

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA NO. 123 of 2018
in
APPEAL NO. 147 OF 2017**

Dated: 19th February, 2018

**Present: Hon'ble Mr. I. J. Kapoor, Technical Member
Hon'ble Mr. Justice N. K. Patil, Judicial Member**

In the matter of:

Power Grid Corporation of India Ltd.

.... Appellant(s)

Vs.

Central Electricity Regulatory Commission & Ors.

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Rhea Lurthra

Counsel for the Respondent(s) : Mr. S. Vallinayagam for R-5

ORDER

The case of the Appellant in the instant application is that the principal issue raised by the Appellant in the instant appeal is whether the Central Commission can refuse to recognize the Revised Cost Estimates (for short 'RCE') towards the LILO of existing Bangalore-Salem 400 Kv s/c line at Hosur under system strengthening – XVIII in Southern Regional

Grid in the 2009-2014 tariff period because of some delay in filing the RCE before the Central Commission. The ground raised by the Appellant is that the additional capital cost has been validly incurred by it and recognized in the RCE. The assets in question are giving service to the beneficiaries. In such a situation, merely because of the delay in submitting the RCE, the Central Commission cannot deny the capital cost to the Appellant. When the things stood thus, the Appellant came to know that in some other matters of the same nature, the Central Commission had decided the very same issue in a different manner. Therefore, the Appellant has filed IA No. 1035 of 2017 before this Hon'ble Tribunal praying for the following reliefs:

“a) Remand the matter back to the Central commission for reconsideration in view of the subsequent order dated 28.09.2017 having been passed by the Central Commission.

b) Pass any such further order (s) as this Hon'ble Tribunal may deem fit in the facts of the present case.”

2. The above said application came up for consideration before this Tribunal on 10.01.2018. On instructions learned counsel appearing for the Appellant made a statement on 10.01.2018 that the appeal could be permitted to be withdrawn subject to granting of liberty to approach the Central Commission by way of Review Petition. Learned counsel for the

Appellant has also placed reliance on the orders dated 01.12.2017 and 02.01.2018 passed by this Hon'ble Tribunal on the similar lines and sought the very same liberty in this appeal also. However, learned counsel for Respondent No.5 has objected for grant of the said relief.

3. After hearing learned counsel for the parties, this Tribunal on 10.01.2018 has passed the order permitting the Appellant to withdraw the Appeal observing that it is open to the Appellant to take appropriate steps as available to it in law.

4. Further it is the case of the Appellant that as per Order 47 of Civil Procedure Code, 1908, a review cannot be preferred against an order which has already been appealed before this Hon'ble Tribunal. Therefore, without the liberty of this Hon'ble Tribunal, law may not permit the Appellant to file a Review Petition before the Central Commission when the appeal filed by the Appellant is pending for adjudication before this Hon'ble Tribunal. It was for this purpose that the Appellant had sought the liberty under IA No. 1035 of 2017 to enable him to withdraw the appeal and file a Review Petition before the Central Commission.

5. It is further the case of the Appellant that upon perusal of the order dated 10.01.2018 uploaded on the web-site of this Hon'ble Tribunal, the learned counsel for the Appellant on 17.01.2018 has brought to the notice of this Tribunal that the earlier orders dated 01.12.2017 and 02.01.2018 passed by this Tribunal in similar matters have inadvertently not been considered while passing the order dated 10.01.2018 in IA No. 1035 of 2017. This Tribunal has orally observed that the Appellant shall make necessary application seeking appropriate order/relief for the recall of the order dated 10.01.2018. Accordingly, the Appellant has filed the instant application seeking relief as follows:

“(a) Recall the order dated 10.01.2018 passed by this Hon'ble Tribunal in the present appeal and permit the Appellant/Applicant to withdraw the appeal with the liberty to file a review against the order dated 30.08.2016 passed by the Central Commission in Petition No. 98/TT/2016;

(b) Pass any such further order(s) as deemed fit.”

6. Learned counsel appearing for the Appellant to substantiate his contentions made in the instant application, has placed reliance on the orders dated 01.12.2017 and 02.01.2018 passed by this Hon'ble Tribunal in similar matters and also on the Judgment of the Apex Court in **JET PLY WOOD (PD) LTD AND ANOTHER Vs. MADHUKAR NOWLAKHA AND**

OTHERS¹ and specifically taken us through paragraph Nos. 24 and 25 and vehemently submitted that this Tribunal can exercise inherent powers envisaged under Section 121 of the Electricity Act, 2003. It is stated that this Hon'ble Tribunal would not be powerless to set aside the order permitting the withdrawal of the Appeal and dispose the same reserving liberty to the Appellant to file a Review Petition. Therefore, he submitted that the order dated 10.01.2018 passed by this Tribunal may kindly be recalled and the Appellant may be permitted to withdraw the appeal reserving the liberty to file Review Petition within two weeks from the date of receipt of this order.

7. Per contra, Mr. Vallinayagam, learned counsel appearing for Respondent No.5, *inter alia*, contended and vehemently submitted that, the instant application filed by the Appellant is liable to be dismissed as mis-conceived and there is no justification or any valid ground as such made out by the Appellant to consider the relief sought in the instant application and that the impugned order passed by the Central commission is in accordance with law. When the statutory period of 45 days has been given to the party to file Review Petition, not choosing to file the Review

¹ 2006 (3) SCC 699

Petition within the limitation period the Appellant has taken a conscious decision to file the present appeal. He further submitted that the prayer seeking the liberty to file Review Petition before the Central Commission is barred by Order 2 Rule 2 of CPC. The Appellant cannot seek the relief of recalling the order dated 10.01.2018 because this Hon'ble Tribunal had already granted permission to the Appellant to withdraw the appeal but did not grant the liberty to file the Review Petition before the Central commission. Learned counsel further stated that it is well settled under CPC that if a prayer is sought and not granted, the same is deemed to have been rejected. The Appellant was aware of the fact that it is the discretion of this Hon'ble Tribunal to grant all the reliefs sought for by the Appellant. This Hon'ble Tribunal has rightly justified in granting the relief as entitled. He further submitted that the order dated 10.01.2018 passed by this Hon'ble Tribunal had attained finality and the remedy available to the Appellant is to file an appeal to get the order dated 10.01.2018 set aside under Section 125 of the Electricity Act, 2003. Therefore, the prayer sought by the Appellant in the instant application itself is an abuse of process of law. Law does not permit remand and reconsideration of the order impugned in the appeal, on the basis of an order passed in some other proceedings, after passing of the impugned order under challenge in this

appeal. Therefore he submitted that the application filed by the Appellant for recall of the order dated 10.01.2018 may be dismissed. To substantiate his contentions, he placed reliance on the Judgment of this Tribunal in **AJMER VIDYUT VITRAN NIGAM LIMITED Vs. RAJASTHAN STATE ELECTRICITY REGULATORY COMMISSION & ANR.**² ; another judgment in **SATYA JAIN (DEAD) AND OTHERS Vs. ANIS AHMED RUSHDIE (DEAD) THROUGH LRS. AND ORS.**³ and also the judgment in the case of **BOARD OF TRUSTEES OF THE PORT OF CALCUTTA Vs. TUSHAR KANTI MAITY**⁴. It is submitted that in view of these judgments and in the light of the observations made in these cases, the instant application filed by the Appellant may be dismissed with costs.

8. We have heard Mr. Anand K. Ganesan, learned counsel appearing for the Appellant and Mr. Vallinayagam, learned counsel appearing for Respondent No.5 for considerable length of time. We have gone through carefully the grounds urged by the Appellant in the instant application and objection taken by the Respondent No.5 and also gone through the judgments relied by learned counsel for both the parties. What is emerged is that this matter has come up for consideration on 10.01.2018 before this

² 2013 SCC Online APTEL 60

³ (2013)8 SCC 147

⁴ (2010) 93 AIC 766 (Cal)

Hon'ble Tribunal. On 10.01.2018, we have passed the order, which reads as follows:

“On instructions, learned counsel appearing for the Appellant states that the Appellant wants to withdraw this appeal with the liberty to file Review Petition before the Central Commission.

Mr. Vallinayagam, learned counsel for Respondent No.5 has strenuously opposed the said prayer of granting liberty to the Appellant to file Review Petition before the Central Commission.

In the circumstances, we permit the Appellant to withdraw the appeal. Accordingly, the appeal is disposed of as withdrawn. It is open to the Appellant to take appropriate steps as available to it in law.”

9. It is significant to note the statement of learned counsel for the Appellant that he placed reliance on orders dated 01.12.2017 and 02.01.2018 passed by this Hon'ble Tribunal and requested to pass an order on similar lines and sought to withdraw the appeal with the liberty to file a Review Petition is not in dispute. The said statement was opposed by Respondent No.5 is also not in dispute. However, taking into consideration the peculiar facts and circumstances as stated above and also on perusal of the orders dated 01.12.2017 and 02.01.2018 passed by this Hon'ble Tribunal, we note that in the instant case the principal ground raised by the

Appellant is that the additional capital cost has been validly incurred by it and recognized in the RCE. The assets in question are giving service to the beneficiaries. In such a situation, merely because of the delay in submitting the RCE, the Central Commission cannot deny the capital cost to the Appellant being public sector undertaking. It is also rightly pointed out by learned counsel for the Appellant that in other similarly situated matters, the Central Commission has dealt with the very same issue in a different manner, therefore, the Appellant wants to withdraw the appeal with the liberty to file Review Petition before the Central Commission to persuade the Central Commission to pass the same order which was passed in other similarly situated matters. Nowhere this course prejudices the rights of the Respondents and in fact the Respondents will get one more opportunity to oppose the relief which may be sought in the Review Petition.

10. Reliance placed by learned counsel for Respondent No.5 Mr. Vallinayagam and the law laid down by the Apex Court in those judgments are not in dispute. However, the ratio of the Judgment of those cases is not applicable to the facts of this case.

11. Having regard to the facts and circumstances as stated supra and keeping the fact in mind that when the CPC is silent regarding a procedural aspect, the inherent powers of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties as held by the Apex Court in **JET PLY WOOD (P) LTD AND ANOTHER's case**, and also the observation made in the said judgment that the Court would not be powerless to set aside the order permitting withdrawal of the suit, we are of the opinion that granting permission to the Appellant to withdraw the appeal with the liberty to file Review Petition, in the interest of justice and equity, in exercise of powers as envisaged under Section 121 of the Electricity Act, 2003, will be just and proper to safeguard the interest of both the parties. Further, such grant of liberty to the Appellant to file Review Petition before the Central Commission does not prejudice the rights of Respondent No.5. It is very much open to him to make out his case before the Central Commission in the Review Petition.

12. For the foregoing reasons, the instant application filed by the Appellant seeking recall of the order dated 10.01.2018 is allowed. Accordingly, the order dated 10.01.2018 passed by this Hon'ble Tribunal is recalled. The Appeal No. 147 of 2017 is disposed of as withdrawn giving

liberty to the Appellant to file the Review Petition before the Central Commission within a period of two weeks from the date of receipt of this order. Needless to say that all the contentions raised by both the parties are left open.

(Justice N. K. Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

Reportable