs that the Commission shall without prejudice to the generality of its powers keep in view the principles enumerated in Sub-clauses (a) to (g) of Section 29(2) of the 1998 Act, which includes all the principles and their application as provided for in Clauses (a) to (g) of Section 29(2) of the 1998 Act. On the said basis the Commission following the said principles has determined the tariff. The High Court, however, found fault with this. The High Court was of the opinion that it is Schedule VI and the said Schedule alone, which has to be applied in the determination of the tariff. In this process, the High Court held:

> "In so far as the Sixth Schedule permits of interpretation, and in so far as the words of the Sixth Schedule permit of determination of issues within their interstices, the Commission not only can, but should apply the ideas set out under Sub-section 29(2)(e) or 29(2)(g). But to obliterate even a single word or a punctuation mark, of the Sixth Schedule, because of any abstract principle which the Commission considers to be important, would be beyond its jurisdiction and an encroachment on the power of the Parliament itself, which only it alone can exercise. The principle which we have hereby formulated, might conveniently be understood as the principle of the continued binding nature of the Sixth Schedule on the Commission, and others."

61. The High Court further held:

> "This is a very important point. We have opined already that notwithstanding the provisions of Section 29, the Sixth Schedule of the Supply Act holds the field, with as much vigour and strength, at least in regard to the private licensees (as opposed to the State Boards), as it did before the passing of the 1998 Act. In view of the above judgment, is our decision right?"

62. Answering the above question posed by itself, the High Court held:

> "It cannot disregard the Sixth Schedule of the Supply Act unless the Sixth Schedule is repugnant to the 1998 Act and, even if it is repugnant Section 57 of the Supply Act still has to be obeyed here, the non obstante provisions of Section 29(2), notwithstanding."

63. The High Court also held while discussing the same question, this:

> "... but even if there were, any such irreconcilable difference, between the two, the ordinary rules of statutory construction would save both by making Section 57 and the Sixth Schedule applicable to private licensees and by making the contrary or repugnant provisions of 1998 Act applicable to others. Since we are convinced that there is no inconsistency or repugnant, we do not enter into the possible point, that the Sixth Schedule is meant for private licensees alone and thus our reasoning is substantially on outright victory of Section 57 over Section 29. Any further discussion in this line would involve us in an exercise which we consider to be too academic."

64. It is clear from the above observation of the High Court that it was of the opinion that while determining the tariff even under the 1998 Act it is only the principles found in Schedule VI to the 1948 Act which apply and the other principles found in Sub-clauses (b) to (g) of Section 29(2) have no application in the process of determining the tariff.

65. Learned counsel for the appellants contended that this view of the High Court is wholly erroneous. He pointed out that with reference to Section 29 of the 1998, the Parliament has in

specific terms laid down more than one guideline to be followed by the Commission while framing the regulations. According to the learned counsel for the appellants, even the guidelines referred to in Clauses (a) to (g) of Section 29(2) were not exhaustive as could be seen from Clause (d) of the said Section which authorities the Commission to bear in mind other matters which the Commission considers appropriate for the purpose of the Act while framing the regulations. Thus according to learned counsel, the guidelines found in Sub-clause (a) of Section 29(2) are not so sacrosanct as has been held by the High Court, to override the other guidelines found in the very same Section.

66. Per contra, learned counsel appearing for the respondent company supported the judgment of the High Court, contending that once the requirements of Section 46, 57 and 57A and Schedule VI to the 1948 Act were bodily incorporated as a guideline in Section 29(2), all other considerations stand excluded because Schedule VI read with Section 57 and 57A is so exhaustive, so as to form a Code by itself which becomes applicable in the determination of tariff. Hence, the requirements of Sub-clauses (b) to (g) of Sub-section (2) of Section 29 become unnecessary, more so in vie of the non obstante clause in Clause I of Schedule VI. It was also argued that even assuming that it is the Commission which has to determine the tariff under the 1998 Act, even then it is Schedule VI which has to be followed in such determination of the tariff.

67. In the above background, we will now decide whether the High Court was justified in coming to the conclusion that it is Schedule VI and Schedule VI alone which has to be followed in determination of the tariff. While discussing the issue as to the right of determination of tariff by the Commission, we have already negatived the argument of the respondents as also the finding of the High Court that the non obstante clause found in Schedule VI to the 1948 Act does override the provisions of the 1998 Act. If that be so, Section 29(1) which opens with the non obstante clause prevails over all other provisions. This does not, however, mean that the Commission can totally ignore the provisions of Schedule VI to the 1948 Act. That is because the Regulations framed by the Commission make the said principles applicable i.e. Section 57, 57A and Schedule VI to the 1948 Act is incorporated in the procedure of determining the tariff but along with the other principles enumerated in the guidelines found in Clauses (b) to (g) of Section 29(2) of the 1998 Act. Even though the Commission had the power of departing from the applicability of Schedule VI while determining regulations under Section 30 of the 1998 Act, it has not chosen to do so. Therefore, as the statute stands, the Commission is bound to take into consideration the principles found in Section 57 and 57A and Schedule VI to the 1948 Act, to the extent it has become applicable. While so applying these principles of the 1948 Act, including the Sixth Schedule, it is open to the Commission to weigh these principles with other requirements which it has incorporated in the form of regulations and suitably apply the same. In this process, if it chooses to place more reliance on one or more of other principles than those found in Schedule VI to the 1948 Act, then it is open to the Commission to do so and in such an event it is not necessary for the Commission to again invoke Section 30 of the 1998 Act because the requirement of invoking Section 30 arises only at the stage of framing of regulations, thereafter, it is for the Commission to consider the various principles which it has incorporated in its regulations and then apply the same, depending upon the facts of the cases with which the Commission is concerned. There is no doubt that in this process if the Commission commits any error either contrary to law or contrary to established facts in applying these principles, then of course it is open to the High Court as an appellate authority under Section 27 to

interfere and rectify the same. Thus, on a careful perusal of the various provisions of the 1998 Act, we are of the opinion that the High Court fell in error when it came to the conclusion that in determining the tariff it is Schedule VI alone which has to be applied.

Appellate power of the High Court under Section 27 of the 1998 Act:

68. The next question that falls for our consideration is as to the extent of the appellate power of the High Court under Section 27 of the 1998 Act which reads thus:

> "27. Appeal to the High Court in certain cases:--
>
> (1) Any person aggrieved by any decision or order of the State Commission may file an appeal to the High Court.
>
> (2) Except as aforesaid no appeal or revision shall lie to any Court from any decision or order of the State Commission.
>
> (3) Every appeal under this section shall be preferred within sixty days from the date of communication of the decision or order of the State Commission to the person aggrieved by the said decision or order;

Provided that the High Court may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that the aggrieved person had sufficient cause for not preferring the appeal within the said period of sixty days."

69. A perusal of the said Section shows that appeal to the High Court under the said Section is on facts also because it is unlimited. Thus there is no doubt that the power of the High Court as an appellate court is co-extensive with that of the trial court. But then the next question would be: is such power wholly unlimited or in any manner controlled by any principle in law? Learned counsel for the appellants urged that in view of the fact that the appeal to the High Court under Section 27 of the 1998 Act arises from a special forum consisting of expert members, the appellate court, normally, should be hesitant to interfere with the findings of fact because the Judges of the appellate court may have knowledge of the special factors required of determining the tariff but may not necessarily have the experience which members of the Commission have. Learned counsel for the respondent company submitted that it is clear from the wording of the statute that the appeal to the High Court is not limited by any restriction and the power of the High Court being co-extensive with that of the Commission, the High Court is at liberty to reassess the evidence considered by the Commission, as also take additional evidence and either remand the matter to the Commission or on consideration of such evidence including the additional evidence proceed to determine the tariff itself as has been done by the High Court in the instant case. Learned counsel for the appellants relied on the judgment in Yorkshire Copper Works Limited's Application for a Trade Mark (Vol. LXXI RPC 150), "Bali" Trade Mark (1969 RPC 472), The Registrar of Trade Mark v. Ashok Chandra Rakhit Ltd. and Reliance Silicon (I) Pvt. Ltd. v. Collector, Central Excise, Thane . Learned counsel for the respondent company in support of its contention relied on State of Kerala and Anr. v. A.c.K.

Rajah and Anr. (1994 Suppl. 2 SCR 679), Murli Manohar & Co. and Anr. v. State of Haryana and Anr. , Ebrahim Aboobakar and Anr. v. Custodian General of Evacuee Property (1952 SCR 696), and Nafar Chandra Jute Mills Ltd. v. United Bank of India and Ors. .

70. We have perused the above judgments as also the arguments of learned counsel, and we have no hesitation in holding that the appellate power of the High Court statutorily is not hedged in by any restriction, but in our opinion, the High Court merely because it has unrestricted appellate power, should not interfere with the considered order of the Commission unless it is satisfied that the order of the Commission is perverse, not based on evidence or on misreading of evidence, keeping in mind the fact that the Commission is an expert body. In the case of Uttar Pradesh Co-operative Federation Ltd. v. Sunder Brothers of Delhi (1966 Supp. SCR 215), while considering the appellate power of the court under Section 34 of the Indian Arbitration Act, this Court held thus:

> "It is well established that where the discretion vested in the Court under Section 34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well-established; but, as has been observed by Viscount Simon, L.C., in Charles Osenton & Co. v. Johnston (1942 AC 130):
>
> "The law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case.""

71. Almost similar is the view of this Court in the case of Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. and Ors. (1988 Supp SCC 796) wherein this Court held while considering its statutory appellate power under Section 130-E(b) of the Customs Act, 1962:

> "...We are, however, of the view that if a fact finding authority comes to a conclusion with in the above parameters honestly and bona fide, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question, in our opinion, is no ground to interfere with that finding in an appeal from such a finding. In the new scheme of things, the Tribunals have been entrusted with the authority and the jurisdiction to decide the questions involving determination of

> the rate of duty of excise or to the value of goods for purposes of assessment. An appeal has bene provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted bona fide with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under Clause (b) of Section 130-E of the Act."

72. Similar is the view taken by this Court in the case of Reliance Silicon (I) Pvt. Ltd. (supra), which was in regard to the appellate power of the Supreme Court under Section 35-L of the Central Excises & Salt Act, 1944. We have also noticed carefully the decisions relied upon by learned counsel for the respondent company, which have held that an appellate court whose powers are not hedged in by any limitation, is free to independently consider the evidence and satisfy itself whether the findings and conclusions arrived at by the court of the first instance are proper or not. These judgments cited by the learned counsel for the Company also hold that the appellate court is competent to adjudicate all questions of fact and law and record its own findings and that it can reappreciate and re-evaluate the evidence and arrive at its own finding and conclusions. These enunciations of law found in the judgments cited by the learned counsel for the respondent company, in our opinion, in no way conflict with the decisions on which we have placed reliance hereinabove. It cannot be disputed that when the appellate power is not hedged in by an restriction, the appellate court can independently reconsider the evidence, but the line of decisions relied on by us show that the rule of prudence in law is that such appellate power is not to be exercised for the purpose of substituting one subjective satisfaction with another, without there being any specific reason for such substitution. Further, in regard to the exercise of appellate power against the order of expert tribunals, on facts, the appellate court which is not an expert forum should be doubly careful while interfering with such expert forum's findings on facts. That is a principle accepted by this Court with which we respectfully agree. See Reliance Silicon (I) Pvt. Ltd. (supra) as also Collector of Customs, Bombay (supra).

73. Having discussed the various statutory provisions of the enactments involved in the procedure of tariff fixation and the duties and obligations of the Commission and the High Court under the 1998 Act, we will now take up for consideration certain factual issues which have arisen in these appeals.

Budge-Budge costs:

74. One of the major factors which was taken into consideration while determining the tariff by the Commission is the cost incurred by the company in installing and commissioning its new generating unit at Budge-Budge. To augment its generating capacity, the company decided to put up the said plant for which, as required under Section 44(3) of the 1948 Act, the Company sought the permission of the West Bengal Electricity Board (the Board) to establish this new generating station. Though, initially the cost of the project was shown as Rs. 1285.70 crores, subsequently the company

went on increasing the said cost on the ground of escalation and ultimately the company sought permission for expending a sum of Rs. 2460 crores on this project, on the ground of further escalation. The Board constituted a Committee for determining the quantum as to what would be the reasonable cost of the project and the said Committee arrived at a figure of Rs. 1853 crores. On that basis, the Board approved the said cost. In view of the fact that the entire project cost furnished by the Company had not been approved by the Board, the licensee approached the Central Electricity Authority (CEA) to refer the dispute for arbitration under Section 44(3) of the 1948 Act. The Board, however, opposed this arbitration contending inter alia that the approval of the revised project cost was not contemplated under Section 44(3) of the 1948 Act and, therefore, CEA had no authority to arbitrate on this dispute. However, the CEA determined the project cost at Rs. 2295.97 crores as on 12.1.2000. The Board challenged the same before a learned Single Judge of the Calcutta High Court who accepted the contention of the Board and held that the subject matter of arbitration was beyond the scope of the CEA under Sub-section (3) of Section 44 and, hence, the CEA had no jurisdiction to adjudicate on this dispute. This judgment was taken up in appeal in a Letters Patent Appeal before the Division Bench of the Calcutta High Court, which allowed the appeal upholding the jurisdiction of the CEA. In the said process the Division Bench also held that the said cost as fixed by the CEA should be taken as the cost of the Budge-Budge project while determining the tariff which was then pending before the Commission. The Board challenged the judgment of the Division Bench before this Court and this Court in its judgment which is now reported in the case of West Bengal State Electricity Board v. Calcutta Electric Supply Corporation Ltd. , upheld the authority of the CEA to determine the dispute pertaining to the cost of the project. However, this Court held that it was unnecessary for the Division Bench to have gone into the question of impact of the project cost as determined by the CEA upon the tariff structure, hence, the said observation was set aside. Before the Commission, the Company pleaded that the actual cost of Budge-Budge was Rs. 2681.72 crores and the Commission should take that as the cost of project while determining the tariff. The Commission, however, without placing any reliance on the claim made by the company, as also on the determination of the cost by the CEA, independently arrived at a figure of Rs. 2075 crores as the cost of Budge-Budge project, to be taken into consideration by it, while fixing the tariff. The High Court found fault with the Commission for not accepting the finding of the CEA and independently determining the cost of the Budge-Budge project. After discussing the provisions of Sections 44(3) and 76(2) of the 1948 Act, it held that since the Award of the CEA is final and conclusive, the same will be binding on the Commission whether the Commission was a party or not to the proceedings before the CEA. On this basis, it accepted the figure of Rs. 2295.57 crore fixed by the CEA as the appropriate cost of the project.

75. The appellants before us have contemplated that the High Court erred in coming to the conclusion that the finding of the CEA was binding on the Commission. They further contend that, at the most, the finding of the CEA would be a piece of evidence before the Commission and it was open to the Commission to consider the same and for good reasons to differ for the said finding. They also state that in the instant case the Commission, for very good reasons, has correctly come to the conclusion that the cost of the Budge-Budge project should be taken as Rs. 2075 crores as against what was determined by the CEA. Per contra, on behalf of the Company, it is contended that the determination of the cost of project by the CEA is done by it under a statutory proceeding after considering all the materials on record. They contend that any decision given under Section 44 of

the 1948 Act being final and binding under Section 76(2) of the said Act, the same is also binding on the Commission, more so, when the said finding has been affirmed by the Division Bench of the High Court as also by this Court.

76. We have considered the argument addressed on behalf of the parties on this issue, as also the provisions of the enactments. Under Section 29 of the 1998 Act, we have already noticed that it is the Commission which has the authority to determine the tariff taking into consideration the principles enunciated in the said section, as also in the Regulation framed by the Commission in this regard. In this process, the Commission will have to take into consideration the findings recorded in collateral proceedings. However, it is not correct to state that the said finding in the collateral proceedings will be ipso facto binding on the Commission. This is because of the fact that the object of determination of the cost of the project by the CEA and the fixation of tariff by the Commission are not entirely the same. There is no obligation on the part of the CEA to take into consideration the efficiency of the Company which is putting up the project, as also the interest of the consumers while determining the cost of the project, whereas the Commission while determining the tariff has to take into consideration these factors also. Therefore, in our opinion, the power of the Commission to determine the correct value, of the factors to be taken note of by it, cannot be restricted by mandating the Commission to be bound by a finding in a collateral proceedings. Such finding is a piece of evidence before the Commission, which even though has a strong evidentiary value, is ipso facto not binding on the Commission. The Commission could for good reason decide to differ from it. The Commission is an independent autonomous body, therefore, its power to examine a piece of evidence cannot, in any manner, be restricted, but then the question still remains, whether in the instant case the Commission has given due weightage to the finding of the CEA in regard to Budge-Budge cost and given reasons to differ from the same. We notice in the instant case that the CEA on the material before it, came to the conclusion that the project costs would be Rs. 2295.57 crores. The appellant, however, contends that this is an inflated figure or at least this excessive cost was incurred by the company because of its mismanagement. They relied upon certain materials to show that the cost incurred by other companies on similar projects show that the figure accepted by the CEA is highly exaggerated. On this basis, they justified the decision of the Commission in arriving at the figure of Rs. 2075 crores as the acceptable cost of Budge-Budge project, which according to the appellants is fair both to the Company as also the consumers.

77. We are not inclined to accept this argument of the appellants. It is true that the figure arrived at by the CEA is not ipso facto or as a matter of rule binding on the Commission, but, as stated above, the Commission will have to take into consideration the finding of the CEA giving due weight to that piece of evidence. The Commission could, of course, disagree with the finding of the CEA for compelling reasons but not on the ground on which the Commission has done in the instant case. The Commission while arriving at the above figure of Rs. 2075 crores took into consideration the project costs of the Budge-Budge as projected by the Company, the Board, the CEA and the consultants, and took an average of all these figures to come to the conclusion that the cost of Budge-Budge project could be Rs. 2075 crores. In this process, we think that the Commission has not rejected the finding of the CEA for any compelling or acceptable reasons. It did not have before it any other material to hold that the estimated cost of the project by the CEA is otherwise erroneous. In the absence of the any such material, in our opinion, the Commission ought to have

accepted the said finding of the CEA and ought not to have indulged in taking the average of the various figures given by different authorities, as stated above. Therefore, we think that the Commission not having given any acceptable reason based on material before it to differ from the finding of the CEA, the figure arrived at by the Commission in regard to Budge-Budge cost by rejecting the finding of the CEA is erroneous. In this view of the matter, we are of the opinion that though the Commission was not bound by the finding of the CEA, still, it having not differed from the said finding for good reasons, the High Court was justified in accepting the figure of Rs. 2295.57 crores as the cost of Budge-Budge project.

Transmission & Distribution losses:

78. This is another major issue between the parties. Over the years the Company has been suffering substantial loss by way of T&D losses and while calculating the tariff under the 1948 Act, the entirety of this loss was taken as an expenditure of the Company. So far as the transmission loss is concerned, the Company having made substantial investments in equipments etc. has achieved a reasonable target of nearly 12%, hence, there is not much of a dispute though the same could be further brought down. However, the Company has for the year 2000-02 claimed a distribution loss of nearly 11% over and above the transmission loss, thus claiming a total T&D loss of 22.36%, which the Commission did not accept and took into account a total T&D loss as 16.8% (that is about 4.8%) though the claim in regard to this loss was 10.36%. In this regard, the Commission has held that over the years the Company has been incurring these losses but has not taken sufficient steps to bring down this loss. The Commission took into account and accepted the fact that the distribution loss is an all India phenomenon and the same varies from place to place, depending on the location being a rural or an urban area. It also took note of the fact that this loss is dependent upon the nature of distribution, namely, whether it is overhead or underground and also the prevailing culture in the society. It has also taken note of the fact that laws controlling theft of electricity till recently, were insufficient to be a deterrent and also the fact that the steps taken by the Company, by instituting prosecution, have remained futile because of delay in disposal of these cases. It is in this background that the Commission came to the conclusion that the distribution loss in its entirety cannot be controlled by the Company for some time to come. However, the Commission also came to the conclusion that the steps taken by the Company over the years to bring down this loss are insufficient, and, hence, held it unfair to pass on the whole liability on the consumers. Therefore, it allowed a distribution loss of about 4.8% and directed the Company to reduce this total T&D loss for future years so as to bring it down to 14% in the next 4 years. Thus, it fixed the total T&D loss at 16.8% for the year 2000-2001.

79. The High, Court on the contrary, came to the conclusion that the distribution loss cannot be controlled by the Company as the Company is a victim of theft of electricity and has not gained anything by allowing the theft of electricity, therefore, the Commission ought to have granted the claim of the Company to the extent of the actual T&D loss. It is on this basis that the High Court reversed the finding of the Commission and allowed a total loss of 22.36% (12% T&D and 10.36% distribution loss) as claimed by the Company.

80. The appellants before us have challenged this finding. They point out that the distribution loss is not wholly due to theft, and that even according to the Company, part of it is attributable to wrong billing and part of it is due to faulty meters apart from theft. They point out that the Company has not brought on record material to show what part of distribution loss could be attributed to theft from amongst these 3 categories of distribution loss. They also point out that the Company has either been complacent, negligent or might even have been colluding in the theft of energy. They contend that the major part of the supply of the Company is underground and compared to various other metropolitan areas, especially the area catered by the Bombay Electricity Supply Co., the distribution loss of the respondent company is far in excess of acceptable limits. They also point out that as far back as in the year 1993 itself, the Government of West Bengal had called upon the Company to reduce its total T&D especially the distribution loss by 1.5% per year but the Company did nothing of the sort. On the contrary, they point out from the available figures that year after year the distribution loss of the Company has been increasing. This they allege, is because of the fact that prior to the coming into force of the 1998 Act, the Company had the privilege of adding on this loss to their expenditure while calculating the tariff and, hence it could pass on the burden to the consumers who had to accept it without demur. They pointed out that things have changed since the coming into force of the 1998 Act. Now the Commission will have to take into consideration proper, efficient management of the Company in all its activities, and controlling the distribution loss is also a vital part of the management of the Company which has to be efficiently managed. They contend that the conduct of the Company in allowing increased distribution losses over the last decade only points out to the callousness of the Company in not reducing the distribution loss. They urge that the consumers whose right has now to be recognised for a cheaper supply of power, cannot be burdened with this callous expenditure of the company.

81. On behalf of the company before us, it is contended that they have done everything possible to prevent this distribution loss. They produced facts and figures to show how at every stage when the theft was detected by them, they had initiated steps to recover the lost revenue or to prosecute the offenders and had also employed vigilance/security staff to prevent thefts. They plead that the law as existing prior to July, 2002 was totally ineffective and complaints ledged by them have not borne any results, and there being no deterring penal law, it is next to impossible to control this menace. They also contend that the social culture of its consumers is such that they do not feel guilty about this misdeed. Per contra, these very persons indulge in violence whenever the Company tried to prevent such mischief of theft of energy. They, however, plead after the coming into force of the new laws and creation of new policing force by the State, thee is every possibility of reducing the distribution loss. They also point out from comparative figures that the distribution loss of the respondent company was far less than most of other similar companies all over the country and, therefore, the allegations of callousness and negligence have no foundation.

82. We notice that the Commission has considered the opinion of the ASCI in this regard, wherein the consultant has found fault with the company for not bringing down the distribution loss by holding:

> "By any standard the T&D losses of 22.36% for a total urban distribution like Calcutta cannot be justified and allowed fully into the tariff calculations."

83. However, in the concluding part of the report on this subject the consultant held thus:

> "The Commission may set a target to bring down the total T&D losses to 15% in the next 5 years from the current 22.36%. To start with Commission may set a loss reduction target of 0.36% for the year 2000-01 as most of the year has elapsed by now and 2% for the year 2001-02 (22 to 20%) and revenue requirement adjusted accordingly."

84. By this, we see that though the consultant ASCI came to the conclusion that the T&D losses in total, claimed by the Company was unjustified, still for no expressed reasons it concluded by saying conditional claim of actual loss of 22.36% (of which 12% is transmission loss) be allowed with a reduction in a phased manner, meaning thereby, the ASCI recommended the acceptance of actual distribution loss without there being any deduction for the contribution of the Company towards this loss for the year 2000-2001.

85. The Commission did not accept this finding of the consultant. In its report after discussing various pros and cons of distribution it held:

> "We, therefore, feel and direct that CESC may be given some more time to bring its loss/unaccounted energy down to 14% in view of the above reasons and constraints. They should also make efforts to bring it down further. We, therefore, allow them 20% more over 14% T & D loss i.e. 16.8% which they should bring down at least to 14% in next 4 years by reduction of 0.7% every year. The T & D loss to be allowed in 2001 - 2002 will be 16.1% of energy sent out plus purchase. Transmission loss on power wheeled not exceeding 4% may be reduced from the energy to be wheeled at the time of delivery and appropriate wheeling charges charged separately."

86. As noticed above, the High Court held that the actual loss incurred by the Company on account of T&D losses should be allowed. Hence it took the T&D losses suffered by the Company as 22.36% as claimed by the Company with no projected reduction for the future also.

87. While we agree with the Commission that it is the duty of the company to bring down the loss under this head, at the same time, we feel that the same cannot be done in its entirety forthwith because of the reasons given by the Commission itself. At the same time, we also take into consideration the fact that this loss be it transmission or distribution is not totally beyond the control of the Company, which fact is established by the admission made by the respondent Company to the Government of West Bengal as far back as in the year 1993 itself, as also the success claimed by the Company before us in bringing down this loss by 1% for the year 2001-02. If only this effort had been put in by the Company ever since the State of West Bengal directed it to do so in a progressive manner in 1993, the situation would have been different today. Therefore, the problem with which the Company is now faced in regard to this loss is very much contributed by the inaction on the part of the Company. Therefore, we are of the opinion that the Company should bear a substantial part of this loss by itself rather than seeking to transfer the entire burden on the consumers. This has also been the finding of the Commission. However, the Commission thought

the loss should be pegged down to 16.8% for the year 2000-01 as against the actuals claimed by the company at 22.36% which we think is rather on the lower side. Therefore, basing our finding on the very same principle as adopted by the Commission, we think that the T&D losses suffered by the Company for the year 2000-01, should be something more than what is allowed by the Commission because of the consequential financial burden on the Company. In this regard, we take note of the fact that it is for the first time after coming into force of the 1998 Act that the Company has realised that it is unable to pass on this loss in its entirety to the consumers. Therefore, there is a need to see that the Company is given some latitude in this regard. We are, thus, of the opinion that for the year 2000-01, the Company should be allowed to claim a T&D loss of 19% i.e. 2.2% more than what is allowed by the Commission, and for the year 2001-02 the same shall be 18% because the Company's documents itself show that for the said year they have been able to curb the loss by 1%. For future years i.e. for the year 2002 onwards, we leave it to the Commission to reconsider the above figures fixed by us based on material available before it while determining the tariff for the year 2002-03. We do notice that there is an element of ad hocism in the fixation of T&D losses by us, but in a situation as is presented to us, an element of ad hocism cannot be escaped from. We have taken note of all factors projected by the parties in this regard as also the opinion of the ASCI and findings of the Commission, and keeping the interests of the consumers as well as the Company in mind, we have arrived at a via media to protect the interests of all concerned. In that process we might have fixed this figure in an ad hoc manner but there is no escape from the same at least for the year 2000-01 and 2001-02. For the future years, taking this as a guidelines, the Commission can assess the efficiency or otherwise of the company in controlling these losses and refix this limit of T&D loss while fixing the tariff.

Employees' cost:

88. The ASCI in its report in regard to the above item held that the number of employees in New Cossipore and Mulajore is very high by any standard. It observed that the running of these institutions has become uneconomical and, hence the company has been advised to take action to reduce the number of employees by proper deployment or Voluntary Retirement Schemes (VRS), particularly, in the context of the proposal for closing down the Mulajore plant. It also observed that the overtime payment made to the employees was a worrying features. It also noticed because of the settlement with the workmen, the Company was paying the workmen overtime irrespective of the need for the same and such payment had no justification especially when the same has to be passed on to the consumers. Therefore, it recommended a drastic cut or alternatively phasing out of this system of overtime payment. The Commission in its report agreed with the views expressed by the consultant. It however did not agree with the consultant as to the closure of Mulajore & New Cossipore plants, unless it was established that the cost of generation of electricity in those plants was higher than the cost of purchase of electricity by the Company from other sources. For the said reason it deferred the finding in regard to closure of the abovementioned two plants. It however agreed with the consultants that the overtime payment that was being made by the company was extremely high and hence for the year 2000-01 it imposed an ad hoc cut from the actual expenditure under this head, to the extent of 447 lacs towards overtime, 600 lacs towards pension contribution and 208 lacs towards provision for leave encashment. The High Court reversed this finding on the ground that the payment of wages including overtime and other welfare benefits was made by the

Company under lawful agreement entered with the workmen. Therefore, during the pendency of these agreements, it was legally not possible for the Company to stop these payments. Therefore, the amounts spent towards this purpose namely, towards the employees' cost should not be treated as the amounts not properly incurred. The High Court on this basis allowed the entire expenditure incurred by the Company under this head.

89. We are in agreement with this finding of the High Court. Since it is not disputed that the payments made to the employees are governed by the terms of the settlement from which it will not be possible for the Company to wriggle out during the currency of the settlement, therefore, for the year 2000-01 the actual amounts spent by the company as employee's costs will have to be allowed. However, we agree with the findings of the consultants as also the Commission that the amounts spent towards wages are highly disproportionate to the energy generated as also the amounts paid as overtime to the workmen is wholly unrealistic. We also notice that the two plants of the respondent company namely those at Mulajore and New Cossipore are stated to be economically not viable. Therefore, the Company should take steps either to make the said plants economically viable or to close down if necessary. In this regard, we note that the Commission has for the relevant year not granted the request of the Company for introducing VRS by allocating required sums of money on this account, which under the circumstances seems to be a good one time investment for reducing the cost under the head "employees' cost". While considering the tariff revision for the year 2002-03 we direct the Commission to bear this fact in mind. However we further direct the Company that should there be any need for entering into a fresh settlement with the workmen, then any agreement which entitles the workmen to get overtime payment even when overtime work is unnecessary should be done away with. With the above observations as a future guidance, we accept the finding of the High Court on this count.

Working capital:

90. In regard to the working capital, the Company in its application had requested the Commission to accept Rs. 23,897 lacs for the year 2000-01. When the issue was referred to the ASCI, it noted that this request was not in conformity with the provisions of Schedule VI to the 1948 Act and in that process, it considered 4 alternatives and after detailed discussion it recommended a positive figure of Rs. 10,247 lacs. The Commission after considering the claim of the Company as also the recommendations of the ASCI, though it came to the conclusion that the recommendation of the consultant was most appropriate, still after taking into account the plea of the Company, held:

> "We have deliberated on the projection by the CESC in this regard as also on the recommendation of the Consultants. We find that the working capital in accordance with Schedule VI of ES Act, 1948 come to negative Rs. 23191 lakhs. The Schedule - VI provides incentives and restrictions to utility in various paras. It is therefore not fair to isolate and look into one para alone. Positive figure of Rs. 10247 lakhs, which makes such a substantial difference, may not be correct in overall circumstances and thee is greater need to have better funds management and we advice CESC accordingly. We have already commented on similar relevant points separately. However, on a balanced approach and as a special case we also do not take the

negative balance for this year and the next year. The position will be reviewed during 2002-2003."

91. The High Court, however, without properly analysing the finding of the Commission which was arrived at as a special case for 2001-02 and also failing to note that the said finding was arrived at with a view to help the Company, proceeded to recompute the same based on certain materials produced by the Company for the first time before it, and accepted the request of the Company. We think the High Court was not justified in doing the same. It is to be noted, admittedly, the material placed before the High Court was not before the Commission or the Consultants. The Consultants had prepared different alternatives and in that process had found that the request of the Company was not in accordance with the guidelines adopted by the Commission, hence it had projected a positive figure of 10,247 lacs which the Commission though was reasonable but still, with a view to assist the finances of the Company for the year 2001-02, it took a neutral figure of zero and calculated the working capital base. We think this approach of the Commission which was done as a favour to the Company, to the extent possible ought not to have been interfered by the High Court. Therefore we set aside the finding of the High Court in this regard and accept the finding of the Commission which is meant for the year 2001-02.

Cross subsidy:

92. A perusal of Sections 29(2)(d), 29(3) and 29(5) of the 1998 Act shows that the consumers should be charged only for the electricity consumed by them on the basis of average cost of supply of energy, and the tariff should be determined by the State Commission without showing any undue preference to any consumer. The statute also obligates the State Government to bear the subsidy which if it requires to be given to any consumer or any class of consumers, should be only on such conditions that the Commission may fix and such burden should be borne by the Government. However, the High Court in its judgment has directed the Company to maintain its tariff structure in regard to different types of supplies as it was prevailing before the Commission fixed the new tariff. It also directed the increase in the average rate of tariff which it had permitted to be distributed pro rate by the Company amongst different consumers, so that the percentage of increase of each rate is the same. In effect, therefore, the High Court has directed the continuance of cross subsidy. One of the reasons given by the High Court in this regard is that the Calcutta Tramways which is otherwise running a cheap transportation system might have to increase its fare and the same cannot be permitted since the Calcutta Tramways were not heard in the matter of fixation of tariff and there is, therefore, a likelihood of wide discontentment if the fares are to be increased. We have noticed the object of the 1998 Act is to prevent discrimination in fixation of tariff by imposing cross subsidy, but at the same time under Section 29(5) of the 1998 Act, if the State Government so chooses to subsidise the supply of energy to any particular class of consumers, the same can be done provided of course the burden of loss suffered by the Company is borne by the State Government and not imposed on any other class of consumers. In this view of the matter, we are of the opinion that while the Commission was justified in its view as to the non- applicability of cross-subsidy, the High Court was in error in issuing a direction to the Commission, contrary to the object and provisions of the 1998 Act to maintain a tariff structure which was prevailing prior to the Commission's report. It is still open to the State Government if it so chooses to direct the Commission to fix the tariff of supply

of the electricity to any class of consumers at a reduced rate provided the State Government itself subsidies the same.

Fixation of tariff for 2002-03:

93. The Commission has refused to fix tariff for 2002-03 as prayed for by the Company on the ground that the application for the same was made by the Company beyond the time granted by the Commission. The High Court on the contrary, by the impugned judgment has held that in view of paucity of time, it is futile to send the same back to the Commission. In the said view of the matter, though it held that it has no facts and figures before it and it had no time for detailed fact-finding, still it thought it appropriate that the tariff fixed for the year 2001-02 be made applicable for 2002-03 also. We find no justification for such a direction. Since there was no material available for the High Court to arrive at a proper tariff as contemplated by the 1998 Act, and the High Court could not have fixed an ad hoc tariff in the manner in which it was done for the year 2002- 03. For these reasons, we think it appropriate that the same should be set aside and the Commission be directed to condone the delay in filing the application by the Company and fix the tariff for the year 2002-03 by following the procedure laid down in the 1998 Act and in the light of this judgment.

Auditor's report:

94. Most of the findings of the High Court proceed on the basis that the accounts audited by the statutory auditors should be accepted by the Commission at its face value. This finding of the High Court is based on the following two reasons:

> (a) The expenditure incurred by the Company falls under the definition of expenditure as defined in Clause XVII(2)(b) of Schedule VI to the 1948 Act therefore these expenditures are to be statutorily accepted, hence the Commission is bound by the same; and
>
> (b) There is no challenge as to the genuineness of the accounts of the Company, by the consumers therefore in the absence of any such challenge the Commission cannot go into the correctness of the accounts and the expenditure so reflected should be accepted on the basis of actuals as reflected in the accounts.

95. We notice that for the purpose of the 1948 Act, Clause XVII of Schedule VI defines the various types of expenditures enumerated therein, as expenditure "properly incurred" therefore for the purpose of the 1948 Act it would have been sufficient for a licensee to bring his expenditure under that definition clause and the same was entitled to be counted for the purpose of determining the tariff under the said Act. But we have noticed hereinabove though the principles of Schedule VI have been adopted by the Commission in its Regulations the same will have to be considered along with other principles enumerated in Regulations which includes the principles encompassed in Clauses (b) to (g) of Section 29(2) of the 1998 Act. We have also held that in the event of there being any conflict, it is the provisions of the 1998 Act which would prevail. The 1998 Act mandates the Commission to take into consideration the efficient management by the licensee of its Company, as

also the interests of consumers while determining the tariff, therefore, if these two factors which go in favour of the consumers are in conflict with the definition of expenditure 'properly incurred' in Schedule VI to the 1948 Act then it is for the Commission to reconcile this conflict and decide whether to accept the expenditure reflected in the accounts of the company or not. In this process the Commission in our opinion is not bound by the auditors' report.

96. Herein we notice that the objects of the 1948 Act are entirely different from the objects of the 1998 Act. The 1948 Act under Schedule VI does not contemplate taking into account the factors like good performance of the Company as also the consumers' interests in its expenditure while considering a particular expenditure as 'properly incurred expenditure'. While the 1998 Act specifically mandates that these factors also should be taken into account while considering whether a particular expenditure is "properly incurred expenditure" or not, therefore, it is not correct to say that each and every expenditure maintained under the provisions of the Sixth Schedule ipso facto becomes binding on the Commission.

97. The High Court further came to the conclusion that in view of the fact that there is no challenge to the accounts of the Company by the consumers, the said accounts of the Company should be accepted by the Commission. Here again we are not in complete agreement with the High Court. There may be any number of instances where an account may be genuine and may not be questioned, yet the same may not reflect good performance of the Company or may not be in the interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the Company, which may be genuine and unchallenged on that count still in the light of the above requirement of Section 29(2)(g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the Company are not ipso facto binding on the Commission. However, we hasten to add that the Commission is bound to give due weightage to such accounts and should not differ from the same unless for good reasons permissible in the 1998 Act.

98. In this view of the matter we are of the opinion that the Commission is not bound by the opinion of the auditors as also the definition of the expenditure properly incurred under Schedule VI to the 1948 Act to the extent held by us hereinabove.

Commission's power to issue interim orders:

99. Under Regulation 46 framed by the Commission, the Commission is vested with the power of passing such interim orders including an ex parte interim order as it may consider appropriate to protect the interest of any of the parties to the proceedings. In our opinion, it is open to the Commission to exercise this power in the event of there being any delay in determination of tariff by it. This power of interim directions can also be exercised by the Commission in the event of there being any requirement for making any changes in the existing statutes even pending revision, for any compelling reasons. Therefore, the apprehension of the respondent company as accepted by the High Court that the Schedule fixed by the Commission for determining the tariff is impracticable or is likely to jeopardise the interest of the Company, cannot be accepted. If for any reason the Commission either refuses to pass any interim order/directions where it is necessary, or passes such

interim order by which any party to the proceedings is aggrieved, it is always open to such aggrieved party to approach the High Court under its appellate power to seek suitable relief.

Re: Bias:

100. In view of the fact that we have ourselves decided the legal as well as most of the factual issues which have arisen in these appeals, we are relieved of the exercise of deciding the question of bias, and, therefore, do not express any opinion on the merits of the arguments addressed by either side on this issue. However, we think it appropriate to deal with one incidental question which arises from the above arguments.

101. The High Court by its order dated 7.5.2002 has declined to hear the arguments of the appellants in CA No. 4048 of 2002, on the ground that they had alleged bias against the Judges. In a case where an allegation of bias made against the Judges in found to be not proved, it is open to the court to initiate such action against the person who made the allegation of bias, as is permissible in law. That in our opinion would not empower the Court to deny a right of hearing, if the person alleging the said bias is otherwise entitled to. We think denial of hearing which is reasonably due to a party cannot be made on the ground of the conduct of the party attributing bias.

102. The right of audi alteram partem is a valuable right recognised even under the Indian Constitution. See Msr. Maneka Gandhi v. Union of India and Anr. wherein it is held, the principle of the maxim which mandates that no one should be condemned unheard, is a part of the rule of natural justice. We have already held that such right of hearing conferred by a statute cannot be taken away even by courts. While reckless and motivated allegations against the Court should be severally dealt with by appropriate proceedings, in our opinion, imposition of the punishment of denying a right of hearing would amount to a violation of the principles of natural justice and,hence, should not be resorted to. However, in the instant case since we have heard these appellants on the merits of the case, the said prejudice, if any, caused to them stands obliterated and requires no further consideration.

Re: An effective appellate forum:

103. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing

with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective.

Directions to the Commission:

104. In these appeals we have decided certain contentious legal and factual issues. The High Court in the impugned judgments has also reversed the finding of the Commission on many other incidental questions, primarily basing its finding on the application of law as understood by it. We in this judgment have taken a different view from that of the High Court in regard to many of these while affirming some of them. The views taken by us are likely to affect the finding arrived at by the High Court on these incidental issues also about which we have not given our opinion, therefore, there is a need that these issues decided by the High Court in regard to which we have not given any specific finding be also reconsidered by the Commission in the light of this judgment of ours. Therefore, we remand these matters back to the Commission to fix the tariff for the relevant years in accordance with the judgment of ours and bearing in mind the findings and directions issued in this judgment.

105. We further direct that the interim order made by this Court dated 12.7.2002 will continue till such time as the Commission prefixes the tariff in accordance with the directions contained in this judgment and on such re-fixation it shall be open to the Commission to adjust excess payment or short payment of tariff already paid by the consumers in such manner as it thinks appropriate.

106. The Commission shall also condone the delay in filing the application for tariff fixation for the year 2002-03 and fix the tariff in accordance with law for the said year.

107. We must make it clear that though we have heard many appellants, some of whom have not even appeared before the Commission or the High Court, this does not ipso facto confer a right of representation on them in the future proceedings either before the Commission or the High Court. Their right to take part in such proceedings, be it the Commission or the High Court shall be dependent on them being permitted by the Commission or the High Court as per the Regulations framed by the Commission.

108. For the reasons stated above, these appeals succeed to the extent mentioned hereinabove and the same are allowed to that extent. The matter will now stand remitted to the West Bengal State Electricity Regulatory Commission for disposal in accordance with law.