

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

MISCELLANEOUS APPLICATIONS No. 633-634 of 2022

IN

CIVIL APPEALS No.9003-9004 OF 2011

BSES Rajdhani Power Ltd. Etc. Applicants

VERSUS

Delhi Electricity Regulatory
Commission & Another Respondents

IN THE MATTER OF:

Delhi Electricity Regulatory Commission Appellants

VERSUS

BSES Rajdhani Power Ltd. & Anr. Etc. Respondents

WITH

MISCELLANEOUS APPLICATION NO.1261 of 2022 in CIVIL APPEAL NO.884 of 2010

MISCELLANEOUS APPLICATION NO.1262 of 2022 in CIVIL APPEAL NO.980 of 2010

MISCELLANEOUS APPLICATION NO.918 of 2022 in CIVIL APPEAL NO.884 of 2010

AND

MISCELLANEOUS APPLICATION NO.919 of 2022 in CIVIL APPEAL NO.980 of 2010

ORDER

1. The applicants – BSES Rajdhani Power Limited (BRPL) and BSES Yamuna Power Limited (BYPL) (collectively, ‘the applicants’) are the distribution licensees in the NCT of Delhi, undertaking distribution business (wheeling and retail supply of electricity) in their respective

areas of supply. The applicants filed Tariff Appeals before the Appellate Tribunal for Electricity (APTEL) challenging the disallowances in their respective Tariff Orders passed by the Delhi Electricity Regulatory Commission (DERC). APTEL disposed of the appeals by a common Judgment dated 12.07.2011, wherein it decided some of the specific issues in favour of the applicants.

2. The judgment of the APTEL was under challenge at the instance of DERC before this Court. This Court on 01.12.2021, dismissed the appeals and directed the DERC as under:

“Having heard learned counsel for the parties, perused the impugned order and the materials placed on record, we are of the view that these appeals do not involve any substantial question of law. The civil appeals are accordingly dismissed.

We are also of the view that the appellant has to comply with the directions issued by the Appellate Authority, namely, Appellate Tribunal for Electricity within a reasonable time. Therefore, we direct the appellant to comply with the directions contained in the impugned order within a period of three month from today, if not already complied with, and file a compliance report before this Court within two weeks thereafter.”

3. In response to the directions contained in the above order, DERC filed a compliance affidavit/report which was opposed by the applicants.

MISCELLANEOUS APPLICATIONS NO. 633-634/2022 IN CIVIL APPEALS NO.9003-9004 OF 2011, MISCELLANEOUS APPLICATION NO. 1261 OF 2022 IN CIVIL APPEAL NO. 884 of 2010 and MISCELLANEOUS APPLICATION NO. 1262 of 2022 in CIVIL APPEAL NO.980 OF 2010

4. Mr. Kapil Sibal and Mr. Dhruv Mehta, learned senior counsel appearing for the applicants, argued that the judgment of this Court has not been complied with by the DERC. According to them, ‘carrying cost’ has to be allowed on Debt-Equity ratio of 70:30. Secondly, DERC is bound to allow interest at the prevalent market rate of State Bank of India's Prime Lending Rate (SBI PLR) for each year.

5. On the other hand, Mr. Nikhil Nayyar, learned senior counsel appearing for the DERC, submitted that the judgment of this Court has been complied with.

Issue No.1 – Carrying Cost

6. In the judgment dated 30.07.2010 in Appeal No.153 of 2009 titled "**NDPL v. DERC**" – 2010 ELR (APTEL) 0891, it was held that the appellant's claim is in line with the view of the State Commission that 'carrying cost' is to be allowed in the ratio of 70:30.

7. In Civil Appeals No.9003-9004 of 2011, DERC had specifically raised the question of law as regards funding of revenue gap in the Debt-Equity ratio 70:30 as under:

"Whether the Appellate Tribunal is right in directing the revenue gap to be funded in the debt equity ratio of 70:30 when such revenue gap funding does not add to the gross block of capital assets to be serviced through debt and equity is only a transitional funding to be serviced through debt and internal accruals of the distribution licensees?"

8. This Court has not accepted the contention of the DERC. As noticed above, the appeals filed by the DERC have been dismissed by this Court.

9. It is evident from the compliance affidavit/report dated 23.03.2022 that DERC has not applied the Debt-Equity ratio of 70:30. We are of the view that DERC ought to have allowed funding of regulatory asset/revenue gap on a normative Debt-Equity ratio of 70:30. There is no question of recomputing the carrying cost rate based on purported equity on the basis of net worth from the audited books and balancing figure as debt. Therefore, we direct DERC to allow funding of regulatory asset/revenue gap on a normative Debt-Equity ratio of 70:30.

Issue No.2 – Rate of interest on carrying cost

(10) On this question, the direction of the APTEL in its judgment dated 12.07.2011, is as under:

“11. The sixth issue is regarding interest rate for carrying cost.

11.1. This issue also had been dealt with in this Tribunal's Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 between **North Delhi Power Ltd. vs. DERC** (Appeal No.153 of 2009). The relevant extracts of the Judgment are reproduced below:

45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is to be deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accrual and/or internal accrual has to be paid for by way of carrying cost. The carrying cost is a legitimate expectation of the distribution company. The State Commission instead of applying the principle of PLR for the carrying cost has wrongly allowed the rate of 9% which is not the prevalent market lending rate. Admittedly, the prevalent market lending rate was higher than the rate fixed by the State Commission in the tariff order. Therefore, the State Commission is directed to reconsider the rate of carrying cost at the prevalent market rate keeping in view the prevailing Prime Lending Rate.”

11. The above view has been upheld by this Court.

12. It is evident from the compliance report that instead of taking the prevalent market lending rate, DERC has taken weighted average rate of interest on term loans for period FY 2007-2011 and for FY 2012-13 onwards and has considered normative rates as approved in the Tariff Order dated 13.07.2012.

13. In our view, it is clear that DERC has substituted the words 'prevailing market rate keeping in view the prevailing Prime Lending Rate' with the words 'actual interest rate paid by BRPL and BYPL on their loans' which is not permissible in view of the aforesaid judgment of the APTEL. A comparison of the two is given below:

Particular	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14	FY 15	FY 16	FY 17	FY 18	FY 19	FY 20	FY 21
BRPL Rate of s	11.03 %	11.47 %	11.30 %	11.87 %	13.11 %	15.26 %	15.02 %	15.14 %	14.19 %	14.07 %	13.85 %	13.38 %	12.25 %	12.24 %
BYPL Rate of	10.93 %	11.66 %	11.37 %	11.56 %	13.28 %	15.19 %	15.17 %	15.40 %	14.63 %	14.28 %	14.16 %	13.93 %	12.53 %	12.20 %
SBI	12.69	12.79	11.87	12.26	14.40	14.61	14.58	14.75	14.29	14.04	13.68	13.68	13.58	12.27
PLR	%	%	%	%	%	%	%	%	%	%	%	%	%	%

14. Therefore, we direct DERC to allow SBI PLR as provided in the Table above, on 70% debt component for funding regulatory asset/revenue gap in the ratio of 70:30.

15. In case DERC has failed to comply with any other direction(s) contained in the order of the APTEL, confirmed by this Court in the above appeals (C.A. No(s).9003-9004 of 2011), liberty is reserved to the applicants – BRPL and BYPL to move the competent authority/Tribunal for appropriate relief(s) in accordance with law.

16. With these directions the matter(s) is closed and M.A. No(s).633-634 of 2022, M.A. No.1261 of 2022 and M.A. No.1262 of 2022 are disposed of accordingly.

MISCELLANEOUS APPLICATION NO.918 of 2022 in CIVIL APPEAL NO. 884 of 2010 & MISCELLANEOUS APPLICATION NO.919 of 2022 IN CIVIL APPEAL NO. 980 OF 2010 :

Issue No. 1 - Distribution Losses and AT and C Losses

17. As regards the findings related to Distribution losses and AT and C losses, challenged by the DERC in the appeals, vide impugned judgment dated 6th October, 2009 and 30.10.2009, passed by APTEL, it had directed BRPL and BYPL[hereinafter referred to as 'the non-applicants'] to submit an appropriate representation to the DERC within one month from the date of passing of the order and if the said representation was made, the DERC was directed to dispose of the same within a period of two months.

18. It is not in dispute that the non-applicants did submit a representation in compliance with the above directions and the DERC passed an order on 20.04.2015, though belatedly. The said order is subject matter of Appeals No.155 and 156 of 2015, pending before APTEL. In view of the pendency of the above appeals in relation to Distribution losses and AT and C losses, it will not be appropriate for this Court to go into the said issue. The non-applicants having assailed the subsequent order before the appropriate forum, parties ought to await the decision of the said appeals.

19. We expect APTEL to dispose of the above appeals filed by the non-applicants as expeditiously as possible, having regard to their long pendency.

Issue No. 2 - Capital Expenditure and Capitalization Charges

20. In respect of Capital expenditure and Capitalization charges that were questioned by the DERC in the appeal, paragraphs 56 and 57 of the impugned judgment dated 6.10.2009 are

relevant and have been relied upon by both sides. For ready reference, the said paragraphs are extracted herein below:

"56. We do feel that it was imprudent on the part of the appellant to resist the comparison to the prices paid to REL with the prices paid for similar products by NDPL. The appellant has realized the folly now. In view of the appellant resisting the comparison mentioned above, the Commission also gave up all efforts to compare. The fact, however, remains that both the appellant as well as NDPL has incurred capital expenditures of various nature and has purchased goods and commodities in furtherance of the same. The Commission has to treat all the distribution companies at par. It is not disputed that the NDPL has purchased products of the same description although they may be different in their quality and technical specifications. Of the long list of articles which are involved in the dispute in hand some may be comparable to articles purchased by the NDPL. If for those articles the Commission has allowed same price there is no reason why the appellant should not have been allowed the same price provided, however, they are lower than the price paid to REL for those products. The Commission has to treat all the distribution licensees on the same scale and no one of them can be either victimized or favoured on account of the stands or pleas taken by them during the tariff hearings. At the same time the Commission is duty bound to make the prudent check on all the claims made by the distribution licensees.

57. The NDPL submitted its records before the Commission simultaneously with the appellant during the tariff hearing of the relevant year. As such the records are expected to be with the Commission. We think it is appropriate to allow the appellant an opportunity to prove, item wise, that the price paid by it to REL was not higher than the price paid by NDPL and allowed to it by the Commission for similar products. The onus would be entirely on the appellant to prove that the products purchased by it and the one purchased by NDPL offered for comparison are of the same technical specifications and quality and also should be similarly priced on account of the other relevant factors influencing the prices namely the time of purchase, the quantity purchased, vender rating etc. In case the price paid to REL is same as or lower than the price allowed to NDPL for a comparable commodity, the Commission shall allow the price paid to REL. The Commission shall, however, allow a lesser price if the NDPL's price is lower than the price of REL's purchase plus 5% profit margin. Till such exercise is completed the appellant will have to accept the decision of the Commission as reflected in the view of the Chairperson."

21. Both sides state in unison that wherever the price in respect of a comparable commodity which has been paid by the non-applicants to REL, happens to be the same or is lower than the price that has been allowed to NDPL, the DERC has allowed the price paid to REL.

22. The divergence of stand is in respect of the understanding of the directions in the last part of paragraph 57 of the impugned judgment, namely, the situation where the DERC has been directed to allow a lesser price in the event NDPL's price happens to be lower than the price of purchases made by REL + 5% profit margin.

23. Paragraph 57 of the impugned judgment ends by recording that till completion of the exercise contemplated to be undertaken by the BRPL to prove that the price paid by it to REL was not higher than the price paid by NDPL for similar products and so allowed by the DERC, the BRPL will have to accept the decision of the DERC, as may be taken by the Chairperson of DERC and the same applies to BYPL in terms of judgment dated 30.10.2009.

24. Mr. Nikhil Nayyar, learned senior counsel appearing for the DERC seeks to urge that the appellant has duly complied with the directions issued in para 57 of the impugned judgment as can be seen from a perusal of its order passed on 12.04.2022 and enclosed with the affidavit of compliance dated 22.04.2022. He refers to the summary of comparison in a tabulated form in paragraph 43 of the order which is extracted below:

"43. The summary of above comparison works out to be as under:

Sl. No.	Description	Line Items (Nos.)	Amount as per BRPL (Rs. Cr.)	Amount approved (Rs. Cr.)
A: Items not comparable				
A 1: Purchases made by BRPL without description of the Material in the Purchase Orders				
Sl. No.	Description	Line Items (Nos.)	Amount as per BRPL (Rs. Cr.)	Amount approved (Rs. Cr.)
1	A1.1 HVDS	423	528.82	330.51
2	A1.2 Supply of material for Grid substation	5	43.67	27.29
3	A2 Items not comparable with the purchases of NDPL due to different technical specifications	176	94.13	58.83
4.	A3: Items either consumables or not Purchased by NDPL	140	56.49	35.31
B: Items comparable with NDPL				
B 1: Items for which price paid to REL is less than NDPL				
5	Items for which price paid to REL is less than NDPL as per PO	159	133.80	133.80
6	Items for which price paid to REL is less than NDPL as per GRN	32	46.25	46.25
B 2: Items for which price paid to REL is more than NDPL				
7	Items for which price paid to REL is more than NDPL as per PO	154	94.9	59.31*
8	Items for which price paid to REL is more than NDPL as per GRN	38	7.17	4.48*
	Total	1127	1005.23	695.78

*As per Tariff Order dated. 23/02/2008, since the details of REL purchase as mandated by Hon'ble APTEL has yet not been submitted by BRPL & BYPL."

25. As is apparent from the table above, under column B are listed the items that are comparable with NDPL. Sub-column B-1 refers to items for which the price paid by the BRPL to REL is less than the price paid by NDPL, which is not disputed by either side.

26. The rub of the matter lies in respect of sub-column B-2, that refers to items for which the price paid to REL is more than NDPL. It is noteworthy that at the foot of the table, a note is appended with an asterisk stating that *"as per Tariff Order dated 23.02.2008, since the details of REL purchase as mandated by APTEL has yet not been submitted by BRPL and BYPL"*. In other words, though para 57 of the impugned judgment records that the DERC will allow a lesser price to the BRPL if NDPL's purchase price is lower than the price of REL's purchase + 5% profit margin, the DERC has passed an order dated 12.04.2022, applying the rate in terms of the Tariff Order dated 23.02.2008, on an observation that the REL purchase price has not been submitted by the non-applicants, which in our opinion, is impermissible.

27. There was no scope of imposing a price stipulated in the Tariff Order dated 23.02.2008, when APTEL has clarified the position in paragraphs 56 and 57 of the impugned judgment, extracted above. To the above extent, the order dated 12.04.2022, passed by the DERC is unsustainable and is accordingly set aside. The DERC is directed to recompute the amount payable to the non-applicants for the commodities purchased by it, strictly in terms of the directions issued in paragraphs 56 and 57 of the impugned judgment dated 6.10.2009. We may reiterate that the above direction is restricted to the items specified in sub-column B-2 of the table forming part of paragraph 43 of the order dated 12.04.2022, passed by the DERC.

28. The next submission made by Mr. Dhruv Mehta, learned senior counsel appearing for the non-applicants is that the DERC has fixed an amount in respect of the items mentioned in Column "A" of the table in paragraph 43 of the order dated 12.04.2022, which relates to items

that are not comparable and has declined to pay even a nominal amount to the non-applicants towards the said items by taking a stand that there is no comparison between a High Voltage Distribution System (HVDS) provided by the non-applicants vis-à-vis the rates for the same system as provided by NDPL. It is submitted that while NDPL had given a breakup of the materials provided since it has purchased the items individually, the non-applicants had purchased the whole dwelling unit at one go and had therefore raised a bill based on the price of the dwelling unit.

29. The aforesaid submission is however disputed by Mr. Nikhil Nayyar, learned senior counsel appearing for the DERC. It is his contention that the non-applicants failed to provide the comparable item-wise breakup of the comparable items for the DERC to conduct an evaluation and arrive at a conclusion on comparison of prices of the items.

30. Learned counsel for the non-applicants responds by stating that his clients are willing to prepare a statement reflecting the item-wise breakup of the materials supplied by NDPL and indicate the components of the dwelling unit purchased by the non-applicants, as a whole, for ease of comparison. Besides that, the non-applicants shall also furnish the details of the colony-wise dwelling units that have been purchased by it for the DERC to undertake the exercise of comparison, as has been directed by APTEL.

31. The aforesaid exercise shall be completed by the non-applicants within four weeks. The DERC shall pass an order on the above aspect within four weeks therefrom after affording an opportunity of hearing to the non-applicants.

32. In view of the above order, the summary of comparisons made in Column A of the table at paragraph 43 of the order dated 12.04.2022, shall be kept in abeyance.

33. The last issue raised by learned senior counsel for the non-applicants is that the DERC has not made proper compliance of the impugned judgment on the aspect of capitalization of fresh assets for which the non-applicants was directed to submit appropriate applications to the Electrical Inspector. It is submitted that while the impugned judgment had directed that capitalization of fresh assets of the DISCOM ought to be allowed in respect of all future assets calculated from the 16th day reckoned from the day the application for the EIC certificate is filed, to ensure that safety protocols are maintained, the DERC has proceeded to extend the directions to the existing assets as well, which is beyond the scope of the directions issued in paragraph 118 of the impugned judgment.

34. The relevant observations made in paragraph 118 of the impugned judgment with respect to capitalization are as follows:

"Capital expenditure and capitalization disallowance, lower approval of capitalization from fresh investment during the MYT period and impact of lower approval of capital expenditure and capitalization on ROCE and RRB:

The view of the Chairman of the Commission with his power of casting vote is approved. So far as purchase from REL is concerned, the Commission's view is accepted subject to our directions in paragraph 57 & 58 of the judgment. For capitalization of fresh assets the DISCOM shall make appropriate applications to the Electrical inspector and the capitalization of such assets will be allowed w.e.f. 16th day of filing of the application and payment of necessary fee."

35. Though it is the stand of learned counsel for the DERC that if the entire judgment on the above aspect is read and understood in the correct perspective, particularly paragraphs 67 and 68, the import would be otherwise, we are of the view that for the purposes of ascertaining compliance of the impugned judgment, it is the directions in the operative paragraph 118 that must be adhered to. The words used in the said paragraph are "*capitalization of the fresh assets*" during the MYT period. That being the position and since this Court is confining itself to examining compliances of the impugned judgment and no further, it is hereby clarified that the DERC was required to consider the issue of capitalization of fresh assets of the DISCOM alone. The DERC is therefore directed to undertake a fresh exercise in the light of the above observations.

36. With these directions, the matter is closed and Miscellaneous Application No. 918 of 2022 in Civil Appeal No. 884 of 2010 and Miscellaneous Application No. 919 of 2022 in Civil Appeal No. 980 of 2010 are disposed of. All the pending applications also stand disposed of.

.....J.
[S. ABDUL NAZEER]

.....J.
[HIMA KOHLI]

**New Delhi;
December 15, 2022.**

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Item No.52:

Civil Appeal No(s). 4906/2015

BSES RAJDHANI POWER LTD.

Appellant(s)

VERSUS

DELHI ELECTRICITY REGULATORY, COMMISSION

Respondent(s)

([ONLY MA 918/2022 in C.A. No. 884/2010 AND MA 919/2022 in C.A. No. 980/2010 ARE LISTED UNDER THIS ITEM.])

WITH MA 918/2022 in C.A. No. 884/2010

(M.A. Nos. 918 AND 919/2022 FOR PLACING COMPLIANCE AFFIDAVIT BEFORE COURT

IA No. 104409/2022 - APPROPRIATE ORDERS/DIRECTIONS)

MA 919/2022 in C.A. No. 980/2010 (FOR ADMISSION)

With

Item No.54:

Miscellaneous Application Nos.633-634/2022

in C.A. Nos.9003-9004/2011

(IA No. 51413/2022 - APPROPRIATE ORDERS/DIRECTIONS)

WITH MA 1262/2022 in C.A. No. 980/2010

(IA No. 104715/2022 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 93329/2022 - APPROPRIATE ORDERS/DIRECTIONS)

MA 1261/2022 in C.A. No. 884/2010

(IA No. 104773/2022 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 93633/2022 - CLARIFICATION/DIRECTION)

Date : 15-12-2022 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S. ABDUL NAZEER

HON'BLE MS. JUSTICE HIMA KOHLI

For the parties:

Mr. Kapil Sibal, Sr. Adv.

Mr. Arvind Datar, Sr. Adv.

Mr. Dhruv Mehta, Sr. adv.

Mr. Amit Kapur, Adv.

Mr. Buddy A. Ranganadhan, Adv.

Mr. Anupam Varma, Adv.

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Mr. Rahul Kinra, Adv.
Mr. Aditya Gupta, Adv.
Mr. Aditya Ajay, Adv.
Mr. Karun Sharma, Adv.
Ms. Manu Tiwari, Adv.
Mr. Wahengbam Immanuel Meitei, Adv.
Mr. Girdhar Gopal Khattar, Adv.
Ms. Isnain Muzaiml, Adv.

Mr. Nikhil Nayyar, Sr. Adv.
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Ms. Neha Mathen, Adv.
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Ms. Mansi Binjrajke, Adv.
Mr. Aditya Rajagopal, Adv.

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Ms. Radhika C., Adv.
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Mr. Akhileshwar Jha, Adv.
Mr. Ravish Kumar Goyal, Adv.
Ms. Niharika Dewivedi, Adv.
Mr. Nitin Sharma, Adv.
Mr. Narendra Pal Sharma, Adv.
For Dr. (Mrs.) Vipin Gupta, AOR

UPON hearing the counsel the Court made the following
O R D E R

Miscellaneous Applications and all the pending
applications stand disposed of in terms of the signed
order.

(ANITA MALHOTRA)
AR-CUM-PS

(KAMLESH RAWAT)
COURT MASTER

(Signed order is placed on the file.)