

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. **Shri Ashok Basu, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri A.H. Jung, Member**

Petition No. 40/2006

In the matter of

Adjudication of dispute with regard to the amounts payable to Subhash Kabini Power Corporation Ltd by Madhya Pradesh State Electricity Board on account of trading of power

And in the matter of

Subhash Kabini Power Corporation Ltd

.... **Petitioner**

Vs

1. Madhya Pradesh State Electricity Board, Jabalpur
2. Adani Enterprises Ltd., Ahmedabad

.... **Respondents**

The following were present:

1. Shri U.K. Singhal, SKPCL
2. Shri G.S. Gupta, SKPCL
3. Shri V.N. Subramaniam, SKPCL
4. Shri Vikram Nankani, Advocate., SKPCL/ AEL
5. Shri Jaiveer Shergill, Advocate., SKPCL/AEL
6. Shri G. Umapathy, Advocate., MPSEB
7. Shri RB Mathur, AEL
8. Shri RK Madan, AEL

**ORDER
(DATE OF HEARING: 26.9.2006)**

The petitioner, a licensee to undertake inter-State trading in electricity has prayed for adjudication of the dispute with the respondent, Madhya Pradesh State Electricity Board that trading margin regulations notified on 27.1.2006 being prospective in operation shall not apply to the contracts concluded before the notification and that the respondent is obliged to pay the price settled between the

parties. The petitioner has further prayed for award of interest @ 18% on the delayed payment.

2. The petitioner agreed to sell power to the respondent during the period 15.1.2006 to 31.3.2006 @ 333 paise/kWh. The total quantum of electricity sold and delivered by the petitioner to the respondent is stated to be 41.28677 MUs. The petitioner has submitted that in the contract for sale of power, the transmission charges, operating charges, open access charges and the transmission losses were to be borne by it and were included in the selling rate of 333 paise/kWh agreed to.

3. The Commission in terms of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 (hereinafter referred to as "the regulations on trading margin) has notified that a licensee (inter-State electricity trader) shall not charge trading margin exceeding 4 paise/kWh of electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses. The charges for open access include the transmission charges, operating charge and the application fee. The regulations on trading margin have come into force with effect from the date of publication in the Official Gazette, that is, 27.1.2006. It has been alleged that consequent to fixation of trading margin by the Commission, the respondent has been insisting that the petitioner cannot charge trading margin exceeding 4 paise/kWh and has accordingly withheld payment of amounts due to the petitioner under the agreement. The petitioner has submitted that an amount of Rs,37,63,702/- is due and outstanding against the respondent.

4. The petitioner has contended that the regulations on trading margin being prospective in operation, apply to the contracts concluded after notification thereof. It has been further contended that the contracts signed before publication of the regulations on trading margin in the Official Gazette and under execution on that date shall continue to be governed by the terms and conditions contained in such agreements since the regulations on trading margin do not intend to take away the vested rights of the parties. The present petition has been filed against the above background, with prayers noted in the opening para above.

5. The reply has been filed on behalf of the respondent. In the reply, there is no dispute on the basic facts averred by the petitioner. The respondent has, however, submitted that the licence granted to the petitioner is subject to trading margin fixed by the Commission from time to time. It has been contended by the respondent that with the notification of regulations on trading margin, the terms and conditions agreed to in the letter of indent along with the conditions of licence issued by the Commission can be interpreted as a binding contract in view of the fact that in all the circumstances, the trader is mandatorily required to comply with the conditions prescribed in the trading licence issued by the Commission. The respondent has stated that the trading margin agreed to be charged by the petitioner from 15.1.2006 to 31.3.2006 range from 9.19 paise/kWh to 17.19 paise/kWh. The respondent has contested the petitioner's claim that by virtue of the letters of intent, any vested right has been created in favour of the petitioner.

6. During pendency of the present petition, M/s. Adani Enterprises Ltd (Adani) made an application for intervention and hearing in the matter, and to seek a

clarification that the regulations on trading margin do not apply to contracts concluded prior to 27.1.2006. Adani sought directions to the respondent to make payment for the power supplied at the contracted rates. By order dated 26.9.2006 the application made by Adani was allowed and it was impleaded as party respondent. However, in view of commonality of interest between the petitioner and Adani, they are collectively referred to as the petitioners.

7. Heard Shri Vikram Nankani, Advocate with Shri Jaiveer Shergill for the petitioners and Shri G. Umapathy, Advocate for the respondent.

8. The regulations on trading margin were notified in the Official Gazette on 27.1.2006, and have come into effect from that date. The agreements for sale/purchase of power were entered into by the parties through Letters of Intent prior thereto. The contention of the petitioners is that the regulations on trading margin being prospective in application, do not govern the agreements which were signed prior to their coming into force. On the contrary, the view of the respondent is that application of regulations on trading margin from 27.1.2006 does not amount to giving retrospective effect to them. The question is to be examined in the light of these basic contentions.

9. It is settled law that the subordinate legislation, the category within which the regulations on trading margin fall, cannot be given retrospective effect unless specially so authorized under the parent statute. It is not necessary for us to refer to the case law on the subject since the matter is well-settled and the understanding of the parties is also to the same effect. The regulations on trading margin were intended to be

prospective, applicable from the date of publication in the Official Gazette and were so published on 27.1.2006. The question is whether or not the regulations on trading margin can be applied to the contracts signed prior to 27.1.2006 and this question is to be considered on the touchstone of the principle governing retrospective operation of statutes. In K.J. Aiyar's Judicial Dictionary, (Twelfth Edition) "retrospective operation" has been interpreted as under:

"The word "retrospective" when used with reference to an enactment may mean---

- (a) affecting an existing contract or,**
- (b) re-opening up of past, closed and completed transaction, or**
- (c) affecting accrued rights and remedies, or**
- (d) affecting procedure" (Emphasis added)**

10. From the above, it is seen that the statute is considered to have retrospective operation if it, *inter alia*, affects the existing contract or the accrued rights and remedies. The respondent's contention if accepted will affect the contracts entered into by it with the petitioners unconditionally as regards the rates. This will thus amount to giving retrospective operation of the regulations on trading margin, not permissible under the law. The interpretation given by the respondent will also affect the rights that have accrued in favour of the petitioners by virtue of the concluded contracts. There is no dispute that the parties had agreed for sale/purchase of electricity at certain rates. By virtue of the agreements, the rights had accrued in favour of the parties. The conclusion is re-inforced by Section 37 of the Contract Act which legislates that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the Contract Act or any other law. The respondent has not pointed out that performance of the contract has been dispensed with or excused

under any of the provisions of the Contract Act or any other law for the time being in force. Therefore, the respondent is under obligation to comply with the provisions of the agreements arrived at with the petitioner.

11. The question somewhat similar to that is raised in the present petition was considered by the Hon'ble Supreme Court in Indian Aluminium Company Vs Kerala State Electricity Board [(1975) 2 SCC 414]. In that case, the appellant company had entered into an agreement in 1941 with the former State of Travancore for supply of electricity at certain rates for a period of 34 years with an option for renewal. After reorganization the area became part of the State of Kerala. On the establishment of Kerala State Electricity Board (the Board) under the Electricity (Supply) Act, 1948, the agreement was deemed to have been concluded with it. Further agreements were entered into by the appellant company in January 1965 and September 1965, each valid for 25 years. While the agreements were in force, the Board, acting under Section 49 of the Electricity (Supply) Act, 1948 passed "Kerala State Electricity Board High Tension Tariff Order, 1969, increasing the tariff applicable to all High Tension Consumers, including the appellant company. It was held by the Hon'ble Supreme Court that once the agreements made contained the stipulations as to charges, it was not competent for the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Hon'ble Supreme Court held that the Board could not enhance the charges in breach of the stipulations contained in the agreements and the power to fix uniform tariffs under sub-section (1) of Section 49 of the Electricity (Supply) Act could not be exercised in derogation of the stipulations fixing special tariffs agreed to. The Hon'ble Supreme Court held that if there is a contractual obligation which binds the Board not to charge anything more

than a certain tariff, the Board could not claim to override it even if it finds that the rates stipulated in the contract were not sufficient to meet the cost of production and supply of electricity and it was incurring operational losses.

12. The respondent in its reply has referred to Black's Law Dictionary to elaborate on the concept of 'Legal Rights' or 'Vested Rights'. As stated by the respondent, "legal rights" as explained in the Black's Law Dictionary means:

"a power, privilege or immunity granted under a constitution, statutes or decisional laws or claimed as a result of long usage. In a narrower signification, an interest or title in a object of property, a just and legal claim to hold, use or enjoy it, or to convey or donate it, as he may please. **A legally enforceable claim of one person against another, it being withheld from him or not in his possession. In this sense "right" has the force of "claim" and is properly expressed by the Latin "Jus". (Emphasis added)**

13. Further, based on Black's Law Dictionary again, the respondent has pointed out that "Vested Rights" means as under:

"In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the Government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justifiably be deprived otherwise then by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws; interests which it is proper for State to recognize and protect and of which individual cannot be deprived arbitrarily without injustice. **Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. A right complete and consummated and of such character that it cannot be divested without the consent of the person to whom it belongs, and filed or established, and no longer open to controversy.**" (Emphasis added)

14. From the above it is to be noted that a legally enforceable claim of one person against another leads to creation of a legal right. Further, the vested right is, inter alia, found to be a right complete and consummated and of such character that it cannot be divested without the consent of the person to whom it belongs and filed or established and no longer open to controversy. When seen in the light of the provisions of the Contract Act adverted to above, and considering the submissions of the respondent, it cannot be gainsaid that legal or vested rights were not created in favour of the petitioners by virtue of the agreements for sale/purchase of power.

15. The further contention of the respondent is that by virtue of the regulations on trading margin, new contract has come into effect since the petitioners, as per the conditions of licence, were bound by the trading margin fixed by the Commission. In our view fixation of trading margin by the Commission during subsistence of a valid contract, does not amount to substituting the agreement earlier arrived at by the petitioners with the respondent. The trading margin has been fixed by the Commission, to say the least, without the consent of the petitioner, under the provisions of law. The position is similar to change in service conditions of a Government servant, where the Government by operation of law has the power to change the service conditions unilaterally.

16. The concept of substitution of contract has been dealt with in Section 62 of the Contract Act. It provides that if a party to the contract agrees to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. From the facts placed on record, we do not find anything in support of novation or alteration of contract by agreement between the parties.

17. Learned Counsel for the respondent placed heavy reliance on the Constitution Bench judgment of the Hon'ble Supreme Court in Dr. Indramani Pyarelal Gupta Vs W.R. Nathu and Others [(1963) 1 SCR 721]. In that case, the question was whether the amended bye-laws, which were of the nature of subordinate legislation, applied to contracts to be entered into in future or also to subsisting contracts. Upon construction of amended bye-laws, the Hon'ble Supreme Court by majority held that these applied not only to contracts entered into in future, but also to subsisting contracts. The Hon'ble Supreme Court held as under:

“We see no force in this argument. The fact that the Act itself makes provision for subsisting contracts being affected, would in our opinion far from supporting the appellants indicate that in the context of a crisis in forward trading the closing out of contracts was a necessary method of exercising control and was the mechanism by which the enactment contemplated that normalcy could be restored and healthy trading resumed.

If therefore we eliminate the provisions in ss.16, 17 and 19 as not containing any indication that a power to frame a bye-law with retrospective effect was withheld from the Association, the question whether such bye-law making power was conferred has to be gathered from the terms of s.11 itself. Thus considered we are clearly of the opinion that a power to frame a bye-law for emergencies such as those for which a bye-law like 52 AA is intended includes a power to frame one so as to affect subsisting contracts for resolving crisis in Forward Markets. We have already referred to the terms of bye-law 52A which shows that when an emergency of the type referred to s.11 (2) (a) arises it is not practicable to rescue a forward market from a crisis without (1) putting an end to forward trading, and (2) closing out subsisting contracts so as to start with a clean slate for the future. When therefore under s.11 (2) power is conferred to frame a bye-law to provide for:

“(O) the emergencies in trade which may arise and the exercise of power in such emergencies including the power to fix maximum and minimum prices;”

and this is read in conjunction with clause (g) reading:

“regulating the entering into, making, performance, rescission and termination of contracts.....”

It is manifest that the section contemplates the making of a bye-law regulating the performance of contracts, the rescission and termination of contracts and this could obviously refer only to the bye-law affecting rights

under contracts which are subsisting on the day the action is taken. It is therefore manifest that s.11 authorises the framing of a bye-law which would operate retrospectively in the sense that it affects rights of parties under subsisting contracts. Finally it should be borne in mind is that ultimately what we are concerned in s.11 of the Act is the power of the Association to frame the bye-law, for if the Association could validly frame such a bye-law, the Central Government could under s.12 have a similar power. We did not hear any argument to establish that the Association had no such power.”

18. The Electricity Act, 2003 under which the regulations on trading margin have been specified does not confer any power on the Commission to make any retrospective regulations, expressly or impliedly. The regulations on trading margin are intended to have prospective application. Therefore, the judgment of the Hon'ble Supreme Court in Indramani Pyarelal Gupta (supra) is of no assistance to the respondent.

19. Learned Counsel for the respondent further submitted that the respondent had entered into contracts with other electricity traders also for purchase of electricity, prior to coming into force of the regulations on trading margin and were subsisting on 27.1.2006 when these regulations came into force. He submitted that from 27.1.1006 the other electricity traders charged margin of 4 paise/kWh as specified by the Commission. Learned Counsel argued that in case the prayer made by the petitioners is allowed, these other electricity traders might also demand higher charges by relying upon the agreements entered into with them. Subsequently, the respondent placed the following details on record as regards purchase of electricity from other traders and the payments made to them:

Name of the Trader	Period for which bills revised based on CERC notification	Rate as per Letter of Intent (Rs./kWh)	Revised rate (Rs./kWh)
Tata Power Trading Co. Ltd.	27.1.2006 to 31.1.2006	3.22	3.19
NTPC VVN Ltd.	27.1.2006 to 31.1.2006	3.25	3.24
	1.2.2006 to 28.2.2006	3.25	3.24
Power Trading Company	27.1.2006 to 31.1.2006	3.28	3.25
		3.23	3.20
		2.99	2.96
		2.56	2.54
	1.2.2006 to 28.2.2006	3.25	3.24
		3.28	3.25
		3.61	3.58
		3.27	3.26
		3.23	3.20
		2.56	2.54
		2.99	2.96
	1.3.2006 to 31.3.2006	2.30	2.29
		2.99	2.96
		2.56	2.54
2.30		2.29	
3.72		3.69	

20. We have considered the submission made on behalf of the respondent and the details placed on record. We are afraid, we are not convinced by the argument. The question raised before us is to be considered in accordance with law. In case other traders have waived the rights available to them under the law, it should not deter us to decide the dispute as per law.

21. It also deserves notice that prior to notification of the regulations on trading margin, the Commission had published the draft proposal to fix the trading margin at 2 paise/kWh in September 2005. The respondent was aware of the proposal and that the final notification was on the anvil. Yet it failed to safeguard its interests while

entering into the agreements for purchase of power from the petitioners by incorporating suitable clause in the agreements/Letters of Intent regarding the applicability of the trading margin fixed by the Commission to the transaction in question.

22. In substance, we conclude that the regulations on trading margin do not govern the agreements entered into prior to their publication in the Official Gazette, but will apply to all agreements signed after that date. We are not giving any direction for payment of specific amount claimed once we have given the above interpretation of the date of applicability of the regulations on trading margin to the contracts executed prior thereto. The parties concerned shall decide the amount due in terms of the agreements between them.

23. Before parting we consider it necessary to point out the procedural violations by the petitioners. Clause (h) of Regulation 7 of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for grant of Trading Licence and other related matters) Regulations, 2004 mandates that trading shall be carried out bilaterally between the parties by entering into appropriate contracts. It has been provided that necessary safeguards with regard to supply of electricity through trading or payment for the electricity traded shall be included in the agreements between the parties. It has been further provided specifically that all trading arrangements shall be done through letters of credit or with any other superior instrument. In case the parties had complied with Clause (h) of Regulation 7 of the 2004 regulations, the question of non-payment by the respondent would not have arisen since in that case it would have been possible for the petitioners to recover the amount agreed to by the

respondent through the letter of credit or any other superior instrument. This would have obviated the need for the proceedings initiated through the present petition. We expect the parties to comply with the Commission's regulations before an adverse view is taken. These regulations are meant to be obeyed since these have been framed in the best interests of the parties.

24. The present petition stands disposed of accordingly.

**Sd/-
(A.H. JUNG)
MEMBER**

**Sd/-
(BHANU BHUSHAN)
MEMBER**

**Sd/-
(ASHOK BASU)
CHAIRPERSON**

New Delhi dated the 27th October, 2006