

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

APPEAL NO. 196 OF 2017

Dated: 23.08.2024

**Present: Hon'ble Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

IN THE MATTER OF:

**MADHYA PRADESH POWER MANAGEMENT COMPANY LIMITED,
Through its Managing Director,
Shakti Bhawan, Vidyut Nagar,
JABALPUR – 482 008.Appellant**

Versus

**CENTRAL ELECTRICITY REGULATORY COMMISSION,
Through its Secretary,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
NEW DELHI – 110 001.**

**NTPC GREEN ENERGY LIMITED,
Through its Managing Director,
NTPC Bhawan, SCOPE Complex 7,
Institutional Area, Lodhi Road,
NEW DELHI – 110 003.**

.....Respondent(s)

**Counsel for the Appellant(s) : Mr. G. Umapathy, Sr. Adv.
Mr. Manoj Kumar Dubey
Mr. Aditya Singh
Ms. Vaishnavi V.
Mr. R. K. Thukral
Ms. R. Mekhala
Mr. Nitin Gaur**

Mr. Deo G. Rozario

Counsel for the Respondent(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Matrugupta Mishra
Ms. Swagitika Sahoo
Ms. Ritika Singhal
Mr. Nipun Dave
Mr. Satish Kumar Sharma
Ms. Sonakshi
Ms. Akanksha V. Ingole
Mr. Shashwar Dubey
Ms. Ishita Thakur
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
Ms. Tanya Sareen
Mr. Pulkit Agarwal for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The instant Appeal has been filed by the Appellant i.e. Madhya Pradesh Power Management Company Ltd. ("MPPMCL" or "Appellant") challenging the legality of the Order dated 31.03.2017 ("Impugned Order") passed by the Central Electricity Regulatory Commission ("CERC" or "Commission") in Petition No. 160/MP/2015 whereby the CERC has allowed the grant of generic tariff for the year 2013-14 i.e. @ Rs.7.87/kWh to the 2nd Respondent, the appellant claimed that the order is contrary to the CERC, RE Regulations, 2012 which do not permit grant of previous year tariff to the current year when the commissioning of the

project was not accomplished in accordance with the Power Purchase Agreement (PPA).

2. The Appellant argued that in the Impugned Order, the Respondent is held to be entitled to the higher tariff which is contrary to CERC's earlier order dated 9.2.2016 passed in an identical case, where it has correctly interpreted Regulation 8(2) of the RE Regulations of 2012.

3. The Appellant, i.e., Madhya Pradesh Power Management Company Limited ("MPPMCL") is a Government Company as defined under the provisions of Section 617 of the Companies Act, 1956, and is a Trading Licensee entitled to undertake transactions of sale and purchase of electricity in the State of Madhya Pradesh.

4. The Respondent No. 1, i.e. the Central Electricity Regulatory Commission is a statutory body constituted under Section 76 of the Electricity Act, 2003 *inter-alia* having powers to adjudicate the matter.

5. The Respondent No. 2, i.e., NTPC Green Energy Ltd. (in short "NGEL") is a company incorporated under the Companies Act, 2013 and engaged in the business of renewable energy generation.

6. Before we discuss the merit of the appeal, it is important to note the issue of maintainability of the Impugned Order as the Appellant submitted that the Impugned Order was signed by the three Members of the Commission as against being heard by the four Members.

7. The part of the preliminary submission of the Appellant is reproduced as follows:

“It is submitted that CERC by its Record of Proceeding dated 15.10.2015 reserved the order in Petition No. 160/MP/2015 and the coram was a Bench comprising of 4 members. The impugned order dated 31.03.2017 was passed by a Bench of three Hon’ble members which is contrary to the catena of Judgments of this Hon’ble APTEL including the order dated 07.02.2024 passed by this Hon’ble APTEL in Appeal No. 297 of 2019 – Jindal India Thermal Power Ltd. Vs. Odisha Electricity Regulatory Commission & Ors. where in para 24 it was held as under:

“24. We clarify and reiterate the legal principle that where one of the Members of the Commission who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign the order. In such a situation, the matter shall be heard de novo and final order be passed / signed accordingly.”

In the light of the above, this Hon’ble Tribunal may be pleased to set aside the order and remand the matter to CERC for de novo adjudication.”

8. The Respondent No. 2, however, submitted as under:

“That vide the order dated 30.04.2024, this Hon’ble Tribunal recorded the submission of the Appellant that the appeal may be remanded to the Respondent Central Commission, as the matter was heard by four Members, but the Impugned Order was signed by only three members and further directed all the parties to file the Written Submissions in this behalf before the next date of hearing.

On account of the aforesaid direction by this Hon’ble Tribunal, NTPC Green Energy Limited is submitting the present Written Submission.

That the contention of the Appellant that the Impugned Order dated 31.03.2017 may be remanded to the Ld. CERC as the matter was heard by 4 Members but signed by 3, has been raised after a substantial period of around seven years. Remanding of the matter to the Ld. CERC at this stage will cause grave prejudice to the Respondent No. 2.

It is pertinent to mention that MPPMCL is paying 95% of monthly energy bills and withholding 5% of monthly energy bills resulting in cumulative withheld amount of Rs. 22.71 Crores till date.

That if the matter is remanded at this stage, all these years of litigation will go to waste as the matter will be taken up afresh by the Ld. CERC which will add up in the resources spent by the parties in the litigation.

Without prejudice to the contentions made above, if this Hon’ble Tribunal decides to remand the matter back to the Ld. CERC, it is

respectfully prayed that this Hon'ble Tribunal may direct the Ld. CERC to adjudicate on the matter in a time bound manner.

Accordingly, in view of the above, it is prayed that the Hon'ble Tribunal be pleased to refrain from remanding the matter to the Ld. CERC or direct the Ld. CERC to expedite the proceedings and adjudicate the matter in a timebound manner.”

9. This Tribunal vide above referred judgment dated 07.02.2024 has noted as under:

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2. *During the hearing of the appeal, it transpired that the cases were heard by a Bench of the Commission comprising of three Members including the Chairperson, whereas the impugned order has been signed by only two Members. This is for the reason that while the order was reserved on 24.04.2018, before the order could be prepared and signed on 04.06.2019, i.e. after a gap of more than a year, one of the Members of the Commission had already retired.*

3. *Accordingly, a preliminary legal objection was raised on behalf of the appellant that the impugned order having been signed by only two Members of the Bench which had heard the case is not sustainable and the appropriate course for the Commission, upon superannuation of one of the Members of the Bench, was to hear the case de novo.*

4. *In view of the same, we thought it appropriate to hear the parties at first on the said preliminary legal objection raised by the appellant*

and to adjudicate upon the same. Hence, we have heard the learned counsels for the parties extensively on this aspect of the case. The learned counsels have referred to various judgments in support of their submissions, which would be dealt with in detail herein below, and have also taken us through the relevant provisions of the Electricity Act, 2003, as well as the Odisha Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 dated 21.05.2004 issued by the 1st Respondent OERC for conduct of its proceedings and discharge of its functions (hereinafter referred to as "OERC Regulations").

5. *On behalf of the appellant, the learned senior counsel Mr. Sajan Poovayya, submitted vehemently that the impugned order is non est and void ab initio as it has been passed in blatant violation of settled principles of law which is "one who hears must decide". It is argued that the said principle has been upheld by the Hon'ble Supreme Court in the case of Gullapalli Nageswara Rao and Ors. V. Andhra Pradesh State Road Transport Corporation and Anr., AIR 1959 SC 308, as well as in the case of Rasiklal Manikchand Dhariwal and Anr. V. M.S.S Food Products, (2012) 2 SCC 196. The learned counsel also cited the judgments of this Tribunal in Global Energy Pvt. Ltd. V. KERC, Appeal No.233 of 2016, Damodar Valley Corporation v. CERC, 2019 SCC Online APTEL 40, and Jindal India Thermal Power Limited v. CERC and Anr. Appeal No.82 of 2018, to canvas that this Tribunal also has consistently set aside the orders as being non est and void, which had been signed by only two members when the matters had been heard by the three Members of the respective Commissions. Referring to Regulation 20 (1) of the Regulation dated 21.05.2004 issued by the*

OERC, the learned senior counsel argued that the use of word “shall” makes it evident that the orders of the Commission have to be signed by all those members who had heard the matter. He urged this Tribunal to set aside the impugned order on this very score and remand the matter back to the Commission for afresh consideration.

6. Mr. G. Umapathy, learned senior counsel appearing on behalf of the 1st Respondent i.e. Commission, supported the impugned order stating that no legal infirmity can be found in the same. He argued that Regulation 8(1) of the Regulations made by the Commission for conduct of its proceedings clearly laydown that the coram for the meeting of the Commission shall ordinarily be two and in some cases matters may be heard by a signal Member also, and therefore, impugned order in this case which has been signed by two Members is valid and legal even though the matter was heard by three Members. It is his submission that the Regulations 76 and 77 provide inherent powers to the Commission to proceed in a matter like the situation arisen in the present case. He also referred to Section 93 of the Electricity Act, 2003, to argue that no act or proceedings of the Appropriate Commission can be questioned or invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission. He argued that the vacancy created in this case upon retirement of one of the Members of the Commission, who also heard the matter, does not invalidate the impugned order signed by other two Members of the Commission. He cited the judgment of this Tribunal dated 11.08.2011 in Faridabad Industries Association & Ors. V. Haryana Electricity Regulatory Commission Appeal No.204 of 2010, and Amausi Industries Association v. Uttar Pradesh Electricity

Regulatory Commission, in which this Tribunal had upheld the order of the Commission which had been passed in similar situation as in the present case i.e. the matter was heard by three Members of the Commission whereas the order was signed by only two Members as the third Member had retired by then. While doing so, this Tribunal had relied upon Section 93 of the Electricity Act, 2003. Invoking the doctrine of necessity as explained by the Hon'ble Supreme Court in Election Commission of India v. Dr. Subramaniam Swamy, (1996) 4 SCC 104 117, the learned senior counsel submitted that upon retirement of the one of the Members of the Commission which had heard the matter in the instant case, it had become necessary for remaining two Members to sign the order and therefore, no legal infirmity can be found in the impugned order.

7. *The learned counsel for respondent no.2, Mr. Arijit Maitra, also supported the impugned order stating that it suffices the coram requirement in terms of Regulation 8(1)(b) of the Regulations issued by the Commission for conduct of its business. He further pointed out that in terms of Section 92 of the Electricity Act, the matters coming up before the Appropriate Commission shall have to be decided by majority of votes of the Members present and voting, and therefore, since the impugned order in the present case has been signed by majority Members of the Commission which had heard the matter, it cannot be said to be void or unsustainable. In this regard, reliance is placed upon the judgment of the Hon'ble Supreme Court in Ishwar Chandra v. Satyanarain Sinha, (1972) 3 SCC 383. The learned counsel also cited the judgments of this Tribunal in Faridabad Industries Association v. Haryana Electricity Regulatory Commission,*

2011 SCC OnLine APTEL 127 and Amausi Industries Association v. Uttar Pradesh Electricity Regulatory Commission, 2013 SCC OnLine APTEL 138 : [2013] APTEL 151, which have already been noted hereinabove. Invoking the doctrine of stare decisis the learned counsel submitted that since these two judgments of this Tribunal have been holding the field for a long time, the legal issues settled therein should not be unsettled now without there being any compelling reasons for the same. He argued that in the subsequent judgment in Damodar Valley Corporation case (supra) relied upon by the appellant's counsel, this Tribunal has not considered the previous judgments in Faridabad Industries case as well as Amausi Industries case, and therefore, the legal issue settled in these two judgments cannot be unsettled merely by relying upon the judgment in Damodar Valley Corporation case.

8. We have considered the rival submissions of the learned counsels and have perused the impugned order. We have also gone through the relevant provisions of the Electricity Act, 2003, as well as the Regulations dated 21.05.2004 framed by the 1st Respondent OERC for conduct of its proceedings and discharge of its functions."

10. It is, therefore, clear that the present issue raised by the Appellant on the validity of the Impugned Order is identical to the case referred to above.

11. Thus, the issue is covered by our earlier judgment dated 07.02.2024 in Appeal No. 297 of 2019 titled *Jindal India Thermal Power Ltd. Vs. Odisha Electricity Regulatory Commission & Ors.*

12. This court is bound by its earlier decisions on the principle of law, accordingly, the matter has to be first examined on the issue of validity of the Impugned Order.

13. This Tribunal vide order dated 07.02.2024 has held as under:

“23. Hence, we find the impugned order of the Commission unsustainable, legally invalid and non est.

24. We clarify and reiterate the legal principle that where one of the Members of the Commission who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign the order. In such a situation, the matter shall be heard de novo and final order be passed / signed accordingly.

25. The appeal is hereby allowed. The matter is remanded to the Commission i.e. 1st Respondent, with the direction to hear and decide the same de novo.

26. The Registry of this Tribunal is directed to transmit a copy of this judgment to the Electricity Regulatory Commissions in all the States/UTs for their information and guidance.”

14. However, we agree with the submission of Respondent No. 2 that the matter has been under consideration by this court since 2017, and further delay will cause grave prejudice to the Respondent.

15. Accordingly, we direct the Central Commission, after hearing all the contesting parties, to pass the order afresh within three (3) months from the date of pronouncement of this judgment.

16. The Appellant and the Respondents are also directed to ensure expeditious decision by the Central Commission without seeking any adjournments in the matter.

ORDER

For the foregoing reasons as stated above, we are of the considered view that Appeal No. 196 of 2017 is allowed to the limited extent as observed and the matter is remanded back to Respondent No. 1, Commission to hear the matter afresh and pass the order expeditiously but not later than three months.

Pending IAs, if any, shall stand disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 23rd DAY OF AUGUST, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj