SUPREME COURT OF INDIA **REPORTABLE**
Bench: Justices Sanjay Kishan Kaul, Sudhanshu Dhulia, Aravind Kumar
Date of Decision: October 09, 2023

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO._2425 OF 2023
CIVIL APPEAL NO._2426 OF 2023

NABHA POWER LIMITED **… Appellant**

Versus

PUNJAB STATE POWER CORPORATION LIMITED **…Respondent**

Section, Acts, Rules, and Article:

Electricity Act, 2003

Subject: Dispute over recovery of deductions in monthly tariff under the Electricity Act, 2003, and subsequent contempt proceedings.

Headnotes:

Civil Appeal - Dispute over recovery of deductions in monthly tariff under the Electricity Act, 2003 - Matter traveled from Regulatory Commission to Appellate Tribunal and to the Supreme Court - Judgment delivered in Nabha Power Limited v. Punjab State Power Corporation Limited - Relief granted regarding washing cost of coal and Gross Calorific Value of coal. [Para 1-2]

Contempt Proceedings - Respondent's non-compliance with payment orders - Contempt petitions filed - Court compelled respondent to make payment in installments - Liberty granted to raise future disputes. [Para 5-15]

Fresh Dispute - Respondent filed a petition before the Regulatory Commission seeking approval for recovery of amounts paid to the appellant - Allegations of inflating coal costs and washing discrepancies - Appellant's objection to maintainability. [Para 12-19]

Impugned Order - Regulatory Commission maintains the petition - Appellant argues against reopening settled issues - Court finds respondent's actions as attempts to evade payment obligations under the 2017 judgment. [Para 20-23]

Costs Awarded - Appellants awarded costs for their legal expenses - Appellants' legal fees quantified. [Para 24-25]

Appeals Allowed - Impugned order set aside with awarded costs. [Para 26]

Referred Cases:

Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The dispute, pertaining to recovery of deductions of monthly tariff by the respondent, gave rise to proceedings under the Electricity Act, 2003 (hereinafter referred to as the '*said Act*'), which travelled from the Regulatory Commission to the Appellate Tribunal and finally to this Court. The Supreme Court dealt with the matter in terms of the judgment in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508.***

2. The limited aspect, on which relief was granted by this Court qua part of the amount, can be summarized as under:

i. The Appellant is held entitled to the washing cost of coal, the transportation from the mine site via washing of coal to the project site inclusive of cost of road transportation for the period where it was necessary.

ii. The Gross Calorific Value ("GCV") of the coal would have to be taken at the project site.

iii. The amount payable to the Appellant as the consequences thereof be remitted within a period of three months from the date of this order, failing which it would carry interest @ 12 per cent per annum (simple interest)

3. The respondent filed M.A. No.1562/2017 in the aforesaid Civil Appeal praying for a direction to the State Commission to determine the amount payable by the respondent as per the aforesaid reported judgment of 05.10.2017 and grant the respondent reasonable time to make payment. This Court found no merit in the application in terms of the order dated 15.12.2017 and observed that it was for the respondent to calculate the amount payable and thereafter disburse the sum due under the judgment, which must be done within a period of four weeks from the date of the order.

4. The next endeavour made by the respondent was through a Review Petition Civil No.165/2018 seeking review of the order in the main judgment itself which was also dismissed on 06.02.2018 opining that having gone through the records there is no error apparent on the face of the record.

5. Despite the aforesaid proceedings, the appellant (*Nabha Power Limited*) was not paid the amount and, thus, they filed Contempt Petition no.12771278/2018 (referred to as the '*First Contempt Petition*') aggrieved by the nonrelease of payment. This Contempt Petition was tagged with another Contempt Petition No.1766-1767/2018 filed by *Talwandi Sabo Power Limited*, the other appellant in one of the appeals before us. The orders passed in these Contempt proceedings dated 07.08.2019 and 03.09.2019, respectively, in identical terms, once again dealt with the controversy. By referring to the main judgment pronounced by this Court on 05.10.2017, the Bench came to the conclusion that on reading of the aforesaid, it is made crystal clear by the judgment observed as under:

> "On a reading of the aforesaid, what becomes clear and what is made crystal clear by the judgment is the fact that, in the formula, both F^{COAL}_{n} and PCV_{n} are costs/ gross calorific value of coal which are actual in nature. This being so, when PCV_{n} is spoken of in the formula, it makes it clear that what is referred to is the weighted average gross calorific value of coal as received at the project site on actuals thereof, and that includes total moisture content that is measured at the project site. Equally, what is meant in F^{COAL}_{n} in the formula, is the actual cost of purchase of unwashed coal, which would involve the actual grade of unwashed coal that is provided by the coal company to PSPCL. This being the case, we are of the view that the judgment has to be followed, both in letter and in spirit, by working the formula as aforesaid, and consequently, deleting alien figures in both numerator and denominator."

6. The aforesaid would, thus, show that vide order dated 07.08.2019 the Court made it abundantly clear that the judgment should be followed in letter

and spirit and disposed of the Contempt Petitions with a direction to pay the amount as a result of the order within a period of eight weeks from the date of the order. Thus, this endeavour of the respondent to delay and cause confusion of the amount to be determined for payment also did not succeed.

7. The appellant addressed a letter dated 07.10.2019 to the respondent, highlighting certain contemptuous actions and called upon the respondent to rectify the computation and pay the dues. Soon thereafter, the respondent filed M.A. No.2396-97/2019 in the First Contempt Petition seeking directions from the Court to have the amounts payable to the appellant to be determined by appropriate authority. The appellant filed Contempt Petition (C) No.11741177/2019 before this Court (referred to as '*Second Contempt Petition*').

8. On 25.11.2019, M.A. No.2396-97/2019 filed by the respondent was dismissed while granting further twelve weeks' time to make payment to the appellant in terms of the judgment dated 05.10.2017.

9. The next development to be noted is that the respondent filed a subsequent Petition No.25/2019 under Section 86(1)(a) read with Section 62 of the Electricity Act on 24.12.2019 seeking approval of the Regulatory Commission for recovery of the amount paid to the appellant in compliance with the Supreme Court's order dated 07.08.2019 from the consumers by proportionately increasing the retail supply tariff of various categories of the consumers. Soon thereafter, the respondent also filed a reply to the Second Contempt Petition filed by the appellant.

10. The Respondent on 14.10.2020 issued a Notice of Dispute to the appellant under Article 17 read with Article 11.6 and Article 11.7 of the Power Purchase Agreement disputing the monthly energy bills and on 15.10.2020 vide

I.A. No. 106244 of 2020 the Dispute Notice was sought to be brought on record before this Court.

11. The Second Contempt Petition came to be decided on 09.03.2021 opining that the respondent was guilty of contempt by not complying with the order dated 05.10.2017. In effect, this Court granted an imprimatur to the calculations of the outstanding dues as understood by the appellant as on 09.03.2021 and directed the respondent to make payment of the same in two equated installments on or before 31.03.2021 and 31.05.2021.

12. In July, 2021, the respondent filed Petition No.49/2021 before the Regulatory Commission seeking, *inter alia:*

i. directions against the Appellant seeking due and correct accounts & details of washing of coal;
ii. coal quality reports etc.;
iii. refund of principal amount of Rs. 386.80 crores;
iv. late payment surcharge.

13. The appellant filed a preliminary objection against the maintainability of that petition and sought dismissal of the said petition as being nonmaintainable. It is this aspect, which has been adjudicated by the impugned order dated 06.04.2022, which opined that the petition filed by the respondent was maintainable as they amounted to fresh disputes as per the order dated 09.03.2021.

14. We may now turn to the phraseology used in the order dated 09.03.2021 in the Second Contempt Petition. It sketched out the dispute and took note of the contentions that there was another endeavour being made to circumvent the orders passed by the Court. This Court, in a chart form, referred to the situation pre and post the order in both the appeals and opined that the Court had little doubt that the order dated 05.10.2017 had not been complied with. The counsel for the respondent thereafter took some time to obtain instructions, as noticed in that order, and came back in the proceedings to state that the respondent will ensure that the order is complied in *toto*. It was also noticed that though the stand of the respondent was that the whole amount stood paid, in the note submitted by them it was admitted that there were arrears even as per the calculations of the respondent. On the assurance to pay the amounts, for which imprimatur was given in that order, the two installments were granted, as prayed for, which would also include interest or any other component, which would be admissible as per the contract *inter se* the parties and there were also the payments for future charges, which would have to be paid as and when the contractual right arises in favour of the appellants.

15. It is paras 13 and 14 of this order, which according to the respondent, gave cause to the respondent to move a petition before the Commission, which has resulted in passing the impugned order. Paras 13 and 14 read as under:

"13. The last aspect which arises for consideration is a plea which was sought to be advanced on behalf of the respondents that in their perspective, there is some problem arising from the records maintained for the GCV unwashed coal and the washed coal as according to them the reject worked out more and their apprehension is that unrealistically the GCV is being varied to cause larger financial commitments from the respondents. What they seek to contend as per the note is that the discrepancy in terms of yield loss and quality of washed coal usually happens when good quality of coal is diverted under the garb of rejects in the washing process which should have been used for generation of power and this in turn raises the issue of mismatch of GCV. On perusal and calling for certain datas, it is a view of the respondents

that their apprehension is not without merit. It is thus their submission that having found this aspect, the respondents cannot be left remedy less as it is a dispute which needs adjudication for which the relevant authority is the SERC and they seek to invoke the jurisdiction of the forum for the said purpose for which notice has been issued.

14. We have examined the aforesaid plea and it is our view that insofar as the liabilities of the respondents to the appellants arising from the judgment are concerned, the matter stands closed in terms of our judgment dated 05.10.2017 and orders passed on the applications from time to time. What is said to be raised is really in the nature of a fresh dispute. If that be the position, we have not precluded the respondents from raising all future disputes as we were concerned with adjudication of certain aspects where we accepted part of the claims of the appellants and rejected part of the claims of the appellants. In our view, it will be for the authority to consider whether any of the claims sought to be preferred by the respondents can really be open to any fresh adjudication in view of the judgment rendered by us and the orders passed by us referred to aforesaid. We make it clear that the liberty to approach the SERC arises from the contract itself but that certainly cannot open the chapters which have been closed and that would be taken care of by the SERC while adjudicating the claim now sought to be raised by the respondents."

16. The aforesaid order records the plea of the respondents that there was some problem arising from the record maintained for the GCV (Gross Calorific Value) unwashed coal and the washed coal as according to them the reject works out more and their apprehension was that unrealistically the GCV is being varied to cause larger financial commitments from the respondents. It appeared form the plea, as submitted in the note in the Court, that the discrepancy in terms of the yield loss and quality of washed coal usually happens when good quality of coal was diverted under the garb of rejects in the washing process, which should have been useful for generation of power and this in turn resulted in the issue of mismatch of GCV. The respondents contended that they could not be left remediless as it is a dispute, which needs adjudication, for which the relevant authority is the Regulatory Commission.

17. This Court opined in para 14 unequivocally that the matter arising from the judgment dated 05.10.2017 and orders passed in the applications from time to time stood closed. What was sought to be raised was really in the nature of fresh dispute and "*if that be the position*" we have not precluded the respondents from raising "*all future disputes*" as we were concerned with the adjudication of certain aspects. It was left to the authority concerned whether any of the claims, sought to be preferred by respondents, could really be opened to any fresh adjudication in view of the judgment rendered by this Court and the orders passed from time to time. It was further clarified that the liberty to approach the Regulatory Commission arose from the contract itself but '*certainly cannot*' open the chapter which had been closed and that would

be taken care of by the Regulatory Commission. The proceeding was closed with the hope and a caution to the respondent that there should be no further occasion for moving an application or revival of the contempt proceedings otherwise the consequences would be very serious. In the end, it was further observed that this Court had not expressed a view on the merits of the dispute now sought to be raised by the respondents as the occasion for the same had not arisen.

18. The submission of the respondent was that what had been done was in pursuance to the liberty granted and all that the Commission had opined was that it would examine the issue and the judgment of this Court would not foreclose the examination in view of the order dated 09.03.2021 passed in Second Contempt Petition. The alleged non-disclosure of information evidencing the fact of inflating the cost in relation to coal, it was alleged that though the calorific value of coal of 1500 kilos calorie per kg was the average mark provided, coal of higher calorific value was taken out as coal rejects while the coal rejects had to be less than 2200 kilo calories per kg. The details of the coal rejects were not provided resulting in higher washing charges and not taking into account the income from the disposal of the coal rejects. In this context, it was submitted that the washing of the coal was done by a washing operator of the appellant though it was approved by the respondent.

19. The submission of the appellant was that this is the same wine in a new bottle. All these issues had been dealt with earlier in the judgment as well as in the various applications filed by the respondent. They referred to the reply filed in the First Contempt Petition as well as the Second Contempt Petition and the MAs filed by the respondents. These allegations, *inter alia*, were regarding the appellant taking monetary benefit on account of increase in GCV of washed coal, requirement of reconciliation for making payment, the same expert opinion to justify alleged increase in GCV and the same Notice of Dispute issued for the first time by the respondent.

20. When we examined the issue, we find the same thing being raked up again and again only as an endeavour to not make payments, till in the Contempt proceedings they were compelled to make payment. The liberty granted by the order dated 09.03.2021 cannot be construed to seek refund of the

amount paid under the orders passed by this Court from time to time. What was noticed was that some aspect was raised which was really in the nature of fresh dispute. The Court did not preclude the respondents from raising *'all future disputes*' but that cannot be to unsettle the effect on the main judgment dated 05.10.2017 abundantly clarified from time to time. Finding themselves helpless in the face of the Second Contempt and with possibility of serious consequences, they sought to wriggle out of the consequences arisen by offering to make payment. The future dispute, thus, must have a reference to a period after the date of the order dated 09.03.2021.

21. The payments were made in terms of the imprimatur granted by this Court as to the quantum and, thus, what was sought to be done was to really reopen the same issue.

22. We are conscious that the impugned order has simply maintained the petition and that would mean another round of litigation, and this is being continuing since the judgment in 2017 for the last six years. Thus, to say that an innocuous order was passed, would not be a correct position, this is more so as we have explained what was meant by '*all future dispute*'.

23. It was submitted that the policy for handling and disposal of washery rejects stands changed from 2021 and the concept of coal being washed at an approved washery operator's site thereafter being shifted to the site and losses being caused, etc., are no more part of the manner of implementation of the contract and, thus, would not arise. Coal is now directly delivered to the project site and washing occurs there. We have, thus, no hesitation in coming to the conclusion that the impugned order, innocuous as it may seem, is not sustainable and this is yet another endeavour of the respondent to wriggle out of its obligation under the judgment dated 05.10.2017, repeatedly explained by various orders. This kind of endeavour can neither be appreciated nor left without consequences thereof. The dispute *inter se* the parties is in the nature of a contractual dispute. Normally, costs must go with the succeeding party in case of a contractual dispute. This is more so where one party repeatedly seeks to evade the rigors of the orders. In fact, the judgment dated 05.10.2017 itself dealt with the legal principles for interpretation of commercial contract exhaustively and those principles were then applied to the contract in question. The pricing of the coal was found to be the crux of the problem, which was adjudicated upon. It is this very issue which is sought to be raked up again.

24. We, thus, feel that some example must be set in such cases and the appeals are liable to be allowed with costs, which were actually incurred by the appellants. It was the aforesaid, which was the reason for us to call upon

the parties to file the actual bill of costs. The Bills of cost have been filed by both the appellants, Nabha Power Limited and Talwandi Sabo Power Limited. There are, however, multiple counsels appearing for the appellant, Nabha Power Limited, and the total invoice amount is Rs.1,95,80,081/-. In the case of Talwandi Sahoo Power Limited the total invoice amount is Rs.1,67,40,563/-. The Bill of cost has also been filed by the respondent and the total invoice amount is Rs.34,81,500/-.

25. In view of this nature of fee, we consider to modulate and quantify the cost in favour of Nabha Power Limited and Talwandi Sabo Power Limited at Rs.40.00 lakhs and Rs.25.00 lakhs, respectively.

26. The appeals are allowed and impugned order is set aside with costs as quantified aforesaid to be paid within 4 weeks.

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