

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO.92 OF 2015**

**Dated: 7<sup>th</sup> September, 2016.**

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

**IN THE MATTER OF:**

**BALAKRISHNA INDUSTRIES LTD.,** )  
A 300-305 & 306-313, )  
RIICO INDUSTRIAL AREA, CHOPANKI, )  
BHIWADI-301707 )  
DIST: ALWAR(RAJASTHAN) ) ... Appellant

Versus

1. **RAJASTHAN ELECTRICITY )  
REGULATORY COMMISSION, )  
"VIDYUT VINYAMAK BHAWAN", )  
NEAR STATE MOTOR GARAGE, )  
SAHAKAR MARG, JAIPUR-302005.**
  
2. **JAIPUR VIDYUT VITRAN NIGAM )  
LTD., )  
VIDYUT BHAWAN, NEAR VIDHAN )  
SABHA, JANPATH JAIPUR-302005. ) ... Respondents**

Counsel for the Appellant(s)

Mr. P.N. Bhandari

Counsel for the Respondent(s)

Mr. R.K. Mehta  
Mr. Abhishek Upadhyay

Ms. Himanshi Andley for **R.1**

Mr. Bipin Gupta  
Mr. Suneel Bansal for **R.2**

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

### **PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:**

1. The Appellant Balakrishna Industries Limited (“**Balakrishna Industries**”) is a renewable energy generator. Respondent No.1 is Rajasthan Electricity Regulatory Commission (“**the State Commission**”). Respondent No.2 Jaipur Vidyut Vitran Nigam Ltd. (“**JVVNL**”) is a distribution company. In this appeal Balakrishna Industries has challenged order dated 29/05/2014 and order dated 14/11/2014 passed by the State Commission.

2. Balakrishna Industries has set up 5 MW captive wind power plant in Jaisalmer, Rajasthan under the Government of Rajasthan’s “Policy for Promotion of Electricity Generation from 2003”. It has executed a Wheeling and Banking Agreement (“**WB Agreement**”) on 21/09/2004 with JVVNL. Balakrishna

Industries filed a petition being Petition No.101 of 2006 before the State Commission on 13/04/2006 under Section 86(1)(e) and Section 86(4) of the Electricity Act (“**the said Act**”) read with Section 9 of the said Act. It was the case of Balakrishna Industries that JVVNL was first adjusting the wheeled energy of wind farm from the total energy consumption and the balance was considered as supplied by JVVNL (under large Industrial Service Tariff) which has provision of minimum billing(requiring minimum energy consumption). Balakrishna Industries’ further case was that this accounting is deliberately distorted and JVVNL should first adjust minimum charges, as is being done with other HT consumers. The specific prayer of Balakrishna Industries was confined to the adjustment of minimum units i.e. consumption in units required to achieve minimum billing first out of the total drawal of its industrial unit at Bhiwadi and adjustment of balance against the wheeled power from its captive wind power plant. JVVNL, on the other hand, referred to Clause 7 of WB Agreement which defined the procedure for adjustment of wheeled energy. After noticing anomalies pointed out to it the State Commission in its Order dated 25/07/2006 observed that Clause 7 of WB Agreement needs to be amended. The State

Commission further observed that it was not an individual case but a matter of general nature applicable to all such agreements under the Government of Rajasthan Policy and the matter of general nature can be considered by the State Commission only against tariff petition or its review or suo-moto tariff determination by it or also while framing/amending its relevant regulations under the provisions of the said Act. The State Commission further observed that it had already issued Order dated 31/03/2006 on promotion of renewable energy in the State, that publication of draft regulations has already been initiated and that public notice inviting comments/suggestions have been issued. The State Commission advised Balakrishna Industries to state its viewpoint before the State Commission in response to the process of public participation initiated by it. The State Commission made it clear that applicability of regulations so finalised will be from the date of publication in the official gazette and consequently the benefits thereon can be derived prospectively only. JVVNL was directed to review the provisions of Clause 7 of the WB Agreement. JVVNL and other Discoms were directed to review similar provisions in other agreements.

3. We must now go to the judgment on which Balakrishna Industries has placed reliance. The Rajasthan State Mines and Minerals Ltd. ("**RSMML**") filed a petition being Petition No.100 of 2006 in the State Commission for removal of difficulties. It challenged the methodology adopted by Ajmer Vidyut Vitran Nigam Ltd. ("**AVVNL**") regarding adjustment of renewable energy generated by RSMML in consequence of audit observation. RSMML's case was that initially out of actual energy consumption energy corresponding to minimum charge was deemed to have been supplied by AVVNL and the balance energy was adjusted against the wheeled energy. The excess wheeled energy was considered for banking. However from November, 2005 AVVNL revised the procedure and started adjusting the wheeled energy first against the actual energy consumption and the balance energy consumption was considered as the energy supplied by AVVNL. If, however, such balance energy consumption was not adequate to cover minimum charge AVVNL levied the minimum charge in the monthly bill. Accordingly, on the basis of revised procedure adjustment was effected with retrospective effect for the periods from July 2002 to August,

2003 and February, 2005 to August, 2005. The amount of recovery effected on account of difference of minimum charges for the above periods was Rs.48,46,653.18 and Rs.43,54,946.64 respectively. The State Commission vide its Order dated 11/5/2006 added other Discoms as necessary parties because a policy made relating to banking and provisions of minimum charges/billing was involved in the petition. JVVNL was also therefore made party to the proceedings.

4. After considering the rival contentions the State Commission in its Order dated 04/11/2006 observed that the billing procedure, as per the audit paragraph, adopted by AVVNL is not based on harmonious interpretation of provisions of WB Agreement and the Government of Rajasthan Policy and is not only against the policy of banking but also against natural justice. The State Commission as a consequence set aside the adopted procedure. The State Commission further observed that the audit objection does not take into consideration the provisions of Section 56 (2) of the said Act which provide that no sum due from any 'consumer' shall be recoverable after the period of two years from the date when such sum became first

due, unless such sum has been shown continuously as recoverable as arrears of charges for the electric supply. The net recovery for the period from July, 2002 to August, 2003 was therefore set aside. The State Commission further observed that although it had already directed JVVNL to review the provisions of Clause 7 of the agreement with Balakrishna Industries and similar clauses of other WB Agreements it was reiterating its direction to JVVNL to review the provisions of all WB Agreements in line with its order and send confirmation about it within 30 days.

5. Being aggrieved by Order dated 25/07/2006 passed in Petition No.101 of 2006 filed by Balakrishna Industries, JVVNL filed appeal before this Tribunal being DFR No.1029 of 2007. There was delay of 361 days in filing the appeal. This Tribunal by its Order dated 13/11/2007 refused to condone the delay and dismissed the appeal *in limini*. It is pertinent to note that in that appeal it was urged by JVVNL that in Petition No.100 of 2006 filed by RSMML against AVVNL, it was impleaded as party and therefore JVVNL believed that its interest in Petition No.101 of 2006 was being taken care of while deciding Petition No.100 of

2006 and therefore it was advised not to take any steps to challenge the Order dated 25/07/2006. Subsequently when AVVNL filed appeal and impleaded JVVNL as party it thought it proper to file appeal and the appeal was filed. Hence there was delay in filing the appeal. Balakrishna Industries filed reply to JVVNL's submissions. Balakrishna Industries opposed the explanation offered by JVVNL for condonation of delay. Balakrishna Industries urged that it is totally false and unbelievable that JVVNL did not file any appeal against the State Commission's Order dated 25/07/2006 because it was added as party in **RSMML v. Ajmer Discom** (Petition No.100 of 2006) and its objections would be considered and rectified in another case pertaining to another Discom (i.e. Petition No.101 of 2006). Balakrishna Industries submitted that it is elementary that an order issued in one case cannot be amended, modified and corrected in another proceedings between different parties. Balakrishna Industries further urged that the two petitions (Petition No.100 of 2006 and Petition No.101 of 2006) were totally different, filed by different parties (RSMML and Balakrishna Industries) against different Discoms (Ajmer Discom and Jaipur Discom). Therefore it cannot be insisted that for the disposal of



any of the petitions, the other Discom should have been heard and made a party. Thus Balakrishna Industries took a firm stand that both these petitions were distinct. It is pertinent to note that while refusing to condone the delay, this Tribunal in its Order dated 13/11/2007 without referring to Balakrishna Industries' above submissions, took the same view.

6. AVVNL filed Appeal No.74 of 2007 against Order dated 04/11/2006 in Petition No.100 of 2006 filed by RSMML and the subsequent Order dated 13/04/2007 declining to review Order dated 04/11/2006. There was a difference of opinion between the two Hon'ble Members of this Tribunal. Mr. A A Khan, the Hon'ble Technical Member held that the appeal has to be allowed subject to Limitation Act, 1963. It was held that principle of estoppel is not applicable to the case. Hon'ble Judicial Member Mrs. Justice Goel concluded that the appeal be dismissed. Relevant paragraph of Mrs. Justice Goel's judgement reads as under:

*“54) In view of the above analysis the appeal is dismissed. The petition filed RSMML before the Commission is allowed. During the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified*

*by the parties, the appellant will bill the respondent No.2 in the method applied before November,2005.”*

7. In view of the difference of opinion the appeal was placed before Mr. Bajaj, another Hon'ble Technical Member. Mr. Bajaj by his Order dated 24/07/2009 held that the billing pattern for the energy consumption of RSMML being followed before November, 2005 was the correct pattern and the billing pattern for the energy consumption of RSMML should be the one that was being followed before November, 2005. Thus Mrs. Justice Goel's view was confirmed. That became the majority judgment as per Section 123 of the said Act.

8. Balakrishna Industries filed Petition No.208 of 2009 on 03/11/2009 praying for appointment of Arbitrator as per Clause 11.1 of WB Agreement. The State Commission dismissed the said petition by its Order dated 23/12/2009. The State Commission observed that the issue raised through this petition has already been settled vide its Order dated 25/07/2006 which has also reached finality having been upheld by this Tribunal. Balakrishna Industries has not raised any new or specific dispute. Balakrishna Industries filed Appeal No.68 of 2010,

challenging the Order dated 23/12/2009. The said appeal was dismissed by this Tribunal at the admission stage on 19/04/2010 by observing that there was no merit in it.

9. Balakrishna Industries filed Petition No.224 of 2010 under Section 142 read with Section 86 (1) (f) of the said Act for enforcement of Order dated 25/07/2006. RSMML filed Petition No.227 of 2010 for non compliance of Order dated 04/11/2006. On 06/01/2011 the State Commission disposed of both the petitions, observing that no action under Section 142 of the said Act was warranted. The State Commission in this order observed that no doubt it has observed in its order dated 25/07/2006 that methodology adopted by JVVNL in some extreme cases would not encourage wind energy generation and provision of Clause 7 is not proper and requires amendment, but no order was given by the State Commission on refund of any amount. The State Commission observed that it is clear from Order dated 25/07/2006, that the said order in case of Balakrishna Industries was to operate prospectively. Turning to its Order dated 04/11/2006 in RSMML's case the State Commission observed that both in Balakrishna Industries' case and RSMML's

case the State Commission found the billing methodology against the policy of banking and against natural justice. Quoting observations from orders in Balakrishna Industries' case and RSMML's case the State Commission observed that the billing methodology was interpreted by the State Commission to be faulty and improper as distinct from being patently illegal. Therefore the plea that the Order dated 04/11/2006 of the State Commission setting aside the billing methodology has to be applied retrospectively on account of the methodology being patently illegal is not coming out from the Orders dated 25/07/2006 and 04/11/2006. The State Commission also observed that in Order dated 04/11/2006, no direction was given as regards refund of past amount. We may quote paragraph 19 of this order which is material.

*“19. It may be stated that had it been the intent of the Commission to declare billing methodology to be patently illegal, with retrospective application, then it would have been held so in the identical case of M/s Balkrishna also wherein application of the order is clearly prospective, as discussed in para 12 of this order. Had it been the intent to apply the order retrospectively in the case of RSMML; it would indeed have created anomalous situation because the two cases are similar more so when it was held in RSMML's case that decision in M/s Balkrishna's cases equally applies to this case also. It may be noted that billing methodology, which was challenged*

*in both the cases, was based on agreements entered into with the consent of the petitioners and such mutual agreements could not be deemed to be patently illegal from the very beginning even if that led to advantage of AVVNL/JVVNL in some cases.”*

10. It is also necessary to quote the conclusion recorded by the State Commission.

*“24. The petitions have been filed u/s 142 of the Act for non compliance of the orders of the Commission and petitioners are only insisting on refund of the amount by modifying billing methodology and applying it retrospectively. From the Commission’s orders dated 25.7.2006 and 4.11.2006, we could not find or infer any specific decision/order for refund of such amount. As regards amendment in WBA, the petitioners do not want any change in WBA proposed by respondent, as has emerged during hearing. In the mean time, Regulations on the issue have come into effect from 2<sup>nd</sup> January, 2007 i.e. within two months of the order dated 4.11.2006 of M/s RSMML case. With coming into effect of the provision of above Regulations, the earlier orders dated 25.7.2006 and 4.11.2006 in respect of billing methodology are no more relevant as provisions incorporated in Regulations take precedence over Commission’s orders.*

*25. After considering the position as above and considering earlier order dated 13.4.2007, we are of the considered view that no further order regarding compliance of earlier orders is required nor any action under Sec. 142 of the Electricity Act for imposing penalty is warranted. The petitions are disposed of accordingly with no order as to cost.”*

11. RSMML and Balakrishna Industries filed Review Petitions being Petition No.RERC-247/11 and 248/11 respectively for review of Order dated 06/01/2011 under Section 94(1)(f) of the said Act on 02/02/2011 in the State Commission. The State Commission by its Order dated 29/11/2011 disposed of the said petitions. It came to a conclusion that Order dated 06/01/2011 suffered from error apparent on the face of record to the extent that it has restricted the implication of Order dated 04/11/2006 in RSMML's case and that has resulted in miscarriage of justice. It is necessary to make a detailed reference to this order. The State Commission referred to its Order dated 04/11/2006 in RSMML's case where it has concluded that the billing procedure as per audit paragraph adopted by AVVNL is not based on harmonious interpretation of provisions of WB Agreement and the Government of Rajasthan Policy. It is against policy of banking and against natural justice. The State Commission recalled that in the circumstances it had set aside the procedure adopted in consequence of the audit paragraph. The State Commission noted that being aggrieved by this Order dated 04/11/2006, AVVNL had filed an appeal in this Tribunal where there was difference of opinion between two members. Mrs.

Justice Manju Goel in her judgement observed that during the continuance of the WB Agreement and the HT Agreement, AVVNL will bill RSMML in the method applied before November, 2005. Mrs. Justice Manju Goel allowed the petition filed by RSMML. The matter was referred to the third Member Mr. Bajaj who concurred with Mrs. Justice Manju Goel on the issue of billing methodology. As per Section 123 of the said Act on 05/08/2009, this Tribunal declared that judgment delivered by Mrs. Justice Manju Goel on the question whether the billing pattern practised prior to November, 2005 was to be followed or not, is the majority judgment. After noticing the above facts, the State Commission observed that in its order dated 04/11/2006, it has set aside the billing procedure adopted and therefore as a consequence, the earlier methodology comes into operation. The implication therefore is that the order of the State Commission dated 04/11/2006, has to operate retrospectively i.e. from the date when the billing methodology was changed as far as RSMML's case is concerned. The State Commission observed that by stating that it does not emerge from Order dated 04/11/2006 that the said order is to be applied retrospectively and excess recovery is to be refunded, it diluted the Order dated

04/11/2006. The State Commission observed that RSMML's order stands on its own legs; that it has become final; that it has been upheld by this Tribunal and clear emphasis has been given by this Tribunal on the issue of billing methodology saying that AVVNL will bill RSMML in the manner followed before November, 2005. In the circumstances the State Commission reviewed its Order dated 04/11/2006 and recorded its conclusion that the billing methodology as per Order dated 04/11/2006 has to be applied retrospectively in case of RSMML i.e. from the date when the billing methodology was changed as a consequence of audit observations and excess recovery be refunded. So far as Order dated 25/07/2006 in case of Balakrishna Industries is concerned, however, the State Commission observed that in the said order in paragraph 15 it has stated that Clause 7 of WB Agreement requires amendment. The State Commission is set to amend regulations and the applicability of regulations so finalised will be from the date of publication in the official gazette and consequently benefits thereon can be derived prospectively only. The State Commission observed that the said Order dated 25/07/2006 has attained finality. So observing, the petitions filed by RSMML and Balakrishna Industries for review of Order



dated 06/01/2011 passed by the State Commission were disposed of by the State Commission by its Order dated 29/11/2011.

12. Being aggrieved by the said order AVVNL filed Appeal No.17 of 2012 in this Tribunal. RSMML was Respondent No.2 therein. The appeal was dismissed by this Tribunal by imposing exemplary costs on the Appellant-AVVNL. This Tribunal came down heavily on the conduct of AVVNL. It is necessary to quote relevant paragraphs of this judgement so that we can get a proper perspective of the matter.

*“47. From the above facts, the following aspects are evident.*

- i) Despite the order passed by the Tribunal on 04.11.2006, in favour of the 2nd Respondent, the Appellant did not allow the R-2 to obtain/ receive the fruits of the said order. In order to prevent the 2nd Respondent to get the relief, the Appellant adopted all methods to drag on the matter.*
- ii) The Appellant instead of filing an Appeal against the order dated 4.11.2006 had filed a Review before the State Commission and it was pending for some time. Ultimately, the same was dismissed on 13.4.2007. Thereupon, the Appellant filed the Appeal No.74 of 2007 before this Tribunal. This Appeal also*

*was dismissed with the consequential direction on 5.8.2009.*

- iii) Instead of filing the Appeal before the Hon'ble Supreme Court under section 125 of the Act, the Appellant chose to rush to High Court and filed a Writ Petition as against the Tribunal's judgment. There are no circumstances shown as to why he had bypassed the jurisdiction of Hon'ble Supreme Court. Admittedly, there was no stay in the Writ Petition. Even then, the Appellant did not comply with the findings and directions given by the majority judgment of the Tribunal dated 5.8.2009.*
- iv) Ultimately, the Respondent-2 had to file a Petition under Section 142 of the Act on 23.7.2010 which was dismissed on 6.1.2011. Again the Respondent filed a Review petition on 2.2.2011 which has been ultimately allowed by the order dated 29.11.2011 in favour of the 2<sup>nd</sup> Respondent.*

*48. Thus, it is clear that the R-2 is dragged and driven from pillar to post without allowing him to get the fruits of the orders passed by State Commission and Tribunal. The unfortunate aspect is as indicated above, that the Appellant instead of filing an Appeal under Section 125 of the Cr.PC under which the Supreme Court alone is entitled to set-aside the Tribunal's judgement, had filed a writ petition in the High Court seeking for setting aside the Tribunal judgment and both the State Commission as well as the 2<sup>nd</sup> Respondent were dragged to High Court.*

*49. From the above facts it is evident that the Appellant has adopted all sorts of dilly-dallying tactics to prevent the 2<sup>nd</sup> Respondent to get the fruits of the*

*order passed by the State Commission and Tribunal. Thus, the Appellant has succeeded in dragging the matter till now though the order was passed in favour of the 2<sup>nd</sup> Respondent on 4.11.2006 i.e. for the past 6 years.*

*50. This conduct of the Appellant, is highly reprehensible. Normally, this Tribunal does not impose cost on the parties but in this case, we feel that this is a fit case where exemplary cost should be imposed upon the Appellant who had dragged on the matter for six years and had driven the parties from the pillar to post.*

*51. In view of the condemnable conduct of the Appellant, as narrated above, the Appellant is directed to pay the cost of Rs.1 lakh each to the State Commission(R-1)as well as to Rajasthan State Mines and Minerals Ltd(R-2), within one month from the date of this order.*

*52. With these observations, the Appeal is dismissed.”*

13. Not deterred by the observations of this Tribunal, AVVNL preferred Review Petition No.12 of 2012 in Appeal No.17 of 2012. This Tribunal quoted the observations made by it in its Order dated 20/09/2012 which we have reproduced hereinabove. This Tribunal again reiterated that instead of filing an appeal against Order dated 04/11/2006, AVVNL filed a review petition before the State Commission which was dismissed. Instead of filing appeal before the Supreme Court under Section 125 of the said Act,

AVVNL filed a writ petition in the High Court challenging the said order. The High Court dismissed the writ petition on 06/10/2012 on the ground that it is not maintainable. This Tribunal again described the conduct of AVVNL as reprehensible and dismissed the review petition. This Tribunal refrained from imposing costs as it had already imposed costs on AVVNL.

14. On 08/03/2013, after about seven years from the passing of Orders dated 25/07/2006 and 04/11/2006, Balakrishna Industries again filed Petition No.375 of 2013 under Section 86 (1) (f) of the said Act relying on judgment of Mrs. Justice Goel in Appeal No.74 of 2007 and praying that JVVNL be directed to review the levies in the past and refund the excess levy along with interest under Section 66 (6) of the said Act. In the petition Balakrishna Industries *inter alia* stated that the review petition filed by RSMML seeking review of Order dated 06/01/2011 whereby the State Commission had rejected the application filed by RSMML and Balakrishna Industries under Section 142 of the said Act for enforcement of Orders dated 04/11/2006 and 25/07/2006 respectively was disposed of by the State Commission by its Order dated 29/11/2011. Balakrishna

Industries pointed out that by the said order the State Commission had directed AVVNL to refund the amount to RSMML. That order was confirmed in the review petition. Balakrishna Industries further pointed out that in Order dated 25/07/2006 passed on Petition No.101 of 2006 filed by it, the State Commission has observed that it was not an individual case, but a matter of general nature applicable to all such agreements under the GOR's policy and in RSMML's case where similar point was involved, notice was issued to all Discoms as the decision was to be applied to all Discoms in a uniform manner. Order passed in the said matter is therefore not restricted to RSMML or to AVVNL, but it applies to all Discoms. Balakrishna Industries therefore prayed that AVVNL be directed to review the levies imposed in the past and refund the excess levy with interest under Section 66 (6) of the said Act.

15. By the impugned Order dated 29/05/2014 the State Commission dismissed the petition. The State Commission observed that the only question that arises is whether Balakrishna Industries is entitled to seek review of the bills raised during the period December, 2004 to July, 2007 and refund of

the amount collected based on the bills to be revised. The State Commission observed that Balakrishna Industries' Petition No.101 of 2006 was disposed of by it on 25/07/2006 by observing that the bill methodology needs revision, but the bills were not set aside. JVVNL filed appeal against the said order but it was dismissed. Balakrishna Industries filed a petition under Section 142 of the said Act for compliance of the State Commission's Order dated 25/07/2006. But the State Commission held that there was no non compliance of Order dated 25/07/2006. The State Commission observed that all orders passed by it on Balakrishna Industries petitions have become final. The State Commission rejected the submission of Balakrishna Industries that its bill should be revised and excess amount should be refunded to it as was done in RSMML's case because its case is covered by it. Relying on the Supreme Court's judgement in **Md. Aziz Alam & Ors Vs. Union of India**<sup>1</sup> the State Commission held that once Balakrishna Industries' matter reached finality it could not be opened on the ground that in some other matter filed at the behest of some other similarly situated persons the Tribunal or Court has granted some relief.

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<sup>1</sup> 2001-10-SCC-93

In the circumstances the petition was dismissed. Balakrishna Industries filed a review petition which was dismissed on 14/11/2014. Both these orders are impugned in this appeal.

16. We have heard Mr. Bhandari learned counsel appearing for Balakrishna Industries. We have perused the written submissions filed by him. Gist of his submissions is as under:

- (a) The claim of Balakrishna Industries is limited for a period of 4 months. The amount involved is around Rs.11 lacs plus interest and there are no other claimants who can claim similar relief.
- (b) It is wrong to say that in Order dated 25/07/2006 passed by the State Commission there was implied rejection of the Appellant's claim. The State Commission has acknowledged that impugned revised billing methodology was leading to free flow of power to Discoms and Clause 7 of the agreement required amendment in view of anomalies pointed out by Balakrishna Industries.

- (c) While pronouncing Order dated 25/07/2006 the State Commission advised Balakrishna Industries to appear for public hearing on 31/07/2006. As per this order all Discoms, including JVVNL were supposed to propose amendments in the agreement. Thus Order dated 25/07/2006 would be conclusive only after steps stated therein were taken.
- (d) In RSMML's petition since the State Commission was dealing with a policy decision, all the Discoms were made party by Order dated 22/06/2006. Therefore, they were all equally bound by the Order dated 04/11/2006 passed in the said matter which quashed the billing methodology. JVVNL is equally bound by it.
- (e) Order 47 Rule 1 of CPC will not be applicable to this case because Order dated 25/07/2006 passed in Balakrishna Industries did not finally decide the case and JVVNL was not 'Another Party'. The said order was applicable to JVVNL. RSMML's order is not 'Another Order' as the Appellant is fully covered by it.



- (f) The State Commission has repeatedly observed that the two cases are similar and the agreements are also similar.
- (g) Order dated 25/07/2006 passed in Balakrishna Industries' matter is undoubtedly prospective and has been implemented accordingly by giving last instalment vide cheque dated 23/3/2013. However, by Order dated 04/11/2006 passed in RSMML's matter the State Commission quashed the revised billing methodology. RSMML was given refund retrospectively. Since order in Balakrishna Industries' case was not conclusive and the issue was finally decided in RSMML's order which is applied to JVVNL, general order of RSMML must apply to Balakrishna Industries retrospectively.
- (h) In appeal carried from RSMML Order dated 04/11/2006, the majority judgement of this Tribunal held that the billing methodology was bad and the earlier methodology was correct.

- (i) AVVNL, the appellant therein was directed to bill RSMML as per the method applied before November, 2005. Hence, there is no scope for debate over prospective or retrospective operation of the State Commission's Order dated 25/07/2006.
- (j) State Commission in its Order dated 29/11/2011 has given retrospective operation to Order dated 04/11/2006 passed in RSMML's case. However, it has, based on a passing remark made in Balakrishna Industries Order dated 25/07/2006, held that the said order is prospective in nature which is wrong.
- (k) Judgment of this Tribunal in Appeal No.38 of 2010 dated 09/11/2011 in **M/s Fashion Suitings Limited v. Ajmer Vidyut Vitran Nigam Limited & Anr.** is relevant because in that judgment this Tribunal has made observations about injustice caused to RSMML & Balakrishna Industries because of flawed billing methodology and similar nature of Balakrishna Industries and RSMML was noted.

- (l) Balakrishna Industries is only seeking the implementation of RSMML's order.
- (m) Balakrishna Industries did not challenge Order dated 25/07/2006 because it was satisfied with the State Commission's conclusion about billing methodology. Principles of *Res Judicata* are not applicable here because the State Commission is not bound by the CPC. In any case Balakrishna Industries merely wants implementation of the general order in RSMML. What is wrong in the case of RSMML cannot be right in the case of Balakrishna Industries. That would be grossly discriminatory. The appeal therefore deserves to be allowed.
- (n) A demand for enforcement of RSMML order duly affirmed by this Tribunal cannot be hit by any provision of limitation. In the impugned order there is no whisper about limitation.

17. Mr. Mehta learned counsel for the State Commission has taken us through all the relevant orders and contended that Order dated 25/07/2006 has assumed finality as it was not

challenged by Balakrishna Industries. The said order is prospective. That has been conclusively stated by the State Commission. Balakrishna Industries is trying to reopen the settled issue after a passage of more than seven years which is not permissible. Balakrishna Industries cannot take advantage of Order passed in RSMML's case. In support of his submissions Mr. Mehta relied on judgments of the Supreme Court in **Md. Aziz Alam, State of Orissa & Anr v. Mamta Mohanty<sup>2</sup>, UP Jal Nigam & Anr. v. Jaswant Singh & Anr<sup>3</sup>** and judgements of this Tribunal in **Transmission Corporation of Andhra Pradesh Ltd & Ors v. National Thermal Power Corporation Ltd & Anr<sup>4</sup>** and **NTPC Limited, New Delhi v. Central Electricity Regulatory Commission & Ors.<sup>5</sup>**

18. We have heard Mr. Bipin Gupta learned counsel appearing for Respondent No.2 and perused the written submissions filed by him. Gist of his written submissions is as under:

- (a) The present appeal is liable to be rejected because Orders dated 06/01/2011 and 29/11/2011 have

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<sup>2</sup> (2011) 3 SCC 436

<sup>3</sup> (2006) 11 SCC 464

<sup>4</sup> 2009 ELR (APTEL) 0445

<sup>5</sup> 2010 ELR (APTEL) 1117

attained finality and the recoveries/settlements pertaining to period prior to 25/07/2006 by filing petition on 08/03/2013 is barred by limitation (see **AP Power v. Lanco**<sup>6</sup>).

- (b) Specific prayer made by Balakrishna Industries in Petition No.101 of 2006 for rectifying the past recoveries stood rejected by Order dated 25/07/2006. The proposed regulations were to operate prospectively.
- (c) Balakrishna Industries did not challenge Order dated 25/07/2006. JVVNL's appeal challenging the said order was dismissed by this Tribunal. Balakrishna Industries on its own has contended that the petition in its case was different from the petition in RSMML's case.
- (d) Balakrishna Industries Petition No.208 of 2009 praying for appointment of Arbitrators was dismissed on 23/12/2009 by observing that final order has been passed in Petition No.101 of 2006 on 25/07/2006.

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<sup>6</sup> (2016)-3-SCC-468

Appeal filed against the said order was dismissed by this Tribunal.

- (e) The Order dated 04/11/2006 only applies to parties in that petition i.e. RSMML and AVVNL.
- (f) The petition filed by Balakrishna Industries under Section 142 of the said Act claiming refund for the past recoveries on the basis of Order dated 25/07/2006 was dismissed. Review petition filed by Balakrishna Industries was also dismissed vide Order dated 29/11/2011. Thus claim for past recoveries prior to 25/07/2006 was dismissed. Fresh petition filed on 08/03/2013 claiming past recoveries prior to 25/07/2006 is barred by *res judicata* as well as limitation.
- (g) **Fashion Suitings'** case is not applicable to this case because the disputed period in that case was from June, 2007 to September, 2007 after coming into force of amendment of new Clause 115 in the Regulations.
- (h) In the circumstances the appeal deserves to be dismissed.

19. There are too many proceedings involved in this case. At the cost of making this judgment tedious we had to refer to them to bring out the sequence of events and also because the Appellant Balakrishna Industries has tried to link two sets of proceedings to get the relief. The controversy involved in the appeal however lies in a narrow compass. Balakrishna Industries amongst other things is relying on order dated 25/07/2006 passed by the State Commission on its Petition No.101 of 2006. It is stated by the counsel for Respondent No.2 JVVNL that Balakrishna Industries has already been given credit for the billing month of May,2007 to October 2007 by applying order dated 25/07/2006 prospectively. This fact is not disputed by Balakrishna Industries. In fact it is stated in the written submissions filed on behalf of Balakrishna Industries that its claim is for four months prior to November, 2005 and it is for the sum of around Rs.11 lacs plus interest. Balakrishna Industries is claiming parity with order dated 04/11/2006 passed in RMML's case and contending that order dated 25/07/2006 has retrospective operation, while JVVNL is contending that it has prospective operation. Thus the issue is whether order dated 25/07/2006 has a retrospective operation.

Connected to this is the issue whether Balakrishna Industries can claim parity on the basis of order dated 25/07/2006 after such a long period when order dated 25/07/2006 was not challenged by it; and when it had taken a stand that order dated 25/07/2006 and order dated 04/11/2006 are two distinct orders arising out of two different proceedings.

20. Facts have been narrated in detail. While appreciating the rival contentions we will have to revisit certain facts. In Petition No.101 of 2006 filed by Balakrishna Industries it assailed the billing methodology of JVVNL. It requested that all wrong adjustments in the past since the setting up of the captive plants by the consumer should be ratified. After noticing the anomalies pointed out by Balakrishna Industries State Commission observed that it was not an individual case but a matter of general nature applicable to all agreements under the Government of Rajasthan policy which can be considered by it against tariff petition or its review or suo-motu tariff determination or at the time of amending regulations and Balakrishna Industries can state its view point before the State Commission in the proceeding regarding publication of draft



regulations initiated by it. The State Commission clarified that the applicability of regulations so finalised will be from the date of publication in the official gazette and consequently the benefits thereof can be derived prospectively.

21. This order in our opinion took note of anomalies pointed out by Balakrishna Industries. The State Commission felt that the issue involved was general in nature and Clause 7 of the WB Agreement needed amendment. The State Commission directed JVVNL and other Discoms to review the agreements. What emerges from this order is that the State Commission was impressed by the anomalies pointed out by Balakrishna Industries. It wanted amendments to be effected in all agreements; hence direction was given not only to JVVNL but also to other Discoms to review their agreements. But what is significant is that the State Commission gave a positive finding that the finalised regulations will have prospective operation. While disposing of the petition it did not grant Balakrishna Industries prayer that all wrong adjustments in the past since the setting up of the captive plant by Balakrishna Industries should be ratified. Thus the State Commission was not in favour of

granting prayer of Balakrishna Industries that all wrong adjustments should be ratified retrospectively. Pertinently this order is not challenged by Balakrishna Industries. It has attained finality.

22. RSMML filed Petition No.100 of 2006 in the State Commission challenging *inter alia* the methodology adopted by AVVNL regarding adjustment of renewable energy generated by RSMML in consequence of audit observation. The State Commission added other Discoms including JVVNL as party to the proceedings because Government of Rajasthan Policy was involved in the case. It came to a conclusion that billing methodology adopted by AVVNL was bad, against the policy and against principles of natural justice. By its order dated 04/11/2006 it set aside the net recovery for the period from July, 2002 to August, 2003. The State Commission stated that it had already directed JVVNL to review the provisions of Clause 7 of the agreement with Balakrishna Industries. The directions were reiterated. It is strongly urged by Balakrishna Industries that benefit of this order must be given to Balakrishna Industries because it was a party to the proceedings along with other

Discoms, as directed by the State Commission, looking to the general nature of the issue related to the Government policy and because in its order dated 25/07/2006 Balakrishna Industries was directed to participate in the proceedings initiated by the State Commission relating to publication of draft regulations. It is further urged that order dated 25/07/2006 is an inconclusive order. RSMML order is a common order. It applies to all Discoms. Order dated 25/07/2006 and order dated 04/11/2006 are similar in nature. Hence, order dated 25/07/2006 also must be given retrospective operation.

23. It is difficult to accept the contention that order dated 25/07/2006 is inconclusive in nature. It finally disposed of Balakrishna Industries petition making it clear that the agreements need to be reviewed and finalised regulations will have prospective operation. It bears repetition to state that in appeal filed by JVVNL challenging order dated 25/07/2006, Balakrishna Industries had taken a diametrically opposite stand. Balakrishna Industries stated that its petition was totally different from RSMML's petition. It contended that both the petitions were filed against different Discoms and for the disposal

of either of the petitions the presence of other was not necessary. In fact while dismissing the said petitions the State Commission observed that parties to the dispute in both the petitions were different. The State Commission recognised the distinct nature of both the petitions. Balakrishna Industries therefore cannot be allowed to take a contrary stand to suit its convenience. It was submitted that a wrong stand on wrong advice taken by Balakrishna Industries may not be held against it. We cannot accept this argument. Balakrishna Industries was represented by a lawyer. The stand was taken obviously consciously. By this order the State Commission has not granted prayer of Balakrishna Industries seeking retrospectivity. It is not appealed against. It is not possible to accept the submission that no appeal was preferred because Balakrishna Industries claim was embedded in RSMML's judgment. Once the prayer was not granted and it was said that amended regulations will have prospective operation, Balakrishna Industries should have preferred appeal which it did not.

24. It is urged that JVVNL was party to RSMML's order; hence it was bound by it. Counsel for JVVNL submitted that having

regard to RSMML's order relying on order dated 25/07/2006 Balakrishna Industries has already been given credit for billing month of May, 2007 to October, 2007 by applying the said order prospectively. Therefore, it cannot be said that JVVNL has ignored the said order. It has, in our opinion, taken action after studying both the orders in a manner so as not to create a conflict between the two.

25. In this connection it also needs to be noted that Balakrishna Industries had filed a petition for appointment of Arbitrator. The State Commission dismissed the said petition by its order dated 23/12/2009 observing that the concerned issue has been settled by it vide its order dated 25/07/2006 which has reached finality having been upheld by this Tribunal. Appeal filed against order dated 23/12/2009 was dismissed by this Tribunal at the admission stage. This Tribunal therefore confirmed that order dated 25/07/2006 was final in nature.

26. AVVNL filed Appeal No.74 of 2007 against order dated 04/11/2006 passed in RSMML's case and subsequent order dated 13/04/2007 declining review of the said order. There was

a difference of opinion between the two members of this Tribunal. Hon'ble Judicial Member Mrs. Justice Manju Goel held that billing method applied before November, 2005 was the correct method. Mrs. Justice Manju Goel's view was confirmed by the third member i.e. Mr. Bajaj, the Technical Member. AVVNL was directed to bill RSMML as per the method applied before November, 2005.

27. Balakrishna Industries filed petition for enforcement of order dated 25/07/2006 and RSMML filed petition for enforcement of order dated 04/11/2006. The State Commission dismissed both the petitions by its order dated 06/01/2011 as in its opinion both the orders did not give any specific order for refund of amount applying them retrospectively.

28. Being aggrieved by this order RSMML and Balakrishna Industries filed review petitions before the State Commission. So far as order dated 04/11/2006 is concerned, the State Commission by its order dated 29/11/2011 held that by stating that the said order is not to be applied retrospectively it had diluted it. The State Commission referred to the appeal filed by

AVVNL against order dated 04/11/2006 passed in RSMML's case and the majority view of the Tribunal mentioned hereinabove that billing pattern practised prior to November, 2005 was to be followed. The State Commission held that implication of the majority view was that order dated 04/11/2006 has to operate retrospectively. Order dated 06/01/2011 was therefore modified to that extent giving to retrospectivity to order dated 04/11/2006. So far as order dated 25/07/2006 in Balakrishna Industries' case is concerned, the State Commission observed that in that order it had stated that amended regulations will have retrospective operation. Balakrishna Industries' prayer was not granted. The said order has attained finality as it was not challenged. Hence, the petition for its retrospective implementation was rightly dismissed. No review of the said order was called for.

29. Being aggrieved by this order AVVNL filed Appeal No.17 of 2012 in this Tribunal. This Tribunal dismissed the said appeal by heavily criticizing the conduct of AVVNL and passing strictures against it. We have reproduced the said paragraphs hereinabove. This Tribunal imposed costs on AVVNL. AVVNL preferred review petition seeking review of the said order. It was dismissed by this

Tribunal by reiterating what it had said in its order dated 20/09/2012.

30. About seven years after order dated 25/07/2006 and 04/11/2006 Balakrishna Industries again filed Petition No.375 of 2013 praying that JVVNL be directed to review the levies in the past. The said petition has been rejected by the impugned order dated 29/05/2014.

31. It is contended by counsel for Balakrishna Industries that there need be no debate on retrospectivity now and benefit of order dated 04/11/2006 and subsequent orders passed by this Tribunal in Appeal No.17 of 2012 and Review Petition No.12 of 2012 *inter alia* criticizing the conduct of AVVNL and imposing costs on it, must be given to Balakrishna Industries. Counsel submitted that impugned order dated 29/05/2014 deserves to be set aside.

32. While we are in respectful agreement with the view expressed by this Tribunal in its judgement dated 20/09/2012 in Appeal No.17 of 2012 and in its judgment dated 17/04/2013 in



Review Petition No.12 of 2012 and we concur with this Tribunal that conduct of AVVNL was reprehensible it is not possible for us to hold that the benefit of retrospectivity should be given to Balakrishna Industries on the basis thereof. At the cost of repetition we must state that in order dated 25/07/2006 the State Commission has while rejecting Balakrishna Industries' prayer for ratification of all wrong adjustments in the past stated that amended regulations will have prospective operation. This order was not appealed against. Balakrishna Industries took a categorical stand that order dated 25/07/2006 and order dated 04/11/2006 are distinct orders. This was accepted by this Tribunal in its order rejecting JVVNL's appeal against order dated 25/07/2006 and while rejecting Balakrishna Industries' petition for appointment of Arbitrator, this Tribunal recognised the final nature of order dated 25/07/2006. Moreover, JVVNL has accepted order dated 25/07/2006 and Balakrishna Industries has been given credit for the billing month of May, 2007 to October, 2007. The claim involved is now for a sum of about Rs. 11 lacs and interest thereon based on retrospectivity, which in our opinion cannot be granted at this distance of time when the original order dated 25/07/2006 is not challenged and has

assumed finality. Balakrishna Industries' petition suffers from delay and laches.

33. In this connection reliance placed by the State Commission on **Md. Aziz Alam** is apt. In that case the Central Administrative Tribunal ("**CAT**") dismissed the claim of the Appellants therein. This order was confirmed by the Supreme Court. It appears that some other similarly situated persons had filed application before CAT and that application was allowed by CAT. Emboldened by this the Appellants therein filed a fresh application before CAT which was dismissed on the ground of delay by CAT. That order was challenged before the Supreme Court. While dismissing the Special Leave Petition the Supreme Court observed as under:

*"2. It is contented by the learned counsel for the appellants that the disposal of OA No.327 of 1989 by the Tribunal filed by some other applicants gives a fresh cause of action to these appellants as they were similarly situated and therefore, the Tribunal committed error in refusing the relief sought for on the ground of limitation. According to the learned counsel, there is no justifiable reason to deny the relief to these appellants when similar relief has been given to some others who also did take the recruitment test along with the appellants in the year 1985 as already stated. We are unable to persuade ourselves to agree with this contention raised by the learned*

*counsel appearing for the appellants, inasmuch as the appellants did approach the Tribunal way back in the year 1988 and being unsuccessful there, did approach this Court and this Court declined to grant special leave in the year 1990 and, therefore, so far as the question of the appellants' right of consideration to the post applied for has become final and would not be reopened merely on the ground that in some other matters filed at the behest of some similarly situated persons, the Tribunal or a court has granted some relief. That apart, more than 15 years have elapsed from the date on which the appellants claim to have taken the test in question."*

These observations of the Supreme Court are clearly attracted to the facts of this case.

34. It was submitted by Mr. Bhandari learned counsel for Balakrishna Industries that Balakrishna Industries is not some other person and RSMML's order is not passed in some other matter. Counsel submitted that Balakrishna Industries was party in the said matter; its name is repeatedly mentioned in the said matter and all Discoms were involved in the said matter. In this connection it bears repetition to state that Balakrishna Industries had taken a stand in writing that the two orders are distinct. This stand was accepted by this Tribunal. In any case

partial benefit has already been given to Balakrishna Industries. After such a long period settled matters cannot be reopened. There has to be some end to litigation.

35. Reliance placed on this Tribunal's judgement in **Fashion Suitings** is misplaced as the disputed period in that case is from June, 2007 to September 2007 i.e after coming into force of the amended Regulations. The factual matrix differs.

36. In the circumstances we find no merit in the appeal. The appeal is dismissed.

37. Pronounced in the Open Court on this **7<sup>th</sup> day of September, 2016.**

**(I.J. Kapoor)**  
**Technical Member**

**(Justice Ranjana P. Desai)**  
**Chairperson**

✓ **REPORTABLE / NON-REPORTABLE**