

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

**IA No.285 & 286 of 2010 in**  
**DFR No.816 & 817 OF 2010**

**Dated : 20<sup>th</sup> Sept, 2011**

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

**In the matter of:**

**UP Power Corporation Limited & Anr**

**.....Petitioner( s)**

**Versus**

**Jagannath Steel Pvt Ltd & Anr**

**.....Respondent(s)**

Counsel for Appellant (s) : Mr.Pradeep Misra,  
Mr. Manoj Kumar Sharma,  
Mr. Daleep Dhayani,  
Mr. Suraj Singh,

Counsel for Respondent(s):Mr. Vishal Dixit for R-1,  
Mr. Kunal Verma for R-2,  
Mr. Ashok Kumar Singh for R-2,  
Mr. Ravindra K. Singh,  
Mr. Sanjay Singh,

**ORDER**

UP Power Corporation Limited has filed two Appeals as against the orders dated 3.9.2004 and 12.1.2005 passed by the UP State Commission.

2. M/s. Jagannath Steel Private Limited, the consumer of the Appellant who is the contesting Respondent in these proceedings has raised the preliminary objection regarding the maintainability of these unnumbered Appeals.

3. We deem it fit to hear the Learned Counsel for the parties on this issue before entertaining these Appeals. Accordingly, we allowed both the Learned Counsel for the parties to argue on this point.

4. We have heard both of them who argued at length on this preliminary objection.

5. Raising the question of maintainability of these Appeals, the Learned Counsel for M/S. Jagannath Steel Private Limited, the Respondent has made the following submissions:

(a) The impugned orders dated 3.9.2004 and 12.1.2005 had been passed by the UP State Commission under UP Electricity Regulatory Commission Act, 1999. Therefore, these orders could be challenged through Appeals u/s 36 of the UP Electricity Reforms Act, 1999 only before the High Court. As such, these Appeals u/s 111 of 2003 Act cannot be entertained by this Tribunal.

(b) In the present case, the impugned orders were passed in the Petition filed by the Respondent in

Petition No.151 of 2003 under clause 7.27 and 7.29 of Supply Code 2002. The dispute in question has been decided by the State Commission through the tariff order in respect of the year 2002-03 under Reforms Act, 1999 which was applicable from 22.10.2002. Therefore, as against these orders, the Appeals will lie only before the High Court u/s 36 of the Reforms Act, 1999.

(c) This Tribunal was constituted u/s 110 of the Electricity Act, 2003 w.e.f 7.4.2005 for adjudicating the disputes under Electricity Act, 2003. As per the 2003 Act, the Tribunal can entertain only the Appeals by any person aggrieved by an order passed under this Act, i.e. 2003 Act. Admittedly, these impugned orders had not been passed under 2003 Act. Since impugned orders had been passed under

Reforms Act, 1999, these Appeals under Electricity Act, 2003 before this Tribunal are not maintainable.

6. The Learned Counsel for the Appellant on the contrary refuted the contention of the Learned Counsel for the Respondent and argued that these Appeals are maintainable by virtue of Section 82 (1) and 185 (3) of the Electricity Act, 2003. According to him even though these orders were passed under old Act, the Appeals were maintainable only before this Tribunal as provided u/s 185 (3) of the Electricity Act, 2003 and accordingly, the Appeals earlier filed before the High Court u/s 36 of Reforms Act, 1999, were withdrawn with a liberty to approach this Tribunal to file these Appeals and as such they are maintainable.

7. Before dealing with the question of maintainability of these Appeals, it would be worthwhile to refer to the background of the case which resulted in filing of these Appeals to understand the issue in the proper prospective. Those relevant facts are as follows:

(a) UP State Commission passed the tariff order of the Appellant Corporation for the year 2002-03 which came into force w.e.f. 9.11.2002.

(b) On 3.11.2002, the Executive Engineer of the Appellant issued a Memorandum on the basis of the representation filed by the Respondent stating that the Respondent is entitled for the rural rebate. However, on 22.10.2003, the above Memorandum was cancelled by the Deputy General Manager of the Corporation and issued the fresh bills.

(c) Aggrieved by this order dated 3.11.2002, the Respondent on 12.12.2003, filed a Petition before the State Commission in Petition No.151 of 2003 praying for setting aside the said order.

(d) After hearing the parties, the State Commission by the order dated 3.9.2004, directed the Appellant to charge the consumer as per the rates applicable to rural schedule as referred to in the memorandum dated 3.11.2002 issued by the Executive Engineer of the Appellant.

(e) As against this order of the State Commission dated 3.9.2004, the Appellant filed an Appeal in High Court u/s 36 of the UP Electricity Reforms Act, 1999 in Appeal No.62 of 2004. The same was admitted by the High Court.

(f) During the pendency of the said Appeal before High Court, the Respondent moved a Review Application on 11.10.2004 before the State Commission for modification of the order dated 3.9.2004. The State Commission by another impugned order dated 12.1.2005 though dismissed the Review Petition, had quashed the portion of the order namely penalty for the use of electricity during peak hours.

(g) Aggrieved by this modification in the Review Petition, the Appellant filed another Appeal on 18.3.2005 in Appeal No.39 of 2005 before the High Court u/s 36 of the UP Reforms Act, 1999. Both the Appeals were pending before the High Court. When the matter came up for final disposal, the Appellant thought it fit to withdraw the Appeals in May, 2009

with a liberty to approach this Tribunal to file the Appeals in this Tribunal.

(h) It was contended by the Appellant before the High Court that since the Tribunal became functional after filing of earlier Appeal in 62/2004 on 29.9.2004 and the other Appeal in Appeal 39/2005 on 18.3.2005, the Appeals are maintainable only before this Tribunal and on that ground, the Appellant sought for withdrawal of the Appeals to enable it to approach Tribunal.

(i) Accordingly, the High Court permitted the Appellant to withdraw these Appeals and gave the liberty to approach this Tribunal for filing these Appeals. However, since the Respondent objected to the maintainability of the Appeals before this Tribunal, the High Court passed the order giving

liberty to the Respondent also to raise the question of maintainability before this Tribunal for considering the said question.

8. Thereupon, these Appeals have been filed before this Tribunal along with their application to condone the delay. Even before these Appeals are numbered, the Respondent who appeared before this Tribunal raised the preliminary objection contending that these Appeals cannot be entertained for the grounds referred to above. That is how we have now been called upon at to decide about the maintainability of these Appeals even at the threshold.

9. According to the Respondent, these Appeals are not maintainable u/s 111 of 2003 Act before this Tribunal as the impugned orders were passed under Reforms Act, 1999 and not under Act, 2003.

10. On the other hand, the Learned Counsel for the Appellant argued that these Appeals are maintainable.

11. We have heard the Learned Counsel for both the parties. As mentioned above, the limited question which arise before us at this stage is whether these Appeals are maintainable or not?

12. In order to deal with this question, it would be proper to quote the relevant portion of 2003 Act. Section 111 of the 2003 Act reads as under:

***“111. Appeal to Appellate Tribunal***

*(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.*

*Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the Appeal, deposit the amount of such penalty;*

*Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realization of penalty”.*

13. This provision makes it clear, as pointed out by the Learned Counsel for the Respondent, that Appellate Tribunal can entertain the Appeal only as against the order passed by the Commission under this Act filed by any person aggrieved by such order.

14. Let us now quote relevant portion of Section 82 (1) of 2003 Act which reads as under:

**“82. Constitution of State Commission – (1)**  
*Every State Government shall, within six months from*

*the appointed date, by notification, **constitute for the purposes of this Act, a Commission** for the State to be known as the (name of the State) Electricity Regulatory Commission:*

*Provided that the State Electricity Regulatory Commission, established by a State Government under Section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date **shall be the State Commission for the purposes of this Act** and the Chairperson, Members, Secretary, and Officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts”.*

15. This Section would provide that the State Commissions established u/s 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, shall be construed to be the State Commissions for the **purpose of this Act i.e.2003 Act.**

16. Now let us see Section 185 (1) and (3) of the 2003 Act which reads as under:

***“ 185 Repeal and Saving:***

*(1) Same as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions act, 1998 (14 of 1998) are hereby repealed.*

*(2).....*

*(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable”.*

17. This Section 185 (3) provides that the provisions of the enactments specified in the Schedule not inconsistent with the provisions of 2003 Act, would apply to the States in which such enactments are applicable. This means that if there is inconsistency, between these enactments, the enactment in the Schedule would not be applicable and provisions of 2003 Act would prevail.

18. The Respondent's main contention is that the wordings contained in the 2003 Act that **“an order made by the Commission under this Act”** would specifically indicate that the Appeal could be entertained only against the orders under that Act and in the present case, the impugned orders of the Commission were made under Reforms Act, 1999 and not under 2003 Act and therefore the Appeals under 2003 Act are not maintainable. We are unable to accept this objection on the following reasons:

(a) 2003 Act came into force on 10.6.2003. The Appellant disallowed the rural tariff w.e.f Nov. 2003 i.e. after enactment of 2003 Act. The Petition was filed by the Respondent on 12.12.2003 in Petition No.151 of 2003. The State Commission passed the

impugned orders on 3.9.2004 and 12.1.2005. All the events referred to above happened only after 10.6.2003, i.e. the date of the enactment of the 2003 Act. The only event occurred prior to 10.6.2003 was the issuance of the Supply Code,2002 which was framed during the year 2002.

(b) It is true that Commission was established under ERC Act, 1998 and became Commission under Reform Act 1999 by virtue of Section 3 of Reform Act,1999. But the reading of Section 82 under Section 2003 Act would clearly indicate that the State Commissions established under the Reforms Act prior to 10.6.2003 functioning on the date of enactment of 2003 Act becomes the State Commission for the purpose of the 2003 Act. It is clearly provided in the said section that the State Commission established by the State Government u/s 17 of the Regulatory Commission Act, 1998 shall be the State Commission for the purpose of this Act.

(c) In other words, the Commissions constituted under the Reforms Act and ERC Act,1998 shall become the Commission for the purpose of Act, 2003; and all its actions would be construed to be governed by the 2003 Act only. Hence, it can not be contended that the State Commission would perform certain functions under the Reforms Act and certain other functions under 2003 Act.

(d) As indicated above, the first proviso of Section 82 (1) of the Act clearly provided that the Commissions established under Reform Act, 1999 or ERC Act,1998, shall be construed to be State Commission for the purpose of 2003 Act.

(e) In terms of Section 185 (3) of the Act, 2003, if the provisions of the enactment specified in the schedule is consistent with the provisions of the 2003 Act, it would be applicable to such States. UP

Reform Act 1999 is included in Schedule to Electricity Act 2003. In other words, if the provisions of the Reforms Act are not consistent with the provisions of the 2003 Act, then the Reforms Act will have no application and provisions of 2003 Act alone would be applicable in such cases.

(f) Bearing this in our mind, if we look at both these enactment namely Reforms Act and 2003 Act, we find that there is inconsistency between these two Acts. Section 36 of the Reforms Act provides for Appeal as against the orders of the State Commission before the High Court. Whereas Section 111 of 2003 Act provides that the Appeal against the State Commission's orders would lie only before this Tribunal. Thus, undoubtedly, there is an inconsistency in both the Acts.

22. In view of the inconsistency in both the Acts and by virtue of the Section 185 (3) of the 2003 Act, Section 36 of the Reforms Act would have no application and the Appeal would only lie before this Tribunal u/s 111 of the Act, 2003 as provided u/s 185 (3) of Act, 2003. We hold accordingly.

23. In view of the discussions made above, we conclude that these Appeals are maintainable.

**( V.J Talwar )**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 20<sup>th</sup> Sept, 2011  
REPORTABLE/NON-REPORTABLE