

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NOS. 291 & 292 OF 2015

Dated: 25th April, 2016.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**POWER GRID CORPORATION OF)
INDIA LTD.)
A Government of India Undertaking,)
Registered office at B-9, Qutab)
Institutional Area, Katwaria Sarai,)
New Delhi through Chief Manager)
(Commercial).) ... **Appellant****

AND

1. **KARNATAKA POWER)
TRANSMISSION CORPN. LTD.)
Cauvery Bhawan, Bangalore,)
Karnataka, through its)
Chairman.)**
2. **TRANSMISSION CORPN. OF)
ANDHRA PRADESH)
Vidyut Soudha, Hyderabad,)
Andhra Pradesh, through its)
Chairman.)**
3. **KERALA STATE ELECTRICITY)
BOARD,)
Vaiduthi Bhawanam, Pattom,)
Thiruvananthapuram, Kerala,)
through its Chairman)**

4. **TAMIL NADU ELECTRICITY BOARD,**)
800, Anna Salai, Chennai, Tamil Nadu, through its Chairman.)
5. **ELECTRICITY DEPARTMENT, GOVERNMENT OF PONDICHERRY,**)
Pondicherry,)
Through its Chief Secretary.)
6. **BIHAR STATE ELECTRICITY BOARD,**)
Vidyut Bhawan, Bailey Road, Patna, Bihar, through its Chairman.)
7. **WEST BENGAL STATE ELECTRICITY BOARD,**)
Bidyut Bhawan, Bidhan Nagar, Block 'DJ', Sector – 2, Salt Lake City, Kolkata, W.B., through its Chairman.)
8. **GRID CORPORATION OF ORISSA LTD.**)
Shahid Nagar, Bhubaneswar, Orissa through its Chairman)
9. **DAMODAR VALLEY CORPN.,**)
DVC Tower, Maniktala, Civic Tower, VIP Road, Calcutta, W.B. through its Chairman)
- 10 **POWER DEPARTMENT,**)
Govt. of Sikkim, Gangtok, Sikkim, through its Commissioner & Secretary (Power))

11 **JHARKHAND STATE)**
ELECTRICITY BOARD,)
 In front of main Secretariat,)
 Doranda, Ranchi, Jharkhand,)
 through its Chairman.) **Respondents**

Counsel for the Appellant(s) Mr. S.B. Upadhyay, Sr. Adv.
 Mr. Pawan Upadhyay
 Mr. Param Kumar
 Ms. Anisha Upadhyay
 Mr. Kaustuv P. Pathak

Counsel for Respondent(s) Mr. Anand K. Ganesan
 Mr. Sandeep Rajpurohit
 Ms. Neha Garg for R-1.

Mr. R.K. Mehta
 Mr. Abhishek Upadhyay
 Ms. Himanshi Andley for R-8

Mr. M.T. George for KSEB.

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. The Appellant filed Petition No.9 of 1999 in the Central Electricity Regulatory Commission (“**CERC**”) for approval of transmission tariff for Jeypore-Gazuwaka HVDC Back to Back Transmission Project on the basis of the norms and

parameters notified by Ministry of Power on 16/12/1997. The CERC disposed of the petition by order dated 3/6/2002. While fixing the tariff the CERC observed that the Appellant had not been able to explain the delay of five months i.e. upto 01/8/1999 and accordingly directed that pro-rata reduction in interest during the construction (IDC) from the expenditure incurred upto 31/3/2001 shall be made which works out to Rs.11.95 crores.

2. The Appellant then filed Review Petition No.97 of 2002 for review of order dated 3/6/2002 passed in Petition No.9 of 1999 with a further prayer to revise tariff of 400 KV Jeypore-Gazuwaka line and 500 MW HVDC Back-to Back station at Gazuwaka between Southern and Eastern Region based on a computation cost of Rs.642.66 crores including IDC of Rs.129.14 crores without making any reduction in the IDC. By order dated 6/2/2003 the CERC dismissed the review petition.

3. Being aggrieved by order dated 3/6/2002 passed in Petition No.9 of 1999 the Appellant filed FAO No.301 of 2003 in the Delhi High Court under Section 16 of the Electricity Regulatory Commissions Act 1998 (**“Regulatory Commissions Act”**). Being aggrieved by order dated 6/2/2003 passed in Review Petition No.97 of 2002 the Appellant filed FAO No.303 of 2003 in the Delhi High Court under Section 16 of the Regulatory Commissions Act.

4. On 10/6/2003 the Electricity Act 2003 (**“the said Act”**) came into force. In view of this development, on 6/12/2005 the Appellant withdrew both the appeals. The order of the Delhi High Court dated 6/12/2005 reads as follows:-

FAO Nos.301/2003 & 303/2003.

“Learned Counsel for the Appellant seeks permission to withdraw the present Appeal with liberty to approach and initiate proceedings before appropriate forum. Appeal is dismissed as withdrawn with liberty as prayed for.”

5. The Appellant then filed appeals in this Tribunal. This Tribunal by order dated 28/7/2006 dismissed the said appeals as not maintainable. This Tribunal *inter alia* held that the Appellant had initiated proceedings under Regulatory Commissions Act and had rightly filed two appeals under Section 16 of the Regulatory Commissions Act in the High Court. This Tribunal further held that under Section 111 of the said Act any person aggrieved by an order made by an adjudicating officer under the said Act or an order made by Appropriate Commission under the said Act may prefer an appeal to the Appellate Tribunal for Electricity i.e. this Tribunal. Since the impugned orders were not passed under the said Act no appeal could be entertained by this Tribunal. This Tribunal further observed that the appeals pending before the High Court could not have been transferred to this Tribunal as Section 185 of the said Act which relates to “Repeal and Saving” does not provide for such a transfer. This Tribunal directed the Registry to return the papers to the Appellant’s counsel. This Tribunal left it open to the Appellant to work out its remedies. In view of this order the Appellant

moved applications before the Delhi High Court for revival of its appeals. On 24/01/2011 the Delhi High Court allowed the said applications and revived the appeals.

6. On 10/7/2014 the Delhi High Court transferred the appeals to this Tribunal. The order dated 10/7/2014 of the Delhi High Court indicates that the learned counsel for the parties pointed out that under the Regulatory Commissions Act appeals preferred against the orders of the CERC used to be filed in the High Court. However, under the said Act such appeals are to be filed before this Tribunal. The High Court placed reliance on certain orders passed by it transferring such appeals to this Tribunal and transferred the said appeals to this Tribunal. It appears from this order that the appeals were transferred to this Tribunal by consent of the parties. Unfortunately, the attention of the High Court was not drawn to the judgment of the Supreme Court in **Himachal Pradesh State Electricity Regulatory Commission & Anr. Vs.**

Himachal Pradesh State Electricity Board¹ which is very crucial to the preliminary issue involved in this case, as we shall soon see.

7. On 31/7/2014 the counsel for the Appellant drew attention of this Tribunal to the judgment of the Supreme Court in **Himachal Pradesh State Electricity Regulatory Commission** and submitted that the Supreme Court has held therein that such appeals would lie only in the High Court. In view of this by its order of the same date, this Tribunal directed the parties to get clarification from the Delhi High Court as to whether in view of the abovementioned judgment of the Supreme Court appeals would lie to the High Court or to this Tribunal.

8. While the appellant's application for clarification was pending in the Delhi High Court on 15/9/2015 this Tribunal after referring to the Supreme Court's above mentioned judgment held that since the Delhi High Court has transferred

¹ (2014) 5 SCC 219

these appeals to this Tribunal in accordance with law there remains no confusion requiring any kind of clarification. This Tribunal directed that since the appeals required expeditious disposal without further delay the appeals be kept for hearing on 17/11/2015.

9. In the meantime the appellant's application for clarification was heard by the Delhi High Court. The Delhi High Court in its Order dated 4/11/2015 observed that in view of the judgment of the Supreme Court in **Himachal Pradesh State Electricity Regulatory Commission**, no clarification is required. The Delhi High Court disposed of the said application with liberty to approach this Tribunal to obtain appropriate directions as to whether this Tribunal has jurisdiction to proceed with the matters. Relevant portion of the Delhi High Court's order reads thus:

“4. In these applications, the relief sought is that, appropriate directions and/or necessary clarification with regard to the maintainability of the appeals be

issued. In view of the judgment of the Supreme Court, no clarification is required. However, since, the Tribunal, has issued a subsequent order, which, as indicated above, is dated 15.09.2015, the appellant would have to approach the Tribunal with regard to the captioned appeals which are, at the moment, pending before it.

5. The applications are disposed of with liberty to approach the Tribunal in that behalf and obtain appropriate directions as to whether they would have the jurisdiction to proceed with the pending appeals.”

10. Thereafter, as directed by this Tribunal the appeals were listed before this Tribunal on 17/11/2015. The order of the Delhi High Court dated 04/11/2015 was shown to this Tribunal. This Tribunal took note of the Delhi High Court's observations. However, it observed that in a similar situation, appeals being Appeal Nos.86, 87, 227 of 2006 and Appeal No.14 of 2009 were decided by this Tribunal. This Tribunal further observed that it was a practice to hear, admit and decide such appeals which were filed under old dispensation were transferred to this Tribunal. So observing this Tribunal admitted the said appeals, issued notice to the Respondents,

made notice returnable within two weeks and posted the said appeals for hearing on 07/01/2016. Pursuant to this order the appeals have been placed before us for final hearing.

11. When we began hearing the instant appeals, counsel for the appellant contended that the issue as to whether this Tribunal could hear these appeals or whether they should be heard by the Delhi High Court must be decided as a preliminary issue. The request appeared to us to be genuine because Order dated 17/11/2015 did not decide this issue finally. It is an order admitting the appeals and fixing date of hearing . As already noted, this Tribunal expressed that the appeals could be heard by it because as a matter of practice, this Tribunal has been deciding such appeals. The issue of jurisdiction was, therefore, not decided and needs to be decided. Counsel for the Appellant placed heavy reliance on the Supreme Court's judgment in **Himachal Pradesh State Electricity Regulatory Commission** and contended that the appeals must be sent back to the Delhi High Court whereas Mr. Mehta, counsel for Respondent No.8 submitted that the

Appellant had on its own withdrawn the said appeals from the Delhi High Court and therefore the Appellant could not be now permitted to take a stand that the appeals can only be entertained and decided by the Delhi High Court.

12. We are concerned here with the question of jurisdiction of the forum to hear and dispose of the appeals. It is well settled that the parties cannot confer jurisdiction on any forum by consent. The issue of jurisdiction will have to be decided having regard to the relevant legal provisions and relevant judgments. Since reliance is placed on the judgement of the Supreme Court in **Himachal Pradesh State Electricity Regulatory Commission**, it is necessary for us to have a look at that judgment. In that case the Supreme Court was considering the provisions of the Regulatory Commissions Act. The Himachal Pradesh State Electricity Regulatory Commission ("**the State Commission**") constituted under Regulatory Commissions Act passed order dated 29/10/2001 under Sections 22 and 29 of the Regulatory Commissions Act determining tariff. While determining the tariff, the State

Commission issued certain directions. The State Commission while discharging its regulatory functions proceeded to review the directions issued by it. It was noticed by the State Commission that part of its order was not complied with. Hence, it issued notice under Section 45 of the Regulatory Commissions Act to the Himachal Pradesh State Electricity Board ("**the Board**"). The Board filed reply raising objection to the jurisdiction of the State Commission. The State Commission passed an order holding that the Board had not complied with the directions and imposed a penalty of Rs.5,000/- on the Board. The Board preferred an appeal under Section 27 of the Regulatory Commissions Act in the High Court. During the pendency of the appeal the Regulatory Commissions Act was repealed and the said Act came into force. Therefore, it was contended that the appeal would lie to this Tribunal under Section 111 of the said Act and that the High Court had lost its jurisdiction to hear the appeals in view of the coming into force of the said Act. The High Court rejected the preliminary objection and held that the appeal could be heard by it despite repeal of the Regulatory

Commissions Act and coming into force of the said Act. The appeal was disposed of on merits. The said judgment was challenged in the Supreme Court. The Supreme Court upheld the High Court's view. It is necessary to summarise the reasoning of the Supreme Court.

13. Before the Supreme Court, it was argued that the High Court erred in holding that despite the repeal of the Regulatory Commissions Act and coming into force of the said Act, the right to prefer an appeal under the Regulatory Commissions Act would still survive. The Supreme Court considered Section 27 of the Regulatory Commissions Act and Sections 110, 111 and 185 of the said Act and Section 6 of the General Clauses Act. We may reproduce Section 185 of the said Act and Section 6 of the General Clauses Act for convenience.

Section 185 of the said Act.

“185. Repeal and saving.- (1) Save 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) 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, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, insofar 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.*
- (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.*
- (4) *The Central Government may, as and when considered necessary, by notification, amend the Schedule.*
- (5) *Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.”*

Section 6 of The General Clauses Act, 1897

“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 anything 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”.

14. Section 6 of the General Clauses Act states the effect of repeal. It *inter alia* states that repeal of an enactment shall not affect any right, privilege, obligation or liability acquired or incurred under any enactment so repealed unless a different intention appears and any such legal proceeding or remedy be instituted, continued or enforced as if the repealing Act or Regulation had not been passed. The Supreme Court

considered its judgment in State of **Punjab v. Mohar Singh**² where it has observed that when the repeal is followed by fresh legislation on the same subject then the provisions of the new legislation have to be seen to ascertain whether they indicate a different intention, that is, the intention to destroy the old rights and liabilities accrued in the repealed Act. In this connection, the Supreme Court referred to the Constitution Bench judgment in **Garikapati Veeraya v. N. Subbiah Choudhry**³ where the following principles were culled out.

“23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

² AIR 1955 SC 84

³ AIR 1957 SC 540

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. (emphasis supplied.)”

15. The Supreme Court then observed that a right of appeal as well as right of forum is a vested right unless it is taken away by the legislature by an express provision in the statute by necessary intention. Having examined the legal position and more particularly Section 185 of the said Act and Section 6 of the General Clauses Act, the Supreme Court held that it was difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, the same does not save the forum of appeal. The Supreme Court made it clear that no contrary intention was seen to hold that Section 6 of the General Clauses Act, which *inter alia* states that repeal of an

Act shall not affect any right, privilege, obligation or liability acquired or incurred under any enactment so repealed, would not be applicable. The Supreme Court concluded that the legislature never intended to take away vested right of appeal in the forum under the Regulatory Commissions Act.

16. The law has been so clearly stated by the Supreme Court that we need not add anything. Appeals filed under the Regulatory Commissions Act in the High Court prior to the coming into effect of the said Act will have to be dealt with by the High Court. Repeal of the Regulatory Commissions Act does not take away the vested right of appeal in the forum under the Regulatory Commissions Act i.e. the High Court. In fact, the Delhi High Court in its Order dated 4/11/2015 which we have quoted above accepted this legal position after noticing **Himachal Pradesh State Electricity Regulatory Commission** but directed the parties to approach this Tribunal in view of this Tribunal's Order dated 15/9/2015.

17. In view of the law laid down by the Supreme Court it is not possible for us to deal with these appeals on the ground that as per the practice followed by this Tribunal, such appeals are entertained and dealt with by this Tribunal. If such a practice is being followed, it must be discontinued as it is in teeth of the Supreme Court's judgment in **Himachal Pradesh State Electricity Regulatory Commission**. We find no substance in the submission of Mr. Mehta that the Appellant had withdrawn appeals from the Delhi High Court and, therefore, it must not be allowed to urge that the appeals would lie only in the Delhi High Court. As earlier stated by us, parties cannot confer jurisdiction on a court by consent or take away its jurisdiction by consent. The Appellant might have withdrawn the appeals under some misconception. We have to examine the legal position and decide which forum should decide these appeals. We have done the said exercise. In the circumstances, we hold that the instant appeals cannot lie in this Tribunal. They will have to be filed in the Delhi High Court. We are informed that the record of the appeals is still in the Delhi High Court. We, therefore, direct the Registry to

return the appeals to the Appellant's counsel so that he can file them in the Delhi High Court, if so advised. We clarify that we have not expressed any opinion on the merits of the case.

18. Pronounced in the Open Court on this **25th day of April, 2016.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE / ~~NON-REPORTABLE~~**