SUPREME COURT OF INDIA

Tamil Nadu State Electricity Board

Vs

Central Electricity Regulatory Commission and Others

(H. K. Sema and V.S. Sirpurkar, JJ)

20.04.2007

JUDGMENT

V. S. SIRPURKAR, J.

1. This judgment will dispose of the above three Civil Appeals which have been filed by three Appellants, namely, Tamil Nadu State Electricity Board, Uttar Pradesh Power Corporation Ltd. and Rajasthan Rajya Vidhyut Prasaran Nigam Ltd. The common question of law is involved in all the three appeals which relates to the interpretation of Regulation 2.7(d)(iv) of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulation, 2001 (hereinafter called the "CERC Regulations, 2001"). These appeals are filed under Section 125 of The Electricity Act, 2003 (36 of 2003) and against the orders passed by the Appellate Tribunal allowing the appeals filed by the respondents therein. The following factual matrix would be necessary for the proper understanding of the controversy involved in these appeals.

2. Before the present Act came in the anvil, the Electricity Supply Act, 1948 was occupying the field and the Central Government norms for fixing tariff for the period 1.11.1992 to 31.10.1997 were notified under Section 43A of the said Act. The Legislature then brought in Electricity Regulatory Commissions Ordinance which was ultimately converted into an Act in the year 1998. Section 3 of the Act provides for the establishment and incorporation of Central Electricity Regulatory Commission (hereinafter called the "CERC" for short). Section 13 provides power to regulate the tariff of generating companies, owned and controlled by the Central Government, sub-section (b) thereof provides power to regulate the tariff of the other companies amongst the other powers which are to be found upto clauses (i) of that Section. Section 28 of the 1998 Act reads as

under:

"28. The Central Commission shall determine by regulations the terms and conditions for fixation of tariff under clauses (a), (b) and (c) of Section 13, and in doing so, shall be guided by the following namely:

(a) the generating companies and transmission entities shall adopt such principles in order that they may earn an adequate return and at the same time that they do not exploit their dominant position in the generation, sale of electricity or in the inter-State transmission of electricity;

(b) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments and other matters which the Central Commission considers appropriate;

(c) National power plans formulated by the Central Government; and

(d) Such financial principles and their applications contained in Schedule VI to the Electricity (Supply) Act, 1948 as the Commission considers appropriate."

A bare glance of the above quoted Section suggests that the CERC would formulate regulations for providing terms and conditions for fixation of tariff under Clauses (a), (b) & (c) of Section 13. The power for making Regulations is to be found in Section 55 of the 1998 Act. Accordingly, the CERC has formulated Regulations which are called Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. We are concerned herein with the Regulations called CERC Regulations, 2001 and more particularly, clause 2.7(d)(iv) thereof.

3. Before we take up the task of interpretation, we must state the facts which necessitate the interpretation of the above clause. In all these appeals we are concerned with the tariff for the period 1.4.2001 upto 31.3.2004. Clause 1.4 of the CERC Regulations, 2001 provides as under:

"1.4 The generation tariff under these Regulations shall be determined station-wise and transmission tariff shall be determined line-wise, sub station-wise, as the case may be, and aggregated to regional tariff."

Provided that a utility may file a petition for fixation of tariff in respect of the completed units/systems.

Clause 1.11 provides:

"For removal of doubts, it is clarified that the norms prescribed herein are the ceiling norms only and this shall not preclude the Generating Company and other beneficiaries from agreeing to improved norms."

Chapter 2 relates to other power generating stations. Para 2.1 is a definition clause and the definition of "Operation and Maintenance Expenses" provides as under:

"Operation and Maintenance Expenses" or "O&M Expenses" In relation to a period means the expenditure incurred in operation and maintenance of the generating station including manpower, spares, consumables, insurance and overheads." Regulation 2.2 in the same Chapter provides as under:

"2.2 The tariff for sale of electricity from Thermal Generating Stations (including Gas and Naphtha based stations) shall comprise of two parts, namely, the recovery of annual capacity (fixed) charges and Energy (variable) charges. The annual capacity (fixed) charges shall consist of interest on loan capital, depreciation, and return on equity, advance against depreciation, operation and maintenance expenses, and interest on working capital. The Energy (Variable) charges shall cover fuel cost." (Emphasis Supplied)

Then comes Regulation 2.7 which under sub-clause (d) provides for Operation and Maintenance expenses including insurance. We are not concerned with sub-clauses (i), (ii) & (iii) thereof. However, the relevant clause which has fallen for our consideration is clause (iv) which reads as under:

"2.7 Payment of Capacity (Fixed) Charges:

The Capacity Charges shall be computed on the following basis and its recovery shall be related to Availability.

(a)...

(b)...

(c)...

(d) Operation and Maintenance expenses including insurance:

(i)

(Ii)

(iii)

(IV)

The escalation factor of 6 percent per annum shall be used to revise the base figure of O&M expenses. A deviation of the escalation factor computed from the actual inflation data that lies within 20 percent of the above notified escalation factor of 6 percent (which works out to be 1.2 percentage points on either side of 6 percent) shall be absorbed by the utilities/beneficiaries. In other words if the escalation factor computed from the observed data lies in the range of 4.8 to 7.2 percent, this variation should be absorbed by the utilities. Any deviations beyond this limit shall be adjusted on the basis of the actual escalation factor arrived at by applying a weighted price index of CPI for industrial workers(CPIIW) and an index of select components of WPI (WPIOM) as per formula given in note below clause

(v) Herein below, for which the utility shall approach the Commission with a petition."

4. National Thermal Power Corporation (hereinafter called the NTPC) generates the electricity at its various plants and sells it to the State utilities like appellants at the tariff fixed by CERC. We have already pointed out that it is the CERC which has the exclusive task of fixing the tariff. After CERC Regulations, 2001 were notified which provide the method for working out the allowable Operation and Maintenance expenses and escalation factors thereupon, the Commission with a view to look into the question of revision of O&M expenses from 2001-2002 to 2003-2004 initiated suo motu proceedings being Petition No.196 of 2004. As per procedure the Commission circulated its Draft Order dated 4.1.2005 dealing with adjustment of O&M expenses based on actual escalation factor for the deviation beyond the limit prescribed by Regulation 2.7(d)(iv). The inflation rates for the relevant years were specified by the Commission in this order which were based on computation arrived at by the staff of CERC. The Draft Order was circulated to the Central Utilities as also the State Utilities like UPCL. The UPCL did not question the inflation rates. The stand of the NTPC throughout was that revision of O&M expenses be undertaken on the notional 6% escalation factor based on actual escalation between 4.8 and 7.2 since 20% was considered to normal deviation. Its further stand was that in case the deviation goes below 4.8 or beyond 7.2, as the case may be, it would be required to be adjusted on the basis of the actual escalation factor meaning thereby it would be only the deviation of the two points, namely, below 4.8% and beyond 7.2% which would be taken into consideration whereas the stand of the Utilities was that the said escalation factor should be related to the standard 6%. For example, according to the NPTC, if the escalation went to 4% which was below 4.8% then only .8% should be taken as an escalation factor so also if the escalation went beyond 7.2, i.e., 8%, then it would be only .8% which would be taken as an escalation factor. On the other hand as per the Utilities the said escalation factor should not be limited to the deviation but it should be 2% in the first and the second case because it was actually

the deviation of 2% from the standard 6%.

5. By its order dated 28.2.2005, the CERC held that where the escalation factor is not in the prescribed norm, O&M expenses should be calculated by working out "the actual escalation factor" and not "the marginal adjusted escalated factor" as explained above. Consequently, the CERC directed that the O&M charges between April 1, 2001 to March 31, 2004 should be worked out by applying the actual escalation rates for the years 2001-2002 and 2003-2004 which was calculated by the staff of CERC.

6. A Review Petition was filed before the CERC by the NTPC. However, that review petition was rejected by the CERC by its order dated 7.6.2005. NTPC, therefore, filed an appeal before the Appellate Authority vide Appeal No.103 of 2005 (We have taken the facts only in the case of UPCL, i.e., CA No.2352/2006 for the sake of convenience as there is no difference in the facts of the other two appeals and the question is absolutely common).

7. The Appellate Authority vide its order dated 3.1.2006 allowed the appeals filed by the NTPC and set aside the orders passed by the CERC dated 28.2.2005 and 7.6.2005. It is against this order of the Appellate Authority that the present appeals have been filed.

8. We would reproduce para 13 of the order of the Appellate Tribunal which contains the findings arrived at by the Appellate Authority:

13. The aforesaid calculations reveal that the CERC did not attach any importance to the deviation beyond the range of 4.8 to 7.2%. It did not work out the deviations at all. Deviations beyond the terminal limits of 4.8% to 7.2% were required to be adjusted on the basis of the actual escalation factor. In Regulation 2.7(d)(iv), the words 'any deviation beyond this limit shall be adjusted on the basis of actual escalation factor' are very significant and must be given effect to. The word 'adjust' used in the Regulation means to accommodate. CERC has not accommodated the deviation at all. In fact the CERC ought to have deducted the actual deviation from the limit of 4.8%. In order to give effect to the real meaning of the Regulation 2.7(d)(iv), the CERC should have made the calculations in the following manner in respect of say for the year 2000-2001:

6x-0.35x =x(6-0.35) = 5.65x {where x= signifies normalized O&M expenses for the year 2000-2001;

4.45 is actual escalation factor;

4.8 is the terminal limit;

0.35 has been arrived at by deducting 4.45 from 4.8; and all figures represent percentages}."

9. Shri Sunil Gupta, Senior Advocate for UPCL and Shri Aruneshwar Gupta addressed us on behalf of the appellants whereas Shri G.E. Vahanvati, Solicitor General addressed us on behalf of respondents. The contentions raised by Shri Sunil Gupta and Shri Aruneshwar Gupta were as under.

10. The Appellate Authority has clearly erred in giving a literal interpretation to the said provision, namely, Clause 2.7(d)(iv). Learned counsel urged that the Appellate Authority was bound to discern the true intendment of the provision and should have given it a meaningful interpretation, in that, the escalation factor should have been calculated keeping 6% as the base and it should not have been limited to the difference alone. Learned counsel Shri Sunil Gupta further argued that the rule was manifestly neutral rule founded on purely neutral considerations and while interpreting the same, the Appellate Court has divested itself with the logic thereof. Learned counsel buttressed his arguments by suggesting that the rule was meant for the convenience of all concerned which included both administrative as well as financial convenience. According to both the counsel the intention behind the rule was that the CERC should not be exposed to the tedious exercise of review and re-adjustment of tariff already fixed so long as the deviation was within 20% which was perceived to be the reasonable tolerance limit and that being the only objective behind the peculiar language of the rule. By adopting the literal interpretation, the Utilities could not have been deprived of the full benefits if the O&M factor went below 20% of the escalation factor of 6%. Learned counsel very fairly submitted that in case the O&M factor went beyond the 20% by way of an upswing then the generating unit like NTPC was always justified to charge on the basis of the full difference between the actual upswing point and the 6%. According to the learned counsel this was the only intendment of the rule.

11. Learned counsel further urged that the range of 20% upswing or downswing, i.e., between 7.2 and 4.8 was not to be viewed as a cushion so as to keep it to be a constant factor and in fact there was no question of the generating station being allowed to suffer in the event of the upswing beyond 7.2%.

12. According to learned counsel the range of 20% up or down from the presumed notional escalation factor of 6% only represented the margin of error in its tariff fixation exercise which the Regulator, i.e., CERC could overlook because of the considerations like administrative and financial convenience of all concerned. For this proposition the learned counsel sought to rely on the margin of 3% in Rule 57(1) of the Indian Electricity Rules, 1956. Lastly, the learned counsel urged that the literal interpretation would be illogical, unprincipled and impractical.

13. Learned counsel Shri Suresh Tripathi appearing on behalf of Tamil Nadu Electricity Board also filed written submissions more or less on the same lines. According to those submissions, it is urged, that the Appellate Authority completely missed the meaning of "adjust" which could only mean "accommodate". The said adjustment was concerned with the tariff setting or in simple terms readjustment of the tariff. The submissions further suggest that the underlying philosophy behind the Regulations in question was that the tariff setting should not be disturbed every now and then on trivial adjustments and, therefore, the Regulator had taken a pragmatic view in making provision for 20% adjustment. Therefore, if the deviation went beyond 20%, there was no scope to limit it only to the extent of beyond the margin. The argument goes further and suggests that the statute envisaged

the interest of the consumers to be safeguarded and, therefore, when the O&M factor dipped beyond 20% limit, the full advantage should have been given to the beneficiaries, i.e., consumers because the dipping of the O&M factor would certainly bring down the price required to be paid by the consumers for the electricity.

14. Shri Aruneshwar Gupta, learned counsel also argued the matter more or less on the same lines explaining the actual effect of the judgment by the Appellate Authority on the price of the electricity payable by the consumers.

15. As against this, the learned Solicitor General urged that as per the established legal principles no unnatural interpretation could be given to the concerned legal provisions particularly when its plain meaning was crystal clear. Learned counsel analysed the whole provision taking each line of the same and urged that there was no necessity of any interpretation to be given when provision was crystal clear. It was urged that where the plain meaning of the provision did not, in any manner, do harm to the objective nor could bring out any absurdity, the golden rule of literal interpretation was the only course to be adopted by the courts of law. Learned counsel went on to analyse the first order of the CERC as also the review order and on that backdrop compared the same with the Appellate Authority's order.

16. In the wake of these rival submissions, the only question that falls for our consideration is whether we should adopt the literal construction which has been given by the Appellate Authority or should interpret the provision keeping in mind the various other factors like the intended logic behind the rule, the benefit which is likely to be given to the ultimate consumers, etc.

17. It will be our first task to see whether the provision as it stands is clear in its language. It is obvious from the plain reading of the clause that the escalation factor of 6% was to be used for revising the base figure of O&M charges. Plainly speaking it would mean that the O&M charges would be revised on the basis of escalation factor of 6%. The 6% would be the standard. It is further provided that each year the escalation factor would be computed on the basis of actual inflation data and if the said deviation factor works out to be within 20% of the standard escalation factor of 6%, such deviation shall be ignored meaning thereby if the deviation factor goes beyond 6% upto 7.2%, still the deviation would be treated to be 6% only. So also if the deviation goes below upto 4.8%, still deviation to this extent, as per the clause, would not make any change. However, if the deviation goes beyond 7.2% on upper side or below 4.8% on the lower side, the same would be adjusted, in the sense that then the calculation would have to be made of O&M factor on the basis of the deviation. The objective of the provision appears to be that there does not have to be an exercise of computation for a little or insignificant change ranging between 1.2% and such deviations would be ignored. The language used is that "such changes shall be absorbed by the utilities/ beneficiaries". This appears to be with the idea that the calculations do not have to be made on the basis of labile deviations upto the limit of 1.2%. The meaning becomes extremely clear from the clause which starts from "in other words" and ends with "absorbed by the utilities". It means any deviations beyond this limit alone shall be adjusted. It is extremely clear from the further sentence that what is to be adjusted is "the deviations beyond the limit of 7.2% on the upper side and 4.8% on the lower side, i.e., if the deviation goes below 4.8%, say, upto 4% then the O&M factor would be

considered in respect of .8% deviation because that is the deviation contemplated by the clause. If the meaning contemplated by the appellants is to be given, it would do harm to the unambiguous language of the clause. Plain and simple meaning of the provision, in our opinion, admits of, no doubt, in the sense that it would be only the deviation "beyond the limit" of 1.2% which would be available for adjustment. In that sense there would a cushion between the two points, namely, 7.2% on the upper side and 4.8% on the lower side. That is precisely provided by the words "any deviation beyond this limit". The words "beyond this limit" would, in our opinion, signify the extent of deviation that is to be taken into consideration and that is required to be "adjusted."

18. The Rule of literal interpretation has been explained by this Court time and again. In Ombalika Das & Anr. Vs. Hulisa Shaw [illegible] 9, this Court unequivocally declared as under: "Resort can be had to the legislative intent for the purpose of interpreting a provision of law, when the language employed by the legislature is doubtful or susceptible of meanings more than one. However, when the language is plain and explicit and does not admit of any doubtful interpretation, the Supreme Court cannot, by reference to an assumed legislative intent, expand the meaning of an expression employed by the legislature and therein include such category of persons as the legislature has not chosen to do."

19. Similar note was struck by this Court in Keshavji Ravji & Co. vs. CIT [illegible] where Three Judge Bench went on to observe:

Are, On Their Own Terms, Ambivalent and So Not Manifest The Intention Of The Legislature."

"As Long As There Is No Ambiguity In The Statutory Language, Resort To Any Interpretative Process To Unfold The Legislative Intent Become permissible. The Supposed Intention Of The Legislature Cannot Then Be Appealed To Whittle Down The Statutory Language Which Is Otherwise Unambiguous. If The Intendment Is Not In The Words Used It Is Nowhere Else. The Need For Interpretation Arises When The Words Used In The Statute

20Without burdening the authorities we may only refer to the verdict by the Privy Council in Pakala Narayanasami vs. Emperor [illegible] where Lord Atkin had declared that "when the meaning of the words is plain, it is not the duty of courts to busy themselves with supposed intentions". The law has been consistent ever since then in more than half a dozen decisions.

21. Thus in our opinion, since the language of Regulation 2.7(d)(iv) is absolutely clear so as to take into consideration only the deviations beyond the limit, i.e., above 7.2% or below 4.8% for the purposes of adjustment, there will be no question of adjusting the full deviation between 6% to the percentage beyond 7.2% or below 4.8%. It is more than clear from the language that any deviation between 4.8 to 7.2 has to be absorbed by utilities/beneficiaries. In that view we would have to reject the argument on behalf of the learned counsel for the appellants that we would have to search for any logic and hold that the full difference between the actual upswing and downswing point and 6% would be available for adjustment. It is not the task of this Court to find out or search for the wisdom of legislature. We are concerned with the interpretation only. For the same reasons we

cannot accept the argument that the word "adjust" should be read to mean "accommodate". There is no reason for doing so. We do not agree to hold that the literal interpretation would be illogical, unprincipled and impracticable as, in our opinion, the learned counsel have not been able to suggest so. We, therefore, fully agree with the order passed by the Appellate Authority and confirm the same.

22. In view of the above, the appeals are dismissed without any order as to costs.