REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2904 OF 2011

Union of India & Anr.

...Appellants

Versus

Rajbir Singh

...Respondent

With

CIVIL APPEAL NO.2905 OF 2011

CIVIL APPEAL NO.3409 OF 2011

CIVIL APPEAL NO.5144 OF 2011

CIVIL APPEAL NO.2279 OF 2011

CIVIL APPEAL NO.1498 OF 2011

CIVIL APPEAL NO.5090 OF 2011

CIVIL APPEAL NO.5414 OF 2011

CIVIL APPEAL NO.5163 OF 2011

CIVIL APPEAL NO.5840 OF 2011

1

CIVIL APPEAL NO.7368 OF 2011

CIVIL APPEAL NO.7479 OF 2011

CIVIL APPEAL NO.7629 OF 2011

CIVIL APPEAL NO.5469 OF 2011

CIVIL APPEAL NO.10747 OF 2011

CIVIL APPEAL NO.11398 OF 2011

CIVIL APPEAL NO.183 OF 2012

CIVIL APPEAL NO.167 OF 2012

CIVIL APPEAL NO. 10105 OF 2011

CIVIL APPEAL NO. 5819 OF 2012

CIVIL APPEAL NO. 5260 OF 2012

CIVILL APPEAL D.16394 OF 2013

1

CIVIL APPEAL NO.1856 OF 2015

(Arising out of SLP (C) No.15768 of 2011)

CIVIL APPEAL NO.1854 OF 2015

(Arising out of SLP (C) No.14478 of 2011)

CIVIL APPEAL NO.1855 OF 2015

Arising out of SLP (C) No.26401 of 2010

CIVILL APPEAL NO.1858 OF 2015

(Arising out of SLP(C) No. 32190 of 2010)

CIVILL APPEAL NO.1859 OF 2015

(Arising out of SLP(C) No.27220 of 2012)

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. These appeals arise out of separate but similar orders passed by the Armed Forces Tribunal holding the respondents entitled to claim disability pension under the relevant Pension Regulations of the Army. The Tribunal has taken the view that the disability of each one of the respondents was attributable to or aggravated by military service and the same having been assessed at more than 20% entitled them to disability pension.

The appellant-Union of India has assailed that finding and

direction for payment of pension primarily on the ground that the

Medical Boards concerned having clearly opined that the disability

2

had not arisen out of or aggravated by military service, the

Tribunal was not justified in taking a contrary view.

3.

Relying upon the decisions of this Court in Union of India

and Ors. v. Keshar Singh (2007) 12 SCC 675; Om Prakash

Singh

v.

Union of India and Ors. (2010) 12 SCC 667;

Secretary, Ministry of Defence and Ors. v. A.V. Damodaran

(Dead) through LRs. and Ors.

(2009) 9 SCC 140; and

Union of India and Ors. v. Ram Prakash

(2010) 11 SCC

220, it was contended by Mr. Balasubramanian, learned counsel

appearing for the appellant in these appeals, that the opinion of

the Release Medical Board and in some cases Re-survey Medical

Board and Appellate Medical Authority must be respected,

especially when the question whether the disability suffered by

the respondents was attributable to or aggravated by military

service was a technical question falling entirely in the realm of

medical science in which the opinion expressed by medical

experts could not be lightly brushed aside.

Inasmuch as the

Tribunal had failed to show any deference to the opinion of the

experts who were better qualified to determine the question of

attributability of a disease/disability to a military service, the

Tribunal had fallen in error argued the learned counsel.

3

4.

On behalf of the respondents it was, on the other hand, submitted that the decisions relied upon by learned counsel for the appellant were of no assistance in view of the later pronouncement of this Court in Dharamvir Singh v. Union of India and Ors. (2013) 7 SCC 316 where a two-Judge Bench of this Court had, after a comprehensive review of the case law and the relevant rules and regulations, distinguished decisions and stated the true legal position. It was the

said

contended

that the earlier decisions in the cases relied upon by the

appellants were decided in the peculiar facts of those cases and

did not constitute a binding precedent especially when the said

decisions had not dealt with several aspects to which the decision

of this Court in Dharamvir Singh's case (supra) had adverted.

Applying the principles enunciated in Dharamvir Singh's case

(supra) these appeals, according to the learned counsel for the

respondents, deserve to be dismissed and indeed ought to meet

that fate.

5.

The material facts giving rise to the controversy in these

appeals are not in dispute.

It is not in dispute that the

respondents in all these appeals were invalided out of service on

account of medical disability shown against each in the following

4

chart:

Case No.	Name of the Respondent	Nature of Disease/Disability	Percentage of Disability determined
C.A. No. 2904/2011	Ex. Hav. Rajbir Singh	Generalized Seizors	20% for 2 years.
C.A. No. 5163/2011	Ex. Recruit Amit Kumar	Manic Episode (F-30).	40% (Permanent)
C.A. No. 5840/2011	Hony. Flt. Lt. P.S. Rohilla	Primary Hypertension.	30%
C.A. No. 7368/2011	Ex. Power Satyaveer Singh	Diabetes Mellitus (IDDM) ICD E 10.9.	40% (Permanent).
C.A. No. 7479/2011	Ex. Gnr. Jagjeet Singh		20% each and

		composite
		disability 40%
		(Permanent).
C.A. No. 7629/2011 Ex. Rect. Charanjit Ram 1. Non-Insulin Dependent C.A. No. 5469/2011 Jugti Ram (through LR) 80%		
		Diabetes Melllitus
		(NIDDM).
		2. Fracture Lateral
		Condyl of Tibia with
		fracture neck of Fibula
		left.
		Mal-descended Testis (R)
		with Inguinal hernia.
C.A. D. No. HavaldarSurjit Singh Schizophrenic Reaction C.A. No. 2905/2011 Ex. Naik Ram Phai Otosolerosis (Rt.) Ear 20%		
		16394/2013 (300) OPTD
		Neurotic Depression
		V-67.

C.A. No. 10747/2011 Sadhu Singh Schizophrenia C.A. No. 11398/2011 Rampal Singh Neurosis (300. 20% for 2 years.

20% for 2 years.

C.A. No. 183/2012 Raj Singh Neurosis 30%.

C.A. No. 167/2012 Ranjit Singh C.A. No. 5819/2012 Ex. Sub. Ratan Singh Other Non-Organic C.A. No. 5260/2012 Ex. Sep. Tarlochan Epilepsy (345) 20% for 2 Psychosis (298, V-67) Singh years.

Primary Hypertension Harbans Singh 30% (Permanent)

Less than 20%

1.Epilepsy (345) 20% each and

2. High Hyper-metropia composite

Rt. Eye with partial disability 40%

Amblyopia. for 2 years.

	Personality Disorder 60%
C.A. No. 10105/2011	
C.A.NO.....OF 2015	
(@ SLP(C)No.	
27220/2012)	
Balwan Singh	
5	
60%	
(Permanent).	
40% for 2	
years.	
C.A.NO.....OF 2015	
(@ SLP (C) No.	
32190/2010)	
C.A. No. 5090/2011	
Sharanjit Singh	**Generalized Tonic Clonic Less than 20%**
	Seizure, 345 V-64.
Abdulla Othyanagath	**Schizophrenia 30%**

C.A.NO.....OF 2015 Sqn. Ldr. Manoj Rana 1. Non-Organic Psychosis 40%

(@ SLP (C) No. 2. Stato-Hypatitis

26401/2010)

C.A. No. 2279/2011 Labh Singh Schizophrenia C.A. No. 5144/2011 Makhan Singh Neurosis (300-Deep) 30% for 2

years.

20%

C.A. No. 14478/2011 Ajit Singh 20%

C.A.NO.....OF 2015 ManoharLal Idiopathic Epilepsy IHD (Angina Pectoris) Less than 20%

(@ SLP (C) No. (Grandmal)

15768/2011) Renal Calculus (Right)

C.A. No. 3409/2011

1.Generalized Seizors 70%

2. Inter-vertebral Disc (permanent)

Prolapse

3.PIVD C-7-D, (Multi-Disc

Prolapse)

Bipolar Mood Disorder

C.A. No. 1498/2011*

C.A. No. 5414/2011

6.

Major Man Mohan

Krishan

Ex. Sgt. Suresh Kumar

Sharma

Rakesh Kumar Singla

20%

20% for 5

years.

It is also not in dispute that the extent of disability in each

one of the cases was assessed to be above 20% which is the

bare minimum in terms of Regulation 173 of the Pension

Regulations for the Army, 1961. The only question that arises in

the above backdrop is whether the disability which each one of

the respondents suffered was attributable to or aggravated by

military service. The Medical Board has rejected the claim for

disability pension only on the ground that the disability was not

attributable to or aggravated by military service. Whether or not

that opinion is in itself sufficient to deny to the respondents the

disability pension claimed by them is the only question falling for

6

our determination. Several decisions of this Court have in the

past examined similar questions in almost similar fact situations.

But before we refer to those pronouncements we may briefly

refer to the Pension Regulations that govern the field.

7.

The claims of the respondents for payment of pension, it is a

common ground, are regulated by Pension Regulations for the Army, 1961. Regulation 173 of the said Regulations provides for grant of disability pension to persons who are invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or above. The regulation reads:

"173. Primary conditions for the grant of disability pension:

Unless otherwise specifically provided a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 percent or over. The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."

8.

The above makes it manifest that only two conditions have

been specified for the grant of disability pension viz. (i) the

disability is above 20%; and (ii) the disability is attributable to or

aggravated by military service. Whether or not the disability is

attributable to or aggravated by military service, is in turn, to be

7

determined under Entitlement Rules for Casualty Pensionary

Awards, 1982 forming Appendix-II to the Pension Regulations.

Significantly, Rule 5 of the Entitlement Rules for Casualty

Pensionary Awards, 1982 also lays down the approach to be

adopted while determining the entitlement to disability pension

under the said Rules. Rule 5 reads as under:

"5. The approach to the question of entitlement to

casualty pensionary awards and evaluation of disabilities

shall be based on the following presumptions:

Prior to and during service

(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health, which has taken place, is due to service."

9.

Equally important is Rule 9 of the Entitlement Rules (supra) which places the onus of proof upon the establishment. Rule 9 reads:

"9. Onus of proof. – The claimant shall not be called upon to prove the conditions of entitlements. He/She will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat

service cases."

10. As regards diseases Rule 14 of the Entitlement Rules stipulates that in the case of a disease which has led to an

8

individual's discharge or death, the disease shall be deemed to have arisen in service, if no note of it was made at the time of individual's acceptance for military service, subject to the condition that if medical opinion holds for reasons to be stated that the "disease could not have been detected on medical examination prior to acceptance for service, the same will not be deemed to have so arisen". Rule 14 may also be extracted for facility of reference.

"14. Diseases.- In respect of diseases, the following rule will be observed –

(a) Cases in which it is established that conditions of military service did not determine or

contribute to the onset of the disease but influenced the subsequent courses of the disease will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(c) If a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and

that the conditions were due to the

circumstances of duty in military service."

(emphasis supplied)

9

11. From a conjoint and harmonious reading of Rules 5, 9 and

14 of Entitlement Rules (supra) the following guiding principles

emerge:

i)

a member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance;

ii)

in the event of his being discharged from service on medical grounds at any subsequent stage it must be presumed that any such deterioration in his health which has taken place is due to such military service;

iii)

the disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service; and

iv) if medical opinion holds that the disease, because of which the individual was discharged, could not have been detected on medical examination prior to acceptance of service, reasons for the same shall be stated.

10

12. Reference may also be made at this stage to the guidelines set out in Chapter-II of the Guide to Medical Officers (Military Pensions), 2002 which set out the "Entitlement: General Principles", and the approach to be adopted in such cases. Paras 7, 8 and 9 of the said guidelines reads as under:

"7. Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise.

Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record on entry in service was due to a non-disclosure of the essential facts by the member e.g. pre-enrolment history of an injury or disease like epilepsy, mental disorder, etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorisation of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may occasionally be direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation

by subsequent service conditions will need examination. The following are some of the diseases which ordinarily escape detection on enrolment:

(a) Certain congenital abnormalities which are latent and only discoverable on full investigations e.g. Congenital Defect of Spine, Spina bifida, Sacralisation,

(b) Certain familial and hereditary diseases e.g. Haemophilia, Congential Syphilis, Haemoglobinopathy.

(c) Certain diseases of the heart and blood vessels e.g.

11

Coronary Atherosclerosis, Rheumatic Fever.

(d) Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given at the time by the member e.g. Gastric and Duodenal Ulcers, Epilepsy, Mental Disorders, HIV Infections.

(e) Relapsing forms of mental disorders which have intervals of normality.

(f) Diseases which have periodic attacks e.g. Bronchial

Asthma, Epilepsy, Csom, etc.

8. The question whether the invalidation or death of a member has resulted from service conditions, has to be judged in the light of the record of the member's condition on enrolment as noted in service documents and of all other available evidence both direct and indirect. In addition to any documentary evidence relative to the member's condition to entering the service and during service, the member must be carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his pre-service history, etc. so that all evidence in support or against the claim is elucidated. Presidents of Medical Boards should make this their personal responsibility and ensure that opinions on attributability, aggravation or otherwise are supported by cogent reasons; the approving authority should also be satisfied that this question has been dealt with in such a way as to leave no reasonable

doubt.

9. On the question whether any persisting deterioration has occurred, it is to be remembered that invalidation from service does not necessarily imply that the member's health has deteriorated during service. The disability may have been discovered soon after joining and the member discharged in his own interest in order to prevent deterioration. In such cases, there may even have been a temporary worsening during service, but if the treatment given before discharge was on grounds of expediency to prevent a recurrence, no lasting damage was inflicted by service and there would be no ground for admitting entitlement. Again a member may have been invalided from service because he is found so weak mentally that it is impossible to make him an efficient soldier. This would

12

not mean that his condition has worsened during service, but only that it is worse than was realised on enrolment in

the army. To sum up, in each case the question whether any persisting deterioration on the available evidence which will vary according to the type of the disability, the consensus of medical opinion relating to the particular condition and the clinical history."

13. In Dharamvir Singh's case (supra) this Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words:

"29.1. Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of

Appendix II (Regulation 173).

29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service [Rule 5 read with Rule 14(b)].

29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally (Rule 9).

29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service [Rule

14(c)].

13

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [Rule 14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons [Rule 14(b)]; and

29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 — "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

14. Applying the above principles this Court in Dharamvir Singh's case (supra) found that no note of any disease had been

recorded at the time of his acceptance into military service. This

Court also held that Union of India had failed to bring on record

any document to suggest that Dharamvir was under treatment

for the disease at the time of his recruitment or that the disease

was hereditary in nature. This Court, on that basis, declared

Dharamvir to be entitled to claim disability pension in the

absence of any note in his service record at the time of his

acceptance into military service. This Court observed:

"33. In spite of the aforesaid provisions, the Pension

Sanctioning Authority failed to notice that the Medical

Board had not given any reason in support of its opinion,

particularly when there is no note of such disease or

14

disability available in the service record of the appellant at

the time of acceptance for military service. Without going

through the aforesaid facts the Pension Sanctioning

Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from "generalised seizure (epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service."

15. The legal position as stated in Dharamvir Singh's case (supra) is, in our opinion, in tune with the Pension Regulations, the Entitlement Rules and the Guidelines issued to the Medical Officers. The essence of the rules, as seen earlier, is that a member of the armed forces is presumed to be in sound physical and mental condition at the time of his entry into service if there

is no note or record to the contrary made at the time of such

entry. More importantly, in the event of his subsequent discharge

from service on medical ground, any deterioration in his health is

presumed to be due to military service. This necessarily implies

that no sooner a member of the force is discharged on medical

ground his entitlement to claim disability pension will arise unless

of course the employer is in a position to rebut the presumption

that the disability which he suffered was neither attributable to

15

nor aggravated by military service. From Rule 14(b) of the

Entitlement Rules it is further clear that if the medical opinion

were to hold that the disease suffered by the member of the

armed forces could not have been detected prior to acceptance

for service, the Medical Board must state the reasons for saying so.

Last but not the least is the fact that the provision for payment of disability pension is a beneficial provision which ought to be interpreted liberally so as to benefit those who have been sent home with a disability at times even before they completed their tenure in the armed forces. There may indeed be cases, where the disease was wholly unrelated to military service, but, in order that denial of disability pension can be justified on that ground, it must be affirmatively proved that the disease had nothing to do with such service. The burden to establish such a disconnect would lie heavily upon the employer for otherwise the rules raise a presumption that the deterioration

in the health of the member of the service is on account of military service or aggravated by it. A soldier cannot be asked to prove that the disease was contracted by him on account of military service or was aggravated by the same. The very fact that he was upon proper physical and other tests found fit to

16

serve in the army should rise as indeed the rules do provide for a presumption that he was disease-free at the time of his entry into service. That presumption continues till it is proved by the employer that the disease was neither attributable to nor aggravated by military service. For the employer to say so, the least that is required is a statement of reasons supporting that view. That we feel is the true essence of the rules which ought to

be kept in view all the time while dealing with cases of disability pension.

16. Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into

17

service. The initial presumption that the respondents were all

physically fit and free from any disease and in sound physical and

mental condition at the time of their entry into service thus

remains unrebutted. Since the disability has in each case been

assessed at more than 20%, their claim to disability pension

could not have been repudiated by the appellants.

17. In the result these appeals fail and are hereby dismissed

without any order as to costs.

.....J.

(T.S. THAKUR)

.....J.

(R. BANUMATHI)

New Delhi

February 13, 2015

18

ITEM NO.1A

(For Judgment)

COURT NO.2

S U P R E M E C O U R T O F

RECORD OF PROCEEDINGS

SECTION XVII

I N D I A

Civil Appeal No.2904/2011

UNION OF INDIA & ANR.

Appellant(s)

VERSUS

RAJBIR SINGH

Respondent(s)

WITH

C.A.No...../2015 @SLP(C)No.26401/2010,

C.A.No...../2015 @SLP(C)No.32190/2010,

C.A.No.1498/2011,

C.A.No.2279/2011,

C.A.No.2905/2011,

C.A.No.3409/2011,

C.A.No.4409/2011,

C.A.No.5090/2011,

C.A.No.5144/2011,

C.A.No.5163/2011,

C.A.No.5414/2011,

C.A.No.5469/2011,

C.A.No.5840/2011,

C.A.No.7368/2011,

C.A.No.7479/2011,

C.A.No.7629/2011,

C.A.No.10105/2011,

C.A.No.10747/2011,

C.A.No.11398/2011,

C.A.No...../2015 @SLP(C)No.14478/2011,

C.A.No...../2015 @SLP(C)No.15768/2011,

SLP(C)No.22765/2011,

C.A.No.167/2012,

C.A.No.183/2012,

C.A.No.5260/2012,

C.A.No.5819/2012,

C.A.No...../2015 @ SLP(C)No.27220/2012

C.A. D 16394/2013

Date : 13/02/2015 These appeals were called on for pronouncement

of judgment today.

19

For Appellant(s)

Mrs. Anil Katiyar,Adv.

Mr. R.D. Upadhyay,Adv.

Mr. J.P. Tripathi,Adv.

Mr. Awadhesh Kumar Singh,Adv.

Ms. Asha Upadhyay,Adv.

Mr. Anand Mishra,Adv.

Mr. Amrendra Kumar Singh,Adv.

Mr. Abhijeet Shah,Adv.

For Dr. (Mrs.) Vipin Gupta,Adv.

Mr. B.V. Balaram Das,Adv.

For Respondent(s)

Mr. R.C. Kaushik,Adv.

Mr. Avijit Bhattacharjee,Adv.

Dr. Kailash Chand,Adv.

Mr. Sanchar Anand,Adv.

Mr. Apoorva Singhal,Adv.

For Mr. Devendra Singh,Adv.

Mr.

Mr.

Ms.

Mr.

Sanjay R. Hegde,Adv.

Bineesh Karat,Adv.

Usha Nandini,Adv.

Biju R. Raman,Adv.

Mr. Nikhil Jain,Adv.

Mr. Prakash Kumar Singh,Adv.

Mr. Ranbir Singh Yadav,Adv.

Mr. Bimlesh Kumar Singh,Adv.

Mr. Saurabh Mishra,Adv.

Mr. Dinesh Verma,Adv.

Mr. Rajat Sharma,Adv.

For Mr. Subhasish Bhowmick,Adv.

Mr. Pawan Upadhyay,Adv.

Mr. Sarvjit Pratap Singh,Adv.

For Ms. Sharmila Upadhyay,Adv.

Mr. Mohan Kumar,Adv.

20

Mr. Ghan Shyam Vasisht,Adv.

In-person

In-person

UPON hearing the counsel the Court made the following

O R D E R

Civil Appeal No.2904/2011,C.A.No...../2015 @

SLP(C)No.26401/2010,C.A.No...../2015 @SLP(C)No.32190/

2010, C.A.No.1498/2011, C.A.No.2279/2011, C.A.No.2905/2011,

C.A.No.3409/2011, C.A.No.5090/2011, C.A.No.5144/2011, C.A.

No. 5163/2011, C.A.No.5414/2011, C.A.No.5469/2011, C.A.No.

5840/2011, C.A.No.7368/2011, C.A.No.7479/2011, C.A.No.

7629/2011, C.A.No.10105/2011, C.A.No.10747/2011, C.A.No.

11398/2011,

C.A.No...../2015

C.A.No...../2015

@SLP(C)No.14478/2011,

@SLP(C)No.15768/2011,

C.A.No.167/

2012, C.A.No.183/2012, C.A.No.5260/2012, C.A.No.5819/2012,

C.A.No...../2015

@

SLP(C)No.27220/2012

and

C.A.No...../2015 D No.16394/2013 :

Hon'ble

Mr.

Justice

T.S.

Thakur

pronounced

the

reportable judgment of the Bench comprising His Lordship

and Hon'ble Mrs. Justice R. Banumathi.

Delay

in

C.A.No...../2015

D.No.16394/2013

is

condoned.

Leave granted.

The appeals are dismissed in terms of the signed

reportable judgment.

C.A.No.4409/2011 and SLP(C)No.22765/2011 :

Delink

from

the

batch

and

list

the

matters

separately.

(Sarita Purohit)

Court Master

(Veena Khera)

Court Master

(Signed reportable judgment is placed on the file)

21

NON REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO.4 OF 2015
IN
CIVIL APPEAL NO. 11133 OF 2011

M/S. ADANI POWER LTD. … APPLICANT/APPELLANT

Versus

GUJARAT ELECTRICITY REGULATORY COMMISSION & OTHERS … RESPONDENTS

O R D E R

Chelameswar, J.

1. This application is filed by the appellant in Civil Appeal No.11133/2011. The prayer in the application is as follows:

> "a) to stay the operation of the impugned Judgment dated 7.9.2011 and suspend further supply of electricity in terms of the PPA during the pendency of this Appeal.
>
> b) in the alternative to prayer (a) above, during the pendency of the accompanying Civil Appeal the Hon'ble Court may direct the Respondent(s) to pay the tariff as per CERC norms for tariff on cost plus basis; and also make the payment from the date of the supply of power under the PPA of the differential amount between the PPA tariff and the tariff as per CERC norms for tariff on cost plus basis on the such terms and condition as this Hon'ble court deems fit as just and proper;"

However, prayer (a) was not pressed when the matter was taken up for hearing. A brief background of the appeal and the application is as follows.

2. The appellant company is a power generating company. The 2nd respondent herein is a company owned by the State of Gujarat carrying on business of purchasing power in bulk from power generating companies such as the appellant herein and supplying to various distributing companies in the State of Gujarat.

3. The appellant and the 2nd respondent entered into a Power Purchase Agreement (hereinafter PPA, for short). Under the said agreement, the appellant is obliged to sell 1000 megawatt of power from the appellant's power project. For various reasons, the details of which are not necessary at this stage, the appellant issued a notice of termination dated 28.12.2009 of the above mentioned PPA w.e.f. 4.1.2010.

4. After some correspondence, the 2nd respondent filed a petition before the Gujarat Electricity Regulatory Commission (the 1st respondent herein) seeking adjudication of the dispute arising out of termination of the PPA by the appellant.

5. The 1st respondent, by its order dated 31.8.2010, set aside the termination notice sent by the appellant and directed the appellant to supply power to the 2nd respondent as per the terms of the PPA.

6. Aggrieved by the said order, the appellant carried the matter in appeal before the Appellate Tribunal for Electricity unsuccessfully. Hence, the appeal No.11133/2011. The appeal was admitted by an order dated 13.8.2012 and since pending. Hence the instant application with averments as follows:

> "7. If the relief sought for by the Appellant is not granted, there is a serious risk of Mundra Power Project becoming a Non Performing Asset causing an irreparable harm to the consumers as well as the lenders of the Mundra Power Project. Since the main Civil Appeal is pending adjudication for final hearing and the Appellant is supplying the power to the Respondent No.2 – GUVNL, the present application is being filed to compensate the Appellant upto the actual cost of generation as per CERC norms for determination of tariff. The same is in order to sustain the

generation and supply of power pending the hearing of the main Civil Appeal.

xxxx xxxx xxxx

9. It is submitted that whereas the pendency of the present appeal is piling huge losses upon the Appellant no prejudice would be occasioned to the Respondents if the present Application is allowed on an undertaking by the Appellant to refund the amount over and above the PPA tariff that will be paid, to the Respondent No.2 or such other condition as this Hon'ble Court may deem fit. Alternatively, in view of the recurring losses, the Appellant be permitted to suspend further supply of electricity in terms of the PPA during the pendency of this Appeal. This shall meet the ends of justice."

7. On behalf of the 2nd respondent, an affidavit dated 23.11.2015 is filed. The said affidavit, while contesting the various assertions made by the appellant and its rights, stated:

15. I submit that, without prejudice to the rights of the Respondent No.2 to contest the present appeal, the answering Respondent with the approval of Government of Gujarat has already shown its willingness to pay compensatory tariff prospectively (from next month of CERC order i.e. March 2014) subject to paras 12 and 13 above to resolve the issue by making suitable adjustments in tariff which till date is not implemented because of non acceptance by Appellant and other stakeholders.

16. I say that without prejudice to its rights in the present appeals the Respondent No.2 is willing to implement the decisions of State Govt. for paying compensatory tariff prospectively (from next month of CERC order i.e. March 2014) to resolve the issue by making suitable adjustment in tariff on the directions of the Hon'ble Court. xxxxxx"

8. Shri Prashant Bhushan, learned counsel appearing for respondent No.4 opposed the prayers of the applicant alleging that the 2nd respondent is colluding with the appellant as there is no occasion for the respondent to make any concession such as the one made in the affidavit filed by the 2nd respondent (the relevant portion of which are already extracted above). More particularly, when the 2nd respondent succeeded before two fora below, the concession of the 2nd respondent to pay compensatory tariff to the appellant though said to be subject to the contentions of the respondent in the appeal is nothing but largesse of the State to the appellant and not consistent with public interest. He further submitted that this Court may not affix a stamp of approval for such a decision of the 2nd respondent by passing any order accepting the concession made by the respondent. He also submitted that the payment of compensatory tariff to the appellant would

ultimately result in compelling the consumers to pay higher price.

9. On the other hand, Shri Harish Salve, learned senior counsel for the appellant denied the allegations of collusion between the appellant and the 2nd respondent. He argued that the decision of the 2nd respondent is supported by a decision of the State of Gujarat on an assessment of the subsequent developments. He submitted that compelling the appellant to supply energy in terms of the PPA is bound to financially destroy the appellant company and therefore prayed that the 2nd respondent be permitted to make the payment in terms of his concession.

10. A PPA is a contract between the parties and the terms of any contract are nothing but the agreed terms of the contracting parties. It is also a settled principle of the law of contracts that parties to a contract can alter the terms of the contract subsequent to the formation of the contract by mutual consent.

11. However, the rights of the State and its agencies and instrumentalities in the realm of contracts are circumscribed by the considerations of public interest. Apart from such general principle, the rights and obligations of the parties to the PPA in question are also subject to certain statutory prescriptions.

12. The questions (i) whether the appellant is entitled to terminate the PPA and (ii) if so, on what terms and conditions are to be examined in the appeal.

13. Independent of such right, if any, of the appellant, if the parties to the PPA are agreeable to alter the terms of the PPA (as indicated in the counter) for whatever reasons, whether such a variation is consistent with the requirements of the statutes applicable to the contract is a separate question. Whether such a variation is consistent with the larger public

interest is altogether a different question. An ancillary question arises whether such an issue can be properly the subject matter of the instant appeal. All these matters require a detailed examination as and when the appeal is taken up for hearing.

14. Coming to the question whether the 2nd respondent be directed to pay the appellant compensatory tariff as indicated in its counter, we are of the opinion no direction can be given at this stage during the pendency of the appeal as the right of the appellant for such compensatory tariff appears to be one of the issues in the appeal.

15. In so far as the question of permitting the 2nd respondent to pay the compensatory tariff as indicated in its counter, we are of the opinion that it requires no permission from this Court. It is upto the 2nd respondent to take a decision in accordance with law to the best of its understanding. We may make it clear that if the 2nd respondent chooses to make such payment, the same shall be subject to the result of the appeal.

16. The I.A. is disposed of as indicated above.

.....J.
(J. Chelameswar)

.....J.
(Abhay Manohar Sapre)

New Delhi;
December 3, 2015