

COURT-II

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

**ORDER IN APPEAL NO. 24 OF 2015 ON THE FILE OF THE
APPELLATE TRIBUNAL FOR ELECTRICITY, NEW DELHI**

Dated: 18th January, 2018

**Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

M/s The India Cements Ltd.

Registered Office at:

“Dhun Building”, 827, Annasalai,
Chennai-600 002

..... Appellant(s)

Versus

- 1. Andhra Pradesh Electricity Regulatory Commission**
11-4-660, 4th Floor, Singareni Bhavan, Red Hills,
Hyderabad 500004
Represented by its Secretary
- 2. Central Power Distribution Company of Andhra Pradesh Ltd.**
Corporate Office, 6-1-50, Mint Compound,
Hyderabad 500063
Represented by its Managing Director
- 3. Southern Power Distribution Company of Andhra Pradesh Ltd.**
Renigunta Road,
Tirupati 517503
Represented by its Managing Director
- 4. Northern Power Distribution Company of Andhra Pradesh Ltd.**
1-1-504, Chaitanyapuri, Hanamkonda,
Warangal 506004
Represented by its Managing Director

5. Eastern Power Distribution Company of Andhra Pradesh Ltd.

P&T Colony, Seethammadhara,
Visakhapatnam 530013
Represented by its Managing Director

6. Telangana Electricity Regulatory Commission

11-4-660, 5th Floor, Singareni Bhavan, Red Hills,
Hyderabad 500004
Represented by its Secretary

..... Respondents

Counsel for the Appellant (s) : Mr. K. Gopal Choudhary
for Challa Gunaranjan

Counsel for the Respondent(s) : Mr. K.V. Mohan
Mr. K.V. Balakrishnan for R-1

Mrs. D. Bharathi Reddy
Mr. Sri Harsha Peechara
Ms. Gauri P Desai
Ms. Vidyottama for R-6

The Appellant has sought the following reliefs in Appeal No. 24 of 2015:

- (a) Allow the appeal by setting aside the common order datd 12.03.2012 passed in O.P. No. 83 & 81 of 2012 by the 1st respondent Commission and consequently direct the respondents 2 & 3 to refund the FSA paid by the appellant for 2nd Quarter (July 2012 – September 2012) of FY 2012-13.
- (b) Pass such other Order or orders as this Hon'ble Tribunal may deem fit just and proper.

The Appellant has presented in this Appeal for consideration under the following Question of Law:

- A. Whether Regulation No. 4 of 2005 specifically classifies cost of power purchase as an uncontrollable item and provides for pass through of the same in the ARR for the year succeeding the relevant year depending on the availability of data as per actual

with respect to the effect of uncontrollable items, therefore corrections for uncontrollable items and controllable items are also to be included in the ARR and allowed as a pass through as per the said Regulation?

- B. Whether or not a legitimate FSA formula within the scope of section 62 (4) of the Act can allow recovery only for the variations arising from changes in fuel cost alone and that too only in respect of the energy purchased and consumed in the respective quarter?
- C. Whether recognizing the need for metering of all electricity supply, specific mandatory provisions, expressed in the negative imperative, were made in Section 55(1) for the compulsory metering of all electricity supply within two years from the date of the coming into force of the Electricity Act 2003, therefore it is mandatory that every licensee shall supply electricity only through a correct meter no later than two years from 10.6.2003?
- D. Whether or not agricultural consumption cannot at all be excluded for the purposes of determination of the FSA?
- E. Whether or not in spite of the Commission's stipulation in Clause 45-B, which was first introduced before the Electricity Act 2003 came into force, and substituted after the said Act came into force, if not ignored or voided as illegal or held to have ceased to be in force, must be construed after the Electricity Act 2003 has come into force assuming that the licensees will comply with the mandatory requirement for metering all electricity supply within the statutorily prescribed period, it must mean that the Condition 1 could apply only during the stipulated period of two years which includes metering of agricultural consumption as well?

- F. Whether after the period has expired, if the licensees have not complied with the stipulation for metered electricity supply, can the 1st respondent merely ignore the statutory requirement and continue to impose undue costs on non-agricultural consumers by way of distributing the additional fuel costs on them?
- G. Whether after the expiry of the date specified in section 55(1), i.e. after 10.06.2005, Condition 1 of Clause 45-B can operate?
- H. When the policy of the Regulation is not to exempt agricultural consumers altogether and to burden the other consumers, purports to turn only on the question of the 1st respondent's satisfaction on metering, can the violation of a mandatory provision of the Act by the licensee be the ground for other consumers to bear the burden?
- I. When the licensees themselves quantify the agricultural consumption in their FSA claims can there be justifiable reason as to why the agricultural consumption should not also be subject to FSA?
- J. Whether or not the entire Chapter IVA of the Conduct of Business Regulation 2 of 1999, including the impugned Clause 45-B has ceased to be in force with effect from 10.6.2004, and/or in any case from the date of coming into force of the Tariff Regulation 4 of 2005?
- K. Whether Regulation No. 9 of 2004, which was issued after 10.6.2004 but purportedly made effective retrospectively from 10.6.2004, purported to make transitory provisions to overcome the effect of the proviso to Section 61 of the Electricity Act 2003, to continue the existing Regulation No. 2 of 1999 as amended as well as all other regulations notified from time to time under the

provisions of the Reform Act as Regulations made under the Electricity Act 2003 and to so remain in force till appropriate new Regulations are notified under the Electricity Act 2003?

- L. Whether or not Chapter IVA of the Regulation No. 2 of 1999, including the Clause 45-B, had ceased to be in force and effect on and from 10.6.2004, it cannot be considered that the same was existing as on the date of notification of the Regulation No. 9 of 2004, therefore, the Regulation No. 9 of 2004 could only be construed to continue and keep in force all the provisions of Regulation 2 of 1999 except Chapter IVA which had ceased to be in force by operation of law on 10.6.2004?
- M. Whether the 1st respondent has power whatsoever to exercise a delegated legislative power with retrospective effect?
- N. Whether or not the Regulation No. 9 of 2004 can have only prospective effect and the said Regulation has to necessarily be construed and given effect to accordingly?
- O. Whether the determination of the FSA in the impugned order is contrary to the Regulations, violative of the principles of natural justice, unreasonable, irrational and contrary to law?
- P. Whether in a matter requiring public notice and hearing, *the 1st respondent itself has a greater duty to enable meaningful public participation and so as not to put the public to frustration and/or inconvenience and the 1st respondent must, before calling for public notice and hearing, verify with due care and diligence at least as to (a) the requirements of procedure and form have been complied with by the applicant, and (b) the information that has been furnished is so complete as to enable the Commission to*

decide on the matter without anything further other than hearing the applicant and the public, and (c) there is sufficient explanation and elucidation in the application to enable the ordinary public to understand the issues and the data and calculations, and (d) the 1st respondent ought to take any measures for consumers facilitation and assistance to enable their meaningful participation?

- Q. When the Regulation requires each licensee to file its own FSA claim, each licensee has to give the particulars of its power purchases, its power purchase costs, its energy sales separately independent of others and a licensee is not permitted to recover anything more than the extra costs incurred by it in terms of the regulations can the FSA calculations be made on a state-wide basis and not on the actual of the individual Discoms' purchases and sales which leads to distorted FSA recoveries as between the different Discoms?
- R. Whether Section 108 of the Act authorizes the State Government to make any directions contrary to the Regulations where the Regulations require the FSA to be determined in respect of each Discom separately and based upon each Discom's costs and sales?
- S. When Section 62(4) permits only fuel cost adjustment by way of a formula, Power purchase cost variation can be considered only to the extent that the variation is due to variation in fuel costs, not otherwise and the FSA has to be determined only with respect to fuel cost variations alone whether the 1st respondent is justified in not adverting to this and has taken other costs also into account which is contrary to law and has not had due regard to and tried to otiose the subsequent Regulation 4 of 2005 which specifies the manner of dealing with variations in power purchase costs?

ORDER

We have heard the learned counsel, Mr. K. Gopal Choudhury, appearing for the Appellant and the learned counsel, Mr. K.V. Balakrishnan, appearing for the first Respondent and the learned counsel, Mrs. D. Bharathi Reddy, appearing for the sixth Respondent for quite some time.

2. The learned counsel appearing for the Appellant has filed a Memo dated 17.01.2018 duly attested by the Notary and signed by Mr. I. Gopinath, authorized representative of the Appellant as well as the learned counsel for the Appellant. The same is taken on record.

3. Further, the learned counsel for the Appellant submitted that, the statement made in the Memo dated 17.01.2018 may kindly be placed on record and the instant Appeal, being Appeal No. 24 of 2015, filed by the Appellant may be disposed of as not pressed in the interest of justice and equity.

4. The submission made by the learned counsel for the Appellant, as stated above, is placed on record.

5. *Per contra*, the learned counsel, Mr. K.V. Balakrishnan, appearing for first Respondent and the learned counsel, Mrs. D. Bharthi Reddy, appearing for the sixth Respondent submitted that, the submissions made by the learned counsel appearing for the Appellant and the statement made in the Memo dated 17.01.2018, as stated above, may kindly be placed on record and the instant Appeal may be disposed of as not pressed.

6. The submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, as stated above, are placed on record.

7. The statement made in the Memo dated 17.01.2018 read thus:

“MEMO

May I please this Hon’ble Tribunal,

The appellant filed present appeal challenging the Common Order dt. 12.3.2013 passed by 1st respondent Commission in O.P. Nos. 83 & 81 of 2012 whereby the FSA for 2nd quarter of 2012-13 has been determined. The appeal has been admitted and is listed for final hearing.

The appellant earlier filed W.P. No. 11481 of 2013 before Hon’ble High Court of Andhra Pradesh challenging Regulation No.1 of 2003 in so far as prescribing the formula for determination of FSA and the consequent Common Order. The Hon’ble High Court vide Judgment dt. 22.4.2014 upheld the Regulation and given liberty to appellant to question the common order passed by 1st respondent. Against the said Judgment appellant filed S.L.Ps has been filed before Hon’ble Supreme Court where Appellant is also one of the party and by a Common Judgment dt. 5.4.2016 (reported in 2016 (9) SCC 134) the appeals were dismissed confirming the Judgment of the Hon’ble High Court. The said Judgment of Hon’ble Supreme Court has considered and dealt with all the issues which are raised in the present appeal. Consequent to the said Judgment the appellant had paid the disputed amounts along with interest as directed in the Common Judgment. Therefore the appellant is advised to place these facts on record and request this Hon’ble Tribunal to close the present appeal.

Hence, this memo.”

8. In the light of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and the statement made in the Memo dated 17.01.2018, as stated above, the instant Appeal, being Appeal No. 24 of 2015, filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi is dismissed as not pressed at the risk of the learned counsel appearing for the Appellant and in the interest of justice and equity.

9. Order accordingly.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

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