

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

A. No. 139 of 2007 and IA Nos. 192 & 193 of 2007
and
A. No. 140 of 2007 and IA Nos. 190 & 191 of 2007

Dated : 20th May, 2009

Coram: Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTERS OF:

Appeal No. 139 of 2007:

M/s. Nalwa Steel and Power Ltd.

28, Najafgarh Road,
New Delhi – 110 015.

... Appellant

Versus

1. Chhattisgarh State Power Distribution Co. Ltd.

Vidyut Sewa Bhawan,
3rd Floor, Danganiya,
Raipur,
Chhattisgarh.
(Through its Managing Director)

2. Chhattisgarh State Electricity Regulatory Commission

Civil Lines,
G. E. Road,
Raipur – 492 001.
(Through its Secretary)

... Contesting Respondents

3. M/s. Jindal Steel & Power Ltd.

Jindal Centre
12, Bikaji Cama Place,
New Delhi – 110 056.
(Through Sr. Manager Legal)

... Proforma Respondent

Appeal No. 140 of 2007:

Jindal Steel & Power Ltd.

P. O. Box No. 16, Kharsia Road,
Raigarh (Chhattisgarh).

... Appellant

Versus

1. Chhattisgarh State Power Distribution Co. Ltd.

Vidyut Sewa Bhawan, 3rd Floor,
Danganiya,
Raipur, Chhattisgarh.
(Through its Managing Director)

2. Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G. E. Road,
Raipur – 492 001.
(Through its Secretary)

... Respondents

Counsel for A. Nos. 139 and 140 of 2007

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J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

These are two appeals which were heard simultaneously because they are based on common facts and raise similar issues. The appeals are directed against the order of Chhattisgarh State Electricity Regulatory Commission (CSERC for short) dated 20.04.07 in petition No. 22 of 2006 and also against the order dated 14.08.07 in petition No. 13 of 2007 and 14 of 2007 by the same Commission.

02) The appellant, Jindal Steel & Power Ltd. (JSPL), a transferee of the industries and transmission lines of Jindal Strips Ltd. (JSL) had constructed and was operating transmission lines from its captive generating plant at Raigarh to its coal washery at Tamnar and to M/s. Nalwa Steel & Power Ltd. (Nalwa for short) under a license. The transmission license was granted vide the order dated 02.02.2000 on the condition, inter alia, that the licensee shall provisionally pay Rs.1.50 Lacs within one month of the completion

of every year to the Madhya Pradesh Electricity Regulatory Commission (MPERC). The CSERC is the successor of the MPERC. CSERC asked the petitioner to pay the requisite fee. The appellant asked for renewal of the transmission license. This led to registration of the Case No. 22 of 2006 and Chhattisgarh State Electricity Board (CSEB), the State transmission utility, was made the respondent in the case. The Commission ruled that no license was required by JSL/JSPL for the dedicated transmission line carrying power from Raigarh to the coal washery in Tamnar as well for the tap off to the Jindal Industrial Park but that the lines for supply of power to Nalwa plant could not be treated as part of dedicated transmission line and therefore JSPL was required to cease the operation of the transmission line leading up to Nalwa. Nalwa which was not a party to the case, petition No. 22 of 2006 filed a petition for review being No. 14 of 2007. JSPL also filed a review petition which was 13 of 2007. Both the petitions were disposed of by the order dated 14.08.07. The Commission observed that there had been a failure of principle of natural justice, so far as Nalwa was concerned and ordered that the supply to Nalwa from the captive generating plant of JSPL would continue till the Board was in a position to supply power to Nalwa. The Commission simultaneously directed Nalwa to make an application for supply of power to the Board within a period of one month.

03) Originally, the transmission license was obtained by Jindal Steel Ltd. (JSL) and was passed on to the appellant, JSPL, after the industries of JSL located at Raigarh were passed on to JSPL. The transmission license was granted for transmission of power from the power plant intended to be set up at Tamnar to the steel plant at Punjipatra, Raigarh but eventually the transmission line was being used for transmission of electricity from the power plant set up at Punjipatra to the coal washery of Tamnar. The license was granted pursuant to a no objection from the Board. The license for point to point transmission was found to have been tapped at two points. The first tapping was for supply of power and the second was for supply to Jindal Industrial Park. For supplying to Jindal Industrial Park, JSPL had obtained permission for the transmission line and the Industrial Park was treated as a part of distribution network for supply of electricity to the Industrial Park. However, the Commission found the lines leading to Nalwa by tapping the dedicated transmission line from Raigarh to Tamnar not permissible under the Electricity Act, 2003, hereinafter referred to as the Act.

Facts in brief and the impugned orders:

04) Originally JSL obtained the transmission license from the Madhya Pradesh Electricity Regulatory Commission vide its order dated 02.02.00 in petition No. 6 of 1999 subject, inter alia, to the condition that the licensee shall provisionally pay Rs.1.50 Lac

within one month of the completion of every year. The license was for transmitting power generated by JSL's captive power plant at Village Tamnar to its steel plant at Raigarh by laying its own 220 KV transmission line subject to certain conditions. The one of the conditions was that the transmission line shall be on point to point basis from 110 MW generating plant at Tamnar to steel plant at Patrapali (Raigarh). Another condition was that the transmission of power should be exclusively for the licensee's use. However, before the date of issue of license Raigarh and Raipur Division of JSL was transferred to JSPL. The power plant was not set up at Village Tamnar but was set up in Raigarh and the transmission line laid between Raigarh and Tamnar came to be used for transmission of power from Raigarh to Tamnar coal washery. JSPL obtained permission from the State Government of Chhattisgarh for supply of 2 MW of power to M/s. Nalwa Sponge & Iron Pvt. Ltd. by laying 220 KV line tapping the transmission line set up in terms of the transmission license vide State Government Notification No. 2401/1FPO/AFO/2003 dated 06.06.03. This notification was issued following the permission granted by the Board vide its letter dated 09.08.02. The notification of the State Government dated 06.06.03 was issued under the provisions of Section 28(1) and 28(1A) of the Indian Electricity Act 1910. JSPL had set up Industrial Park in Village Punjipatra and Tumdih and had obtained no objection certificate from the State Government on 28.02.04 for supply of power from its captive power plant to industries being set

up in the Industrial Park. The transmission line was again tapped and a 6.4 km line laid for supply of power to the Industrial Park. JSPL pleaded before the Commission that for supply to Nalwa it had obtained permission from the State Government as well as from the Board and the line connecting the transmission line and the Industrial Park was being treated as distribution network for supply to the Industrial Park. The Commission noticed that the supply to Industrial Park was a part of distribution network which had been approved by the Commission by grant of a distribution license. However, so far as connection from the Raigarh – Tamnar transmission line to Nalwa is concerned, the Commission found it as a violation of the provisions of the transmission license for Raigarh – Tamnar line notwithstanding the permission granted by the Board on 09.08.02 and the State Government on 06.06.03. The Commission observed that the condition of the transmission license for Raigarh - Tamnar line was exclusively for the licensee's use and the condition was that power shall not be supplied or sold to anyone else, nor the line should be utilized for any other purpose. So far as the Government's permission dated 06.06.03 was concerned, the Commission observed that JSPL was required to seek permission of the State Electricity Regulatory Commission which the JSPL had failed to do although the Commission had become functional w.e.f. 01.07.04. JSPL applied for the permission only when the license fee was asked for.

05) The Commission raised a question as to whether the State Government's permission under Section 28(1) and 28(1A) of the Indian Electricity Act 1910 was saved under Section 185(2) of the Act. The Commission found that the permission of the State Government under Section 28(1) and 28(1A) were not saved by Section 185(2) of the Act. The Commission, however, also held that no license was required to maintain the dedicated transmission line under the Act. The tapping for Nalwa was treated to be a violation of the condition of the license for the Raigarh-Tamnar transmission line on account of which the Commission imposed a penalty of Rs.1.50 Lac. Nalwa was not a captive consumer. A generating plant under Section 10 of the Act, the Commission observed, could lay dedicated transmission line and supply electricity to any consumer subject to Regulations under sub-Section 2 of Section 42 of the Act, namely open access. The Commission observed that no one without license could transmit or distribute electricity as per provisions of Section 12 of the Act. The Commission observed that a dedicated transmission line of a generating station could not be used for supply of electricity. The permission granted by the State Government under Section 28(1) and 28(1A) were thus found to be inconsistent with the Act. The Commission accordingly directed that the line connecting Nalwa with the Raigarh-Tamnar line be ceased.

06) As mentioned earlier, two review petitions were filed by JSPL and Nalwa, registered as petition Nos. 13 & 14 of 2007. Both were dismissed by the second impugned order dated 14.08.07.

07) Supply and transmission are two related but distinct functions. Supply means sale of power. Transmission means carrying power from one point to other. In the case No.22 of 2006 the Commission raised a distinct issue relating to transmission and not of supply. The issue raised was whether the JSPL requires the transmission license and not whether JSPL requires a license to supply. Although the Commission was initially concerned with the change in the name of the license holder it accepted the claim of JSPL to the license initially issued to Jindal Strips Ltd. Commission, however, held that the conditions of the license to transmit power from Tamnar to Raigarh had been violated. The Commission noted that the point to point transmission line from Tamnar to Raigarh had been used for reverse flow. The Commission also noted the failure to pay the requisite fee. However, the main reason for directing stopping of the transmission line to Nalwa was that the connection to Nalwa itself constitutes a violation of the condition of Tamnar – Raigarh transmission license. The point to point transmission line had been tapped twice – once for the Industrial Park and second for supply to Nalwa. So far as tapping for Industrial Park was concerned, the same was excused as the Commission had granted distribution license for supply to

the Industrial Park. However, so far as Nalwa was concerned tapping was held to be impermissible under the license which required the line to be exclusively used for transmission of power for JSL's own use.

08) The Commission opined that the permission under Section 28 of the Indian Electricity Act 1910 was not saved by the saving provision of Section 185 of the Act since the Act does not envisage supply of electricity by a generator to a consumer except through open access or through a licensee.

09) Now the permission under Section 28 of Indian Electricity Act dated 06.06.03 is a permission to supply as well as to transmit electricity. Section 28 of the Indian Electricity Act allows State Government to sanction supply of energy. Section 30 of the same Act allows a person having sanction under Section 28 to carry out the function of transmission. The permission under Section 28 can now be extracted for perusal:

“By using the powers of Indian Electricity Act, 1910 (1910 No.9) Section 28 sub section (1) and (1-A) State Government hereby with the consultation of Board grants permissions to M/s. Jindal Steel and Power Limited for its Captive Power Project to supply 2 MW electricity through 220 KV capacity transmission line to its own sister

concern M/s Nalwa Sponge Iron Limited on following conditions:-

1. *For the purposes of supply of proposed supply through prescribed 220 KV line by the company all the various acts and rules and sub rules issued thereunder which are in force applicable in Electricity field shall be compulsorily complied with and all the general functions concerning to transmission line shall be done as per the rules.*
2. *This permission is granted with the condition that company should obtain the permission for the purposes of registration of the referred Electricity Transmission line from State Electricity Registration Commission Chattisgarh in future separately and in this regard if any orders were issued by the Chattisgarh State Electricity Regulatory Commission then such orders shall be treated in force automatically.*
3. *Applicant has to comply with the prescribed conditions mentioned in the Chattisgarh State*

Electricity Board Letter No. 1170 dated 9.8.2002 (copy enclosed) compulsorily.

4. *In case of breach of any of the above conditions the permission shall stand cancelled automatically.*

This notification shall be Effective immediately from the date of issuance.”

10) This clearly is a permission both to supply and to transmit. Is the permission set to naught because the Act has come into force? Section 185(1) of the Act repeals the Indian Electricity Act 1910. The saving clause is as under :

- “185(2) Notwithstanding such repeal,-*
(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in

so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

- (b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made thereunder shall have effect until the rules under sections 67 to 69 of this Act are made;*
- (c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.*
- (d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;*
- (e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.”*

11) The new Act envisages grant of transmission license. The new Act also envisages supply by the generating company and the captive generating company to a consumer. When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of, if no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term 'subject to' is interpreted to mean 'only under' it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on complying with the relevant rules and on payment of the required charges and not that even if

the existing lines are too far away, the generating company cannot directly supply to a consumer.

12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16) means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of load and not an individual industry/factory as consumer. According to Mr. Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr. Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed dedicated transmission line when we treat the point of consumption as a 'load centre'. In other words, a single consumer can be a load centre. A dedicated transmission line can go from the captive generating station to a

load centre and such load centre can also be a consumer. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a generating station under Section 10 of the Act. In this view one may say that a generating company may need license to supply to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it. JSPL is supplying from its captive generating plant to Nalwa for which it needs no license.

13) The Act, thus, does envisage transmission and supply of electricity from a captive generating plant to a consumer – although subject to the provisions of the Act and Rules and Regulations made thereunder. The Act also envisages grant of transmission license. The Act is not repugnant to the concept of a captive generating plant seeking transmission license. Hence, we do not see why the permission under Section 28 of the Indian Electricity Act is not saved under Section 185(2) of the Act.

14) We cannot lose sight of provision 6 of the General Clauses Act which also deals with repeal and saving. The same is as under:

“6. Effect of repeal. – Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or

hereafter to be made, then, unless a different intention appears, the repeal shall not –

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or*
- (b) affect the previous operation of any enactment so repealed or any thing duly done or suffered thereunder; or*
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;*

and any such investigation, legal proceeding or remedy may be instituted continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

15) A repeal, as per the above provision, shall not affect any right or privilege acquired under the repealed enactment unless a

different intention appears from the repealing Act. In other words, it will mean that unless the repealing Act specifically takes away the right acquired under the previous Act the right will continue to be in force. The Supreme Court in the case of *State of Punjab Vs Mohar Singh Pratap Singh (AIR 1955 SC 84: (1955) 1 SCR 893)* gave us the following clue:

“the line of enquiry would be not whether the new act expressly keeps alive the old rights and liabilities but whether it manifests an intention to destroy them”.

16) The Supreme Court also said in that case that Section 6 would be applicable in cases of repeal followed by the new legislation unless new legislation manifests an intention incompatible with or contrary to provisions of Section 6. In the present case, there is nothing to say that Section 185 is incompatible with the provisions of Section 6. This view of the Supreme Court has been repeatedly reiterated in its subsequent judgments. Namely, *Jayantilal Amrathlal Vs Union of India (1972) 4 SCC 174, India Tobacco Co. Ltd. Vs CTO (1975) 3 SCC 512, T. S. Baliah Vs ITO AIR 1969 SC 701, Gajraj Singh Vs. STAT (1997) 1 SCC 650* as well as the recent judgment in the case of *Southern Petrochemical Industries Co. Ltd.. Vs. Electricity Inspector and ETIO & Ors. (2007) 5 SCC 447.*

17) There is nothing in the new Act which specifically destroys all sanctions already granted under Section 28 of the Electricity Act 1910. Therefore, by virtue of the provision of Section 6 of the General Clauses Act the sanction under Section 28 granted to JSL/JSPL has to be held to be surviving.

18) In view of the above, we are unable to agree with the impugned order of the Commission dated 20.04.07. The JSPL, therefore, should be deemed to have been duly permitted to lay transmission line up to Nalwa as well as to supply 2 MW power to Nalwa through such transmission line and those sanctions should be deemed to have survived despite repeal of the Indian Electricity Act 1910.

19) Case No. 22 of 2006, in which the impugned order dated 20.04.07 was passed, was registered when the Commission issued a notice for license fee and JSPL asked for a revival or regularization of the transmission license issued vide order dated 02.02.00. The Commission directed JSPL to cease the operation of the line connecting Nalwa with the Raigarh – Tamnar line. At the same time it held that for the Raigarh – Tamnar line no license was required as it was a dedicated transmission line. The Commission will have to reconsider the petition for grant of license in the light of our observation that the sanction under Section 28 of the Indian Electricity Act 1910 survives despite the repeal of the Indian Electricity Act 1910. The Commission will have to take into

account the existence of two tap offs including that of Nalwa and will have to reconsider if Raigarh-Nalwa-Tamnara line needs a license. The Commission will have the liberty to call for a revised application and the JSPL will have the right to submit more details in respect of the lines including those leading up to Nalwa in order to facilitate the consideration of the JSPL's requirement of and entitlement to a license.

20) Accordingly, we allow the two appeals and remand case No. 22 of 2006 for a fresh direction in the light of the direction in the previous paragraphs and observations made in the judgment.

21) The IAs stand disposed of.

22) Pronounced in open court on this **20th day of May, 2009**.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member