

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

Appeal No. 178 of 2009.

Dated: 25th February 2010

**PRESENT: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER**

In the matter of:

**Tamil Nadu Electricity Board
Anna Salai,
Chennai-600 002**

... Appellant

Versus

**1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.**

**2. NTPC Ltd.
7, Institutional Area,
NTPC Bhawan
SCOPE Complex, Lodhi Road,
New Delhi-110 003**

... Respondent(s)

Counsel for the Appellant

**Mr. M.N. Venkataramani, Sr. Adv.
Mr. S.S. Dash
Mr. P.R. Kovilan**

Counsel for the Respondent

**Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri**

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

JUDGMENT

1. Tamil Nadu Electricity Board (TNEB) is the Appellant. NTPC Ltd. is the second respondent.

2. The Appellant filed a Petition for Review of the order dated 13.06.2005 before the Central Commission. The said Review Petition was dismissed by the order dated 25.06.2009 on the ground of inordinate delay. Aggrieved over this order, Appellant has filed this Appeal.

3. Even at the time of admission, the NTPC, The second Respondent herein has raised a preliminary objection with regard to the maintainability of the Appeal.

4. Since the jurisdiction of this Tribunal to entertain this Appeal in question, is in question, we thought it fit to hear the arguments by

the leaned counsel for the parties with reference to maintainability of this Appeal even before admission of this Appeal. Accordingly we have heard the learned counsel for both the parties.

5. Let us now, refer to the relevant facts leading to the filing of this Appeal.

6. The NTPC filed a petition before the Central Commission in the year 2003 in Petition No. 1 of 2003 for determining the tariff applicable for the Talchar-2 station belonging to NTPC for the period 2001 to 2004. The TNEB was party to the said proceedings before the Central Commission. By the order dated 13.06.2005 the Central Commission allowed the outstanding un-discharged liabilities also by including the same for determination of tariff in favour of the NTPC. This order dated 13.06.2005 became final since the TNEB, the Appellant had not chosen to file any Appeal as against the same.

7. For the period 2004 to 2009, the NTPC, Respondent-2, filed a petition before the Central Commission for determining the tariff for Thalchar-2 station of the NTPC. The Central Commission after hearing the parties passed order dated 31.01.2008 determining the tariff but this time did not include the undischarged liabilities for the purpose of determining the tariff calculations. Aggrieved over this order, the NTPC filed an Appeal before the Tribunal on 18.03.2008 in Appeal No. 66 of 2008. The same is still pending before this Tribunal. TNEB, the Appellant is the Respondent in the said Appeal.

8. During the pendency of the said Appeal before this Tribunal, the Appellant TNEB filed a petition for review in petition No. 47 of 2008 before the Central Commission for review of the order dated 31.01.2008 seeking for the reconsideration of the earlier order dated 13.06.2005 passed in favour of NTPC on the aspect of inclusion of outstanding undischarged liabilities in the light of non inclusion of the outstanding undischarged liabilities in the order dated

31.01.2008. This Review Petition was dismissed on 29.05.2008 by the Central Commission as not maintainable.

9. Apart from the order dated 31.01.2008 disallowing the undischarged liabilities in respect of Thalchar-2 station of NTPC, the Central Commission had passed similar orders against NTPC in respect of its various other generating stations for the period from 2004 to 2009 disallowing the undischarged liabilities. Against all these orders, the NTPC filed different Appeals before this Tribunal and the Tribunal ultimately decided the issue of undischarged liabilities in respect of various other generating stations in favour of the NTPC by setting aside the order of the Central Commission. However, the Appeal filed by the NTPC in regard to Thalchar-2 station in Appeal No. 66 of 2008 is still pending.

10. Again on 13.04.2009, the Appellant filed another Review petition in No. 138 of 2009 seeking for review of the order dated 13.06.2005 passed in Petition No. 1 of 2003 filed by the NTPC praying that the order passed on 13.06.2005 has to be cancelled and

set aside in view of contrary view expressed by the Central Commission in respect of Thalchar-2 station by the order dated 31.01.2008 relating to the period 2004 to 2009. Since there was a delay of 3 years and 10 months from the order dated 13.06.2005 an Application for condonation of delay for the said period had also been filed. However, the Central Commission passed the impugned order on 29.06.2009 dismissing the said Review Petition on the ground of inordinate and unexplained delay in filing the said Review Petition. This order is the subject matter of this Appeal before this Tribunal, filed by TNEB, the Appellant.

11. The maintainability of the Appeal is questioned by the learned counsel for the Respondent on the following grounds:

- (i) The order impugned dated 29.06.2009 was passed in the Review Petition filed by the Appellant under Section 94 of the Act, before the Central Commission under R.P. No No. 138 of 2009 rejecting the Review Petition on the ground of long and unexplained delay. This order cannot be appealed before the**

Tribunal as there is a bar under Order 47 Rule 7 of the Code of Civil Procedure.

(ii) The main order had been passed on 13.06.2005 itself. The Appellant filed a petition for review before the Central Commission for reviewing the order dated 13.06.2005 with a delay of 3 years and 10 months. This inordinate delay has not been explained by the Appellant. Unless the delay is properly explained and condoned, the Review Petition cannot be entertained. Furthermore, the main order had been passed on 13.06.2005. The Appellant must have filed the Appeal long back before the Tribunal against the said order and instead he has now chosen to file Review Petition before the Central Commission that too after inordinate delay. Therefore, the Appellant should not be allowed to circumvent the procedure contemplated under the Act.

12. Before dealing with the question of maintainability of this Appeal, we feel it necessary to bear in mind 3 aspects which would emerge from the background of this case as enumerated earlier.

(i) According to the Appellant, it is aggrieved over the order passed on 13.06.2005 determining the tariff allowing the undischarged liabilities in favour of NTPC. Even though the said order was passed in favour of NTPC as early as on 13.06.2005, the Appellant did not take immediate action by way of filing of any Appeal before the Tribunal or filing the Review Petition before the Central Commission, despite the full knowledge of the order passed on 13.06.2005 by the Central Commission regarding the issue of undischarged liabilities in favour of NTPC. Why, no reasons have been accorded by the Appellant as to why no action was taken even when it was said to be aggrieved over the order passed as early as on 13.06.2005 and why Appellant has allowed the said order to become final? There is no answer.

(ii) The NTPC for the subsequent period i.e. for the year 2004 to 2009, filed a petition for determination of tariff praying for inclusion of the undischarged liabilities. However, the Central Commission did not allow the undischarged liabilities this time in favour of NTPC. This order was passed on

31.01.2008. Aggrieved over this order the NTPC filed an appeal before this Tribunal in Appeal No. 66 of 2008 and the same is pending before this Tribunal. Admittedly, the TNEB, the Appellant as the respondent was a party to this Appeal in 66 of 2008 before the Tribunal. Instead of contesting the matter as Respondent before the Tribunal in justification of the order of Central Commission in this Appeal the Appellant filed a Review Petition No. 47 of 2008 before the Central Commission for review of its order dated 31.01.2008, seeking for reconsideration of the earlier order passed by the Central Commission on 13.06.2005 in favour of NTPC. Instead of directly filing a Review Petition as against the order dated 13.06.2005, before the Central Commission, the Appellant thought it fit to file a Review Petition No. 47 of 2008 seeking for review of the order dated 31.01.2008. But his actual prayer in the said petition is for reconsideration of the earlier order dated 13.06.2005. This petition was dismissed by the Central Commission on 29.05.2008 as not maintainable. Against this order also no further action was taken. Why Appellant has not

shown any reasons as to why he chose to file the Review Petition before the Central Commission in R.P. 47 of 2008 as against the order dated 31.01.2008 even though he was not aggrieved over that order? Similarly, why the Appellant had to pursue the matter before the Central Commission by way of filing a Review Petition as against the order dated 31.01.2008 even though he was a respondent party in the Appeal filed by the NTPC in Appeal No. 66 of 2008 as against said the order dated 31.01.2008? There is no answer.

(iii) Even though the final order was passed by the Central Commission dated 13.06.2005, in favour of NTPC the Appellant had not chosen to file an Appeal against this order before this Tribunal, but it approached the Central Commission for Review. Even though, the said Review Petition No. 47 of 2008 was dismissed it again rushed to the Central Commission and filed second Review Petition No. 138 of 2008 for review of the order dated 13.06.2005 on the ground that the said order was to be cancelled in the light of the subsequent order passed by the Central Commission dated

31.01.2008 disallowing the undischarged liabilities for the period 2004 to 2009. This Review Petition was filed after a long delay of more than 3 years and 10 months. Why Appellant kept quiet all along without filing any appeal before Tribunal or Review Petition before the Central commission as against the order dated 13.06.2005 which was passed in favour of the NTPC immediately. Similarly why the Appellant had to approach the Central Commission and to file R.P. 47/08 for reviewing the order dated 31.01.2008 , although the said order was passed in favour of the Appellant. The said petition was dismissed on 29.05.2008 on the ground it was not maintainable as its main prayer was for reconsideration of the order dated 13.06.2005. Even then, why it was now chosen to file a second Review seeking for the same relief before the Central Commission. There is no answer.

13. We will deal with this aspect at the appropriate time.

14. Let us now discuss over the preliminary objection with regard to maintainability of the Appeal raised by NTPC, the second respondent.

15. The detailed submissions regarding the preliminary objection urged by the learned counsel for NTPC, the Respondent herein could be summarised as follows:

(i) By the impugned order dated 25.06.2009, the Central Commission dismissed the Review Petition in 138/2008 filed by the Appellant on the ground of inordinate delay. This amounts to rejection of the Review Petition filed under Section 94 of the Act. In terms of section 94 of Electricity Act, the Central Commission can exercise the power of review in the same manner as are vested in the Code of Civil Procedure. Accordingly, the provision of Order 47 Rule 7 of the CPC would apply. As per this provision there is a statutory bar to the maintainability of the Appeal against the order rejecting the Review Petition. In view of the said bar, this Appeal cannot be entertained.

(ii) The Appellant is seeking to challenge the order dated 13.06.2005, passed by the Central Commission, in the petition filed by the NTPC in respect of the tariff fixed for Thalchar-2 station allowing the undischarged liabilities in favour of the NTPC. Even though the Appellant was a party to the said proceedings before the Central Commission it did not chose to file Appeal before the Tribunal as an aggrieved person. On the contrary it has allowed the said order dated 13.06.2005 to become final. Now after a long delay, even though he had full knowledge of the earlier order dated 13.06.2005 regarding the issue, has now filed a Review Petition before the Central Commission merely on the ground that the Central Commission had taken a contrary view regarding undischarged liabilities in the orders passed subsequently, one is on 04.04.2005 and another on 07.04.2005. The Appellant must have taken appropriate steps to file an Appeal either immediately after passing of the order dated 13.06.2005 or at least after the subsequent orders passed by the Central Commission giving the contrary view in the orders dated

04.04.2005 and 07.04.2005. The Appellant did not do so. As such, the Appellant should not be allowed to approach the Central Commission by way of Review Petition after long delay that too without showing sufficient cause. Similarly, the Appellant should not be permitted to file an Appeal against the order passed in the Review Petition instead of filing an appeal against the main order dated 13.06.2005.

(iii) Having kept quiet all along from 13.06.2005 and having filed a Review Petition in 2008 seeking reconsideration of the order passed on 13.06.2005 and having got the same dismissed by the Central Commission by the order dated 29.05.2008, the Appellant has now filed second Review petition which is not permissible under law. Similarly, after the dismissal of the second Review Petition, the Appellant has filed an Appeal as against the said order, which is again not permissible under law.

(iv) The casual approach of the Appellant all along by filing review after review would show that it has not come to this Tribunal with clean hands and as such filing of this Appeal is

amounting to gross abuse of the process of Tribunal. Therefore, this is to be dismissed *inlimine*.

16. Refuting the above preliminary objections the Learned Senior Counsel for the Appellant would make the following submissions to substantiate his plea that the Appeal is maintainable.

(i) It is true that the Central Commission while exercising its power of review under Section 94 of the Act, has to act in the same manner as are vested under the Code of Civil Procedure while passing order in the Review Petition. Only when the said order rejecting the Review is on merit the said order cannot be appealed under order 47 Rule 7. But in the present case order impugned passed by the Central Commission is not the order rejecting the review on merit but it is an order rejecting the Petition for merely condoning the delay in filing of the Review Petition. As such the Central Commission did not exercise the power under section 94 of the Act to satisfy as to whether sufficient ground is made out to entertain the review. It merely refused permission for the invocation of

Review Jurisdiction. Hence, the dismissal of the Review Petition cannot be said to be in the exercise of jurisdiction in terms of Section 94 of the Act or under Order 47 Rule 1 and Rule 4(1) of the CPC. Therefore, the bar under Order 47 Rule 7 would not apply to the impugned order.

(ii) The words “an order” occurring in section 111 of the Act conferring Appellate Power to the Tribunal means any order which is not subject to any qualification. This is because unlike the scheme of the CPC with regard to the maintainability of appellate/revisional powers provided under the CPC, the scheme of appeals under the Electricity Act 2003 is entirely different and distinct.

(iii) There are various decisions rendered by the various High Courts in the matter of Letters Patent Jurisdiction where it has been held that an Appeal lies from an order refusing to excuse delay in filing the appeal. It has been further held that the right derived under clause 15 of the Letters Patent is not affected by Order 47 Rule 7. Similarly under the Provincial Insolvency Act the various High Courts have held that the

statutory provisions of the Appeal would prevail over the Order 47 Rule 7 of CPC and accordingly, an Appeal would lie against an order passed in the Review Petition whether rejecting or granting. Therefore, section 111 of the Electricity Act has to be construed to the Rule 15 of the Letters Patent and *pari materia* under the Provincial Insolvency Act. This has been decided by the Bombay High Court in AIR 1924 Bom. 399 – *Nagindas Motilal versus Nilaji*, AIR 1964 AP 162 – *Sattemma vs. Vishnumurthy* and AIR 1956 Nagpur 215 – *Ram Prasad vs. Dagdulal*, 1941 Madras 588 – *Chidella Veraiyya vs. Kollam Koti Reddy*, AIR 1937 Lahore 568 – *Sher Singh vs. Firm Bishan Lal*, AIR 1955 Tripura 49 – *Pushharan vs. Ramkrishan*. Therefore, Order 47 Rule 7 cannot be said to have any control over any of the Appeal powers conferred on the Tribunal under the Electricity Act, 2003.

(iv) Section 94 of the Act gives the power of Review to the Central Commission. This cannot accommodate a provision relating to the Right of Appeal to the Appellate Tribunal. Section 111 is a substantive provision relating to Appeal. It

does not provide for any such qualification as contained in Order 47 Rule 7. The meaning and scope of this provision under section 111 cannot be said to be governed by some other part of the statute. Therefore, the Appeal powers given to the Tribunal cannot be curtailed. Hence the Appeal is maintainable.

17. We have heard the learned counsel for the parties and considered their submissions.

18. The question that arises for consideration is as follows: “whether the Appeal is barred in terms of the provision of Order 47 Rule 7 of the Code of Civil Procedure when the order impugned was said to be passed by the Central Commission rejecting the Review Petition on the ground that it is time barred under section 94(1) of the Electricity Act?

19. It is not disputed that the Central Commission has got the power to review its own order or to reject the prayer for Review.

This Review jurisdiction of the Central Commission is provided under section 94(1)(f) of the Act 2003. This provision is as follows:

“94 – Powers of the Appropriate Commission (1) the Appropriate Commission shall for the purposes of any inquiry or proceedings under this Act have the same powers as are vested in the civil court under the Code of Civil Procedure 1908 in respect of the following matters namely.

..... (f) reviewing its decision, directions and orders”

Thus, section 94(1)(f) incorporates by reference to the provisions of the Code of Civil Procedure in regard to exercise of power over the Review of its own decision, directions and orders. Accordingly, the relevant provisions of CPC 114 and Order 47 Rule 7 deal with Review as if it has been provided for in Section 94 of the Electricity Act including the provision of Order 47 Rule 7.

20. The provision of the Order 47 Rule 7 reads as under:

“Rule 7 – Order of rejection not appealable, objections to order granting application (1) An order of the court rejecting

application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from a decree or order finally passed or made in the suit.

21. So, a reading of section 94 of the Act would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. If the intention of Parliament was to restrict the incorporation of the review only to the extent that the Central Commission exercise powers and not to deal with any other incident of review such as Rule 7 of Order 47, the same would have been incorporated for separately.

22. In other words, the Parliament would have provided for a separate provision stating that the Appropriate Commission shall have the powers to review its decision, directions and orders *de horse* the CPC . As a matter of fact, section 94(2) deals with the powers of the Commission to pass interim orders. In this section, the Parliament has chosen to say that provision of the CPC will not

apply but has specifically recognised the power to pass interim orders under section (2) of 94 of the Act. So the distinction in approach adopted in the case of interim orders under Section 94(2) of the Act and in the case of Review under Section 94(1)(f) is quite relevant. In the case of Review Parliament had decided that the application shall be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim order under Section 94(2) of the Act. Therefore, the implication mentioned in Rule 7 of Order 47 will certainly apply.

23. It is contended on behalf of the Appellant that the scope of Section 111 is wider and it provides for an Appeal against any order including the order rejecting the review made by the Appropriate Commission. In elaboration of this plea, the Appellant has made a distinction to the effect that the Appeal power of this Tribunal does not envisage any restriction and therefore, Appeal is maintainable. This contention in our view is not tenable. It is quite relevant to note in this context that under the CPC the following Appeal provisions are provided:

- (i) Order 41 Rule 1 read with Section 96 provides for the Appeal arising out of original decrees.**
- (ii) Order 43 Rule 1 provides for an Appeal arising out of the orders.**
- (iii) Section 100 CPC provides for the second appeal.**

24. These provisions which are Appeal provisions do not provide for any prohibition that there shall be no appeal against the order passed in the Review Petition but this prohibition of an Appeal as against the order rejecting the Review Petition alone has been specifically provided in Order XLVII Rule 7. Therefore, despite the other provision which provides for an appeal against the order passed by the Appropriate Commission, the restriction in section 94(1)(f) read with Order 47 Rule 7 CPC will have application to the present case.

25. The next contention of the Appellant is that the impugned order is only a rejection of condonation of delay application and not the order of the rejection of review and therefore it is appealable.

We are not able to find any merit in this contention. Admittedly, the impugned order shows that the Central Commission has rejected the Review Petition on the ground of delay. The order rejecting the Review Petition on the ground that there is no sufficient cause shown for the delay and as such it is time barred is virtually an order passed in the Review Petition. Admittedly, this order rejecting the explanation for the delay was in the Review Petition filed by the Appellant. Since there was a delay in filing the Review Petition, the Central Commission has to take a decision as to the Review Petition can be entertained or not. Accordingly, there cannot be any differentiation on the ground of the matter being related to the condonation of delay or on the ground of the merits of the main review sought. The impugned order which is rejecting the Review Petition on the ground of delay is equally to an order under Section 94(1)(f) of the Act within the meaning of Order 47 Rule 7 of the CPC rejecting the Review Petition. As a matter of fact even when a court dismisses an application for condonation of delay it does not exercise independent jurisdiction but exercises the substantive

jurisdiction, i.e. under Section 94 conferred by the statute in respect of main matter.

26. Now let us refer to the various authorities cited by the Learned Counsel for the parties. The Learned Counsel for the respondent mainly relied on (1994) 2 SCC 753 – *Shankar Motiram Nale versus Shiolasing Gannusing Rajput* in which Hon'ble Supreme Court has applied the provision of Order XLVII Rule 7 rejecting the Appeal against the review order passed by the Learned Single Judge. The relevant observation made by the Supreme Court is as follows:

“This appeal is obviously incompetent. It is against an order of a Division Bench of the High Court rejecting the application for review of a judgment and decree passed by a learned Single Judge, who seems to have retired in the meantime. It is not against the basic judgment. Order 47 Rule 7 of CPC bars an appeal against the order of the court rejecting the review. On this basis, we reject the appeal. No costs.”

27. The other decision cited by him is (2004) 13 SCC 677 – *Suseel Finance & Leading Co. versus M. Lata*. The relevant observation is as follows:

“3. In the case of *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* it has been held by this Court that against an order rejecting an application for review, a special leave petition is not maintainable. This authority is directly on the point in issue. Not only are we bound by it but we are also in agreement with it. Faced with this situation, it is sought to be submitted that this Court in the case of *Green View ea & Industries v. Collector2 and K. Rajamouli v. A.V.K.N. Swsamy3* has taken contrary views. We find that in these two cases the question whether a special leave petition was maintainable against an order rejecting a review petition, was not considered at all. In these cases, the question was whether special leave petition was barred by principles of res judicata. It was held hat special leave petition was not barred by principles of res judicata. In neither of these cases has reference been made to the abovementioned judgment of this Court in *Shanker*

Motiram Nale case1. In both those cases it has been held that a special leave petition is maintainable only in the context of it not being barred on principles of *res judicata*. In both these cases the question whether a special leave petition is against an order disposing of a review petition was not considered at all. These cases therefore have no relevance at all.

4. On the basis of the ratio in *Shanker Motiram Nale case1* we hold that these special leave petitions are not maintainable., They are dismissed as such. There will be no order as to costs.”

28. The Hon’ble Supreme Court rendered another judgment in (2004) 13 SCC 677 MN Haider Vs. Kendriya Vidyalaya Sangathan.

The relevant observations are as follows:

“We are unable to accede to this request. In none of these cases has it been considered that once a special leave petition against the main order has been dismissed it would not be open to challenge the main order again. Further, it is settled law (cases of *Shanker Motiram Nale v . Shiolalsingh Gannusing Rajput21* and *Suseel Finance & Leasing Co. v. M. Lata2* may be

looked at) that a special leave petition is not maintainable against an order in a review petition. These authorities have not been shown or considered by this Court whilst passing the above orders. Once SLP is not maintainable no orders can/should be passed thereon except to dismiss the same. In view of the settled position, the abovementioned orders cannot be considered to be precedent.”

29. One more decision of Hon’ble Supreme Court cited by the learned senior counsel for NTPC is quite relevant. In this decision it has been held that when a court dismisses an application for condonation of delay it does not exercise an independent jurisdiction but exercises the substantive jurisdiction conferred by the statute in respect of the main matter. This decision would clarify the question raised in this Appeal to substantiate the plea made by the learned counsel for the Respondent that even when the order rejecting the application for condonation of delay is passed it would mean rejection of the Review Petition itself under Section 94 of the

Act. The citation is JT (2009) SC344. The relevant observation of the Hon'ble Supreme Court is as follows:

“Firstly, we must clarify that when the Division Bench considered the question of condonation of delay in filing the appeal against acquittal, though technically, it was deciding the application under Section 378(3), Cr. P.C. It was actually the whole appeal itself which was before it. In this behalf it will have to be seen that the limitation for filing such appeal at the instance of the State Government against acquittal is provided by Article 114 of the Limitation Act. It is undoubtedly true that sub-section (3) specifically provides that the appeal under sub-section (1) and (2) cannot be entertained except with the leave of the High Court and, therefore, an application for leave in such appeal filed by the State Government is a must. The limitation for filing the appeal is 90 days from the date of the order while the same Article provides for 30 days of limitation from the date of granting of special leave. Therefore, what was before the High Court was the appeal itself and the petitioner prayed the condonation of delay of 801 days in filing appeal

against acquittal. When the High Court declined to grant that permission, it in effect refused to entertain the Appeal against the order of the Trial Court, thus making it final.

30. These decisions would squarely apply to the present facts of the case to hold that this appeal is not maintainable.

31. As referred to above, the Appellant has relied on the following decisions of the court for substantiating his plea to show that the Appeal is maintainable.

- (a) Nagindas Motilal v. Nilaji, AIR 1924 BOM. 399**
- (b) Sattemma v. Vishnumurthi, AIR 1964 Appellant 162**
- (c) Ram Prasad v. Dagdulal, AIR 1956 Nag. 215**
- (d) Chidella Veraiyya v. Kotlam Koti Reddy, AIR 1941 Mad 588.**
- (e) Sher Singh v. Firm Bishal Lal, AIR 1937 Lah 568**
- (f) Pushharan v. Ramakrishan, AIR 1955 Tr. Co 49**

32. The above cases would not apply to the present facts of the case. They are either in relation to the scope under section 15 of the Letters Patent Act or in relation to the scope under Section 75 of Insolvency Act 1920. Firstly, these decisions are prior to the laying down of principle by the Hon'ble Supreme Court in number of cases as referred to above. Secondly, the word "judgment" Incorporated to mean that nothing would apply even to the area which are not appealable under Order XLVII Rule 1. This cannot have application to a specific provision such as section 94(1)(f) which has been incorporated in the Electricity Act by bringing into force all the provisions relating to it. Therefore, all the provisions as a whole will have to be read as it is a registration by incorporation. In view of this it would also include Order 47 Rule 7 containing prohibition against the Appeal from an order rejecting the review. In that context, Section 111 cannot be incorporated to provide that an appeal would lie against an order rejecting the Review. Similarly, even in respect of the decision of the Provincial Insolvency Act 1920, it is to be noted hat Section 5 of the said Act starts with "subject to" Section 5 the said Act, provides that the court, shall have the same

powers as it follows in the exercise of the original jurisdiction. There is no such qualification prescribed under Section 94 of the Act. Therefore, the reliance made on behalf of the Appellant on the basis of Letters Patent and Provincial Insolvency Act is of no assistance.

33. In view of the above discussion, we are of the considered opinion that this Appeal is as against the order rejecting the Review petition by the Central Commission on the ground of long and unexplained delay under Section 94 of the Act and as such this Appeal is barred under Order 47 Rule 7. Hence, this Appeal is dismissed as not maintainable.

34. Before parting with this case we would like to comment about the conduct of the Appellant.

35. As narrated above, the Appellant's main grievance is that the Central Commission determined tariff allowing the undischarged liabilities in favour of the NTPC by the order dated 13.06.2005. The Appellant for the reasons best known to it, never took any step to

file the Appeal before the Tribunal which is the competent authority to go into the legality of the order dated 13.06.2005 passed by the Central Commission. There is no reason as to why the Appellant had not taken any steps to file the Appeal before this Tribunal till date. On the other hand it kept quiet all along by allowing the order dated 13.06.2005 to become final. Only when the Central Commission by the order dated 31.01.2008 declined to allow undischarged liabilities in respect of the subsequent period in favour of the NTPC, the Appellant has chosen to file a petition seeking reconsideration of the order dated 13.06.2005 under the garb of filing a petition for review of the order dated 31.01.2008. There is no reason as to why the Appellant did not choose to file a Review directly as against the order dated 13.06.2005.

36. As stated above the order dated 31.01.2008 disallowing the claim of the NTPC had been challenged by NTPC before the Tribunal in Appeal No. 66 of 2008. In that Appeal the Appellant was opposite party and the said Appeal is still pending. There is no reason as to why it had to approach the Central Commission for

review of the order dated 31.01.2008 even though he was to oppose the claim of NTPC in Appeal filed by the NTPC in Appeal No. 66 of 2008 seeking to set aside the order dated 31.01.2008 which was not passed in favour of the NTPC. Similarly, the Review Petition was filed by the Appellant for reconsideration of the order dated 13.06.2005 under the garb of the petition seeking for the Review dated 31.01.2008. This Petition was admittedly dismissed on 29.05.2008 rejecting the request for reconsideration of the order dated 13.06.2005. When that being the case there is no reason as to why the Appellant had chosen to file the second Review petition that too after the delay of 3 years and 10 months as against the order dated 13.06.2005. In the same way there is no reason as to why they have filed Appeal against the order passed in the Review which is not maintainable even though the Appellant had no sufficient reason to condone the delay of 3 years and 10 months.

37. It is to be reiterated that the Appellant still is not inclined to file the Appeal against the order dated 13.06.2005 before this

Tribunal by giving proper explanation to condone the delay in filing the said Appeal.

38. The above conduct would clearly show that the Appellant has made unsuccessful attempts to circumvent the mandatory procedure contemplated under the Act as well under CPC thereby it consistently and continually abused the process of the Central Commission. The learned counsel for the Respondent pointed out that this is the fittest case where exemplary cost has to be imposed on the Appellant who has driven the Respondent, NTPC, from pillar to post. We too sincerely feel that the Appellant has to be severely dealt with by imposing heavy costs.

39. However, we refrain ourselves to pass the orders relating to the costs as we fervently hope that the Appellant would not indulge in similar serious misconduct in the future. But, we cannot, but express our strong displeasure over the misconduct of the Appellant as in our view, that would suffice for the present. Registry is directed to send the copy of this order to the Chief Secretary,

Government of Tamil Nadu, so that he could give proper directions to the concerned officers to avoid committing this sort of misconduct in future.

40. With these observations the Appeal is dismissed as not maintainable. As referred to above, no costs.

**(H.L. Bajaj)
Technical Member**

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

Dated : 25th February, 2010

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