

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.64/MP/2013

Coram:

Shri V.S.Verma, Member

Shri M.Deena Dayalan, Member

Date of Hearing: 8.8.2013

Date of Order: 11.9.2013

In the matter of

Petition under Section 79(1)(f) read with 79(1)(a), (b) and (c) of the Electricity Act, 2003 in respect of Power Supply related disputed issues raised by Jharkhand State Electricity Board.

And in the matter of

Damodar Valley Corporation, Kolkata

. Petitioner

Vs

Jharkhand State Electricity Board, Ranchi

.... Respondents

Present:

1. Shri M.G.Ramachandran, Advocate, DVC
2. Shri Pulak Bhattacharya, DVC
3. Ms. Poorva Saigal, Advocate
4. Shri R.B.Sharma, Advocate, JSEB

ORDER

The petitioner through this petition made under clause (f) of sub-section (1) of Section 79 read with Section 79(1)(a),(b) and (c) of the Electricity Act, 2003 ('the Act') has prayed for the following reliefs:

- (a) Adjudicate on the disputes and differences mentioned above;
- (b) Issue directives to JSEB for liquidation of outstanding dues of which principal dues is ` 3621.84 crore and DPS is ` 2172.87 crore) as claimed by DVC till the end of February, 2013, immediately so that the financial health improves;
- (c) Issue directives of JSEB to restrain from claiming line loss prior to year of claim preferred to DVC;
- (d) Issue directives to JSEB to restrain from claiming free hydel power prior to the year 2006-07, subject to acceptance by this Hon'ble Commission, since for the past period upto 2006-07 DVC already allowed a 15% rebate to JSEB on its energy charge and demand charge;

- (e) Issue directives to DVC & JSEB as the Hon'ble Commission considers most appropriate in respect of other disputed issues raised by JSEB viz. TISCO differential, rebate on tariff, Delayed Payment Surcharge, Incentive, Settlement of differential tariff.
- (f) To kindly settle the disputes and resolve the long pending issues once for all so that tariff can be regularised in the operating area of DVC.
- (g) Pass such order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.

2. Damodar Valley Corporation (DVC) is a statutory body established by the Central Government under the Damodar Valley Corporation Act, 1948 (hereinafter referred to as the 'DVC Act') for the development of the Damodar Valley, with three Participating Governments; the Central Government and two State Governments, namely, Government of West Bengal and Government of Bihar. After the re-organisation of the State of Bihar, Government of Bihar has been substituted by the Government of Jharkhand. The representatives of the Governments of Jharkhand and West Bengal are in the Board of the petitioner Corporation.

3. Section 12 of the DVC Act provides for the following functions, namely:

- “(a) the promotion and operation of schemes for irrigation, water supply and drainage,*
- (b) the promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydroelectric and thermal.*
- (c) the promotion and operation of schemes for flood control in the Damodar river and its tributaries and the channels, if any, excavated by the Corporation in connection with the scheme and for the improvement of flow conditions in the Hooghly river,*
- (d) the promotion and control of navigation in the Damodar river and its tributaries and channels, if any,*
- (e) the promotion of afforestation and control of soil erosion in the Damodar valley, and*
- (f) the promotion of public health and the agricultural, industrial, economic and general well-being in the Damodar valley and its area of operation”.*

4. DVC has multifarious functions in the Damodar Valley, which extends to the States of West Bengal and Jharkhand. The activities of DVC are not restricted to generation and sale/supply of electricity, but include promotion and operation of schemes for irrigation, water supply and drainage, flood control and improvement of flow conditions in the Hooghly river,

navigation in the Damodar river and its tributaries and channels, afforestation and control of soil erosion in the Damodar Valley and promotion of public health and agricultural, industrial, economic and general well being in the Damodar Valley under its areas of operation. Many of the activities such as drainage, flood control, improvement in the flow conditions, navigation, afforestation and control of soil erosion or the promotion of public health, in which DVC is engaged are not commercial in nature, or are not generating any significant revenue from the users of services. The main revenue earning activity of DVC is the generation and supply of electricity. DVC as a generating company supplies power to the respondent, JSEB to the 33 off-take points of JSEB in terms of the Power Supply Agreement executed between DVC and JSEB. The tariff for such sale of power to JSEB is determined by the Central Commission.

5. It has been submitted that disputes and differences have arisen between DVC and JSEB with respect to non-payment of dues by JSEB for the power supplied by DVC, including the applicability of rebate on tariff and delayed payment surcharge, incentives in terms of Securitisation scheme of the Government of India, 12% free hydel power, TISCO differential etc., It has also been submitted that the non-payment of power supply dues by JSEB to DVC is to the tune of `5794.72 crore (Principal of `3621.85 crore plus DPS at `2172.87 crore) as on 28.2.2013. The petitioner has submitted that non-payment of huge outstanding dues has caused serious financial crunch in DVC, which is stalling the timely completion of the ongoing capacity addition projects of DVC. It has further been submitted that huge accumulation of JSEB dues have thrown DVC's financial health in dismal position, compelling DVC to sustain generation of thermal power plants with short time borrowings. In this background, the present petition has been filed by DVC seeking directions from the Commission in terms of the prayers mentioned in para1 above.

6. The petition was admitted on 11.6.2013 and the respondent, JSEB has filed its reply to the petition. In its reply dated 13.7.2013, JSEB has raised preliminary objections in regard to the maintainability of the petition in so far as the jurisdiction of this Commission for

adjudication of disputes under Section 79 (1)(a),(b) and (c) of the Electricity Act, 2003 (the Act) is concerned. JSEB has submitted that while DVC came under the purview of the Central Commission for regulation of tariff for generation and inter-state transmission of electricity under Section 79 of the Act, the jurisdiction to determine tariff in respect of distribution system and supply of power is vested in the respective Commissions of the State of West Bengal and Jharkhand. JSEB has pointed out that the disputes raised in the petition are not referable to the jurisdiction of the Central Commission related to regulate the tariff for generation and inter-state transmission of electricity of the petitioner and number of these disputes is referable to the jurisdiction of the Jharkhand State Electricity Regulatory Commission as these disputes relate to the regulation of tariff of intra-state transmission and distribution of electricity. JSEB has also submitted that the matter relating to settlement of differential tariff for the period from April, 2006 to April, 2010 is subjudice and pending before the Hon'ble Supreme Court and hence the petition in current form is not maintainable.

7. DVC in its rejoinder affidavit dated 29.7.2013 has submitted that DVC is generating company supplying electricity to JSEB since April, 2001. It has also submitted that the tariff for such sale and related issues are regulated by the Central Commission in terms of Section 79(1)(a) of the Act as DVC is a company controlled by the Central Government. DVC has also pointed out that tariff for supply of electricity having been determined by this Commission, the jurisdiction to deal with the disputes with JSEB vests with this Commission as per provision of Section 79(1)(f) of the Act.

8. Heard the learned counsel for the parties. The learned counsel for the petitioner has submitted that since tariff of DVC, being a government company, for supply of electricity to JSEB is determined by this Commission in terms of Section 79(1) (a) of the Act, the jurisdiction to adjudicate the disputes with JSEB vests with this Commission under Section 79(1)(f) of the Act. The learned counsel for JSEB objected to the said submissions and vehemently argued that the disputes relating to intra-state transmission and distribution of

electricity are referable to the jurisdiction of the Jharkhand State Electricity Regulatory Commission.

9. The relevant statutory provisions of the Act are extracted hereunder for reference:

“79. (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”

10. Clause (f) of sub-section (1) of Section 79 of the Act confers jurisdiction on the Commission to adjudicate disputes connected with clauses (a) to (d) of sub-section (1) of Section 79 of the Act. The question thus is whether the dispute raised in the petition might be construed to be within the ambit of any of the clauses (a) to (d) of sub-section (1) of Section 79. In the instant case, the dispute involves adjudication of claims relating to supply of electricity by DVC, a government company, whose tariff is determined by this Commission to JSEB. The functions assigned under clause (f) of sub-section (1) of Section 79 of the Act to the Commission is to adjudicate upon disputes involving the generating companies or transmission licensee in regard to matters connected with clauses (a) to (d). A plain reading of clause (f) show that the adjudication of disputes falls within the jurisdiction of the Commission on satisfying the following conditions, namely-

(a) The dispute involves the generating company or the transmission licensee.

(b) The dispute is in regard to matters connected with clauses (a) to (d), that is, the dispute should be either connected with regulation of tariff of the generating company, or regulation of inter-State transmission of electricity, or with the determination of tariff for inter-State transmission of electricity.

11. There is no dispute that DVC is a generating company as defined under sub-section (28) of Section 2 of the Act. Further, it is also an acknowledged fact that DVC is owned or controlled by the Central Government by virtue of provisions of the Damodar Valley Corporation Act, 1948. DVC supplies power to JSEB, a distribution licensee in the State of Jharkhand as per arrangement since April, 2001 and pursuant to the Act, the tariff for such supply of power by DVC to JSEB is at the rates fixed by this Commission, ostensibly, under clause (a) of sub-section (1) of section 79 of the Act. Therefore, by virtue of clause (f) of sub-section (1) of section 79, this Commission has the jurisdiction to adjudicate the dispute raised in this petition that involves a generating company within the meaning of Section 79(1)(a) and the distribution licensee.

12. One more objection raised by JSEB is that the petition is barred by limitation as the disputes contained in the petition pertain to the period prior to April, 2006. JSEB has pointed out that though complete details related to the disputes and the period of disputes along with the amounts involved have not been furnished in this petition, the disputes are very old. It has further submitted that though the Electricity Act, 2003 being a special statute does not expressly provide for any period of limitation for adjudication of claims by the Appropriate Commission, the provisions of the Limitation Act, 1963 are applicable by virtue of Section 175 of the Act read with Section 29(2) of the Limitation Act, 1963. JSEB has argued that Section 175 of the Act clearly stipulate that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. It has further submitted that the applicability of limitation Act, 1963 to the disputes adjudicated by the Appropriate Commission is intended to bring about some finality in the adjudication of disputes.

13. In response, DVC in its rejoinder has submitted that the plea of limitation raised by JSEB is totally misconceived, devoid of merits and is liable to be dismissed. It has submitted

that JSEB and DVC have been mutually discussing the settlement of various claims of DVC for generation and sale of electricity during all the relevant period including upto late 2011. DVC has also submitted that it has been pursuing the settlement of claims including payment of outstanding dues of JSEB consistently and on failure of JSEB to pay the amount, DVC has approached the Government of India, Ministry of Power for ensuring recovery of amount. It has also submitted that pursuant to the meeting of JSEB officials and DVC at Ranchi, reconciliation of the count was done during March, 2011 and concluded on 24.3.2011. DVC has further submitted that pursuant to the determination of tariff by this Commission, reconciliation was done on 18.11.2011. Accordingly, DVC has submitted that the parties have been mutually discussing the reconciliation of various running accounts of JSEB and DVC in regard to the payment of outstanding dues to DVC as late as November, 2011 and JSEB has signed the reconciliation statement dated 24.3.2011 and 18.11.2011. During the hearing, the learned counsel for DVC argued that the question of limitation being applied during the period when both parties have been corresponding and mutually making efforts to discuss and reconcile the outstanding payments to DVC, is not tenable. In support of its contention, the learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in Hari Shankar Singhania & ors Vs Gaur Hari Singhania & ors (2006) 4 SCC 658 and Shree Ram Mills Ltd Vs Utility Premises (P) Ltd (2007) 4 SCC 599. The observations of the SC in Hari Shankar Singhania case is as under:

"24. Where a settlement with or without conciliation is not possible, then comes the stage of adjudication, by way of arbitration. Article 137 as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced, it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even when there is serious hope of the parties themselves resolving the issues."

14. Referring to the above judgment in Shree Ram Mills Ltd case, the Hon'ble SC observed that where negotiations were still on, there would be no question of starting the limitation period. The learned counsel for the respondent submitted that these judgments related to arbitration proceedings and is not applicable to the present case.

15. We have considered the objection of limitation raised by JSEB. The Act is a special Act and does not provide for any period of limitation for filing of the application before the Commission. The Limitation Act, 1963 (the Limitation Act) consolidates the law for limitation of suits and other proceedings. The Hon'ble Supreme Court has consistently held the view that the provisions of the Limitation Act are not applicable to the proceedings before the quasi judicial bodies and tribunals. In *LS Synthetics Ltd Vs Fairgrowth Financial Services Ltd & others* [(2004) 11 SCC 456], the Hon'ble Supreme Court held as under:

“33. The Limitation Act, 1963 is applicable only in relation to certain applications and not all applications despite the fact that the words "other proceedings" were added in the long title of the Act in 1963. The provisions of the said Act are not applicable to the proceedings before bodies other than courts, such as quasi-judicial tribunal or even an executive authority. The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act 1963 per se may not be applied to the proceedings before it. Even in relation to certain civil proceedings, the Limitation Act may not have any application. As for example, there is no bar of limitation for initiation of a final decree proceedings or to invoke the jurisdiction of the Court under Section 151 of the Code of Civil Procedure or for correction of accidental slip or omission in judgments, orders or decrees; the reason being that these powers can be exercised even suo motu by the Court and, thus, no question of any limitation arises.”

16. The issue of applicability of the Limitation Act was also considered in *Nityananda M. Joshi Vs LIC* [(1969) 2 SCC 199] wherein the question was examined with reference to applicability of Article 137 thereof. The Hon'ble Supreme Court held that the Limitation Act deals with the applications before the courts and the labour court, a quasi judicial body under the Industrial Disputes Act, was not a court within the meaning of the Limitation Act and hence Article 137 of the Limitation Act was not applicable. The observations of the Hon'ble Supreme Court are extracted below:

“3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963 all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is “when the court is closed.” Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.”

17. The issue was again considered in *Sushila Devi Vs Ramanandan Prasad* [(1976) 1 SCC 361] with reference to applicability of Section 5 of the Limitation Act to an application made before the Collector. Here also, the Hon'ble Supreme Court held that the Collector was not a court though certain powers under the Code of Civil Procedure were vested in him. The Hon'ble Supreme Court concluded that Section 5 of the Limitation Act could not be invoked in the proceedings before the Collector. These observations of the Hon'ble Supreme Court are extracted hereunder:

“The third ground on which the decision of the High Court rests relates to the applicability of Section 5 of the Limitation Act, 1963. We do not see how Section 5 could be invoked in connection with the application made on October 17, 1965 by the first respondent. Under Section 5 of the Limitation Act an appeal or application “may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Collector to whom the application was made was not a court, though Section 15 of the Act vested him with certain specified powers under the Code of Civil Procedure; also, the kind of application that was made had no time limit prescribed for it, and no question of extending the time could therefore arise.”

18. Another case in which this issue was considered is reported as *Sakuru Vs Tanaji* [(1985) 3 SCC 590]. In this case also the Hon'ble Supreme Court held that the Limitation Act does not apply to the appeals or applications before quasi judicial Tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under Code of Civil Procedure or Criminal Procedure Code, as per the observations extracted below:

“.....the provisions of the Limitation Act, 1963 apply only to proceedings in “courts” and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him.”

19. As noted above, the Act does not specifically lay down the period of limitation for adjudication of disputes under clause (f) of sub-section (1) of Section 79. In the light of the decisions of the Hon'ble Supreme Court as stated hereinbefore, the Limitation Act cannot be invoked to decide the bar of limitation in the present petition.

20. Notwithstanding the fact that the Limitation Act does not govern the proceedings before the quasi judicial authorities like the Commission, we proceed to examine whether there has been an unreasonable delay on the part of the petitioner approaching the Commission for adjudication of dispute. We note that the disputes pertain to claim under various heads namely, the non-payment of dues for ₹ 2353.26 crore as on 31.3.2012 by JSEB for power supply, applicability of rebate and delayed payment surcharge, line loss, incentives in terms of securitisation scheme of Govt. of India, TISCO differential tariff etc., JSEB has also been raising different disputes on several issues and claiming deduction for a total amount of ₹ 1402 crore as on 31.3.2012 from the outstanding dues payable. DVC has been pursuing with JSEB the settlement of claims, including the payment of outstanding dues by JSEB consistently and on failure of JSEB to pay the amounts, DVC had approached the Ministry of Power, Govt. of India for ensuring recovery of the amounts. On a meeting conducted by the Secretary (Power), Govt. of India, with the representatives of the DVC and JSEB on 3.2.2011, it was agreed that for constitution of a four member committee (as suggested by JSEB) to sort out all issues and conclude joint reconciliation within a time bound schedule. It was also decided amongst others, that joint reconciliation between DVC and JSEB should start from 1.3.2011 after completion of the National games at Ranchi. It is noticed that pursuant to the above decision, reconciliation meetings were held between JSEB and DVC during March, 2011 in respect of bills raised by DVC for the period from April, 2006 to January, 2011 and the reconciled accounts duly signed by both parties have been filed as Annexure-A to the rejoinder affidavit dated 29.7.2013. It is also noticed that JSEB had not raised any disputes regarding the reconciled except for TISCO differential and line loss. Subsequent to the said reconciliation, DVC by letter dated 30.8.2011 (Annexure-B) had approached the Ministry of Power, Govt. of India praying for recovery of the outstanding dues from the Central Plan Allocation of Jharkhand in terms of Clause 17 of the Tripartite Agreement in respect of JSEB. In connection with this, a letter dated 14.2.2012 has also been addressed to the Ministry of Finance, Govt. of India by the Ministry of Power (Annexure-C). We further notice that after the grant of provisional tariff for DVC in June,

2011, reconciliation meeting was held between JSEB and DVC and minutes of the meeting in this regard has been signed by both the parties on 18.11.2011.

21. From the above noted facts, it emerges that JSEB has always acknowledged its liability to pay the outstanding dues. However, despite the joint reconciliation, payments have not been forthcoming on some pretext or the other. We find that at no stage, JSEB had denied its liability to pay the outstanding dues which had been jointly reconciled in the meetings as aforesaid. DVC has been pursuing its claims and JSEB has all along accepted its liability to pay the outstanding dues as reconciled. In our opinion, the petitioner has been diligently and reasonably pursuing the claim for payment of outstanding dues by JSEB. Under these circumstances, it cannot be held that the DVC's claim suffers from delay and laches. Accordingly, the objections raised by JSEB are rejected as there has been no delay and laches on the part of the petitioner.

22. The issue of maintainability having been decided in favour of the petitioner as above, the disputes raised in the petition is required to be examined on merits. JSEB in its preliminary reply has submitted that detailed reply, if considered necessary will be filed after the issue of maintainability of the petition is decided by the Commission. Hence, we direct the respondent, JSEB to file its detailed reply on the disputes raised by DVC by 25.9.2013, with copy to DVC, who shall file its rejoinder by 4.10.2013. Accordingly, the petition shall be listing for hearing the parties on 8.10.2013.

Sd/-
[M.Deena Dayalan]
Member

Sd/-
[V. S. Verma]
Member