

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) No.157/2010**

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Date of Decision: 13.08.2010

Haryana Power Purchase Centre. Appellant/applicant
Through Mr. Parag Tripathi Sr. Advocate with
Raghav Gupta, Advocate for the
Appellant.

Versus

P.T.C. India Ltd. and Another Respondents
Through Mr.Ashish Bernard & Mr.Varun Pathak,
Advocates for respondent No.1.

Mr.Shanti Bhushan, Sr.Advocate with
Mr.Vishal Gupta, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The appellant/applicant, Haryana Power Purchase Centre (hereinafter referred to as the 'HPPC') has filed this appeal under Section 37 (1) (a) of the Arbitration and Conciliation Act, 1966 seeking inter-alia to set aside the order dated 19th February, 2010 passed in OMP No.25 of 2010 filed by the P.T.C. India Ltd. against the Jaypee Karcham Hydro

Corporation Ltd. (hereinafter referred to as 'the JKHCL) under Section 9 of the Arbitration and Conciliation Act, 1966. The appellant/applicant has also sought a direction to PTC India Ltd., respondent No.1 and JKHCL, respondent No.2 to approach Central Electricity Regulatory Commission (hereinafter referred to as 'CERC') and to make an interim arrangement for three weeks for continuation of order dated 29th January, 2010 passed by the Division Bench in FAO (OS) No.73 of 2010 whereby Single Judge was directed to dispose off the matter expeditiously and the counsel for JKHCL had stated that the said company shall not enter into any agreement with any other party for the sale of power, so as to allow the HPPC to approach the CERC and to obtain the order under Section 94 (2) of the Electricity Act, 2003.

2. By order dated 19th February, 2010, the application filed by the PTC India Ltd. under Section 9 of the Arbitration and Conciliation Act, 1966, seeking stay of termination of PPA (Power Purchase Agreement) by JKHCL and directions against the JKHCL from entering into any agreement for sale of power with any other party, was dismissed by the learned Single Judge by the said order.

3. In the said petition under Section 9 of the Arbitration and Conciliation Act, 1966 being OMP No.25 of 2010, titled as 'PTC India Ltd. v. JKHCL', an application for impleadment of the

appellant/applicant, HPPC under Order I Rule 10 (2) read with Section 151 of the Code of Civil Procedure dated 19th February, 2010 was also filed. In the application, the appellant/applicant contended that it had entered into a power sale agreement dated 25th September, 2006 for the purpose of 200 MW of power from PTC India Ltd. in which power was to be procured by the PTC India Ltd. under the Power Purchase Agreement dated 25th March, 2006 from JKHCL.

4. The allegation of the appellant/applicant was that the Power Sale Agreement (PSA) was executed for procurement of power on continuous basis for 35 years from the commercial operation date (COD) of the Hydro Electricity Power Project developed by the JKHCL in the State of Himachal Pradesh. The plea of the appellant/applicant is that the tariff payable by the appellant/applicant to PTC India Ltd. had to be determined by the said Central Electricity Regulatory Commission in accordance with its Regulations and reliance was placed on Clause 9.1.2 of Power Sale Agreement.

5. The appellant/applicant further asserted that JKHCL suffered cost escalation and approached CERC for its approval and filed a petition bearing No.153 of 2009 seeking grant of approval for the revised capital cost of Rs.7080.38/- crores and to declare and confirm that the CERC shall consider the final cost and/or tariff for the project.

According to the appellant/applicant by order dated 26th October, 2009, the CERC had adjudicated the prayer for approval of revised capital cost and did not consider final capital cost and/ or tariff for the project. It was also pleaded that under Regulation 5 of the CERC (terms and condition of tariff) Regulation, 2009 JKHCL was to approach six months before the commercial operation date. According to the appellant/applicant ultimate beneficiary of power generated from the project is the appellant/applicant as PTC India Ltd. is only entitled to recover and retain its trading margin for the supply of power for the project, and in case PPA and PSA are terminated and parties are directed only to pay damages, it will not be an adequate relief to the appellant/applicant, and if cost of procuring power would be more, the appellant/applicant shall be forced to pass it on to the consumer which will be against the public interest. In the circumstances, it was asserted that the Court is not the appropriate forum for adjudication of disputes between the PTC India Ltd. and JKHCL, and Electricity Act, 2003 is a comprehensive Act with respect to all the matters pertaining to electricity which should be determined by the CERC.

6. The appellant/applicant also contended that in the circumstances, under Section 79 (1)(f) of the Electricity Act, 2003 the CERC has the statutory responsibility to adjudicate upon the disputes involving generating company with regard to the matters connected with

Clause 'a' to 'd' of Section 79 (1). The appellant/applicant also contended that in terms of Section 94 (2) of the Electricity Act, 2003, the CERC also has the power to grant interim relief and on these allegations, the appellant/applicant sought to be impleaded as party to OMP No.25/2010, the petition filed by the PTC India Ltd. under Section 9 of the Arbitration and Conciliation Act, 1996 against JKHCL to seek the declaration that the said petition under section 9 of the Arbitration and Conciliation Act, 1996 filed by the PTC India Ltd. was not maintainable and for direction to PTC India Ltd. to approach the CERC for adjudication of his disputes with JKHCL.

7. The grievance of the appellant/applicant is that though on 19th February, 2010, application for impleadment was filed by the Appellant/applicant in OMP No.25 of 2010, and the fact about filing of the application for impleadment was mentioned before the Learned Single Judge, however, he has not taken into consideration the submissions made on behalf of the appellant/applicant. According to the appellant/applicant even if the application for impleadment of the appellant/applicant was not on record, while dismissing OMP No.25/2010, the petition of the PTC India under section 9 of the Arbitration and Conciliation Act, 1996, the learned Single Judge should have considered the pleas and contentions raised by the appellant/applicant.

8. Mr. Tripathi, learned senior counsel for the Appellant has also pointed out by referring to para 18 of the appeal stipulating that the application for impleadment filed by the appellant was withdrawn by the appellant on 24.2.2010 as the main petition being OMP No.25/2010 under section 9 of the Arbitration and Conciliation Act, 1996 had been disposed of by the Single Judge by order dated 19th February, 2010. Mr. Tripathi, senior Advocate has further contended that despite withdrawal of application of the appellant for impleadment to the proceedings under section 9 of the Arbitration and Conciliation Act, 1996 on account of non consideration of pleas and contentions of the applicant/appellant, the decision of the Single Judge dated 19th February, 2010 has been impacted and in the circumstances the present appeal shall be maintainable.

9. The learned senior counsel has relied on (1983) 3 SCC 75, M/s M.Ramnarain Private Limited Vs State Trading Corporation of India Ltd; (2002) 10 SCC 668, V.D.Barot Vs State of Gujarat and Ors. (1998) 6 SCC 507, P.R.Despande Vs Maruti Balaram Haibatti and (2000) 5 SCC 44, Jagdish Lal Vs Parma Nand in support of his contention that though the application for impeachment was withdrawn by the appellant before the learned single judge and no order had been passed on the pleas and contentions of the appellant, yet the appeal against the

impugned order passed in the petition of respondent no.1 is maintainable.

10. In Jagdish Lal (supra) the tenant had given an undertaking before the High Court to vacate the premises and thereafter, had approached the Supreme Court. It was held that the right of the tenant to approach Supreme Court under Article 136 of the Constitution of India is not curtailed because of undertaking given to the lower Court. It was further held that the Supreme Court could examine the circumstances under which the undertaking was given and decide whether the tenant's special leave petition misled the Court or deceived the other party. The Supreme Court had however, left the question moot where the tenant himself requested to the Court to vacate the premises and gave the undertaking and thereafter approached the Supreme Court. Apparently the case of the appellant is quite distinguishable as the application for impleadment was withdrawn by the appellant on his own.

11. In P.R.Deshpande (supra) it was held that the appeal by a tenant against an order of eviction would be maintainable notwithstanding any undertaking given by him before High Court that he would vacate the premises within specified time. In V.D.Barot (supra) a writ petition was withdrawn by a petitioner in order to file a representation to the

authorities and after representation was rejected, a fresh writ petition was filed which was held to be maintainable despite petitioner not withdrawing the earlier writ petition with liberty to file the writ petition after adjudication of his representation. In *M/s M.Ramnarain Pvt. Ltd.* (supra) an appeal which was not competent was withdrawn and subsequently another appeal was filed incorporating grounds which were taken in earlier appeal. The Supreme Court had held that such an appeal was maintainable.

12. The ratio of all these cases relied on by the appellant are different and distinguishable and does not support the plea of the appellant that after withdrawing his application for impleadment before the Single Judge, he can challenge the order passed by the learned Judge in the main petition in which impleadment was sought by the appellant. It is no more *res integra* that the ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It must be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and

circumstances in two cases.

13. On 19th February, 2010 when the Single Judge decided the petition of the respondent no.1 under section 9 of the Arbitration and Conciliation Act, 1996 pursuant to the order of the Division Bench in FAO (OS) 73 of 2010 dated 29th January, 2010 to decide the petition expeditiously, though the application for impleadment was filed by the appellant, however, it was neither listed nor could be termed to be pending, so as to take the same into consideration by the Single Judge.

14. Whether the appellant was a necessary party to be impleaded in a petition under Section 9 of the Arbitration & Conciliation Act, 1996 has not been adjudicated by the Single Judge. Without impleadment of the appellant, whether the appellate Court should interfere with the discretionary interim order passed by the Single Judge. In the peculiar facts and circumstances of this case it would not be appropriate to take up the pleas and contention of the appellant in order to determine the validity of the order of the learned Single Judge dated 19th February, 2010.

15. This also cannot be disputed that the appellate Court is not to interfere with the exercise of discretion of the Court of first instance and

substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored the settled principles of law regulating grant or refusal of interim orders. An appeal against exercise of discretion is appeal on principle and the appellate Court is not to reassess the material and to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The appellant could contest the grant or decline of interim order by respondent No.1 against respondent No.2 after being impleaded as a party to the petition. The appellant for the reasons known to him opted to withdraw the application for impleadment and consequently the pleas and contentions of the appellant remained undetermined by the Learned Single Judge.

16. After withdrawing the application for impleadment to the petition under Section 9 of the Arbitration & Conciliation Act, 1996 filed by respondent No.1, if the appellant was of the view that he was a necessary party and should have been heard and its pleas considered by the Single Judge, the appellant could have filed another application for impleadment and could have sought review of order dated 19th February, 2010 passed by the learned Single Judge in OMP No.25/2010 the petition of respondent No.1 under Section 9 of Arbitration &

Conciliation Act, 1996 or could have initiated any other proceedings deemed appropriate. This observation by this Court, however, does not adjudicate that after withdrawing the application for impleadment without seeking leave of the Court to file a fresh application, whether such a subsequent application would be maintainable or not.

17. In the circumstances the facts which have emerged are that the application for impleadment was withdrawn by the appellant and the appellant was not impleaded by the learned Single Judge. The pleas and contentions raised by the appellant in respect of the order under Section 9 of the Arbitration & Conciliation Act, 1996 dated 19th February, 2010 have not been considered and adjudicated by the learned Single Judge. In the circumstances, whether this appellate Court should consider the pleas and contentions of the appellant and interfere with the impugned order dated 19th February, 2010 which is a discretionary order passed by the Single Judge, is to be determined by this Court.

18. If the jurisdiction of the appellate Court is restricted and the appellate Court is not to interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion is exercised arbitrarily or capriciously or perversely or in

ignorance of settled principles of law, it will not be appropriate for the appellate Court to exercise jurisdiction in favour of the appellant whose pleas and contentions were not considered because the appellant/applicant had opted to withdraw his application for impleadment and consequently even the pleas and contentions raised by the appellant could not be considered by the learned Single Judge.

19. In the totality of facts and circumstances and taking into consideration all the facts, it would not be appropriate for the appellate Court to exercise its appellate jurisdiction against the order dated 19th February, 2010 passed by the learned Single Judge in a petition under Section 9 of the Arbitration & Conciliation Act, 1996 by respondent No.1 against respondent No.2 on the basis of pleas and contentions of the appellant. Consequently the appeal of the appellant cannot be entertained and is rejected.

20. The learned counsel for the appellant has also placed reliance on (2008) 4 SCC 755, Gujarat Urja Vikas Nigam Ltd v. S.R.Power Ltd holding that conduct of arbitration under Section 86(1) (f) of Electricity Act, 2003 would be governed by the provisions of the Arbitration & Conciliation Act, 1996 to the extent there is no conflict with any

provisions of Electricity Act and in case of conflict the Electricity Act would prevail. The learned counsel for the appellant has contended that while considering the order of the Single Judge dated 19th February, 2010 passed on a petition under Section 9 of the Arbitration & Conciliation Act, 1996 filed by respondent No.1 against respondent No.2, the ratio laid down by the Supreme Court in Gujarat Urja Vikas Nigam Ltd (Supra) be considered. The learned counsel has also placed reliance on Order 1 Rule 8A of Code of Civil Procedure authorizing Court to permit a person or body of persons to take opinion or to allow persons to take part in the proceedings. In the circumstances, it is contended that since the appellant is also an interested person in questions of law and pleas and contentions raised by respondent No.1 and respondent No.2, therefore, the said precedent be considered by this Court while adjudicating the challenge to the order dated 19th February, 2010 of the learned Single Judge.

21. This has not been disputed by the learned counsel for the appellant, Mr.Prag Tripathi, Senior Advocate that the said precedent is referred to by both the parties, respondent No.1 and respondent No.2 in the appeal being FAO (OS) No.146/2010 titled PTC India Ltd v. Jaypee Karcham Hydro Corporation Ltd as the said appeal was listed along with the present appeal and was argued by respective counsel for

respondent No.1 & 2. Therefore, the said precedent, Gujarat Urja Vikas Nigam Ltd shall be considered by the Court in the appeal filed by PTC India Ltd against J.P.K.H.C.L against the order dated 19th February, 2010. In the circumstances the appellant is not to be given any further permission under Order 1 Rule 8A of Code of Civil Procedure to take part in the proceedings as the appeal No.FAO (OS) No.146/2010 had been heard before the present appeal.

With these observations the present appeal is disposed of.

ANIL KUMAR, J.

August 13, 2010
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MOOL CHAND GARG, J.