

(2008) 08 SC CK 0110

In the Supreme Court Of India

Case No : Civil Appeal No's. 5722 of 2006 and 185 of 2007 and Civil Appeal No. 399 of 2007 (Arising out of SLP (C) No. 11629 of 2007)

Grid Corporation of Orissa Ltd.

APPELLANT

Vs

Gajendra Haldea and Others

RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:

Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 — Regulation 2
Central Electricity Rules, 2005 — Rule 9
Electricity Act, 2003 — Section 111, 111(1), 121, 127, 142

Citation : AIR 2009 SC 304 : (2008) ELR 511 : (2008) 4 JCR 10 : (2008) 9 JT 184 : (2008) 11 SCALE 313 : (2008) 13 SCC 414 : (2008) 2 UJ 1095

Hon'ble Judges : P. Sathasivam, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Party in Person N.P. Vikas Singh, A.S.G., Aruneshwar Gupta, A.A.G., Dushyant Dave, Arun Jaitley, A.M. Singhvi, K.K. Venugopal, Shyam Diwan, Shanti Bhushan, S. Ganesh, Jaideep Gupta, Suman Kukerty, Raj Kumar Mehta, Mriganka, Amit Kapur, Mansoor Ali, Aribam Guneshwar Sharma, K.K. Lahiri, Ejaj Maqbool, Abhijieet Sinha, Keshav Mohan, Prateek Dhar, C.K. Rai, D. Julius Riamei Sridhar Potaraju, Sitesh Mukherjee, Vishal Anand, Jagjit Singh Chhabra, Ajay Saroya, Sapan Kumar Mishra, Swati Sinha, Fox Mandal and Co., M.G. Ramachandran, Sanjeev Kumar, Avinash Menon, Kumar Mihir, for Khaitan and Co., Aproova Misra, Pradeep Misra, Daleep Kr. Dhayani, D.J. Kakalia, Syed Naqvi, Smieeta Inna and Rajesh Kumar, Paras Kuhad, Biju Mattam, Richa Srivastava, S. K. Puri, V.M. Chauhan, Priya Puri, H.K. Puri, Arun Pendenkar, S.S. Shinde, Hemantika Wahi, Pinky, Sangeeta Singh, Neeraj Kumar Jain, Bharat Singh, Sanjay Singh, Sandeep Chaturvedi, Ugra Shankar Prasad, P. Narasimhan, P. Pradeep Dahiya, S. K. Sabharwal and V.N. Raghupathy, for the Appellant;

Final Decision : Allowed

Judgement

Arijit Pasayat, J.—These appeals involve an important question regarding jurisdiction of the Appellate Tribunal for Electricity (in short 'Appellate Tribunal'), New Delhi. The first judgment of the Appellate Tribunal is assailed in the case of

appellant-Grid Corporation of Orissa Ltd.

2. Background facts in a nutshell are as follows:

Respondent No. 1-Gajendra Haldea a serving officer based in Delhi filed a petition before the Central Electricity Regulatory Commission (in short the 'CERC') purportedly u/s 52 read with Section 79(1)(g) of the Electricity Act, 2003 (in short the 'Act') on 28.2.2006. The prayers inter- alia were under:

(a) Direct GRIDCO to adhere to the maximum trading margin of 4 paise while entering into a contract for sale of power to any trading licensee in case such power is ultimately routed to a licensee outside the State of Orissa through an inter-state transmission system.

(b) Direct GRIDCO to file appropriate returns in the prescribed Form-III of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for grant of Trading License and other related matters) Regulations, 2004 in respect of each transaction of sale, where the electricity sold by it has been ultimately transferred to a license outside the State of Orissa using inter-state transmission system.

(c) Direct GRIDCO not to sell electricity in the course of inter state trade with a margin exceeding 4 paisa per unit and to modify any contract that allows it to retain a higher margin.

(d) Direct GRIDCO not to invite bids with the intent of selling electricity in the course of inter-state trade with a margin exceeding 4 paisa per unit.

(e) Exempt petitioner from the requirement of payment of the prescribed fee.

(f) Pass such other and further orders and/or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

As is evident from paras 9 and 11 of the petition, the same was purportedly in public interest and was intended to save interests of consumers of electricity in the country. The appellant-Grid Corporation of India filed objections inter-alia taking the stand that petition filed by respondent No. 1- Gejendra Haldea was misconceived and not maintainable in law and was liable to be rejected. By order dated 1.5.2006 CERC dismissed the petition and following findings were recorded:

In our considered view, GRIDCO though deemed to be an Electricity trader is an intra-state trader and is amenable to the jurisdiction of the Orissa Commission. Therefore, the Trading margin of 4 paise/KW specified by the Commission in its Notification dated 23.1.2006 published in the Official Gazette on 27.1.2006 does not apply to GRIDCO.

Challenging the order of CERC, respondent No. 1- Gajendra Haldea carried the matter before the Appellate Tribunal in appeal purportedly filed u/s 111 of the Act. By the impugned order, the Appellate Tribunal allowed the appeal and granted reliefs as prayed for by respondent No. 1.

3. The basic challenge in these appeals is that the petition filed by respondent No. 1-Gajendra Haldia was thoroughly mis- conceived because the appeal in terms of Sub-section (1) of Section 111 has to fulfill the following requirements.

111. Appeal to Appellate Tribunal.-(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except u/s 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under Sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under Sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under Sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

4. It was, therefore, submitted that respondent No. 1 was neither entitled to file a petition before the CERC u/s 52 read with Section 79(1)(g) of the Act nor is entitled to file an appeal before the Appellate Tribunal.

5. It is pointed out that the expression 'any person aggrieved' must be a person who suffered legal grievance or legal injury or one who has been unjustly deprived and denied of something which he would have entitled to obtain in usual course.

6. On merits it is submitted that the transaction between the appellant-Grid Corporation of Orissa Ltd. and PTC India Ltd. was intra-state within the meaning of Central Electricity Regulatory Commission (Procedure, Terms & conditions for Grant of Trading License and Other Related Matters) Regulations, 2004 (in short the 'Regulations'). It is submitted that even on cursory reading of the Regulations, it would be apparent that the appellant's sale to Power Trading Corporation of India Ltd. (in short 'PTC') cannot be construed as inter-state trading within the meaning of said expression.

7. Civil Appeal No. 185/2007 has been filed by PTC India Ltd and the challenge is to the order of the Appellate Tribunal dated 16.11.2006. Here again, the Appellate Tribunal held that the transaction of sale of surplus energy by GRIDCO to PTC was in the nature of inter-state trade attracting Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 (in short 'Trading Regulations'). PTC being an inter-state trader could not sell electricity purchased from GRIDCO in Orissa. Allowing electricity traders to sell electricity at unregulated price without fixing trading margins will have baneful effect on the development of the power sector. The aforesaid findings of the Appellate Tribunal are questioned in this appeal.

8. It is pointed out that PTC was not impleaded as the respondent or a party before CERC and/or PTC was never afforded an opportunity of placing its case in writing or even in hearing before the Appellate Tribunal. The Appellate Tribunal concluded its hearing on 28.8.2006. The subject matter of Petition No. 41 of 2005 and Appeal No. 81 of 2006 are unrelated. It was understood by PTC that it was not required to intervene in the Appeal No. 81 of 2006, particularly, since hearing of Petition No. 1 of 2005, which was subject matter of challenge in Civil Appeal No. 68 of 2007 was concluded on 26.3.2006 and the judgment was reserved. In said matters larger question of design of electricity market u/s 66 of the Act and role of regulators under Sections 60, 62, 79(1)(j) and 178 thereof were involved.

9. It is pointed out that in terms of the agreement dated 9.3.2006 which was for sale of electricity by GRIDCO to PTC, sale was completed within Orissa at the points of supply listed in Clause 2 of the General Terms and Conditions of the Agreement. The Appellate Tribunal concluded as follows:

(a) Title passed to PTC within Orissa.

(b) Risk passed to PTC within Orissa.

(c) Obligation to pay for electricity arose against PTC within Orissa.

(d) Control over the electricity so supplied and choice of whom to sell and at what price passed to PTC within Orissa.

10. It is pointed out that the finding recorded to the effect that the sale took place only after electricity was exported outside Orissa and sale took place only by consumption are contrary to the scheme of the Electricity Act. It is also submitted that the finding regarding protection of consumers' interest and the question qua exporting of unregulated rates at which the electricity is sold by a trader of electricity will promote competition and protect consumers and the finding that the appropriate Commissions must utilize the mechanism of fixing trading margins u/s 79(1)(j) and 86(1)(j) to protect consumers' interests is neither based on any pleadings nor arises for adjudication in Appeal No. 81 of 2006.

11. It is pointed out that the Appellate Tribunal itself understood that there is no power vested in any ERC to determine tariff for trading. It has noted as follows:

Section 66 requires development of market (price determination by forces of demand by supply); and

(b) Section 60 empowers the ERCs to adjudicate upon any instance of and issue directions considered appropriate to prevent an adverse effect on competition in electricity industry by-

(i) Entering into an agreement

(ii) Abusing its dominant position; or

(iii) Entering into a combination.

12. The appellant-GRIDCO has also submitted that the definition of inter-state trading in terms of Section 2(g) of the Regulations has not been kept in view. Reference is made to Clauses 2, 3, 4, 18 and 23 to contend that the Appellate Tribunal's conclusions are erroneous. It is also submitted that scope and ambit of Clause 26 has been mis-construed by the Appellate Tribunal.

13. Additionally, learned Counsel for GRIDCO has submitted that in reply to the petition filed GRIDCO had categorically submitted that respondent Gajendra had no locus standi to file the petition and the petition filed was not maintainable. CERC held that trading margins are not applicable to GRIDCO since it is carried out the functions of bulk supply of electricity within the State of Orissa under Bulk Supply Licence issued by the CERC and the transactions were completed in the State of Orissa. The entire benefit from the sale of such surplus power was passed on to the consumers of the State through the Bulk Supply Tariff Orders. CERC, it is pointed out, had dismissed the petition by respondent No. 1-Gajendra Haldea by holding that GRIDCO is an intra state trader. GRIDCO's transactions

under the said contract with PTC was completed within the State of Orissa. Accordingly, it was held that the Regulations were not applicable to GRIDCO. CERC in view of the above did not deal with the question of locus standi. Appellate Tribunal held that Gajendra Haldea had locus standi to file the petition. Though it did not disturb the findings of CERC that GRIDCO is an intra-state trader, it held that the transactions of sale of surplus power by GRIDCO to the inter-state traders are in the nature of inter-state trading. Accordingly, it held that the transactions of GRIDCO are governed by the Trading Regulations and directed CERC to find out a methodology for refund of the excess amount.

14. On behalf of respondent No. 1-Gajendra Haldea the order of Appellate Tribunal is supported.

15. It is unnecessary to go into the question as to the nature of the transaction, because respondent No. 1-Gajendra Haldea in order to prove that he had locus standi relied on Sections 121 and 142 of the Act. It was also stated that it is not in the nature of PIL. It was stated that the prayer for refund was not being pressed.

16. A bare reading of Sections 121 and 142 of the Act which read as follows shows that those provisions are not applicable.

121. Power of Appellate Tribunal- The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory function under this Act.

142. Punishment for non-compliance of directions by Appropriate Commission.-In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

17. Therefore, the Appellate Tribunal was wrong in interfering with the conclusions of CERC that respondent No. 1's petition was not entertainable and/or maintainable.

18. In Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, it was inter alia observed as follows:

To constitute a sale in the course of export of goods out of the territory of India, common intention of the parties to the transaction to export the goods followed by actual export of the goods, to a foreign destination is necessary. But intention to export and actual exportation are not sufficient to constitute a sale in the course of export, for a sale by export "involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier or transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction": *State of Travncore Cochin and Ors. v. The Bombay Company Ltd.* A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India. There are a variety of transactions in which the sale of a commodity is followed by export thereof. At one end are transactions in which there is a sale of goods in India and the purchaser immediate or remote exports the goods out of India for foreign consumption. For instance, the foreign purchaser either by himself or through his agent purchases goods within the territory of India and exports the goods and even if the seller has the knowledge that the goods are intended by the purchasers to be exported, such a transaction is not in the course of export, for the seller does not export the goods, and it is not his concern as to how the purchaser deals with the goods. Such a transaction without more cannot be regarded as one in the course of export because etymologically, "in the course of export", contemplates an integral relation or bond between the sale and the export. At the other end is a transaction under a contract of sale with a foreign buyer under which the goods may under the contract be delivered by the seller to a common carrier for transporting them to the purchaser. Such a sale would indisputably be one for export, whether the contract and delivery to the common carrier are effected directly or through agents. But in between lie a variety of transactions in which the question whether the sale is one for export or is one in the course of export i.e., it is a transaction which has occasioned the export, may have to be determined on a correct appraisal of all the facts. No single test can

be laid as decisive for determining that question. Each case must depend upon its facts. But that is not to say that the distinction between transactions which may be called sales for export and sales in the course of export is not real. In general where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export.

It may be conceded that when chests of tea out of the export quota are sold together with the export rights, the goods are earmarked for export, and knowledge that the goods were purchased by the bidders for exporting them to the foreign principals of the bidders must clearly be attributable to them. Does the co-existence of these circumstances, impress upon the transactions of sale with the character of a transaction in the course of export out of the territory of India? We are unable to hold that it does. That the tea chests are sold together with export rights imputes knowledge to the seller that the goods are purchased with the intention of exporting. But there is nothing in the transaction from which springs a bond between the sale and the intended export linking them up as part of the same transaction. Knowledge that the goods purchased are intended to be exported does not make the sale and export parts of the same transaction, nor does the sale of the quota with the sale of the goods lead to that result. There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain export licence, which he may or may not obtain. There is nothing in law or in the contract between the parties, or even in the nature of the transaction which prohibits diversion of the goods for internal consumption. The sellers have no concern with the actual export of the goods, once the goods are sold. They have no control over the goods. There is therefore no direct connection between the sale and export of the goods which would make them parts of an integrated transaction of sale in the course of export.

In our view, the transactions of sale in the present case did not occasion the export of the goods, even though the appellants knew that the buyers in offering the bids for chests of tea and the export quotas were acting on behalf of foreign principals, and that the buyers intended to export the goods. There was between the sale and the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The appellants were not concerned with the actual exportation of the goods, and the sales were intended to be complete without the export, and as such it cannot be said that the sales occasioned export. The sales were therefore for export, and not in the course of export.

19. The Appellate Tribunal's conclusions regarding nature of transactions are not supportable when various clauses of the agreement are considered. They clearly

establish intra-state nature of the transactions.

20. It is to be noted that under Rule 9 of the Central Electricity Rules, 2005 (in short the 'Central Rules') there is no restriction on the licensee effecting sale or re-sale in the same State and no separate licence is needed. In fact, there was no agreement to take out the electricity, as was inferred by the Appellate Tribunal. PTC is bound by the Regulations. It is pointed out that whenever there is sale for inter state trade, the margin is maintained. Additionally, PTC was not a party before CERC. Originally also it was not a party before the Appellate Tribunal. In another case relating to trade margin PTC was a party. The issues were different and PTC was discharged from the proceedings. It is stated that PTC is affected by para 56 of the Appellate Tribunal's order. The observation of the Appellate Tribunal that PTC could not have sold electricity and it could not have effected sale inside the State is wrong because of Rule 9 of the Central Rules. It is also to be noted that the contract was concluded in the State of Orissa and the transmission loss was to be borne by PTC who was not agent of GRIDCO.

21. In that view of the matter, looked at from any angle the order passed by the Appellate Tribunal cannot be maintained and is set aside.

22. In view of the order passed in Civil Appeal No. 5722 of 2006, other Civil Appeals are allowed, and in view of the said order passed, no separate orders are necessary to be passed in IAs and they are rejected, and SLP (C) No. 11629 of 2007 filed by Haryana Power Generation Corporation Ltd. is dismissed. Costs made easy.