

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 25/2009

and

I.A. No. 37/09

Dated: 5th May, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

IN THE MATTER OF:

Transmission Corporation of Andhra Pradesh Ltd.,
Vidyut Soudha
Khairabad
Hydrabad – 82

Andhra Pradesh Central Power Distribution Co. Ltd.
Mint Compound, Near Secretariat
Hyderabad

Andhra Pradesh Eastern Distribution Co. Ltd.
P&T Colony, Seethammadhara
Visakhapatnam – 530 013 (AP)

Andhra Pradesh Northern Distribution Co. Ltd.
H.No. 1-1-504, Opp. NIT Petrol Pump
Chaitanyapuri, Warangal – 506 004 (AP)

Andhra Pradesh Southern Power Distribution Co. Ltd.
H.No. 193-93 (M) Upstairs
Renigunta Road, Tirupati – 517 501 (AP)

..... Appellants

Versus

National Thermal Power Corporation Ltd.
NTPC Bhawan
Scope Complex
Core-7, Lodhi Complex
New Delhi – 110 003

Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110 001

..... Respondents

Counsel for the Appellant (s) : Mr. Sanjay Sen &
Ms. Shikha Ohri

Counsel for the Respondent(s): Mr. M.G. Ramachandran
Ms. Swapna Seshadri &
Mr. Anand K. Ganesan

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

Andhra Pradesh Transmission Corporation (APTransco) and Others are Appellants.

2. Aggrieved by the Order passed by the Central Commission on 10/6/08 dismissing the Review Petition filed by the Appellants, they have filed this Appeal. Since there was a delay of 29 days in filing the above Appeal, the Appellants have also filed an Application for Condonation of Delay. The brief facts in a nutshell are as follows:

3. NTPC the Respondent herein is owning and operating generating stations in various States of India. The first Appellant is the Transmission company. The Appellants 2 to 5 are the Distribution companies. They are having all their operations in the State of Andhra Pradesh. The NTPC approached the Central Commission for deciding the methodology for calculation of the Foreign Exchange Rate Variation (FERV). The Central Commission deliberated on the different practices followed with regard to the claim of FERV existing with different utilities including the Appellants, and finalized the methodology for calculation of FERV, and passed the

Order on 21/12/2000. The Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 notified on 26/03/2001 incorporated the said methodology for calculation of FERV.

4. The two units of the Simhadri Thermal Power Station (Simhadri TPS) owned by NTPC were commissioned for commercial operation on 1/9/02 and 1/3/03 respectively in Andhra Pradesh. On 11/8/03, the NTPC filed a Petition before the Central Commission for determination of tariff in respect of these plants for the period 2002-04. On 19/5/04, the Central Commission passed the Order determining the tariff in respect of these plants for the said period and also decided the FERV aspects for the period 2002-03 on the basis of the methodology prescribed as per Regulations, 2001. Both the Appellants as well as the Respondent NTPC who were parties to the said order accepted the above calculation and acted upon the same.

5. On 26/10/04, the Respondent NTPC filed a Petition for determination of tariff for the period 2004-09 in respect of the above plants and claimed capitalization of FERV for the period 2003-04. After hearing both NTPC and the Appellants, the Central Commission passed an Order on 22/9/06, determining the tariff for the period 2004-09 and also the capitalization of FERV for the period 2003-04 for an amount of Rs. 142.95 crores, as per the methodology prescribed in Regulations, 2001. Both the parties i.e. the Appellants and the Respondent NTPC accepted these Orders in respect of the capitalization of FERV for the period 2003-04 and acted upon it.

6. In one other matter, this Tribunal happened to deal with the FERV calculation in a matter between TNEB and the Power Grid Corporation of

India for the period 2001-04. In that matter, this Tribunal passed the Order dated 4/10/06 fixing the methodology.

7. On becoming aware of the said Order in the above case, with which the parties of this Appeal were not concerned with, the Appellants thought it fit to use the said Order and filed a Review before the Central Commission, seeking for revising the Order dated 22/9/06 in respect of the decision taken by the Central Commission on FERV calculation in respect of the year 2003-04 on the strength of the said Order dated 4/10/06 passed by the Tribunal. However, the Central Commission dismissed the same by the Order dated 10/6/08, holding that the Review Petition is not maintainable.

8. As against this Order, the Appellants have filed this Appeal. Since there was a delay of 29 days in filing the above Appeal, they have filed the application to condone the same. Both were taken together and arguments were heard.

9. Shri Sanjay Sen, the Ld. Counsel appearing for the Appellants would make the following contentions while assailing the Order impugned dated 10/6/08:

- a. Even though the Appellants filed the Petition before the Central Commission seeking for review of the order dated 22/9/06, the said Petition cannot be construed to be a Petition for Review since they sought only for reworking of the calculation concerning FERV capitalization in consonance with the Orders of the Tribunal subsequently passed on 4/10/06 in the Appeal between TNEB and

Powergrid and therefore, the Central Commission ought not to have dismissed the said Petition on the ground that the Review is not maintainable.

- b. The Central Commission dismissed the said Review Petition on the ground of unexplained delay also. The question of delay does not arise in this case since for recovery of every bill, a separate cause of action would arise. When there is a continuous cause of action, the Appellants have got a right to file a separate Application for every cause of action for opposing the FERV methodology. Hence, the Central Commission's finding that there was no application for condoning the delay in filing the Review of the Order dated 22/9/06, is not legally valid.
- c. The Central Commission ought to have considered the Tribunal's Orders dated 4/10/06 for the purpose of reworking of the calculation by fixing the methodology adopted by the Tribunal and instead of doing so, the Central Commission wrongly concluded that the Review Petition cannot be entertained on the basis of the subsequent Orders passed by the Tribunal.

10. In reply to the above submissions, Shri M.G.Ramachandran, the Learned Counsel for the Respondent NTPC, besides justifying the grounds for rejecting the Review mentioned in the order impugned, contended that both this Appeal as well as the application for condonation of delay of 29 days in filing the appeal before this Tribunal are not maintainable. The gist of his reply is as follows:

- a. The issue raised by the Appellants in the present Appeal related to the decision about the methodology of calculation of FERV taken by the Central Commission on 21/12/2000 itself. Admittedly, that order was not challenged. Without challenging the same, the Appellants cannot reopen the issue which was already decided by the Central Commission, under the garb of this Appeal challenging the dismissal of the Review Petition.
- b. In respect of the FERV calculation for the period 2003-04 the NTPC filed a Petition on 26/10/04 before the Central Commission requesting the Commission to decide the FERV capitalization for the year 2003-04 on the basis of the said methodology adopted on 21/12/2000. The Central Commission after hearing the parties including the Appellants, decided the FERV calculation by the order dated 22/9/06. The Appellants never challenged the said order by filing an Appeal. Instead, they filed the Petition to Review of the Order dated 22/9/06 without a legal ground, that too after a long delay.
- c. As a matter of fact, the benefits out of the Order dated 19/05/2004 as well as the Order dated 22/9/06 passed by the Central Commission have been fully enjoyed by the Appellants throughout. The Appellants admittedly did not chose to challenge the Orders dated 19/05/2004 and 22/9/06 by way of the Appeal. Having decided not to challenge the same, through the Petition for Review the Appellants have now ventured to reopen the same, which is not permissible under law.
- d. In order to overcome the above legal difficulties, the Appellants have chosen to file a Petition between the Central Commission praying for

the reworking of the FERV calculation. The said prayer would virtually amount to challenging the Regulations, 2001 in regard to the methodology and the order dated 22/9/06 fixing the FERV calculation.

- e. The Appeal against the Order of dismissal of Review is not maintainable under Order 47 Rule 7 CPC. The Appeal could be filed only against the main Order dated 22/9/06 and not against the dismissal order in Review Petition dated 10/6/08. Even if this is to be treated as an Appeal against the Order dated 22/9/06, then there is a long delay in filing this Appeal of about 24 months (from 22/9/06). Therefore, both the Appeal as well as the Application for condonation of delay of 29 days in filing the Appeal are not maintainable.

11. In the light of the above preliminary objection raised by the Ld. Counsel for the Respondent in regard to the maintainability of the Appeal as well as the application to condone delay, we are now to consider whether they are maintainable or not.

12. Before dealing with the said question, it is appropriate to refer to the grounds on the basis of which the Central Commission dismissed the Review Petition filed by the Appellants, through the Order dated 10/6/08 which is the subject matter of the challenge in this Appeal. Let us refer to those grounds, which are as follows:

A. The prayer made by the Petitioners before the Central Commission is for revising the Order dated 22/9/06 in respect of FERV calculation fixed as Rs. 142.95 crores which has been capitalized. The said prayer would clearly

indicate that the Petitioners sought to revise the order dated 22/9/06 and therefore, it has to be treated as a Review only.

B. If the said Petition is to be considered as a Petition for review of the order dated 22/9/06, then the Review application has to be filed within sixty days under Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations 1999. If it is not filed within sixty days, then under Regulation 116, a separate Application has to be filed for condonation of delay of the period by explaining the said period of delay. Admittedly, in this case, the Review application has not been filed within 60 days from the date of the Order dated 22/9/06. Similarly, the Appellants did not file any Application to condone the delay in filing the Review even though the Review has been filed only on 7/4/08, i.e. after a delay of more than 18 months. Therefore, Review cannot be entertained in the absence of the application to condone delay.

C. It is contended by the Applicants that no question of limitation would arise as it is a continuous cause of action. This is wrong because the original cause of action has already arisen on 21/12/2000 itself, or at any rate, the cause of action in the instant case must be construed to have arisen when the main order was passed on 22/9/06 by the Central Commission. Hence, the limitation question would certainly arise in this matter.

D. It is argued by the Ld. Counsel for the Appellants that under Clause 1.7 of the Regulations 2001, a right is conferred to the beneficiaries like the Appellants to object to the amounts, whenever they are claimed by the Respondent on account of FERV, it gives rise to a cause of action. This

contention cannot be accepted for the reason that Clause 1.7 of the Regulation would not apply to this case. The text of the said Clause is as under:

Clause 1.7

“The recovery of Income-Tax and FERV shall be done directly by the utilities from the beneficiaries without filing of the Petition before the Commission. In case of any objections by the beneficiaries to the amounts claimed on these counts, they may file an appropriate Petition before the Commission.”

The above clause 1.7 would reveal that only when the generating stations sought the recovery of FERV amount without any Order of the Appropriate Commission, then the beneficiaries can dispute the claim regarding the amount, before the Commission. That is not the case here. Rather, this is a case where the Commission has already decided about the claim of NTPC for capitalization of FERV after adjudication. Therefore, the argument submitted by the Appellants on this ground is to be rejected.

E. The main ground on the basis of which the Review of the order dated 22/9/06 was sought for by the Ld. Counsel for the Appellants was on the strength of the Order subsequently passed by this Tribunal on 4/10/06 in the case involving TNEB and PGCIL. The Order 47 Rule 1 puts a specific bar on considering subsequent Orders as a ground for Review. The said Order 47 Rule 1 provides thus:

“Explanation.

The fact that the decision on a Question of Law on which a Judgment of the Court is based has been reversed or modified by the subsequent

decision of the Superior Court in another case shall not be the ground for the Review of the said Judgment.

A reading of the above rule would indicate that the fact that the subsequent Order passed by the Superior Court taking a different view from that of the subordinate Court, with regard to the issue shall not be the ground for Review. Therefore, there was no legal ground for Review”.

13. These are the grounds on the basis of which the Central Commission dismissed the Review Petition holding that the Review is not maintainable. Further, it is noticed that even in this Appeal, the Appellants themselves have admitted that they filed a Review Petition before the Central Commission challenging the methodology adopted in the Order dated 22/9/06. The relevant paragraphs are as follows:

“Being aggrieved by the Order dated 22/9/06, the Appellants filed a Petition being Review Petition No. 46/08 before the Hon’ble Central Electricity Regulatory Commission challenging the method of classification of Foreign Exchange Rate Variation by the Simhadri Thermal Power Station.”

14. In the light of the above admission by the Appellants in this Appeal and also in view of the detailed reasons given by the Central Commission for dismissing the Review Petition, we have no hesitation to conclude that the said Petition filed by the Appellants is the Review of the Order dated 22/9/06 and not a Petition for mere reworking of the calculation and as such, the conclusion arrived at by the Central Commission that the Review is not maintainable, is perfectly valid.

15. Let us now refer to the question which is raised in this Appeal as to whether this Appeal and Application for condonation of delay in filing the said Appeal is maintainable or not:

- i. According to the Ld. Counsel for the Respondent, the Appeal against the Order dismissing the Review is not maintainable and consequently, the Application to condone the delay also is not sustainable. As we indicated above, we have concluded that the Central Commission rightly treated the Petition as a Review Petition especially when the Appellants themselves had admitted both in the Petition for Review and in the present Appeal to the effect that they filed the Petition for review seeking for the revision of the Order dated 22/9/06, challenging the methodology for FERV calculation. Once we conclude that the said Petition was a Review of the Order dated 22/9/06, then the period of limitation would reckon from the date of the main Order i.e. from 22/9/06, especially when the main order was not modified by the Central Commission in the Review Petition. In other words, when the Review Petition is dismissed by the Central Commission, it means that the main order is confirmed. On the other hand, if the Central Commission in the Review modified the main order, then the limitation period has to be reckoned from the date of the Review Order for filing the Appeal as the main Order gets merged with the Review Order. This is settled law.
- ii) If the said settled law is applied to the present case, then the period of limitation starts from the date of the main Order in

this case because Central Commission dismissed the Review Petition, confirming the main Order. The main order in this case was passed on 22/9/06. The Review application has been filed before the Commission only on 7/4/08. As pointed out by the Central Commission, the Review Application should have been filed within 60 days, but in this case, it was filed on 7/4/08 i.e. after about 18 months. Similarly, in filing this Appeal, the period of limitation starts from the main Order dated 22/9/06. If that date has to be reckoned, the Appellants should have filed the appeal within 45 days, but in this case, the Appeal has been filed after a delay of about 24 months. Therefore, filing an Application to condone the delay of 29 days cannot be maintained as the days of delay has to be calculated from the date of the main order i.e. 22/09/06 and not from the date of the order i.e. 10/06/08 dismissing the Review Petition.

- iii) The Ld. Counsel for the Appellants has reiterated his contention which was urged before the Central Commission that they did not seek for a Review but they only sought for a reworking of the FERV methodology and therefore, the question of delay with reference to the Review does not arise. This contention has correctly been rejected by the Central Commission, as it has no basis. The matter in issue relates to the methodology to be adopted for the treatment of FERV for the period 2003-04. It cannot be disputed that this methodology for such a treatment was prescribed in Regulations, 2001 notified on 29/03/2001. On this basis, the

FERV in regard to the year 2003-04 was calculated by the Central Commission by the main Order dated 22/9/06, based on the methodology provided in Regulations, 2001.

- iv) In this case, the methodology for calculation of FERV employed was prescribed in the Regulations, 2001 dated 29/03/01. On this basis, FERV calculation order was passed on 19/5/04 following the said methodology. This was not challenged by the Appellants. Similarly, the Order passed on 22/9/06 fixing the FERV calculation based on the relevant Regulations passed by the Central Commission was also not challenged. Instead, the Appellants have only filed the Review Petition, for the first time and that too after a delay of more than 18 months, seeking to revise the Order dated 22/9/06 under the garb of praying for a reworking of the calculation, without giving any explanation for the long delay.
- v) As mentioned above, if actually the Appellants decided to challenge the Order dated 22/9/06 through an Appeal before this Tribunal, they should have filed an Appeal within 45 days from the date of communication of the said Order or in the alternative, if they decided to file a Review before the Central Commission, they should have filed the same before 60 days. The Appellants did not choose to follow either of the above two options.
- vi) As pointed out earlier, the methodology for FERV calculation as provided in the Regulations, 2001 became final and

binding on both the parties. The said Orders passed by the Central Commission fixing the methodology as well as the calculation of FERV consistent with the Regulations, 2001 and order passed on 22/9/06 in respect of the period 2003-04, cannot be allowed to be challenged by the Appellants by preferring a Petition for revising the aforesaid Order for the purpose of reworking the said methodology as it will amount to challenging the Regulations i.e. the subordinate legislation. Admittedly, this Tribunal does not have jurisdiction to examine the validity of Regulations.

- vii) It is a well-settled principle of law that once a matter gets settled between the parties before the judicial forum, the same cannot be reopened and re-agitated even if a different view has been taken by the superior Court as per the relevant provisions of Rules. This is also laid down by the Supreme Court in Mohd. Azim Ala vs. Union of India reported in 2001 10 SCC 93. The relevant observation in this case is as follows:

“Once the matter on the Appellants reached finality, it could not be opened merely on the ground that in some other matter filed at the behest of some other similarly situated persons, the Tribunal or the Court has granted some relief”.

- viii) The Appellants’ main contention is that there is a continuous cause of action and as such for every cause of action, they have got a right to file a separate Petition opposing the FERV

methodology. This contention is absolutely wrong because the present case involves the issue relating to the period 2003-04, whereas the cause of action raised in the methodology of FERV for the said period would arise immediately after the Order dated 21/12/2000 was passed. There is no fresh FERV issue for the Appellants from 31/3/2004.

- ix) As correctly pointed out by the Ld.Counsel for the Respondents that the Order dismissing the Review is not appealable as per the relevant provisions of the Act. Under Section 94 of the Electricity Act, the Central Commission has got the powers for reviewing its own orders under the powers vested with the Civil Court under the Order 47 of Rule 7. The Order of Review is not appealable under Order 47 of Rule 7. The said Order 47, Rule 7 of the CPC reads as under:

“Rule 7 Order of Rejection not appealable. Objection to Order granting Application”

(i) The Order of the Court rejecting the Application shall not be appealable, but an Order granting an Application may be objected to at once by an Appeal from the Order granting the Application or in an Appeal from the decree or an Order finally passed or made in the Suit.”

A reading of this rule would indicate that the Final Order alone can be appealed against, before the Appellate Authority and not the Order rejecting the Application for Review. In other words, in this case, the Original Order has been passed

on 22/9/06 which is appealable. The Application has been for seeking review of the said Order was dismissed on 10/6/08 and this is not appealable. The remedy available for the Appellants/Petitioners is to file an Appeal against the main Order dated 22/9/06 along with an Application to condone the delay explaining the delay by giving the appropriate reason. In that event, the Appellate Tribunal would consider the ground for delay and condone the same and entertain this Appeal. The Appellants have not adopted this Course.

- x) There is one more reason to hold that the Appeal is not maintainable as against the Order passed on 10/8/08 in the Review Petition. As stated earlier, the Order dated 22/9/06 not only determined the tariff for the period 2004-09, but also fixed the FERV calculation on the basis of the methodology which was prescribed in Regulations, 2001 in respect of the year 2003-04. In other words, the Order dated 22/9/06 with reference to the FERV calculation for the year 2003-04 is only an implementation of the Regulations, 2001 and 2004. When no Appeal has been filed against the Order dated 22/9/06 which decided the issue with reference to the FERV calculation for the year 2003-04, how can the Order passed in Review to revise the Order passed on 22/9/06 be appealed against?

16. Therefore, none of the grounds urged by the Ld. Counsel for the Appellants would establish that there is a valid ground to entertain this Application for condonation of delay or the Appeal. In view of the above,

both the Applications for condonation of delay as well as the Appeal are dismissed as not maintainable. No costs.

(A.A.Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 5th May, 2009.

REPORTABLE / NON – REPORTABLE