

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

**(APPELLATE JURISDICTION)**

**APPEAL NO.98 OF 2018 &  
IA NO. 178 OF 2018**

**Dated: 24.02.2022**

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**In the matter of:**

**1. PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD.**

*[Through Its Managing Director]*

Victoria Park, Meerut  
Uttar Pradesh – 250 001

**2. EXECUTIVE ENGINEER**

Electricity Distribution Division  
Paschimanchal Vidyut Vitran Nigam  
Bijnor – 246 701

.... Appellants

**VERSUS**

**1. M/S PARMARTH IRON PVT. LTD**

10<sup>th</sup> KM Stone,  
Nagina Road,  
Bijnor – 246 701

**2. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION**

2<sup>nd</sup> Floor, Kisan Mandi Bhawan  
Gomti Nagar, Vibhuti Khand  
Lucknow – 226 010

... Respondents

Counsel for the Appellant (s) : Mr. Pradeep Misra

Counsel for the Respondent (s) : Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood for R-1  
Mr. C.K. Rai  
Mr. Sumit Panwan for R-2

## **J U D G M E N T**(*Oral*)

### **PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appeal is filed by the distribution licensee operating in the State of Uttar Pradesh. It is aggrieved by the Order dated 23.08.2017 passed by the Uttar Pradesh Electricity Regulatory Commission (“UPERC” or “State Commission”, for short) in Petition no. 488 of 2007 holding that the case of theft of electricity against the first respondent was not made out. The petition before the UPERC was registered on the basis of complaint of the first respondent invoking the jurisdiction of the State Commission under Section 128 of the Electricity Act, 2003 alleging non-compliance with the provisions of UP Electricity Supply Code, 2005 in the matter of assessment in the wake of allegations of theft of electricity, and breach of the rules and regulations framed in that regard by the Commission seeking investigation into affairs of the distribution licensee.

3. The first respondent (complainant before the State Commission) is concededly a consumer of the appellant. It had been accused of having indulged in certain acts of commission or omission vis-à-vis the metering of the electricity supply, as allegedly found during inspection carried out on 22.06.2007, the facts statedly revealed there from forming the subject

matter of criminal case registered under Section 135 of Electricity Act, 2003 in the shape of First Investigation Report (“FIR”) registered on 22.06.2007 by the Police Station KotwaliSadar, Bijnor, Uttar Pradesh. It may be mentioned here itself that upon completion of investigation into the said FIR, criminal complaint was presented before the Special Court, Bijnor, the proceedings wherein eventually resulted in a judgment of acquittal having been passed on 20.07.2013. It is also an admitted fact that an appeal against the said judgment of acquittal was subsequently filed before the High Court of Judicature at Allahabad which Appeal (no. 315 of 2013) is still pending.

4. After the registration of the criminal case, the appellant, as distribution licensee, in exercise of its power and jurisdiction, *inter alia*, under the Supply Code, had made a provisional assessment of the amount payable by the first respondent on account of acts of commission or omission, as stated above, in sum of Rs.2,65,26,391/-, such assessment Order being dated 22.06.2007. The matter reached the High Court in its writ jurisdiction, more than once. In terms of Orders dated 03.10.2007, 30.01.2008 & 07.02.2008, read together, the first respondent herein deposited a total sum of Rs. four crores with the appellant against the said provisional assessment. Concededly, the provisional assessment thus made was envisaged to be eventually adjusted against the civil liability that the Special Court would determine in terms of Section 154(5) of Electricity

Act, 2003 in due course. But since the Special Court found no case of theft proved, the said stage of determining liability under Section 154(5) was never reached, action in such nature being now subject to the decision of the High Court in the pending criminal appeal mentioned earlier.

**5.** Against the above backdrop, the complaint under Section 128 of Electricity Act, 2003 was considered by the State Commission, it having initially declined to take any action there under by its Order dated 18.01.2008. The first respondent had thereafter moved an application seeking recall of the said order. The writ proceedings were heard during the pendency of the prayer for recall of the said earlier order. In that light, the High Court gave the interim directions for deposits to be made, the order to such effect was challenged at one stage by Special Leave Petition no. 4471 of 2008 before the Hon'ble Supreme Court which, however, came to be withdrawn and dismissed accordingly. There is no contest to the fact that in terms of the directions of the writ court by various orders, particularly the Order dated 07.02.2008, the Commission was duty bound to examine the application for recall of its order dismissing the petition under Section 128 of Electricity Act, 2003.

**6.** Acting on the said petition, the State Commission by its Order dated 06.01.2015, appointed an investigating authority under Section 128 of Electricity Act tasking it to investigate into the allegations made by the first

respondent and submit its report within the period specified. The time given to the investigating authority was extended later. Eventually, its report was received and considered, the first respondent also having joined the proceedings at all such stages. It is seen from the chronology of the event set out in the appeal that the Commission while considering the report of the investigating authority for the purposes of Section 128 of Electricity Act, also required the presence of Chief Engineer - Transmission (West), for production of certain relevant documents. It is on that basis that the Commission accepted the findings of the investigating authority and passed the impugned order eventually to hold that no case of theft was made out against the appellant.

7. The grievances of the appellant against the impugned order essentially are that the investigation under section 128 could not have been ordered without recall of the earlier order declining any action and that the case of an individual consumer could not have been acted upon by the Commission, its jurisdiction under Section 86(1)(f) of Electricity Act, 2003 being limited to adjudication of disputes between licensees and generating companies. Reliance is placed on *Maharashtra Electricity Regulatory Commission v Reliance Industries Limited* (2007) 8 SCC 381.

8. We have considered the above objections of the appellant but find no substance therein. The order constituting investigating authority itself

amounted to recall of the earlier order. Such order was not challenged by the appellant. It is too late in the day to go by the technicality that there was no express order recalling the previous order of the Commission declining action. Even otherwise, the provision contained in section 128 confers power on the Commission to undertake such an investigation *suo motu*. The order which is impugned by this appeal is based on consideration of report of investigation which was ordered within its jurisdiction by UPERC. In our considered view, the investigation ordered by the Commission, *albeit* on the complaint of the first respondent, was meant, designed and intended for general investigation into the affairs of the distribution licensee and, thus, within the four corners of its powers under Section 128 of Electricity Act. Though in the final order, the Commission seems to have restricted its scrutiny to the case of theft against the first respondent, the validity of the order of appointment of the investigating authority on basis of input of the first respondent in the first place cannot be questioned.

9. We are conscious that the result of the criminal case before the Special Court is now subject matter of appeal pending before the High Court. In these circumstances, the Commission should have been slow - rather refrained from making such conclusive observations on the question as to whether the case of theft against the first respondent was or was not made out in the facts and circumstances that had been presented. We

may add here that the report of the investigating authority appointed by the State Commission in exercise of its power under Section 128 of Electricity Act was a material or evidence that may not have been presented before the Special Court in the criminal trial. The result of the criminal trial would depend largely upon the evidence that was adduced by the prosecution in the said criminal case. Any observations in such regard while appeal is pending would be an overreach.

**10.** In above facts and circumstances, all that we wish to say in this appeal is that the observations of the State Commission in the impugned Order dated 23.08.2017 that no case of theft made out against the first respondent is merely an opinion of the Commission, such conclusion not being in the nature of a clinching decision on the case which is subject matter of the appeal pending before the High Court.

**11.** We do not find any case made out for any further observations or directions in the present appeal. The appeal and the pending applications are disposed of accordingly.

**(Sandesh Kumar Sharma)**  
Technical Member  
*vt/tp*

**(Justice R.K. Gauba)**  
Officiating Chairperson