

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

**(APPELLATE JURISDICTION)**

**APPEAL NO. 92 OF 2014**

**Dated: 04<sup>th</sup> January, 2018**

**Present: HON'BLE MR. N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF**

**DNH Power Distribution Corporation Limited**

(Formerly Electricity Department, Dadra and Nagar Haveli)  
Opposite Secretariat,  
Silvassa – 396 230

**..... Appellant**

**VERSUS**

**1. NTPC – SAIL Power Company Limited**

NBCC Tower, 4<sup>th</sup> Floor, 15, Bhikaji Cama Place,  
New Delhi-110 066

**2. Central Electricity Regulatory Commission**

3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building,  
Janpath,  
New Delhi-110 001

**..... Respondents**

Counsel for the Appellant ... Ms. Swapna Seshadri  
Mr. Anand K. Ganesan  
Ms. Neha Garg  
Ms. Parichita Chowdhury

Counsel for the Respondent(s)... Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Mr. Shubham Arya for R-1  
  
Mr. K.S. Dhingra for R-2

## **J U D G M E N T**

### **PER HON'BLE JUSTICE N.K. PATIL, JUDICIAL MEMBER**

The DNH Power Distribution Corporation Limited (hereinafter referred to as the '**Appellant**') presented the instant Appeal under Section 111 of the Electricity Act, 2003, being aggrieved by the Order dated 03.02.2014 (hereinafter referred to as the '**Impugned Order**'), passed in Petition No. 145/MP/2013 on the file of the Central Electricity Regulatory Commission, New Delhi (in short "**Central Commission**") whereby, the Central Commission had dismissed the Appellant's petition claiming force-majeure condition in the purchase and off-take of electricity under the Power Purchase Agreement dated 18.12.2012 entered into between the Appellant and NTPC – SAIL Power Company Limited (in short, "**Respondent No.1**") for purchase of 25 Megawatt of electricity on account of non-availability of open access. The Appellant, further, sought to pass such other Order(s) and this Hon'ble Tribunal may deem just and proper in the interest of justice and equity.

#### **BRIEF FACTS OF THE CASE:**

1. The Respondent No.1 is a generating company having established a 500 Megawatt (2x250 Megawatt) generating station at Bhilai in the State of Chattisgarh. The Respondent No.1 is a joint venture company of NTPC Limited and Steel Authority of India Limited (SAIL). The generating station was established primarily for

the captive use of the Respondent No.1. Out of the total installed capacity, the Appellant has a total contracted capacity of 100 Megawatt on long term basis. The parties have entered into a Power Purchase Agreement dated 26.10.2007 for purchase by the Appellant on the contracted capacity of 100 Megawatt on long term basis be that as it may. Since, there was a surplus electricity which was not being used for the captive purposes of the Respondent No.1 for a temporary period, the Respondent No.1 proposed a change in the allocation and offered to sell up to 165.5 Megawatt a capacity on medium term basis to the Appellant, which was acceptable to the Appellant. For the purpose, the parties had entered into an Amendment Agreement dated 18.12.2012, providing for the terms and conditions for procurement of electricity on medium term basis for the period from 01.04.2013 to 31.05.2014. The parties had also previously signed various supplementary agreements between 06.01.2009 to 30.05.2011 and 10.10.2012 amending the terms of the Power Purchase Agreement and supply of certain quantum of electricity on short-term and medium term basis. This was in view of the fact that the Respondent No.1 had surplus power from time to time which was not being used for its captive purposes.

2. The medium term open access for 40.5 Megawatt was granted by the Western Regional Load Despatch Centre (WRLDC) to the

Appellant in the month of October, 2010. The said electricity was procured by the Appellant, on the terms and conditions contained in the said Agreement. However, for the 25 Megawatt, the open access was not granted in view of the non-availability of the transmission corridor and due to system constraints. The Appellant was prevented from performing its obligations under the Power Purchase Agreement dated 18.12.2012 for purchase of 25 Megawatt. However, the Respondent No.1 continued to claim capacity charges from the Appellant for such 25 Megawatt. Taking into consideration the facts and circumstances of the case, as stated above, the Appellant had filed a petition, being Petition No. 145/MP/2013 on the file of the Central Electricity Regulatory Commission, New Delhi seeking a declaration that the Appellant was not required to pay the tariff under the Agreement dated 18.12.2012 in view of the force-majeure situation that had arisen and the inability of the Appellant to procure electricity to the extent of 25 Megawatt capacity.

3. The Central Commission has rejected the petition filed by the Appellant on a hyper-technical ground. The point of passing of the title on the electricity was not even an issue relevant to the present dispute and without offering reasonable opportunity for filing a rejoinder to the reply filed by the Respondent No.1 to the main

petition and total gross violation of principle of natural justice. The Central Commission has erred in misdirecting the issues arising in the case to reject the claim of the Appellant. Therefore, it is a specific case for the Appellant that the Impugned Order dated 03.02.2014 passed in Petition No. 145/MP/2013 by the Central Electricity Regulatory Commission, New Delhi may be set-aside and the matter may stand remitted back to the Central Commission for reconsideration in accordance with law after offering reasonable opportunity of hearings to all the parties without going into merit of the case and in the interest of justice and equity presented in this Appeal.

**SUBMISSIONS MADE BY THE APPELLANT:**

4. The learned counsel appearing for the Appellant submitted that, on three pleadings supported by affidavits, (i) Affidavit filed before the Central Commission on 27.01.2014, (ii) Appeal filed before this Tribunal on 28.03.2014 and, (iii) Rejoinder filed to the reply of Respondent No.1, that the reply filed by the Respondent No.1 was not served on the Appellant. The Appellant, being a public utility and a responsible distribution company, has made these statements on affidavit. It is significant to note that no sincere effort has been made by the Respondent No.1 even in the Appellate Proceedings to show that the reply was served on the

Appellant and, therefore, vehemently submitted that the Respondent No.1 as well as the Central Commission are relying on certificate of posting of reply by speed post but have not produced any authentic acknowledgement as on date. It is the case of the learned counsel appearing for the Respondent No.1 that reply was sent by speed post to the Appellant. The Appellant was appearing through advocate before the Central Commission and the vakalatnama was on record. There was no occasion of service on any other person apart from the counsel representing the Appellant before the Central Electricity Regulatory Commission, New Delhi.

5. Further, the learned counsel appearing for the Appellant submitted that, during the course of the submissions, the learned counsel appearing for the Respondent No.1 had stated that it is a fact that reply copy of the main petition have not been served to the learned counsel, who represented the Appellant before the Central Commission. This may kindly be taken on judicial note for the fair statement made by the learned counsel appearing for the Respondent No.1. Further, she submitted that the learned counsel appearing for the Central Commission argued that there is a presumption of service under the General Clauses Act but the Central Commission, has not, as a statutory authority, ensured that the rules of natural justice of serving of pleadings has been

fulfilled. Further, she submitted that the learned counsel appearing for the Central Commission also argued that no prejudice has been caused to the Appellant since the Central Commission has given its own reasoning on passing the impugned order and not relied on the reply of the Respondent No.1. This is absolutely incorrect. Apart from the fact that the Central Commission has heavily relied on the reply of the Respondent No.1, therefore, the matter needs to be remanded to the Central Commission on this short issue alone leaving all contentions of the parties open in view of the judgment dated 14.11.2017 passed by this Tribunal in Appeal No. 285 of 2016 in the matter of DANS Energy Limited v. UERC & Anr., where it is held that *“..we observe that the Appellant has been deprived of opportunity by not serving the reply of UPCL to it and providing it the time to respond to the said reply. The application of the Appellant was merely rejected based on the reply filed by UPCL without providing appropriate opportunity for the Appellant to be heard...”*

6. Further, she placed reliance on the judgment of the Hon'ble Supreme Court of India in Dharampal Satyapal Limited v. Dy. Commission of Central Excise (2015) 8 SCC 519, wherein, it is stated that no prejudice being caused cannot be a ground for violation of the principles of natural justice. It is, further, submitted that, if the Central Commission had ensured the service

of the reply on the Appellant, all these issues would not have arisen. The matter was heard on 01.10.2017 when the first Respondent was given time to file their reply and, thereafter, rejoinder was to be filed by the Appellant. There was no further hearing provided for the Respondent was not in dispute.

7. The Appellant had never received a copy of the reply and as it was suggested in the hearing to find out a solution, the Appellant after waiting for reasonable time, filed the affidavit on 27.01.2014. Even this has not been considered by the Central Commission and, therefore, she submitted that the matter needs to be remanded on this count also. Further, she submitted that the learned counsel appearing for the Central Commission submitted that leave of the Central Commission was not sought for filing an additional affidavit. The Appellant was waiting for reply of the Respondent No.1 to file his rejoinder and, after reasonable time, no reply was received, the Appellant proceeded to file the affidavit. Where can there be a question of seeking leave in such a case will arise. The Appellant has only placed the facts on record that had arisen after the hearing in the matter before the Central Commission. Therefore, the submission made by the learned counsel for the Central Commission has also travelled beyond the order and sought to justify the same by expanding the scope of the order. Therefore,

she vehemently submitted that the impugned order passed by the Central Commission cannot be sustained on account of total gross violation of principles of natural justice. It is well settled law laid down by the Apex Court and by this Tribunal that any order passed by the appropriate authorities shall be in compliance of the principles of natural justice. Therefore, she submitted that the impugned order passed by the Central Commission may kindly be set-aside and the matter may stand remitted back to the Central Commission for fresh consideration and in accordance with law in the interest of justice and equity. All contentions of both the parties may kindly be left open.

**PER-CONTRA, SUBMISSIONS MADE BY THE RESPONDENTS:**

8. The learned counsel appearing for the first Respondent, *inter-alia*, contended and substantiated the impugned order passed by the Central Electricity Regulatory Commission, New Delhi strictly in consonance with the relevant provisions of the Act and Rules. There is no error or irregularity, as such, committed by the Central Commission while dismissing the petition filed by the Appellant on merits. The question of giving one more opportunity to the Appellant to make out a new case is not justifiable. Further, he submitted that the reliance placed by the Appellant on DANS Energy case is not applicable to the facts of the instant case. The

distinguishing feature in the present case is that the matter was heard by the Central Commission on 01.10.2013 with both parties addressing their respective arguments and the parties agreeing that the Respondent No.1 will place the reply subsequently. The reply filed placed on record, the submissions already made. No new ground was made in the reply by the Respondent No.1. Therefore, the reliance placed by the learned counsel for the Appellant has no assistance to substantiate the ground made out for remitting back the case for fresh consideration and, hence, not justifiable.

9. Further, to substantiate his stand, he placed the reliance on the judgments (AIR 1954 SC 44) in the case of Satybrata Ghosh v. Mugneeram Bangur, (1984) 4 SCC 410 in the case of State of A.P. v. Vallabhapuram Ravi and; (1986) 1 SCC 465 in the case of American Home Products Corporation v. Mac Laboratories (P) Ltd., etc. The law laid down in these cases taken into consideration, the Order passed by the Central Commission is sustainable in law.

10. Further, he submitted that with the plea of non-serving of the copy of reply to the Appellant taken before the Central Commission and the Central Commission's non-reliance on the stand taken by the Appellant in the reply and passing the order on the merit of the case, the question of remanding at this stage will not be justifiable.

Therefore, he submitted that interference by this Appellate Tribunal is not called for.

11. The learned counsel appearing for the Central Electricity Regulatory Commission, New Delhi (Respondent No.2) vehemently submitted that he has filed detailed written submissions, additional submissions and reply to the main petition. He specifically pointed out that the Impugned Order dated 03.02.2014 was already under circulation before the Central Commission and was at the stage of finalization of the Order by the Central Commission. At this stage, the Appellant filed an affidavit dated 27.01.2014. It is also relevant to state that during the period intervening between the date of filing the affidavit and the date of publishing the impugned order, 01.02.2014 and 02.02.2014, were closed holidays, being Saturday and Sunday, and it is not a case where the affidavit was not considered in the order published long after filing of the affidavit. The Appellant has not pointed out that any issue of consequence raised in the affidavit dated 27.01.2014, non-consideration of which has caused any prejudice to the Appellant.

12. Further, he submitted that no point requiring deeper or further consideration by the Central Commission, not raised in the petition filed by the Appellant, has been urged in the said affidavit. All the points raised in the petition were considered in the

impugned order by the Central Commission. Therefore, the grievance of the Appellant, based on the allegation of non-consideration of the affidavit dated 27.01.2014, does not have any legs to stand and also further reliance placed on the judgments of the Apex Court and of this Tribunal amply clarify that the matter has been decided on merit based on the pleadings available on record and interference of this Tribunal does not call for nor the Appellant has made any key ground as such to set-aside the matter and remanding the matter back for consideration is not justifiable at this stage.

13. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent Nos.1 and 2 at considerable length of time. We have carefully gone through the written submissions and additional written submissions filed by the respective counsel and the impugned order passed by the Central Electricity Regulatory Commission, New Delhi.

14. The only issue arise for our consideration in the instant case is as follows:

*Whether the impugned order dated 03.02.2014 passed in Petition No. 145/MP/2013 by the learned Central Electricity Regulatory Commission, New Delhi is sustainable in law on account of not following the principles of natural justice.*

15. What has emerged from the available record before us is whether the impugned order passed by the Central Electricity Regulatory Commission, New Delhi is sustainable in law on account of not offering reasonable opportunity for filing rejoinder to the reply filed by the first Respondent to the main petition. The specific ground has been pleaded by the Appellant in the Memo of Appeal that the Central Commission has failed to appreciate that the reply was never served by the first Respondent personally or through their counsel to the Appellant. It was, in these circumstances that the Appellant has been constrained to file its affidavit dated 27.01.2014 before the Central Commission but, unfortunately, the same has not been taken on record and the Central Commission has erroneously come to the conclusion on factual and legal aspect of the matter. Further, the bone contention of the learned counsel for the Appellant, as stated in three pleadings supported by the affidavit (i) Affidavit filed before the Central Commission on 27.01.2014, (ii) Appeal filed before this Tribunal on 28.03.2014 and, (iii) Rejoinder filed to the reply of Respondent No.1, is that, the reply filed by the Respondent No.1 was not served to the Appellant. The Appellant, being a public utility and responsible distribution company, has made three statements on sworn affidavit that no sincere efforts, as such, has been made by the Respondent No.1, even before the Appellate

proceedings, to show that the reply was duly served on the Appellant or the learned counsel appearing for the Appellant nor produced any authenticated acknowledgement till as on date.

16. Further, learned counsel for the Appellant vehemently submitted that, the learned counsel for the Respondent No.1 has fairly submitted that the reply affidavit to the petition has not been served to the counsel appearing for the Appellant before the Central Commission. If it is an undisputed fact in the instant case, which suffices to this Tribunal to set-aside the impugned order passed by the Central Electricity Regulatory Commission, New Delhi on account of gross violation of principles of natural justice. To enable the Appellant to make out the case on what circumstances they could not draw electricity of 25 Megawatt if the opportunity had been offered to the Appellant in a better position to substantiate and justify for not utilizing 25 Megawatt from the Respondent Company and also has rightly placed the judgment dated 14.11.2017 passed by this Tribunal in Appeal No. 285 of 2016 in the matter of DANS Energy Limited v. UERC & Anr. wherein this Tribunal after following the judgment of Hon'ble Supreme Court of India has held that if the reply is taken on record and petition is decided after dealing with it, as has been done in this case, it amounts to unfair treatment being given to the Appellant, because

the Appellant has not been given time and opportunity to file rejoinder to the same. Hence, although the Appellant was heard but it was deprived of time and opportunity to counter the reply of UPCL. It is also not understood why the Commission was in such a hurry that it issued the impugned order without offering opportunity to the Appellant. Admittedly, in the instant case also, the Central Commission has committed grave error committing miscarriage of justice without following the well settled law laid down by the Apex Court, High Court and this Tribunal. Further, it is held that if any impugned order passed by the Competent Authorities is found to be in total gross violation of principle of natural justice, such order cannot be sustained at any stretch of imagination. In view of the law laid down by this Tribunal in the case of *DANS Energy Limited v. UERC & Anr.* dated 14.11.2017 passed in Appeal No. 285 of 2016, and also judgment of the Apex Court reported in (2015) 8 SCC 519 in the case of *Dharampal Satyapal Limited v. Dy. Commission of Central Excise*, wherein it is categorically held that no prejudice being caused cannot be a ground for violation of the principles of natural justice. Taking into consideration the legal and factual aspects in the instant case, we are of the considered view that the impugned order cannot be sustained and liable to be set-aside and the matter requires reconsideration in accordance with law.

17. We are of the considered view that the matter requires reconsideration by the Central Commission afresh as stated in the above paragraphs. Therefore, we do not propose to consider the other grounds urged by the learned counsel for the Appellant as well as the learned counsel for the Respondents in their respective written submissions, additional submissions and reliance placed by the respective counsel to substantiate their stand in the grounds urged in the appeal memo, written submissions, additional written submissions and rejoinders. If we consider the stand taken by the respective counsel, it will prejudice the stand to be taken before the Central Commission by the respective counsel. Therefore, we do not want to express any opinion on merits and demerits of the case on the stand taken by the respective counsel on the other grounds urged in the instant Appeal at this stage.

### **ORDER**

18. For the above foregoing reasons, at supra, the instant Appeal, being Appeal No. 92 of 2014 filed by the Appellant is allowed. The impugned Order dated 03.02.2014 passed in Petition No. 145/MP/2013 by the Central Electricity Regulatory Commission, New Delhi is hereby set-aside. The matter stands remanded back to the Central Electricity Regulatory Commission, New Delhi to reconsider the matter afresh and pass appropriate order in

accordance with law after offering reasonable opportunity of hearing to the Appellant and the Respondent No.1 and dispose of the matter as expeditiously as possible at any rate within a period of six months from the date of the appearance of the parties before the Central Electricity Regulatory Commission, New Delhi.

19. All the contentions of the Appellant and the Respondents are kept open.

20. The Appellant and the Respondent No. 1 are directed to appear before the Central Electricity Regulatory Commission, New Delhi personally or through their counsel without notice from the Central Electricity Regulatory Commission, New Delhi on 16.01.2018 to enable them to collect necessary date of hearing.

**PRONOUNCED IN THE OPEN COURT ON THIS 04<sup>TH</sup> DAY OF JANUARY, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE/ ✓ NON-REPORTABLE**

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