

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 188 OF 2013

Dated: 11th April, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF

NTPC Limited,
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110 003

.... Appellant/
Petitioner

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110001
2. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14, Ashok Marg,
Lucknow, Uttar Pradesh-226001
3. Jaipur Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Janpath,
Jaipur-302005
4. Ajmer Vidyut Vitaran Nigam Ltd.
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305001
5. Jodhpur Vidyut Vitaran Nigam Ltd.
New Power House, Industrial Area,
Jodhpur-342003
6. Tata Power Delhi Distribution Ltd.
33 KV Sub Station, Hudson Lines,
Kingsway Camp, Delhi-110 009
7. BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place,
New Delhi-110019
8. BSES Yamuna Power Ltd.
Shakti Kiran Building,
Karkardooma, Delhi-110 092

9. Haryana Power Purchase Centre,
Shakti Bhawan, Sector-VI,
Panchkula, Haryana-134109
 10. Punjab State Power Corporation Ltd.,
The Mall, Patiala-147001
 11. Himachal Pradesh State Electricity Board,
Kumar Housing Complex Building-II,
Vidyut Bhawan, Shimla-171004
 12. Power Development Department,
Govt. of J & K, Behind Civil Secretariat,
M A Road Srinagar – 190001
 13. Power Department (Chandigarh),
Union Territory of Chandigarh,
Addl. Office Building,
Sector-9 D, Chandigarh-160 009
 14. Uttarakhanda Power Corporation Ltd.
Urja Bhawan, Kanwali Road,
Dehradun-248 001
- Respondents

Counsel for the Appellant(s) ... Mr. M.G. Ramachandran
Ms. Poorva Saigal

Counsel for the Respondent(s) ... Mr. Pradeep Misra &
Mr. Manoj Kr. Sharma for R-2

Mr. Alok Shankar for R-6

Mr. R.B. Sharma for R-7

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an Appeal preferred under Section 111 of the Electricity Act, 2003 against the Order dated 25.5.2012 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Petition No. 279/2009 titled as NTPC Ltd., New Delhi vs Uttar Pradesh Power corporation Ltd, Lucknow & Ors., Whereby the learned Central Commission has determined the tariff applicable for generation and supply of the electricity for the Appellant's

Feroze Gandhi Unchahar Thermal Power Station, Stage-III (210 MW) for the period from 1.4.2009 to 31.3.2014.

2. The relevant facts giving rise to this Appeal are as follows:

- (a) that the Appellant is the power generator. Respondent No.1 is the Central Electricity Regulatory Commission and Respondent Nos. 2 to 14 are the Distribution Companies/Licensees.
- (b) that the Appellant-Petitioner, NTPC has filed this Appeal for approval of tariff of Feroze Gandhi Unchahar Thermal Power Station, Stage-III (210 MW) (hereinafter called the '**Generating Station**') based on the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 (hereinafter called the '**Tariff Regulation, 2009**').
- (c) that the generating station comprises of one unit with the date of commercial operation as 1.1.2007. This Unchahar Station with the capacity of 210 MW was commissioned on 1.1.2007. The tariff of the generating station for the period from 1.1.2007 to 31.3.2009 was determined by the Central Commission vide order dated 10.7.2008 in Petition No. 84/2007 based on the capital cost of Rs.74397.06 lakh as on 1.1.2007. Subsequently, by order dated 21.4.2011 in Petition No. 181/2009, the Central Commission revised the annual fixed charges after considering additional capital expenditure during the period from 1.1.2007 to 31.3.2009 and after taking into consideration the judgment of this Appellate Tribunal dated 13.6.2007 in Appeal Nos. 139 to 142 of 2006 etc and the judgments dated 10.12.2008 and 16.3.2009 in Appeal Nos. 151 & 152/2007 and Appeal Nos. 133, 135 etc. of 2008 respectively, subject to the final outcome of the Civil Appeals C.A. Nos. 5434/2007 to 5452/2007, 5622/2007 etc., and C.A. Nos. 4112-4113/2009 and C.A. Nos. 6286 to 6288/2009, and other connected appeals) filed by the Commission and pending before the Hon'ble Supreme Court. The annual fixed charges allowed by the learned Central Commission are mentioned in its order dated 21.4.2011 in Petition No. 181/2009.

- (d) that the learned Central Commission, for the tariff period from 1.4.2009 to 31.3.2014, framed Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009, then on 16.1.2009, NTPC filed the impugned petition no. 279/2009 before the Central Commission for determination of tariff of generating station for the period 2009-2014 which has been decided as stated above by the impugned order dated 25.5.2012.
- (e) that on 5.7.2012, NTPC filed a Review Petition being R.P. No. 17/2012 before the learned Central Commission seeking review of the order dated 25.5.2012 which has been rejected by the Central Commission vide Review Order dated 2.4.2013. Thus, the Appellant-NTPC first tried to raise its grievances through the review petition and when the review petition was dismissed vide Review Order dated 2.4.2013, filed the instant appeal against the main order/impugned order dated 25.5.2012.

3. The Appellant-NTPC has challenged the impugned order dated 25.5.2012 of the Central Commission on the following grounds:

- (A) that the Central Commission has erroneously not allowed fully the additional capitalization claimed by the Appellant in respect of:
- (a) capitalization of spares amounting to Rs.17.03 crore (including HP/IP Turbines module) up to the allowed limit as provided under the Regulation 8 of the Tariff Regulations, 2009 (amounting to Rs.802.62 lakhs during FY 2009-2010 and Rs.900.00 lakhs during FY 2011-2012.
 - (b) capitalization towards Sewerage System in plant amounting to Rs.124.00 lakh during FY 2011-12.
 - (c) capital expenditure towards balance work of various packages amounting to Rs.21.29 lakh during FY 2009-2010 and Rs.8.61 lakh during FY 2010-2011.
- (B) that further the Central Commission has only allowed Rs.7.55 lakh during FY 2009-2010 and Rs.2.86 lakh during FY 2010-2011 towards capital expenditure on balance work of various packages

within the original scope of work against the claim of NTPC of Rs.28.84 lakh during FY 2009-2010 and Rs.11.47 lakh during FY 2010-2011.

4. We have heard Shri M.G. Ramachandran, the learned counsel for the Appellant, Shri Pradeep Misra and Shri Manoj Kumar Sharma, the learned counsel for Respondent No.2, Shri Alok Shankar, the learned counsel for Respondent No.6 and Shri R.B. Sharma, the learned counsel for Respondent No.7. We have also gone through the written submissions presented by the rival parties and gone through the evidence and material available on record.

5. The following submissions have been made by the learned counsel for the Appellant:-

- (a) that the Appellant had claimed the capital expenditure in respect of the above mentioned aspects under regulation 5, 6 and 7 of the Tariff Regulations, 2009. The Central Commission has not rejected the claim of the Appellant simpliciter on the ground that the claims cannot be held admissible within the scope of Regulation 9(2) read with Regulation 7 of Tariff Regulations, 2009. The Central Commission has considered the merits of individual claim and has not allowed the claims on grounds of lack of justification, observing that sufficient steps have not been taken.
- (b) that the Central Commission, as is clear from the impugned order, would have allowed the claims if the Central Commission had accepted the justification on merits, notwithstanding the interpretation by the Central Commission on the scope of Regulations 5, 6, 7, 9 and 19(1)(e) of the Tariff Regulations, 2009
- (c) that the decision of this Appellate Tribunal in Appeal No. 44/2013 on the interpretation of Regulations 7 and 9 of Tariff Regulations, 2009 does not in any manner affect the consideration of the above claims of the Appellant-NTPC under Regulation 44 of the Tariff Regulations, 2009, that deals with Central Commission's power to relax.
- (d) that the Appellant-NTPC during the proceeding before the Central Commission was under bonafide belief that it could claim the above

capital expenditure under Regulations 5, 6 and 7 and not under Regulation 9 of Central Tariff Regulations, 2009. This does not preclude the Appellant-NTPC from making claims under other provisions of the Tariff Regulations, 2009.

- (e) that even assuming that the claim was initially under the wrong provision of Tariff Regulations, 2009, the same, does not, by itself vitiate the powers of the Central Commission to grant the necessary relief so long as the power does exist and can be traced to a source available in law, i.e., the 'power to relax' under Regulation 44 of the Tariff Regulations, 2009.
- (f) that it is a well-settled principle of law that if an authority has a power under the law, then merely because the source of power is not specifically referred to or a reference is made to the wrong provision of law, that by itself does not vitiate the exercise of powers so long as the power does exist and can be traced to a source available in law, as observed in the matter of *P.K. Palanisamy vs N. Arumugham and Anr (2009)9SCC 173* and *T. Nagappa vs Y.R. Muralidhar (2008) 5 SCC 633*.
- (g) that the reasonings rendered by the Central Commission in the impugned order clearly suggest that the Central Commission had considered the possibility of giving relaxation to the Appellant notwithstanding the Regulation 9 of Tariff Regulations, 2009.

6. **Per-contra**, the learned counsel for the Respondents have made the following contentions:

- (a) that the Central Commission has rightly disallowed the additional capitalization claimed by the Appellant in respect of the following:
 - (i) Capital Initial spares.
 - (ii) Sewerage System in Plant.
 - (iii) Balance work of various packages.
- (b) that the Appellant has questioned the interpretation of Regulation 7 and 9 of Central Tariff Regulations, 2009 which has already been settled by this Appellate Tribunal in its judgment dated 27.1.2014 in Appeal No. 44/2012 by upholding the views of the Commission. It is

surprising that even after the judgment of this Appellate Tribunal dated 27.1.2014, the Appellant is still contending that the claim of additional capitalization is still surviving even though the base on which this Appeal was made, has been eroded by the judgment dated 27.1.2014 in Appeal No. 44/2012, in paragraph 50 of which judgment, this Tribunal has observed as under:-

“50. Summary of our findings: i) The additional capitalization has to be allowed only according to the Regulation 9 of the 2009 Tariff Regulations which will apply to both existing and new power projects.

(ii) The claim of NTPC for online CO2 Monitoring System is not covered under Regulation 9 and, therefore, cannot be allowed.

(iii) There is no merit in the claim of NTPC for including the compensation allowance as allowed under Section 19(e) in the O&M expenses for computing the working capital.

51. In view of above, the Appeal is dismissed as devoid of any merit. No order as to costs.”

In accordance with the above judgment, the additional capital expenditure for the tariff period 2009-2014 should fall within the overall framework as summarized above.

- (c) that **regarding the issue of capital initial spares**, the alleged claim of the Appellant has been rejected by the Central Commission in the impugned order as the same is not covered under Regulation 9(2) of the Tariff Regulations, 2009 as the Appellant could not complete the work within the cut-off date in terms of the provisions of Tariff Regulations, 2004. The relevant para of the impugned order dated 25.5.2012 in Petition No. 279/2009 rejecting the claim of the Appellant is quoted below:

“33. The date of commercial operation of the generating station is 1.1.2007 and the petitioner is aware that all works within the original scope of the project need to be completed within the cut-off date, in terms of the provisions of the 2004 Tariff Regulations. It is observed that the petitioner had placed orders for spare rotors only after the commercial operation of the generating station, and it had full knowledge of the frequent delays on the part of M/s BHEL to supply the power plant equipments, after the placement of the order. This, according to us, indicates that the petitioner has not taken appropriate monitoring and project management measures, to complete all the works of the generating station within the cut-off date. The claim for capitalization on the ground that orders were placed prior the cut-off date, but could not be completed due to delays, is not acceptable, considering the fact that no steps were taken by the petitioner for

completion of the said work within the cut-off date. In view of this, the claim for capitalization of the said expenditure is not allowed.”

- (d) that the claim of the Appellant before the Central Commission regarding the Lead time for BHEL supply spares would not have become material if the Appellant had been monitoring the project and based on such monitoring, was taking appropriate actions. The order for the spares (HP Turbine and IP Turbine) was placed on 15.6.2007 before the cut-off date of 31.3.2008. Thereafter, as soon as the Appellant became aware that the initial spares cannot be delivered before the cut-off date, the Appellant was expected to move an application before the Central Commission under Regulation 13 (Power to Relax) of Tariff Regulations, 2004 to extend the cut-off date but no such efforts were even made by the Appellant.
- (e) that the Appellant’s contention that there was no default on the part of the Appellant-NTPC is without any substance. In fact, there is clear lapse on the part of the Appellant and the consequences of lapses on the part of the Appellant cannot be shifted to the beneficiaries by allowing the additional capitalization. The Appellant must recognize that he is operating under a regulatory environment and therefore Appellant-NTPC in their own interest must understand these regulatory practices. If the Appellant-NTPC does any thing that is not in accordance with the regulatory practices, they do so at their own peril.
- (f) that the Appellant has also cited the order dated 28.5.2012 in Petition No. 260/2009 in the support of its claim on initial spares, which contention was raised by the Appellant before the Commission in the Review Petition No. 17/2012 seeking review of the impugned order dated 25.5.2012 and the Commission, vide its Review order dated 2.4.2013, while rejecting the review petition, clearly held that the order dated 28.5.2012 in Petition No. 260/2009 had a distinguishable feature and thus not applicable to the present case. The learned Central Commission in para 14 of the Review Order dated 2.4.2013 clearly mentioned that the Central Commission had granted liberty to NTPC to approach the Commission as and when

replacements are done, which is nothing but in the nature of power to relax.

- (g) that the Regulation 8 of Tariff Regulations, 2009 prescribes a ceiling norm of 2.5% of the capital cost as allowable. It clearly means that any amount of initial spares from 0 to 2.5% of the capital cost is permissible for the purpose of capitalization. The capital expenditure incurred on initial spares between the date of commercial operation and up to the cut-off date can only be capitalized. In the case in hand, initial spares of Rs.9.61 crore which is 1.19% of the capital cost has been capitalized. Any amount over and above this limit would be in utter disregard to the Tariff Regulations, 2009.
- (h) that the cut-off date of the said station was 31.3.2008 and accordingly Regulation 9(2) of the Tariff Regulations, 2009 is applicable for additional capitalization. The additional capitalization on account of initial spares is not covered under Regulation 9(2) of the Tariff Regulations, 2009 and, therefore, the claim of the Appellant on this count cannot be allowed.
- (i) that **regarding the issue of sewerage system in plant**, the following submissions have been made on behalf of the respondents:
- (aa) that the alleged claim of the Appellant has been rejected by the Central Commission in the impugned order as the same is not covered under Regulation 9(2) of Tariff Regulations, 2009. The relevant para of the impugned order dated 25.5.2012 in Petition No. 279/2009 rejecting the claim is quoted below:
- “29. The generating station was taken over by the petitioner during 1992. It is observed that there were difficulties in the restoration of the sewerage pipe lines in the absence of drawings of underground facilities. However, there appears to be no justification in the execution of sewerage system after more than three years after the cut-off date, i.e. 31.3.2008. In view of this, the justification submitted by the petitioner is not acceptable and accordingly, the expenditure of Rs.124.00 lakh during 2011-12 is not allowed to be capitalized.”*
- (j) that the contention of the Appellant, that the learned Central Commission has not properly appraised or appreciated the justification furnished by the Appellant, is not correct as the work in

question is a small work amounting only to Rs.1.24 crore and even this small work could not be completed by the Appellant even after more than three years time. The cut-off date of this station was 31.3.2008 and, accordingly, Regulation 9(2) of the Tariff Regulations, 2009 is applicable for additional capitalization and, therefore, the claim on this count cannot be allowed.

(k) that **regarding the issue of balance work of various packages**, the following contentions have been made on behalf of the respondents:

(i) that it is wrong to say that the Central Commission has erred in partly allowing the capital expenditure towards the balance work and not allowing the capital expenditure towards sewerage system in plant, as contended by the Appellant. The alleged claim of the Appellant has been rejected by the Central Commission by the following paragraph of the impugned order:

“Balance work of various packages within the original scope of work

34. The petitioner has claimed expenditure of '28.84 lakh during 2009-10 and '11.47 lakh during 2010-11 as balance payment/final settlement made in respect of various works (as detailed in Annexure-I of the affidavit dated 14.11.2011) which are within the original scope of work and has since been completed, except for some minor pending jobs. On prudent check, expenditure of '7.55 lakh during 2009-10 and '2.86 lakh during 201-11 only is found justified as balance/final payment on completion of work, and the same is allowed to be capitalized, in terms of Regulation 9(2)(viii) of the 2009 Tariff Regulations.”

(ii) that the learned Central Commission, in the impugned order, has allowed the additional capitalization of the completed work covered under the original scope of work. The claim is covered under the Regulation 9(2)(viii) of Tariff Regulations, 2009 arising out of any un-discharged liability towards final payment/ withheld payment due to contractual exigencies for works executed within the cut-off date. The additional capitalization claimed by the appellant refers to those works which were not completed within the cut-off date and hence not covered under Regulation 9(2)(viii) of the Tariff Regulations,

2009. Thus, the disallowance of this claim is strictly in accordance with the Tariff Regulations, 2009.

7. The following issues require our consideration in the instant Appeal:-
- (A) Disallowance of capitalization of spares amounting to Rs.17.03 crores.
 - (B) Disallowance of capital expenditure towards Sewerage system amounting to Rs.124 lakhs during FY 2011-2012
 - (C) Disallowance of capital expenditure towards balance work of various packages amounting to Rs.21.29 lakh during FY 2009-2010 and Rs.8.61 lakh during FY 2010-2011.

8. Point-wise considerations are as follows:

(A) Disallowance of capitalization of spares amounting to Rs.17.03 crores.:

The main contention on this issue has raised by the learned counsel for the Appellant-NTPC is that the Appellant, during the proceedings before the Central Commission under some bonafide belief, made the said claim under Regulation 5, 6 and 7 of Tariff Regulations, 2009. In view of the Central Commission, as depicted in the impugned order, the cut-off date of the generating station has expired, hence NTPC's claim for additional capital expenditure was required to be examined in terms of the provisions of Regulation 9(2) of the Tariff Regulations, 2009. Accordingly, the Central Commission has examined the submissions of the Appellant on admissibility of additional capital expenditure.

The issue regarding interpretation of Regulation 7 and 9 of Tariff Regulations, 2009 has already been settled by this Appellate Tribunal vide judgment dated 27.1.2014 in Appeal No. 44/2012. This Tribunal has clearly observed in its judgment dated 27.1.2014 in Appeal No. 44/2012 that additional capitalization has to be allowed only according to the Regulation 9 of Tariff Regulations, 2009 which will apply to both existing and new power projects.

The COD of the plant was 1.1.2007. The cut-off date of the said generating station was 31.3.2008. Thus, Regulation 9(2) of the Tariff Regulations, 2009 is applicable for additional capitalization. The additional

capitalization on account of initial spares is not covered under Regulation 9(2) of the Tariff Regulations, 2009 and, therefore, the said claim of the Appellant has rightly not been allowed by the learned Central Commission.

The learned Central Commission has not committed any illegality or perversity in disallowing in capitalization of spares because the Appellant could not complete the said work within the cut-off date. The capitalization of the spares on the ground of unavoidable or inevitable delays or that the orders were placed prior to the cut-off date, could not be legally claimed by the Appellant-NTPC particularly, when no proper monitoring and appropriate steps were taken by the Appellant for completion of the said work within the cut-off date.

The Appellant cannot legally question or challenge the interpretation of Regulation 7 & 9 of the Tariff Regulations, 2009 which has already been settled or answered by this Appellate Tribunal vide judgment dated 27.1.2014 in Appeal No. 44/2012. This Tribunal in its judgment dated 27.1.2014 has clearly observed that additional capitalization has to be allowed only according to Regulation 9 of Tariff Regulations, 2009 which will apply to both existing and new power projects. We also affirm the same view of this Tribunal as recorded in its judgment dated 27.1.2014 in Appeal No. 44/2012.

The Appellant has contended that the Central Commission should have exercised its '*power to relax*' under Regulation 44 of the Tariff Regulations, 2009. However, the Appellant neither prayed nor made out any case before the Central Commission to exercise power to relax. We feel that Central Commission has rightly not opted the power to relax as the facts and circumstances of the matter in hand did not warrant the exercise of power to relax by the Central Commission.

The material on record clearly reflects that this was not a fit case authorizing the learned Central Commission to exercise the power to relax provided under Regulation 44 of Tariff Regulations, 2009 and allow the additional capitalization under Regulation 9(1). The learned Central Commission in the Review Order dated 2.4.2013, in Review Petition No. 17/2012 whereby impugned order dated 25.5.2012 was sought to be reviewed, mentioned that the Commission in the case of Vindhyaachal STPS

- III had granted liberty to Appellant-NTPC to approach the Commission as and when replacements are done on the basis of which the Commission had granted relaxation in that case.

The material on record clearly depicts that disallowance of capitalization of spares amounting to Rs.17.03 crore has been made by the Central Commission in the impugned order after recording a finding that the Appellant could not complete the work within the cut-off date. The claim for capitalization of the spares on the ground, that orders were placed prior to the cut-off date but work could not be completed due to delays, did not find favour with the Central Commission because no steps were taken by the Appellant for completion of the said work within the cut-off date. The Central Commission has also held that the Appellant was aware that all works within the original scope of the project need to be completed within the cut-off date, in terms of the 2004 Tariff Regulations but the Appellant placed order for spare rotors only after the COD of the generating station and it had full knowledge of the delays on the part of the supplier of the equipment. After going through the impugned order and considering the rival submissions, we find ourselves in agreement with the finding/observation made by the learned Central Commission in the impugned order and there is no sufficient reason to deviate from the said finding. **This issue is decided against the Appellant.**

(B) Disallowance of capital expenditure towards Sewerage system amounting to Rs.124 lakhs during FY 2011-2012:

The said claims of the Appellant has rightly been rejected by the learned Central Commission in the impugned order as there was no justification in execution of the work after more than three years after the cut-off date i.e. 31.3.2008. The claim of the Appellant is not covered under Regulation 9(2) of Tariff Regulations, 2009. The said generating station was taken over by the Appellant-Petitioner in the year 1992 and according to the Appellant due to the absence of drawings of underground facilities of the sewerage pipeline; there were difficulties in restoration of the sewerage pipelines. The learned Central Commission has rightly not accepted the said plea causing more than three years delay in the execution of sewerage system after cut-off date of 31.3.2008.

On this issue also, the same submissions have been repeated saying that the reasonings rendered in the impugned order clearly suggest that the Central Commission had considered the possibility of giving relaxation to the Appellant but has unreasonably failed to exercise the powers to relax provided under Regulation 44 of Tariff Regulations, 2009. This claim of the Appellant has been rejected by the Central Commission in the impugned order as the same is not covered under Regulation 9(2) of Tariff Regulations, 2009. According to the Appellant, the generating station was taken over by the Appellant-petitioner in the year 1992, there were difficulties in restoration of sewerage pipelines in the absence of drawings of underground facilities. The learned Central Commission, in the impugned order, has rightly observed that there is no justification in the execution of sewerage system more than three years after the cut-off date namely, 31.3.2008. We note that the justification made by the Appellant-petitioner, that in the absence of drawing of the underground facilities there were difficulties in restoration of sewerage pipelines, has rightly not been accepted. In view of the above discussion, we also find ourselves in agreement with the finding/observation made by the learned Central Commission in the impugned order. **This issue is also decided against the Appellant.**

(C) Disallowance of capital expenditure towards balance work of various packages amounting to Rs.21.29 lakh during FY 2009-2010 and Rs.8.61 lakh during FY 2010-2011:

The Appellant's contention that the learned Central Commission has, while passing the impugned order, proceeded on a theoretical basis that Appellant-NTPC had sufficient time to complete the balance work and that there were genuine reasons resulting in delay in completion of work has not been appreciated by the learned Central Commission is not legally sound or valid contention inducing us to disturb the relevant findings of the learned Central Commission. After prudence check of the claim of capital expenditure towards balance work for FY 2009-2010 and 2010-2011 made by the Appellant the Commission allowed only such expenditure as covered under Regulation 9(2)(viii) of Tariff Regulation, 2009 because the additional capitalization claimed by the Appellant refers to those works which were not completed within the cut-off date and hence

not covered under Regulation 9(2)(viii) of the Tariff Regulations, 2009. No error or infirmity has been committed by the learned Central Commission in the impugned order while deciding these issues.

The only submission of the Appellant on this issue is that the Central Commission considers such issues from the point of view of commercial entities. The Central Commission has proceeded on a theoretical basis that Appellant-NTPC had sufficient time to complete the balance work. There were genuine reasons in not completing the work by the Appellant much earlier. After going through the impugned order dated 25.5.2012, we observe that the learned Central Commission after prudence check of the claim made by the Appellant, has allowed additional capitalization of the balance payment/final settlement made in respect of completed work which was covered under the original scope of work under Regulation 9(2)(viii). However, the claims not covered under the Regulation 9(2)(viii) have been disallowed.

Here again, the Appellant has argued that the Central Commission should have exercised *power to relax* under Tariff Regulation 44 and there is indication that the Central Commission has considered the '*power to relax*' for granting the additional capital expenditure. There is no dispute regarding the settled legal position that non-mentioning of relevant provision of law or wrong mentioning of the provision of law or the section of the relevant Act under which relief is claimed would have no relevance because the court is to go into the facts and circumstances of each case and decide the controversy according to the legal provisions of law. In this case, no case was made by the Appellant and no prayer was made before the State Commission to exercise power to relax. The learned Central Commission has rightly not exercised the discretion vested in it under Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 as we do not find any sufficient ground or cogent reason to interfere with the way of discretion exercised by the Central Commission while passing the impugned order. Thus, the citations namely, P.K. Palanisamy vs N. Arumugham And Another reported in (2009) 9 Supreme Court Cases 173 and T. Nagappa vs Y.R. Muralidhar reported in (2008) 5 Supreme Court Cases 633, do not help the Appellant particularly in the instant matter. **This issue is also decided against the Appellant.**

9. **SUMMARY OF FINDINGS**

(A) **Disallowance of capitalization of spares amounting to Rs.17.03 crores:**

The Central Commission has correctly rejected the claim of the Appellant on the ground that the claim is not permissible under the Tariff Regulation 9. The cut-off date of the project has already expired and the Appellant placed order for the spares only after COD of the plant having full knowledge of the delays on the part of the suppliers.

(B) **Disallowance of capitalization of capital expenditure towards Sewerage system amounting to Rs.124 lakhs during FY 2011-2012:**

The said claim has been rightly rejected by the Central Commission as it is not covered under Regulation 9(2).

(C) **Disallowance of capital expenditure towards balance work of various packages amounting to Rs. 21.29 lakh during FY 2009-2010 and Rs.8.61 lakh during FY 2010-2011:**

The Central Commission has rightly allowed only the expenditure covered under the Regulation 9(2)(viii) and disallowed the expenditure which is not covered under the said Regulation.

10. In view of the above discussions, we do not find any merit in the submissions made by the learned Counsel for the Appellant. All the aforementioned issues are decided against the Appellant as the findings recorded by the learned Central Commission in the impugned order 25.5.2012 did not reflect any infirmity, illegality or inconsistency. There is no sufficient cause or any error on record to assail the said findings of the Central Commission. Accordingly, this Appeal is dismissed since it has no merits and the impugned order dated 25.5.2012 is hereby affirmed. No order as to costs.

Pronounced in open Court on this 11th day of April, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ REPORTABLE/NON-REPORTABLE