REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4117 OF 2006

U.P. Power Corporation Ltd. …

Appellant

Versus

N.T.P.C. Ltd. & Ors. …Respondents

WITH CIVIL APPEAL NOS.5361-5362 OF 2007

J U D G M E N T

T.S. THAKUR, J.

1. This appeal under Section 125 of the Electricity Act, 2003 calls in question the correctness of a Judgment and Order dated 7th July, 2006 passed by the Appellate Tribunal

for Electricity whereby the Tribunal has while partially modifying the Order passed by the Central Electricity Regulatory Commission ('CERC' for short) dismissed Appeal No.36 of 2006 filed by the appellant.

2. The CERC had by the Order impugned before the Tribunal allowed Petition No.139 of 2004 filed by the respondent-Corporation and permitted capitalisation of Rs.4.521 crores over the approved cost for the completion of Feroz Gandhi Unchahar Thermal Power Station Stage-I for the period 1st April, 2001 to 31st March, 2004. While doing so the CERC had in Para 37 of its Order held respondent No.1 entitled to return on equity and interest on loan on the said amount payable along with the tariff for the period 2004-2009. What is significant is that both the CERC and the Appellate Tribunal rejected the contention urged on behalf of the appellant-Corporation that the additional capital expenditure incurred by the respondent-Corporation could not be taken into consideration for tariff fixation without the same having been approved by the Central Electricity Authority ("CEA" for short) as required under

Regulation 2.5 of the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001. The primary question that therefore falls for consideration in this appeal is whether the CERC and the Tribunal have correctly interpreted Regulation 2.5 of the said regulations while permitting capitalisation of the additional expenditure for purposes of determining the tariff. That question arises in the following factual backdrop:

3. Feroz Gandhi Unchahar Thermal Power Station Stage-I was taken over by the respondent-National Thermal Power Corporation from the erstwhile U.P. State Electricity Board on 13th February, 1992. The Central Government had approved the takeover cost of Rs.925 crores in terms of a communication dated 2nd May, 1993 issued by the Ministry of Power. By a subsequent letter dated 5th August, 1996 the CEA accorded approval for an additional Rs.2.85 crores for R&M under Environment Action Plan, thereby taking the total approved project cost to Rs.927.85 crores.

4. The CERC (Terms & Conditions for Determination of Tariff) Regulations, 2001 for the period 1st April, 2001 to 31st

March, 2004 came to be notified on 26th March, 2001, pursuant whereto the respondent-Corporation filed Petition No.41 of 2001 for approval of tariff for the relevant tariff period in respect of the generating plant in question. By an Order dated 24th October, 2003, the CERC approved the tariff taking into consideration the capital cost at Rs.940.70 crores as on 1st April, 2001 but did not consider the additional capitalisation claimed by the respondent since the latter was based only on an estimated capital expenditure and was unsupported by an auditor's certificate. Respondent-Corporation then moved petition No.139 of 2004 before the CERC on 5th October, 2004 seeking approval of the revised fixed charges in respect of the generating plant for the relevant tariff period taking into account the additional capital expenditure incurred during the said period which was estimated at Rs.6.101 crores. By an order dated 31st March, 2005, the CERC disposed of the said petition approving an amount of Rs.4.521 crores towards capital expenditure while disallowing the rest.

5. The CERC held that the respondent would not be entitled to tariff revision during the relevant period in the light of Regulation 1.10 of the CERC Regulations which prohibited allowance of an additional capital expenditure, if such expenditure happened to be less than 20 per cent of the approved project cost. It all the same held in Para 37 of its Order that the respondent was entitled to relief in the form of return on equity at the rate of 16% and interest on loan on the approved additional capital expenditure for the period 2004-2009. The CERC observed :

> *"37. As there is nothing in the notification dated 26.3.2001 to deny the petitioner the reasonable return to service the capital expenditure incurred by the petitioner and found to be justified by us, we direct that the petitioner shall earn return on equity @ 16% on the equity portion of the additional capitalization approved by us. Similarly, the petitioner shall also be entitled to the interest on loan as applicable during the relevant period. Return on equity and interest shall be worked out on the additional capitalization of Rs.4.521 crore approved by us from 1st April of the financial year following the financial year to which additional capital expenditure relates up to 31.3.2004. The lump sum of the amount of return on equity and interest on loan so arrived at shall be payable by the respondents along with the tariff for the period 2004-09 to be approved by the Commission. The exact entitlement of the petitioner on this account shall be considered by the Commission while approving tariff for the period 2004-09."*

6. Aggrieved by the order passed by the CERC the appellant-Corporation approached the Appellate Tribunal for Electricity in Appeal No.36 of 2006. The appellant thereby questioned the CERC's authority to approve the additional capital expenditure of Rs.4.521 crores as also the power to award relief in the nature specified in para 37 supra. It was contended on behalf of the Corporation that in the absence of approval of the expenditure by CEA as required under Regulation 2.5 of the CERC Regulations, the CERC had no authority to hold that the respondent-NTPC was entitled to additional capitalisation. The Appellate Tribunal for Electricity, however, repelled that contention and dismissed the appeal filed by the appellant on the ground that CERC's approval of additional capitalisation to the tune of Rs.4.521 crores did not call for any interference and that the respondent-Corporation had placed sufficient material before the CERC to substantiate its claim. The Tribunal declared that the CERC was empowered to undertake a prudent check and approve additional capitalisation after the deletion of Section 43-A(2) of the Electricity (Supply) Act, 1948 because of which deletion CEA ceased to have any role in

such matters. The Tribunal further held that the project had been originally approved by CEA as far back as on 5th August, 1986 and was taken over while still incomplete by the respondent-NTPC in 1992. The incomplete items were then completed by the respondent NTPC after the takeover which required investment of additional capital. The Tribunal was, therefore, of the view that the additional capital was well within the approved cost of the project which remained unexecuted on the date of vesting. The Appellate Tribunal, however, accepted the appellant's contention that the relief regarding the return on equity and interest on loan could not be granted until the next tariff period. Consequently the Tribunal directed deletion of Para 37 of the CERC's order giving liberty to the CERC to take the said relief into consideration while determining the tariff for the next period. The present appeal assails the correctness of the view taken by the CERC and the Appellate Tribunal.

7. When this appeal came up for admission on 29th September, 2006, this Court admitted the same only to examine the following two questions:

"a. What is the true scope and ambit of Regulation 2.5 of CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001?

b. xxxxxxx

c. xxxxxxx

d. Whether the CERC could have allowed the additional capitalization which was not approved by the concerned authority i.e. Central Electricity Authority?

e. xxxxxxx"

8. Appearing for the appellant Mr. Pradeep Misra strenuously contended that the CERC and so also the Appellate Tribunal had failed to correctly interpret Regulation 2.5 of the Regulations in question. He submitted that Regulation 2.5 of the Regulations was much too clear to admit of any equivocation. A plain reading of the Regulation, argued Mr. Misra, left no manner of doubt that any additional capital expenditure incurred on the completion of the project could be taken into consideration for fixation of tariff only if such excess was allowed by the CEA or an appropriate independent agency constituted under the said Regulations. So long as the capital expenditure incurred in excess of the approved expenditure did not have the sanction of the CEA or the independent agency nominated

by the CERC, the same could not, according to the learned Counsel, constitute a valid input for fixing the tariff. No such approval having been sought or granted either by the CEA or any independent agency in this case, the CERC could not have taken the additional capital expenditure into consideration for purposes of fixing the tariff. It was also contended that the CERC as also the Appellate Tribunal had fallen in error in holding that deletion of Section 43A(2) of the Electricity (Supply) Act, 1948 made a reference to the CEA in terms of Regulation 2.5 of the Regulations unnecessary. The deletion of Section 43A(2) notwithstanding, the CEA continued to exercise powers in terms of Sections 28 to 32 of the Act. The statutory requirement of an approval from the CEA of the additional cost had not, therefore, been rendered a surplusage by reason of the removal of Section 43A(2) from the statute book.

9. On behalf of the respondent it was contended by Mr. Ramachandran that the CERC as also the Tribunal were perfectly justified in taking into consideration the additional

expenditure incurred on the completion of the project, not only because there was no dispute that such an expenditure had in fact been incurred but also because the said expenditure was found to be capital in nature. The question of an approval from the CEA or the independent agency was, therefore, rendered academic in the facts and circumstances of the case.

10. It was further argued that since the appellant itself accepted the expenditure to have been incurred and the nature of the expenditure having been found to be capital in character, the CEA or the independent agency could not have, even if a reference was made, declined approval to the same. It was also argued that the deletion of Section 43A(2) of the Electricity (Supply) Act, 1948 from the statute book made a material difference and that the CERC and the Tribunal had correctly held that a reference to the CEA or independent agency was on that count unnecessary.

11. Regulation 2.5 of the Regulations reads as under:

> *"2.5* ***<u>Capital Expenditure</u>***
>
> *The capital expenditure of the project shall be financed as per the approved financial package set*

out in the techno-economic clearance of the Authority or as approved by an appropriate independent agency as the case may be. The project cost shall include reasonable amount of capitalized initial spares.

The actual capital expenditure incurred on completion of the project shall form the basis for fixation of tariff. Where the actual expenditure exceeds the approved project cost, the excess expenditure as allowed by the Authority or an appropriate independent agency shall be considered for the purpose of fixation of tariff.

Provided that such excess expenditure is not attributable to the Generating Company or its suppliers or contractors;

Provided further that where a Power Purchase Agreement entered into between the Generating Company and the beneficiary provides a ceiling on capital expenditure, the capital expenditure shall not exceed such ceiling for computation of tariff."

12. The term "independent agency" referred to in the above Regulation is defined in regulation 1.9 as under:

"1.9 'Independent agency' means the agency approved by the Commission by a separate notification."

13. A plain reading of the above makes it manifest that the basis for fixation has to be the "actual capital expenditure" incurred on the completion of the project. But where the actual expenditure exceeds the approved expenditure the excess so incurred can be taken into consideration to the extent the same is allowed by the Central Electricity

Authority or an appropriate independent agency nominated for the purpose. This implies that the excess expenditure must go through a process of scrutiny either by the CEA or the independent agency before it can constitute an input for determination of the tariff. Scrutiny of the excess would in turn primarily involve examination of two distinct aspects *viz*.

(a) Whether the excess expenditure has been actually incurred or is a make believe or an exaggeration by the generating company; and

(b) Whether the expenditure was capital in nature.

14. In cases where the answers to these two questions is in the affirmative, the CEA or the Independent Agency would have no reason to disallow such expenditure, nor would its consideration for tariff fixation present any difficulty. In case a lesser amount is allowed by the CEA or the Independent Agency either because the generating company fails to substantiate its claim of having incurred the expenditure as claimed or even if the amount is incurred, only a part of the same was in the nature of capital

expenditure, the lesser amount alone will constitute an input for tariff determination. To that extent, there is no difficulty nor was Mr. Misra, Counsel for the appellant, able to suggest any other dimension which the CEA or the Independent Agency would be entitled to consider while examining the question of allowing or disallowing the excess expenditure incurred by the generating unit. If that be so, absence of a reference under Regulation 2.5 (supra) to the CEA or Independent Agency would make little or no difference having regard to the facts of the case at hand. We say so because although the respondent-Corporation had claimed an excess expenditure of Rs.6.101 crores the amount actually taken into consideration for fixation of the tariff was Rs.4.521 crores only. The CERC had on a prudent check disallowed a substantial part of the excess that was claimed by the respondent-Corporation. What is significant is that the appellant-Corporation had fairly conceded that an amount of Rs.4.521 crores was indeed spent by the respondent for the completion of the project. That is evident from the following observation of the Electricity Appellate Tribunal, where Mr. Misra learned counsel for the

appellant made a candid admission as to the extent of the expenditure incurred over and above the approved Project cost:

> *"Mr. Pradeep Misra, learned counsel for the appellant, while relying on Regulation 1.10 which provides that there shall be no tariff revision if the capital expenditure is less than 20% of the approved cost of the project contended that there could be no tariff revision at all much less the appellant shall be made liable to pay 16% ROE as well as interest as directed in Para 37 of the Impugned Order under challenge. Mr. Pradeep Misra also contended that the claim of this additional expenditure, under five Heads, are not disputed but they are only maintenance expenditure. It was also contended by the learned counsel that in the absence of approval of expenditure by CEA and there being no proof of such approval, CERC has no authority to hold that NTPC had incurred additional capital expenditure and entitled to additional capitalisation."*
>
> *(emphasis supplied)*

15. From the above, we have no difficulty in holding that the first of the two aspects that may have engaged the attention of the CEA or the Independent Agency was concluded by the admission of the appellant, which was the best evidence, in the matter apart from the fact that the figure arrived at by the Commission was based on a fair and prudent check of the extent of admissible expenditure said to have been incurred.

16. That leaves us with the second aspect which, any scrutiny or examination by the CEA may have involved viz. whether the expenditure was capital or revenue in nature. The CERC has found the expenditure to be capital in nature which finding has been affirmed by the Appellate Tribunal. There is nothing perverse about that finding in our opinion nor has this appeal been admitted on the question whether the expenditure was capital or revenue. In the absence of any question relating to the nature of the expenditure, we find it difficult to appreciate how the absence of a reference to CEA has caused any miscarriage of justice for the appellant or vitiated the tariff fixation by the CERC. It follows that even if a reference to CEA was in the facts of the case required to be made, the absence of any failure of justice or prejudice would render it unnecessary for us to interfere with the orders passed by the CERC and the Appellate Tribunal.

17. Since the question whether or not a reference to CEA was necessary under Regulation 2.5 was argued before us at some length we may as well deal with the same before parting. A reference to the backdrop in which the question

arises becomes necessary and may be summarised as under:

18. The Electricity (Supply) Act, 1948 *inter alia* dealt with the generation and supply of electricity by generating companies. Chapter V comprising Sections 28 to 58 of the said Act dealt with the preparation of schemes by generating companies and concurrence of the CEA for such schemes including the capital cost to be incurred by these generating companies. Section 43A of the Act dealt with sale of electricity by the generating companies and provided norms and parameters to be determined by the CEA and notified by the Government of India. Since much of the debate at the Bar was around the said provision and the effect of deletion of sub-section (2) thereof, it would be useful to reproduce the same at this stage.

> *"43A.* ***Terms, conditions and tariff for sale of electricity by Generating Company****.- (1) A Generating Company may enter into a contract for the sale of electricity generated by it-*
>
> > *(a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;*
> >
> > *(b) with the Board constituted for any other State in which it is carrying on its activities in*

pursuance of sub-section (3) of section 15A; and

(c) with any other person with consent of the competent government or governments.

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

19. In the year 1998, came the Electricity Regulatory Commissions Act, 1998, which established the Central Electricity Regulatory Commission (hereinafter referred to as "the Central Commission"). The Central Commission was *inter alia* charged with the function of determining tariffs of Central Units such as those owned and controlled by the respondent-Corporation. Significantly enough Section 51 of this Act empowered the Central Government to delete sub-section (2) of Section 43A with effect from such date as the

Central Government may decide. The Central Government, invoked that power and by a notification dated 11th September, 2000, directed the deletion of Section 43A (2) of the Electricity Supply Act, 1948 in respect of generating companies regulated by the Central Commission retrospectively w.e.f. 24th July, 1998. Shortly thereafter the Central Commission issued an order in regard to operational norms applicable to generating stations owned among others by respondent-NTPC. The order was to the following effect:

> *"As regards capital costs, the situation is somewhat difficult. As the law stands today in respect to PSUs, the required approvals from the Government and clearance from CEA have to be obtained before the commencement of the project, subject to certain limits for which no clearance is required. After the completion of the project, if the actual expenditure or the scope of the project vary beyond certain limits, they are required to be further approved. This process of approval is time consuming, resulting in a provisional clearance, making a subsequent retrospective revision inevitable. Changes in legislation are being contemplated by which the clearance from CEA for projects might be done away with. However, as the law stands today, approvals are inevitable. Still it is possible to bring about stability in tariff in case a time schedule is worked out by which utilities may submit data of CEA at least 6 months prior to the completion of a project, so that clearance could be obtained sufficiently in time before the tariff for the station/lines is determined. It is hoped that any variations on actual finalization of accounts thereafter should be minor in nature which could be absorbed by the*

utility and if substantial, can be taken care of in the next revision. In view of the above, all utilities seeking determination of tariff in respect of new projects, shall submit their applications to us at least 3 months in advance of the anticipated date of completion, along with the project cost as approved by the appropriate independent authorities, other than the Board of Directors of the Company. This project cost will constitute the basis for tariff fixation, and no revision would be entertained till the next tariff period. This direction presupposes that CEA may hereafter, unlike the past, clear capital cost escalations on factors other than the change in scope as well. We would urge upon CEA to consider and deal with the approval of additional capital costs other than those due to change in the scope of the project as well, in the interest of avoidance of tariff shocks down stream. In case the projects exempted from CEA clearance, the Commission would consider accepting a due diligence clearance from any recognised agency."

20. The above was followed by the Central Commission framing Tariff Regulations 2001, in which Regulation 2.5 extracted earlier dealt with capital expenditure. It was in the above background that the Central Commission determined the Tariff for the generating unit in question for the period 1st April, 1997 to 31st March, 2001 by an order dated 30th October, 2002. Shortly after that order the Parliament enacted the Electricity Act, 2003 which came into force w.e.f. 10th June, 2003. The new legislation repealed the Electricity (Supply) Act, 1948. The effect of this repeal

was that all provisions of the 1948 Act including those requiring approval by the CEA of the scheme of the generating stations and capital cost which the repealed Act provided for became inapplicable and irrelevant under the new Act. The new law aimed at deregulating electricity generation. In the case of Thermal Power Stations the capital cost was not required to be approved by the CEA, as was the position under the earlier law.

21. In Petition No.139 of 2004, the respondent-Corporation sought additional capitalisation of the expenditure on the project in question relevant to the period 2001-2004. The Central Commission determined the additional capitalisation and allowed the same to the respondent, which determination was upheld by the Tribunal with the modification to which we have adverted in the beginning of this order.

22. There is no gainsaying that the prayer for additional capitalisation was made by the respondent-Corporation and considered by CERC after the Electricity Act 2003 had come into force, repealing the earlier enactments. The new legislation did not set out any role for the CEA, in the matter

of approval of the schemes for the generating companies or the capital expenditure for the completion of such projects. The entire exercise touching the regulation of the tariff of generating companies owned or controlled by the Central Government, like the respondent was entrusted to the Central Commission. The role of the Central Electricity Authority established under Section 7 of the 2003 Act, was limited to matters enumerated under Section 73 of the Act, approval of the scheme for generating companies or the capital expenditure for the completion of such projects or capitalisation of the additional expenditure not being one such function. The CERC was, therefore, right when it said that the Central Electricity Authority had no part to play in the matter of approval for purposes of capitalisation of the extra expenditure incurred on a project. That was so notwithstanding the continuance of Regulation 2.5 of the regulations framed by the CERC providing for such an approval by the CEA. The far reaching changes that came about in the legal framework with the enactment of the 2003 Act, made Regulation 2.5 redundant in so far as the same envisaged a reference to the CEA or an Independent

Agency for approval of the additional capitalisation. Insistence on a reference, to the CEA for such approval, despite the sea change in the legal framework would have been both unnecessary as well as opposed to the spirit of new law that reduced the role of CEA to what was specified in Section 73 of the Act. The CERC and the Tribunal were in that view justified in holding that a reference to the CEA was not indicated nor did the absence of such a reference denude the CERC of its authority to fix the tariff after the 2003 Act had come into force. That was so notwithstanding the fact that proviso to Section 61 of the Electricity Act, 2003 continued the terms and conditions for determination of tariff under the enactments mentioned therein and those specified in the Schedule for a period of one year or till such terms were specified under that section whichever was earlier. In the result this appeal fails and is hereby dismissed with costs assessed at Rs.50,000/-

Civil Appeal Nos.5361-5362 of 2007

23. In these appeals the order impugned by the appellant places reliance upon the order passed by the Tribunal, in Appeal No.36 of 2006 against which order we have in the foregoing part of this judgment dismissed the appeal preferred by the appellant. On a parity of reasoning these appeals are also destined to be dismissed and are, accordingly, dismissed with costs assessed at Rs.50,000/-.

.....J.
(T.S. THAKUR)

.....J.
(VIKRAMAJIT SEN)

New Delhi
September 18, 2013