

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3457-3458 OF 2009
(Arising out of SLP (C) Nos. 14217-14218 of 2007)

GLOBAL ENERGY LTD. & ANR.

... APPELLANTS

Versus

**CENTRAL ELECTRICITY REGULATORY
COMMISSION**

... RESPONDENT

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

INTRODUCTION

2. Constitutional validity of clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation 2006 (hereinafter referred to and called for the sake of brevity as “Amended Regulation”) is the question involved herein.

BACKGROUND FACTS

3. It arises in the following factual matrix.

The Parliament enacted Electricity Act, 2003 (hereinafter referred to as, “the said Act”). In exercise of its jurisdiction conferred by Section 178 of the said Act, the Central Electricity Regulatory Commission (for short, “CERC”) made Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters), Regulation 2004 (for short, “the Regulation”)

Indisputably, in terms of the provisions of the said Act as also the Regulations, inter alia, license is required to be taken by a person who is desirous of dealing in inter-state trading, which in terms of Regulation 2(g) means “transfer of electricity from the territory of one State to the territory of another State by an electricity dealer”.

4. Appellant No. 1 is a Public Limited Company incorporated and registered under the Indian Companies Act.

5. Pursuant to or in furtherance of the said Act and the Regulations, the appellant No. 1 herein filed an application for grant of inter-State Trading License under Category ‘A’ before CERC on 23.3.2004. CERC published a

notice as regards the said application filed by the appellant No. 1 for grant of inter-state Trading License in all editions of 'Indian Express', Financial Express' and a vernacular daily 'Jansatta'. Appellant No. 1 also filed an interlocutory application seeking permission to trade in the electricity pending final disposal of its petition for grant of inter-state trading license as it had been engaged in inter-state trading of electricity prior to the commencement of the said Act. By reason of an order dated 31.3.2004, the said application was allowed. Objections filed to the appellant No.1's application for grant of license pursuant to the aforementioned notice were also rejected by an order dated 30.6.2004.

6. On or about 6.9.2004, CERC directed as under:

“(i) The petitioner No. 1 was qualified for the grant of Category 'A' license for inter-state trading in electricity for trading up to 100 million units in a year.

(ii) The CERC proposed to issue the license for inter-state trading to the petitioner No. 1 as category 'A' trader.

(iii) The petitioner No. 1 was directed to publish a notice under Section 15(5) of the Act. Section 15(5) of the Act reads as follows:

'15. Procedure for grant of licence.

.....

(5) Before granting a licence under section 14, the Appropriate Commission shall-

- (a) publish a notice in two such daily newspapers, as that Commission may consider necessary, stating the name and address of the person to whom it proposes to issue the licence;
- (b) consider all suggestions or objections and the recommendations, if any, of the Central Transmission Utility or the State Transmission Utility, as the case may be.”

7. After the publication of notices, objections were also received as regards appellant No. 1's trading in inter-state supply of electrical energy pursuant to the aforementioned interim order. The matter was taken to High Court and interim license granted to appellant No. 1 was extended by the High Court from time to time.

Draft Regulations were published to which appellant No. 1 filed objection. The Amended Regulations were notified on 3.4.2006. By an order dated 20.8.2006, CERC rejected the application filed by the appellant No. 1 for grant of inter-state trading license opining that Regulation 6A brought in through the amended Regulation will have a retrospective effect. An appeal preferred thereagainst is pending before the Appellate Tribunal for Electricity.

8. Appellants filed Writ Petitions before the High Court questioning the validity of the said Regulation. By reason of the impugned judgment the said Writ Petitions have been dismissed.

CONTENTIONS

9. Mr. Dipankar Gupta, the learned Senior Counsel appearing on behalf of the appellants, inter alia, would submit :-

- i. Having regard to the objects and reasons for which the said Act was enacted, the High Court must be held to have committed a serious error insofar as it held that the Amended Regulations would apply to the appellant No. 1's application.
- ii. It was also contended that sufficient guidelines having been laid down as regards disqualification of persons applying for grant of licence, the impugned Regulations must be held to be ultra vires Article 14 of the Constitution of India.
- iii. In any event, keeping in view the facts and circumstances of this case, the provisions should be read down.

10. Mr. Parag Tripathi, learned Additional Solicitor General appearing on behalf of the respondent, would, however, support the impugned judgment.

THE ACT

11. The said Act was enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

12. Indisputably, one of the objects and reasons for enacting the said Act was to encourage private sector's participation in generation, transmission and distribution of electrical energy. Trading is considered to be a distinct activity. Preamble of the Act also refers to distribution and trading as one of the objects sought to be achieved by reason of the said Act.

13. Section 2(71) defines "trading" to mean purchase of electricity for resale thereof and the expression "trade" is construed accordingly. Part IV of the Act providing for licensing, inter alia, mandates that no person shall

undertake trading in electricity unless he is authorized to do so by a licence issued under Section 14, or is exempt under Section 13.

Section 14 of the Act, inter alia, provides for grant of licence to any person inter alia trading in electricity as an electricity trader.

Section 15 provides for the detailed procedures for grant of licence as also the exercises required to be undertaken by the appropriate commission therefor. Section 16 of the Act empowers the Appropriate Commission to lay down conditions for grant of licence, which is as under:

“16. Conditions of licence. – The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.”

Section 17 imposes certain restrictions on activities of licensing. Section 18 empowers the appropriate commission to amend the terms of an existing licence in public interest. This power can be exercised by the appropriate commission either on an application made in this connection by

the licensee or suo motu. Section 19 lists the grounds for revocation of a licence.

Section 52 lays down the provisions with respect to eligibility of electricity trader for grant of licence. The said section provides that the Commission may specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader.

Section 66 mandates that the Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 of the Act.

Section 76 provides for constitution of a Central Commission. Functions of the Central Commission are laid down in Section 79 thereof; clauses (e) and (j) of Sub-Section (1) thereof reads as under:

“(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

xxx

xxx

xxx

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary.

Section 178 of the Act provides for a regulations making power. Sub-Section (1) thereof empowers the Commission to make regulations consistent with the Act and the rules generally to carry out the provisions of the Act. Sub-Section (2) of Section 178, inter alia, prescribes that such regulations may provide, inter alia, for (a) period to be specified under the first proviso to Section 14; (b) the form and the manner of the application under sub-section (1) of Section 15; and (c) the manner and particulars of notice under sub-section (2) of section 15.

THE REGULATION

14. Sub-Regulation (4) of Regulation 2 applies to trading carried out bilaterally between the generating company, including captive generating plant, distribution licensee and the electricity trader on the one hand and the electricity trader and the distribution licensee on the other. Supply to consumers is, thus, not a general function.

15. Chapter II of the Regulations lay down the procedure for grant of licence for inter-state trading.

16. Chapter III lays down the requirements of being an electricity trader. The title of Regulation 6 is Capital adequacy, Requirement and Creditworthiness, in terms whereof the net worth of the electricity trader at

the time of application is required to be not less than the amounts specified thereunder. Chapter IV provides for the terms and conditions of the licence. Regulation 7 lays down the obligations of the licensee.

AMENDMENT IN REGULATION

“5. Insertion of Regulation 6A: After regulation 6 of the principal regulations, the following shall be inserted, namely:-

“6A. Disqualifications: The applicant shall not be qualified for grant of licence for inter-state trading, if:

- (a)
- (b) The applicant, or any of his partners, or promoters, or Directors or Associates is involved in any legal proceedings, and in the opinion of the Commission grant of licence in the circumstances, may adversely affect the interest of the electricity sector or of the consumers; or
- (c)
- (d)
- (e)
- (f) The applicant is not considered a fit and proper person for the grant of licence for any other reason to be recorded in writing;

Explanation: For the purpose of determining as to whether the applicant is a ‘fit and proper person’, the Commission may take account of any consideration, as it deems fit, including but not limited to the following, namely:-

- (i) financial integrity of the applicant.

- (ii) His competence;
- (iii) His reputation and character; and
- (iv) His efficiency and honesty.”

INTERPRETATION

17. Regulation 6A has been inserted. The said provision is imperative in character. It is couched in negative language. It provides for disqualifications.

Indisputably, a subordinate legislation should be read in the context of the Act. Thus read, Regulation 6A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader.

It affects the creditworthiness of the applicant. It also affects the credit effectiveness, namely, (1) financial integrity of the applicant; (2) his competence; (3) his reputation and character; and (4) his efficiency and honesty.

It affects a pending proceeding. Because of the said amendment, an interim licence granted in favour of the appellant stood revoked.

This, however, would not mean that an amendment made in a regulation would under no circumstance, affect pending proceeding.

18. It is now a well settled principle of law that the rule making power “for carrying out the purpose of the Act” is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

We may, in this connection refer to a decision of this Court in Kunj Behari Lal Butail & Ors. vs. State of H.P. & Ors. [(2000) 3 SCC 40], wherein a Three Judge Bench of this Court held as under :

“14. We are also of the opinion that a delegated power to legislate by making rules “for carrying out the purposes of the Act” is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.”

(See also State of Kerala & ors. vs. Unni & Anr. (2007) 2 SCC 365 (Paras 32 to 37), A.P. Electricity Regulatory Commission vs. M/s R.V.K. Energy Pvt. Ltd. & anr. (2008) 9 SCALE 529)

19. The power of the regulation making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualification therefor. Provisions for imposition of general conditions of licence or conditions laying down the prequalifications therefor and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of licence also.

20. Mr. Tripathi had relied on a decision of this Court in The Rampur Distillery Co. Ltd. V. The Company Law Board & Anr. [(1969) 2 SCC 774]. This Court therein was considering the validity of a provision laying down the concept of a 'fit and proper person' for the purposes of Section 326(2) of the Companies Act, 1956 by reason whereof the Central Government has been conferred power to refuse the approval of appointment of a Managing Director, if in its opinion, he was not a fit and proper person. This Court held that the satisfaction contemplated thereby must be the result of an objective appraisal of relevant material and subject to the judicial scrutiny. Stating that by reason thereof, the Central Government was not made the final arbiter of the existence of the ground on which the satisfaction may be

founded. Such a power was held to be a quasi judicial one and not an administrative one, carrying with it a duty arising from the nature of the Act empowered to be done the job for which it is to be done, the conditions in which it is to be done and its repercussion upon the power of the company, the shareholders, the creditors and the general public for whose benefit, the power is to be exercised.

This decision, therefore, itself may be considered to be an authority for the proposition that where the Parliament thought it fit and proper to confer such a power upon an authority exercising quasi judicial power, the same is specifically conferred by the provisions of the Act itself and not by a subordinate legislation.

Paragraph 19 of the said decision clearly shows that for the purpose of arriving at a satisfaction that a person was fit and proper to be re-appointed as managing agent, all past conduct and actings were required to be taken into consideration. Regulation 6A is a disqualifying statute. The statute, however, does not provide for any machinery to collect independent material for being placed before the proper authority as regards evaluation of credit effectiveness and creditworthiness of the applicant.

CONSTITUTIONALITY ISSUE

21. For deciding the question involved herein, we must notice the purport and object for which such disqualifications have been brought into the statute book. In terms of Section 52 of the Act, the creditworthiness of the applicant must be apparent. Creditworthiness of an applicant can be considered from two angles. It may have two concepts, one is positive and the other is negative.

Four aspects of creditworthiness are envisaged in the Regulations as would appear from the Explanation appended thereto, which are as under:-

- (i) financial integrity of the applicant;
- (ii) his competence;
- (iii) his reputation and character; and
- (iv) his efficiency and honesty.

Article 19(1)(g) of the Constitution of India confers fundamental right on every citizen to carry out business, trade, profession or occupation. Clause (6) of Article 19, however, provides for imposition of reasonable restrictions by a statute. [See Udai Singh Dagar v. Union of India, {(2007) 10 SCC 306 }].

In the event a statute provides for licensee, in a case of this nature, the same must thus be found to satisfy the test of reasonableness.

The standard for determining reasonableness of a statute so as to satisfy the constitutional scheme as adumbrated in Article 14 of the Constitution of India must receive a higher level of scrutiny than an ordinary statute. Such a higher level of scrutiny is necessary not for the purpose of determining the Constitutionality of the statute alone vis-à-vis the field of legislative power as envisaged under Article 245 of the Constitution of India but also having regard to the object and purpose, the statute seeks to achieve.

Electricity was subject to strict regulations. It, subject to just exceptions, was the monopoly of the State Electricity Boards, Public Sector Undertakings.

Participation of the private sector inter alia in trading was encouraged by the provisions of the Act. Court's concern, therefore, would be not only to see that the Statute is intra vires the Constitutional scheme including the legislative field, but also as to whether it passes the test of reasonableness having regard to the object and purpose of the Act. For achieving the aforementioned purpose not only the premise, relevancy of the constitutional scheme in relation thereto is required to be taken into consideration as would be noticed a little later but therefor the doctrine of purposive interpretation should also be resorted to. [See New India Assurance Company Ltd. v. Nusli Wadia and Another, { (2008) 3 SCC 279 }]

In UCO Bank & Anr. vs. Rajinder Lal Capoor [(2008) 5 SCC 257],
this Court held:

“26. It is now a well-settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation, be made applicable in a case of this nature.”

When a disqualification is provided, it is to operate at the threshold in respect of the players in the field of trading in electricity.

When, however, a regulatory statute is sought to be enforced, the power of the authority to impose restrictions and conditions must be construed having regard to the purpose and object it seeks to achieve. Dealing in any manner with generation, distribution and supply and trading in electrical energy is vital for the economy of the country. The private players who are permitted or who are granted licence in this behalf may have to satisfy the conditions imposed.

No doubt, such conditions must be reasonable. Concededly, the doctrine of proportionality may have to be invoked. The Superior Court

would ensure that the subordinate legislation has been framed within the four corners of the Act and is otherwise valid.

22. The issue therefore which arises for our consideration is as to whether the delegation having been made for the purpose of carrying out the object, could the limitation be imposed for ascertaining as to whether the applicant is fit and proper person and disregarding his creditworthiness. There cannot be any doubt whatsoever that a statute cannot be vague and unreasonable.

23. Strong reliance has also been placed by the learned Additional Solicitor General on a decision of this Court in Clariant International Ltd. & Anr. vs. Securities & Exchange Board of India [(2004) 8 SCC 524], wherein it was held that a discretionary jurisdiction has to be exercised having regard to the purpose for which it was conferred, the object sought to be achieved and the reasons for granting such wide discretion. It was furthermore held that when any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity therewith. (See also Secretary, Ministry of Chemicals & Fertilizers, Govt. of India vs. Cipla Ltd. & ors., (2003) 7 SCC 1, para 4.1). There cannot be any doubt or dispute with regard to the aforementioned legal proposition.

24. The question, which, however, falls for our consideration is as to whether the purported legislative policy is valid or not. Such a question did not arise for consideration in Clariant (supra).

25. Yet again in State of T.N. & Anr. vs. P. Krishnamurthy & ors. (2006) 4 SCC 517, whereupon reliance has been placed by Mr. Tripathi, it has been held:

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.”

26. A legislative policy providing for qualification or disqualification of a person for obtaining a trading licence should not be vague or uncertain. Parameters must be laid down therefor for determining the financial integrity, reputation, character, efficiency and honesty of the applicant. An explanation appended to clause (f) of Regulation 6A points out various aspects that may be considered while determining the said criteria.

However, what should be the criteria in regard to financial integrity, character, reputation, etc. have not been defined. How and in what manner the said criteria are required to be ascertained have not been laid down, the criteria are subjective ones.

27. A disqualifying statute, in our opinion, must be definite and not uncertain; it should not be ambiguous or vague. Requisite guidelines in respect thereof should be laid down under the statute itself. It is well settled that essential legislative function cannot be delegated.

It has been accepted by Mr. Tripathi that the explanation appended to clause (f) of Regulation 6A is not exhaustive.

It is now a well settled principle of law that essential legislative functions cannot be delegated. The delegatee must be furnished with adequate guidelines so that arbitrariness is eschewed. On what basis and in particular, keeping in view the possible loss of reputation and consequently the business of an applicant for grant of licence would suffer, it was obligatory on the part of the Parliament to lay down requisite guidelines therefore. The factors enumerated in the 'Explanation' appended to clause (f) of Regulation 6A are unlimited. For determining the question as to whether the applicant is a fit and proper person, a large number of factors may be taken into consideration. It for all intent and purport would be more than the technical requirement, capital adequacy requirement and credit worthiness for being an 'electricity trader' as envisaged under Section 52 of the Act.

An applicant usually would be a new applicant. It is possible that there had been no dealings by and between the applicant and the licensor. Each one of the criteria laid down in the explanation refers to creditworthiness.

28. In State of Kerala & ors. vs. Unni & anr. [(2007) 2 SCC 365], this Court has held:

“When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down.”

In State of Rajasthan & ors. vs. Basant Nahata [(2005) 12 SCC 77] Section 22-A of the Registration Act, 1908 which was inserted by Rajasthan Amendment Act 16 of 1976 was struck down, holding:-(1) The executive while making a subordinate legislation should not be permitted to open new heads of public policy, (2) the doctrine of public policy itself being uncertain cannot be a guideline for anything or cannot be said to be providing sufficient framework for the executive to work under it, (3) Essential

functions of the legislature cannot be delegated and it must be judged on the touchstone of Article 14 and Article 246 of the Constitution, and (4) only the ancillary and procedural powers can be delegated and not the essential legislative point.

29. Our attention has been drawn to some other legislations wherein the concept of ‘fit and proper person’ had been applied, namely, Securities and Exchange Board of India (Criteria for Fit and Proper Person) Regulations, 2004.

30. We have not been shown as to how the purpose and object of the said Regulations can be said to be in pari materia with the Regulations in question. It must also be borne in mind that an elaborate public hearing process is provided for grant of licence in terms of Section 15 of the Act. Such an independent inquiry cannot be carried out de hors the statute. But the Parliament thought it fit to confer a hearing as regards public objection only.

Regulation 6A in effect confers powers/discretion on matters of licensing even in public hearing. Such relevant factors which provide for the criteria laid down in Regulation 6A could be brought on record. Section 15, however, empowers the Commission to specify the form and manner of the

application and the fees that is required to be attached. The parliamentary object must be read in the context of the preamble.

The reform legislation sought to bring in transparency in the work of the public sector. It postulates competition from the private sector. Only such a competition now would give rise to a development of a proper market in the long run. The power of the Regulatory Commission to impose qualification/restrictions should be read in line with the larger object of the Act. The Consumer tariff is to be laid down by the Commission. How licensees would operate their business to the extent permissible under law should be subject to Regulation, which ordinarily should not be resorted to discourage private participation in the power sector. A trader of electricity does not deal with consumers; he is merely an intermediary between a generating company and a distribution licensee. The tariff that a distribution licensee will charge from its consumers is regulated. Even the margin that a trader can make is regulated. It is, therefore, not correct to contend that Regulation 6A is in consumer interest as it has not been shown how it will protect the consumer interest.

ULTRA VIRES ISSUE

31. Section 52 of the Act is without prejudice to the provisions contained in sub-Section (c) of Section 12. By reason of the said provision the appropriate Government is vested with the power to specify:- (1) Technical requirement; (2) Capital adequacy requirement and; (3) Creditworthiness in relation to an electricity trader.

Regulation 6 deals with capital adequacy requirement and creditworthiness. Regulation 6A (b), therefore, cannot have anything to do with capital adequacy requirement and creditworthiness. The finding of the High Court to that effect cannot be upheld as Regulation 6A is a stand alone provision providing for a set of disqualifications. Although by the said provisions, it cannot be said that the legislature has exhausted itself but the same should also be taken into consideration for the purpose of determining the effect of the Regulations. As Section 52 does not empower the Regulation making authority to provide for qualification or disqualification, the delegated legislation or a subordinate legislation as is well known must conform exactly to the power granted.

In Supreme Court Employees' Welfare Association vs. Union of India & Anr. [(1989) 4 SCC 187], this Court has held:-

“62. Thus as delegated legislation or a subordinate legislation must conform exactly to the

power granted. So far as the question of grant of approval by the President of India under the proviso to Article 146 (2) is concerned, no such conditions have been laid down to be fulfilled before the President of India grants or refuses to grant approval. By virtue of Article 74(1) of the Constitution, the President of India shall, in exercise of his functions, act in accordance with the advice of the Council of Ministers. In other words, it is the particular department in the Ministry that considers the question of approval under the proviso to Article 146 (2) of the Constitution and whatever advice is given to the President of India in that regard, the President of India has to act in accordance with such advice. On the other hand, the Chief Justice of India has to apply his mind when he frames the rules under Article 146(2) with the assistance of his officers. In such circumstances, it would not be unreasonable to hold that the delegation of the legislative function on the Chief Justice of India and also on the President of India relating to the salaries, allowances, leave and pensions of the officers and servants of the Supreme Court involve, by necessary implication, the application of mind. So, not only that the Chief Justice of India has to apply his mind to the framing of rules, but also the government has to apply its mind to the question of approval of the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions. This condition should be fulfilled and should appear to have been so fulfilled from the records of both the government and the Chief Justice of India. The application of mind will include exchange of thoughts and views between the government and the Chief Justice of India and it is highly desirable that there should be a consensus between the two. The rules framed by the Chief Justice of India should normally be accepted by the government and the question of exchange of thoughts and

views will arise only when the government is not in a position to accept the rules relating to salaries, allowances, leave or pensions.”

32. We may now consider the provisions of Section 178 of the Act. Although various clauses contained therein are merely illustrative in nature and not exhaustive, we will assume that although the matter relating to grant of licence is covered by Section 12 and 14 of the Act, the Regulation making power may also be available for the said purpose.

33. We have noticed hereinbefore the effect of sub-Section (1) of Section 178. We may only notice that clauses (a), (b), (c) and (o) which are referable to the provisions of Sections 14 and 15 as such do not provide for any power to deal with disqualification authorizing the respondent to frame regulation. This Court in Kerala Samasthana Chethu Thozhilali Union vs. State of Kerala & ors. [(2006) 4 SCC 327] held as under:

“37. Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less have been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under

which the statutory framework should ordinarily be worked out.”

34. We have seen that clause (b) of Regulation 6A provides for a disqualification only on the ground of involvement of the applicant or any of its promoters, partners, directors, associates etc. in any legal proceeding. The same may or may not by itself be sufficient to disqualify a person, but the Commission must be satisfied that grant of licence in the circumstance may adversely affect the interest of the electricity sector or of the consumers. Such legal proceedings are, apart from the judgment of convictions of an offence involving moral turpitude or any economic offence on the part of the applicant or his partner, or promoter, or Director, or associates at any time in the past, as it may have something to do with the pending legal proceedings in which the Commission is a party.

The correctness of the Commission’s determination of a dispute between the applicant and the Commission may be a subject matter of a legal proceeding. Only because a legal proceeding had been pending and the Commission is of the opinion that the same adversely affects the interest of the electricity sector or of the consumers, in our opinion, cannot by itself be an objective criteria as by reason thereof the statutory authority would necessarily be required to enter into the merit of the proceeding. The

members of the Commission need not necessarily be trained in law; they may not be having legal background and, thus, a power conferred on it so as to directly or indirectly enter into the merit of a legal proceeding in which it may itself be involved, in our opinion, would not be a fair and reasonable criteria.

We are unmindful of the fact that clause (f) to Regulation 6A of the Regulations mandates recording of reasons in writing. In the event, thus, if wrong reasons are recorded a judicial review would be maintainable. But availability of judicial review itself, although is a relevant factor, by itself cannot be a ground to declare a subordinate legislation valid which otherwise it is not. {See State of Kerala & Ors. vs. Unni & Anr. [(2007) 2 SCC 365]}

Judicial review from an administrative decision lies on a very narrow compass. The superior courts in exercise of their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily would not enter into the merit of the matter. Their primary concern are with the decision making process.

LOCUS STANDI OF THE APPELLANT

35. Mr. Tripathi would urge that the appellant had no vested right in regard to grant of licence. It may be so. But then it has a right to be considered therefor. Consideration for such grant must be based on a legal and valid statute. The case of the applicant cannot be rejected at the threshold relying on or on the basis of statutory provisions which are ultra vires. Submission of Mr. Tripathi that the appellant had no locus standi to question the validity of the Regulation, therefore, is not correct.

36. In Tashi Delek Gaming Solutions Ltd. vs. State of Karnataka & ors. [(2006) 1 SCC 442], this Court held:

“If by a statutory provision the right of an agent to carry on his business is affected, he may, in our considered opinion, in his own right maintain an action.”

[See also Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal & ors. (AIR 1962 SC 1044)]

37. Strong reliance has been placed by Mr. Tripathi as also by the High Court on State of Tamil Nadu vs. M/s Hind Stone & ors. [(1981) 2 SCC 205]. One of the issues involved therein was renewal of existing mining lease where applicants had filed applications before the coming into force of the new mining policy. Merely an application was filed and no further

action had been taken. In the aforementioned fact situation, this Court while opining that applications for grant of mining lease should be dealt with within a reasonable time but on that account the applicant would not be clothed with a right for disposal thereof, stating:

“...No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application.”

No exception thereto can be taken. Here, however, appellant was found eligible for grant of trading licence. He was found to be qualified.

38. Reliance has also been placed on S.B. International Limited & ors. vs. Assistant Director General of Foreign Trade & ors. [(1996) 2 SCC 439], wherein in the scheme and context, it was held that no vested right accrued to the licensee for issuance of advance licence.

LEGITIMATE EXPECTATION

39. Appellant applied for grant of licence. He was found to be qualified therefor having satisfied the statutory requirements. It was granted an

interim licence. It has started trading in electricity. It, therefore, had a legitimate expectation that in considering the application for grant of licence, the same criteria as laid down in the statute shall be applied.

In P.T.R. Exports (Madras) Private Limited & ors. vs. Union of India & ors. [(1996) 5 SCC 268], whereupon reliance has been placed, this Court inter alia opined that in the matter of grant of licence the doctrine of legitimate expectation would have no role to play as it would depend upon the policy prevailing on the date of grant of licence.

It was again a case where an Export and Import Policy to be notified by the Central Government under the Foreign Trade (Development and Regulation) Act, 1992 was involved.

40. Reliance has also been placed on M.P. Ram Mohan Raja vs. State of T.N. & ors. (supra). Therein also like Hind Stone (supra) there was no intimation from the State Government to the applicant that it was found qualified for grant of mining lease.

41. Reliance has also been placed by Mr. Tripathi on Commissioner of Municipal Corporation, Shimla vs. Prem Lata Sood & ors. [(2007) 11 SCC 40]. This Court therein was concerned with a planning and development statute framed under the Himachal Pradesh Town and Country Planning Act,

1977. In that case, this Court was considering the enforcement of right in several stages holding that the 'conditions precedent' laid down therein unless satisfied no right can be said to have vested in the person concerned.

42. The cases relied upon by Mr. Tripathi are distinguishable on fact. We accept the general principle that an applicant by filing a mere application cannot be said to have derived a vested right but we are of the opinion that he has a right to be considered. It will bear repetition to state that such consideration must be made not only on the basis of a valid statute but also rationale and objective criteria should be applied therefor.

EPILOGUE

43. The law sometimes can be written in such subjective manner that it affects efficiency and transparent function of the government. If the statute provides for point-less discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due

Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19. A modern deliberative democracy can not function without these attributes. The constitutive understanding of aforementioned guarantees under the Fundamental Rights chapter in the Constitution does not give rise to a mere rhetoric and symbolic value inhered by the polity but has to be reflected in minute functioning of all the three wings of state – executive, legislature and judiciary. When we talk of state action, devil lies in the detail. The approach to writing of laws, rules, notifications etc. has to showcase these concerns.

The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation.

While we say so, we are not oblivious of the contours of the judicial review of legislative acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters.

A subjectively worded normative device also enables the agency to acquire rents. It determines the degree of accountability and responsiveness of officials and of political and judicial control of the bureaucracy.

However, when the provision inherently perpetuates injustice in the award of licenses and brings uncertainty and arbitrariness it would be best to stop the government in the tracks. Since the vires of the regulation is under challenge, we took the opportunity to consider the propriety and constitutionality of generic decision-making process encapsulated under the impugned legislation. Amongst others, in this context, we strike down the impugned clause.

44. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly.

Clauses (b) and (f) of Regulation 6A are declared ultra vires the Constitution of India as also the Act. The Commission is directed to consider the matter from the same stage as if the provisions had not come

into force, as expeditiously as possible, and preferably within a period of three months from the date of receipt of a copy of this order.

45. The appeals are allowed with costs. Counsel fee assessed at Rs.50,000/-.

.....J.
[S.B. Sinha]

.....J.
[Cyriac Joseph]

New Delhi;
May 11, 2009