

* The Hon'ble Sri Justice C.V.Nagarjuna Reddy

+ Writ Petition Nos.19359, 21928, 22177, 22193, 22601, 22602, 22603, 22605, 22606, 22798, 22797, 22816, 22817, 22818, 22819, 22832, 22833, 22939, 22943, 22944, 22945, 22951, 22952, 22953, 22959, 22964, 22965, 22966, 22967, 22968, 22992, 22993, 23002, 23003, 23024, 22960, 23058, 23207, 23208, 23211, 23240, 23267, 23275, 23277, 23279, 23283, 23284, 23287, 23288, 23292, 23303, 23325, 23329, 23330, 23348, 23366, 23367, 23368, 23369, 23370, 23371, 23372, 23373, 23374, 23375, 23378, 23407, 23409 & 23410 of 2012

% 31-07-2012

+ W.P.No.19359 of 2012:

M/s. Thermal Systems (Hyderabad)
Pvt. Ltd., rep. by its Senior Vice President
(Finance), IDA, Jeedimetla, Hyderabad. ...
Petitioner

Vs.

\$ Andhra Pradesh Electricity Regulatory
Commission, rep. by its Chairman,
Red Hills, Hyderabad and others ... Respondents

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> HEAD NOTE:

! Counsel for the petitioner : Mr. C. Kodandaram
Senior Counsel

^ Counsel for respondent No.1 : Mr. Srinivasa Rao
Putturi

^ Counsel for R.2 to R.6 : Mr. N. Sridhar Reddy
Spl. G.P. for Advocate

General

? CASES REFERRED:

- 1) 2012 (2) ALD 739
- 2) (2004) 2 SCC 747
- 3) 2004 (1) SCC 712
- 4) (2000) 6 SCC 359

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The Court made the following :

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Common Order:

In this batch of writ petitions, orders dated 17.01.2012 passed by the Andhra Pradesh Electricity Regulatory Commission (for short “the Commission”) in O.P.Nos.39 to 54 of 2011 pertaining to the Fuel Surcharge Adjustment (for short “FSA”) have been questioned. In some of these writ petitions, orders of even date in O.P.Nos.23 to 38 of 2011 pertaining to the FSA for the financial year 2008-09 are also questioned.

The brief background, in which these writ petitions came to be filed, needs to be summarized. The A.P. Power Co-ordination Committee filed applications on behalf of the four Distribution Companies (for short “the DISCOMs”) in the State of Andhra Pradesh for determination of the FSA. Under Regulation 45-B of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (for short “the 1999 Regulations”) as amended by the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) First Amendment Regulations, 2000 and also Andhra Pradesh Electricity Regulatory Commission (Conduct

of Business) Amendment Regulation 1 of 2003 (for short “the Regulation 1 of 2003). The Commission has allowed the applications by orders dated 05.06.2010 whereby it has permitted the DISCOMs to levy the FSA for the financial year 2008-2009. The said orders were challenged in a huge batch of writ petitions. The learned Single Judge, who heard the writ petitions, disposed of the same by a common judgment dated 29.07.2011. Briefly stated, the learned Single Judge held that the Andhra Power

Co-ordination Committee not being a licensee as defined under Section 2(39) of the Electricity Act, 2003, has no *locus standi* to file the applications before the Commission claiming the FSA on behalf of the DISCOMs, that under Regulation 55 of the 1999 Regulations, the Commission has no inherent power to condone the delay enabling it to entertain the applications claiming the FSA beyond the time prescribed under Regulation 45-B (4) thereof, that however, the Commission has the power to condone the delay in filing the applications by the licensees claiming the FSA even beyond the time prescribed under Regulation 59 thereof, and that while considering the applications filed by the licensees claiming the FSA, the Commission has to follow the principles of natural justice. The learned Single Judge, accordingly, set aside the orders dated 05.06.2010 of the Commission and allowed the writ petitions.

Feeling aggrieved by the said common order, several consumers filed Writ Appeal Nos.858 of 2011 and batch. Pending the writ appeals, the DISCOMs have filed

applications before the Commission for determination of the FSA for both the years, namely, 2008-09 and 2009-10. The Division Bench permitted the Commission to go-ahead with the hearing of the O.Ps and pass final orders with a further direction that the orders, if any, passed shall not be implemented. Shortly after the said order was passed, the Division Bench allowed the batch of writ appeals by common judgment dated 20.01.2012 (***M/s. Jairaj Ispat Limited, rep. by its Managing Director, Hyderabad Vs. A.P. Regulatory Commission, rep. by its Secretary, Hyderabad and others***^[1]). In the said judgment, the Division Bench held that as the amended Regulation 45-B (4) makes it explicit that failure to abide by the time stipulated therein enjoins forfeiture of future claims by the DISCOMs in that regard, the Commission cannot exercise its power under Regulation 59 of the 1999 Regulations to enlarge time in a situation covered by the amended Regulation 45-B (4). The Division Bench further held that as the applications filed by the DISCOMs were beyond the time limit prescribed by Regulation 45-B (4) of the 1999 Regulations as amended, the Commission ought not to have maintained those applications. Accordingly, the Division Bench held that the claims of the DISCOMs were hopelessly time barred.

In view of the fact that a few days before the Division Bench has delivered its judgment i.e., on 17.01.2012, the Commission has allowed the applications of the DISCOMs, which fact was not placed before the Division Bench, the

orders of the Commission for the financial year 2008-09 were not specifically set aside, but by necessary implication, they cannot have any effect in Law with the declaration by the Division Bench that the applications of the DISCOMs were hopelessly time barred and the Commission had no power to extend time.

Questioning the judgment of the Division Bench, all the four DISCOMs have filed Special Leave Petitions before the Supreme Court which are stated to be pending. It is not in dispute that the Supreme Court has not stayed or suspended the operation of the judgment of the Division Bench and an interim order, to the effect that the DISCOMs need not refund the FSA already collected from their consumers, was granted.

As noted above, the Commission has passed various orders on 17.01.2012 even in respect of the financial year 2009-10 permitting the DISCOMs to collect the FSA. As regards the FSA for the financial year 2008-09, the orders passed by the Commission made it clear that recovery of the FSA by the DISCOMs shall be subject to the outcome of the pending writ appeals as on that date. As the writ appeals were allowed and the S.L.Ps are pending before the Supreme Court, the DISCOMs have not raised any demand for recovery of the FSA for the financial year 2008-09. However, they have raised demands for the financial year 2009-10 which is assailed in these writ petitions.

At this stage, it needs to be mentioned that the orders of the Commission have been challenged on various grounds

including the merits and also on the ground that as laid down by the Division Bench, the Commission has no power to enlarge the time stipulated under the amended Regulation 45-B (4) and that, therefore, the same ratio, which applied to the financial year 2008-09, would equally apply to the financial year 2009-10, though the same is not the subject matter of the Division Bench Judgment. It is also relevant to mention that after passing of the orders by the Commission on 17.01.2012, its Secretary has addressed letter No.S-11/Secy/2012-204(1) dated 19.01.2012 to all the DISCOMs and also the other licensees wherein it is informed that the FSA orders for the financial year 2009-10 shall not be given effect to, in view of the interim order passed by this Court on 03.12.2011 in W.A.M.P.No.2564 of 2011 in W.A.No.1121 of 2011 filed by M/s. Vamshadhara Paper Mills Ltd., Srikakulam and others. Paragraph Nos.3 and 4 of the said letter are very relevant which read as under:

“3. The Commission has directed me to inform you that in view of the above orders of Hon’ble High Court of A.P., the present FSA order for FY 2009-10 shall not be given effect to, until further orders of Hon’ble High Court of A.P. in W.A.No.1121 of 2011 and shall be subject to the orders therein.

4. As regards implementation of FSA orders for FY 2008-09, similar directions have already been incorporated in the respective orders of the Commission for the four quarters of FY 2008-09 which have to be adhered to.”

In this batch of writ petitions, the main plea of

Mr. Katragadda Gopal Chowdary and Mr. C. Kodandaram, learned Senior Counsel for the petitioners in the respective cases and various other learned counsel, who adopted their submissions, is that when the judgment of the Division Bench pertaining to the financial year 2008-09 which held that the Commission has no power to enlarge time and that the applications filed by the DISCOMs for the financial year 2008-09 are hopelessly time barred, it is highly improper and impermissible for the DISCOMs to raise bills for collecting the FSA for the financial year 2009-10 in the face of the fact that the applications filed before the Commission for the financial year 2009-2010 were also time bared. The learned senior counsel submitted that unless and until the judgment of the Division Bench is reversed or at least suspended by the Supreme Court, the ratio laid down therein continues to bind the DISCOMs and that, therefore, they are not entitled to collect the FSA from their consumers.

Mr. N. Sridhar Reddy, learned Special Government Pleader representing the learned Advocate General submitted that since the orders passed by the Commission for the financial year 2009-10 are not the subject matter of the Division Bench Judgment in W.A.Nos.858 of 2011 and batch, there is no legal impediment for the DISCOMs to raise the demands and collect the FSA for the financial year 2009-10. He relied on the judgments of the Supreme Court in ***Union of India and others Vs. West Coast Paper Mills Ltd. and another***^[2] and ***Dharam Dutt and others Vs. Union of India***

and others^[3], in support of his submissions.

I have carefully read the judgments of the Supreme Court cited by the learned Special Government Pleader. But, as the facts in those cases are completely different from those on hand, these two judgments are of no avail to the respondents.

The Supreme Court in **Kunhayammed and others**^[4] **Vs. State of Kerala and another**^[4], while dealing with the doctrine of merger, deduced certain legal principles in paragraph 14 of its judgment. Principle No.4 of the judgment, which applies in all fours to the present batch of cases, is extracted hereunder:

“In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.”

In the instant cases, it is represented that the special leave petitions filed by the DISCOMs are pending and, so far, leave has not been granted. As noted above, an interim order only to the extent of stay of refund of the FSA already collected from the consumers has been granted. Therefore, technically speaking, the Division Bench Judgment not only

continues to bind the parties but it is deemed to be final till such time as leave to appeal has been granted. Even in the event of grant of leave, the finality of the Division Bench Judgment will be put in jeopardy but it continues to be binding and effective between the parties unless either it is a nullity or the Court passes a specific order staying or suspending its operation.

It is not the pleaded case of the respondents that the Division Bench Judgment is a nullity. It is also not their case that so far, the Division Bench Judgment has been stayed or suspended. Therefore, on this admitted fact situation, the Division Bench Judgment is holding the field in all its fours. As per this judgment, the Commission has no power or jurisdiction to extend the time for filing the applications by the DISCOMs beyond the prescribed period of 30 days, under the amended Regulation 45-B (4). On facts, it is undisputed that as in case of the financial year 2008-09, even in case of the financial year 2009-10, the DISCOMs have filed their applications beyond the prescribed time and the Commission has condoned the delay in filing such applications. The action taken by the DISCOMs in collecting the FSA from its consumers on the basis of such orders of the Commission is invalid in law. Following the ratio of the Division Bench Judgment, as the Commission had no such power as on today, the various orders passed by the Commission on 17.01.2012 pertaining to the FSA in respect of the financial year 2009-10 cannot be sustained in law. Obviously, being conscious of the fact that the Judgment in W.A.No.1121/2011

& batch will govern its orders passed for the Financial Year 2009-10 as well, the Commission has sent its views through its Secretary vide the latter's letter dated 19-1-2012 referred to above wherein it has directed that the orders for the Financial Year 2009-10 shall not be given effect to until further orders with the further observation that the said orders shall be subject to further orders in the W.A.No.1121/2011 & batch. This would clearly imply that the Commission was of the clear view that if the Division Bench has set-aside its orders for the Financial Year 2008-09, the ratio therein will equally apply to its orders for the Financial Year 2009-10.

Ordinarily, this Court would have *set aside* these orders, on the ratio laid down by the Division Bench, but as the Division Bench Judgment is the subject matter of the SLPs, this Court feels that propriety requires that the judgment of the Supreme Court is awaited in the SLPs pending before it.

In the facts and circumstances of the cases, all these Writ Petitions are disposed of in the following terms:

- 1) The orders dated 17.01.2012 of the Commission pertaining to the FSA for the financial year 2009-10 shall not be enforced on any of the consumers of the four DISCOMs, till disposal of the SLPs pending before the Supreme Court,
- 2) The enforceability or otherwise of the orders of the Commission for the financial year 2009-10 shall

depend upon the result of the SLPs,

- 3) In the event the Supreme Court confirms the judgment of the Division Bench, the orders dated 17.01.2012 for the financial year 2009-10 will become unenforceable. In a converse situation, the petitioners shall be entitled to question the orders of the Commission in respect of both the financial years 2008-09 and 2009-10 on merits, and
- 4) If any of the DISCOMs have collected the FSA from any of the consumers including the petitioners, they shall adjust the same in the future electricity bill/bills immediately falling due, which shall also be subject to the result of the SLPs before the Supreme Court.

As a sequel to disposal of these writ petitions, W.P.M.Ps filed therein are disposed of as infructuous.

(C.V.Nagarjuna Reddy, J)

31st July, 2012

Note: L.R. copy to be marked.

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31st July, 2012

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[\[1\]](#) 2012 (2) ALD 739

[\[2\]](#) (2004) 2 SCC 747

[\[3\]](#) 2004 (1) SCC 712

[\[4\]](#) (2000) 6 SCC 359