

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 241 /2009

Coram

Dr. Pramod Deo, Chairperson

Shri V. S. Verma, Member

Shri M Deena Dayalan, Member

Date of Hearing: 16.05.2013

Date of Order : 07.06.2013

In the matter of

Petition under Sections 142 and 149 of the Electricity Act, 2003

And in the matter of

Bhaskhar Shrachi Alloys Ltd, Kolkata

..... **Petitioner**

Vs

1. Damodar Valley Corporation, Kolkata
2. The Chairman, Damodar Valley Corporation, Kolkata
3. The Chief Engineer (Commercial),
Damodar Valley Corporation, Kolkata

.....**Respondents**

The following were present

1. Shri Amit Kapur, Advocate, BSAL
2. Shri M G Ramachandran, Advocate, DVC

ORDER

The petitioner, Bhaskhar Shrachi Alloys Ltd has filed this petition under Sections 142 and 149 of the Electricity Act, 2003 (referred to as "the 2003 Act") against Damodar Valley Corporation (referred to as 'DVC'), Chairman, DVC and Chief Engineer, (Commercial), DVC (the respondents herein), with the following prayers:

“(a) Appropriate proceedings be drawn up and initiated against the respondents under Sections 142 and 149 of the Electricity Act, 2003 and if no cause or sufficient cause is shown, appropriate action and directions be issued against the respondents; and

(b) pass such other or further orders as to this Hon’ble Commission may deem fit and proper.”

2. DVC was established under the Damodar Valley Corporation Act, 1948 (hereinafter "the 1948 Act") and performs multifarious functions including the generation, transmission and sale/supply of electricity within its statutory 'Command Area'. Under Section 20 of the 1948 Act, the charges for the supply of electrical energy, including the rates for bulk supply and retail distribution, were being fixed by DVC itself. Accordingly, DVC in exercise of its powers under Section 20 of the 1948 Act had fixed the schedule of charges in the year 2000, which included Fuel Cost Surcharge or FCS Formula for adjusting the prices, GCV etc of fuels used for generation of electricity.

3. After coming into force of the 2003 Act, the powers to fix tariff of the power component of tariff of DVC was vested in this Commission. DVC filed Petition No 66/2005, before this Commission for approval of tariff for its generation and transmission related activities. The Commission vide order dated 3.10.2006 granted exemption to DVC to charge its own tariff till 1.4.2006 and determined the tariff for the period 1.6.2009 till 31.3.2009. The order was challenged before the Appellate Tribunal for Electricity and the matter was remanded to the Commission vide judgement dated 23.11.2007. The Commission implemented the judgement of Appellate Tribunal and revised the tariff of DVC by its order dated 6.8.2009.

4. The petitioner has filed this petition alleging willful, deliberate and contumacious acts and omissions by the respondents for disobedience and contravention of the orders of the Commission dated 29.3.2005, 3.10.2006 and 6.8.2009 in Petition No. 66/2005 and also the provisions of the 2003 Act read with the 2004 and 2009 Tariff Regulations of the Commission. The gist of the submissions of the petitioner is as under:

(a) The Fuel Cost Surcharge (FCS) applicable to DVC (the respondent No.1) was approved by the Commission in the tariff order dated 3.10.2006. As no appeal was filed on the issue of FCS, the order of the Commission was final and binding. However, DVC in gross contravention of the 2003 Act has refused to implement this order of the Commission dated 3.10.2006 and charged FCS as per its own formula under Section 20 of the DVC Act, 1948, which has been repealed by the Act;

(b) Even though the Commission by order dated 6.8.2009 had directed DVC to implement the FCS formula approved in order dated 3.10.2006, the said order has been flouted with impunity by DVC by continuing to charge FCS as per different formula;

(c) The respondents have failed, refused and neglected to file the tariff petition before the Commission for the period 2009-14;

(d) Even though the order of the Commission dated 6.8.2009 was not stayed by the Appellate Tribunal in the appeal (Appeal No. 146/2009) filed by DVC, the

order of the Commission was not implemented and DVC continued to charge its own ad hoc tariff in contravention of the provisions of the 2003 Act.

(e) Pursuant to the order of the Commission dated 6.8.2009, which was not stayed by the Appellate Tribunal, DVC in contravention of the 2003 Act, did not file appropriate application before the State Commissions of West Bengal and Jharkhand.

5. According to the petitioner, the above deliberate acts and omissions on the part of the respondents constitute actionable wrongs in terms of Section 142 and 149 of the 2003 Act, and appropriate action be initiated against the respondents for contempt and violation of the following:

6. At the hearing held on 17.12.2009, the learned counsel for DVC accepted notice and submitted that in view of the interim order dated 16.9.2009 of the Appellate Tribunal in Appeal No. 146/2009 filed by DVC against this Commission's order dated 6.8.2009, the petition was not maintainable. Learned counsel for the petitioner pointed out that the interim order dated 16.9.2009 did not exonerate DVC from implementing the Fuel Price Adjustment Formula notified by this Commission in the order dated 3.10.2006 and reiterated in the order dated 6.8.2009 as the Formula was neither challenged by DVC nor was interfered or set aside by the Appellate Tribunal in its judgment dated 23.11.2007. Learned counsel for the petitioner further pointed out that the statement was made on behalf of DVC before the Appellate Tribunal that the retail tariff was to be

determined by the State Regulatory Commissions of West Bengal and Jharkhand after taking into account the tariff determined by this Commission. Based on this statement, DVC was allowed to continue existing tariff till such time retail tariff was fixed by the concerned State Commissions. Learned counsel for the petitioner alleged that no petition was filed by DVC before the State Commissions for determination of retail tariff. After considering the submissions made by the learned counsel for the parties at the hearing, this Commission directed DVC to file a proper affidavit explaining the reasons for non-compliance of the Fuel Price Adjustment Formula notified by this Commission and continuing with its own Formula.

7. The required affidavit does not appear to have been filed by DVC. However, DVC in its reply dated 14.6.2010 filed in Petition No.301/2009 has submitted that the Fuel Price Adjustment Formula could not be invoked in isolation and can be implemented only when tariff decided by this Commission is finally held to be applicable in its entirety to DVC after disposal of appeal No.146/2009 and final determination by the appropriate Commission. DVC has further submitted that the Appellate Tribunal in its interim order dated 16.9.2009 on its appeal had permitted continuation of the tariff then in force till fixation of its tariff for retail supply by the West Bengal and Jharkhand Regulatory Commissions.

8. As one of the Members of this Commission had demitted office before the passing of orders in the matter, the petition was again listed for hearing on 16.5.2013. During the hearing, the learned counsel for the petitioner submitted

that the Commission may pass orders in the matter after taking into consideration the submissions of the parties and the documents available on record.

9. We have considered the submissions of the petitioner and respondent. The petitioner has sought initiation of action against DVC under Section 142 and 149 of the Act which are extracted as under:

“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.”

“149(1).Offences by Companies: Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of having committed the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of having committed such offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purpose of this section, -

(a) “company” means a body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

10. As regards the prayer for taking action against DVC under section 149 of the Act, it is pertinent to mention that the question whether the Commission can punish the person in charge of the affairs of the company for the offences committed by the company under section 149 of the Act was considered by the Appellate Tribunal in its judgment dated 31.7.2009 in Appeal No.53/2009 (BSEB & Another V CERC) and the Appellate Tribunal held as under:

"63. As indicated earlier, Section 142 of the Act does not deal with the offences. On the other hand, we have mentioned various Sections which deal with the offences like Sections 135 to 141, 146 and 150. Unless it is proved that any of these offences are made out as against a person or a company, Section 149 of the Act cannot be invoked. This exercise of finding out which offence under this Act was committed by the person could be made only by the criminal court through trial and not by the Commission."

The Civil appeal filed by the Commission against the above judgment is pending before the Hon'ble Supreme Court. In view of the above observations of the Appellate Tribunal, this Commission cannot invoke the provisions of section 149 of the Act against the Respondent No.2 and 3.

11. Section 142 provides for imposition of penalty for non-compliance of the statutory provisions. Hon'ble Supreme Court in the matter of Rare Earth and Another Vs Senior Geologist, Department of Mines & Geology and Another {2004(2) SC 783} has held as under with regard to the factors to be taken into consideration to deal with the cases of failure to carry out statutory obligations:

"An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or conduct or acted in conscious disregard of its obligation."

12. Therefore, in order to impose penalty for failure to carry out statutory obligations, it has to be seen whether the party concerned has (a) acted deliberately in defiance of law or (b) was guilty of contumacious or dishonest conduct or (c) acted in conscious disregard of its obligations.

13. The allegation of the petitioner is that the Respondents have not complied with the Commission's orders dated 29.3.2005, 3.10.2006 and 6.8.2009. The order dated 29.3.2005 pertains to the directions of the Commission to DVC to file tariff petition for determination of tariff for the period 2004-09. In pursuance of the said directions, DVC had filed Petition No.66/2005 in the year 2005. Therefore, DVC cannot be said to have not complied with the directions of the Commission in order dated 29.3.2005.

14. The petitioner has alleged that DVC has not implemented the orders dated 3.10.2006 and 6.8.2009. The tariff for the generating stations of DVC was initially determined by this Commission's order dated 3.10.2006 which was challenged by DVC and some respondents/consumers including the petitioner, before the Appellate Tribunal. The Appellate Tribunal by its interim order dated 6.12.2006, 15.1.2007 while observing that the Commission can proceed with the matter, directed the concerned State Commissions not to pass any final order till the disposal of Appeal No. 273/2006 filed by DVC. Thereafter, Appeal No.273/2006 and related appeals were disposed of by the Appellate Tribunal by its judgment dated 23.11.2007 and remanded the matter to this Commission for a *de novo* consideration of the tariff order dated 3.10.2006. The judgment dated 23.11.2007

was challenged by this Commission, the West Bengal Electricity Regulatory Commission, the States of West Bengal and Jharkhand, and some HT consumers including the petitioner. The petitioner herein filed Interlocutory Application before the Hon'ble Supreme Court in C.A. No. 971-973/2008 praying for leave to pay the retail tariff in accordance with the order dated 3.10.2006 passed by this Commission, on the applications already filed by DVC before the State Commissions. The Hon'ble Supreme Court vide its order dated 11.2.2008 dismissed the interim application. The petitioner further filed I.A No.4 to 6 of 2009 in Civil Appeal No.971-973/2008 before the Supreme Court for directions to DVC to implement the directions of the Appellate Tribunal without prejudice to its rights and contentions in the civil appeal. During the hearing on 17.7.2009, the I.As were withdrawn by the petitioner. It is pertinent to mention that the Jharkhand State Electricity Regulatory Commission through its various orders issued during the years 2007, 2008 and 2009 had directed DVC to raise invoices on its consumers in accordance with the tariff fixed by the Central Commission as an interim measure and also not to revise the Fuel Price Adjustment Formula without its approval. On appeals being filed by DVC against these orders, the Appellate Tribunal in its judgment dated 22.7.2009 in Appeal No. 85/2009 observed as under:

“52...the cost of Fuel Surcharge is to be calculated in accordance with the approved formulae in generation tariff so as to adjust the cost of fuel used in generation of electricity to bring it to the level of its true market price. The FCS, therefore, is to be regulated by the authority regulating the generation tariff and no one else. The impugned order dated 27.04.2009 has failed to establish fictional distinction to the effect that “the distribution tariff may have its own fuel surcharge formulae and generation tariff may have its own.” However, in the interest of smooth and orderly transition of DVC generation tariff from the regime of DVC

Act, 1948 to Electricity Act 2003, **it is unavoidably essential that the provisional tariff determined under Section 20 of the DVC Act effective from 01.09.2000 continues till the fixation of the final tariff for generation and transmission by the Central Commission.** The purpose of Section 6 of the General Clause Act, 1894 read with principles contained in Section 185 of the Electricity Act, 2003, is exactly to avoid abrupt transition.' (Emphasis added)

15. This Commission by its order dated 6.8.2009 had revised the tariff of the generating stations of DVC for the period 2006-09, in accordance with the observations of the Appellate Tribunal in the judgment dated 23.11.2007 in Appeal No. 273/2006 and other related appeals. DVC filed Appeal No.146/2009 before the Appellate Tribunal against the order dated 6.8.2009 and the Appellate Tribunal by its interim order dated 16.9.2009 in the said appeal directed as under:

"02) It is generally understood that after the CERC has passed the impugned order a retail tariff will be determined by the West Bengal State Electricity Regulatory Commission and the Jharkhand State Electricity Regulatory Commission separately and till retail tariff is fixed by the two commissions the tariff already in force will have to continue. So far as the two Commissions are concerned, they have to take the tariff generation fixed by CERC as the input for fixing the retail supply tariff. Mr.M.G.Ramachandran has prayed that the two Commissions may proceed to fix the tariff but may not finally determine and issue an order in respect of retail supply tariff. Mr. Shanti Bhushan, Sr. Counsel appearing for respondent No. 8, submits that CERC being a statutory body and CERC having already determined the tariff it will not be fair to stay the tariff fixed by them and allow the appellant to perpetuate the tariff which they have fixed under DVC Act in the year 2000. Mr.Vaidyanathan, Sr. Counsel for respondent No.7 suggested that the State Commissions may be allowed to fix the retail supply tariff but their implementation can be subject to the present application.

03) We have considered the submission given by the parties. We have already noticed that the tariff in force for the DVC is lower than the tariff of the West Bengal Distribution Companies and the Jharkhand Distribution Companies. In view of the case made out by the appellant, we feel it will be appropriate to allow the two Commissions to proceed to fix the retail supply tariff but not to pass any final order in this regard. We order accordingly."

16. In view of the above interim order dated 16.9.2009, DVC continued to charge the tariff then in force till fixation of retail tariff by the State Commissions.

The Appellate Tribunal by its judgment dated 10.5.2010 dismissed the Appeal No.146/2009 filed by DVC and observed as under:

"107. Since, we do not find any substance in the grounds raised in the Appeal, we deem it fit to dismiss the Appeal as devoid of merits. Consequently, we direct the Appellant (DVC) to implement the Tariff as determined by the Central Commission vide its order dated 06.08.2009. DVC is also directed to revise the electricity bills raised by it for electricity consumption during April, 2006 onwards of its licensees and HT consumers and refund the excess amount billed and collected along with the interest at the rate of 6% per annum in line with Section 62(6) of The Electricity Act, 2003. Alternatively the Appellant (DVC) may adjust the excess amount recovered, along with interest at the rate of 6% per annum, in 24 equal monthly prospective installments, starting from July, 2010 by giving credit in the monthly bills of the consumers/licensees. Thereafter, the DVC is directed to approach the concerned State Electricity Commissions for getting the final order relating to the Retail Tariff who in turn will fix the retail tariff according to law."

The judgment of the Appellate Tribunal has been challenged by DVC in the Supreme Court in Civil Appeal 4881/2010.

17. DVC has filed second appeal (Civil Appeal No 4881/2010) against the judgment of the Appellate Tribunal dated 10.5.2010 in the Hon'ble Supreme Court. The Hon'ble Supreme Court by its order dated 9.7.2010 rejected DVC's application for stay of the judgment dated 10.5.2010, but ordered stay on refund by DVC until further orders. Meanwhile, on an application moved by one of the consumers of DVC, the Hon'ble Supreme Court by its order dated 17.8.2010 directed as under:

"Pending further orders, it is clarified that Damodar Valley Corporation for accounting purposes alone may raise bills on consumers appearing before us so that any recovery made by DVC at a lower rate would be subject to the outcome of the pending appeal(s)."

The Civil appeal filed by DVC has been tagged with other appeals including the one filed by this Commission and the civil appeals are pending before the Hon'ble Supreme Court.

18. Pursuant to the judgment of the Appellate Tribunal dated 10.5.2010 in Appeal No.146/2009, DVC filed Petition No.272/2010 before this Commission for determination of tariff in respect of deferred elements for the period 2006-09. The Commission after hearing all parties including the HT consumers of DVC, has determined the final tariff for the period 2006-09 vide order dated 9.5.2013. DVC is stated to have filed the tariff petitions before West Bengal Electricity Regulatory Commission on 3.11.2009, 22.6.2011 and 12.9.2011 and before the Jharkhand State Electricity Regulatory Commission on 5.9.2011 for finalization of retail distribution tariff. We direct DVC to take appropriate steps to get the retail distribution tariff determined by the State Commissions and charge retail tariff accordingly.

19. The petitioner has also alleged that DVC in violation of the orders of the Commission has charged Fuel Cost Surcharge as per its own formula. We have in our order dated 6.8.2009 held that Fuel Price Adjustment shall be governed as per the formula given in our order dated 3.10.2006 in Petition No.66/2005. Some inadvertent mistake noticed in the said formula had been rectified vide our order dated 2.5.2013 in Petition No.301/2009. In the said order we have directed DVC "to confirm that FPA has been calculated and recovered in accordance with the formula approved by this Commission and submit detailed calculation for the period from 1.4.2006 till 31.3.2013 on affidavit within a period of three months." The petitioner's grievance regarding FPA will be addressed after DVC files the required information as directed by us in order dated 2.5.2013 in Petition No.301/2009.

20. From the sequence of events narrated above, it emerges that there has been no deliberate and willful act or omission on the part of DVC for non-implementation of the Commission's order dated 3.10.2006 and 6.8.2009.

21. Considering the above facts in totality, we are of the view that the charge against DVC for willful non-compliance of the orders of the Commission dated 29.3.2005, 3.10.2006 and 6.8.2009 has not been made out for initiation of proceedings against DVC under Section 142 of the Act.

22. The petition is disposed of accordingly.

Sd/-
(M Deena Dayalan)
Member

Sd/-
(V S Verma)
Member

Sd/-
(Dr. Pramod Deo)
Chairperson