

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 58 of 2008

Dated: 22nd July, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

IN THE MATTER OF:

**Madhya Pradesh Power Trading Co. Ltd.
Block No. 2, Ground Floor, Shakti Bhawan
Rampur
Jabalpur – 482 008** **Appellant**

Versus

**Central Electricity Regulatory Commission
Core-3, 6th Floor
Scope Complex, Lodhi Road
New Delhi – 110 003** **Respondent 1**

**Powergrid Corpn. Of India Ltd.
Registered Office: B-9, Qutab Institutional Area
Katwaria Sarai
New Delhi – 110 016** **Respondent 2**

**Bihar State Electricity Board
Vidyut Bhawan, Baily Road
Patna – 800 001** **Respondent 3**

**West Bengal State Electricity Board
Bidyut Bhawan, Bidhan Nagar
Block DJ, Sector-II, Salt Lake City
Kolkata – 700 091** **Respondent 4**

**Grid Corporation of Orissa Ltd.
Shahid Nagar
Bhubaneswar – 751 007** **Respondent 5**

Damodar Valley Corporation DVC Tower, Maniktala, Civil Centre VIP Road Kolkata – 700 054	.....	Respondent 6
Power Department Government of Sikkim Gangtok – 737 101	.....	Respondent 7
Jharkhand State Electricity Board Engineering Bhawan Dhurwa Ranchi – 834 004	.....	Respondent 8
Gujarat Urja Vikas Nigam Ltd. Vidyut Bhawan, Race Course Baroda – 390 007	.....	Respondent 9
Chhattisgarh State Electricity Board P.O. Sunder Nagar, Danganiya Raipur – 492 013	.....	Respondent 10
Maharashtra State Electricity Distribution Co. Ltd. Prakashgad, 4th Floor, Bandra (E) Mumbai – 400 052	.....	Respondent 11
Electricity Department Govt. of Goa Vidyut Bhawan Panaji – 403 001	.....	Respondent 12
Electricity Department Administration of Daman and Diu Daman – 396 210	.....	Respondent 13
Electricity Department Administration of Dadra and Nagar Haveli Silvasa – 396 230	.....	Respondent 14
Karnataka Power Transmission Corpn. Ltd. Cauvery Bhawan Bangalore – 560 009	.....	Respondent 15

**Counsel for the Appellants(s) : Mr. Sakesh Kumar
Mr. Anil Pandey**

**Counsel for the Respondent(s) : Mr. MG Ramachandran
Mr. Anand K. Ganesan
Mr. R.B. Sharma**

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Madhya Pradesh Power Trading Co. Ltd. (MPPTC) is the Appellant herein. Aggrieved by the Order dated 8.8.2007 passed by the Central Commission (CERC) dismissing the Review Petition, the Appellant has filed this Appeal.

Facts

2. The Power Grid Corporation of India Ltd. (PGCIL), the R-2 herein, filed a Petition in No. 69/04 before the Central Commission for approval of the transmission charges for Korba-Budhipahar transmission system between the Eastern and Western Regions for the period between 1.4.2004 and 31.3.2009 based on the Central Electricity Regulatory Commission (Terms and Conditions of the Tariff) Regulations dated 26.3.2004. It was prayed by the Madhya Pradesh Power Trading Co. Ltd., the Appellant herein, before the Central Commission that fixation of sharing of transmission charges between the Eastern and Western

Regions should be on a 50:50 basis, as per Clause 59 of the Regulation dated 26.3.2004 and accordingly the same may be fixed.

3. However, the Central Commission passed the final order dated 16.3.06 directing that charges for the transmission system shall be shared in the ratio of $1/3:2/3$ between the Eastern and Western Regions respectively, w.e.f. 1.4.2004 in respect of the period between 2004-09, after rejecting the prayer made by the Appellant herein.

4. Earlier, in respect of the period from 2001 to 2004 in the Petition filed by the Powergrid Corporation in Petition No. 87/05, the Central Commission passed an Order on 22.9.2005 on the issue of sharing of transmission charges for the very same lines on a $1/3:2/3$ basis, in contravention of the provision of Regulation dated 26.3.2001 which prescribed that sharing of transmission charges should be in the ratio of 50:50 between the Eastern and Western Regions.

5. Aggrieved by the said Order dated 22.9.2005 passed in Petition No. 87/05, the Appellant earlier filed an Appeal before this Tribunal in Appeal No. 19/06 pointing out that the sharing of transmission charges in the ratio of $1/3:2/3$ is in contravention of the regulations dated

26.3.2001 which prescribed sharing of transmission charges in the ratio of 50:50. Accepting this argument advanced by the Appellant in that Appeal, the Tribunal by the Order dated 14.11.2006 allowed the Appeal and set aside the above Order of the Central Commission. This Tribunal further directed the Central Commission to revise the share of transmission charges in accordance with the Regulation 4.8 of the CERC Regulations which prescribe a ratio of 50:50 by these two regions. Accordingly, the Central Commission modified the ratio as per the Regulation, following the dictum laid down by the Order of this Tribunal by fixing 50:50 instead of $1/3:2/3$.

6. In the light of the then Order of the Tribunal dated 14.11.2006 setting aside the Order of the Central Commission to revise the sharing of transmission charges in accordance with Regulation 2001 for sharing on a 50:50 basis, the Appellant filed a Review Petition in 45/07 before the Central Commission seeking for the modification of the main Order passed by the Central Commission on 16.3.2006 in Petition No. 69/04 in regard to sharing of transmission charges for the period 1.4.2004 to 31.3.2009 praying for the ratio 50:50 instead of $1/3:2/3$.

7. However, the Central Commission rejecting the point urged by the Petitioner in Review Petition after hearing all the parties, dismissed the said Review Petition by its Order dated 8.8.2007 holding that the ground for Review of the Order dated 16.3.2006 is not made out as the principle laid down by the Tribunal in Order dated 14.11.2006 is not applicable to this case. Being aggrieved over this Order of the Central Commission rejecting the Review Petition, the Appellant has filed the present Appeal.

8. The points urged by the Learned Counsel for the Appellant are as follows:

- (i) The Central Commission wrongly decided that the sharing of transmission charges between the Eastern and Western Regions is on $1/3:2/3$ basis. This is in violation of Clause 59 of the Regulations. As per the said Clause, the transmission charges, after deducting recovery from the short term customers shall be shared on a 50:50 basis between the Eastern and Western Regions. Therefore, the decision of the Central Commission with regard to the sharing of the charges is wrong.

- (ii) The Tribunal subsequently in one other matter in respect of the earlier period passed an Order dated 14.11.2006 directed to give primacy only to the Regulation over any agreement between the parties. In this case, the Central Commission did not follow the said dictum and simply decided the share of transmission charges on a $1/3:2/3$ basis under the garb of exercising its power to relax under Clause 13 of the 2004 Regulations without any valid reason. This decision is in violation of Clause 59 as well as the Order of the Tribunal.
- (iii) The Central Commission merely observed in the Order dismissing the Review Petition that it exercised the power of relaxation under Clause 13 of the Regulations to modify the ratio contained in Clause 59 to fix the ratio as $1/3:2/3$. The Central Commission did not specify any reason for the same. Mere existence of the power to relax would not be a justification to fix a different ratio from the ratio given in Clause 59.

9. In reply to the said submission, the Learned Counsel for the Respondent would make the following contentions:

- (i) The Appeal itself is not maintainable as this Tribunal has no jurisdiction to entertain this Appeal.
- (ii) The ratio fixed by the Central Commission as $1/3:2/3$ was decided by the Central Commission in the main Order itself which was passed on 16.3.2006. This Order has not been challenged in the Appeal before this Tribunal. Instead, the Appellant filed a Review before the Central Commission and obtained a dismissal order which alone has been appealed. The Appeal against the order of dismissal of the Review is not maintainable under Order 47 Rule 7 of the CPC.
- (iii) The Review filed by the Appellant before the Central Commission as against the Order dated 16.3.2006 itself is not maintainable. The main order has been passed by the Central Commission fixing the ratio on 16.3.2006. Challenging the same, the Review has been filed before the Central Commission mainly on the ground that the Tribunal in one other matter held by the order dated 14.11.2006 that the fixing of the sharing charges only on 50:50 basis and therefore the earlier order passed by the Central Commission on 16.3.2006 fixing the ratio as $1/3:2/3$ shall be modified as the ratio on 50:50 basis. The Order 47 Rule 7 clearly indicates that the Court cannot review its order merely because

its superior court took a different view in the subsequent order passed by it. When the Review itself is not maintainable, then Appeal also automatically becomes non-maintainable.

- (iv) The ground of Appeal has also no merits. The Tribunal passed an Order on 14.11.2006 fixing the ratio on 50:50 basis on the strength of the Regulations 2001 in respect of the period 2001-04. The said order would not apply to the present facts of the case because the ratio fixed in this case is on the basis of the Regulation 59 of the Regulations 2004 in respect of the period from 2004-09 coupled with Clause 13 of the Regulations 2004 by which powers have been conferred on the Commission to relax the ratio. Therefore, the Order passed by the Tribunal on 14.11.2006 would not be applicable to the present case which was decided on its own facts and circumstances of the case. Hence, the Order passed by the Central Commission fixing the ratio in the Main Order confirmed in the Review Order is perfectly justified.

10. We have heard the Learned Counsel for the parties and also gone through the records as well as the impugned Order dated 8.8.2007.

11. At the outset, it shall be stated that the objection raised by the Respondent Counsel with reference to the maintainability of this Appeal is legally valid and sustainable. The reasons are as follows:

- (i) The challenge has been made in this Appeal only against the Order in the Review Petition dated 8.8.2007 with reference to the ratio decided by the Central Commission for sharing of the transmission charges between the Eastern and Western Regions. This was actually fixed by the Central Commission in the main Order dated 16.3.06. This main Order has not been challenged before this Tribunal by way of an Appeal. On the other hand, this Appeal has been filed by the Appellant as against the Order of dismissal of the Review Petition dated 8.8.2007. It is settled law that the Main Order alone can be appealed before the Tribunal and the Appeal is not provided against the Order of dismissal of the Review Petition by the Central Commission which confirmed its earlier main Order.
- (ii) The Appeal against the Order of dismissal of the Review is not maintainable under Order 47 Rule 7 CPC. The Appeal could be filed only against the main Order and not against the dismissal Order in the Review Petition. It is true that under Section 94 of

the Electricity Act, the Central Commission has got its powers for reviewing its own Orders as well as under the powers vested in Civil Court. But rejection of the Review Petition is not appealable as per Order 47, Rule 7. The said Order 47, Rule 7 of CPC reads as follows:

“Rule 7: The Order of rejection is not appealable objection to Order granting application.”

(i) The Order of the Court rejecting the application shall not be appealable. The Order granting application can be objected to at once by an Appeal or the Order granting application or in an Appeal from the decree or Order finally passed or made in the suit.”

(iii) A reading of this rule would indicate that the final Order alone can be appealed against before the appellate authority and not the order rejecting the application for review.

(iv) In this case, the original Order has been passed on 16.3.06 which is appealable. But this is not appealed. Instead of filing an Appeal against this Order, the Appellant filed a Review of the said Order before the Central Commission which was dismissed on 8.8.2007. This alone has been appealed though this is not appealable. What the Appellant should have done is that it should have filed an Appeal against the main Order dated 16.3.06 along with an

Application to condone the delay which was occurred due to the pendency of Review Petition before the Commission. In that event, the Appellate Tribunal would consider the said ground for delay and after condoning the delay, it would entertain the Appeal. The Appellant has neither filed an Appeal against the main Order passed earlier nor thought it fit to file the Appeal at least later i.e. after the disposal of the Review Petition as against the main Order along with the application to condone the delay. Therefore, this Appeal as against the Order passed in the Review Petition is not maintainable.

- (v) The main ground on the basis of which the Review of the main Order sought by the Appellant before the Commission was on the strength of the Order passed by the Tribunal. In this case, the main Order was passed on 16.3.06 by the Central Commission. The Tribunal passed an Order fixing the share of charges on 50:50 basis on 14.11.06. Only thereafter, the Appellant filed a Review Petition, mainly on the ground that the Tribunal set aside the Order of the Central Commission fixing the ratio of $1/3:2/3$ instead of 50:50. This shows that the Review application has been filed to review the Order dated 16.3.06 on the ground that the Tribunal subsequently passed an Order favouring the ratio on

50:50 basis. This Review itself is not maintainable because the Order 47 Rule 1 puts a specific bar on considering the subsequent Orders passed by the superior Court as a ground for review. The Order 47 Rule (1) provides thus:

Explanation:

“The fact that the decision on a question of law on which the Judgment of the Court is based, has been reversed or modified by the subsequent decision of the Supreme Court in the subsequent case, shall not be a ground for review of the said Judgment.”

A reading of the above rule would indicate that the fact that a subsequent Order passed by the superior Court, namely this Tribunal taking a different view from that of a subordinate Court, namely, the Central Commission with regard to the issue cannot be the ground for Review. Therefore, there is no legal ground for Review. When the Review itself is not maintainable, the Appeal against the Order in Review also automatically becomes not-maintainable.

12. The reasons referred to above, in our view, would be sufficient to hold that the Appeal itself is not maintainable.

13. In view of the above finding, we do not want to go into the other aspects. Accordingly, we dismiss the Appeal as not maintainable. No costs.

(A.A. Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 22nd July, 2009

REPORTABLE / NON-REPORTABLE