

**SUPREME COURT OF INDIA**

U.P.Power Corp.Ltd.

Vs.

National Thermal Power Corp. Ltd.

C.A.No.5775-5780 of 2007

(Mukundakam Sharma and Anil R.Dave,JJ.,)

14.09.2011

**JUDGMENT**

**Anil R.Dave,J.,**

1. Delay condoned.

2. At the request of the learned counsel appearing for the parties, all these appeals are heard together as similar issues are involved in all these appeals. Central Electricity Regulatory Commission (hereinafter referred to as the `Central Commission') had determined tariff for generation and sale of electricity generated by different units of the respondent-National Thermal Power Corporation Limited for the period commencing from 1st April, 2001 to 31st March, 2004 and for some other periods. The tariff so determined was challenged by the respondent before the Appellate Tribunal for Electricity by filing several appeals. The said appeals and Review Petition were decided by different orders and all such orders have been challenged in the aforesaid appeals filed before this Court. Though, the issues involved are similar, for the sake of convenience, wherever facts have been referred to in this judgment, we have taken the same from Civil Appeal No. 5775 of 2007.

3. Thus, the main issue involved in all these appeals is with regard to determination of tariff for electricity generated and sold by the respondent, namely, NTPC, which is a government company incorporated under the Companies Act, 1956.

4. Generation of electricity is regulated by the government authorities. The respondent has several power plants in the country and electricity is generated at those power plants. The electricity so generated is sold to several State Electricity Boards. There are regulations which determine the price at which the electricity generated by the respondent is to be sold to State Electricity Boards and the electricity so generated is transmitted to the ultimate consumers through the State Electricity Boards. The generation and sale of electricity by the respondent is regulated under the provisions of Electricity Act, 2003 and prior to enactment of the aforesaid Act, it was regulated by the Central Commission under the Provisions of Electricity Regulatory Commissions Act, 1998 (hereinafter referred to as "the Act"). The said

Act came into force with effect from 25th April, 1998 and prior thereto the tariff for generation and sale of electricity was determined by the Central Government under the Provisions of the Electricity Supply Act 1948. Under the said provisions, the Central Government used to issue tariff notifications from time to time for determining the tariff, i.e. the rate at which electricity generated by the respondent was to be sold to the State Electricity Boards.

5. The Central Government had issued Tariff Notification dated 30th April, 1994 determining tariff for the generation and sale of electricity from the Kawas Gas Power Station for the period commencing from 1st January, 1993 to 31st March, 1998. Thereafter, another Notification dated 21st December, 2000 was issued whereby it was directed that the conditions incorporated in notification dated 30th April, 1994 would continue to be applicable even for period commencing from 1st April, 1998 to 31st March, 2001. We are also concerned with determination of tariff for the aforesated period and for other periods in respect of some other plants of the respondent.

6. The tariff so determined was subject matter of the present litigation before the Central Commission and the Tribunal. The respondent was aggrieved by the determination of tariff and, therefore, the order determining tariff had been challenged by the respondent before the Tribunal. The final order passed by the Tribunal with regard to the determination of tariff was reviewed in pursuance of a Review Petition filed by the respondent. Orders passed in the Review Petition as well as original order passed by the Tribunal are subject matter of these appeals.

7. In the said review petition as well as in the orders passed by the Tribunal, the issues were with regard to some of the factors, which ultimately decide the amount of tariff, namely, calculation of interest on loan capital, calculation of the loan capital, non- inclusion of value of fuel like Naphtha and other liquid fuel while determining working capital, etc.. Several factual aspects were considered by the Tribunal while coming to the final conclusion. Equity capital, borrowed capital, revenue expenditure in the nature of fuel, etc. are of vital importance for determining the tariff. After considering all these relevant factual aspects, based on accounting principles, the Tribunal finally decided the appeal.

8. We have heard the learned counsel appearing for the parties on the subject of determination of tariff. The issues were with regard to necessary ingredients of cost to be considered for the purpose of determination of tariff to be charged by the power plants of the respondent in the matter of sale of electricity to different State Electricity Boards. The issues involved are also with regard to calculation of interest forming part of the tariff.

9. For the purpose of determining tariff for generation and sale of electricity by the generating stations of the respondent, cost can be broadly divided into fix charges and energy charges. It also contains the amount of interest paid on the capital employed as the capital employed in all electricity generating power plants is very huge. The issues with regard to determination of interest as well as capital are some of the most important issues which were decided by the Tribunal.

10. Upon hearing the learned counsel for the parties and upon perusal of the record, we find that several factual issues with regard to calculation of capital employed are involved in these appeals. The issues are not only based on the principles on which the amount of interest and the energy charges are to be determined but they also depend upon certain other technical and factual aspects.

11. Our attention was drawn to the judgment delivered by this Court in the case of West Bengal Electricity Regulatory Commission V. Cesc Ltd. reported in and more particularly to Para 102 of the same judgment, which reads as under:

"102. 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 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 appellate 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 provision may be considered to make the relief of appeal more effective."

12. Looking to the observations made by this Court to the effect that the Central Commission constituted under Section 3 of the Act is an expert body which has been entrusted with the task of determination of tariff and as determination of tariff involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, this Court was firmly of the view that the issues with regard to determination of tariff should be left to the said expert body and ordinarily High Court and even this Court should not interfere with the determination of tariff.

13. Looking to the aforesaid legal position and in view of the technical aspect involved in the impugned order with regard to determination of tariff, which we prima facie find to have been determined in a just and proper manner, we are of the view that the conclusion arrived

at by the Tribunal in the impugned orders do not appear to be unreasonable or unjustified and therefore, in our opinion the impugned orders require no interference by this Court and, therefore, all these appeals are dismissed with no order as to costs.

Judgment Referred.

<sup>1</sup>(2002) 8 SCC 0715