



**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO(S).4124 OF 2009**

**AJMER VIDYUT VITRAN
NIGAM LIMITED**

.....APPELLANT(S)

VERSUS

**HINDUSTAN ZINC LTD. AND
ANOTHER**

.....RESPONDENT(S)

J U D G M E N T

Rastogi, J.

1. The instant appeal under Section 125 of the Electricity Act, 2003 (hereinafter referred to as the “Act 2003”) has been preferred at the instance of the distribution company, namely, Ajmer Vidyut Vitran Nigam Limited (for short “AVVNL”), a Government Company incorporated under the Companies Act, 1956 with an object, inter alia, for distribution and supply of electricity, assailing the impugned judgment dated 03rd February, 2009 passed by the Appellate

Tribunal for Electricity.

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2. The brief facts culled out from the record and relevant for the purpose are that the Hindustan Zinc Limited (for short “HZL”) has captive generating plant set up at Chanderia in the District of Chittorgarh, State of Rajasthan where it generates electricity primarily for its own consumption and uses the electricity generated at its units/works situated at:- i) Debari in the district of Udaipur; ii) Agucha in the district of Bhilwara; and iii) Dariba in the district of Rajsamand. All the three districts are in the State of Rajasthan and for wheeling of electricity generated in the captive generating plant, HZL uses the distribution system of AVVNL from the point of injection at Chanderia to the points of drawal at its different units/works as indicated above.

3. In other words, the use of the distribution system for wheeling electrical energy from the generating point to the drawal is called “open access facility” and the user of such facility is called “open access consumer”. For the aforesaid purposes, regulations were framed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as the “Commission”) in exercise of its power conferred under Section 42 read with Section 181 of the Act, 2003 by notification dated 26th May, 2004 called the Rajasthan Electricity

Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 (for short “Regulations, 2004”) which came to be further amended by 3rd amendment vide notification dated 27th December, 2006 under Section 42 read with Section 181 of the Act, 2003 called the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) (3rd Amendment) Regulations, 2006(hereinafter being referred to as the “Regulations 2006”).

4. Under the scheme of Regulations 2004, open access customer has been defined under Regulation 2(c) which includes such persons using or intending to use the transmission system or the distribution system or both the licences in the State for transmission or wheeling of electricity in the State and open access agreement is to be executed between the parties in terms of Regulation 12 and the pricing mechanism of unscheduled interchange pricing is to be determined in terms of Regulation 20 as specified by the Commission for the State from time to time.

5. Regulations 2(c), 12 and 20 of Regulations, 2004 which came to be notified on 26th May, 2004 are reproduced thereunder:-

“2. Definitions

....

c) "Open Access Customer" means a person using or intending to use the transmission system or the distribution system or both of the licensees in the state for transmission or wheeling of electricity in the State;

.....

12. Open Access Agreement

(1) An open access customer shall enter into commercial agreements with the transmission and distribution licensees, generators, traders and others, as applicable for use of their transmission and distribution systems;

(2) The agreement shall provide, amongst other things for the eventuality of premature termination of agreement and its consequences on the contracting parties;

(3) After agreements have been entered into and copies furnished to State Load Dispatch Centre, the State Load Dispatch Centre shall inform the open access customer the date from which open access will be available which will not be later than 3 days from the date of furnishing of agreements.”

20. Unscheduled interchange pricing

The payment for mismatch between the schedule and the actual drawal shall be governed by the pricing mechanism as specified by the Commission for the State from time to time.”

6. In terms of the provisions of Regulations 2004, the agreement for short term open access of distribution system and supply of regular and standby HT supply came to be executed between the parties i.e. the appellant and the respondent herein on 22nd September, 2006 and draft format of the open access agreement

became effective from 01st May, 2006 and they are concerned with Part III of standby supply and the manner in which the billing has to take place followed with payments. The relevant clauses of the open access agreement for the purpose are reproduced thereunder:-

“22. Tariff applicable for stand by supply shall be as applicable for temporary supply as per tariff for electricity supply determined by RERC as applicable to HT large industrial/ mixed load/ bulk supply service. Tariff shall be applied on daily basis as & when such standby supply is availed & shall be subject to minimum annual drawal for 36 days in a financial year.

25. This agreement shall, subject as hereinafter provided, remain in force at least for a period of one year in the first instance commencing from the date of supply and shall remain in force till its termination.

Provided that either party shall be at liberty to terminate this agreement or get his contract demand altered by giving one month's notice in writing in that behalf subject to the condition shall reduction in contract demand will be permissible only on completion of initial period of one year including the notice period. The consumer can also get his connection permanently disconnected or get his contract demand reduced on the same day of notice if he is ready to by pay the minimum billing amount equivalent to one month.

29. Billing

(1) Ajmer Discom (distribution licensee) shall raise the bills at the end of the month for the use of distribution system for wheeling of Open Access Power, as also for regular and standby supply. The bills shall be for:

- a. Wheeling charges for the contracted open access power on distribution system as determined by the Commission from time to time.
- b. Cross-subsidy surcharge as determined by the Commission, from time to time under OA Regulations.
- c. Additional surcharge as determined by the Commission from time to time under OA Regulation in case the consumer avails

open access and receives electricity supply from a licensee other than (i.e. distribution licensee of the area of supply).

d. Regular supply as per tariff for supply of electricity, specified by the distribution licensee for temporary supply for large industrial / non domestic/ mixed load service (schedule HT-5).

e. Standby supply as per tariff for supply of electricity, specified by the distribution licensee for temporary supply for large industrial/non domestic/ mixed load service, during the period of outage of generating unit effecting open access supply for the days of such drawals.

f. Inadvertent drawal of electricity in excess of regular & standby supply as per subclause (e) at temporary supply tariff.

g. Reactive energy charges for open access supply at the rates specified by the Commission.

(2) The Billing shall be made as per finalized energy accounts issued by SLDC, based on various para-meters at 15 minutes interval, starting from 0.00 hours of the day, stored in ABT complaint meters and as specified by the Commission.

Provided, that pending finalization of energy accounts by SLDC, bills shall be issued by the distribution licensee based on provisional energy account.

Provided that a soft copy of the provisional and final energy account shall be supplied to open access customer along with the bills.

30. Payments:

The open access customer shall arrange the payments for the bills raised by the distribution licensee within the due date indicated on such bills. In the event of monthly bill[s] not paid in full within the period specified on the bills, the Open access customer shall pay the Late Payment Surcharge to the distribution licensee. Late payment surcharge shall be as specified for applicable tariff at clause 28(d) from time to time.

This agreement shall be governed by the provisions of the general conditions of supply of the distribution licensee except for the specific provisions made in this agreement. Provided that such specific provisions will apply to the respective part of the agreement. This agreement is liable to be modified subject to revision/final agreement approved by RERC.”

7. Consequently, the Commission in terms of open access regulations specified a standard format of agreement for short term open access for distribution system and for HT supply which came to be served on 03rd January, 2007. It may be relevant to note that under clause 29(1)(f), the standard format of agreement was supplied by the Commission by its letter dated 03rd January, 2007, which is referred to as under:-

“29(1)(f). inadvertent drawal of electricity in excess of regular & standby supply as per subclause (e) at temporary supply tariff.”

8. Although, it was forwarded to the respondent for its signatures on 07th June, 2007, Clause 29(1)(f) of the format was different from the standard agreement prescribed in the open access regulations and the change effected was thus (inadvertent drawl of electricity in excess of regular & standby supply as per sub-clause (e) at temporary supply tariff).

9. Pursuant to the release of standard format agreement, the appellant (AVVNL) sought certain clarifications pertaining to alleged contradiction in Clauses 29(1)(f) and 32(4) of the standard format agreement from the Commission. In furtherance thereof, the

appellant issued a revised demand for access drawal of electricity on the basis of tariff for regular supply on 30th June, 2007.

10. The reference to the changes in the standard agreement for HT supply and short term open access in distribution came to be examined by the Commission in the Petition No.134/07 and after deliberation, the Commission made substantial changes and altered Clauses 29(1)(e) and 29(1)(f) and 32(4) of the standard format agreement and observed that the inadvertent drawal will be billed at the same rate as regular supply irrespective of whether such inadvertent drawal was done during a period of outage of generating unit affecting open access supply or during the period of shortage of supply.

11. To be more specific, Clause 29(1)(f) earlier provided that all inadvertent supply would be charged as per temporary supply tariff but under order dated 15th September, 2007, the Commission altered the position substantially and held that instead of the tariff for temporary supply, a tariff for regular supply will be payable for inadvertent drawal. The extract of the order passed by the Commission dated 15th September, 2007 with which the present

controversy is concerned is referred to under Clauses 29(1)(e) and 29(1)(f) which are reproduced hereunder:-

“Clause 29(1)(e) :

13. Under clause 29(1)(e) it has been proposed that in the situation of reduced supply or outage of generating unit effecting supply to Open Access Consumer the tariff for standby supply shall be as per tariff for temporary supply, whereas in the Agreement the situation considered is the outage of generating unit only. Jodhpur Discom has agreed for his proposal, Sh. P.N.Bhandari, also agreed to the proposed change to be incorporated in the Agreement.

Clause 29(1)(f) :

16. Under clause 29 of the Agreement it is stipulated that the distribution licensee shall raise the bills for different purposes wherein at para (f) it is for inadvertent excess drawal of electricity. Under clause 29(1)(f), it is now proposed to specify the applicable rate also which is actually missing for billing inadvertent excess supply for the sake of clarify in implementation. Sh. Bhandari stated that since inadvertent supply or drawal, according to Commission's own definition is inevitable mismatch, which cannot be stopped by licensee or the CPP, therefore, levy of excess demand charges in such cases would be outright harsh. Shri Bhandari further submitted that in clause 29 (1)(f) the provision to charge temporary supply tariff on per day basis when drawal has exceeded is quite logical and does not require any change as it being accidental and non intentional.

17. The inadvertent supply in this case is the excess demand over and above the regular supply demand plus standby supply demand which is in excess of regular and standby supply. The existing provision in the Agreement considered inadvertent drawal, which is in excess of regular and standby supply. The standby supply has been further qualified as the supply which is as per sub clause (e) to be billed at temporary supply tariff. This qualification is inadvertent and can be deleted. However, this does not mean that the applicable tariff for inadvertent or excess drawal is temporary supply tariff. The accounting and billing of permissible and excess demand is covered in clause 32 of the Agreement for both the scenarios i.e. with ABT & without ABT. The proposed changes clarify that this inadvertent supply is a part of excess demand of regular supply contract demand. Jodhpur Discom has not agreed to the proposed change stating that drawal of electricity in excess of regular and standby supply should

be billed at temporary supply tariff. Jaipur Discom also did not agree to the proposal without stating any reason.

Commission's decision :

20. In view of the above, it is decided that the sub-clause 29(1)(f) of the Agreement be clarified further as under:

"(f) drawal of electricity in excess of sum of the contract demand under regular supply and standby supply shall be billed alongwith 29(1)(d) above."

12. No clarification was made by the Commission as to whether the substantial changes which have been made under the open access agreement will apply retrospectively from the date of agreement when executed or prospectively from the date the Commission under its Order dated 15th September, 2007 has given effect to. Although a clarification was made by the Secretary of the Commission to be prospective which indeed holds no authority but when the bills were raised by the appellant for the period from June, 2006 to February, 2008 (for the anterior period) by demand notice dated 12th March, 2008, aggrieved with the same, the respondents filed appeal before the Appellate Tribunal questioning the order of the Commission dated 15th September, 2007 with the grievance that the substantial modification has been made in terms of the standard format agreement and is not merely an interpretation/clarification of the standard format agreement and in the given facts and circumstances,

it will apply only prospectively and the demand raised for the anterior period to the substantial changes that the Commission has given effect to by its order dated 15th September, 2007 will not in any manner be construed different on the clarification under terms of open access agreement.

13. The Appellate Tribunal after taking note of the submissions made under its order impugned held that the proposed changes which are effected by the Commission and particularly, in Clause 29(1)(f) are substantial changes in the standard format agreement and further observed that it has altered the position substantially and changed the tariff from temporary supply to regular supply in cases of inadvertent drawal and such substantial changes/amendments which have been made, in no manner, can be read as mere clarification but a substantial alteration in the standard format agreement, therefore, the same can be given effect to only from the date, i.e. 15th September, 2007, the Commission has introduced those amendments under the agreement. The operative part of the Order of the Tribunal is quoted hereunder:-

“The impugned order of the Commission says that "any interpretation/clarifications etc. to the order dated 15.09.07 have to be derived from within it". The Commission thus means that retrospectivity or prospectivity of the order has to be determined

from the order itself. Apparently, the Commission is avoiding to make a categorical pronouncement about the prospectivity or retrospectivity of the order dated 15.09.07. Nonetheless, the Commission in paragraph 12 of the impugned order, as extracted above in paragraph 12, says that the order dated 15.09.07 is but an interpretation of various clauses of the standard format. Thus the Commission, without making a categorical pronouncement says that the order dated 15.09.07 shall apply with effect from the date standard format was issued. Thus there is a genuine grievance on the part of the appellant which has required the appellant to present the appeal. We find force in the contention of the appellant. The order dated 15.09.07 has to be read as an order amending the standard format issued on 01.03.07 and therefore can be given effect to only from 15.09.07. The respondent No.2 in its petition No. 166 of 2007 had prayed that the order dated 15.09.07 be declared as operative retrospectively from the effective date of agreement i.e. 01.05.06. This prayer could not at all have been allowed because even the format as issued on 01.03.07 could not be given retrospectivity from 01.05.06. The parties had agreed in the original agreement to abide by any change in the terms and conditions of open access notified by the Commission. This does not mean every time there is a change, notified by the Commission, the change will relate back to the effective date of the agreement. Every change can have only prospective effect. Therefore, the change brought about by the order dated 01.03.07 would be effective only from 01.03.07. Similarly, the change brought about by order dated 15.09.07 could be effective from 15.09.07. The petition No. 166 of 2007 presented by respondent No.2 before the Commission only deserved to be dismissed.”

14. The judgement of the Appellate Tribunal dated 03rd February, 2009 became the subject matter of challenge in appeal before us under Section 125 of the Act 2003.

15. Learned counsel for the appellant submits that changes which have been given effect to by the Commission under its order dated 15th September, 2007 are strictly in terms of the scheme of Regulations 2004 which clearly postulate that the parties will abide

by any change in the terms and conditions, if any, being notified by the Commission and once the Commission has recorded its satisfaction and introduced those changes in the open access agreement dated 22nd September, 2006, it goes without saying that such clarification stands incorporated and made a part of the agreement from the date of its execution. It is true that to give retrospective effect to any statutory instrument, power is vested with the legislature but in the instant facts and circumstances, where the parties have entered into a commercial agreement (open access agreement) with open eyes that they will abide by any change in the terms and conditions of the open access agreement notified by the Commission, all alterations effected by the Commission indeed will have to be read as a part of the agreement as being incorporated from its very inception. Thus, in the facts and circumstances, the finding of prospective applicability of the changes in Clause 29(1)(f) which has been given effect to by the Tribunal under its order dated 03rd February, 2009 is not sustainable and needs to be interfered with by this Court.

16. Learned counsel for the respondents, on the other hand, while supporting the finding recorded by the Tribunal submits that the

Commission under its order dated 15th September, 2007 has made substantial changes in the open access agreement executed between the parties and Clause 29(1)(f), in particular, which was clear in terms that during the period of outage of the generating unit effecting the open access supply because of which all inadvertent supply would be charged as per temporary supply tariff which has been substantially altered by the Commission and instead of the tariff for temporary supply, the tariff for regular supply became payable for inadvertent drawal and this cannot be considered to be a mere clarification under the terms of agreement executed between the parties and if that being so, all such substantial modifications/amendments which are made under the terms of agreement, in no manner, can be read prejudicial to the interest of the parties and if such substantial change which has been given effect to is given retrospective effect, that indeed will seriously prejudice the rights of the respondents, more so, when the conditions of the open access agreement with which the present dispute is concerned in reference to Clauses 29(1)(e) and 29(1)(f) of the agreement are neither in contradistinction nor in contravention to the provisions of the Regulations 2004 or of 3rd Amendment 2006. In

the given circumstances, the finding recorded by the Tribunal that such changes being substantial in character may not be read prejudicial to the interest of the parties inter se to be read prospectively and that has been accepted by the respondents and accordingly, the payments are made after 15th September, 2007 in terms of the modified clause 29(1)(f) which the Commission has given effect to and the finding which is duly supported by law needs no interference of this Court.

17. We have heard the learned counsel for the parties and with their assistance perused the material available on record.

18. The question in the instant appeal before us is as to whether the Order dated 15th September, 2007 of the Commission is a mere interpretation/clarification of standard format agreement or the order changes the position substantially the terms of the format having prospective effect for raising future bills.

19. It is not disputed that the Commission issued the draft agreement to give effect to the Regulations, 2004 and further 3rd amendment was made to the regulations on 27th December, 2006 with provisions for unscheduled interchange pricing. The

Commission further made amendment in the format on 03rd January, 2007 and included Clause 32 in the agreement.

20. The initial standard format agreement executed between the parties on 22nd September, 2006 effective from 01st May, 2006 undisputedly, refer to inadvertent drawal of electricity in sub-clause 29(1)(f) as quoted above and that such drawal in excess of regular and standby supply was to be charged as per sub-clause (e). Sub-clause (e) simply provided that standby supply would be charged as per temporary rates during the period of outage of generating unit affecting open access supply for the days of such drawal. Clause 22 makes no exception for standby supply during the period of outage of generating unit affecting open access supply. In other words, the “period of outage of generating unit affecting open access supply” in sub-clause (e) is not of any consequence but all that it can mean is that during the time of outage, the standby supply will be charged at the same rate at which temporary supply is charged and if sub-clause (e) and sub-clause (f) are read in conjunction, it clearly manifests that all inadvertent supply will be charged as per temporary supply tariff. Sub-clauses 29(1)(e) and 29(1)(f) which have been substantially altered by the Commission under its Order dated 15th September,

2007 holds that instead of the tariff of temporary supply, the tariff of regular supply will be payable for inadvertent drawal.

21. It may further be noticed that the new sub-clause makes no reference to outage of the generating units or of unscheduled interchange. At the same time, Clause 32(4) under the heading “unscheduled interchange pricing” also mentions excess drawal at the drawal end beyond the permissible limit in case of reduced supply or outage of suppliers generating station. The situation contemplated in Clauses 29(f) and 32(4) deals in different context and if they are overlapping, it will always be open for clarification but the Order of the Commission dated 15th September, 2007, in our view, cannot be considered to be as such a clarification since it has virtually amended the original Clause 29(1)(f) thereby changing the tariff for inadvertent drawal from temporary supply rate to the regular supply rate which indeed is a substantial alteration in the conditions of the agreement.

22. It is also not the case of the appellant that the conditions of open access agreement with which we are presently concerned and particularly, Clauses 29(1)(e) and 29(1)(f) of the agreement are either in contradistinction or in contravention to the Regulations, 2004 and tariff to be charged for inadvertent drawal from temporary supply rate

was equally permissible under the scheme of Regulations, 2004 and agreement was accordingly executed between the parties in compliance thereof.

23. In our considered view, the substantial change/modification which has been given effect to by the Commission under its order dated 15th September, 2007 under Clause 29(1)(f) effecting the tariff for inadvertent drawal from temporary supply rate to regular supply rate is indeed a substantial change in the condition of the agreement and prejudicial to the interest of the parties (respondents herein) and cannot be read to apply retrospectively from the date of agreement executed between the parties.

24. Although, we cannot lay down a straight-jacket principle as to what is to be considered a clarification or what may tantamount to a substantial change or modification but if we take note of the guiding principles from Section 152 of the Code of Civil Procedure, 1908 in a way where there is an unintentional omission or mistake or an arithmetic or typographical error, if any, while drafting the agreement that may have been permissible to give an effect at a later stage from its inception but, at the same time, where there is a substantial amendment/alteration in the conditions of agreement, if taken place

with its inception, may certainly cause prejudice to the rights of the parties inter se financially or otherwise. As we are dealing with the commercial agreement, if any modification, that too substantial is being permitted to be altered under the agreement executed between the parties at a later stage with retrospective effect even by the statutory authority in the garb of correction or mistake or any typographical error, if any, that may, if prejudicial to the interest of the parties inter se in law be neither permissible nor advisable to give effect anterior to the date of modification/altercation in terms and conditions of the agreement.

25. This Court, by an interim order dated 27th August, 2010, directed the appellant to file an undertaking in the format of an affidavit that in case the appeal fails, the money which has been deposited by the respondents will be refunded subject to adjustment, if any, with interest that may be fixed by the Court at the appropriate time. Taking note of the order dated 27th August, 2010 passed by this Court, directing the appellant to refund the amount deposited by the respondents with interest, we consider it appropriate to clarify that since the parties are in long business relations, let the money which has been deposited by the respondents as noticed by this

Court in the order dated 27th August, 2010, be adjusted against the future bills to be raised by the appellant in the terms as agreeable to the parties.

26. Consequently, the appeal stands dismissed with the observations.

27. Pending application(s), if any, stand disposed of.

.....**J.**
(AJAY RASTOGI)

.....**J.**
(ABHAY S. OKA)

NEW DELHI
FEBRUARY 17, 2022.