

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

APPEAL NO. 296 OF 2016

AND

I.A. NO.606 OF 2016

Dated: 23rd December, 2016.

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

In the matter of:-

1. **JHARKHAND URJA VIKAS)
NIGAM LIMITED)
(in short "JUVNL"), through its)
Chairman-cum-Managing)
Director, having its office at)
Engineers Bhawan, HEC,)
Dhurwa, Ranchi- 834004)**

2. **THE CHIEF ENGINEER)
(COMMERCIAL & REVENUE))
Jharkhand Urja Vikas Nigam)
Limited,)
Having its office at Engineers)
Bhawan,)
HERC, Dhurwa,)
Ranchi - 834004)** **)... Appellants**

AND

1. **M/s INLAND POWER LIMITED,)
having its Registered Office at P-)
221/2, Strand Bank Road,)
Kolkata - 700001, through its)
Authorised Signatory Sri M.L.)
Khetan, S/o C.P. Khetan,)**

Resident of Shree Apartment, 121)
 B/2 Moti Lal Nehru Road, P.O. &)
 P.S. – Lake Town, Town &)
 District – Kolkata (West Bengal))

2. **JHARKHAND STATE)**
ELECTRICITY REGULAOTRY)
COMMISSION)
 2nd Floor, Rajendra Jawan)
 Bhawan-cum-Sainik Bazar,)
 Mahatma Gandhi Marg (Main)
 Road), Ranchi - 834001) ... **Respondents**

Counsel for the Appellant(s) : Mr. Ramesh P. Bhatt, Sr. Adv.
 Mr. Ajit Kumar
 Mr. Himanshu Shekhar
 Mr. Mohit Kr. Shah
 Mr. Navin Kumar
 Mr. Aabhas Parimal
 Ms. Aparajita Bhardwaj

Counsel for the Respondent(s) : Mr.Anand K. Ganesan for **R.1**
 Mr. Farrukh Rasheed for **R.2**

ORDER

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

1. In this appeal the Appellants have challenged order dated 29/07/2015 passed by the Jharkhand Electricity Regulatory Commission (“**the State Commission**”). Mr. Ganesan, learned counsel appearing for Respondent No.1- M/s Inland Power Limited

has raised objection to the maintainability of this appeal. Counsel submitted that even otherwise there is no merit in the appeal and hence it deserves to be summarily rejected though it is a statutory appeal.

2. On the question of maintainability of the appeal and also on the merits of the appeal we have heard Mr. Bhatt, learned senior counsel appearing for the Appellants and Mr. Ganesan, learned counsel for Respondent No.1. We have carefully perused the written submissions/reply filed by the counsel. It is necessary to give the gist of the submissions.

3. Mr. Ganesan submitted that the order of the State Commission dated 27/05/2014 determining tariff has attained finality. It is only after Respondent No.1 moved the State Commission *inter alia* for a direction to the Appellants to make payment towards energy supplied by Respondent No.1 as per the tariff rate notified by the State Commission that belatedly in August, 2015 the Appellants have filed an appeal challenging the

State Commission's order dated 27/05/2014 determining tariff. Tariff determined by the State Commission is binding on the Appellants. By the impugned order the State Commission has only directed the Appellants to comply with the tariff order dated 27/05/2014. The Appellants want to deviate from the determined tariff and pay at a lesser rate which is not permissible. In this connection counsel relied on the Supreme Court's judgment in **Shree Sidhali Steels Limited v. State Uttar Pradesh**¹. Counsel submitted that in the circumstances the appeal is not maintainable. It deserves to be dismissed. Counsel submitted that even otherwise there is no merit in the appeal and hence it deserves to be dismissed summarily even though it is a statutory appeal. In this connection counsel relied on **Bolin Chetia v. Jogadish Blyan & Ors**².

4. On the other hand Mr. Bhatt, learned senior counsel appearing for the Appellants pointed out various reasons for which in his opinion the tariff order dated 27/05/2014 is unsustainable

¹ (2011) 3 SCC 193

² (2005) 6 SCC 81

in law. Counsel submitted that due to the erroneous tariff order the Appellants have, in fact, to pay more than what they are required to pay. Counsel submitted that the State Commission therefore erred in issuing a direction to the Appellants by the impugned order to make payment to Respondent No.1 as per the said tariff order. Counsel submitted that the impugned order which is passed under Section 142 of the Electricity Act, 2003 (**“the said Act”**) travels beyond the scope of Section 142. Counsel further submitted that even if it is treated as an order under Section 86(1)(f) of the said Act, the State Commission should have referred the matter for arbitration. It should not have given such wide directions to the Appellants. Counsel submitted that the impugned order is passed ignoring Clause 8.6 of the PPA which contains inbuilt mechanism for deciding the disputes between the parties. However, Respondent No.1 did not participate in any conciliatory meetings. Counsel submitted that the State Commission has also imposed costs of Rs.50,000/- on the Appellants without issuing any show cause notice. Counsel submitted that the tariff order dated 27/5/2014 has not assumed finality as the Appellants have challenged the said order in this

Tribunal. Counsel submitted that the instant appeal is a statutory appeal and hence deserves a different treatment. Counsel submitted that the objection to the maintainability of this appeal is without merit and hence may be rejected.

5. At the outset we need to deal with the submission that the instant appeal being a statutory appeal deserves a different treatment and will have to be finally heard and disposed of. We are unable to accept this submission. The Supreme Court has in a number of judgments held that even a statutory appeal can be summarily dismissed if the court finds that there are no arguable questions of facts and law involved therein. This discretion has to be however exercised sparingly and in exceptional cases. The first appellate court exercising this discretion must record reasons for the summary dismissal. In **Bolin Chetia** the Supreme Court considered whether a statutory appeal provided under Section 116-A of the Representation of People Act 1951, could be summarily dismissed. Following observations of the Supreme Court could be quoted:

“9. The discretion conferred on the appellate court to dismiss the appeal at its threshold is a judicial discretion and cannot be exercised arbitrarily or by whim or fancy. The appellate courts exercise the discretion in favour of summary dismissal sparingly and only by way of exception. However, that does not tantamount to saying that the appellate court does not possess the power to dismiss an appeal summarily and at the threshold. Such power to summarily dismiss can be exercised, depending on the facts and circumstances of a given case, before issuing notice to the respondent and even before sending for the record of the inferior forum. Where the appellate court exercises its discretion in favour of dismissing the first appeal without issuance of notice to the respondent, it is expected that the reasons for doing so are placed on record. Such recording of reasons is necessary where the order of summary dismissal is open to challenge before a superior forum. This rule of practice does not apply to the Supreme Court as it is the final court and as no appeals lie against the decisions of this Court, including a decision by which an appeal is summarily dismissed.

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16. It is thus clear that the appellate courts including the High Court do have power to dismiss an appeal summarily. Such power is inherent in appellate jurisdiction. The power to dismiss summarily is available to be exercised in regard to first appeals subject to the caution that such power will be exercised by way of exception and if only the first appellate court is convinced that the appeal is so worthless, raising no arguable question of fact or of law, as it would be a sheer wastage of time and money for the respondent being called upon to appear, and would also be an exercise in futility for the court. The first appellate court exercising power to dismiss

the appeals summarily ought to pass a speaking order making it precise that it did go into the pleas – of fact and/or law – sought to be urged before it and upon deliberating upon them found them to be devoid of any merit or substance and giving brief reasons.....”

The above observations of the Supreme Court make it clear that even a statutory appeal can be dismissed by the first appellate court summarily by giving reasons if it is of the opinion that it has no merit.

6. Having considered the rival submissions and having applied our mind to the impugned order and the challenge raised thereto, we are of the opinion that the instant appeal deserves to be summarily dismissed as it has no merit. We, however, feel that considering the fact that the Appellants are under financial strain, the Appellants should be relieved of the direction to pay costs of Rs.50,000/-. We shall now proceed to give reasons for our conclusion that the appeal deserves to be dismissed summarily.

7. Admittedly, by order dated 27/05/2014 the State Commission has determined the tariff. There is no dispute that

Respondent No.1 has raised bills according to the said order. Respondent No.1 filed application under Section 86(1) (f) and Section 142 of the said Act because the Appellants had stopped paying the bills for the power supplied. The Appellants expressed its inability to pay tariff at Rs.4.36 per unit as determined by the State Commission on the ground of its poor financial condition. The Appellants in their replies dated 26/08/2014 and 03/09/2014 stated that they will purchase power only at Rs.3.71 per unit and not at Rs. 4.36 per unit. This stand of the Appellants is in violation of the terms of the agreement between the parties and in violation of the tariff order dated 27/05/2014. The Appellants are trying to deviate from the tariff order which is not permissible. In this connection reliance placed by Respondent No.1 on **Shree Sidhbali** is apt. Following paragraphs of the said judgment are material.

“ 61. It will not be out of place to mention that in view of Section 29 of the Electricity Regulatory Commission Act, 1998, the licensee i.e. Respondent 2 has no authority to enforce any tariff other than the one approved by the Commission. In view of Section 24 of the U.P. Electricity Reforms Act, 1999 the licensee i.e. Respondent 2 lacks power/authority to modify the tariff determined by the Commission and in case of any violation, the licensee

would be exposing itself to the punishment prescribed under Section 28 of the Act of 1999.

62. This Court in Assn. Of Industrial Electricity Users v. State of A.P. as well as in W.B. Electricity Regulatory Commission v. CESC Ltd., and in BSES Ltd. V. Tata Power Co. Ltd., has held that the licensee has no power to amend and/or modify the tariff determined by the Regulatory Commission. Grant of reliefs claimed by the petitioners would amount to compelling them to act against the statute. Such a course is not permissible while exercising powers under Article 32 of the Constitution. Thus Respondent 2 Corporation cannot be directed to amend or modify the tariffs determined by the Commission nor the petitioners would be entitled to seek any direction against the licensee to amend or modify the tariff determined by the Commission.”

The above observations support Respondent No.1's contention that the Appellants cannot ask Respondent No.1 to accept reduced tariff.

8. Counsel for the Appellants submitted that the impugned order is passed under Section 142 of the said Act. The scope of Section 142 is limited. Counsel submitted that under Section 142, the State Commission can only impose penalty on a person if there is non-compliance of directions issued by the Appropriate Commission. Counsel submitted that in this case the State

Commission has virtually passed a decree which is not permissible. Counsel submitted that even if it is held that the impugned order is passed under Section 86(1)(f) of the said Act, the State Commission ought to have referred the matter to the Arbitrator.

9. We find no merit in this submission. In the title of the application Respondent No.1 has referred to Section 142 of the said Act as also Section 86(1)(f) of the said Act. Pertinently, no penalty is imposed by the State Commission on the Appellants. Penalty is an essential part of Section 142. State Commission has only imposed costs of Rs.50,000/- on the Appellants. The argument of the counsel for the Appellants that the State Commission could not have given directions to the Appellants must therefore fail.

10. So far as referring the matter for arbitration is concerned, Section 86(1)(f) confers discretion on the State Commission either to adjudicate upon the dispute or refer any dispute for arbitration. Section 86(1)(f) reads as under:

“86(1)(f) – adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;”

*In **Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd.**³*

the Supreme Court held that the word “and” between the words “generating companies” and the words “refer any dispute for arbitration” means “or”. We may quote relevant paragraph here:

“27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word “and” between the words “generating companies” and the words “refer any dispute” means “or”, otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word “and” in Section 86(1)(f) means “or” ”.

In the circumstances, if the State Commission has exercised the discretion to decide the matter itself it cannot be faulted for that.

11. So far as Clause 8.6 of the PPA is concerned, it pertains to billing dispute. In this case there is no billing dispute. Bills are

³ (2008) 4 SCC 755

correctly raised. The Appellants' grievance is about the tariff order dated 27/05/2014. As long as it holds the field, the Appellants have to pay according to the said order. The Appellants want Respondent No.1 to reduce the determined tariff. That cannot be done. Even if it is assumed that as per Clause 8.6 of the PPA, any dispute between the parties needs to be mutually discussed, it does not prevent a party from approaching this Tribunal, if it feels that it is essential to do so.

12. The Appellants have belatedly after the impugned order was passed on 29/07/2015, in August 2015, filed appeal challenging the tariff order dated 27/05/2014. If that appeal is decided in favour of the Appellants, legal consequences will follow. The Appellants will get necessary adjustment in the bills. The Appellants, however, cannot at this stage, deviate from the determined tariff. Impugned order merely directs the Appellants to pay as per the tariff order dated 27/05/2014. That cannot be interfered with. As per Clause 8.4.1.1 of the PPA, the Appellants had to provide to the seller for payment of its monthly bill, a monthly unconditional, revolving and irrevocable stand-by letter of

credit and maintain the same in terms of the PPA. The Appellants have not done so. Therefore, the impugned order directs the Appellants to open a letter of credit in favour of Respondent No.1 and operate and maintain the same in terms of the PPA. This order cannot be called illegal. No interference is necessary with it.

13. It is the case of the Appellants that they want to reduce the quantum of power purchase to 25% of the total quantum agreed to be purchased by them under the PPA if Respondent No.1 does not agree to sell the power at the rate of Rs.3.71 per unit. The State Commission has correctly observed that the Appellants cannot unilaterally reduce the agreed quantum of power purchase. However, if there is any other remedy available to the Appellants under the PPA and in law, to reduce the quantum of power purchase, the Appellants may resort to it. On that aspect we have expressed no opinion. If the Appellants adopt any such proceeding, the forum seized of the matter will decide it independently and in accordance with law.

14. The main plank of the Appellants' case is that their financial condition is not good. In the circumstances, we are of the opinion that the order directing the Appellants to pay costs of Rs.50,000/- needs to be set aside. Hence, we set aside the said direction. With this modification of the impugned order, we dismiss the appeal. We make it clear, however, that we have not expressed any opinion on the merits of the tariff order dated 27/05/2014. The Appellants' appeal challenging the same will be dealt with by this Tribunal independently and in accordance with law.

15. In view of dismissal of the appeal, I.A. No.606 of 2016 does not survive and is disposed of as such.

16. Pronounced in the Open Court on this **23rd day of December, 2016.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

~~REPORTABLE~~/√ ~~NON-REPORTABLE~~