

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. Dr. Pramod Deo, Chairperson
2. Shri R.Krishnamoorthy, Member
3. Shri V. S. Verma, Member

Petition No105/2008

In the matter of

Prayer for allowing North Eastern Electric Power Corporation to recover the interest on deficit tariff against Ranganadi Hydro Electric Power Project from Tripura State Electricity Corporation Limited (TSECL) as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and the First Amendment thereof

And in the matter of

North Eastern Electric Power Corporation Ltd, Shillong **Petitioner**

Vs

Tripura State Electricity Corporation Limited, Agartala **Respondent**

The following were present:

1. Shri Sanjay Sen, Advocate, NEEPCO
2. Shri P. K. Borah, NEEPCO
3. Smt Debjani Dey, NEEPCO
4. Shri A. Gan Chaudhuri, TSECL
5. Shri A. Das SM, TSECL

ORDER

(Date of Hearing: 12.3.2009)

This petition filed by North Eastern Electric Power Corporation Ltd, raises a question of interpretation of date of applicability of regulation 5A of the Central

Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, inserted by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2006. The said regulation published in the Official Gazette on 8.6.2006 has come into force from that date.

It provides as under-

"5A **Provisional Tariff:** Provisional tariff or provisional billing of charges, wherever allowed by the Commission based on the application made by the generating company or transmission licensee or by the Commission on its own motion or otherwise, shall be adjusted against the final tariff approved by the Commission;

Provided that where the provisional tariff charged exceeds the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall pay simple interest @ 6% per annum, computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment;

Provided further that where the provisional tariff charged is less than the final tariff approved by the Commission, the beneficiaries shall pay simple interest @ 6% per annum, computed on monthly basis on the deficit amount from the date on which final tariff will be applicable up to the date of billing of such adjusted amount."

2. The Commission, by its order dated 30.4.2008 approved the final tariff in respect of Ranganadi Hydro Electric Project owned by the petitioner, effective from 1.4.2004. Prior thereto, the petitioner was charging provisional tariff approved by the Commission by its order dated 11.4.2002 in Petition No. 87/2001. The provisional tariff charged was less than the final tariff approved by the Commission in the order dated 30.4.2008. Accordingly, after approval of final

tariff, the petitioner billed the beneficiaries to claim interest from 1.4.2004, stated to be in terms of regulation 5A.

3. It appears that all the beneficiaries, except Tripura State Electricity Corporation Ltd, respondent herein, made payment of the bills raised by the petitioner to claim interest. However, the respondent did not accept the petitioner's claim on the ground that regulation 5A could not be applied from 1.4.2004 as it came into effect on 8.6.2006 when it was published in the Official Gazette.

4. We heard Shri Sanjay Sen, Advocate for the petitioner and the representatives of the respondent.

5. Shri Sen argued that the claim of the petitioner was justified based on regulation 5A as interest was payable from the date on which final tariff was applicable and in this case final tariff was applicable from 1.4.2004 and therefore, interest was payable from that date. Learned counsel further argued that even in equity the petitioner was entitled to claim interest on the additional tariff recoverable in terms of the Commission's order dated 30.4.2008. He relied on the judgment of the Appellate Tribunal dated 20.4.2007 in Appeal No. 64/2006 and other related appeals.

6. The representatives of the respondent reiterated the stand taken in the reply-affidavit that regulation 5 A could not be applied retrospectively.

7. The dispute primarily involves adjudication about the date of applicability of regulation 5A. It is settled law that the subordinate legislation, the category within which regulation 5A falls, cannot be given retrospective effect unless specifically so authorized under the parent statute. In this context, the Hon'ble Supreme Court in **State of M.P. v. Tikamdas [(1975) 2 SCC 100]** held as noted below-

“There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf.”

8. The Electricity Act, 2003 under which the regulations on terms and conditions of tariff were notified does not authorize the Commission to make the regulations which may apply retrospectively. For this reason, while notifying the amendment, it was specifically stated that the amendment was intended to come into force from the date of publication in the Official Gazette.

9. The further question is when a statute can be said to be retrospective. The rule in general is that where the statute is to affect vested rights or to impose new burdens or to impair existing obligations, it is said to have retrospective operation. It is a settled principle of law that every statute which takes away or impairs vested rights acquired under the existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or obligations already past, must be presumed to be intended not to

have a retrospective effect. Regulation 5A introduced through the amendment and notified on 8.6.2006 imposes an obligation to pay interest. Therefore, the provision should be so read to impose the obligation only prospectively that, from the date of its publication in the Official Gazette. When so interpreted, the regulation 5A suggests that where the final tariff approved is applicable from a date prior to 8.6.2006, interest may be payable from 8.6.2006, that is, the date of publication of the notification in the Official Gazette and in other cases, the cases where final tariff approved is payable from a date subsequent to the date of publication of the notification in the Official Gazette, interest may become payable from the later date.

10. In its judgment dated 20.4.2007 (supra), relied upon by learned counsel for the petitioner, the Appellate Tribunal held that on the grounds of justice, equity and fair play, the appellants therein were entitled to interest on payment made by them to NTPC in excess of the final tariff determined by the Commission. Facts in those cases were that during 2001-04, the appellants therein paid provisional tariff, in excess of the tariff finally approved by the Commission, under the directions of the Commission, despite that the petitions for approval of tariff for the period 2001-04 were duly filed by NTPC. After determination of final tariff, the appellants claimed interest on the excess payment recovered by NTPC pursuant to interim directions of the Commission. This was allowed by the Appellate Tribunal. We have given our serious thought to the issue in the light of the judgment of the Appellate Tribunal. In our

respectful view, the facts of the case before us are clearly distinguishable from the facts in the cases before the Appellate Tribunal. In case of Ranganadi HEP the petition for approval of tariff for the period commencing on 1.4.2004 was filed on 11.7.2007 and the tariff was approved by order dated 30.4.2008. Meanwhile, the petitioner continued to provisionally charge tariff approved by the Commission in the order dated 11.4.2002 *ibid*. It can be said that the arrears of tariff accumulated for the reason attributable to the petitioner itself inasmuch that filing of the tariff petition was delayed, for whatever reason. The respondent is in no way responsible for the resultant delay in recovery of tariff finally approved by the Commission. The benefit of the judgment of the Appellate Tribunal dated 20.4.2007 (*supra*) is not available to the petitioner. Incidentally, the said judgment of the Appellate Tribunal is stated to have been stayed by the Hon'ble Supreme Court.

11. The theory behind payment of interest is that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for deprivation, by whatever name it may be called, like interest, compensation or damages. In this regard, in **Union of India v. Pramod Gupta [(2005) 12 SCC 1]** it was held by the Hon'ble Supreme Court that payment of interest is directed to compensate a party suffering damages because of a positive action or inaction of the other party, resulting in blockade of money. The relevant part of the judgment is extracted hereunder:

“.....Statutory provisions are made for payment of interest with a view to compensate a party which had suffered damages owing to a positive action or inaction of the other resulting in blockade of money which he would otherwise have received.....”

12. In **LIC of India v. S. Sindhu [(2006) 5 SCC 258]** the Hon'ble Supreme Court emphasized that interest can be awarded on the ground that the contract between the parties or law applicable to the transaction/liability provides for payment of interest. The third situation in which interest can be allowed according to the Hon'ble Supreme Court, is when it is payable as per the provisions of the Interest Act, 1978. The Hon'ble Supreme Court observed that:

“.....It is now well settled that interest prior to the date of suit/claim (as contrasted to pendent lite interest and future interest) can be awarded in the following circumstances:

(a) where the contract provides for payment of interest; or

(b) where a statute applicable to the transaction/liability, provides for payment of interest; or

(c) where interest is payable as per the provisions of the Interest Act, 1978.....”

13. In the present case, as already noted, application for approval of tariff for Ranganadi HEP was filed by the petitioner on 11.7.2007. The tariff was approved by the Commission vide order dated 30.4.2008, just within 8 months of making the application. Under these circumstances, it is difficult, or rather impossible to hold that the petitioner “suffered damages owing to a positive action or inaction of the other (the respondent) resulting in blockade of money which he (the petitioner) would otherwise have received.” The respondent cannot be said to be responsible for delay in recovery of tariff and, therefore, by

applying ratio of judgment of Supreme Court in Pramod Gupta (supra), the respondent cannot be said to be liable to pay interest from 1.4.2004..

14. Further, when considered in the light of the judgment of the Hon'ble Supreme Court in case of **LIC v. S. Sindhu** (supra) it may not seem equitable to fasten liability on the respondent to pay interest from 1.4.2004. There is nothing on record to show that there existed any contract between the parties providing for payment of interest. The interest claimed by the petitioner is not based on the Interest Act, 1978. Therefore, applicability of sub-paras (a) and (c) of the Hon'ble Supreme Court's judgment extracted at para 12 above, is ruled out. Accordingly, the petitioner's claim can be considered under sub-para (b) of the extract of the Hon'ble Supreme Court's judgment in **LIC v. S. Sindhu** (supra). The petitioner has based its claim on regulation 5A which regulation came into effect on the date it was published in the Official Gazette, that is, on 8.6.2006 and that may be the crucial date for the purpose of payment of interest. Thus, by applying ratio of the Hon;ble Supreme Court's judgment in **LIC v. S. Sindhu** (supra), interest cannot be claimed by the petitioner from 1.4.2004,

15. The petitioner's claim for interest was initially based on regulation 5A *ibid*. However, during the hearing learned counsel for the petitioner sought to invoke the common law principle of justice, equity, and fair play. In our opinion the common law principle cannot be applied to override regulation 5A *ibid* which is statutory.

16. The Hon'ble Supreme Court in **Guljag Industries v. CTO (2007) 7 SCC 269**, held that if there is a conflict between the common law and the statute law, one has to construe a statute in conformity with the common law. However, if it is plain from the statute that it intends to alter the course of the common law, then that plain meaning should be accepted. By applying the principle of law laid down by the Hon'ble Supreme Court in **Guljag Industries** case (supra), equity must yield to statutory law in case of conflict between the two. Since regulation 5A is not retrospective by its plain language, as already held, common law principle of equity should not apply. In view of the plain meaning of regulation 5A that it has come into force from the date of its publication in the Official Gazette on 8.6.2006, equitable consideration should not come while considering the petitioner's claim for recovery of interest from 1.4.2004.

17. In the above view of the matter, the contention of the petitioner cannot be upheld. However, the respondent has agreed to pay interest from 8.6.2006, it is justified to direct payment of interest from that date. The respondent shall remain so bound.

18. The petition is accordingly disposed of.

Sd/-

[V. S. VERMA]
MEMBER

Sd/-

[R. KRISHNAMOORTHY]
MEMBER

Sd/-

[DR. PRAMOD DEO]
CHAIRPERSON

New Delhi, dated the 19th June 2009