

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

WP.No.3595 of 2015

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ORDER:

In this Writ Petition, the petitioner is seeking refund of a sum of Rs.47,94,590.80 ps. collected from petitioner towards Fuel Surcharge Assessment charges (for short, 'the FSA') for the year 2008-09 with interest at the rate of 24% per annum.

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THE WRIT PETITION

2. The petitioner herein is a private limited company and had established an industrial unit in Medak District for which it had obtained a H.T. power supply service connection bearing No.MDK-1020 from 2nd respondent which is a licensee under the provisions of the Electricity Act, 2003.

3. For the year 2008-09, the Andhra Pradesh Electricity Regulatory Commission had permitted the Power Co-Ordination Committee constituted by the erstwhile Government of the composite State of Andhra Pradesh to submit proposals on behalf of four distribution companies (Discoms) owned by the State for collection of the FSA charges for 2008-09. Thereafter, necessary permissions were accorded and basing on the same the

Discoms, who are the distribution licensees under the Act, collected FSA charges from petitioner for the year 2008-09.

4. This action on part of the Power Co-Ordination Committee was questioned by several consumers in WP.No.18212 of 2010 and batch before this Court. The said Writ Petitions were allowed on 29.07.2011 holding that the said committee had no power to submit proposals on behalf of Discoms. As regards the delay in filing proposals, the learned single Judge left it open to the Discoms to file applications afresh before the said commission.

5. This was questioned in W.A.No.858 of 2001 and batch (**Jairaj Ispat Ltd., Hyderabad v. Andhra Pradesh Regulatory Commission, Hyderabad and others**^[1]) before a Division Bench of this Court.

6. In the meantime, the Discoms filed applications before the Regulatory Commission which condoned the abnormal delay in filing such applications and permitted the Discoms to collect FSA charges.

7. Subsequently on 20.01.2012, in **Jairaj Ispat** (1 supra), the Division Bench allowed the batch of Writ Appeals holding that as per Regulation No.44-B(4) of the Andhra Pradesh Electricity Regulatory Commission (Business) Regulations, 1999, the Regulatory

Commission cannot condone the delay in filing applications afresh before it by the Discoms in view of the limitation contained in the said regulations regarding filing of claims by Discoms.

8. This was questioned in the Supreme Court of India in SLP (Civil) Nos.13785-13837 of 2012 by the Discoms.

9. The Supreme Court of India by order dt.08.05.2012 stayed the recovery of the FSA charges.

10. The petitioner contends that, in terms of the judgment in **Jairaj Ispat** (1 supra), the petitioner who had paid the FSA charges for the year 2008-09 of Rs.47,94,590.80 ps., is entitled to refund of the same. The petitioner contends that although respondents are bound to refund the above amount collected towards FSA charges from petitioner, they had not so far chosen to do so and the action of the respondents in not refunding the same is illegal, arbitrary, unjust, irrational and violates Articles 14, 19(1)(g), 21, 265 and 300-A of the Constitution of India and that the respondents are bound to refund the same with interest at the rate of 14% per annum in terms of the subject code regulations. The petitioner also contends that it had submitted a representation dt.01.12.2014 requesting the respondents to refund the FSA charges with interest, but no orders were passed thereon and that was why the present Writ Petition was

filed.

11. The counsel for petitioner reiterated the above submissions and further contended that the issue raised in this Writ Petition is squarely covered by a Division Bench judgment of this Court in **Jairaj Ispat** (1 supra), that although the 1st respondent had preferred S.L.P.s in the Supreme Court of India against the said order, the Supreme Court of India had granted stay of refund of the FSA charges only as against the respondents therein, but since the petitioner was not a party to the said matters and since the Division Bench judgment referred to above was not stayed or suspended by the Supreme Court of India, the petitioner's Writ Petition is also liable to be allowed in terms of the said judgment. He further contended that petitioner undertakes to refund the same in the event the respondents are successful in the S.L.P.s and would execute a bond to that effect.

12. The counsel for petitioners also placed reliance on an order dt.31.07.2012 in WP.No.19359 of 2012 and batch wherein a learned Single Judge considered the Division Bench judgment in **Jairaj Ispat** (1 supra), and opined that the ratio of the Division Bench judgment would equally apply for the financial year 2009-10 although the same was not the subject matter of the Division Bench judgment and that the ratio of the Division Bench judgment continues to bind the parties and it is deemed to

be final till leave to appeal has been granted.

THE COUNTER AFFIDAVIT OF RESPONDENTS

13. Respondent nos.1 to 3 filed counter-affidavit contending that the judgment in **Jairaj Ispat** (1 supra) is subject matter of S.L.P.Nos.13785 – 13937 of 2012, that the Supreme Court on 08.05.2012 had granted stay of refund of the amount already collected and that if any amount is paid by petitioner towards FSA for the year 2008-09, in view of the said Supreme Court order dt.08.05.2012, the same cannot be refunded. They contend that respondents would abide by the final orders of the Supreme Court in the above SLPs. They also contend that in WP.No.19359 of 2012 and batch, the learned single Judge by order dt.31.07.2012 had directed that the order dt.17.01.2012 issued by the Electricity Regulatory Commission pertaining to FSA for the financial year 2009-10 shall not be enforced till the disposal of the SLP pending before the Supreme Court, and if any amounts are collected towards FSA charges, the same shall be adjusted in the bills. The respondents contend that the said order pertains only for the financial year 2009-10, and since the petitioner is claiming refund of the FSA charges for 2008-09 and the same are subject matter before the Supreme Court of India, the relief claimed by petitioner cannot be granted.

THE CONSIDERATION BY THE COURT

14. I have noted the submissions of both sides.

15. From the facts narrated above, there is no dispute that collection of FSA charges for 2008-09 by the Discoms was set aside by a single Judge in WP.No.18212 of 2011 and batch and the same was confirmed by the Division Bench judgment in **Jairaj Ispat** (1 supra). It is also not in dispute that the judgment of the Division Bench was challenged before the Supreme Court in SLPs.13785-13937 of 2012 and the Supreme Court had only granted stay of refund of the amount already collected.

16. However, the order therein would apply only to the parties in the SLPs and cannot be applied to petitioner who was not a party therein. The SLPs filed by Discoms are pending as on date and it is not the case of respondents that leave has been granted by Supreme Court therein. Therefore, the decision of the Division Bench continues to bind the parties till such time as leave of appeal is granted.

17. As rightly held in the order dt.31.07.2012 in WP.No.19359 and batch, even if leave is granted in the SLPs, the finality of Division Bench judgment in **Jairaj Ispat** (1 supra) will be put in jeopardy, but it continues to be binding and effective between the parties since it is not a nullity unless the Supreme Court passes a specific order staying or suspending its operation. Since there is no stay

or suspension of the said order of the Division Bench, the judgment in **Jairaj Ispat** (1 supra) continues to bind the respondents, and therefore, in terms of the said judgment, it has to be declared that the Power Co-ordination Committee could not have filed applications before the Commission on behalf of the Discoms for levying FSA in 2008-09 and Regulation No.59 of the Andhra Pradesh Electricity Regulatory Commission (Business) Regulations, 1999 did not confer any power on the said Commission to enlarge the time stipulated in Regulation No.45-B(4) thereof for the purpose of entertaining applications from Discoms for determination of FSA. Consequently the respondents cannot retain the amounts collected for the year 2008-09 towards FSA from petitioner.

18. In this view of the matter, the Writ Petition is allowed and the action of respondents in not refunding the sum of Rs.47,94,590.80 ps. to petitioner, which sum had been collected as FSA charges for the year 2008-09, has to be termed as illegal, arbitrary and violative of Articles 14, 19(1)(g), 21, 265 and 300-A of the Constitution of India. Consequently, the petitioner is entitled to refund of the sum of Rs.47,94,590.80 ps. with interest at the rate of 24% per annum from the date of such collection till the date of refund. No order as to costs.

19. However, the amount shall be refunded to

petitioner by respondents subject to petitioner executing a bond to the effect that if the respondents are successful in Special Leave Petition pending before the Supreme Court against the judgment in **Jairaj Ispat** (1 supra), it would pay the same to the respondents with same rate of interest.

20. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 19-01-2016

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