

OPINION

CENTRAL ELECTRICITY REGULATORY COMMISSION ... QUERIST

I have gone through the brief for opinion and the accompanying documents and also had the benefit of having a conference with the instructing Advocates.

The facts relevant to the case for opinion are as follows:

In the year 2003, the Parliament enacted the Electricity Act 2003 (hereinafter 'the 2003 Act') repealing the Electricity Regulatory Commissions Act, 1998 as also other statutes governing the Electricity Sector, viz. The Indian Electricity Act 1910 and Electricity (Supply) Act, 1948. The 2003 Act is clearly a special Act and is a complete code with respect to all matters concerning electricity.

The Querist was the Central Commission established the Central Government under sub-section (1) of Section 3 of the Electricity Regulatory Commissions Act 1998 and functioning as such before the date of coming to force of the 2003 Act. By virtue of and in terms of Section 76 of the 2003 Act, the Querist is deemed to be the Central Commission for the purpose of the 2003 Act.

Section 99 of the 2003 Act provides for constitution of a separate fund known as the Central Electricity Regulatory Commission Fund [hereinafter CERC Fund]. Section 99 of the Act reads as follows:

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“99. Establishment of Fund by Central Government

- (1) There shall be constituted a Fund to be called the Central Electricity Regulatory Commission Fund and there shall be credited thereto –
 - (a) any grants and loans made to the Central Commission by the Central Government under section 98;
 - (b) all fees received by the Central Commission under this Act; and
 - (c) all sums received by the Central Commission from such other sources as may be decided upon by the Central Government.
- (2) The Fund shall be applied for meeting –
 - (a) the salary, allowances and other remuneration of Chairperson, Members, Secretary, officers and other employees of the Central Commission;
 - (b) the expenses of the Central Commission in discharge of its function under section 79;
 - (c) the expenses on objects and for purposes authorised by this Act, and
- (3) the Central Government may, in consultation with the Comptroller and Auditor-General of India, prescribe the manner of applying the Fund for meeting the expenses specified in clause (b) or clause (c) of sub-section (2)”.

By notification dated 22.10.2007 the Central Government has enacted rules called the Central Electricity Regulatory Commission Fund (Constitution and the manner of application of the Fund) and Form and Time for Preparation of Budget Rules, 2007 [hereinafter CERC Fund Rule]. Under the said rules a Fund to be called the Central Electricity Regulatory Commission Fund has been constituted (vide Rule 3). Rule 3(5) provides that the Fund shall

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comprise of (i) any grants and loans made to the Central Commission by the Central Government under Section 98 of the Act; (ii) all fees received by the Central Commission under the Act; (iii) all sums received by the Central Commission from other sources as may be decided upon by the Central Government from time to time. Rule 4 provides for application of the Fund. Rule 7 prescribes the manner of applying the Fund. Rule 8 reads as follows:

“Budget Estimates and Revised Estimates. – The Central Commission shall prepare its budget estimates and revised estimates in the format as at Annexure – I and Final Grant statement in format as at Annexure – II and submit them to the Central Government by the 30th September and 15th January of each Financial Year”.

Rule 10 provides for the audit of the accounts by Comptroller & Auditor General [C&AG]. Rule 10(2) reads as follows:

“(2) The accounts of the Central Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf, together with audit report thereon shall be forwarded annually to the Central Government by the Central Commission to enable it to place the audit report before each House of Parliament”.

Section 79 of the 2003 Act provides for the functions of the Commission. One of the functions is to levy fees for the purposes of this Act [Section 79(g)]. Section 79(2) stipulates the matters on which the Central Commission may advise the Central government as stated therein. Section 107 of the 2003 Act requires the Querist to be guided by the directions of the Central Government as provided therein.

The Querist in discharge of its statutory functions levies fees and the said fees are credited to the CERC Fund. The Statement of Objects and Reasons for

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the 2003 Act is relevant. The relevant provision to be noticed is Clause 3 which reads as under.

“3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commission ...” [emphasis added]

At this stage it is necessary to consider Article 266(1) of the Constitution which is as follows:

“266. Consolidated Funds and public accounts of India and of the States. – (1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled “the Consolidated Fund of India”.

Article 266(2) reads as under:

“(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.”

I have perused the note prepared by the Querist about the operationalisation of CERC Fund in public accounts of India. It appears that against the fund deposited by the Querist, the Ministry of Power released Rs.31.48 crore in 2011-12 as Grant-in-Aid (General). Chairperson of the Querist vide DO letter dated 30.11.0211 had objected to the categorizing release of funds from the Public Accounts of India to the Querist as Grants-in-aid (General) for the reasons stated therein. The Ministry of Power has released the half year budgeted requirements from the CERC Fund placed under the

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Public Account of India again as Grants-in-aid (General). The Querist by its letter dated 25.05.2012 has drawn the attention of the Ministry of Power to the said letter of the Chairperson of the Querist dated 30.11.2011 and requested it to modify sanction letters regarding the grants-in-aid. The Querist has treated the receipt of funds of Rs.31.48 crore from the Ministry of Power as release of Funds from the CERC Fund maintained under the Public Account of India in its Annual Accounts for the year 2011-12 and not as grants-in-aid.

The query on which my opinion is sought is whether the fees and amounts received by the Querist in discharge of its statutory duties and functions can be regarded as “public moneys received by or on behalf of the Government of India”.

In my opinion for an amount to be credited to the Public Account of India under article 266(2) two requirements have to be satisfied – (i) it should be ‘public moneys’, and (ii) it should be received by or on behalf of the Government of India.

In view of the statutory provisions set out above it is clear that the Querist is an independent statutory corporation and not an agency of the Central Government. The fees received by the Querist are not on behalf of the Government of India but in discharge of its statutory duties.

The provision empowering the Central Government to have the Querist’s accounts audited by the C&AG and place them before Parliament as per Rule 10 of CERC Fund Rules and the power to issue directions under Section 107 of the 2003 Act do not transform the Querist into an agency of the Government of India nor make it an agent who is under the supervision and control of the Government of India. That is the crux of the matter. A different

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conclusion would militate against the independent character of the Querist which the 2003 Act seeks to ensure as is evident from the aforesaid Clause 3 of the Statement of Objects and Reasons cited above.

I have been instructed in the conference that no loans have been made to the Querist by the Central Government. Rule 3 of the CERC Fund rules which requires that CERC fund be credited to the Public Account of India must be read in harmony and conformity with Article 266(2) of the Constitution. Any other interpretation would render the Rule constitutionally vulnerable.

Accordingly, in my opinion, the fees received by the Querist in discharge of its statutory function cannot be considered as public moneys received "for and on behalf of the Government of India" within the meaning of Article 266(2) of the Constitution. Consequently any action on the part of the Central Government on that footing would be unwarranted in law.

I have nothing further to add.

New Delhi
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