

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO.805 OF 2008

**WEST BENGAL ELECTRICITY
REGULATORY COMMISSION**

.....APPELLANT(S)

VERSUS

HINDALCO INDUSTRIES LTD. & ORS.

...RESPONDENT(S)

W I T H

CIVIL APPEAL NO.3341 OF 2008

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. In these two appeals the appellants are aggrieved by the order passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'the Tribunal') in Appeal No.3/2007 dated October 31, 2007. The present Appeal No. 805 of 2008 is at the instance of West Bengal Electricity Regulatory Commission (hereinafter referred to as 'the Commission'). Appeal No.3341/2008 has been filed by the Calcutta

Electricity and Supply Company Limited (hereinafter referred to as 'CESC').

2. We propose to decide the two appeals by this common judgment as they arise out of the aforesaid common order passed by the Tribunal.

3. The controversy between the parties revolves around the methodology, criteria/formula that has to be applied in determining the wheeling charges in accordance with the applicable Regulations framed under the Electricity Act 2003.

4. We may notice here the skeletal facts which are necessary for the purpose of disposal of these two appeals. HINDALCO Industries Limited, formerly known as Indian Aluminum Company Limited (hereinafter referred to as respondent No.1) has an aluminum and copper products factory at Belurmath in West Bengal within the distribution licence area of CESC. It had an existing Contract Demand Agreement for 8.5 MW with CESC drawing power at the voltage of 33 KV through dedicated lines from the Belurmath receiving Sub-Station of CESC. For this purpose, respondent No.1 has installed a 33 KV Sub-Station at its premises. It has a captive power plant at Hirakud, Orissa. On 31.10.2003 respondents filed an application under Section 9 and 42 of the Electricity Act, 2003 before

the Commission seeking permission for open access to wheel surplus captive power of an approximately 9 MW from its power plant to its Belur factory. The distance between the captive power plant at Hirakud, Orissa and Belurmata plant in West Bengal is about 555 kilometers, out of which 550 kilometers falls within the jurisdiction of West Bengal State Electricity Board (for short WBSEB), OPTCL and Eastern Region. We may also notice here that out of these five kilometers, respondent No.1 had at its own cost put up 2 kilometers long dedicated transmission line, thus using only 3 kilometers of the CESC network. Respondent No.1 paid wheeling charges for transmission of power at the rate of 9.57 paise per unit for 550 kilometers. However, in respect of remaining five kilometers, which also fall within the State of West Bengal, respondent No.1 has to pay wheeling charges at the rate of 83.54 paise/kWh as fixed by the Appellate Commission by its order dated 21.11.2005. In its order dated 21.11.2005 the Commission had observed as follows:

“26.0 Thereafter, actual of working of open access should follow, naturally depending-upon availability of capacity as laid down in the Regulations on open access. Payments of various charges / fees should follow the provisions of the Regulations dealing with fees, charges and formats. There are still two items on which specific orders from the Commission will be required. The first one concerns the quantum / rate of additional surcharge, while the second one concerns the wheeling charge which will have to be determined by the Commission in terms of Regulation 14.3(b) and Regulation 14.5(b) respectively of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005. We have since determined the wheeling charges applicable to CESC Limited for the year 2005-06 based on

factors like distribution network cost, units saleable by the distribution licensee to its consumers, units to be wheeled by the open access customer etc. and the same has worked out to 83.54 paise per kWh. This will be revised appropriately, needless to add, by the Commission every year.”

5. Aggrieved by the aforesaid order, respondent No.1 challenged the same before the Tribunal by way of an appeal being Appeal No.1/2006. The aforesaid appeal was allowed by the Tribunal by its order dated 11.7.2006. The impugned order of the Commission was quashed and set aside. The matter was remanded back to the Commission for a fresh determination of wheeling charges with the following observations:

“35. It follows that in calculating wheeling charges for the distribution system or associated facilities are to be assessed on applicable distribution network cost, units saleable and units wheeled by all open access customers in the network. The learned counsel for appellant contends that as per CERC (Open Access in Inter-State Transmission) Regulations and WBERC (Terms & Conditions for Open Access –Schedule of Charges, Fees & Formats for Open Access) Regulation, the wheeling charges of the Distributing system should be 0.25 time for short term open access. However, we find from Para 26.0 of the order appealed against, there is no detailed discussion in this respect except holding that 83.54 paisa/kWh shall be the wheeling charges. No particulars been disclosed is the main grievance and Regulations governing wheeling charges have not been applied correctly. The second respondent has stated in its submission that the WBERC determined the wheeling charges in case of WBSEB for 2005-06 at the rate of 56 paisa/kWh and a copy also was filed. In the circumstances with respect to fixation of wheeling charges the matter deserves to be remitted back to WBERC for fresh consideration in the light of the relevant Rules and affording opportunity to appellant. The

authority shall take note of the fact that open access within the Distribution area of CESC is applied to a distance of 5 KM and out of 5 KM, 2 KM distance is appellant's dedicated transmission line put up at its costs."

6. Upon remand, the matter was again heard, and decided by the Commission vide order dated 16.11.2006. By this order the Commission sought to demonstrate and detail the methodology for determining the wheeling charges payable by respondent No.1. The wheeling charges were re-determined by the Commission at 83.54 paisa per KWH. Again being aggrieved by the aforesaid order, respondent No.1 impugned the same before the Tribunal by way of Appeal No.3/2007.

7. We may notice here that in both the matters before the Tribunal, respondent No.1 had challenged the determination of wheeling charges for the year 2005-06. Initially, respondent No.1 had challenged the order passed by the Commission on 21.11.2005 in Appeal No.1/2006. By order dated 11.7.2006 Appeal No.1/2006 was allowed and the matter was remanded back to the Commission for fresh determination of wheeling charges. It was observed that there was no detailed discussion in the order which would throw light upon the manner and methodology behind determination of wheeling charges. The grievance made by respondent No.1 which was noticed by the Tribunal was that "no particular wheel disclosed is the main

grievance and regulation governing wheeling charges have not been applied correctly.”

8. Taking note of the aforesaid observations, the Commission re-determined the wheeling charges. It is the case of the appellants herein that wheeling charges had been correctly re-determined on the basis of the total distribution network cost as mandated under the Commission (Terms and Conditions for Open Access –Schedule of Charges, Fees & Formats for Open Access) Regulations, 2005; the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 as well as the West Bengal Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2005.

9. It is claimed by the appellants that the formula/methodology/criteria for determining wheeling charges has to be in terms of form 1.27 attached to the Tariff Regulations, 2005. In spite of the clear and categorical statutory provisions contained in the applicable regulations, the appellants have been wrongly directed by the Tribunal to re-determine the wheeling charges on the basis of applicable network of 33 KVV distribution system on which the electricity is being rolled by respondent No.1. The appellants had laid considerable emphasis on the submissions that the determination of wheeling charges based on the interpretation directed by the Tribunal

would be *ex facie* contrary to the scheme contemplated under the applicable regulations framed under the Electricity Act, 2003 governing determination of wheeling charges. A combined reading of all the applicable regulations, according to the appellants, leads to the irresistible conclusion that for determining wheeling charges total distribution cost of the network and not the voltage-wise cost would be the determining factor. The interpretation made by the Tribunal, if accepted, would render the regulation framed by the appellant otiose. The Tribunal incorrectly understood and interpreted the expressions applicable distribution network as the distribution network cost which is to be determined at the relevant voltage level.

10. At this stage we need not decide any of the issues raised by the appellants as, in our opinion, the appeals have to be allowed on the short ground that the Tribunal has failed to consider the objection raised by the appellants with regard to the maintainability of the appeal filed by respondent No.1, before the Tribunal.

11. Both the appellants had categorically stated before the Tribunal that respondent No.1 has sought to challenge the wheeling charges for the year 2005-06 as determined by the Tribunal in the order dated 16.11.2006. During the year 2005-06 not a single unit of energy was wheeled by respondent No.1 and therefore no wheeling charges were paid/payable. Therefore, the appeal filed by respondent No.1 herein

was at best of an academic interest only, as at the relevant point of time when Appeal No.03/2007 was filed the wheeling charges for the year 2006-07 had already been determined. It was also mentioned that for reasons best known to respondent No.1 herein the wheeling charges for 2006 were not challenged in the appeal before the Tribunal. In any event since respondent No.1 had not wheeled any power during the period 2005-06, it did not have to pay any wheeling charges in the first place. Thus, the appeal ought to have been dismissed as having become infructuous. It is emphasised by the counsel for the appellant that detailed written notes were submitted before the Tribunal during the course of hearing in Appeal No.3/2007. Thereafter also written submissions were filed detailing the scope of the issues before the Tribunal. Copies of these written submissions have been placed before us as an annexure to the grounds of appeal.

12. The specific submission made by the appellant with regard to the maintainability of the appeal was an important issue which needed consideration by the Tribunal. Numerous issues, which have been raised in these appeals on merits, were also raised before the Tribunal which seem to have escaped the notice of the Tribunal rendering its decision vulnerable. In our opinion, it would be in the interest of justice to remand the matter back to the Tribunal for fresh consideration of all the issues after taking into consideration the factual and legal submissions made by the appellant. In view of the

above both the appeals succeed and are allowed. The order passed by the Tribunal is set aside. The appeals are remanded back to the Tribunal to be decided afresh on merits, in accordance with law preferably within a period of three months of the receipt of a certified copy of this order.

13. Appeals are allowed as indicated above with no order as to costs.

