

SUPREME COURT OF INDIA

Union of India through General Manager Northern Railways

Vs.

Chairman, UP State Electricity Board

(P. Sathasivam and H.L. Gokhale JJ.)

09.02.2012

JUDGEMENT

H.L. GOKHALE J.

1. Both these transferred cases are concerning the legality of construction of the transmission lines by Northern Railways to draw power from the power plants of the National Thermal Power Corporation Ltd. ('NTPC' for short), and no more from the transmission lines of Uttar Pradesh State Electricity Board ('UPSEB' for short), through which they were drawing power earlier.

Facts leading to these transferred cases are as follows:-

2. UPSEB was purchasing power from the power plants of NTPC, and supplying the same to Northern Railways through transmission lines of the UPSEB. Railways found the tariff of UPSEB to be excessive, and therefore, decided to enter into a power purchasing agreement with NTPC, and to construct their own transmission lines to carry the supply. The Railways moved the Central Govt. for permission in this behalf, and obtained approval from the cabinet committee on 6.6.1990. This was recorded in the then Railway Minister's letter addressed to the then Minister of Energy dated 24.8.1990. Later, it was decided that 100 MW power will be allocated to the Railways from Dadri Gas Station of NTPC. In case of a shortfall, the requirement would be met from the Auraria Gas Station of NTPC. The above allocation to Railways was to be subject to entering into a power purchasing agreement with NTPC. This is recorded in the letter dated 10.2.1998 from Deputy Secretary to the Ministry of Power addressed to the Chairman, Central Regulatory Electricity Authority. Accordingly, Railways entered into the necessary power purchasing agreement with NTPC in March 1998.

3. Thereafter, Railways started constructing transmission lines from Dadri Gas Power Plant and Auraria Gas Power Plant of NTPC upto the sub-station of Railways at Dadri, District Ghaziabad, U.P. This led to UPSEB to issue a threat to demolish the said transmission lines, and a notice was issued to the Railways on 7.9.1999. The notice was issued by the Superintendent Engineer, Electricity Transmission Circle, U.P. State Electricity Board, Ghaziabad, U.P. to the Chief Electrical Engineer (Construction), Northern Railways, Tilak Bridge, New Delhi, calling upon the Railways to immediately stop the activity of construction of distribution/service lines. The notice further stated that if the Railways did not stop or refrain from these activities inspite of receipt of the notice, UPSEB will be constrained to take steps of its own for demolition of the said lines and will also sue for damages suffered or to be suffered by UPSEB consequent upon this construction.

4. This notice led the Railways to file Writ Petition No.6802/1999 in the High Court of Delhi to challenge the said notice. The High Court vide its order dated 9.11.1999 stayed operation of this notice/order. The High Court subsequently passed another order on 12.5.2000 allowing the Railways to carry on their work of construction.

5. After the construction of transmission lines was completed, the Railways started drawing power from the NTPC power plants through those lines. That led UPSEB to file Writ Petition No.3588/2001 in Allahabad High Court to challenge the act of Railways of drawing electrical energy from NTPC through Railway's own service lines.

6. Since, two petitions were filed in two different High Courts arising out of the same cause of action, the Railways sought transfer of these two writ petitions to the Supreme Court of India, in order to avoid the multiplicity of proceedings and conflicting decisions. The same having been allowed, W.P. No.6802/1999 in Delhi High Court has been numbered as Transferred Case No.37/2001 and W.P. 3588/2001 in Allahabad High Court has become Transferred Case No.38/2001 in this Court.

7. Union of India through General Manager, Northern Railways is the petitioner in Transferred Case No.37/2001. Railway Board, General Manager Northern Railways and Dy. Chief Engineer/Electrical (Construction) of Northern Railways are respondent No.1 to 3 in Transferred Case No.38/2001. UPSEB is the first respondent in Transferred Case No.37/2001 and petitioner in Transferred Case No.38/2001. NTPC and its officer are respondents No.4 to 6 in Transferred Case

No.38/2001. The parties are referred to as Railways, UPSEB and NTPC for convenience. Shri P.P. Malhotra, learned Additional Solicitor General has appeared for Railways, Smt. Rachna Joshi Issar has appeared for NTPC, and Shri Pradeep Misra has appeared for UPSEB.

The submissions of the rival parties:-

8. It was submitted on behalf of the Railways by Shri Malhotra that the action of the Railways to erect, operate, maintain or repair any electric traction equipment was very much within the jurisdiction of the Railways, inasmuch as Sections 11 (a) and (g) of the Railways Act, 1989 empower them to carry out such activity and all such necessary works for the purposes of constructing or maintaining a railway. These Sections 11 (a) and (g) read as follows:- 11. Power of railway administrations to execute all necessary works.- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government Railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway-

(a) make or construct in or upon, across, under or over any lands, or any streets, hills, valley, roads, railway, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes, oil-pipes, sewers, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages, conduits, drains, pies, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;

(b)

(c).....

(d).....

(e).....

(f).....

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and.....

(emphasis supplied)

9. The NTPC has also the authority to sell power to Railways in its capacity as a generating company under Section 43A of the Electricity Act, 1948 This section reads as follows:-

43A. Terms, conditions and tariff for sale of electricity by Generating Company. –

(1) A Generating Company may enter into a contract for the sale of electricity generated by it-

(a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;

(b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and

(c) with any other person with consent of the competent government or governments.

[(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority ad in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in this Official Gazette: Provide that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to tome, by the government or governments concerned.]]

(emphasis supplied)

10. The generating company has, however, to obtain necessary clearance from the competent Govt. before entering into a contract for sale of electricity to any person other than an Electricity Board. NTPC is a wholly owned company of the Central Govt. It has, therefore, to obtain permission from the Central Government, which it had. 'Competent Government' is defined under Section 2 (3A) of the 1948 Act, which reads as follows:-

2. Interpretation.....

(3A) competent government means the Central Government in respect of a Generating Company wholly or partly owned by it and in all other cases the Government of the State in which the generating station of a Generating Company is located or proposed to be located.

11. Railways had also obtained the necessary permission from the Government of India and, thereafter, they had entered into the necessary agreement with NTPC. It was pointed out that the authority of the Railways to act as above is left unhindered under Section 173 of the Electricity Act, 2003 [which Act replaced the Electricity (Supply) Act 1948]. This Section reads as follows:-

173. Inconsistency in laws. - Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989).

12. The submissions of Shri Malhotra, learned counsel for the Railways were supported by Smt. Rachana Joshi Issar, learned counsel for NTPC. She also stressed the fact that NTPC was required to obtain only the consent from the Govt. of India under Section 43A of the Electricity Supply Act, 1948, and that consent had been obtained prior to entering into the agreement from the Central Govt. which was the competent government under Section 2 (3A) of 1948 Act.

13. The submissions on behalf of the Railways and NTPC were countered by Shri Pradeep Misra, learned counsel for UPSEB. In his submission, Govt. of India was not competent to grant such permission to Railways to buy power from NTPC, or to construct these transmission lines. Such activity ought to have been sanctioned

by the UP State Electricity Commission/State Government under Section 27D of the 1910 Act. This Section 27D reads as follows:- 27D. Grant of transmission license by the State Government: (1) Until the State Government Commission is established the State Government and thereafter the State Commission may, subject to the provisions of sub section (4), grant a transmission license to any person.

14. With respect to the authority of the Railways under Section 11 (a) and (g) of the Railways Act, 1989, Shri Misra submitted that this Section can be read to authorize the Railways to have their electricity supply and lines only for working and maintenance of railways, and not for transmitting energy from generating stations. If transmitting lines were to be constructed, a license was necessary to be obtained. Section 27D of the 1910 act cannot be ignored while reading Section 11 (a) and (g) of the Railways Act, 1989. Consideration of the rival submissions

15. (i) We have considered the arguments by the rival parties. As far as reliance on Section 27D of the Electricity Act, 1910 is concerned, it is to be noted that this Section came into force on 31.12.1998. The agreement between Railways and NTPC was signed prior thereto in March, 1998. That apart, it is true that in terms of Section 27D of the Indian Electricity Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other those authorized or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989 and not by the enactments governing electricity.

(ii) That apart, Sections 11 (a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorizes the Railway administration to execute all necessary works for the purpose of constructing or maintaining railways. Sub-section (a) of this Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g), thereof, the Railways are authorized to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with working of the railways. This sub-section clearly empowers Railways to erect any electric traction equipment, and power supply and distribution installation which is in connection with the

work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by the UPSEB as well. (iii) Besides, Section 26A (1) of the Electricity Supply Act, 1948 exempts the generating company from the requirement of taking a license under Electricity Act, 1910. This section 26A (1) reads as follows:-

26A. Applicability of the provisions of Act 9 of 1910 to Generating Company - (1) Notwithstanding anything contained in sub-section (2), nothing in the Indian Electricity Act, 1910, shall be deemed to require a Generating Company to take out a licence under that Act, or to obtain sanction of the State Government for the purpose of carrying on any of its activities. (iv) The generating company does have the necessary authority to enter into a power purchasing agreement under Section 43A of the Electricity Supply Act, 1948. NTPC has been permitted by the Central Government to enter into an agreement. Railways and NTPC both have obtained the permission from the concerned ministries prior to entering into this agreement. In the instant case, the Railways found the tariff of UPSEB to be excessive and therefore, they decided to construct their own transmission lines. This being so, the action on the part of the Railways of constructing transmission lines, and drawing power from thermal power plants of NTPC, was perfectly legal. Even under the Electricity Act, 2003, a direct sale of power by a generating company to a consumer is specifically permitted under Section 10 (2) thereof.

16. In the circumstances, the notice dated 7.9.1999 given by the UPSEB was totally uncalled for, and is required to be quashed and set-aside. Accordingly, the Transferred Case No.37/2001 will have to be allowed, and Transferred Case No.38/2001 will have to be dismissed.

17. In the circumstances, we pass the following order:-

(a) Transferred Case No.37/2001 is allowed. The impugned notice/order dated 7.9.1999, issued by UPSEB to the Northern Railways, is hereby quashed and set-aside.

(b) Transferred Case No.38/2001 is dismissed.

(c) There will be no order as to costs.

