

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 157 of 2012

Dated: 04th Jan, 2013

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

In the matter of

Delhi Jal Board
Varunalaya, Jhandewalan
New Delhi – 110005

... Appellant

Versus

1. Delhi Electricity Regulatory Commission
Viniyamak Bhawan
C Block, Shivalik
New Delhi – 110 017
2. North Delhi Power Ltd.
Sub Station Building
Hudson Lines, Kingsway Camp
Delhi – 110 009
3. BSES Yamuna Power Ltd
Shakti Kiran Building
Karkardooma
Delhi – 110031

4. BSES Rajadhani Power Ltd
BSES Bhawan, Nehru Place
New Delhi – 110019

...Respondent(s)

Counsel for the Appellant : Mr. Suresh Tripathy

Counsel for the Respondent(s): Mr. Amit Kapur
Mr. Arun Kumar Beriwal
Mr. Kaabir Hussain Khan
Mr. K.H. Khan
Ms. Suganda Somani

JUDGMENT

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

1. Delhi Jal Board is the Appellant herein.
2. According to the Appellant, the State Commission(R1) passed the Tariff Order on 26.8.2011.
3. Aggrieved by the Tariff order dated 26.8.2011, passed by the State Commission in the applications filed by the distribution licensees rejecting the claim of the Appellant that the Appellant be put with the parity of Delhi Metro Tariff, the

Appellant presented the Appeal in 194 to 196 of 2001 before this Tribunal earlier.

4. In these Appeals the main issue raised in these Appeals was with reference to the Appellant's claim to put the Appellant with the parity of the Delhi Metro Railway Corporation. However, the Appellant also raised another issue in these Appeals that the State Commission ought to have put the Appellant at least with the parity of industrial tariff as the Appellant is engaged in public utility services.

5. These Appeals No..194 to 196 /2011 were taken up for final disposal and both the parties were heard. This Tribunal ultimately disposed of these Appeals by the judgment dated 10.4.2012 rejecting the prayer of the Appellant claiming the parity with Delhi Metro Railway Corporation. However, this Tribunal remanded to the State Commission to consider the alternative claim made by the Appellant regarding the parity of the Appellant's tariff with the industrial tariff.

6. In pursuance of the said remand order, the Appellant approached the State Commission and prayed for considering the issue. Accordingly, the State Commission after hearing the Appellant and other parties considered the issue of parity of the Appellant tariff with industrial tariff and consequently revised the tariff of the Appellant as fixed earlier and put the Appellant's tariff at parity with industrial tariff through the impugned order dated 6.7.2012. The State Commission in that order directed that the revised tariff would take effect from 1.7.2012.

7. Aggrieved over the direction to the effect that this is effective from 1.7.2012 i.e. giving prospective effect, the Appellant has filed this present Appeal.

8. In this Appeal the question raised for consideration is this "whether tariff revised for the Appellant by the State Commission pursuant to the directions of this Tribunal has

to be given effect to from FY 2011-12 retrospectively or from 1.7.2012 prospectively.

9. On this question, the learned counsel for both the parties have argued at length.

10. Before dealing with this question, it would be proper to recall some factual aspects which would show the background of the case as well as the conduct of the parties.

11. Originally the tariff order had been passed by the Delhi State Commission on 26.8.2011 in the applications filed by the Distribution Licensees. As against this order, the Appellant had filed before this Tribunal in Appeal nos. 194 to 196 of 2011 on 24.10.2011. After hearing the parties, this Tribunal by the judgment dated 10.4.2012 rejected the claim of the Appellant that tariff must be put in parity with Delhi Metro Railway Corporation and thereby confirmed the finding of the State Commission on this issue. However, this

Tribunal remanded the matter for consideration with regard to the issue raised by the Appellant relating to its alternative claim that the Appellant at least be put in parity with the industrial tariff.

12. In pursuance of the said direction given in the judgment dated 10.4.2012, the Appellant on 24.4.2012 filed an application before the State Commission for implementation of the said direction seeking for consideration of its tariff at par with the industrial tariff. Strangely, at or about the same time the Appellant had filed civil Appeal No. 4109-4111 of 2012 before the Hon'ble Supreme Court challenging the very same judgment of this Tribunal dated 10.4.2012 rejecting the claim of the Appellant for parity of tariff with Delhi Metro Railway Corporation.

13. As pointed out by the Respondents, in the application filed before the State Commission seeking for the

consideration of the relief with reference to parity with the industrial tariff, the Appellant had not chosen to mention that in respect of the main relief he had approached the Hon'ble Supreme Court by filing the Civil Appeal as against the judgment of the Tribunal dated 10.4.2012. Similarly, in the Appeal before the Hon'ble Supreme Court, the Appellant did not care to mention about the filing of the application before the State Commission for the implementation of the remand order passed in the very same judgment dated 10.4.2012 by the Tribunal.

14. As a matter of fact, though this application was filed on 24.4.2012 before the State Commission it was heard by the State Commission only on 19.6.2012.

15. In the meantime the Civil Appeal filed before the Hon'ble Supreme Court was taken up for hearing and the

same was dismissed in *limine* by the order dated 5.7.2012. It is pointed out that even on the date of hearing on 19.6.2012 before the State Commission, the Appellant did not inform State Commission about the fact that it had filed Appeal before the Hon'ble Supreme Court as against this Tribunal's judgment and the same was pending in the Supreme Court during that period.

16. Ultimately the State Commission after hearing the parties passed the impugned order dated 6.7.2012 granting the relief as sought for by the Appellant by revising the tariff at par with the industrial tariff effective from 1.7.2012.

17. Thereafter, on being aggrieved over the order which takes effect prospectively, the Appellant, instead of filing the Appeal as against the said order had filed application in DFR no. 1273 of 2012 before this Tribunal seeking for clarification and praying for the direction to the State

Commission to give effect to this order dated 6.7.2012 retrospectively i.e. for the FY 2011-12 instead of with effect from 1.7.2012 prospectively as ordered by the State Commission.

18. This Tribunal by the order dated 3.8.2012 dismissed the said clarificatory application as not maintainable but granted the Appellant liberty to file an Appeal challenging the impugned order dated 6.7.2012 passed by the State Commission

19. Only thereafter on 9.8.2012, the present Appeal has been filed by the Appellant challenging the impugned order dated 6.7.2012 and seeking for the direction to the Delhi State Commission to give effect to this order dated 6.7.2012 for the FY 2011-12 instead of with effect from 1.7.2012.

20. The above chronological events would show the following aspects:-

A. The Appellant has simultaneously sought to pursue two mutually exclusive/contradictory remedies by approaching two Forums. On 24.4.2012, the Appellant on one hand filed a Civil Appeal before the Hon'ble Supreme Court challenging the Tribunal judgment dated 10.4.2012. At or about the same time, the Appellant filed a Petition before the State Commission seeking implementation of the same judgment dated 10.4.2012 of this Tribunal for consideration of tariff at par with the industrial tariff.

B. As indicated above, while filing Civil Appeal before Supreme Court as against this Tribunal judgment dated 10.4.2012 the Appellant has not mentioned that they approached the State Commission for implementation

of the judgment. Similarly, when the Appellant has sought implementation of this Tribunal judgment dated 10.4.2012 before the State Commission, the fact of having approached Supreme Court challenging the judgment of the Tribunal has not been disclosed.

21. Thus, the Appellant's conduct in pursuing simultaneously multiple and contradictory proceedings by approaching two different forums seeking the relief which are also contradictory would show that the Appellant has indulged in Forum shopping. Even in the present Appeal, before this Tribunal filed on 9.8.2012, the Appellant has not mentioned with reference to the fact that already he has challenged judgment dated 10.4.2012 of filing Civil Appeal in the Supreme Court on 24.4.2012 and the same was dismissed on 5.7.2012.

22. As a matter of fact, this Appeal in 157 of 2012 was admitted on 30.8.2012. Earlier, the Appellant filed clarification Petition and the same had been dismissed on 3.8.2012 by this Tribunal. In that Petition also the Appellant had not mentioned that he already filed the Appeal against the judgment in the Supreme Court and the same was dismissed on 5.7.2012.

23. It is to be pointed out that when this Tribunal rendered the judgment on 10.4.2012 in the earlier Appeal partly allowing these Appeals, the Appellant has to opt for one among the two options either by challenging the same in Civil Appeal before Supreme Court to claim parity with Delhi Metro Railway Corporation tariff or by approaching Delhi Commission for implementation of the remand order claiming parity with industrial tariff. But, the Appellant approached both the Forums that is Hon'ble Supreme Court as well as the Delhi Commission seeking for different and

conflicting reliefs. Thus, the course of action adopted by the Appellant by approaching different forums seeking for conflicting reliefs is quite unfair and contrary to the settled law that a person cannot approbate or reprobate at the same time.

24. The learned counsel for the Respondent cited three judgments “(a) *R.N. Gosain v. Yashpal Dhir* [(1992) 4 SCC 683 at Para 10], (b) *Shyam Telelink v. Union of India* [(2010) 10 SCC 165 at Paras 23-27] and (c) *Karam Kaptri v. Lal Chand* [(2010) 4 SCC 753 at Paras 50-56]” in which it is held the person cannot be allowed to approbate and reprobate at the same time.

25. In view of the above conduct of the Appellant, we have no hesitation to hold that the Appellant has not come with the clean hands before this Tribunal to seek for the relief.

26. In addition to this, we are to state that the Appellant has not only taken the contradictory stand by approaching two different Forums for seeking contrary reliefs but also suppressed the facts of having approached different Forums thereby the Appellant indulged in Forum shopping as well as in multiplicity of proceedings. Under those circumstances we are of the view that the Appellant is not entitled to the relief sought for in this Appeal as it has not come with the clean hands.

27. Even on merits, we feel that there is no valid ground made out in this Appeal warranting interference in the impugned order. The remand order passed by this Tribunal in the judgment dated 10.4.2012 was limited in nature which directed the State Commission to consider the issue of parity of Appellant's tariff with the tariff of the industrial category. We have not given any direction to the State Commission to

revise the tariff of the Appellant retrospectively from FY 2011-12. As correctly pointed out by the learned counsel for the Respondents that the Appellant's tariff could not be revised retrospectively. It is a settled position of law that the tariff cannot be revised retrospectively and the judgment in tariff revision should be carried out prospectively. Further, the State Commission in the earlier tariff order dated 26.8.2011, has not decided this issue at all. Therefore, we have simply remanded the matter for considering the issue without setting aside any part of the finding contained in the said order dated 26.8.2011. Hence the question of reconsideration or retrospectivity does not arise.

28. Summary of findings

The Appellant has not come with clean hands. The Appellant not only approached different forums seeking for contradictory relief but also suppressed the relevant facts before these forums. The State Commission in the

tariff order passed earlier did not deal with this issue at all. Hence we simply remanded the matter for considering the said issue without setting aside the tariff order. In fact, we have not given any direction earlier to the State Commission to revise the tariff retrospectively. Therefore the question of reconsideration of the issue or retrospectivity does not arise.

29. In view of our above findings, we do not find any reason to interfere with the order impugned. Therefore, the Appeal is dismissed.

30. Even though we feel that this is a fit case for imposing exemplary cost in view of the conduct of the Appellant, we refrain from doing so with the hope that the Appellant being a Public Sector would not commit similar mistake in the future.

**30. Pronounced in the open court on this
04th day of January, 2013.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 04th Jan.2013

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REPORTABLE/NON-REPORTABLE

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