

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 11th Sept, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.41 OF 2014

In the Matter of:

Steel Authority of India Limited
Bhilai Steel Plant,
Bhilai-490001,
Chhattisgarh

..... Appellant

Versus

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

- 2. Western Regional Load Despatch Centre,**
F-3, MIDC Area, Marol,
Andheri East
Mumbai-490 003

...Respondent(s)

Counsel for the Appellant(s) : Mr. M G Ramachandran
Ms. Swagtika Sahoo
Ms. Poorva Sehegal
Ms. Swapna Seshadri
Ms. Anushree Bardhan

Counsel for the Respondent(s): Mr. M S Ramalingam
Amicus Curiae for R-1

ORDER

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

1. Steel Authority of India Limited, is the Appellant herein.
2. Aggrieved by the levy of the Transmission Losses by the Western Regional Load Despatch Centre, the Appellant filed a Petition before the Central Commission for a direction to the Load Despatch Centre not to levy the Transmission Losses on the Appellant.
3. The Central Commission ultimately, after hearing the parties, passed the Impugned Order dated 20.11.2013 holding that the Appellant being a designated ISTS Customer is liable to share the Transmission Losses under the ISTS Regulations, 2010.
4. Challenging the said Order, the Appellant filed a Review Petition on 17.1.2014 seeking for the Review of the Order dated 20.11.2013 before the Central Commission. During the pendency of the Review Petition, the Appellant filed this Appeal on 20.1.2014 before this Tribunal challenging the very same Order dated 20.11.2013.
5. When this Appeal came up for admission it was noticed that the Review Petition was still pending in respect of the same

issues and no final Order was passed in the Review Petition.

6. In such a situation, we entertained a doubt with regard to the Maintainability of the Appeal when the Review Petition filed by the Appellant before the Central Commission challenging the very same Impugned Order is still pending in respect of the same issues. Therefore, we issued notice to the Central Commission, the Respondent to clarify the legal position with reference to the Maintainability of the Appeal. Accordingly, Mr. M S Ramalingam, the learned Counsel entered appearance on behalf of the Central Commission (R-1). He objected to the Maintainability of the Appeal on the ground that still Review Petition filed before the Central Commission raising the same issues was pending and no final order was passed and therefore, the Appeal cannot be entertained.
7. In view of the objection raised by the Respondent, we directed both the parties to file the Written Notes on the Maintainability Question. In the said Order, we appointed Mr. M S Ramalingam, the learned Counsel as a Amicus Curiae to assist this Tribunal by elaborating the legal position with reference to the Maintainability of this Appeal.

8. Accordingly, both the parties have filed the Written Notes. We have also heard them in detail with regard to the Maintainability of the Appeal.
9. Both the parties cited the authorities to substantiate their respective arguments.
10. The gist of the arguments advanced by the Appellant on the Maintainability Question is as follows:

“The Electricity Act, 2003 provides for a right to file a Review Petition before the Central Commission u/s 94 of the Act read with Order 47 Rule-1 CPC as well as the right to file an Appeal before the Tribunal u/s 111 of the Act. Order 47 Rule-1 of the CPC provides that a party who has filed the Appeal before the Tribunal cannot apply for a Review of the Order but there is no condition that when the Review Petition filed earlier was pending, the Appeal cannot be filed. In other words, there is no such bar in the said provision for filing the Appeal before the Tribunal while the Review Petition which has already been filed, was pending. As such, there are no restrictions in regard to the filing of an Appeal subsequent to filing of the Review Petition. In the present case, the Review Petition has been filed on 17.1.2014 and only thereafter, the

Appellant has filed this Appeal on 20.1.2014. Thus, on the date of the filing of the Review Petition, no Appeal was pending but on the date of filing of the Appeal, Review is pending. Since, there is no embargo for entertaining the Appeal subsequent to filing the Review Petition, this Appeal may be entertained”.

11. The Appellant has cited several authorities in support of its arguments which are as follows:

- (a) Thungabhadra Industries Ltd v Govt of A.P (1964) 5 SCR 174;
- (b) Behari Lal & Anr V M M Gobardhan Lal & Ors (AIR 1948 ALL 353 (Majority Judgment of a Full Bench Decision)
- (c) Kunhayammed & Ors Vs State of Kerala (2000) 6 SCC 359;
- (d) State of Assam v Ripa Sarma 2013 IV AD(SC) 27;
- (e) DSR Steel Pvt Ltd V State of Rajasthan (2012) 6 SCC 782;

- (f) Manohar & Ors v Jaipalsing & Ors (2008) 1 SCC 520;
- (g) Sushil Kumar Sen v State of Bihar (1975) 1 SCC 774;
- (h) Rekha Mukherjee V Ashish Kumar Das (2005) 3 SCC 477;
- (i) Kannegolla Naghabhushanam v The Land Acquisition Officer (AIR 1993 AP 209);
- (j) Devbrat Mishra v Keshwa Nand Shukla & Ors (Order dated 12.3.2010 passed by the Allahabad High Court)
- (k) Pandivi Satyanandam & Ors v Paramkusam Nammayya & Anr (AIR 1938 MAD 307)

12. The learned Counsel as Amicus Curiae has made the following submissions:

“Section 94 of the Act which provides for Review before the Regulatory Commission and Section 111 of the Act which provides for the Appeal before the Tribunal; do not lay out any express condition regarding concurrently pursuing these two remedies. On the contrary, Section 10 of the CPC prohibits the

pursuit of two proceedings concurrently. The reasons for the same are to avoid the plurality of litigation and to avoid the possibility of conflicting judgments by two Forums of competent jurisdiction. Further, in the Rekha Mukherjee case cited by the Appellant, it was held that the Appeal is not maintainable during the pendency of the Review Petition on the very same issues. Hence, this Appeal is not maintainable”.

13. In the light of the above contentions, the only question that may arise in this matter is **“Whether this Appeal could be entertained against the Impugned Order which is challenged before the Central Commission in the Review Petition raising the very same issues pending before the Central Commission?”**

14. Before dealing with this question we shall refer to the relevant observations made by the Hon’ble Supreme Court as well as the Other Courts which are as under:

(a) Thungabhadra Industries Ltd V Govt of AP (1964) 5 SCR 174

“8. Order 47 Rule 1 (1) of the Civil Procedure Code permits an Application for Review being filed “from a decree or order from which an Appeal is allowed but from which no Appeal has been preferred.”

.....

If on that date no appeal has been filed it is competent for the Court hearing the Petition for review to dispose of the Application on the merits notwithstanding the pendency of the Appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.”

(b) Behari Lal and Another v M M Gobardhan Lal and Others

“The question that has been referred to this Bench is whether the preferring of an Appeal subsequent to the filing of an application for review makes the review application incompetent.

.....

That crucial date, therefore, is the filing of the Application for review. If on that date, the Appellate Court has no appeal pending before it, the review application is under the Code, as it stands, competent.”

(c) Kunhayammed v State of Kerala (2000) 6 SCC 359

“This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date, no Appeal has been filed, it is competent for the Court hearing the Petition for review to dispose of the

application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the Application for review is finally decided the Appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to and end. On the date when the application for review was filed the Applicant had not filed an Appeal to this Court and therefore, there was no bar to the Petition for review being entertained.

.....The position then, under Order 47, Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the Appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent.”

(d) Kannegolla Naghabhushanam Vs The Land Acquisition Officer AIR 1993 AP 209

“...The learned Judges of the Hon’ble Supreme Court held that the crucial date for determining whether or not the terms of Order 47, Rule 1 (1) are satisfied or not is the date when the application for review is filed. In the instant case, the Review application was filed before the Sub-Court, before the Appeal was filed by the L.A.O in the High Court. In this view of the matter, the order of the learned Subordinate Judge dismissing the review application as not maintainable cannot be sustained.”

(e) Pandivi Satyanandam and Others v Paramkusam Nammayya and Another AIR 1938 MAD 307

“Now, it is well settled that when an application for review has been made, the subsequent filing of an Appeal will not render the Application for review incompetent.....But, if the application for review is granted during the pendency of the Appeal, the appeal cannot be heard and must be dismissed.”

15. We have gone through the above judgments.
16. As pointed out by the learned Amicus Curiae Counsel, all the decisions would refer to the ratio that when a Review petition has been filed, the subsequent filing of an Appeal will not render the Petition for Review incompetent and if during the pendency of the Appeal, if the Petition for the Review has been allowed, the Appeal must be dismissed.
17. This observation made by the Hon'ble Supreme Court and High Court was based on the question whether the Review Petition before the Commission was maintainable when the Appeal was not filed on the date of the Review Petition even though the Appeal had been filed during the pendency of the Review. That is not the question to be dealt with in this matter.
18. Now the present question raised is this:“Whether the Appeal could be entertained as against the Impugned Order on the same issues which are raised in the Review Petition pending

before the Regulatory Commission?” This question was not dealt with in the above authorities.

19. The Amicus Curiae Counsel has pointed out that even though the Appellant submits that there is no bar for entertaining the Appeal during the pendency of the Review Petition, there is an embargo as provided u/s 10 of the CPC prohibiting the pursuit of two proceedings concurrently.
20. It is true that there is express bar under Order 47 Rule-1 that Review could not be entertained by the Subordinate Forum when the Appeal was pending before the Appellate Forum.
21. While interpreting the relevant provisions dealing with in this issue, we have to take note of the other provisions of the CPC as well as the Act.
22. As indicated above, Section 10 of the CPC prohibits for the pursuit of the two proceedings concurrently. The objective of the above prohibition as pointed out by the Amicus Curiae are as follows:
 - (a) Pursuit of multiple proceedings before two different Forums relating to the same issues will result in unwarranted encroachment into precious time of the judiciary;

(b) There is a possibility of conflicting outcome by the different Forums;

(c) The other party is dragged to two different Forums to deal with the same issue raised before those two Forums;

(d) The Respondent is likely to be frustrated unnecessarily;

23. While dealing with this issue we have to take note of Section 10 of the Code of Civil Procedure as well as its objectives. They are as follows:

“Section 10:

Stay of suit

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Objectives:

.....*The basic purpose of this Section is to protect a person from multiplicity of proceedings as also to avoid conflict of decisions. In other words, the Section aims to avert inconvenience to the parties.*

.....

Objective of the provision is to prevent courts of concurrent jurisdiction from adjudicating upon parallel litigations between the same parties having the same matter in issue with a view to avoiding conflict of decisions.

.....

The objective of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matter in issues”

- 24.** One other important aspect to be noticed in this context.
- 25.** As regards the applicability of the provisions of the CPC to the proceedings before this Tribunal, it is noticed that Section 120 of the Electricity Act, 2003 gives a free hand to this Tribunal to follow its own procedure regardless of the procedure incorporated under the Code of the Civil Procedure. The relevant provision of Section 120 is as under:

“(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure,

1908, but shall be guided by the principles of natural justice and subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.”

- 26.** The above provision would make it clear that this Tribunal has got the plenary powers to decide the issues in the interest of justice subject to the compliance of the Principles of Natural Justice to regulate its own procedure where the statutory provisions are silent.
- 27.** Even though Order 47 Rule-1 did not specifically refer to the bar with reference to the entertainment of the Appeal, after filing the Review, this Tribunal for the purpose of avoiding various practical difficulties in facing simultaneous proceedings, it can regulate its own procedures.
- 28.** In the light of the Section 120 of the Act, we have to consider the question whether it is desirable to entertain the Appeal after filing of the Review Petition before the Regulatory Commission on the very same issues.
- 29.** It is true as admitted by both the parties the power of the Review has to be exercised by the Regulatory Commission is so limited whereas the powers of the Tribunal while exercising the power of the Appeal is so wide.

- 30.** In view of the above, the Regulatory Commission could entertain the Review Only when there is a prima facie case about the apparent error committed by the State Commission in the Impugned Order. However, the Appellate Forum could entertain all the grounds including the ground of Review for the purpose of analysing the question whether the Impugned Order on the whole is legal or not.
- 31.** On the other hand, the State Commission could not entertain the Review in respect of the other grounds which could be urged only before this Appellate Tribunal.
- 32.** In the present case, admittedly, the Appellant has raised various grounds in this Appeal which has been filed on 20.1.2014 while the very same grounds have been raised in the Review Petition which was filed before the Central Commission on 17.1.2014.
- 33.** Thus, it is evident that both the Forums have been called upon to decide the same issues which have been raised in both the Appeals as well the Review Petition as before the Central Commission. When the proceedings are conducted concurrently, then these multiple proceedings would ultimately result in the encroachment into the time as well as into the powers of the other Forum. That apart, there is a

possibility of conflicting outcome from both these Forums which may cause waste of time as well as waste of money. This aspect has to be taken note of while deciding this question.

34. On understanding the concept of various provisions of the Act, as well as the Rules and the Relevant provisions of the CPC we are of the firm opinion that if both the proceedings namely Review Petition before the Regulatory Commission and the Appeal proceedings before this Tribunal on the same issues, are allowed to continue concurrently, it will not only prejudice interest of both the parties but also would result in following defects:

(a) The Act provides time frame within which the Regulatory Commission as well as the Tribunal have to dispose of the matters. The Tribunal has to dispose of the Appeal within 180 days from the date of the Filing of the Appeal. A similar time frame from 30 days to 90 days has been fixed for the disposal of Review Petition by the Regulatory Commission through its Regulations.

(b) In fact, the Regulations have been framed by the Regulatory Commission fixing the time frame both for entertaining the Review as well as for the disposal of the Review.

(c) After the Appeal is entertained during the pendency of the Review, the Appeal has to be disposed of within 180 days irrespective of the pendency of the Review over the same issues raised before both the Forums. If those issues are decided against the Petitioner by the Regulatory Commission then the question would arise whether the Appellate Forum would be constrained to go into the legality of the Impugned Order alone or order passed in the Review.

(d) Similarly, if the Appeal is disposed of during the pendency of the Review Petition before the Regulatory Commission by holding that the Impugned Order is valid, then the said findings given by the Tribunal would be binding on the Regulatory Commission. In that event, the Regulatory Commission cannot review its own orders by application of judicial mind over the points raised by the Petitioner in the Review Petition.

(e) Similarly, if the Review is allowed by the Regulatory Commission on the very same date when the Appeal is disposed of by confirming the Impugned Order then there is a difficulty for the party to enjoy the fruits of the Review Order as the findings of the

Tribunal in the Appeal would prevail over the findings of the State Commission in the Review Petition. As such, the party who filed the Review and secured the benefits by the Review Petition being allowed, will be deprived enjoying the fruits of the Review Order as the Appeal is dismissed.

(f) When the Review Petition is pending before the Commission, normally the parties before the Tribunal invariably seek for adjournment of the Appeal on the ground that the Review was pending and prayed that the Appeal could be taken up for hearing after the disposal of the Review. On that ground, this Tribunal was constrained to periodically adjourn the matter awaiting the result of the Review thereby the Appeal is compulsorily is kept pending for more than 180 days. This is not desirable.

(g) It is open to one party to go for the Review and other party can file an Appeal in respect of the respective portion of the findings. Similarly, the same party can file the Review before the Commission only in respect of some issues which can be the grounds of Review and simultaneously file the Appeal before the

Tribunal in respect of other issues which can be the grounds of Appeal.

(h) In that event, there cannot be any clash between the issues which are raised before both the Forums. When the same issues are raised by the same party before two different Forums namely Regulatory Commission as well as the Tribunal, then there will be many difficulties which may arise.

(i) There is one more important difficulty, if both the proceedings before both the Forums are allowed to be continued. The same is as follows:

“The Appeal provisions as referred to in Section 111 of the Electricity Act, 2003 empower this Tribunal while admitting the Appeal to call for the records from the subordinate authority namely the Regulatory Commissions. When we feel that there is a necessity for the scrutiny of the entire original records, we call for those records from the Regulatory Commissions which in turn would send those records for perusal and scrutiny for the proper disposal of the Appeal. If at that stage, if the Review Petition is pending before the Regualtory Commission, it would experience

the difficulty to pass final orders in the Review Petitions without the original records. Those original records which have been called for by this Tribunal would be sent back to the Regulatory Commissions only after the disposal of the Appeal pending before this Tribunal. The relevant provisions provide that the Appeal should be disposed of within 180 days i.e. within 6 months. If the records are sent back after disposal of the Appeal, the Regulatory Commission would not be able to dispose of the Review Petition till the receipt of those records which have been sent back by this Tribunal. In that event, there will be an enormous delay for the disposal of the Review Petition. Invariably, as mentioned above, almost all the Regulatory Commissions have framed Regulations fixing the time frame of 30 days to 90 days within which the Review Petition was to be disposed of. Once records are called for by the Tribunal when the Appeal is pending, then the Regulatory Commission would not be able to dispose of the Review Petition within time frame fixed through the Regulations. Therefore, it is not desirable to

allow the Appellant to pursue the remedies both before the Regulatory Commission through the Review Petition and before the Tribunal through the Appeal that too on the same issues.

35. In view of the above, we are of the view that it is not appropriate to admit this Appeal at this stage especially when the very same issues raised in this Appeal have been raised before the Central Commission in which no final order is passed.

36. To Sum-Up

(a) **In the present case, the issues raised by the Appellant in the Appeal and the issues and relief sought for in the Review Petition are substantially the same. Since both the Appeals and the Review Petitions have been filed by the Appellant before the respective Forums raising the very same issues and having regard to the fact the Review Petition is still pending adjudication before the Central Commission this Appeal could not be maintained.**

(b) **The Appellant has failed to demonstrate that the issues raised in the Review Petitions are distinct from those raised in the present Appeal.**

The Appellant itself admitted in the Appeal that same grounds have been raised both in the Review Petition as well as in the Appeal. Having regard to the fact that the identical issues have been raised before both the Forums, the outcome of the Review Petition pending before the Regulatory Commission will bare the direct impact on the present Appeal and vice versa. Hence, the Appellant cannot be allowed to pursue the same cause of action on the same issues before the two Forums at the same time.

(c) It is open to the Appellant to file a Review with regard to the issues which satisfy the ingredients of the apparent error committed in the Impugned Order before the Regulatory Commission. While the said Review Petition is pending, the Appellant is at liberty to file the Appeal against the Impugned Order raising the various other issues as the grounds of Appeal other than the issues which could be raised in the Review Petition. However, the Appeal during the pendency of the Review Petition on the very same issues could not be entertained or otherwise so

many practical difficulties would arise as explained in detail in the earlier paragraphs.

(d) If the issues raised before the Appellate Forum are distinct from those raised before the Review Forum then, in that case, the Appeal as well as the Review proceedings may simultaneously proceed. In other words, if the issues raised before the State Commission in the Review Petition and before this Tribunal in the Appeal are substantially the same and not distinct from each other, then the Appeal could not be maintained. In the present case, as admitted by the Appellant, the issues raised in the Appeal have been raised before the Review Forum also. Therefore, we are not inclined to admit the Appeal.

37. Since we have been given effective assistance by Mr. Ramalingam as Amicus Curie Counsel for deciding this issue, we record our appreciation for the service rendered by the Amicus Curie Counsel.

38. After preparation of this order, which was about to be pronounced, the Appellant sought permission to mention about the subsequent developments which took place in the present case through the Affidavit. Accordingly, we have permitted the

Appellant to file the necessary Affidavit. Then the Appellant filed an Affidavit to place on record that the Review Petition pending before the Central Commission has now been disposed of by dismissing the said Petition by the order dated 1.8.2014.

39. On the strength of this Affidavit, it is submitted by the learned Counsel for the Appellant that the Appeal filed against the order dated 20.11.2013 is not affected now in any manner as already the Review Petition has been dismissed.

40. In view of the fresh developments as pointed out by the Appellant through the Affidavit; there is no hurdle to entertain this Appeal. Hence, we direct the Registry to post the Appeal in Appeal No.41 of 2014 for considering the question of admission though we hold on principle that the Appeal is not maintainable when the Review is pending before the Regulatory Commission on the same issues.

41. The Appeal be posted for considering the admission on **17th September, 2014.**

(Rakesh Nath)
Technical Member
Dated:11th Sept, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~