REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 684 OF 2007

POWER GRID CORPORATION OF INDIA ...APPELLANT

VERSUS

TAMIL NADU GENERATION AND DISTRIBUTION CO. LTD. & ORS. ETC. ETC ...RESPONDENTS

WITH

CIVIL APPEAL NO. 13452 OF 2015

NTPC LIMITED ...APPELLANT

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION AND ORS. ...RESPONDENTS

J U D G M E N T

N.V.RAMANA, J.

Civil Appeal No.684 of 2007

1. The present appeal arises out of the decisions of the Central Electricity Regulatory Commission, New Delhi ["CERC"] wherein an issue relating to capitalization of Foreign Exchange Rate

Variation ["FERV"] was determined by the Commission and thereafter affirmed in a review petition, *vide* orders dated 30.06.2003 and 04.12.2003 respectively. On appeal, the Appellate Tribunal for Electricity, New Delhi *vide* judgment dated 04.10.2006 in Appeal Nos. 135-140 of 2005, approved the methodology for ascertaining the FERV; however, with respect to apportionment of the FERV, the appeal was allowed and FERV was directed to be apportioned only in respect of debt liability. It is this judgment of the Appellate Tribunal for Electricity, New Delhi which is in challenge before us.

2. The appellant is a transmission company which plans, executes and makes available transmission systems for conveyance of power from one place to another. The tariff which it charges for the conveyance is fixed by the CERC. FERV is a pass through which is kept to ensure that any liability or gain by virtue of fluctuation in foreign exchange rates passes to the beneficiary in a staggered manner.

3. The limited issue before us is apportionment of FERV into debt and equity after FERV has been calculated and added to capital cost.

4. The learned counsel on behalf of the appellant contended that any foreign exchange gets added to the capital cost and not individually to debt or equity. This capital cost is thereafter divided into debt and equity, on the basis of a normative debt-equity ratio. As a natural corollary, even the FERV needs to be apportioned both towards debt and equity. Further, he contends that FERV has been apportioned as such, as a matter of practice.

5. On the other hand, the learned counsel for respondent no.1 disputed the existence of such practice. He contended that the Electricity Regulatory Commissions Act, 1998 ["the Act"] was enacted to do away with such practices. He referred to Regulations 1.3 and 1.7 of Tariff Regulations, 2001 and argued that liability accrued on account of FERV can be recovered by the appellants directly from respondent no.1 and the question of capitalization of FERV does not arise.

6. Having heard the counsels and from a detailed perusal of the record, at the outset, we note that the present question regarding the apportionment of FERV between debt and equity is not a question of law, much less a substantial question of law. Regulation 1.13(a) of Central Electricity Regulatory Commission

(Terms and Conditions of Tariff) Regulations, 2001 ["Tariff Regulations, 2001"] which has been cited before us to buttress the argument of apportionment of FERV does not in fact provide for apportionment of FERV and rather, is restricted only to the methodology of calculation of FERV. This methodology of FERV calculation is not in challenge before us and has already been affirmed by the CERC as well as the Appellate Tribunal for Electricity, New Delhi. No rule, regulation, statute or precedent has been cited before us to substantiate the argument that post calculation FERV needs to be necessarily apportioned in a debt-equity ratio, much less to substantiate what exactly this ratio is and on what factors the same is determined. Thus, on this ground alone, for lack of a substantial question of law, these appeals ought to be dismissed.

7. In any case, once the FERV is calculated, in terms of Regulations 1.3 and 1.7 of the Tariff Regulations, 2001, the same can be recovered by the appellants from respondent no.1 without even filing a petition before the CERC. Regulations 1.3 and 1.7 of Tariff Regulations, 2001 provide as under:

> "**1.3** These Regulations shall apply where the capital cost-based tariff is determined by the Commission.
>
> …
>
> **1.7 <u>Recovery of Income Tax and Foreign Exchange Rate Variation shall be done directly by the utilities from the beneficiaries without filing a petition before the Commission</u>**. In case of any objections by the beneficiaries to the amounts claimed on these counts, they may file an appropriate petition before the Commission."
>
> <u>(emphasis supplied)</u>

8. This has not been done in the present case, i.e., Civil Appeal No. 684 of 2007. Further, FERV is sought to be capitalized by the appellant in the normative debt-equity ratio of 50:50 as a matter of practice, without citing any rule, regulation, statute or precedential law.

9. This observation becomes pertinent in light of the fact that the Act was introduced to reform the problems in the power sector prior to 1998, *inter alia*, the lack of rational retail tariffs, poor planning and operation, the neglect of the consumer and the absence of an independent regulatory authority. The Act also aimed at protecting and improving the financial health of the State Electricity Boards, which were losing heavily on account of irrational tariffs and lack of budgetary support. Thus, noting the

premise on which the Act was enacted and the fact that the Tariff Regulations, 2001 prescribed under the aegis of this Act do not provide for apportionment of FERV in a particular debt-equity ratio, this Court is not inclined to interfere in the matter.

10. Further, the present dispute arises with respect to tariff charged between 01.04.2001 and 31.03.2004 on account of FERV calculation and apportionment. Any variation in the apportionment of FERV now, for the abovementioned period, will consequently be passed on to the consumers. This will be unfair to the consumers who were not consumers for the abovementioned period but will eventually bear the brunt of transactions which took place 15-18 years ago. This is another ground for non-interference in the present matter [*See* ***U.P. Power Corpn. Ltd.*** **v.** ***NTPC Ltd.***, (2009) 6 SCC 235].

11. In light of the abovementioned observations, the appeal is dismissed. No order as to costs.

Civil Appeal No. 13452 of 2015

12. This appeal is preferred against the impugned judgment and order dated 18.08.2015 passed by the Appellate Tribunal for

Electricity whereby the appeal preferred by the appellant was dismissed. Further, the order of the CERC was upheld by observing that the CERC has rightly applied the decision dated 04.10.2006, which is the same order that is impugned in Civil Appeal No. 684 of 2007, to the instant matter and directed that the entire FERV should be apportioned only in respect of debt liability. Thus, the issue being the same, this appeal is also dismissed in a sequel to the discussion set out above. No order as to costs.

.....J.
(N.V. RAMANA)

.....J.
(MOHAN M. SHANTANAGOUDAR)

.....J.
(INDIRA BANERJEE)

NEW DELHI;
MAY 09, 2019.