Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NOs.52 & 87 of 2013

Dated:2nd Dec, 2013
Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER

Appeal No.52 of 2013

In the Matter of:
Tamil Nadu Generation
And Distribution Corporation Limited (TANGEDCO)
(Formerly Tamil Nadu Electricity Board (TNEB)
800 Anna Salai,
Chennai-600 002

Appellant(s)

Versus

1. **Neyveli Lignite Corporation Limited., (NLC)**
   Nayveli House,
   135-E.V.R Periyar Road,
   Kilpauk, Chennai-600 010
   Tamilnadu

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

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Ms. Himanjali Gautam

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Mr. R Sasi Prabhu
Mr. Somiran Sharma
Mr. Rajat Nair
Smt C L Sabrina

Appeal No.87 of 2013

In the Matter of:
Nayveli Lignite Corporation Limited (NLC)
Nayveli House,
135-E.V.R Periyar Road,
Kilpauk, Chennai-600 010
Tamilnadu

Appellant(s)

Versus

1. **Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)**
   (Formerly Tamil Nadu Electricity Board (TNEB)
   800 Anna Salai,
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Mr. E R Kumar
Mr. Gulav Sharma
Mr. Vishal Prasad
Ms. S Lakshmi
Ms. Himanjali Gautam

J U D G M E N T

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

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) is the Appellant in Appeal No.52 of 2013.

2. Neyveli Lignite Corporation Limited (NLC) is the Appellant in Appeal No.87 of 2013.

3. Both these parties have filed these Appeals as against the Impugned Order dated 19.12.2012. Since, the Impugned Order is the same passed in the Petition filed by the same party; this common judgment is being pronounced.

4. Let us refer to the facts.

5. The case has got a chequered history. For proper appreciation of the dispute, we first take note of the background of the case in which the present Appeals have been filed.

6. Though these two Appeals have been filed by two different parties, we can refer the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) as the

Appellant who has filed the Appeal No.52 of 2013 and Neyveli Lignite Corporation Limited (NLC) as the Respondent who has filed the Appeal in Appeal No.87 of 2013.

7. The Appellant TANGEDCO (Formerly known as Tamil Nadu Electricity Board (TNEB) besides itself being a Generator and Distributor buys electricity from the NLC, the Respondent, the Generating Company.

8. The NLC (Respondent) entered into a Bulk Supply Power Supply Agreement dated 18.2.1999, valid up to 31.3.2001 with five beneficiaries of the Southern Region including the TNEB (TANGEDCO) to supply power to them which provided that these beneficiaries including the TNEB (TANGEDCO) would make payment of dues through an irrevocable Letter of Credit opened in favour of the NLC.

9. The Agreement also provided that the NLC would allow a rebate of 2.5% when the payments were made by the beneficiaries through the Letter of Credit. The said Agreement further provided that even without Opening the Letter of Credit, if the payment was made within three working days from the date of receipt of bills they would be entitled for a rebate of 2.5% of the billed amount.

10. That apart, the said Agreement also provided that in case the bill was delayed beyond 30 days, it would pay the

surcharge at the rate of Rs.1.5% per month on the amount of the bill for the period of delay.

11. Another Bulk Power Supply Agreement was entered between the Appellant TANGEDCO and the Respondent NLC on 9.3.2001 effective from 1.4.1997 to 31.3.2002 for supply of power by NLC to TNEB from NLC's Thermal Power Station I.

12. This also provides the similar clause regarding the rebate as contained in the earlier Agreement dated 18.2.1999.

13. Again on 20.9.2001, the third Bulk Power Supply Agreement was entered into between the Appellant TANGEDCO and the Respondent NLC for the supply of power from Thermal Power Station-I (Expansion). The provisions contained in this Agreement regarding rebate on timely payments of the bills in the Agreements were similar to the Agreements dated 18.2.1999 and 9.3.2001.

14. In the meantime, the Central Commission on 26.3.2001, notified the Electricity Commission's Regulations, 2001 for the period 1.4.2001 to 31.3.2004. These Regulations provided for the rebate of 2.5%, if the payment was made through the Letter of Credit and for rebate of 1% if the payment was made within one month.

15. The Notification provided for levy of late payment surcharge of 1% per month in case the payment of bill beyond 60 days

from the date of presentation of the Appeals. The Regulations notified by the Central Commission on 26.3.2001 also made similar provisions for rebate except that the rate of rebate was reduced from 2.5% to 2% in case of payments were made through the Letter of Credit.

16. Despite the provisions of the Bulk Power Sale Agreements, the Appellant TANGEDCO did not open the Letter of Credit in favour of the Respondent NLC, but was availing of rebate @ 2.5% whenever payment of the bills was made within 3 days of receipt thereof, based on the Agreements executed.

17. It appears that there was accumulation of arrears of Rs.191.62 crore for the period commencing from 1.10.2001. The Respondent NLC addressed a letter 5.6.2003 to the Appellant TANGEDCO requesting to settle the arrears accumulated together with surcharge. In a meeting held subsequently the Appellant TANGEDCO agreed to pay the total outstanding amount in 10 equal monthly instalments starting from January 2004.

18. On 26.10.2004, the Respondent NLC sent another letter informing the Appellant TANGEDCO that rebate of 2.5% already availed by it from 1.4.2004 would be retrospectively adjusted with effect from 1.4.2004 as rebate was payable at the rate of 2% in accordance with this Commission’s notification dated 26.3.2004.

19. Thereupon, the Respondent NLC filed a petition (No. 97/2005) on 9.8.2005 before the Central Commission seeking for a direction to the TANGEDCO to refund the amount of Rs.79.52 crore deducted as rebate in excess of 1% on the ground that deduction contravened this Commission's Notifications.

20. This petition was allowed by this Central Commission by order dated 19.10.2005, holding that in accordance with this Commission's Notifications dated 26.3.2001 and 26.3.2004 the claim for rebate of 2.5% or 2% could be allowed only when the bills were settled by opening the Letter of Credit.

21. The Central Commission also felt that that the Appellant TANGEDCO (TNEB) could not claim rebate @ 2.5% or 2% unless the payment was made through the Letter of Credit.

22. Consequently, the TNEB was directed to refund or adjust the excess amount of rebate recovered, within a period of three months. The relevant part of the order is extracted hereunder:

> *"In terms of these regulations, liberty is granted to the beneficiaries to make payment by any mode other than the letter of credit. In such cases, the beneficiaries can claim a rebate of 1% in case the payment is made within a period of one month and in case the payments are withheld beyond 60 days, the beneficiaries become liable to pay late payment surcharge. It is however, made clear that in case, payment is made through a mode other than the letter of credit, the Respondent as*

a beneficiary cannot claim rebate @ 2.5 or 2% even if the payment of bill is made within 3 days of raising by the Appellant or earlier. Therefore, in future, the Respondent will be entitled to claim rebate strictly in accordance with the Commission's regulations on the subject. We further direct that the Respondent shall refund or adjust the excess amount of rebate withheld for the past period, in variance, with the Commission's regulations within a period of three months from the date of this order."

23. The order dated 19.10.2005 had not been challenged before any superior forum and thus it attained fiality. Thereafter, the meetings were held between the NLC and the TNEB wherein the NLC accepted the TNEB's proposal to open the back-up Letter of Credit. However, no further positive steps were taken by TNEB in the direction of opening of back-up Letter of Credit.

24. For reason of non-payment of the amount ordered in its favour, the NLC filed another petition (17/2006), seeking for a fresh direction for the refund of excess rebate retained by the TNEB. This petition was also allowed by Central Commission by the order dated 14.9.2006. In this order, the Central Commission directed that the TNEB to refund or adjust the entire excess rebate amount in compliance with the order dated 19.10.2005. The extracts from the order dated 14.9.2006 are reproduced hereunder:

> *"27. In the light of the above order which leaves no room for any doubt, we find the Respondent's contention and reliance on the expired BPSA is wholly unjustified. We once again make it clear that the Respondent in the past was entitled to claim 1% rebate on all payments made within one month from the date of raising of the bills by the Appellant, till such time it opens LC. Accordingly we direct the Respondent to refund or adjust the excess amount withheld within a period of two months from the issue of this order. Any default or non-compliance may be a cause f*or invoking penal provisions under the Electricity Act, 2003."

25. Like the previous order, this order was also not challenged by the TNEB. However, the TNEB, on 31.12.2007, opened the back-up Letter of Credit and thereafter the TNEB has been availing the rebate in accordance with this Central Commission's Notifications. In this manner, the dispute is confined to the rebate applicable for the period 1.4.2001 to 31.12.2007.

26. Despite the orders passed by this Central Commission, the amount of excess rebate withheld by the TNEB prior to 31.12.2007 was not refunded. Hence the NLC filed another petition which is the present petition in No.163 of 2008 on 23.12.2008 seeking for a direction to refund the excess rebate to the tune of Rs. 79.52 crore up to 31.12.2007.

27. The Central Commission after hearing the parties in its order dated 31.3.2009 allowed the petition again directing

the TNEB to refund the excess rebate of 79.52 crores unilaterally withheld by the TNEB. The direction was based on the earlier orders dated 19.10.2005 and 14.9.2006 of the Central Commission.

28. Challenging the said order dated 31.3.2009; the TNEB filed an Appeal (No. 78/2009) before the Appellate Tribunal and also filed Appeals (Nos. 79/2009 and 80/2009) against the orders dated 19.10.2005 and 14.9.2006. These Appeals filed against the orders dated 19.10.2005 and 14.9.2006 were subsequently withdrawn to enable the TNEB to seek further review of the orders passed by the Central Commission.

29. As regards the Appeal against this Central Commission's order dated 31.3.2009 (Appeal No 78/2009), by judgment dated 20.5.2009 the Appellate Tribunal remanded the matter to the Central Commission for fresh consideration on the ground that one of the Members who passed the order happened to be the Chairman and Managing Director of the Appellant company during the relevant period of exchange of correspondence between the parties.

30. Pursuant to the directions of the Appellate Tribunal, the Central Commission with a fresh Bench passed the order dated 7.1.2010 again allowing the said Petition filed by NLC.

31. Aggrieved by this Central Commission's order dated 7.1.2010 decided in favour of the NLC, the TNEB, the Respondent filed another Appeal, being Appeal No 49/2010 before this Tribunal. In this Appeal, the TNEB pointed out that the Central Commission in its order dated 7.1.2010 had not considered the letters dated 5.6.2003 and 26.10.2004 as also the decision arrived at in the meeting held on 22.12.2003, recorded in the Minutes of Meeting . The submissions of the TNEB in this regard are noted in Appellate Tribunal's judgment dated 10.9.2010 as extracted hereunder:

> *"(B) The earlier orders passed by the Central Commission on 19.10.2005 and 14.09.2006 directing for the refund of excess rebate did not consider the material documents namely the letter dated 05.06.2003 sent by the Chairman of the Corporation to the Chairman of the Electricity Board and the letter dated 26.10.2004 sent by the General Manager (Commercial) of the Corporation to the Chief Financial Controller, TNEB. Both these documents would clearly indicate that the Corporation admitted that the NLC, even though the Electricity Board had not opened the LC, granted 2% rebate on the bill amount on the basis of payments made by the Electricity Board within 3 working days from the date of presentation of the bills. This fact also has been acknowledged by the Corporation to the Power Ministry through its letter dated 14.07.2003. In addition to this, the minutes of the meeting held between both the parties, held on 22.12.2003 decided about the issue and sorted out their dues. Without referring to these documents, the Central Commission passed the earlier order."*

32. On the basis of this submission, the Appellate Tribunal while disposing of the Appeal in 49 of 2010 judgment dated 10.9.2010 upheld the TNEB's contention and observed that the Cental Commission did not go into the aspect of refund of excess rebate on merits, but was influenced by dismissal of the Review Petitions filed against the orders dated 19.10.2005 and 14.9.2006. The Appellate Tribunal also observed the same in the operative part of the judgment which is as follows:

> *"The order passed by the Central Commission on 31.03.2009 with reference to refund of Excess Rebate was challenged by the Appellant in Appeal No. 78/09 before the Tribunal. The said order was set aside by this Tribunal on 20.05.2009 directing the Central Commission to re-hear the matter on this issue afresh. Therefore, the order dated 31.03.2009 passed by the Central Commission was no longer in existence. In the present case, the Central Commission did not decide the said issue afresh as directed by the Tribunal. Instead it simply constituted a fresh Bench and heard the matter on other issue namely reimbursement of income tax and gave finding only on that issue and retained its earlier order dated 31.03.2009, ignoring the directions of the Tribunal. Therefore, the impugned order dated 07.01.2010 is set aside on this issue and the matter remanded to the Central Commission to hear the matter on the issue of refund of Excess Rebate afresh and decide the matter according to law. However, it is made clear that we have not considered the issue on merits and as such we are not expressing any opinion on this issue. Consequently, it is open to the Central Commission to decide the issue on the basis of the*

submissions and materials placed by the parties and pass the order in accordance with law."

33. This judgment of Remand was rendered by this Tribunal on 10.9.2010. In the meantime, the TNEB filed the Petitions (Nos. 98/2009 and 99/2009) seeking review of the Commission's orders dated 19.10.2005 and 14.9.2006. It was submitted before the Central Commission that subsequent to the orders dated 19.10.2005 and 14.9.2006, the TNEB discovered certain material documents which would go to the root of the matter to establish that the NLC had agreed to allow rebate of 2.5% without insisting on opening of the Letter of Credit in case the payment was made within three days of raising of the bills. The TNEB further submitted that these documents could not be produced previously even after exercise of due diligence, as the previous petitions were handled by the Planning Department, whereas the documents were held by the Accounts Department. It was further submitted that they came across these documents only when details relating to the Appellant's claim for income-tax raised in the present petition were being verified.

34. However, the Review Petitions were dismissed by the Central Commission by the common order dated 17.12.2009. In that order, it was held that the two departments (Planning Department and Accounts

Department) of the Respondent were the limbs of the same organization and the TNEB as a legal entity could not rely upon lack of internal co-ordination or inter-departmental consultations as the ground for review. The operative part of the order of the Central Commission is extracted below:

> *"50. In view of our discussion in the preceding paragraphs, the review petitions are not maintainable on the ground of limitation as well for the failure on the part of the review Appellant to make out a case for review under Order 47 Rule 1 of the Code."*

35. Against the order of dismissal of the Review Petitions, the TNEB filed an Appeal (No. 50/2010) before this Tribunal. This Tribunal by its order dated 24.5.2010 dismissed the Appeal on ground of maintainability. After dismissal of the Appeal, the TNEB (TANGEDCO) filed the fresh appeals (Nos. 132/2010 and 133/2010) again challenging the Central Commission's orders dated 19.10.2005 and 14.9.2006. As there was a delay in filing of the Appeals, the TNEB filed applications for condonation of delay. But, the Appellate Tribunal by its Order dated 5.1.2011 declined to condone the delay, dismissed the applications seeking condonation of delay and consequently rejected the Appeals. However, the Appellate Tribunal in its order observed as follows –

> *"65. Alternatively, the Appellant has now sought for a liberty to the Appellant to raise the issue in respect of the entire period from 2001 till 30th November 2007*

and prayed for the direction to the Central Commission to decide the Petition No. 163/2008 which was remanded earlier in respect of the entire subject matter from 1.4.2010 till 31.12.2007 on its merit.

66. At this stage, we may point out that already we have given direction while remanding the matter in Appeal No. 49/2010 after setting aside the orders passed in Petition No. 163/2008 to allow the Appellant to make his submissions with regard to the documents referred to in the reply filed in Petition No. 163/2008. The relevant direction is as follows:

> *"We make it clear that we are not expressing any opinion on the points urged by the learned counsel for the Appellant on this issue on the strength of various documents produced before this Tribunal as we are of the considered view that it is for the Central Commission to consider those documents and submissions made by the parties and to decide the said issue."*

67. As pointed out by the learned Counsel for the Appellant, the Respondent has mentioned in its Written Submission dated 29.9.2010 stating that the Appellant Tamil Nadu Electricity Board is at liberty to raise the grounds of waiver and unjust enrichment in the remand proceedings and as such the Appellant does not require any more direction or grant of liberty to raise these grounds In view of the same, we are not inclined to give any more direction to the Central Commission.

68. It is made clear that the Central Commission is open to decide the relevant issue in the Petition No. 163/2008 based on the materials placed by the parties in that proceedings and the submissions of the parties

thereto in accordance with law. We reiterate that we do not enter into the merits of the matter as we are concerned only with reference to the prayer to condone the inordinate delay of 1668 days and 1338 days in filing the Appeals.

69. In the above circumstances, the Appellant may approach the Central Commission and make submissions on the basis of the new documents introduced by the Appellant through his reply in Petition No. 163/2008 as directed earlier and to raise only the relevant issue as mentioned above." (Emphasis added)

36. In terms of the Appellate Tribunal's judgments dated 10.9.2010 and 5.1.2011, the Central Commission was directed to consider the documents introduced by the TNEB for the first time in its reply to the present Petition before the Central Commission.

37. Accordingly, the TNEB relied upon three documents. These documents are letters dated 5.6.2003 and 26.10.2004 sent by the NLC to TNEB and the Minutes of Meeting dt. 22.12.2003. According to the TNEB, these documents would show that the NLC had consented to give rebate as per the Agreements between the parties.

38. The Central Commission ultimately passed the present Impugned Order on 19.12.2012 allowing petition partly. Aggrieved by the Impugned Order TNEB(TANGEDCO) has filed Appeal No. 52 of 2013 challenging the Central Commission's order allowing rebate only up to 2005 and not

for the later period. The NLC has also filed Appeal against the Impugned Order being Appeal No. 87 of 2013 challenging the other portion of the order where the Central Commission has directed TNEB to refund the rebate withheld for the period only from 9.8.2005 to 31.12.2007 and not for the earlier period.

39. Let us refer to the relevant portion of the Impugned Order which reads as under:

> ***"Letter dated 26.10.2004***
>
> *21. The other letter that has been pressed into service by the Respondent is dated 26.10.2004 addressed by General Manager (Commercial) of the Appellant to the Chief Financial Controller of the Respondent stating inter alia that:*
>
> > *"NLC, hitherto, is allowing rebate of 2.5% for the timely payment of power Bills as per clause 8.2 of the Bulk Power Supply Agreement entered between TNEB and NLC signed on 20 Sep 01 for TPS-I Expn. However, it may be seen that clause 25 of the CERC Notification dated 26.3.2004 provides that rebate of 2% shall be allowable for the payment of bills of power supply through a Letter of Credit. However rebate of 1% is allowed if the payment is made other than LC but made within one month from the date of presentation of bills. Though the revised tariff petition for all the Thermal Power Stations for the period from 01.04.2004 to 31.3.2009 is yet to be filed, we wish to inform you that the rebate allowable shall be 2% as per clause 25 of the notification dated 26.3.2004. Accordingly rebate from 1.4.2004 shall be retrospectively adjusted. From Nov 2004*

onwards, rebate of 2% on the bill amount excluding duties, cess, royalty and other statutory levies can be availed for the payment made within 3 working days from the date of presentation of bills.

Though the revised tariff pertaining for all the Thermal Power Stations for the period from 01.04.2004 to 31.3.2009 is yet to be filed, we wish to inform you that rebate allowable shall be 2% as per clause 25 of the notification dated 26.3.2004. Accordingly rebate from 1.4.2004 shall be retrospectively adjusted. From Nov 2004 onwards, the rebate of 2% on the bill amount excluding duties, cess, royalty and other statutory levies can be availed for the payment made within 3 working days from the date of presentation of bills. "

22. The above letter is important. From the letter the following inferences can be drawn:

(a) Till 26.10.2004 the Appellant was allowing rebate of 2.5% in terms of clause 8.2 of the Agreement dated 20.9.2001 pertaining to TPS I (Expansion) on payment of bills within three days of presentation thereof.

(b) Under clause 25 of this Commission's notification dated 26.3.2004, rebate of 2% only was permissible.

(c) With effect from 1.4.2004, rebate of 2% was to be allowed when the Respondent made payment within 3 working days from the date of presentation of the bills and the rebate availed with effect from 1.4.2004 was to be adjusted accordingly.

(d) With effect from 1.11.2004, rebate of 2% would be allowed. 23. The Appellant's letter dated 26.10.2004 as regards the rate of rebate is based on this Commission's notification dated 26.3.2004, which specified rebate of 2% against rebate of 2.5% applicable prior thereto on payments made by opening the Letter of Credit. Though the Appellant pointed out that rebate of 2% was payable with effect from 1.4.2004, it did not insist on the Respondent to open the Letter of Credit and rather agreed to allow rebate of 2% in future, with effect from 1.11.2004, on the Respondent making payment within three days of presentation of the bills in accordance with the Agreement dated 20.9.2001 in respect of TPS-I (Expansion). It is on record that the Respondent made payment of extra rebate availed from 1.4.2004 to 31.10.2004. In other words, despite the notification dated 26.3.2004, the Appellant conceded to extend the benefit under the Agreement dated 20.9.2001. Although the letter dated 26.10.2004 was in respect of TPS I (Expansion), it can be safely concluded that the Appellant had no objection to extend similar benefit in respect of other generating stations as well since no action was taken by the Appellant in respect of those stations despite its knowledge of this Commission's notification dated 26.3.2004 that rebate of 2% was allowed on payments made against the Letter of Credit. The Appellant has contended that the letter dated 26.10.2004 was in the context of recovery of dues after securitization of past dues. We don't find any such indication from the said letter. On the contrary the said letter specifically refers to the Bulk Power Sale Agreement dated 20.9.2001.

24. The question that arises whether the Appellant could agree to allow rebate in a manner different from that specified in this Commission's notifications. For an answer to this question, the legal position on this aspect has to be examined. It is settled principle of law that a person for whose benefit a statutory provision has been made can waive the benefit, unless the statutory provision serves the public purpose or is in public interest. In support of this proposition, the law laid down by the Hon'ble Supreme Court can be conveniently noticed. The Hon'ble Supreme Court in Shri Lachoo Mal vs Shri Radhey Shyam, 1971 (1) SCC 619, held that everyone has the right to waive and to agree to waive the advantage of a law or rule made solely for the benefit of the individual in his private capacity without infringing any public right or public policy. In Commissioner of Customs, Mumbai Vs. Virgo Steels, Bombay, 2002 (4) SCC 316 after noticing the earlier precedents it was held by the Hon'ble Supreme Court that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right. The Hon'ble Supreme Court ruled as under:

> *"9. The next question for our consideration is: can a mandatory requirement of a statute be waived by the party concerned? In answering this question, we are aided by a catena of judgments of this Court as well as of the Privy Council. We will first refer to the judgment of the Privy Council which has been consistently followed by the Supreme Court in a number of subsequent cases involving similar points. In Vellayan Chettiar v. Government of Province of Madras (AIR 1947 PC 197), the Privy Council held that even though S. 80, C.P.C. is mandatory, still non-issuance of*

such notice would not render the suit bad in the eye of law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council held that the protection provided under S. 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.

10. In the case of Dhirendra Nath Gorai and Sabal Chandra Shaw and Ors. v. Sudhir Chandra Ghosh and Ors. (1964 (6) SCR 1001), this Court followed the judgment of the Privy Council in Vellayan Chettiar (supra) and held that even though the requirement of S. 35 of the Bengal Money Lenders' Act is mandatory in nature, such mandatory requirement could be waived by the party concerned. On a true construction of S. 35 of that Act, this court held that the said Section is intended only for the benefit of the judgment debtor and, therefore, he can waive the right conferred on him under the said section.

11. In the case of S. Raghbir Singh Gill v. S. Gurucharan Singh Tohra and Ors. (1980 Supp SCC 53), this Court negatived an argument that the requirement of S. 94 of the Representation of the People Act, 1951 cannot be waived. This argument was based on the principle that public policy cannot be waived. Rejecting the said argument, this court held that the privilege conferred or a right created by a Statute, if it is solely for the benefit of an individual, he can waive it. It also held that where a prohibition enacted is founded on public policy, Courts should be slow to apply the doctrine of waiver but if such privilege granted under the Act is for the

sole benefit of an individual as is the case under S. 94 of the Representation of the People Act, the person in whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waiver. .

12. In Krishan Lal v. State of J and K (1994 (4) SCC 422), this Court while considering the requirement of furnishing copy of inquiry proceedings under S. 17(5) of the J and K (Government Servants) Prevention of Corruption Act, 1962 held following the judgment in V. Chettiar's case (supra) and D. N. Gorai (supra) that though the requirement mentioned in S. 17(5) of the Act was mandatory, the same can be waived because the requirement of giving a copy of the proceedings of the inquiry mandated by S. 17(5) of the Act is one which is for the benefit of the individual concerned.

13. In Martin and Harris Ltd. v. 6th Additional Distt. Judge and Ors. (1998 (1) SCC 732) : (1998 AIR SCW 77 this court while considering the provision of S. 21(1)(a) first proviso of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 negatived a contention advanced on behalf of the appellant therein that the said provision was for public benefit and could not be waived. It held that it is true that such benefit enacted under the said proviso covered a class of tenants, still the said protection would be available to a tenant only as an individual, hence, it gave the tenant concerned a locus poenitentiae to avail the benefit or not. It also held that the benefit given under the said section was purely personal to the tenant concerned, hence, such a statutory

> *benefit though mandatory, can be waived by the person concerned.*
>
> *14. From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of persons concerned and is for his benefit, the said person can always waive such a right."*

25. The provisions made in this Commission's notifications were for the benefit of the generating companies like the Appellant and the transmission licensees. The aim was to ensure timely recovery of the dues. Nevertheless, they could adopt any other mode, according to their convenience or wisdom, for recovery of dues by mutually agreeing to any other arrangement. This Commission's notifications in relation to operational norms specifically provided that the norms were the ceiling norms and did not preclude the generating company or the transmission licensee, as the case may be, and the beneficiaries from agreeing to improved norms of operation and in case the improved norms were agreed to, such improved norms would be applicable for determination of tariff. Even if the norms relating to rebate do not fall within the category of operational norms, yet the same principles should apply while seeking enforcement of the norms governing recovery of rebate in view of the law declared by the Hon'ble Supreme Court and adverted to above. Accordingly, the Appellant's action to allow rebate on the Respondent making direct payment of the billed amounts within three days of presentation of the bills and still avail rebate of 2.5% or 2% do not involve infringement of this Commission's notifications in the legal sense.

26. The Appellant first filed the petition on 9.8.2005 seeking directions to the Respondent to refund the excess amount by placing reliance on this Commission's notifications dated 26.3.2001 and 26.3.2004. This means that on filing of the petition the Appellant withdrew the benefit allowed to the Respondent. Accordingly, during the period from 9.8.2005 to 31.12.2007, the Appellant cannot be said to have acquiesced to allow rebate in a manner different from that provided in the notification dated 26.3.2004. Therefore, the Respondent is found to be entitled to avail the relief of rebate in accordance with this Commission's notification. Since the Respondent had not opened the Letter of Credit during this period and made payments within one month from the date of presentation of the bills, it can avail rebate of 1% during this period.

27. The Respondent has placed on record certain letters procured from other beneficiaries of the Appellant's generating station in Southern Region to claim that it cannot be discriminated against and is therefore entitled to claim the rebate in accordance with the Agreements entered into with the Appellant when payments were made within three days after receipt of the bills. The beneficiaries whose letters have been filed in support of the contention are Kerala State Electricity Board and Power Company of Karnataka Ltd. KSEB under its letter dated 19.6.2009 informed the Respondent that the funds were being transferred directly to the Appellant's account within three working days from the date of receipt of the invoices after deducting 2% rebate by maintaining the Letter of Credit as back-up. Power Company of Karnataka by its reply dated 20.8.2009 similarly informed the Respondent that irrevocable/back-up Letters of Credit were opened in favour of the

Appellant for releasing the monthly energy charges. It has been added that rebate of 2.5%/2.25% was availed of on the Letter of Credit amount paid within three days from the date of presentation of bills and of 1% for the bill amount paid within one month. The Respondent has further pointed out that Andhra Pradesh was allowed rebate on payments made against the Letter of Credit in two instalments.

28. The above submissions of the Respondent have been considered carefully. In our opinion, the Respondent has not been able to make out the case of discrimination. From the letters filed by the Respondent from the utilities in the States of Kerala and Karnataka it is crystal clear that they had opened irrevocable/back-up Letters of Credit in favour of the Appellant. Similar Letter of Credit was not opened by the Respondent till 31.12.2007. After opening of the Letter of Credit on 31.12.2007, the Respondent has been availing of the rebate in accordance with this Commission's notifications. Even in case of Andhra Pradesh, of the Respondent's own submission, the Letter of Credit has been opened in favour of the Appellant. Under these circumstances, the Respondent cannot be heard to allege discrimination on the part of the Appellant.

29. The Respondent has alleged that this Commission in its order dated 31.8.2004 approved the tariff for the period 1.4.2002 to 31.3.2004 in respect of TPS-I (Expansion) in Petition No 33/2004 based on the terms and conditions contained in the Bulk Power Purchase Agreement. It however needs to be pointed out that the tariff was approved for the period ending 31.3.2004. For the tariff period commencing on 1.4.2004, the tariff of all generating stations of the Appellant has been determined under the terms and conditions contained in this Commission's notification dated 26.3.2004 and not

on any Agreement between the parties. We have taken a view that during the period 9.8.2005 to 31.12.2007 the Respondent is to be allowed rebate of 1% since during this period the Respondent had not opened the Letter of Credit. Therefore, the ground of attack has lost significance. Similarly, the objection on ground of limitation and other similar grounds raised by the Respondent also do not survive and are not available to the Respondent.

30. For the foregoing reasons, we direct that the Respondent shall refund or adjust the amount of excess rebate withheld by it for the period 9.8.2005 to 31.12.2007 latest by 31.1.2013, with interest @ 9% per annum from 1.9.2005 till the date of refund or adjustment.

40. Let us now refer to various grounds raised by both the Appellant TANGEDCO and Respondent NLC in both these Appeals.

41. The learned Senior Counsel for the Appellant has made the following submissions urging the grounds in Appeal No.52/2013 as against the Impugned Order:

(a) The Agreement by NLC with TNEB to grant rebate to the payments made by a mode other than through LC is a commercial and reasonable decision, which NLC was perfectly within its right to take, which it did and indeed derived the benefit of such decision by enjoying the use of money for a period of 27 days every time the payment was made by TNEB within three working days from the receipt of the monthly

invoice. Further, NLC had not paid anything out of its pocket. The rebate, as already demonstrated above, was nothing but the refund of interest, admittedly, loaded upfront on the Working Capital which includes receivables equivalent to two months average billings for sale of electricity. It is further submitted that in the absence of any prohibition in the Regulations, a generating company including a PSU, is well within its right by an Agreement to extend the rate of rebate to provide for the payments of bills through LC to the payments made by a mode other than through LC unless the decision is vitiated by fraud or considerations, which are prohibited by law. Thus the contention of NLC that any Agreement by NLC to grant a rebate of 2.5% or 2%, as the case maybe, to the payments made otherwise than through LC, is prohibited by the Regulations, is erroneous and is not borne out by the Regulations.

(b) In the aforesaid facts and circumstances, the Agreement to extend the rate of rebate meant for payment through LC to the payments made within three working days from the receipt of the monthly bill was eminently just, fair and reasonable and was indeed in public interest since, the ultimate beneficiaries of the extension of the rebate are

members of the public/consumer. Indeed, the benefit has long been passed on to the ultimate consumers and cannot now be recovered at this distance of time. Therefore, no public interest or public policy has been infringed by the Agreement in question as wrongly contended by NLC. Further, NLC has not suffered any loss by this mutually agreed arrangement. In fact, NLC has hugely benefited by the payment within three working days from the receipt of the bill:

Under the Regulations, according to the NLC, the beneficiary would be entitled to rebate *"… that is to say at 2.5%, if payment is made within 30 days and subject to opening of an irrevocable LC*." Whereas in the present case, NLC received the amount of the bill within 3 working days from the receipt/presentation of the monthly bill.

(c) The tariff, which TNEB can recover from its consumers i.e. domestic, industrial and commercial etc. are fixed by the Tariff Commissioners and while fixing the tariff, they take into consideration the payments made by TNEB to NLC after full rebate. In other words, the full rebate allowed to TNEB by NLC has been passed on to the consumers of electricity. It

is impossible for TNEB to recover the additional amounts from its consumers.

(d) For the above reasons, it is prayed that the Appeal No.52/2013 may be allowed and Appeal No.87/2013 may be dismissed.

42. In reply to above submissions made by the learned Senior Counsel, for the Appellant in Appeal No.87 of 2013 and the Respondent in Appeal No.52 of 2013 has made the following submissions:

(a) The Bulk Power Supply Agreements(BPSAs) ceased to be binding on the parties after the Regulations 2001 came into force on 01.04.2001, except to the extent provided under the Regulations 2001 and specifically consented by the Central Commission on the Petition by either of the parties.

(b) The Regulations governed the issue of rebate and as laid down by the Supreme Court in PTC India Ltd. Vs CERC (2010) (4) SCC 603'A" Regulation under S.178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulating entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations. It is

thus, a statutory obligation for TANGEDCO and NLC to ensure that the BPSAs, even if they remained in force, were brought in conformity with the Regulations.

(c) There was no waiver of its rights by NLC as regards rebate. The provisions in the three BPSAs were not uniform. In fact, the BPSA dated 20.09.2001 of TPS-I Exp., did not even provide for full rebate without opening LC Waiver cannot be retrospective as has been wrongly held by the CERC.

(d) The letter of 26.10.2004 referred to Clause 8.2 of BPSA dated 20.09.2001 in respect of TPS-I Expn, which Clause pertained to Supplementary Bills. The letter referred to Clause 25 of the Regulations, as regards entitlement for full rebate in respect of monthly power bills. The Central Commission erred in reading such letter as a waiver with retrospective effect. Even if it were treated as constituting waiver, it can only operate prospectively and not retrospectively.

(e) The contents of the three documents dated 05.06.2003, 22.12.2003 and 26.10.2004 came to the knowledge of TANGEDCO only in March, 2009 and this Hon'ble Tribunal has held that TANGEDCO could not have acted on the basis of any inference based on the contents of the three documents as referred to in Para

57 in the judgment dated 05.01.2011 in Appeal Nos. 132 and 133 of 2010.

(f) Even assuming that there was waiver by virtue of letter dated 26.10.2004, by the letter dated 03.11.2004, 07.01.2005 etc., NLC had equivocally demanded that the Letter of Credit should be opened for availing full rebate without opening Letter of Credit. In any case, by filing Petition No.97 of 2005, the NLC having taken coercive legal action, there can be no question of continuing waiver;

(g) TANGEDCO knowingly and admittedly took the risk of withholding rebate without opening Letter of Credit in case of NLC, though they opened Letter of Credit in case of some other Generating Stations. They disregarded the orders of the Central Commission repeatedly. Andhra Pradesh, Karnataka and Kerala opened the Letter of Credit and availed full rebate by opening Letter of Credit. TANGEDCO cannot claim preferential treatment having deliberately breached the Regulations for monetary gain.

(h) The contention that TANGEDCO has been continuing to avail rebate by making payment of power bills within 3 days even after 31.12.2007 is incorrect and unsubstantiated. Even now TANGEDCO has

opted to make belated payment with rebate of 1% or no rebate.

(i) NLC has been unjustly deprived of the full price of the power sold to TANGEDCO, in that TANGEDCO unilaterally withheld full rebate in violation of the Regulations and despite adverse orders of the Central Commission. It is, therefore, just and fair that NLC is awarded interest for the entire period.

(j) For the above reasons, it is prayed that Appeal No.52 of 2013 may be dismissed and Appeal No.87 of 2013 may be allowed.

43. In the light of the rival contentions urged by both the parties, the following issues are involved in these two Appeals:

(a) **In Appeal No.52 of 2013, whether it was proper for the CERC to have denied relief to TANGEDCO for the period from 09.08.2005 to 31.12.2007 by holding that there was an Agreement by which NLC had waived the requirement of opening Letter of Credit for availing full rebate, and that by filing Petition No.97 of 2005 on 09.08.2005 such waiver had been withdrawn by NLC ?**

(b) **In Appeal No.87 of 2013, whether the CERC was justified in holding that NLC's letter dated 26.10.2004 established that even from 01.04.2001**

onwards, there was an Agreement by which NLC was deemed to have waived the Regulatory requirement of opening Letter of Credit for availing full rebate where payment was made within 3 days of presentation of the bill and that such Agreement continued upto 09.08.2005 when NLC filed Petition No.97 of 2005?

44. The crux of the issue is as to whether the findings of the Central Commission based on NLC's Letter dated 26.10.2004 that NLC was deemed to have agreed from 1.4.2011 onwards to allow full rebate for making payment in 3 days of presentation of the bills without opening the Letter of Credit was correct or not.

45. If this issue is answered in Affirmative, the Appeal No.52 of 2013 has to succeed and Appeal No.87 of 2013 has to fail.

46. On the other hand, if the answer is in negative, the Appeal No.52 of 2013 filed by the TANGEDCO has to fail and Appeal No.87 of 2013 filed by the NLC has to succeed.

47. The learned Counsel for both the parties have elaborately argued on so many days and for so many hours and also have filed several documents as well as the detailed Written Submissions covering several number of pages raising several points which are both relevant and irrelevant.

48. After hearing the parties and perusing the records, we feel that we need not refer to each and every point raised by the parties as most of them are irrelevant to the issue in question. We are of the opinion that it would be enough to confine ourselves with reference to the findings given by the Central Commission in favour of the TANGEDCO in respect of the earlier period and other findings in favour of the NLC in respect of the later period.

49. Let us now give the crux of the findings given by the Central Commission in Impugned Order dated 19.12.2012.

50. The letter dated 26.10.2004 sent by the NLC to the Appellant TANGEDCO is quite relevant. From the contents of the letter the following things would be manifestly clear:

(a) **Till 26.10.2004, the NLC was allowing a rebate of 2.5% in terms of Clause 8.2 of the Agreement dated 20.9.2001 on payments of bills within three days of the receipt of the bills.**

(b) **Under clause 25 of the Central Commission's Notification dated 26.3.2004, a rebate of 2% only was permissible.**

(c) **With effect from 1.4.2004, the rebate of 2% was to be allowed when the TANGEDCO made payment within three working days from the date of**

receipt of the bills and rebate availed with effect from 1.4.2004 was to be adjusted accordingly.

(d) **With effect from 1.1.2004, rebate of 2% would be allowed. This letter would show that though the NLC pointed that the rebate of 2% was payable with effect from 1.4.2004, it did not insist the TNEB to open the Letter of Credit. In fact, by this letter it agreed to allow a rebate of 2% in future with effect from 1.11.2004. The record would show that the TNEB made extra rebate availed from 1.4.2004 to 31.10.2004. This would mean that despite the Notification dated 26.3.2004; the NLC conceded to extend the benefit under the Agreement dated 20.9.2001.**

(e) **It is true that the letter dated 26.1.2004 was in respect of the Thermal Power Station-I (Expansion). But it is noticed that the Appellant NLC had never raised objection to extend similar benefits in respect of other Generation Stations as well despite its knowledge about the Notification dated 26.3.2004.**

(f) **The question is whether the NLC could agree to allow rebate in a manner different from the Central Commission's Notification.**

(g) **It is settled law that a person for whose benefit a statutory provision has been made can waive the benefit unless statutory provisions serves the public purpose or is in public interest as held by the Hon'ble Supreme Court in 1971 (1) SCC 619 Shri Lachoo Mal Vs Shri Radhey Shyam and other similar decisions rendered by the Hon'ble Supreme Court.**

(h) **The provisions made in the Notifications issued by the Central Commission were for the benefit of the Generating Companies like NLC and the transmission licensees. The aim was to ensure timely recovery of the dues. Nevertheless, there was no bar for adopting any other mode, according to the convenience or wisdom for recovery of dues by mutual Agreement or by mutual arrangements. Therefore, the action of the NLC to allow rebate on the TANGEDCO (TNEB) making direct payment of the billed amounts within three days of the receipt of the bills would not involve infringement of the Central Commission's Notifications in the legal sense.**

(i) **The very fact that the NLC filed a Petition only on 9.8.2005 seeking directions to the TNEB to refund the excess amount by placing reliance on**

the Central Commission's Notification would show that the NLC after having withdrawn the benefit allowed to the TNEB so long has filed the Petition relying upon the Notification. Therefore, it was to be held that they have waived for the refund of the excess amount in respect of the period 2001 to 2005.

(j) **But for the period from 9.8.2005 to 31.12.2007 on which date the letter of credit is opened, the NLC cannot be said to have acquiesced to allow the rebate in a manner from that provided in the Notification dated 26.3.2004. Therefore, it has to be held that since the TNEB has not opened the Letter of Credit during this period and made payments within one month from the date of the presentation of the bill it can avail rebate of 1% only during this period.**

(k) **After opening the Letter of Credit on 31.12.2007, the TNEB has been availing the rebate in accordance with the Central Commissions Notification.**

(l) **In view of the above, the TNEB shall refund or adjust the amount of excess rebate withheld by it for the period 9.8.2005 to 31.12.2007 and the NLC**

would not be entitled to the refund of the amount for the period 2001 to 2005.

51. The above findings would show that the Central Commission has not accepted the claim of the TNEB that the rebate was on the basis of any Agreement between the two parties but it accepted the claim of the TNEB only in respect of the earlier period on the ground of a letter sent by the NLC to TNEB. Thus, the Central Commission's analysis was based upon the said letter reflecting the mutual consent for the same. But in the absence of the very legal Agreement subsequently entered, the fact of the said letter from NLC to TNEB allowing the rebate would get elapsed the moment the NLC filed a Petition for recovery of the rebate.

52. On the strength of the letter the Central Commission rejected the claim of NLC for refund of the excess rebate for the period from 1.4.2001 to 8.8.2005. However, it allowed the claim of NLC for the refund of rebate for the period from 9.8.2005 to 30.12.2007 on the reason that by filing the Petition on 9.8.2005 seeking for the refund, the NLC withdrew the benefit allowed to TNEB for the earlier period and further held that TNEB could avail the rebate of only 1% during the period 9.8.2005 to 30.12.2007 since TNEB had not opened the Letter of Credit during this period and it simply made payment within one month from the date of receipt of the bills.

53. According to the Appellant, having accepted the case of the Appellant (TNEB) on the basis of this letter, the Central Commission ought not to have allowed the claim for refund of the rebate for the later period from 9.8.2005 to 30.12.2007. The similar arguments have been advanced by the NLC the Respondent to the effect that having accepted the claim of NLC with regard to refund of the rebate on the basis of the Notification for the later period, the Central Commission ought to have allowed the same for the entire period from 2001 to 2007.

54. Both the parities have cited several cart loads of authorities to substantiate their respective arguments. We have gone through judgments dealing with various issues. However, we need not refer to those judgments since the main crux of the issue in their Appeals is as to whether the letter can be relied upon to allow for refund in respect of a portion of the period in the facts and circumstances of this case.

55. According to the NLC the claim made by the NLC was on the basis of the Notification and merely because there was a mutual consent through the Letter the same would not prevail over the Notification issued by the Central Commission as held by the Hon'ble Supreme Court.

56. As a matter of fact, the Central Commission has relied upon the judgment of Hon'ble Supreme Court as referred to above

in the impugned order. As correctly pointed out by the Central Commission there is no prohibition in the Notification with regard to making mutual Agreement or mutual arrangements.

57. As indicated in the impugned order passed by the Central Commission, the conduct of the NLC by giving consent for allowing rebate if the payment is within three days without raising any further question would show that there was a mutual arrangement between the parties upto the particular period. But, the moment the NLC raised the question by filing a Petition seeking for refund of the excess rebate, as correctly pointed out by the Central Commission, the said benefit which has been given earlier to the TNEB cannot be allowed to be continued.

58. Of course, the letters exchanged between the parties and the provisions in the Notification involves the interpretation with regard to the intention of the parties.

59. Merely because the Central Commission allowed for the refund of the rebate in respect of the earlier period, it cannot mean straightway that payment must be allowed for the entire period. This argument would apply to TNEB also.

60. It is true that there are two views or two interpretations possible. But when one interpretation which is in favour of the party on the basis of the letter sent by the NLC which

has not been disputed, cannot be rejected outright as a wrong interpretation.

61. In view of the above, without going into the various nitty gritty details which have been furnished by both the parties on the basis of which both the parties have argued on several days, it is appropriate to hold that interpretation given by the Central Commission in the impugned order, is one of the possible interpretations. It is a legal and valid interpretation which we do not like to interfere. In fact, in our opinion, the Central Commission has balanced the rights of both the parties by making possible and acceptable interpretation in the Impugned Order which is not liable to be interfered with.

62. However, we want to make an order with reference to the interest.

63. According to the TNEB there is no prayer for interest by the NLC in the Petition No.163 of 2008 nor was there any demand of interest made in the correspondence between the parties.

64. The TNEB in its Comprehensive Written submission has prayed that that without prejudice to their various grounds urged in their Appeal, the interest if at all, can be allowed atleast from the date of filing of the Petition No.163 of 2008 and not from any date prior thereto.

65. Although the NLC never claimed for interest either through the correspondence or prayer in the Petition, we feel that interest of justice would be met by holding that it would be appropriate to hold that the TNEB is liable to pay the interest @ 9% per annum as ordered by the Central Commission from the date of filing of the Petition No.163 of 2008 and not from any date prior to that. Accordingly ordered.

66. **Summary of Our Findings**

(a) **As correctly pointed out by the Central Commission, the conduct of the NLC by giving consent for allowing rebate if the payment is within three days without raising any further question would show that there was a mutual arrangement between the parties. Similarly, the moment, the NLC raised the question by filing a Petition for refund of the excess rebate, as correctly pointed out by the Central Commission, the same benefit which has been given earlier to the TNEB cannot be allowed to be continued. It is true that there are two views or two interpretations possible. But when one interpretation which is in favour of the party on the basis of the letter sent by the NLC which has not been disputed, cannot be rejected outright as a wrong interpretation. Therefore, without going into the various nitty gritty details which have been**

furnished by both the parties on the basis of which both the parties have argued on several dates before this Tribunal it is enough to hold that interpretation given by the Central Commission in the impugned order is one of the possible interpretations. As this is a legal and valid interpretation we do not incline to interfere with the impugned order. In fact, the Central Commission has achieved balance of interest of both the parties.

(b) **Although the NLC never claimed for interest either through the correspondence or in the prayer in that Petition, we feel that interest of justice would be met by holding that it would be appropriate to direct that the TNEB is liable to pay the interest as ordered by the Central Commission only from the date of filing of the Petition No.163 of 2008 and not from any date prior to that. Accordingly ordered.**

(c) **Except this modification with reference to the interest, we are not inclined to interfere in the findings rendered by the Central Commission as in our view, the interpretation and conclusions made by the Central Commission are perfectly valid and justified.**

67. With these observations, both the Appeals are disposed of.

68. However, there is no order as to costs.

(V.J Talwar) ***(Justice M. Karpaga Vinayagam)***
Technical Member **Chairperson**

Dated:2nd Dce, 2013
√REPORTABLE/~~NON-~~