IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.10400 of 2014

Date of decision: 11.02.2015

Dakshin Haryana Bijli Vitran Nigam, through its authorized representative, C-Block, Vidyut Sadan, Vidyut Nagar, Hisar, Haryana-125 005.

... Petitioner

versus

State of Haryana, through Secretary (Power), Government of Haryana, New Secretariat, Haryana, Chandigarh, and others.

.... Respondents

II. <u>Civil Writ Petition No.22390 of 2014</u>

Uttar Haryana Bijli Vitran Nigam, Vidyut Sadan, Plot No.C16, Sector-6, Panchkula, Haryana, through its authorized representative.

... Petitioner

versus

State of Haryana, through Secretary (Power), Government of Haryana, New Secretariat, Haryana, Chandigarh, and others.

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Samir Malik, Advocate and
Mr. Raheel Kohli, Advocate,
for the petitioner.

Mr. Keshav Gupta, Assistant Advocate General,
Haryana.

Mr. Sanjeev Sharma, Senior Advocate, with
Mr. Vikram Sharda and Mr. Rose Gupta, Advocates,
for respondent No.3 in CWP No.10400 of 2014.

Mr. Rose Gupta, Advocate,
for respondent No.3 in CWP No.22390 of 2014.

Mr. Atul Lakhanpal, Senior Advocate,
with Mr.Vikrant Pamboo, Advocate,
for respondent No.8 in CWP No.10400 of 2014.

Mr. Vikrant Pamboo, Advocate,
for respondent No.8 in CWP No.22390 of 2014.

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1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ?**Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J.

1. The writ petition in CWP No.10400 of 2014 is at the instance of Dakshin Haryana Bijli Vitran Nigam (for short, 'DHBVN') and the writ petition in CWP No.22390 of 2014 is by Uttar Haryana Bijli Vitran Nigam (for short, 'UHBVN'). They involve adjudication of the same issue on law and facts and the narration of the facts to address the point of law that would require to be adjudged shall be taken from CWP No.10400 of 2014.

2. Both the writ petitions challenge a common order issued on 20.11.2013 issued by the Haryana Electricity Regulatory Commission. The common order was passed in 4 different petitions filed for various reliefs. The point that hogs our interest is raised in the petition filed on 17.12.2012 by Jindal Stainless Limited (JSL) seeking for amendment of clause 15(6) of Haryana Electricity Regulatory Commission (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012 read with clauses 57 to 59

of the aforesaid Regulations. Another petition dated 01.01.2013 was filed by Mahakali Agro & others seeking for clarification/ implementation of 2012 Regulations read with clauses 57 and 59 of the said Regulations. JSL, which is the contesting respondent before me, had sought for amendment of 2012 Regulations with regard to the application of clause 15(6) by incorporating the underlined portion to read as under:

> "During peak load hours restrictions, the open access consumers shall restrict his total drawal, <u>excluding the drawal under open access</u>, to the extent of peak load exemption allowed by the distribution licensee." (underlining mine)

The Company had submitted that the clause as it already existed without such an exclusion clause was against the spirit of the Electricity Act as well as National Electricity policy notified by the Central Government. It was pointed out that the concept of Peak Load Exemption Charges (for short, 'PLEC') introduced by the order of the Commission on 22.12.2000 was only on the ground that the Discoms were required to purchase costlier power for onward supply to the consumers during peak load hours and hence PLEC were charged to compensate for the extra cost incurred. The Company's grievance was that it would be totally illogical to restrict the drawal of consumers during peak load hours, including drawal through open access to the extent of special dispensation allowed during peak load hours. The objection was only that the restriction must not be applied also for open access consumers, for, according to them, the Discoms were not incurring anything extra to procure costlier power. The proposed amendment was to exclude the application of PLEC for the drawal under open access. Their plea for amendment was in the context of a sales circular issued by DHVBNL on 17.04.2013 wherein it had been provided that PLEC would also be chargeable on the energy drawn through open access and further that in case the total energy drawal exceeded, the contract demand then for levying demand surcharge for the energy drawn through open access would also be included.

3. The contention in defence of the Regulations as they existed and the sales circular was that the definition of "contract demand" as appearing in Regulation 3 of Regulation 2012 was nothing but sanctioned contract demand as appearing in the agreement. Agreements were actually executed at times when the concept of open access itself was not in existence. Consequently, the agreements did not make any specific provisions with reference to open access mechanism. During peak load hours when the open access consumers scheduled power through open access and draw more than what they had scheduled through open access, they actually draw their entire requirements beyond open access

schedule. Upto the contract demand such ad hoc drawals were detrimental to grid security, planning efficiency as well as loss of opportunity for the Discoms and non-recovery of operation costs. It was the submission of the Power Corporation that PLEC as provided under Regulation 15(6) was essential to ensure grid stability and security, since unrestricted peak demand really pushed up the network cost, and if unhindered drawals were not restricted during peak load hours, the grid stability would be in great jeopardy.

4. While dealing with the issue, the Commission observed that it had not approved of any sales circular to allow for PLEC to be levied on the power brought through open access by the embedded open access consumers and hence, the same could not therefore be automatically extended by Power Corporation through open access. The Commission, however, observed that open access power brought in by open access consumers also flowed through same distribution system of the Discoms and beyond a point such power may also be contributing to the system constraints and congestion. The Commission, therefore, observed that it would revisit the issue and incur necessary changes to the 2012 Regulations and effective from the date when the notification was issued.

5. It can be noticed therefore the crucial issue raised by the parties as regards PLEC for open access consumers was dealt with on a reasoning that there was no approval taken from the

Commission, even while conceding the fact that even the open access power flowing from the same distribution system would contribute to system constraints and congestion and hence, the same would require to be revisited by an amendment. DHBVNL is in challenge to this order pointing out to the fact that the order came to be passed when the open access consumers were actually applying for an amendment to the Regulations. They were aware of the fact that in the absence of specific exclusion of the drawal under open access, they would become liable for PLEC in view of the specific provisions that open access consumers were required to restrict the total drawal including the drawal under open access to the extent of peak load exemption allowed by the distribution licensee. The open access consumers were actually therefore not seeking for any adjudication for an interpretation of a clause, but they were indeed asking for a modification through exclusion and they were applying for regulatory mechanism of the Commission to be put in place.

6. The issue of whether the direction that was ultimately given was in the exercise of adjudicatory powers of the Commission or in its regulatory power assumed significance and was brought to center-stage at the time of arguments in view of the objection taken by the respondents that under the Regulations, an order passed by the Commission in its adjudicatory jurisdiction was amenable to an appeal remedy and the writ petition itself was not maintainable. The

primordial thrust in the arguments of the counsel appearing on behalf of the petitioner was, therefore, to show the nature of order that was passed and the maintainability of the writ petition. The learned senior counsel appearing on behalf of the respondents refused to open even on the merits of the case and meet the justification for PLEC for open access consumers. Even when I invited the learned senior counsel to argue on the merits on the pleas raised by the petitioner, the counsel would express that he would be satisfied in meeting the issue of jurisdiction and rest his defence there.

7. The issue of what qualifies for regulatory powers of the Commission and whether the nature of redressal that is possible could be by means of a writ petition or an appeal came for consideration on a reference to a Constitution Bench in ***PTC India Limited Versus Central Regulatory Commission-2010(4) Supreme Court Cases 603***. The crucial point for consideration raised for determination was, inter alia, *"Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of the Central Electricity Regulatory Commission (fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?* The Supreme Court held, inter alia, that if a dispute arises in adjudication of interpretation of a

Regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111. However, no appeal to the Appellate Tribunal shall lie on the validity of Regulation made under Section 178. It concluded that the Appellate Tribunal for Electricity will have no jurisdiction to decide on the validity of the Regulations framed by the Central Electricity Regulatory commission under Section 178 of the Electricity Act, 2003. The validity of the Regulation, however, could be challenged by seeking judicial review under Article 226 of the Constitution of India. In other words, if the Regulation 15(6) itself is challenged in its existing form as making untenable the levy PLEC to open access consumers, the writ petition would lie. If it was, on the other hand, interpreting Regulation 15(6) as not making possible the levy of PLEC for open access in the manner it has been framed, then only an appeal would lie.

8. It does not require much forensic skill to see that at no point before the Commission an argument was even attempted by the open access consumers that there was any ambiguity or interpretation that was necessary to Regulation 15(6). On the other hand, the open access consumers were pleading that the Regulation was against the spirit of Electricity Act, 2003 as well as the National Electricity Policy notified by the Central Government. Therefore, it wanted a change of Regulation by way of amendment and, therefore,

they had proposed in the existing provision under Regulation 15(6) an exclusion for PLEC for open access consumers. The regulatory powers of the Commission are brought out under Sections 61, 79(1), 111 and 178 of the Electricity Act. Section 61 provides for terms and conditions for determining of tariff through Regulation that may be framed therefor. Section 79, while setting out the functions of the Central Commission sets out 3 different functions, some of them which are regulatory, some of them which are advisory and some of them which are adjudicatory. I would find Section 79 (a) to (c) that deal with the tariff or the inter-State transmission of electricity to be regulatory and clause (f) of Section 79 as adjudicatory in so far as it refers to the power to resolve the dispute involving generating companies or transmission licensee. The advisory functions are spelt out under clause (2) of Section 79 that refers to its power to advise the Central Government to formulate the National Electricity Policy or tariff policy, promotion of competition, promotion of investment etc. Section 178 specifically makes reference to powers of Central commission to make regulations.

9. We have already seen that the Supreme Court has held in ***PTC India Limited*** (supra) that the Regulation issued under Section 178 is in the nature of subordinate legislation and the validity of the Regulations themselves cannot be challenged by way of an appeal. A judicial review of the Regulations could only be brought by filing

writ petition under Article 226 of the Constitution. If there could be an appeal, the appeal could be with reference to interpretation of the Regulations. I have already pointed out that there was hardly a scope for an interpretation. The provision in Regulation 15(6) was clear enough and the open access consumers were therefore seeking for an amendment to the Regulations in its power to make a subordinate legislation. The objection that was taken up for consideration before the Commission was rested on a plea of how the open access consumers were trying to say that the existing Regulations were against the spirit of the policy and, therefore, would require to be amended. When the Electricity Commission was, therefore, accepting the contentions of the Power Corporations that an express provision was required to be revisited, it stated so on the basis that it found a justification for the contentions of the Power Corporations and the need for application of PLEC. It could have simply concluded the issue on that and also held that there was no scope for bringing an amendment in the manner sought for by the open access consumers. It, however, held that there was a need to revisit because the Power Corporations had not taken its sanction for issuing the sales circular. The point urged by the counsel for the petitioner was, therefore, that the sales circular was not the source of power or the justification but the Regulation 15(6) itself provided the justification for applying PLEC to open access consumers.

10. The manner in which the Regulation 15(6) could be read shall be also with reference the imbalance charges leviable under Regulation 24. While Regulation 15(6) provides that open access consumers shall restrict its total drawal including the drawal under open access to the extent of peak load exemption, Regulation 24 makes reference to scheduling of all transactions pursuant to open access, be it long term, medium term and short term. The entitlement on the drawal point for any 15 minute block should be worked out in advance after taking into account transmission or distribution losses. Regulation 24 specifically provides that when the recorded drawal was more than the entitled drawal during peak load hours, the consumer would be liable to pay peak load violation charges in addition to demand surcharge, if applicable. Regulation 43 provides for settlement of energy at drawal point in respect of embedded consumers. Clause (ii) of the said Regulation provides that the recorded maximum drawal will be accounted for and charged as per Regulation 24(2).

11. The learned senior counsel Shri Sanjeev Sharma appearing on behalf of the respondents would try to make short of the whole issue as regards the non-maintainability of the writ petition by reference to the Regulations which are issued by the Haryana Electricity Regulatory Commission on 03.12.2013 stating that as per the existing Regulations, PLEC is not leviable on the

energy drawn through open access for embedded open access consumers and leviable only on the energy drawn from the distribution licensee. This, according to him, was itself an admission that Regulation 15(6) as it originally stood did not contemplate PLEC as leviable to open access consumers. Their own petition for amendment was to make clear what was already inherent. According to him, the petitioners cannot therefore plead that the Electricity Commission was exercising in its regulatory jurisdiction. The learned senior counsel would point out that what was at issue was the implementation of the terms and conditions of the 2012 Regulations. It was, therefore, essentially a matter of adjudication of the rights on an interpretation of the Regulations. Even the complaint by the open access consumers was only that the intervention of the Commission was necessary since it was against the sales circular.

12. I cannot accept the above argument made by the learned senior counsel for the respondent that the issue before the Commission was merely an issue of implementation of a Regulation that already existed. On the other hand, the Regulation 15(6) was so applied to justify PLEC to open access consumers and the open access consumers had a plea that the Regulation was against the stated policy and would require to be amended. The decision of the Commission came in a context of a specific delegated legislative

power that was possible for its exercise to benefit the open access consumers. If the Electricity Commission found a justification for PLEC for open access consumers, it ought to have simply rejected the plea for amendment but it was wrong to allow for the respondents to get what they wanted on a specious reasoning that the sales circular had not been approved but the Regulation 15(6) would be re-visited. If the Regulation framed already with its approval concluded the issue of PLEC, the sales circular must be taken as merely an application of what was already laid down under the Regulations. There was no other warrant for a specific approval from the Commission. I would, therefore, find that the decision of the Commission to be unjustified and the challenge brought before this court in the writ jurisdiction was perfectly tenable.

13. The petitioner brought sufficient justification on its merits for levy a PLEC. I have already observed that even the Commission found that there was a justification on merits and it was, therefore, making reference to a need for revisiting the provisions. The counsel would refer to the issues of the increase of network cost, the requirements to maintain grid stability, the reliability of supply, reduction of volatility in demand and enhancement of operational efficacy. The learned senior counsel appearing on behalf of the respondents was not prepared to join issues on merit at all. It must be remembered that the decision of the

Supreme Court in ***PTC India Limited*** (supra) cannot be wrongly understood to even fetter the jurisdiction under Article 226. If the Supreme Court was holding that the validity of regulation cannot be challenged before the appellate Tribunal and only an interpretation thereof or dispute arising therefrom could be taken before the Tribunal, it ought not to be understood that what could be taken before the Tribunal could not be brought in challenge under Article 226. Even if the remedy by way of appeal against the decision to the Tribunal were assumed to exist on a reasoning that the impugned order was adjudicatory, there could be nothing inherently incompetent to test the correctness in the writ jurisdiction. It must be remembered that the limitation to exercise of jurisdiction under Article 226 is invariably a self-imposed one. The lack of jurisdiction for a Tribunal may non-est an order passed by it. There is no such limitation for this court. If the impugned order is untenable and even if a right of appeal to Tribunal were to exist, this is a fit case to exercise the writ jurisdiction as well to correct a serious error in the impugned order. With the respondent not willing to join the issue on merit to the contentions raised by the petitioner the respondents literally hand on a platter a concession that the petitioner's contentions are indeed tenable.

14. The counsel for the petitioners also refers to several decisions relating to unjust enrichment and the open access

consumers having already shifted the incidence of burden on the ultimate consumers of their products and hence they could not have the benefit of claiming any refund from the Power Corporation. Since I have held that the Regulation 15(6) itself allowed for PLEC to be claimed from open access consumers and found the levy to be justified, I find no reason for making reference to any of those decisions.

15. The impugned orders of the Electricity Commission are quashed and both the writ petitions are allowed.

(K.KANNAN)
JUDGE

11.02.2015
sanjeev