

In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal Nos. 185 of 2013 and 264 of 2013

Dated: 29th April, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Appeal No. 185 of 2013

Bhaskar Shrachi Alloys Ltd.
8/1, Middleton Row, 3rd Floor,
Kolkata – 700 071

... Appellant(s)

Versus

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

2. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata – 700 054

... Respondent(s)

Counsel for the Appellant(s) : Mr. Rajiv Yadav, Mr. Rahul Chouhan,
Mr. Siddharth Sharma, Mr. Shahbaz
Ahmad

Counsel for the Respondent(s) : Mr. K. S. Dhingra for R.1
Mr. M. G. Ramachandran,
Mr. Shubham Arya, Ms. Anushree
Bardhan, Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan for R.2

Appeal No. 264 of 2013

Steel Authority of India Ltd.
Regd. Office :
Ispat Bhawan, Lodhi Road,
New Delhi

... Appellant(s)

Versus

1. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata – 700 054

**2. The Chairman,
Damodar Valley Corporation**

DVC Towers, VIP Road,
Kolkata – 700 054

3. Central Electricity Regulatory Commission

Through its Chairman

3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi – 110 001

... Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.,
Mr. Rajiv Ranjan, Mr. Rajiv Shankar
Dwivedi, Mr. Yashovardhan,
Mr. Sushant. Kr. Sarkar, Advs.
Ms. Tulika Mukherjee,
Mr. Ajay Kumar, DGM, Mr. Bajpayi,
Mr.S. Bharwatiya, Reps.

Counsel for the Respondent(s) : Mr. M. G. Ramachandran,
Mr. Arvind Kumar Dubey,
Ms. Swagatika Sahoo, Ms. Ranjitha
Ramachandran, Ms. Anushree
Bardhan, Mr. Shubham Arya,
Ms. Poorva Saigal for DVC, R.1
Mr. Saurabh Mishra for R.6

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

Both these appeals have emanated from a common order dated 08.05.2013 (***Impugned Order***), passed by the Learned Central Electricity Regulatory Commission (***Central Commission***) in Petition No.272 of 2010 in the matter of determination of deferred elements of tariff for generation and inter-State transmission of electricity in respect of Damodar Valley Corporation (***DVC***) for the period 01.04.2006 to 31.03.2009, whereby the learned Central Commission has allowed the additional capitalization for the period 2004-05 and 2005-06.

2) The grievances of the appellants in these appeals are stated as under:

- i) That the Central Commission has wrongly allowed additional capitalization for the period of 2004-05 and 2005-06 when the same had already been granted in terms of the order dated 06.08.2009 of the Central Commission and confirmed by this Appellate Tribunal in its judgment dated 10.05.2010. The additional claim was barred by the

principle of estoppels and/or *res judicata*. The Civil Appeal No.4881 of 2010 has been filed by Respondent No.2 against the Appellate Tribunal's order dated 10.05.2010 before the Hon'ble Supreme Court but the Hon'ble Supreme Court had not stayed the operation of the judgment dated 10.05.2010 passed by this Appellate Tribunal.

- ii) That the Central Commission has wrongly allowed additional capitalization for generating units in view of the fact that firstly, in terms of its order dated 06.08.2009, the deferral was only with respect to the asset under transmission and secondly, the said claim was made after the relevant period was over and hence allowing the same is contrary to Regulation 18(4) of the CERC (Terms and Conditions of Tariff) Regulations 2004 (hereinafter referred to as **Tariff Regulations 2004**), which provision has wrongly been relied on by the Central Commission because the provision to claim additional capitalization twice in a tariff period does not mean that the same claim, which had been claimed and disallowed can be claimed again. Thirdly, the Central Commission has wrongly allowed the additional capitalization for a period 2006-09 without conducting any prudence check or providing reasons or basis for allowing the same.
- iii) The Central Commission has wrongly permitted recovery of pension and gratuity fund contribution firstly in the absence of a complete actuarial report, without station-wise figures and thirdly without factoring in income accrued from the trust and treatment of interest of trust fund.
- iv) The Central Commission has wrongly allowed enhanced Operation and Maintenance expenses (**O&M expenses**) when :
 - a) alleged pay revision has been allowed without conducting prudence check of the actual station-wise cost towards employees. While Charges are to be approved for each generating station as the recovery is linked to station-wise availability factor but the Ld. Central Commission allowed a pass through recovery of claims of pay revision of employees not connected to power division of Respondent No.2, without apportioning the head-office expenses into power, irrigation and flood control.

- b) Neither did the Petition filed by Respondent No.2 nor the notices issued by the Ld. Central Commission or any of the records or proceedings put the consumers/interested parties to notice regarding the tariff of Respondent No.2 under various heads of claims by Respondent No.2 related to new element of O&M expenses for which Ld. Central Commission was considering revising the normative levels of O&M expenses. As such, the appellants were never given effective or reasonable opportunity to evaluate and submit their position on these additional claims. The Ld. Central Commission has violated and ignored the finding given by this Appellate Tribunal at paragraph 94 and 95 of its judgment dated 10.05.2010.
- v) The Central Commission has wrongly allowed the relaxation in O&M norms and the expenses towards the same in the absence of a proper notice to the objectors to afford them any opportunity to present their views and without giving sound reasons for allowing the relaxation which is clear violation of principle of natural justice and Tariff Regulations. In passing the Impugned Order, the Central Commission has completely disregarded the principles of prudence check and transparency which is enshrined in the Tariff Regulations and also upheld by this Appellate Tribunal in catena of judgments.
- 3) The appellant, Bhaskar Shraichi Alloys Ltd., of Appeal No. 185 of 2013 is a company primarily engaged in ferro-alloy and/or iron and steel industry and is a high tension consumer of the respondent No.2. The appellant, namely Steel Authority of India Ltd. (hereinafter referred to as **SAIL**) of appeal No.264 of 2013, is a Government of India Company registered under Indian Companies Act 1956 having its units at Bokaro (Bokaro Steel Plant), Jharkhand (Bokaro Steel Plant) known as BSP, Burnpur, West Bengal known as ISP and Durgapur known as DSP. While BSL is a distribution licensee, apart from being a bulk consumer, ISP and DSP are only bulk consumers. SAIL, as such, is a beneficiary of DVC as per the CERC Regulations.
- 4) The respondent, Central Electricity Regulatory Commission, is an electricity regulator which is empowered to perform various functions and discharge duties provided under various sections of the Electricity Act, 2003. Respondent DVC is a statutory body constituted under the provisions of the Damodar Valley

Corporation Act 1948 (hereinafter referred to as **DVC Act**). DVC is a statutory corporation with participation from Central Government, Government of West Bengal and Government of Jharkhand. DVC is a generating company having a number of generating stations in the States of West Bengal and Jharkhand and is vertically integrated unit having its own generation, transmission and distribution in the identified common area under the DVC Act. Thus DVC is also a deemed licensee under 4th proviso to Section 14 of the Electricity Act, 2003.

- 5) The relevant facts for the purpose of deciding these appeals are as under:
 - 5.1) That the DVC used to determine its own tariff under Section 20 of DVC Act before 10.06.2003. On 10.06.2003, the Electricity Act, 2003 came into force and under section 14, 4th proviso of which, DVC became a deemed licensee under the Electricity Act, 2003, though obliged to, DVC, respondent herein, did not apply to the Central Commission for determination of its own tariff.
 - 5.2) That in the year 2004, the learned Central Commission initiated *suo moto* proceedings being Petition No.168 of 2004 against the respondent No.2 (DVC) vide order dated 29.03.2005, the Central Commission directed DVC to submit its application for approval of tariff w.e.f. 01.04.2004.
 - 5.3) Consequently, DVC filed its Petition No.66 of 2005 on 08.06.2005 before the Central Commission for determination of tariff for the period 01.04.2004 to 31.03.2009. During the hearing of the said Petition No.66 of 2005, various consumers of DVC filed intervention applications for allowing them to file their objections/submissions. On 03.10.2006, the Central Commission disposed of Petition No.66 of 2005 and made the tariff so determined applicable only from 2006 to 2009.
 - 5.4) That Appeal Nos. 271 and 272 of 2006 were filed in November, 2006 against the Central Commission's order dated 03.10.2006 by some consumers of the DVC including the appellant before the Appellate Tribunal challenging the tariff order dated 03.10.2006.
 - 5.5) That on 06.10.2006, the DVC also filed Appeal No.273 of 2006 challenging the same order dated 03.10.2006 of the Central Commission.
 - 5.6) That this Appellate Tribunal vide limited remand order dated 23.11.2007 allowed the Appeal No.273 of 2006, filed by DVC, on following five issues:

- i) Additional capitalization for the period 2004-05 and 2005-06;
- ii) Pension and Gratuity contribution
- iii) Revenue to be allowed to Respondent No.2 under the DVC Act
- iv) Operation and Maintenance expenses
- v) Debt Equity Ratio

5.7) That the appellant filed Civil Appeal No.971-973 of 2008 on 21.01.2008 before the Hon'ble Supreme Court against this Appellate Tribunal's limited remand order dated 23.11.2007. The judgment dated 23.11.2007 of this Appellate Tribunal had been challenged by the appellant, Bhaskar Shrachhi Alloys Ltd, in Civil Appeal No.971-973 of 2008 before the Hon'ble Supreme Court which are pending disposal.

5.8) That the Central Commission in compliance of the limited remand order of this Appellate Tribunal passed the revised tariff order on 06.08.2009 against which the DVC filed Appeal No.146 of 2009 before this Appellate Tribunal. This Appellate Tribunal, vide judgment dated 10.05.2010, dismissed the Appeal No.146 of 2009, filed by the respondent DVC, against which DVC preferred Civil Appeal No.4881 of 2010 before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 09.07.2010 stayed the refund of the excess amount collected by the respondent DVC till final disposal of the appeal. However, the judgment dated 10.05.2010 of this Appellate Tribunal was not stayed by the Hon'ble Supreme Court.

5.9) That with respect to the issue of additional capitalization for FY 2004-06, this Appellate Tribunal in its judgment dated 23.11.2007 in Appeal Nos. 271, 272, 273 and 275 of 2007 and Appeal No. 8 of 2007 remanded the matter to the Central Commission 'for *de novo*' consideration of the tariff order dated 03.10.2006 in terms of findings and observations made in the Appellate Tribunal's judgment while partly allowing the Appeal No.273 of 2006, filed by DVC.

5.10) This Appellate Tribunal in judgment dated 23.11.2007 with respect to the issue of additional capitalization for FY 2004-06 had observed as under:

"The Central Commission at para 50 of the impugned Order has observed that 'the Petitioner - Corporation has not claimed any additional capitalization for the period 2004-09.' However, the records submitted

by the Appellant show that a sum of Rs.767.45 crores and Rs.181.14 crores have been shown to be capitalized during 2004-05 and 2005-06 respectively. In order to get the relief on this account, the Appellant may bring out the above omission on the notice of the Central Commission who may appropriately dispose of the matter in terms of Law. The appeal is, accordingly, allowed on this count.”

- 5.11) That in the light of the remand order vide judgment dated 23.11.2007, passed by this Appellate Tribunal, the tariff determination proceedings were revived before the Central Commission in Petition No.66 of 2005 and revised tariff order dated 06.08.2009 (2nd tariff order) came to be passed whereby the Central Commission dealt, *inter alia*, with the issue of additional capitalization for FY 2004-06. It may be mentioned here that when the said Petition No.66 of 2005 was revived before the Central Commission, DVC filed Interlocutory Application No.19 of 2009 before the Central Commission, seeking recovery of additional capitalization for FY 2006-09, additional O&M expenses and utilities towards employee cost on account of pay revision, Pension and Gratuity contribution apart from claiming the additional capitalization for FY 2004-06 in the remand proceedings. Since the remand proceedings were confined to the afore said five issues specified in the judgment dated 23.11.2007, passed by this Appellate Tribunal, the learned Central Commission declined to entertain the Interlocutory Application No.19 of 2009, with the following observations:

“14. The claim of the petitioner for additional capital expenditure for the period 2006-09 is outside the scope of the Appellate Tribunal in which directions have been issued to consider the order dated 3.10.2006 de novo to the extent indicated in the judgment. Accordingly, we have decided to confine our consideration of the issues earlier decided in our order dated 3.10.2006 in the light of the observations of the Appellate Tribunal. The petitioner is allowed liberty to approach the Commission through an appropriate application for consideration of any additional issues which would be considered in accordance with Law. With the said observation, the interlocutory application is disposed of.”

- 5.12) Thus the Central Commission had deferred the recovery of certain cost elements including DVC's claim for additional capitalization for FY 2006-09 by granting liberty to DVC to file a separate petition. The DVC, in pursuance to

the said liberty granted by the Central Commission, filed Impugned Petition No.272 of 2010 before the Central Commission.

- 5.13) That on 11.10.2010 Impugned Petition No.272 of 2010 was filed by the respondent, DVC before the Central Commission for determination of deferred elements of tariff for the period 01.04.2006 to 31.03.2009 under Section 79(1)(a) of the Electricity Act, 2003, read with applicable provisions of the Tariff Regulations 2004.
- 5.14) That the learned Central Commission, by Impugned Order dated 08.05.2013 has decided the Impugned Petition hence, the present appeals.
- 6) We have heard Mr. Rajiv Yadav, Mr. Rahul Chouhan for the appellant, Mr.K.S. Dhingra for R.1, Mr. M. G. Ramachandran for R.2 in A.No.185 of 2013, Mr.Sanjay Sen, Sr. Adv., for appellant and Mr.M.G. Ramachandran, for DVC, R.1 and Mr. Saurabh Mishra for R.6 in Appeal No.264 of 2013. We have also gone through the written submissions submitted by rival parties and also gone through the material on record including the Impugned Order passed by the State Commission.
- 7) The following issues arise for our consideration:
- (A) Whether the learned Central Commission has wrongly allowed additional capitalization for the period 2004-05 and 2005-06, when the same had already been granted in terms of the order dated 06.08.2009 passed by the Central Commission and confirmed by this Appellate Tribunal vide judgment dated 10.05.2010?
- (B) Whether the Central Commission has wrongly allowed additional capitalization for generating units in view of the fact that in terms of its order dated 06.08.2009, particularly when the deferral was only with respect to assets under the transmission (A-N) and the claim was made after the relevant period was over and the claim was allowed contrary to Regulation 18(4) of the Tariff Regulations 2004.
- (C) Whether the Central Commission was correct in allowing the additional capitalization for the period 2006-09 without conducting prudence check without providing basis or reasons for allowing the same?

- (D) Whether the learned Central Commission has wrongly allowed enhanced O&M expenses?
- (E) Whether the learned Central Commission has erred in allowing pension and gratuity?
- 8) **Issue No.(A), (B) & (C)**- relating to additional capitalization for FY 2004-05 & 2005-06, whether the Central Commission has wrongly allowed additional capitalization and whether the Central Commission was correct in allowing the additional capitalization for the period 2006-09 without conducting prudence check:

Since all these issues are inter connected, we are taking them up and deciding them together. On these issues, following contentions are made by the appellants:

- 8.1) That the learned Central Commission has erred in allowing additional capitalization for FY 2004-06 after the same had been consequently disallowed vide revised order dated 06.08.2009.
- 8.2) That the revised order dated 06.08.2009 had attained finality because the learned Central Commission had disallowed various elements of capital cost (pertaining to generation assets vide revised tariff order dated 06.08.2009). The said disallowance had, admittedly, not been impugned by DVC in Appeal No.146 of 2009 and hence the same had attained finality.
- 8.3) That with respect to capital finalization for FY 2004-06 this Appellate Tribunal in judgment dated 10.05.2010 held in para 60 thereof that additional capitalization for FY 2004-06 and 2005-06 were actually considered by Central Commission and allowed and with regard to these findings about additional capitalization in respect of these years the appellant had not urged any ground challenging the same.
- 8.4) That in spite of the fact that the order dated 06.08.2009 of CERC having attained finality, the DVC once again sought admission of such capital cost elements and the learned Central Commission proceeded to allow the DVC's previously rejected claim on account of additional capitalization for FY 2004-06. Thus the admission of said additional capitalization for FY 2004-06 is opposed to the principle of *res-judicata* because the revised tariff order dated 06.08.2009 had become final after disposal of Appeal No.146 of 2009 by this Appellate

Tribunal vide judgment dated 10.05.2010 in which this Appellate Tribunal had not only upheld the revised tariff order dated 06.08.2009 but had, in fact, directed the Central Commission to implement the tariff fixed there under.

- 8.5) That the Central Commission has erroneously observed in paragraph 20(b) of the Impugned Order that the subject Petition had been filed pursuant to this Appellate Tribunal's judgment dated 10.05.2010 and the said observation of the Central Commission has been for the purpose of belatedly entertaining DVC's claim for additional capitalization for FY 2004-06. There is nothing in the judgment dated 10.05.2010 of this Appellate Tribunal like entitling DVC to approach the Central Commission for agitating its claims for additional capitalization after the same had been rejected vide order dated 06.08.2009. This Appellate Tribunal observed that DVC had not challenged the decision of CERC with respect to additional capitalization for FY 2004-06. Further, by directing Central Commission to implement the tariff as determined vide order dated 06.08.2009 by the Central Commission, this Appellate Tribunal had stamped its approval on the said revised tariff order dated 06.08.2009 and the same was liable to be complied with for FY 2004-06.
- 8.6) That this Appellate Tribunal in paragraphs 50 and 51 of its judgment dated 10.05.2010, had only endorsed the liberty granted by the Central Commission to DVC to press its claim on account of additional capitalization for FY 2006-09 by filing a separate petition as it would not cover the remand order. This Appellate Tribunal never entitled the DVC to re-agitate its previously disallowed claims pertaining to FY 2004-06. Hence, the learned Central Commission ought not to have entertained DVC's claim for FY 2004-06 after expiry of the tariff period *de hors* the embargo imposed by Regulation 18(4).
- 8.7) That the learned Central Commission while dealing with firefighting equipment has allowed a sum of Rs.8.89 Lac on account of fire fighting system, even though the same had not been claimed in Original Petition No.66 of 2005. Hence, the firefighting equipment would qualify as "*minor items/assets*" within the meaning of Regulation 18(3) and the same was inadmissible for tariff determination.
- 8.8) That the Central Commission had erroneously observed in the Impugned Order that *the plea of res judicata cannot be strictly applied in case of tariff determination*. Hence, refusal of the Central Commission to adhere to the

principle of *res judicata* is opposed to the established legal position as held in ***State of West Bengal Vs. Hemant Kumar Bhattacharjee AIR 1966 SC 1061*** and in ***R. Unnikrishnan V. Vs. V. K. Mahanudevan (2014) 4 SCC 434***.

- 8.9) That the DVC was *estopped* from raising the same issue of admissibility of disallowed capital cost element by CERC in subsequent proceedings before the same Forum (Petition No.272 of 2010). The settled law on the point is that if such an issue is decided against a person, he would be estopped from raising the same issue in the latter proceedings.
- 8.10) That in the revised tariff order dated 06.08.2009, the Central Commission, while dealing with additional capitalization towards transmission assets, disallowed a sum of Rs.26.94 Lacs and Rs.217.98 Lacs for FY 2004-05 and FY 2005-06, respectively. As DVC had not been able to clarify whether the cost of the assets were recovered from the respective customers. However, DVC was granted liberty to claim the said amounts in accordance with law, after proper justification.
- 8.11) That the Impugned Order does not discuss on the cost of capital assets recovered from the consumers. Instead, a sum of Rs.2711.53 Lacs (for FY 2004-05) and Rs.9431.79 Lacs (for FY 2005-06) has been admitted by the Central Commission in the Impugned Order without specifying any reason therefore. The DVC has been allowed capital cost in respect of transmission lines, from sub-station to the premises of HT consumers, funded by HT consumers.
- 9) **Per contra**, following are the contentions raised on behalf of the respondent, DVC:
- 9.1) That the Central Commission vide order dated 06.08.2009 in the *de novo* proceedings decided the matter as per the decision dated 23.11.2007 of this Appellate Tribunal. The Central Commission in its revised tariff order dated 06.08.2009 held that the claim of the petitioner for additional expenditure for the period 2006-09 is outside the scope of the judgment of this Appellate Tribunal in which directions were issued to consider the order dated 03.10.2006 *de novo* to the extent indicated therein. Hence, the Central Commission considered the direction of this Appellate Tribunal. The Central Commission has allowed liberty to DVC to approach the Commission through an appropriate application for consideration of any additional capitalization

which would be considered in accordance with law. This Appellate Tribunal in judgment dated 23.11.2007 contained a specific direction for provision of escalation of the O&M expenses of thermal generating stations as it was not considered by the Commission in its order dated 03.10.2006 (main tariff order). Hence, the DVC's claim of O&M expenses based on actual expenses would not be entertained because the directions given by this Appellate Tribunal were to consider the same *de novo*.

- 9.2) That in the order dated 06.08.2009 (revised tariff order), the Central Commission did not consider some of the aspects of additional capitalization claimed by DVC for the FY 2004-05 and 2005-06 for want of proper justification and aggrieved thereby against the order dated 06.08.2009 of the Central Commission, DVC had filed an appeal being Appeal No.146 of 2009 before this Appellate Tribunal, which was decided vide judgment dated 10.05.2010 of this Appellate Tribunal where this Appellate Tribunal held that the Central Commission correctly did not consider the additional capitalization for the years 2006-09 as the same were out of scope of limited Remand Order dated 23.11.2007 and as per the Remand Order, the Central Commission was to consider additional capitalization in respect of FY 2004-05 and 2005-06 only and not in respect of period from 2006-09.
- 9.3) That in the circumstances, DVC filed Petition No.272 of 2010 (Impugned Petition) on 11.10.2010 for determination of those aspects of tariff relating to the period 2006-09 deferred for consideration or otherwise not considered by the Central Commission in its revised tariff order dated 03.10.2006. The Central Commission has passed the Impugned Order dated 08.05.2013 while determining the deferred elements of tariff for DVC for the period 01.04.2006 to 31.03.2009.
- 9.4) That the allegation made by the appellants that DVC is agitating the same issues, already decided by this Appellate Tribunal in order dated 23.11.2007 or in the order dated 10.05.2010 or the claim of DVC is barred by principles of *res-judicata* or constructive *res-judicata* are without any merit.
- 9.5) That there is no double counting or considering something which has been rejected as imprudent in the past. Additional capitalization for FY 2004-05 and 2005-06 during the period from 01.04.2004 to 31.03.2006, the Central Commission in its revised tariff order dated 06.08.2009 had deferred the

inclusion of the same in the project cost on the ground of there being not enough justification in the petition. Having dealt with the aspect of capital cost element under various aspects, the Central Commission vide the revised tariff order dated 06.08.2009 stated in paragraph 31 thereof as under:

“However, the petitioner is at liberty to claim the said amounts in accordance with law, after proper justification”

- 9.6) That in the circumstances, the specific aspects of additional capitalization for 01.04.2004 to 31.03.2006 was raised by DVC in the Impugned Petition filed by DVC with detailed justification in support of its claim. As the earlier decisions of the Central Commission clearly permitted DVC to raise the issue of additional capitalization with full justification. The observations contained in paragraph 31 of the revised tariff order dated 06.08.2009 of the Central Commission are not limited to the transmission assets but extend to other elements also. All the elements not considered earlier by the Central Commission for want of justification were allowed to be raised in the Impugned Petition with full justification whether relating to generation or transmission.
- 9.7) That the order dated 06.08.2009 of the Central Commission which was upheld by this Appellate Tribunal vide judgment dated 10.05.2010 specifically provided for the right of DVC to raise the said issue in the proceedings before the Central Commission.
- 9.8) That the plea of the appellant based on Regulation 18(4) of the Tariff Regulations 2004 where under the Central Commission can revise the tariff twice for the control period due to the impact of additional capitalization has no relevance to the present case. This Regulation is not applicable to the present matter as both Central Commission and Appellate Tribunal have specifically given the right to DVC to approach the Central Commission for the items which were deferred for want of proper justification when the appellant had challenged the disallowances. Further, Regulation 18(4) is an enabling provision for mid-term consideration and does not debar the consideration of claim for additional capitalization after the control period is over.
- 9.9) That vide the Impugned Order dated 08.05.2013, the Central Commission has given the liberty to DVC to claim capitalization of the expenditure as and when these assets are commissioned. Subsequent to the passing of the Impugned Order dated 08.05.2013, DVC has filed the application before the Central

Commission on 19.06.2013 seeking determination of certain elements of tariff relating to the tariff period 01.04.2004 to 31.03.2009 namely, serving of capitalization/ additional capitalization undertaken by DVC during 01.04.2004 to 31.03.2009.

- 9.10) That the additional capital expenditure for construction of bays at different sub-station form part of accounts under the T&D head of account.
- 9.11) That additional capitalization for FY 2006-09 claimed by DVC before the Central Commission in the Impugned Petition was for the expenditure incurred duly recovered in the books of accounts and duly audited by Controller & Auditor General. Pursuant to analysis of these details disclosed by DVC and after a thorough prudence check, the Central Commission has legally and correctly allowed the claim of DVC in the Impugned Order.
- 10) Regarding additional capitalization for FY 2006-09 the appellants' contentions are as under:
 - 10.1) That Tariff Regulations 2004 relating to additional capitalization after the cut-off date has been provided under Regulation 18(2). It is imperative upon the Central Commission to satisfy itself on the test of such costs being necessary for efficient and successful operation of the generating station.
 - 10.2) The Impugned Order is replete with instances of unjustified recovery of cost elements un-related to DVC's generation activity. The Central Commission has failed to exercise the requisite prudence check to examine the necessity of various cost elements for efficient and successful operation of the generating station. The appellant in the written submissions has given an illustrative list of so called extraneous cost elements allowed by Central Commission as additional capitalization (pertaining to generation assets) for FY 2006-09, which according to the appellant is without testing the same on the touchstone of Regulation 18(2)(iv) of Tariff Regulations 2004.

Our consideration and conclusion:

- 11) After considering the rival contentions of the parties and going through the material on record, particularly, the Impugned Order, we now directly proceed towards decision on these issues because reiterating the same facts in our opinion is not necessary except to increase the volume of the judgment.

11.1) We have considered that the Central Commission disallowed the additional capitalization for FY 2004-06 in its revised tariff order dated 06.08.2009. We have gone through the revised tariff order dated 06.08.2009 of the Central Commission in Petition No.66 of 2005 in the matter of **Damodar Valley Corporation Vs. Department of Energy, Government of West Bengal**. It appears there from that the DVC filed the Interlocutory Application No.19 of 2009 before the Central Commission in Petition No.66 of 2005 only after the matter was remanded to the Central Commission by this Appellate Tribunal. According to the Interlocutory Application No.19 of 2009, the DVC claimed for additional capitalization expenditure for FY 2006-09. The learned Central Commission vide paragraph 14 of its revised tariff order dated 06.08.2009 observed as under:

“14. The claim of the petitioner for additional capital expenditure for the period 2006-09 is outside the scope of the judgment of the Appellate Tribunal in which directions have been issued to consider the order dated 3.10.2006 de novo to the extent indicated in the judgment. Accordingly, we have decided to confine our consideration of the issues earlier decided in our order dated 3.10.2006 in the light of the observations of the Appellate Tribunal. The petitioner is allowed liberty to approach the Commission through an appropriate application, for consideration of any additional issues which would be considered in accordance with law. With the said observation, the interlocutory application is disposed of.”

11.2) It is apparent from the afore quoted paragraph 14 that DVC was allowed liberty to approach the Central Commission through appropriate application for consideration of any additional issues which would be considered in accordance with law and the said IA No.19 of 2009 was accordingly disposed of.

11.3) The Central Commission while dealing with transmission (A-N) in revised tariff order dated 06.08.2009 in paragraph 31 thereof stated that the DVC claimed additional capital expenditure for the years 2004-05 and 2005-06, respectively towards assets for capital augmentation and system strengthening in order to meet the load growth commensurate with increased generation. The Commission while discussing on that aspect and finding the investment necessary for efficient and successful operation of a generating station allowed some part of the amount claimed for FY 2004-05 and 2005-06 incurred towards

tower poles and lines etc. in terms of Regulation 53(2)(iv) of Tariff Regulations 2004. The remaining amount was disallowed in that very paragraph 31 of the revised tariff order incurred for assets like relays, extension works, replacement of 132 kV CB etc. on the ground that the gross value of the replaced assets have not been de-capitalized. Some amount for FY 2004-05 and 2005-06 incurred for lines and bays, ATR etc. was also disallowed for want of proper details/justification as it appears that the work was related to the new line of the new units of Mejia TPS, another generating station of the DVC. The Central Commission vide revised tariff order dated 06.08.2009, in Petition No.66 of 2005 granted liberty to DVC to claim the said amounts in accordance with law after proper justification.

- 11.4) We have also perused judgment dated 10.05.2010, particularly paragraph 60 thereof, passed by this Appellate Tribunal with respect to additional capitalization for FY 2004-06. The revised tariff order dated 06.08.2009 of the Central Commission was challenged in Appeal No.146 of 2009 before this Appellate Tribunal and this Appellate Tribunal vide judgment dated 10.05.2010 had dismissed the appeal filed by DVC and directed DVC to implement the tariff as determined by the Central Commission vide revised tariff order dated 06.08.2009 and further to revise the electricity bills raised by it for electricity consumption during April, 2006 onwards of its licensees and HT consumers and refund the excess amount billed and collected along with interest @ 6% per annum in line with Section 62(6) of the Electricity Act, 2003, alternatively, DVC was given opportunity to adjust the excess amount recovered along with interest @ 6% per annum in 24 equal monthly prospective installments starting from July, 2010 by giving credit in the consumption bill/license and DVC was further directed to approach the concerned State Commission for getting the final order relating to retail tariff which Commission would in turn fix the tariff according to law.
- 11.5) For consideration of the aforesaid issues, we deem it proper to reproduce the relevant parts of the judgment of this Appellate Tribunal dated 10.05.2010 in Appeal No.146 of 2009 which are as under:

“44. It is also submitted on behalf of the Appellant that the Central Commission merely disallowed certain claims of the Appellant on the ground either for want of proper justification or for want of proper details/justification and these reasons cannot be said to be sufficient reasons to reject their claim.

45. We are unable to accept this plea because admittedly the Appellant did not produce any material in justification of their claims. When there are no materials to show that the claims made were to be admitted as per the procedure and provisions of the Electricity Act, there is no valid reason to allow those claims. Hence, the reason given by the Central Commission that there is no justification to allow their claim is perfectly valid. In fact, the Tribunal has categorically held in the remand Order that only provisions of DVC Act can be allowed to operate when they are consistent with the Electricity Act and not otherwise. In such circumstances, the Central Commission was correct in considering the admissibility of the claims keeping in mind the safeguard of consumer interest as per the provisions of the Electricity Act and also regulations framed under the said Act.
48. This direction related to the period 2004-05 and 2005-06. Only in accordance with this direction, the Central Commission by its Order dated, 28th April, 2009 directed the Appellant to furnish detailed information with regard to the additional capital expenditure for the period 2004-05 and 2005-06 as well as provisions made towards pension and gratuity and depreciation.
49. The Appellant filed IA 19 of 2009 and submitted the details of the additional capitalization for the period 2006-09 based on the combined capital cost as on 1st June, 2006. Subsequently, by a further affidavit dated 11th June, 2009, the appellant filed details with regard to the additional capitalization for the period 2004-05 and 2005-06 which included the capital expenditure in respect of Mejia TPS Unit-4.
50. As indicated above, the inclusion of the claim for additional capitalization for 2006-09 would expand the scope of the de novo consideration as the Central Commission has to be confined to the period 2004-05 and 2005-06 alone in respect of Additional Capitalization and not for further period.
51. In fact the claim for the further period was disallowed by the Central Commission not on merits but, the opportunity was given to the Appellant to approach the Commission for additional capitalization in respect of the further period 2006-09 by filing a separate petition as it would not cover the remand Order.
- 11.6) We have gone through the fact and circumstances of the matters before us in these appeals and also gone through the principle of *res adjudicata* and *estoppel*, as provided under Civil Procedure Code and the authorities cited on these points. In view of the above, we do not find any perversity or infirmity in the findings recorded by the Central Commission on these issues. The contentions raised on behalf of the appellants on these issues have no merits and are liable to be spurned. The learned Central Commission while passing the Impugned Order has considered all the contentions raised in these appeals and addressed them in a just, proper and legal way. The Central Commission

has allowed the said claims of additional capitalization on proper justification on being satisfied with the material and data supplied by DVC before the Central Commission. The learned Central Commission has complied with the judgment of this Appellate Tribunal in the same spirit in which this Appellate Tribunal pronounced the said judgment on the said aspects of the issues involved in these appeals. Hence, all these three issues (A), (B) and (C) are decided against the appellant.

- 12) **Issue Nos. (D) & (E):** relating to enhanced O&M expenses, pension and gratuity: On these issues, following are the contentions made on behalf of the appellants:
- 12.1) That the Central Commission has erroneously invoked its Power to Relax and Power to Remove Difficulties under Section 12 & 13, respectively of Tariff Regulations 2004. No doubt it is true that the said power cannot be routinely exercised to dilute the normative parameters without justification.
- 12.2) That the learned Central Commission with respect to ash evacuation stated that additional expenses on account of installation of ash evacuation equipment have been allowed on consideration of environ protection, which is in the nature of mandatory expenditure. The learned Central Commission erred in allowing recovery of revenue expenditure because the cost of installing ash evacuation equipment, if any, ought to have been capitalized.
- 12.3) That the Central Commission has failed to respond to the appellant's contention that DVC was under obligation to comply with environmental norms even before the enactment of the Electricity Act, 2003. The Central Commission has failed to examine whether DVC had undertaken ash evacuation on a regular basis. The cost of past omissions of DVC cannot be rectified at consumers' expense.
- 12.4) That the learned Central Commission has allowed additional O&M expenses in respect of old plants against Tariff Regulations 2004. The normative O&M expenses were approved in the Tariff Regulations after considering the age and size of the units. The beneficiaries ought not to have been saddled with additional O&M expenses on account of DVC's failure to undertake timely overhauling/R&M of its old units.
- 12.5) That under the Tariff Regulations, 'spares' formed part of O&M expenses and the same had therefore been allowed in the prescribed norms. There was no

occasion for additional claims of DVC to be allowed on account of amortization of capital spares. The Central Commission has allowed the cost of unserviceable and obsolete maintenance spares to be recovered from the consumers in a manner *de hors* the Tariff Regulations.

- 12.6) That the Central Commission has not provided any justification for allowing additional O&M expenses on account of mega insurance. There is no merit in the contention of the Central Commission that expenses on account of insurance were permitted because they were not factored in the specific Regulation. DVC has admittedly not cited any extra ordinary factors that have necessitated additional insurance cover for its units. Acceptance of unsubstantiated statements to the effect that mega insurance was necessitated in view of the substantial increase in the risk profile of power plants on account of various issues, including lenders covenants, natural calamities, law and order and various other strategic safeguard measures bear testimony to lack of prudence check on the part of Central Commission. These factors did not expose DVC's power plants to an enhanced risk profile justifying the insurance expense as an additional pass-through over and above the prescribed regulatory norms.
- 12.7) Regarding acceptance of pension and gratuity by DVC, the Central Commission has failed to exercise adequate prudence check in accepting the pension and gratuity liability projected by DVC.
- 12.8) That the Impugned Order contains no discussion on the contents of the actuarial valuation report submitted by DVC.
- 12.9) That the paragraph 153 of the Impugned Order reveals that the figures taken from the actuarial valuation as on 01.04.2006 has been routinely accepted by Central Commission without any critical scrutiny thereof. The Central Commission did not even examine whether the pension and gratuity liability (projected by the actuarial valuation as on 01.04.2006) was towards employees engaged in power generation and transmission business. No activity linked segregation of DVC's employees was undertaken prior to arriving at projected liability on account of pension and gratuity. The projected liability is in respect of employees engaged in DVC's multifarious activities and is not specific to its power and transmission business.

- 12.10) That the actuarial evaluation report is bereft of any critical verification of data by DVC by way of CD and E-mail. The methodology adopted was grossly inadequate for any credible actuarial exercise and hence, the learned Central Commission ought to have undertaken an independent verification of actuarial projections. Furthermore, in the absence of segregation of employees, DVC consumers have been unjustifiably burdened with pension and gratuity payouts for employees not associated with power business.
- 12.11) That DVC had entered into long term PPAs with DISCOMs outside its command area for newly added capacity. Such power plants have been conceptualized to operate as IPPs. The costs associated with employees working in such plants, including their retirement benefits appear to have not been excluded from the costs recoverable from DVC's own consumers.
- 12.12) That the pension and gratuity, being part of O&M expenses (capacity charges) must be linked to plant availability. The Central Commission has failed to link O&M expenses on account of pay revision of station-wise availability factor, as provided under Regulation 21(1)(iv) of Tariff Regulations 2004. The Central Commission appears to have erroneously allowed the entire pay revision as a pass through without linking the same to station-wise availability.
- 12.13) That the entire pay revision was not recoverable during the tariff period. The learned Central Commission has disallowed the pay revision of Rs.210- Cr. to be recovered even though DVC itself had submitted that only 40% of the pay revision was borne by it in FY 2008-09 and the balance 60% was to be borne in FY 2009-10.
- 12.14) That employees not connected with DVC's power business specific to command area have been reckoned for pay revision. The TSL Division of DVC is probably engaged in the transmission construction activity for new projects, which are not meant to service the command area.
- 12.15) That the Central Commission appears to have allowed pay revision in respect of generating stations that were not even commissioned in FY 2006-09. Further, such pay revision has been allowed in respect to generating stations, in respect of which DVC has signed PPAs with beneficiaries outside the command area.
- 13) **Per contra**, the respondent, DVC has contended as under, on the said two issues (D) & (E) :

- 13.1) That DVC has provided all the particulars regarding impact of 6th pay revision before the Central Commission. The O&M expenses relating to 6th Pay Commission are a modification required to be carried out by the Central Commission consequent to the implementation of the recommendations of the 6th Pay Commission.
- 13.2) That the revised pay is a necessary expenditure incurred by DVC which is in accordance with the decision taken by the Central Government on the recommendations of the Hon'ble Justice S.S.Mohan Committee on the Public Sector employees.
- 13.3) That this issue relating to enhanced O&M expenses is fully covered by this Appellate Tribunal's judgment dated 24.03.2015 in the batch matter of Appeal No. 55 of 2013 where this Appellate Tribunal has upheld the decision of the Central Commission with regard to additional costs towards pay revision. Further, this Appellate Tribunal had decided the issue of pay pension in favour of DVC by judgment dated 19.02.2016. The Hon'ble Supreme Court in ***West Bengal Electricity Regulatory Commission Vs. CESC Ltd. (2002) 8 SCC 715*** held that employee cost including pension etc. are standard and legitimate costs and hence, should not be denied. The Central Commission, while allowing a pass through to the claims under the pension and gratuity fund made by DVC, has considered the details of the expenditure on the welfare activities of the DVC. It has considered all the documents before allowing such contribution towards pension and gratuity fund. During the proceedings before the Central Commission none of the objectors including the appellants herein were able to show anything wrong in the actuarial valuation undertaken by the reputed Actuary Mr. Bhudeb Chatterjee. The Central Commission was right in relying on the actuary certificate of an expert in the field in the absence of any prima facie evidence on behalf of the appellant. Hence, now the appellants cannot raise the frivolous issues at this appellate stage without any proper basis.
- 13.4) That the issue of pension and gratuity fund has been decided in favour of the DVC by judgment dated 19.02.2016 passed by this Appellate Tribunal in Appeal No.184 and 305 of 2013 in the matter of *Bhaskar Shrachhi Alloys Ltd. & Ors. Vs. Central Electricity Regulatory Commission*.
- 14) **Our consideration and conclusion:**

14.1) We have gone through rival contentions of the parties and also perused the Impugned Order on these issues. Without reiterating here again we find no force in the contentions of the appellants on these issues. Mr. Rajiv Yadav, learned counsel for the appellants, in these appeals, on our query about the applicability of the judgment dated 24.03.2015 in the batch matter of A.No.55 of 2013 and judgment dated 19.02.2016 in Appeal No.184 and 305 of 2013 in the matter of *Bhaskar Shrachi Alloys Ltd. & Ors. Vs. Central Electricity Regulatory Commission* passed by this Appellate Tribunal, honestly states that these issues are indirectly covered by the said judgments of this Appellate Tribunal but the facts are slightly distinguishable. We have gone through the case law laid down by this Appellate Tribunal in the aforesaid two judgments and we find that both these issues are completely and fully covered by the aforesaid judgments of this Appellate Tribunal. Since these issues have already been decided by Appellate Tribunal in favour of DVC and against the appellants, we decide these issues against the appellants.

14.2) Since all the issues raised in these appeals have been decided against the appellants, both these appeals are liable to be dismissed.

ORDER

15) The instant appeals, being Appeal Nos. 185 of 2013 and 264 of 2013, are hereby dismissed and the Impugned Order dated 08.05.2013 passed by the Central Commission is hereby affirmed.

No order as to costs.

Pronounced in the open court on this **29th day of April, 2016.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~