

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 75 of 2010

Dated : 28th July, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V.J. Talwar, Technical Member

NTPC Ltd. ... Appellant(s)

Versus

C.E.R.C & Anr.Respondent(s)

Counsel for the Appellant(s): Mr.M.G. Ramachandran,
Mr. Anand K Ganesan,
Ms. Swapna Sheshadri,
Ms. Ranjitha Ramachandran,
Ms. Sneha Venkataramani

Counsel for the Respondent(s): Mr. S Vallinayagam(R2 to
R6)

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

This Appeal has been filed by the NTPC relating to
determination of tariff under additional capitalisation

petition filed relating to for the generating stations of NTPC for the tariff period 1.4.2004 to 31.3.2009.

2. The Central Electricity Regulatory Commission (Central Commission) had disallowed some of the claims of the Appellant while passing the impugned order dated 11.1.2010 in respect of Simhadri Thermal Power Station. The following issues have been raised by the Appellant in this Appeal:

(a) Exclusion of part of the capital expenditure validly incurred but pending actual disbursement/payment from the capital cost for the purposes of tariff;

(b) Equating depreciation with normative loan repayment;

(c) Disallowance of cost of maintenance spares;

(d) Impact of de-capitalisation of assets on cumulative repayment of loan;

(e) De-capitalisation of capital spares and minor items and excluding them from capital base even when capitalization of substituted components is not allowed;

(f) Applying principle of cut-off date on erroneous interpretation of Regulation 14 and 18 (2) of Tariff Regulations, 2004.

3. The Learned Counsel for the Appellant submitted that the issues raised in this Appeal have already been decided by this Tribunal in various Judgements and prayed to dispose of the Appeal in terms of those Judgements. The issues and the relevant judgements are given below.

4. The **Issue No.1** regarding the Exclusion of part of the capital expenditure validly incurred but pending actual disbursement/payment from the capital cost for the purposes of tariff, is already covered and decided in favour of the Appellant by Judgment of this Tribunal in Appeal Nos. 133, 135 etc. of 2008 (**NTPC Vs. CERC& Ors – 2009 ELR (APTEL) 337**), dated 16.03.09 and Appeal Nos. 151 & 152 of 2007 (**NTPC Vs. CERC& Ors – 2008 ELR (APTEL) 916**) dated 10.12.2008.

5. With regard to **Second Issue**, namely Equating depreciation with normative loan repayment, the said issue is covered and decided in favour of the Appellant by the Judgment of this Tribunal in Appeal Nos. 133, 135 etc. of 2008 (**NTPC Vs. CERC& Ors – 2009 ELR (APTEL) 337**), dated 16.03.09 and Appeal Nos. 139, 140 etc. of 2006 dated 13.06.2007.

6. The **Third issue**, namely Disallowance of cost of Maintenance Spares, the same is covered and decided in favour of the Appellant by the Judgement of this Tribunal in Appeal Nos. 139 and 140 of 2006, dated 13.06.07. The said issue has been decided in the same manner in Appeal No. 54 of 2009 (**NTPC Vs. CERC& Ors – 2009 ELR (APTEL) 705**), dated 21.08.2009.

7. The **next Issue** is impact of de-capitalisation of assets on cumulative repayment of loan. This issue has also been decided in favour of the Appellant in Judgement of this Tribunal in Appeal Nos. 139, 140 etc. of 2006, dated 13.06.07.

8. With regard to **fifth issue** regarding De-capitalisation of capital spares and minor items and excluding them from capital base even when the capitalization of substituted components is not allowed, the Tribunal

rejected the claim of the Appellant and as such this point has been covered by the Judgement of this Tribunal dated 4.02.2011 in Appeal No.92 of 2010 NTPC V. CERC and the same has been decided against NTPC, the Appellant.

9. The **sixth issue** is Applying principle of cut-off date on erroneous interpretation of Regulations 14 and 18 (2) of Tariff Regulations, 2004. According to the Appellant, in respect of this issue, the Central Commission has not considered additional capitalisation (which is within the approved scope of work) incurred by NTPC after the actual commercial operation of the generating station on an erroneous interpretation of the principles of cut-off date as provided in Regulations 14 and 18(2) of the Tariff Regulations, 2004 and has treated the same as a deferred work, which is wrong.

10. A similar issue was raised by the Appellant before this Tribunal in Appeal No. 66 of 2008 which was decided by the Judgement dated 18.8.2010 (**2010 ELR (APTEL) 1096**) rejecting this claim. However, some observations have been made in favour of the Appellant. The relevant observations are as follows:

“41. In the instant case, the Appellant has four units of the generating station. In case of generating station, the date of commercial operation in terms Regulations 2001 means the date of commercial operation of the last unit. Thus, what is called scheduled commercial date is the date ideally fixed for putting the concerned unit under commercial operation. Such an ideal date, the date targeted, may turn out to be a reality, may not be so. The units may be put under commercial operation ahead of scheduled date of commercial operation, or after that date. The date of scheduled commercial operation is the date ideally taken to be one by which the unit is expected to be commissioned. There may be a failure to adhere to that date, there may a success also, and success may come before that date also. Therefore, in terms of the regulations the date of commercial operation must be to all intents and purposes the actual date of commercial operation.

42. We are unable to accept the submission of Mr. Ramachandran that the scheduled commercial date should be the basis for determining the cut off date. As already observed, the provision of the regulations admits of no confusion and ambiguity. Where the plain meaning of the regulation is clear, no contrary reasoning is admissible.....
.....

11. Even though, this point has been held as against the Appellant, this Tribunal has directed the Commission to consider for the relaxation of Regulations. The observation is as follows:

“44. The Appellant has submitted that the orders for certain works for a sum of Rs.76 crores could not be placed by 31.03.2007 due to detailed review of initial spares. After detailed exercise enquiry for some of the spares was issued in July and September, 2006 against which offers were received from BHEL in September and November, 2006. The order could be placed after negotiation and bringing down the cost only after 3.1.3.2007. Also some orders relating to Civil Works were placed after 31.3.2007. It has been argued by the Learned Counsel for the Appellant that the present case is a just and proper case for exercising the Power to Relax.

45. We have examined the details of the items where the orders were placed after the cut off date submitted by the Appellant. These are essentially the initial spares required for the power plant. In view of the

explanation offered by the Appellant, we are convinced that it is a fit case for consideration of the Commission to exercise its power to relax under the Tariff Regulations, 2004. Accordingly, we remand this matter to the Commission to consider the request of the Appellant to extend the cut off date appropriately in exercise of its power to relax”.

12. The reading of the above observations would indicate that although the Tribunal rejected the submissions of the Appellant that the scheduled commercial date should be the basis for determining the cut-off date, this Tribunal directed the Central Commission to consider the exercise of the power to relax and give relief to the Appellant on the issue of spares, taking note of the facts and circumstances. Similarly, the Central Commission may consider the facts of this case also and decide whether the facts of this case would apply to the above judgement. If a similar explanation is offered by the Appellant before the Commission, then the Commission may consider for the exercise of its power to relax the relevant tariff regulations.

13. Accordingly, we remand this matter to the Commission on this issue to consider the request of the Appellant to consider the cut-off date appropriately in exercise of its power to relax.

14. Even though the Learned Counsel for Respondent-2 to 6 vehemently objected to the submissions made by the Appellant through his oral and written submissions and contended that in respect of the some of the issues, already the Appeal has been filed before the Hon'ble Supreme Court and the same is pending and during the course of proceeding before the Hon'ble Supreme Court, the Appellant gave undertaking to the effect that those issues would not be pressed for fresh determination but despite that, those issues are being pressed before this Tribunal and as such the same cannot be allowed.

15. On the said ground, the Learned Counsel for the Respondent-2 to 6 on the strength of the decision of the Hon'ble Supreme Court in **Jain Export Pvt. Ltd & Anr. Vs. Union of India & Ors.** (1996) (5) SCC 619) and also in (2006) 11 SCC 114 (**Rama Narang Vs. Ramesh Narang and Anr**), has vehemently contended that the undertaking given by the Court cannot be breached and as such the Appellant should not be allowed to raise those issues.

16. On the other hand, the Learned Counsel for the Appellant has brought to our notice the judgement of Hon'ble Supreme Court in **CHAMUNDI MOPEDS LIMITED Vs. CHURCH OF SOUTH INDIA TRUST** (1992 (3) SCC 1) and contended that the said point would not disentitle the Appellant to raise these issues in the present case. He has also cited the Judgment of this Tribunal in Appeal Nos.62 and 63 of 2010 dated 19th April, 2011, Appeal No.73 of 2010 dated 19th April, 2011, Appeal No.76 of 2010 dated 19th April, 2011 and Appeal

No.86 of 2010 dated 19th April, 2011 and contended that this point has already been considered and findings have been rendered in favour of the Appellant on the basis of the earlier judgements of this Tribunal.

17. We have gone through the Judgments of the Hon'ble Supreme Court as well as the Judgment of this Tribunal and in the light of the view taken by us earlier, we are unable to accept the objections raised by the Respondent.

18. In view of the above, this Appeal is allowed in respect of the issues (a), (b) (c) (d) and (f) in terms of the judgements referred to above. As indicated earlier, the claim on the issue in (e) regarding the de-capitalisation of the capital spares and minor items is rejected.

18. Thus, the Appeal is partly allowed. No order as to cost.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th July, 2011

REPORTABLE/NON-REPORTABLE