

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

**(APPELLATE JURISDICTION)**

**APPEAL NO. 202 OF 2016 &  
IA No. 163 OF 2018**

**Dated: 18<sup>th</sup> January, 2019**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**In the matter of:-**

**Sasan Power Limited**

C/o. Reliance Power Ltd.  
3<sup>rd</sup> Floor, Reliance Energy Centre,  
Santa Cruise East,  
Mumbai 400055

...Appellant

Versus

1. **Central Electricity Regulatory Commission**  
3rd & 4th Floor, Chanderlok Building,  
36, Janpath,  
New Delhi- 110001
2. **The Managing Director**  
MP Power Management Company Limited  
Shakti Bhawan, Jabalpur – 482008,  
Madhya Pradesh.
3. **The Managing Director**  
Pashchimanchal Vidyut Vitran Nigam Limited,  
Victoria Park, Meerut-250 001, Uttar Pradesh
4. **The Managing Director**  
Purvanchal Vidyut Vitran Nigam Limited

Hydel Colony, Varanasi – 221004, Uttar Pradesh.

5. **The Managing Director**  
Madhyanchal Vidyut Vitran Nigam Limited  
4A-Gokhale Marg, Lucknow – 226001,  
Uttar Pradesh.
6. **The Managing Director**  
Dakshinanchal Vidyut Vitran Nigam Limited  
220 kV Vidyut Sub-Station,  
Mathura Agra By-pass Road,  
Sikandra, Agra-282007,  
Uttar Pradesh.
7. **The Chairman and Managing Director**  
Ajmer Vidyut Vitran Nigam Limited  
Hathi Bhata, City Power House,  
Ajmer-305001  
Rajasthan.
8. **The Chairman and Managing Director**  
Jaipur Vidyut Vitran Nigam Limited  
Vidyut Bhawan, Jaipur – 302005,  
Rajasthan.
9. **The Chairman and Managing Director**  
Jodhpur Vidyut Vitran Nigam Limited,  
New Power House, Industrial Area,  
Jodhpur-342003, Rajasthan.

Also at:

**Chief Engineer (Power Trading)**

Shed No. 5, Room No. 6, Vidyut Bhavan,  
Vidyut Marg, Lal Kothi, Jaipur- 302005  
(For Procurers above at S. No. 11 to 13)

10. **The Managing Director**  
Tata Power Delhi Distribution Limited  
Grid Substation Building, Hudson Lines,  
New Delhi- 110 009
11. **Chief Executive Officer**

BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place, New Delhi- 110 019

12. **Chief Executive Officer**

BSES Yamuna Power Limited,  
BSES Bhawan, Nehru Place, New Delhi- 110 019

13. **The Secretary**

Punjab State Electricity Board,  
The Mall, Patiala- 147 001, Punjab

Also at:

**The Chief Engineer (PP&R)**

Punjab State Power Corporation Ltd.  
Shed C-3, Shakti Vihar, Patiala-147 001, Punjab

14. **The Chief Engineer/PPM**

Haryana Power Generation Corporation Limited,  
Shakti Bhawan, Panchkula- 134109, Haryana

Also at:

**The Chief Engineer**

Haryana Power Purchase Centre (HPPC)  
Sector -6, Shakti Bhawan, Panchkula-134109  
Haryana

15. **The Chairman and Managing Director**

Uttarakhand Power Corporation Limited  
Urja Bhawan, Kanwali Road,  
Dehradun-248001, Uttarakhand.

... Respondent

**Counsel for the Appellant(s)** : Mr.Sajan Poovayya, Sr. Adv.  
Mr. Vishrov Mukherjee  
Mr. Janmali  
Ms. Priyanka M.P.  
Ms. Catherine Kayllore

**Counsel for the Respondent(s):** Mr. K. S. Dhingra for **R-1**

Mr. G. Umapathy  
Mr. Aditya Singh for **R-2**

Mr. Rajiv Srivastava  
Ms. Gargi Srivastava  
Ms. Garima Srivastava  
Ms. Harshita Sinha for **R-3 to 6**

Mr. M. G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardhan  
Mr. Shubham Arya for **R-7 to 9 & R-14**

Ms. Ranjana Roy Gawai  
Ms. Vasudha Sen  
Mr. Saurabh Mishra  
Ms. Aayushi Singh  
Mr. Vivek Kumar for **R-10**

Mr. Abhijeet Rastogi  
Mr. Rahul Dhawan  
Mr. Mohit Aggarwal for **R-11 & 12**

Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Parichita Chowdhary  
Ms. Neha Garg  
Mr. Ashwin Ramanathan for **R-13**

## **J U D G M E N T**

**(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

1. The undisputed facts that led to filing of the present appeal are as under:

Petition No. 14/MP/2013 came to be filed by the Appellant – Sasan Power Limited seeking compensation on account of unforeseen, uncontrollable and unprecedented depreciation of Indian Rupee (“**INR**”) as against United States Dollar (“**USD**”), which has severely affected the power project of the Appellant. On 21.02.2014, the said Petition came to be disposed of wherein the 1<sup>st</sup> Respondent – Central Electricity Regulatory Commission (“**CERC/Commission**”) passed the following order.

“(a) Rejected the claim of the Appellant that the unprecedented, unforeseen and uncontrollable steep depreciation of the Indian Rupees vis-a-vis the US Dollar would constitute a force majeure event

(b) There may be a case for intervention by the CERC in exercise of its powers under Section 79 (1) (b) of Electricity Act, 2003 (Act 2003)

(c) CERC called for further particulars from the Appellant and fixed a further hearing.”

2. It's not in dispute that the Appellant did not challenge the above said order of the Commission, but on the other hand, Haryana Power Purchase Centre and Ajmer Vidyut Vitran Nigam Limited filed appeals being Appeal Nos. 99 of 2014 and 104 of 2014 respectively before this Tribunal challenging the reliefs granted by the Commission at points (b) and (c) mentioned above. By Order\_dated 07.04.2016 passed in the aforesaid appeals the Full Bench of this Tribunal opined that CERC has

no regulatory power under Section 79(1)(b) of the Electricity Act 2003 (“**the Act**”) to grant compensatory tariff and thereby the Order dated 21.02.2014 passed by the Commission came to be set aside since the appeals filed by the distribution companies came to be allowed.

3. The Commission by impugned Order dated 26.04.2016 disposed of the petition filed before it by following the opinion of the Full Bench of this Tribunal, therefore the prayer for compensation against the unforeseen depreciation of INR came to be rejected. Challenging the said Order dated 26.04.2016 the present appeal came to be filed.

4. It's not in dispute that opinion of the Commission that the claim of the Appellant pertaining to depreciation of INR is not a force majeure event never came to be challenged by the Appellant. The application being IA No. 163 of 2018 came to be filed by the Appellant before this Tribunal on 02.02.2018 seeking remand of the matter by placing reliance on the Judgment of the Hon'ble Apex Court in ***Energy Watch Dog vs Central Electricity Regulatory Commission and Ors***<sup>1</sup> dated 11.04.2017 on the ground that the Commission while disposing of the petition of the Appellant on 26.04.2016 did not give an opportunity of being heard to the Appellant, and therefore, the Appellant seeks remand

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<sup>1</sup> 2017 (4) SCALE 580

of the matter to the Commission for fresh consideration of the claim of the Appellant.

5. As against this, the Respondents' contention is that finding of the Commission pertaining to points at (b) & (c) in the Order dated 21.02.2014 was not challenged by this Appellant though the answering Respondent in the present appeal supported the submissions of two distribution companies in Appeal Nos. 99 of 2014 and 104 of 2014 before this Tribunal. Therefore, the finding with regard to the issue of force majeure has attained finality in the absence of any challenge by the Appellant herein. The impugned Order dated 26.04.2016 passed by the CERC is nothing but an order following the opinion of the Full Bench of this Tribunal dated 07.04.2016 opining that the Commission has no regulatory power under Section 79(1)(b) of the said Act to grant compensatory tariff. Therefore, the Respondents contend that the remand of the matter to the Commission would be nothing but an empty formality since the Commission has already applied its mind while disposing of the matter on 26.04.2016.

6. They also contend that the contention of the Appellant in the application seeking remand of the matter based on the Judgment of the Apex Court in Energy Watch Dog's case is also misplaced. In Energy

Watch Dog's case, the Hon'ble Apex Court opined that the Commission is authorised and permitted under the law to exercise its regulatory power in the absence of guidelines/competitive bidding guidelines or PPA on the subject matter, therefore, the prayer of the Appellant for remand of the matter seeking exercise of regulatory powers of Commission to adjudicate the claims is untenable. They further contend that guidelines cover the filed in the present matter, therefore remand of the matter would not serve any purpose.

7. The Appellant, so far as merits of the matter, contends that rate of foreign exchange variation from the date of submission of bid to the date of filing the petition translates to a depreciation of approximately 37% of INA vis-a-vis USD and therefore needs to be compensated.

8. According to the Appellant, the judgment delivered by the Full Bench of this Tribunal came to be challenged by way of CA Nos. 9643-9644 of 2016 titled as "Sasan power Limited vs. CERC & Ors.". Similar appeals came to be filed being CA Nos. 5399-5400 of 2016, CA No. 5347 of 2016, CA No. 5348 of 2016, CA No. 5364 of 2016, CA No. 5346 of 2016, CA Nos. 5351-5352 of 2016, CA No. 5415 of 2016, CA Nos. 9635-9642 of 2016 and CA No. 9035 of 2016 by other generating companies.



9. On 11.04.2017, the Hon'ble Supreme Court by its order in Energy Watch Dog's case admittedly set aside the Full Bench Judgment of this Tribunal. It also opined that the CERC has regulatory power, which may be exercised in situations where the relevant issue in question is not dealt with by either of Competitive Bidding Guidelines (CBG) or PPA. Civil Appeals filed by the Appellant, referred to above, came to be disposed of on 20.04.2017. Though the Appellant in the memorandum of appeal and also at the initial stage of arguments contended that event of steep depreciation of INR vis-a-vis the USD is an event of force majeure as well as a situation where exercise of regulatory powers under Section 79(1)(b) of the Act could be invoked but in the rejoinder arguments fairly conceded that since the Appellant did not challenge the opinion/decision of the Commission rejecting the claim of the Appellant pertaining to compensation on account of steep depreciation of Indian Rupee, will not re-agitate the same in the absence of filing any appeal. So far as exercise of regulatory powers, the Appellant seriously contend that the absence of giving an opportunity of being heard to the Appellant before the Commission subsequent to the Judgment of the Full Bench amounts to violation of principles of natural justice. It is further contended that in the absence of an opportunity of hearing to the Appellant before the Commission regarding exercise of regulatory

powers, it's an order without hearing the Appellant though the Appellant deserved a fair hearing. Therefore they contend that under these situations, the fairness and ends of justice require remand of the matter for fresh consideration.

10. With these pleadings and submissions at our command, we now proceed to consider the merits of the case.

11. It's not in dispute that the Appellant in the petition filed before the Commission for compensation did claim compensation pertaining to steep depreciation of INR vis-a-vis USD on the ground of force majeure. Commission while rejecting the said claim of the petitioner (Appellant herein), did reserve the matter and called upon the Appellant herein to furnish the relevant documents and papers by opining that compensation pertaining to steep depreciation of INR vis-a-vis USD may be considered by exercising regulatory powers. The Appellant contends that it did not challenge the said order rejecting force majeure event since it believed and did hope that regulatory power would be exercised to consider the said claim, therefore, it did not file any appeal.

12. It is not in dispute that prior to Energy Watch Dog's case and subsequent to Full Bench Judgment of this Tribunal, the Commission

without hearing the Appellant dismissed the petition since the Full Bench Judgment of this Tribunal rejected the exercise of regulatory power to compensate or exercise of regulatory power under Section 79(1)(b) of the Act. Para 20 of the Energy Watch Dog Judgment of the Apex Court relates to the discussion and opinion with regard to exercise of regulatory power by the Commission, which reads as under:

*“20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government’s guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission’s power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in*

*accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."*

13. Apparently, though the Civil Appeals came to be filed by the Appellant came to be dismissed at the first instance, later on in the Review by Order dated 20.04.2017, the Appeals were disposed of in terms of the Judgment in Energy Watch Dog's case. In Energy Watch Dog's case, the Hon'ble Supreme Court did opine that CERC can exercise regulatory power in certain situations. Whether such a situation is available or not was never considered by the Commission, since the Commission disposed of the matter much prior to the Judgment of the Apex Court in Energy Watch Dog's case. Based on the opinion of the Full Bench Judgment of this Tribunal, it simply rejected the claim of the petitioner. Without considering the case under Section 79(1)(b) of the Act, it dismissed the petition. Over and above that Commission did not afford any opportunity to the Appellant to put forth its case so far as exercise of regulatory powers under Section 79(1)(b) of the Act is concerned.

14. Since the Appellant is not pursuing the claim based on force majeure event, we need not ponder over the contentions raised in the appeal and arguments advanced in that regard by all the parties.

15. So far as fair opportunity of hearing being given or not is concerned, admittedly, the Appellant was not asked to address arguments on the pending petition, though the Commission itself opined in the initial order that claim of the Appellant for exercising powers under Section 79(1)(b) may be available. Since the opinion of the Full Bench of this Tribunal so far as exercise of regulatory powers came to be reversed by the Apex Court in Energy Watch Dog's case, it is incumbent upon the Commission to decide the said issue in the light of the Judgment of the Energy Watch Dog's case by affording an opportunity of being heard. No prejudice whatsoever is caused to the Respondents, since they will also be heard before the Commission.

16. In that view of the matter, we are of the opinion that the instant appeal and IA No. 163 of 2018 deserve to be allowed. The Commission is directed to hear the Appellant's claim of compensation only on the ground of exercise of regulatory powers under Section 79(1)(b) of the Act and not the ground of force majeure event.

17. Accordingly, the appeal is allowed to the extent indicated above. Parties to bear their own costs.

18. Pronounced in the open court on this the 18<sup>th</sup> day of January 2019.

**S.D. Dubey**  
**[Technical Member]**

**Justice Manjula Chellur**  
**[Chairperson]**

Dated: 18<sup>th</sup> January, 2019

**REPORTABLE/~~NON-REPORTABLE~~**