

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO.57 OF 2015**

**Dated: 23<sup>rd</sup> September, 2015**

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

**In the matter of:-**

**CHHATTISGARH STATE POWER )  
DISTRIBUTION CO. LIMITED, )  
Vidyut Sewa Bhawan, Danganiya, )  
Raipur – 492 013. ) ... Appellant**

**AND**

1. **CHHATTISGARH STATE )  
ELECTRICITY REGULATORY )  
COMMISSION, )  
Shanti Nagar, Irrigation Colony, )  
Raipur – 492 001 (Chhattisgarh). )**
2. **SINGHAL FORESTRY PRIVATE )  
LIMITED, )  
“Vandana Bhawan”, M.G. Road, )  
Raipur – 492 001 (Chhattisgarh). )**
3. **M/S. CHHATTISGARH )  
INVESTMENTS LIMITED, )  
Registered Office: 1<sup>st</sup> Floor, )  
Vanijya Bhawan, Sai Nagar, )  
Raipur – 492 001 (Chhattisgarh). )**

4. **CHHATTISGARH STATE )  
RENEWABLE ENERGY )  
DEVELOPMENT AGENCY (CREDA) )  
CSERC Building, 2<sup>nd</sup> floor, Shanti )  
Nagar, Raipur - 492 001 )  
(Chhattisgarh). ) ... **Respondents****

**WITH**  
**APPEAL NO.58 OF 2015**

**In the matter of:-**

**CHHATTISGARH STATE POWER )  
DISTRIBUTION CO. LIMITED, )  
Vidyut Sewa Bhawan, Danganiya, )  
Raipur - 492 013. ) ... **Appellant****

**AND**

1. **CHHATTISGARH STATE )  
ELECTRICITY REGULATORY )  
COMMISSION, )  
Shanti Nagar, Irrigation Colony, )  
Raipur - 492 001 (Chhattisgarh). )**

2. **M/S. CHHATTISGARH )  
INVESTMENTS LIMITED, )  
Registered Office: 1<sup>st</sup> Floor, )  
Vanijya Bhawan, Sai Nagar, )  
Raipur - 492 001 (Chhattisgarh). ) ... **Respondents****

Counsel for the Appellant(s) : Ms. Suparna Srivastava  
Ms. Anushka Arora

Counsel for the Respondent(s) : Mr. Sakesh Kumar for **R-1.**

Mr. Sanjay Sen, Sr. Adv.  
Ms. Shikha Ohri,

Mr. Matrugupta Misra  
Ms. Ruth Elwin for **R-2 & R-3**

**ORDER**

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

1. These two appeals arise out of two judgments and orders, both dated 2/1/2015 passed by the Chhattisgarh State Electricity Regulatory Commission ("**the State Commission**"). They are being disposed of by a common order because they involve the same issue. The Appellant as the successor of the Chhattisgarh State Electricity Board ("**the Board**") is performing all the functions and duties pertaining to distribution of power in the State of Chhattisgarh in terms of the transfer scheme whereby the said duties and functions were transferred to and vested in it. Respondent No.1 is the State Commission.

2. Appeal No.57 of 2015 is filed against order dated 2/1/2015 passed by the State Commission in Petition No.24 of 2014(M) whereby the State Commission dismissed Petition

No.24 of 2014(M) filed by the Appellant purportedly under Section 86(1)(k) of the Electricity Act, 2003 (“**the Electricity Act**”) for removal of difficulty in implementation of order dated 23/12/2013 passed by the State Commission in Petition No.23 of 2013(D) and Petition No.35 of 2013(D). Respondent No.2 is Singhal Forestry Private Limited (“**Singhal**”). Respondent No.3 is M/s. Chhattisgarh Investments Limited (“**CIL**”). Singhal and CIL are generating companies, who have set up solar projects in the State of Chhattisgarh and are supplying power to the Appellant under PPAs executed for that purpose. Respondent No.4 – Chhattisgarh State Renewable Energy Development Agency (“**CREDA**”) is the Nodal Agency created by the State Government for development of non-conventional and renewable sources of energy.

3. Appeal No.58 of 2015 is filed against order dated 2/1/2015 passed by the State Commission in Petition No.23 of 2014 filed by CIL under Section 142 of the Electricity Act seeking a direction to the Appellant for complying with order

dated 23/12/2013 passed by the State Commission. By the impugned order, the State Commission has allowed the said petition. Respondent No.1 in this petition is the State Commission and Respondent No.2 is CIL.

4. Since Mr. Sen, learned senior advocate appearing for Singhal and CIL raised preliminary objection as regards maintainability of these appeals, we posted them for hearing on the question of maintainability. We have heard learned counsel for the parties on the said issue. We are of the considered opinion that the present appeals are not maintainable. Before we give reasons for this conclusion, it is necessary to give the factual background of the case.

5. The State Commission vide order dated 8/9/2008 determined tariff inclusive of Generation Based Incentive (“**GBI**”) payable by the Government of India to solar PV power producers at Rs.15.84 per unit. The tariff period was

determined as ten years i.e. upto 31/8/2008. After the launch of Rooftop PV and Small Solar Power Generation Programme (“**RPSSGP**”) of Ministry of New Renewable Sources of Energy (“**MNRE**”) in January, 2010, the State Commission vide its’ order dated 9/7/2010 modified order dated 8/9/2008 to the extent that the tariff fixed by the State Commission in the said order was made applicable to all power generation projects operating under RPSSGP. Tariff decided in order dated 8/9/2008 was to be levelized tariff for 25 years and was to be reviewed by the State Commission through a regulatory process. It was stated in the order that the State Commission was in the process of tariff determination as per RPSSGP scheme in line with the regulations of the Central Regulatory Commission.

6. After passing of amended order dated 9/7/2010 the State Commission registered Suo Motu Petition No.37 of 2012(T) for determination of generic tariff for RPSSGP based solar projects. According to the Appellant the suo motu petition

was registered because some of the developers who had been awarded projects under the scheme and had commenced commercial operation had requested the State Commission to issue new order. It is the case of the Appellant that considering that the said developers had already registered their projects under the scheme as per tariff determined by the State Commission vide order dated 8/9/2008 read with amended order dated 9/7/2010, the State Commission had no jurisdiction to re-determine tariff. According to the Appellant, despite lack of jurisdiction, the State Commission proceeded vide order dated 9/10/2012 to re-determine tariff for solar PV projects at Rs.17.91 per kWh for FY 2010-11 which leveled tariff was made applicable for those power plants that had qualified under RPSSGP subject to certain conditions. According to the Appellant, this redetermination of tariff for solar PV projects registered under RPSSGP was without any jurisdiction and non-est in the eyes of law.

7. Singhal and CIL then filed Petition No.23 of 2013(D) and Petition No.35 of 2013(D) respectively before the State Commission inter alia alleging that the Appellant was applying wrong tariff and making impermissible deductions in the energy bills of Singhal and CIL and the Appellant was required to act in accordance with tariff order dated 9/10/2012 to make payments to Singhal and CIL.

8. It is the case of the Appellant that the Appellant was only applying GBI as being received from IREDA as per the State Commission's tariff order in force at the time of registering of the projects of Singhal and CIL under RPSSGP at Rs.15.84 per unit and paying the tariff accordingly. This was in consonance with the scheme of GBI based projects set up under MNRE scheme. It was not permissible to claim a tariff which was more than what was permissible under the scheme of which GBI was an integral part.

9. The State Commission vide order dated 23/12/2013 while disposing of the petitions filed by Singhal and CIL inter alia directed the Appellant to rectify the bills for power purchase of Singhal and CIL and make payment as per the methodology specified in the order. It was further directed that GBI should be claimed by the Appellant from IREDA. The Appellant was directed to take up the issue of GBI in appropriate forum and if required it was permitted to seek judicial and legal remedy from competent authority under the provisions of law.

10. The Appellant filed petition being Petition No.24 of 2014(M) purportedly under Section 86(1)(k) of the Electricity Act for removal of difficulty in implementing order dated 23/12/2013 passed by the State Commission in Petition No.23 of 2013(D) and Petition No.35 of 2013(D) filed by Singhal and CIL respectively. By order dated 2/1/2015 impugned in Appeal No.57 of 2015, the State Commission dismissed the said petition observing that the Appellant's

petition was in the nature of review of order dated 23/12/2013 passed by the State Commission and was not maintainable. It was observed that tariff order dated 9/10/2012 and order dated 23/12/2013 were not appealed against and were not implemented. Paragraph 18 of the said order reads as under:

*“18. The submissions of respondents needs to be agreed that this petition is in form of review of orders passed in P No.23/2013(D) and 35/2013(D). Instead of seeking legal remedy on issue of GBI under the provisions of law, petitioners desires that solar power projects installed in State under guidelines issued by Govt. of India be refrained from their legal claim of tariff decided by this Commission. This cannot be permitted as the issue of tariff and GBI are entirely different. The petitioner is further directed to take legal remedy on issue of GBI. There is no such provisions in guidelines prescribed by Govt. of India that tariff decided by this Commission should not be made applicable because correct GBI is not paid to petitioner. In view of this, the petition is liable to be dismissed.”*

11. CIL filed Petition No.23 of 2014 under Section 142 of the Electricity Act praying that action be taken against the

Appellant for non-compliance or order dated 23/12/2013 passed by the State Commission. By order dated 2/1/2015 challenged in Appeal No.58 of 2015, the State Commission inter alia directed the Appellant to comply with order dated 23/12/2013 and make payment as per the tariff decided in order dated 9/10/2012 passed in Petition No.37 of 2012(M). The State Commission even in this order observed that order dated 9/10/2012 passed in Petition No.37 of 2012(T) which decided tariff of such projects was neither implemented nor appealed against by the Appellant and similarly order dated 23/12/2013 passed in the petition filed by solar developer was neither appealed against nor implemented by the Appellant.

12. Assailing the impugned orders, Ms. Srivastava, learned counsel for the Appellant contended that the State Commission fell into an error when it held that the Appellant was seeking a review of orders dated 9/10/2012 and 23/12/2013. Counsel submitted that under the MNRE guidelines the tariff determined by the State Commission at

the time when the said projects are registered for implementation under the scheme is the only tariff to be made applicable for the entire period of 25 years and the State Commission does not have the jurisdiction to revise or re-determine the same. The State Commission's order dated 9/10/2012 re-determining the tariff is completely without jurisdiction. Consequently, order dated 23/12/2013 is also without jurisdiction. Counsel submitted that the jurisdiction which earlier vested in the State Commission was divested by the MNRE guidelines. The orders passed by the State Commission dated 9/10/2012 and 23/12/2013 are in the circumstances a nullity. It was therefore perfectly legal for the Appellant to approach the State Commission for clarification of order dated 23/12/2013. The State Commission also erred in directing the Appellant to comply with order dated 23/12/2013 and make payment as per the tariff decided in order dated 9/10/2012. In support of her submissions, counsel relied on judgments of the Supreme Court in **Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) Through his**

**LRs.<sup>1</sup> and Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors.<sup>2</sup>**

13. Mr. Sen, learned senior advocate appearing for Singhal and CIL contended that the present appeals are not maintainable. He submitted that the State Commission had jurisdiction to re-determine tariff. This is not a case of lack of inherent jurisdiction. In any case, the Appellant did not challenge orders dated 9/10/2012 and 23/12/2013. In these Appeals, it is trying to seek a review of these orders which is not permissible. The Appeals are, therefore, liable to be dismissed as not maintainable.

14. At the outset, we must mention that Petition No.24 of 2014(M) filed by the Appellant before the State Commission which is the basis of Appeal No.57 of 2015 was totally misconceived. It was purportedly filed under Section 86(1)(k)

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<sup>1</sup> (1990) 1 SCC 193

<sup>2</sup> (2007) 2 SCC 355

of the Electricity Act for removal of difficulty in implementation of order dated 23/12/2013 passed by the State Commission in Petition No.23 of 2013(D) and Petition No.35 of 2013(D). Section 86 sets out the functions of the State Commission. Section 86(1)(k) permits the State Commission to discharge such other functions as may be assigned to it under the Electricity Act. Assuming that a petition could be filed for removal of difficulty in implementation of any order, Section 86(1)(k) even remotely does not refer to such power. Such a petition could never have been filed.

15. It is a fact that the Appellant did not challenge order dated 9/10/2012 whereby the State Commission re-determined tariff for solar PV projects for FY 2010-11. The Appellant also did not challenge order dated 23/12/2013 passed by the State Commission giving direction to the Appellant inter alia to rectify the bills for power purchase of Singhal and CIL. The said orders were not even implemented by the Appellant. It is clear from order dated 2/1/2015

impugned in Appeal No.57 of 2015 that in the guise of seeking clarification, the Appellant reopened the entire issue and virtually tried to reargue the case and get the orders dated 9/10/2012 and 23/12/2013 set aside on merits. Such a course was not open to the Appellant. After passing the said orders, the State Commission has become functus officio. It could not have reopened the matter. The remedy of the Appellant lied elsewhere, which it did not choose to adopt. Appeal No.57 of 2015 is, therefore, not maintainable. Appeal No.58 of 2015 must also meet the same fate. Since the Appellant has neither complied with order dated 23/12/2013 nor challenged it in higher forum, the direction issued by the State Commission in Petition No.23 of 2014 filed by CIL under Section 142 of the Electricity Act seeking direction to the Appellant to comply with order dated 23/12/2013 could not have been challenged by the Appellant in this Appeal. By raising the said challenge in Appeal No.58 of 2015, the Appellant is, in effect, seeking to challenge orders dated 9/10/2012 and 23/12/2013 and reopen the entire matter. Such a course is not open to the Appellant.

16. It was urged by the counsel for the Appellant that orders dated 9/10/2012 and 23/12/2013 are non-est as the State Commission had no jurisdiction to pass them. Counsel submitted that the MNRE guidelines had divested the State Commission of the jurisdiction to re-determine tariff and, hence, it was open to the Appellant to approach the State Commission. In this connection, counsel relied on the observations of the Supreme Court in **Sushil Kumar Mehta** that a decree passed by a court without jurisdiction is a nullity and the plea can be set up whenever and wherever the decree is sought to be enforced or relied upon, and even at the stage of execution or collateral proceedings.

17. We are unable to agree with the learned counsel. The State Commission's jurisdiction to re-determine tariff cannot be challenged and is not challenged. What is sought to be urged is that the MNRE guidelines took away the said jurisdiction. The Electricity Act vests the jurisdiction to

determine tariff, to amend tariff or to revoke a tariff order in the Appropriate Commission. This legal position cannot be disputed. A power which is statutorily vested in the State Commission cannot be taken away by MNRE guidelines. It is well settled that the guidelines cannot travel beyond the parent statute. Besides, MNRE guidelines are not framed under the Electricity Act. They do not have statutory flavour. There is no question of such guidelines divesting the State Commission of its inherent jurisdiction.

18. The judgment of the Supreme Court in **Sushil Kumar Mehta** is not applicable to the facts of the present case. In that case, by the Haryana Urban (Control of Rent & Eviction) Act, 1973 (“**the Haryana Act**”), the civil court was divested of jurisdiction to pass a decree of ejection of a tenant. The landlord, the Respondent therein had taken a lease of land from the Municipal Corporation and constructed a building thereon. The Appellant, tenant committed default in payment of rent. The Respondent issued a notice under Section 106 of

the Transfer of Property Act terminating the Appellant's tenancy. He filed a suit for ejectment and recovery of rent against the Appellant. Ex-parte decree of eviction was passed which became final. The Respondent filed an execution application. The Appellant raised an objection under Section 47 of the Code of Civil Procedure, 1908 that the decree of the civil court was a nullity as the Haryana Act had divested the civil court of jurisdiction to pass a decree of eviction. It is against the backdrop of these facts that the Supreme Court observed that the civil court lacked inherent jurisdiction of the cause and pass a decree and the said decree was a nullity. The Supreme Court further observed that the plea that a decree is a nullity can be raised at the stage of execution or even in collateral proceedings. The facts of the instant case are totally different. Here it cannot be urged that the State Commission lacked inherent jurisdiction. The submission of the Appellant is that MNRE guidelines divested the State Commission of the said jurisdiction. We have already noted that MNRE guidelines are not made under the Electricity Act. They cannot divest the State Commission of the inherent

jurisdiction vested in it in law. In any case, no guidelines can travel beyond the statute.

19. **Hasham Abbas Sayyed** also has no application to the present case as it reiterates the same principles laid down in **Sushil Kumar Mehta**. In the circumstances, we hold that the present appeals are not maintainable.

20. Ms. Srivastava, learned counsel for the Appellant submitted that the Appellant may be permitted to adopt appropriate remedy available to it in law. We are not expressing any opinion as to whether any appropriate remedy is available to the Appellant in law. But, if such remedy is available to the Appellant in law, the Appellant will be at liberty to adopt it and the forum seized of the proceedings initiated by the Appellant will deal with it in accordance with law. Mr. Sen, learned senior advocate appearing for Singhal and CIL submitted that proceedings under Section 142 of the Electricity Act be permitted to be proceeded with. If any

proceedings under Section 142 are initiated by Singhal or CIL, they will be at liberty to pursue them and the State Commission shall dispose them of in accordance with law. With the above observations, the appeals are dismissed as not maintainable.

21. Pronounced in the Open Court on this 23<sup>rd</sup> day of September, 2015.

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**

✓ **REPORTABLE / ~~NON-REPORTABLE~~**