SUPREME COURT OF INDIA

DSR Steel (P) Ltd

Vs.

State of Rajasthan

C.A.No.3814 of 2007

(T.S.Thakur and Gyan Sudha Misra, JJ.)

01.05.2012

ORDER

T.S.Thakur, J.

1. These appeals under Section 125 of the Electricity Act, 2003 call in question the correctness of an order dated 23rd November, 2006, passed by the Appellate Tribunal for Electricity whereby a batch of appeals including those filed by the appellants against an order dated 8th June, 2006 passed by the Rajasthan Electricity Regulatory Commission, have been dismissed.

2. Jaipur Vidyut Vitran Nigam Limited (JVVNLfor short), Jodhpur Vidyut Vitran Nigam Limited (JDVVNLfor short) and Ajmer Vidyut Vitran Nigam Limited (AVVNLfor short), submitted separate applications before the Rajasthan Electricity Regulatory Commission (for short Commission) at Jaipur in terms of Sections 62 and 64 of the Electricity Act, 2003 for revision of tariff to be effective from December 1, 2004. Each one of these distribution companies (Discomsfor short) had an existing tariff but in their respective applications they sought an identical tariff revision which requests were taken up by the Commission for consideration together and disposed of in terms of a common order dated 17th December, 2004, passed after notices regarding filing of the said applications were published in different newspapers having circulation in the State of Rajasthan. Several objections were filed and suggestions made by nearly 100 individuals and organizations in the course of the proceedings before the Commission. All these objections were then considered by the Commission no matter only 38 of those who had filed the same had complied with the requirement laid down by the former. A large number of people and organizations even applied for personal hearing and were heard on different dates at different venues fixed for the purpose. Some of these objections also related to individual problems of the consumers or disputes relating to bills and other matters which were directed to be considered by the Discoms and decision taken on the same under intimation to the persons concerned. Other

issues including those questioning the maintainability of the petitions and alleging non-compliance with the regulations and directions of the Commission were also raised. Issues touching reforms in power sector, non¬determination of the Rajasthan Vidyut Utpadan Nigams tariff from whom the Discoms purchase electricity, poor performance of Vidyut Vitran Nigams were also agitated. Similarly objections to the proposed increase in tariff, interest charges, depreciation etc. too were raised and examined by the Commission. Suggestions regarding improvement, objections relating to high T&D losses, inadequacy of staff, continuation of un-metered supply, issue of deemed licensee and tariff for deemed licensee were also examined. Questions relating to high voltage supply, segregation of mixed load, billing demand, demand based tariff for MIP consumers, power factor and shunt capacitor surcharge, vigilance checking of consumers, minimum billing, agriculture, domestic and industrial tariff too were examined by the Commission apart from several other issues that were placed before the Commission to which the Commission has made a reference in its order dated 8th June, 2006. The Commission eventually directed that the revised tariff determined by it will become effective from 1st January, 2005 and remain in force till the same is amended by the Commission by a separate order passed by it.

3. Aggrieved by the order passed by the Commission, the appellants and a large number of other consumers in that category filed review petitions under Section 94 (1)(f) of the Electricity Act, 2003 seeking review and continuation of the incentive scheme. These review petitions were dismissed by the Commission in terms of its order dated 8th June, 2006. The Commission noted the contention urged on behalf of the petitioners that they were affected by the withdrawal of the incentive scheme. It was also urged that these consumers had made investments on the basis of the incentive scheme bona fide believing that the same would continue for at least three years. The review petitioners, therefore, sought continuation of the said scheme by suitable review of the Commissions order dated 17th December, 2004. The Commission also noted the opposition of the Discoms to the said prayer and the contention that the incentive scheme was to be effective upto 31st March, 2003 or till the Commission issued a tariff order whichever was earlier.

4. The Commission noted the submissions made on behalf of the Discoms that the tariff petitions had been filed in August 2004 and the details of the scheme had been published in newspapers including the incentive scheme which was deliberated in the course of the public hearing and dealt with in the Commissions tariff order dated 17th December, 2004. It was also argued on behalf of the Discoms that the modified incentive scheme was free from any legal flaw.

5. Consideration of the rival submissions led the Commission to the conclusion that its order dated 17th December, 2004 had examined the question raised by the petitioners regarding the

continuation of the incentive scheme and found that the scheme had a limited validity and its withdrawal did not offend the principles of promissory estoppel. It also held that the modification of the scheme was not without public notice and the discontinuance of the old incentive scheme had been given wide publicity pursuant to which large industries and associations had been heard on the question of introduction of a new scheme in place of the old. The Commission also held that the question of applicability of Promissory Estoppel had been raised before the Commission at the hearing of the tariff petitions and that the material sought to be introduced in support of the said plea at the stage of review could not be taken into consideration. The Commission, accordingly, concluded that there was no mistake or error apparent on the face of the record in the order passed by it to call for a review of the same. In support the Commission noted several decisions of this Court on the question of Promissory Estoppel including those delivered in M/s *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors*[1]*Kasinka Trading and Anr. v. Union of India an Anr*[2]*Shrijee Sales Corporation and Anr. v. Union of India*[3]*Union of India & Ors. v. Godfrey Philips India Ltd*[4].

6. Aggrieved by the orders dated 17th December, 2004 and 8th June, 2006 passed by the Commission, the appellants and few others filed Appeal Nos. 180-197 of 2006 and Appeal No.226 of 2006 before the Appellate Tribunal for Electricity, at New Delhi which were as noticed above dismissed by the Tribunal by the order impugned in these appeals. The Tribunal noted that there was no challenge before it as to the revision of the tariff order issued by the Commission. It also found that the Regulatory Commission could exercise its power of review in terms of Section 94(1)(f) of the Electricity Act, 2003 read with Order XLVII of the Civil Procedure Code and that it could review an order, provided a case for any such review was made out. The Tribunal rejected the contention urged on behalf of the appellants that the doctrine of Promissory Estoppel was attracted in the facts of the case. It concurred with the view taken by the Commission that the incentive scheme was applicable only upto 31st March, 2007 or till the Commission issued a tariff orderwhichever was earlier. The Tribunal observed:

> "As has been held in Pawan Alloys & Casting Pvt. Ltd., Meerut v.U.P. State Electricity Board And Others, (1997) 7 Supreme Court Cases 251, in this case, no promise was held out to any new industries nor there was an invitation for investments of large scale fund but it only imposed a condition that existing industries could avail of the incentive subject to the stipulations in the scheme and nothing more. The tariff fixation is a statutory function in terms of The Electricity Act 2003 and tariff is to be fixed in the larger interest of consumer public at large. That being the position and when in the very tariff scheme, it has been specifically provided that the scheme will come to an end on 31.03.2007 or when the Regulatory Commission determines

> distribution tariff which ever is earlier. This is only meaning it is not known as to how the appellants could advance the said contention that the scheme is to be given any other meaning is impermissible. This sentence which is incorporated in the scheme is fatal to the claim of the appellants and none of the precedents pressed into service by the appellants will come to their rescue. It will be sufficient to answer this point, however, as the appellants on all the contentions pressed for a decision.

7. We have heard learned counsel for the parties at considerable length. An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 of the C.P.C. in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the Courts below, which would in the present case, imply the Regulatory Commission as the Court of first instance and the Appellate Tribunal as the Court hearing the first appeal, cannot be re-opened before this Court in an appeal under Section 125 of the Electricity Act, 2003. Just as the High Court cannot interfere with the concurrent findings of fact recorded by the Courts below in a second appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loathed to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to *Govindaraju v. Mariamman*[5]*Hari Singh v. Kanhaiya Lal*[6]*Ramaswamy Kalingaryar v. Mathayan Padayachi*[7] *Kehar Singh v. Yash Pal and Ors*[8]*Bismillah Begum (Smt.) (Dead) by LRs. v.Rahmatullah Khan (Dead) by LRs*[9]should, however, suffice.

8. The Regulatory Commission has, in the case at hand recorded a clear finding of fact that the old incentive scheme was limited only upto 31st March, 2007 or till the Commission issued a tariff order whichever was earlier. It has also recorded a finding that while considering revision of tariff it had gone into the proposals regarding introduction of a new incentive scheme and approved the same, effectively bringing to an end the existing scheme and introducing a new scheme in its place. The Commission had declined to accept the contention that the appellant companies had altered their position to their detriment by making additional investments or that there was any specific representation or promise made to them that the old scheme would inevitably continue till 31st March, 2007. The additional material which the appellants had sought to introduce belatedly at the review stage had also been declined by the Commission. In its order dated 17th December, 2004 revising tariff the Commission had dealt with the question relating to the incentive scheme in the following words:

> "The incentive scheme was proposed by the Nigams as a stopgap arrangement to arrest the decline in industrial consumption. The Commission while conveying its

approval to extension of the incentive scheme clearly stipulated that it shall be valid till 31.3.07 or revision of tariff whichever was earlier. The scheme itself had a limited validity and therefore, did not attract the principle of promissory estoppel. The Commission had envisaged review of incentive scheme at the time of tariff revision, as the proceeding would have provided opportunity to public to express their views to enable appropriate changes in incentive scheme or tariff. After considering the petitionersproposal and the views expressed before us, the Commission is of the view that no separate scheme is called for at this stage. The need to provide incentive to promote consumption of electricity by large industrial power (LIP) consumers should be taken care of by the tariff itself. An incentive which encourages better load factor will serve the purpose. Consequently, an incentive scheme linked to consumption per KVA of contract demand is proposed. Accordingly we direct that the incentive shall be available to all LIP consumers including railways and public water works, and eligibility for incentive shall be as follows:

(i) The annual consumption of the consumer for the current financial year shall not be less than his annual consumption of the previous financial year.

(ii) In respect of new LIP consumers and existing LIP consumers who reduce their contract demand, incentive shall be admissible from the quarter following six months from the date of new connection or reduction of contract demand, as the case may be.

(iii) Consumer should have no arrear outstanding against him. Incentive shall be allowed to eligible consumers provisionally on quarterly basis provided that consumption during the quarter is not less than his consumption during the corresponding quarter during the previous year. Incentive so allowed shall be subject to final assessment at the end of the year, on year-to-year basis. If consumption of a consumer in any quarter is less than that of the corresponding quarter of the previous year but the annual consumption is more than that of the previous year, he shall be eligible for the incentive for the year as a whole. Incentive shall be as under on energy charges:- |(i) |Energy consumption of 250 KWh per| | | |month per kVA of contract demand | | | |and upto 400 KWh per month per | | | |kVA of contract demand. 11.0% | |(ii) |Energy consumption exceeding 400 | | | |KWh per month per kVA of contract| | | |demand and upto 550 KWh per month| | | |per kVA of contract demand. |4.0% | |(iii) |Energy consumption in excess of | | | |550 KWh per Month per kVA of |7.0% | | |contract demand. | |

9. The Tribunal concurred with the above view taken by the Commission and repelled the contention based on the principle of promissory estoppel not only on the ground that there

had been no unequivocal representation regarding continuation of the scheme till 31st March, 2007 but also on the ground that there was no material to support the contention that the appellants had indeed made any investment or changed their position to their detriment so as to attract the doctrine of promissory estoppel. In coming to that conclusion the Commission has also relied upon several decisions of this Court to which we have made a mention above. We do not see any perversity in any one of those findings nor do we see any substantial question of law arising in the fact situation of these appeals. We have, therefore, no hesitation in dismissing these appeals on merits although the same have been filed beyond the period stipulated for the purpose under Section 125 of the Electricity Act, 2003.

10. We may before parting mention that in Civil Appeal No.3814 of 2007 filed by DSR Steel (P) Ltd., one of the questions that was urged before us was whether the period of limitation would start running from the date of pronouncement of the order or the date of communication thereof. Relying upon the decision of this Court in Chhattisgarh State Electricity Board v.Central Electricity Regulatory Commission and Ors. (2010) 5 SCC 23 it was contended on behalf of the respondent that the date on which the order was pronounced would also be the date on which the same is deemed to have been communicated.

11. Section 125 of the Electricity Act, 2003 makes it abundantly clear that the period of limitation commences from the date of communication of the decision or order and not from the date of its pronouncement. As a matter of fact, Rules 94 and 98 of the Rules framed under the Act make a clear distinction between intimation regarding pronouncement of the order on the one hand and the communication of the order so pronounced to the parties on the other. While Rule 94 appears to us to provide for notice of pronouncement of an order, it makes no mention about the communicationof such an order as is referred to in Section 125 of the Act. Transmission of the order by the Court Master to the Deputy Registrar of the Tribunal and its onward communication to the parties is dealt with by Rule 98 of the said Rules which communication alone can be construed as a communication for purposes of Section 125 of the Electricity Act, 2003. The decision of this Court in the Chattisgarh State Electricity Boards case (supra) may in that view require reconsideration if the same were to be understood to be laying down that the date of pronouncement is also the date of communication of the order. We would have, in the ordinary course, made a reference to a larger Bench for that purpose but having regard to the fact that we have dismissed the appeals on merits, we consider it unnecessary to do so in the present case.

12. So also the question whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed an application for review of the said order was argued before us at some length. Learned counsel for the appellants contended that since a review petition had been filed by two of the appellants namely, J.K. Industries Ltd. (Now

known as J.K. Tyres and Industries Ltd.) and J.K. Laxmi Cement Ltd. in this case, the orders made by the Tribunal dismissing the appeals merged with the orders passed by it in the said review applications so that it is only the order dismissing the review application that was appealable before this Court. If that were so the period of limitation could be reckoned only from the date of the order passed in the review applications.

13. Different situations may arise in relation to review petitions filed before a Court or Tribunal. One of the situations could be where the review application is allowed, the decree or order passed by the Court or Tribunal is vacated and the appeal/proceedings in which the same is made are re- heard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition. The second situation that one can conceive of is where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified. Such an order shall then be a composite order whereby the Court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that ineffective for purposes of a further appeal, if any, maintainable under law.

14. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

15. The decisions of this Court in *Manohar S/o Shankar Nale and Ors. v. Jaipalsing S/o Shivalalsing Rajput*[10]*in our view, correctly settle the legal position. The view taken in Sushil Kumar Sen v. State of Bihar*[11]*and Kunhayammed and Ors. v. State of Kerala & Anr*[12]wherein the former decision has been noted, shall also have to be understood in that light only.

16. In the result, we dismiss these appeals as no substantial question of law arises for our consideration. The respondent shall also be entitled to cost of Rs.20,000/- in each case to be deposited in the SCBA LawyersWelfare Fund within six weeks from today.

Judgment Referred

[1] *1978] INSC 254; (1979) 2 SCC 409*
[2] *1994] INSC 525; (1995) 1 SCC 274*
[3] *(1997) 3 SCC 398*
[4] *1985] INSC 219; (1985) 4 SCC 369*
[5] *(AIR 2005 SC 1008)*
[6] *(AIR 1999 SC 3325)*
[7] *(AIR 1992 SC 115)*
[8] *(AIR 1990 SC 2212)*
[9] *(AIR 1998 SC 970)*
[10] *(2008) 1 SCC 520*
[11] *1975] INSC 73; (1975) 1 SCC 774*
[12] *(2000) 6 SCC 359*