

(2008) 11 GAU CK 0052
In the Gauhati High Court

Assam Branch Indian Tea Association	APPELLANT
Vs	
Assam State Electricity Board and Others	RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 23, 26, 49, 49(1), 79

Citation : (2009) 5 GLR 134 : (2009) 3 GLT 67

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Anima Hazarika, J.—All these writ petitions involve common question of law and facts and as such those are heard analogously and disposed of by this common judgment.

2. Heard the learned Counsel for the parties.

3. Challenge made in this batch of writ petitions are to the legality and validity of the circular dated 20.6.2001 issued by the Chief Engineer ("COM"), Assam State Electricity Board ("Board") intimating their Field Officer about the resolution No. 18 dated 24.5.2001 whereby and where under the respondent Board had reviewed the provision relating "demand charges by modifying the provisions of maximum demand recording" appear in category IX to the schedule of tariff by revising the same with bailable demand as well as by incorporating a new clause, viz., Clause 2(XXV)(b) in the Terms and Conditions of Supply, 1998 and by renumbering the existing Clause 2(XXV) as Clause 2(XXV)(a), which, as alleged by the petitioners had effect of revising/enhancing the demand charges applicable to Tea Category of consumer as well as other Industries without issuing prior notification as per provisions laid down in Clause 28(ii) of the Electricity (Supply) Act, 1948 ("the Act") applicable for such revision. The petitioners herein pray for setting aside and quashing the circular dated 20.6.2001. Further prayer of some of the petitioners are for a direction to refund

of the amount released in excess on or after 1.7.2001 till 31.3.2003 (with effect from 1.4.2003, i.e., new schedule of tariff was notified by the Assam Regulatory Commission) over and above the rate applicable as per the provision of maximum demand recording and/or adjust any amount which has been received by the Board from the consumer petitioners pursuant to the circular dated 20.6.2001.

4. A recital of the facts in WP(C) No. 7295/01 is considered adequate to cover all the cases for passing a common judgment.

5. The petitioners' case, in brief, is that for the first time, in the year 1993, two part tariff was introduced by the board on the ground that the same will reduce the KVA demand of the consumer with the installation of demand meters as well as matching capacitors. Consequently, the consumer will be liable to pay the lesser amount towards energy/demand charges. However, the said notification revising/introducing two part tariff was quashed by this Court. Once again in the year 1994 two part tariff was introduced with the similar object and to that effect a provision was also incorporated in the category IX of the Schedule of Tariff 1998. The introduction of two part tariff gave rise to installation of Demand Meters.

Category IX - Clause (i) deals with the provision relating "maximum demand recording" which provides:

Demand charges shall be levied on the basis of maximum demand recorded in the demand meter installed at the premises of the consumer. Where demand meter is not installed or demand meter is found defective demand charges shall be levied on the basis of 80% of the connected load in KW converted into KVA at 85% power factor.

6. In order to make the aforesaid provision workable, a notice dated 22.2.1999 was issued by the Chief Engineer (Distribution) of the board intimating various field officers to realize security deposits amounting to Rs. 65,500 from consumers against static Trivector Electronic Meter, 11 KV CT/PT and towards cost of other accessories. As alleged by the writ petitioners, the security deposit as demanded was more than cost of the said meter and other accessories.

7. After realizing the cost of Electronic Meters and installation thereof a promise was made by the Board that consumers would be billed towards demand charges as per the meter reading which was also in tune with the provisions contained u/s 23 and 26 of the Act, 1948. With the installation of demand meters, it became possible for the consumers to know their exact demand. From the newly installed demand meters it transpires that so far the Tea Consumers are concerned their maximum demand remains in between 55% - 60% of their connected load.

8. Situated at thus when the Petitioners were paying their bills regularly as per the demand charges, the Respondent Board issued the impugned circular dated 20.6.2001 contained under No. CE(COM)/T-7(3)/2001/12. By the said circular,

the respondent No. 2 intimated its Field Officer that Board vide resolution No. 18 dated 24.5.2001 reviewed the demand charge applicable to various categories of consumers including Tea Consumer falling under category IX of the schedule of tariff by modifying provision of "maximum demand recording" with that of "Billable Demand".

As per the aforesaid modification, the consumers having demand meters were made liable to pay the demand charges for the month on actual maximum demand recorded in the demand meter or 80% of the "contracted demand/connected load" whichever was higher. However, the consumers not having demand meters, in all circumstances were made liable to pay 80% of their connected load like pre-modified provision.

The impugned circular dated 20.6.2001, annexed to the writ petition is quoted hereunder:

ASSAM STATE ELECTRICITY BOARD OFFICE OF THE CHIEF ENGINEER (COMMERCIAL), PALATANBAZAR, GUWAHATI-1.

To

(1) All Superintending Engineers, ASEB

(2) All Area Managers (IRCA) Tinsukia.

Sub: MODIFICATION OF TARIFF AND TERMS & CONDITIONS OF SUPPLY, 1998.

The Board vide resolution No. 18 dated 24.5.2001 reviewed the demand charge applicable to consumers under categories,

The Board decided to modify the provisions of "Maximum Demand Recording" as follows:

"Billable Demand" the Demand charge for the month shall be made on actual maximum demand recorded in the demand meter or 80% of the contracted demand whichever may be higher. Where demand meter is not installed or the demand meter is found to be defective demand charge shall be levied on the basis of 80% connected load converted into KVA at 85% power factor.

Accordingly, the relevant provisions of the schedule of tariff (w.e.f. 1.9.1998) is modified and a new Clause 2(XXV)(b) is incorporated in the T&C of supply, 1998. The existing Clause 2(XXV) is renumbered as 2(XXV)(a).

This will come into effect from the date on or after 1.7.2001 on which the meter reading is taken. Necessary action may be taken to implement the modification accordingly.

Sd/- CHIEF ENGINEER (COM)/ASEB.

Copy to:

1. S.A. to the Chairman,

2. The Member (T),
3. The Member (F),
4. The Chief Engineer (D), ASEB, Paltanbazar, Ghy-I
5. The Chief Accounts Officer,
6. All Addl. CE(E),ASEB,
7. The Director (TI), ASEB, Paltanbazar, Ghy-1.

Sd/- CHIEF ENGINEER (COM)/ASEB.

Copy to:

(1)....

for information and necessary action.

9. After coming to know about the aforesaid circular, representation was submitted by some of the petitioners before the respondent No. 2 intimating that contract demand and connected load were two different concepts under the provision of law and that the same could not be linked for the purpose of levy of demand charges and the consumers should be given option to enter into demand relating to contract in view of the fact that connected load had no bearing with the actual demand. The grievance of the petitioners is that, in view of the aforesaid modification, total connected load of a consumer was raised and thus, impugned circular resulted in enhancement of demand charges in comparison to actual meter reading.

10. Subsequently, a meeting was held on 20.7.2001 between the officials of the Board and consumers, association in connection with the aforesaid modification.

11. Consequent thereto a letter was addressed to the Secretary, Assam Branch of Indian Tea Association (ABITA for short) by Respondent No. 2 admitting that the demand charges were raised on the basis of connected load keeping in mind the revenue of the Board. Vide the aforesaid communication it was also admitted that the meter relating to contract demand would be taken into consideration while reviewing the terms and conditions of supply as well as Schedule of Tariff 1998. Thus, in principle, the "Board accepted that demand charges could not be levied on the basis of connected load. By the aforesaid communication, the Secretary ABITA was requested to ask its members to cooperate with the Board.

The communication dated 26.7.2001 is quoted hereunder:

To,

Date 26.7.2001

The Secretary, ABITA, Bamunimaidan, Guwahati-781021

Sub: Discussion on Notification of demand charge on 20.7.2001.

Dear Sir,

At the outset, we thank you very much for the cooperation you have Extended in the meeting of dated 20.7.2001.

While clarifying our position, it is to intimate you that the "Demand Charge" have been raised on the basis of connected load to the extent of 80% keeping in view of revenue of ASEB.

However, the matter related to "Contracted Demand" as raised in the said meeting will be taken into consideration while reviewing Terms and Conditions of Supply as well as Schedule of Tariff, 1998. The revised Schedule of Tariff revision is in process, as such your proposal to keep in abeyance of the said order cannot be considered at this stage.

You are, therefore, requested to impress upon your members of your association to kindly co-operate with ASEB at this juncture.

Yours faithfully,

Sd/- Illegible, CHIEF ENGINEER (COM)

Copy to:

1. Tea Association of India, Zoo-Narengi Rd., Ghy.
2. Surma Valley Branch, Silchar.
3. Bharatiya Chah Parishad, Dibrugarh.

CHIEF ENGINEER (COM)

12. Petitioners' further case is that although the terms and conditions of supply of 1998 were framed in exercise of power conferred u/s 49 of the Act 1948 but the board considered the same as the principles governing the supply of electricity to the persons other than licensees u/s 49 of the Act 1948 and treated the same as regulations within the meaning of Section 79(j) of the Act 1948 and accordingly, vide letter dated 11.10.2002 the secretary, of the board requested the under secretary to the Government of Assam, Department of Power for publication of the same in the official gazette. It is urged by the learned Counsel for the petitioners that Section 79 of the Act 1948 empowers the Board to frame regulations in respect of meters enumerated in Section 79 by notification in the official gazette. Unless the regulations sought to be framed by the board covering any of the matters specified in Section 79 of the Act, 1948 are published in the official gazette, such Regulations cannot have any legal effect.

Learned Counsel for the petitioners would further urge that the amendments/modification to the existing regulations framed u/s 79 of the Act, 1948 before taking a legal character as a part of an existing regulation must, therefore, be duly notified. In this regard, learned Counsel has referred to the decision in *Sitaram Singh Vs. Meghalaya State Electricity Board and Others*, wherein this

Court held that amendments not notified as required u/s 79 of the Act, 1948 do not have any legal force. This Court has noticed that the aforesaid reported judgment has been approved by the division bench of this Court in *State of Meghalaya v. Sitarama Singh* 2003 (1) GLR 25.

13. The Petitioners further submit that in the instant case the impugned circular dated 20.6.2001 having been issued in violation of the provisions of Sections 49 and 79 of the Act, 1948 as well as violation of Clause 28(ii) of the Terms and Conditions of Supply, 1998 is liable to be set aside and quashed and the fixed/demand charges realized from the members of the petitioner's association on the basis of impugned circular dated 20.6.2001 with effect from 1.7.2001 till 31.3.2003 should be refunded to the consumer petitioners.

14. Mr. B.D. Das, learned Counsel appearing for the Board, at the very outset, argued on the maintainability of the writ petitions filed under Article 226 of the constitution of India. Mr. Das urged that the Board having been separated into five companies in the year 2005 as per requirement of the Electricity Act, 2003, the present petitions against the Board are not maintainable as per provisions of law, inasmuch as, the rights and liabilities of the Board have been distributed to the five newly formed companies.

15. On the point of maintainability, learned Counsels appearing for the petitioners, on the other hand, strenuously urged that the instant writ petitions have been filed in the year 2001, more so, in view of the order passed on 9.4.2003 in Review Application No. 33/2003 [in WP(C) No. 6059/2001], wherein the aforesaid writ petition was withdrawn by the petitioners on the ground that during the pendency of the said writ petition, the State Electricity Regulatory Commission ("Commission") was constituted in the State of Assam under the Electricity Regulatory Commission Act, 1998 ("1998 Act"). After constitution of the Commission under the 1998 Act, all disputes relating to supply of electricity including the fixation of tariff etc. are to be decided by the Commission. Therefore, the petitioners prayed before this Court for withdrawing the writ petitions so that the said dispute may be settled by the said commission and with that view the prayer was made before this Court to allow the petitioners to approach appropriate authority, i.e., the commission for settlement of the dispute in question which was allowed by the court. Thereafter, when the electricity dispute in question was brought to the notice of the commission, the commission observed that since the dispute in question was a dispute prior to the constitution of commission in the State of Assam, as such, the commission is not competent to settle the said dispute. Thus the petitioners prayed before this Court for recalling the order of withdrawal whereby this Court vide order dated 9.4.2003 allowed the review application by restoring WP(C) No. 6059/01 in its file. While allowing the petition this Court passed the following order:

...Admittedly the commission has been constituted after the issuance of the impugned notification dated 20.6.2001, which is under challenge in the related writ petition and the commission, having no retrospective jurisdiction is not

competent to adjudicate upon the same. Consequently, a prayer to review the order dated 13.1.2003 passed in WP(C) No. 6059/2001 allowed and the order dated 13.2.2003 passed in the related writ petition is hereby recalled. The writ petition to be restored in the original file....

Thus, in view of the above position, in the considered opinion of this Court, the writ petitions are maintainable in its present form.

16. After hearing learned Counsel of both the parties, this Court is of the considered opinion that the sole issue which arises in this case for determination is whether the circular dated 20.6.2001 containing the resolution No. 18 dated 24.5.20.01 is legally sustainable under the law?

17. Mr. B.D. Das learned Counsel for the Board would urge that the respondent board have amended the provisions relating to Maximum Demand recording and Billable Demand by taking into account the resolution No. 18 dated 24.5.2001 and bringing in a similar provision as existed prior to the position of 1998 Terms and Condition of Supply in the interest protection of revenue of the Board. As such, there is no mala fide, arbitrary and illegal action on the part of the Board.

18. In support of the above submission, Mr. Das has placed reliance to a decision rendered by a Division Bench of this Court in WP(C) No. 3116/01 (Ganeska Kanoi Tea Co. v. Assam State Electricity Board and Ors.) which was disposed of on 23.3.2003. Referring to paragraph 32 of Ganeska (supra), Mr. Das has submitted that the instant case is squarely covered by the decision rendered in the said case.

19. I have carefully gone through the decision of the Ganeska (supra). Relevant Paragraph 32 of Ganeska (supra) is quoted hereinbelow:

The submissions made by the learned Counsel for the petitioner that the Board has not followed the provisions of Clause 28(h) of the Terms and conditions of supply, 1998 because the Board has not revised the schedule of tariff for load security with prior notification is without any force. The facts alleged in the return and noted herein above clearly reveals that the consumers have been given enough opportunity to make representations, and in fact, the Board has made various amendments in its original proposal of load security deposit for existing consumers as well as for all categories of consumers, after consideration of representations of the consumers. We have already noticed the decisions in the matter of B.K. Srinivasan (supra) and ITC Bhadrachalam Paper Boards (supra), the requirement of prior notification for effecting the change in the schedule of tariff need not be in the official gazette when the mode of publication is being prescribed in the subordinate Legislation. It is said by the court, the requirement of the publication would be satisfied when the subordinate legislation prescribes the manner of publication, if such mode of publication is reasonable mode of publication. The Board has given wide publicity to the amendments sought to be introduced and, thus, in our view, has substantially complied with the provision of Clause 28(h) of the Terms and Conditions of

Supply, 1998.

20. While applying the above ratio to the facts of the instant case, it can not be overlooked that this Court in *Ganeska* (supra) has clearly held that consumer have been given enough opportunity to make representations and the Board in fact has made various amendments after consideration of the representations of the consumers. However, the same is lacking in the case in hand, inasmuch as, no report/notifications, etc., could have been produced by the Board before this Court showing any prior notification issued at any point of time before issuance of the impugned circular dated 20.6.2001.

21. After going through the impugned circular dated 20.6.2001 and after hearing learned Counsel for the parties, I find that by the said circular the schedule of Tariff has been modified and a new clause, i.e., Clause 2(XXV)(b) has been incorporated by the Board.

22. A plain reading of the Circular No. CE(COM)/T-7(3)/2001/12 dated 20.6.2001 issued by the Chief Engineer (COM)/ASEB, which is the subject matter of challenge in this series of Writ Petitions would reveal that the Board had already taken, a decision vide resolution No. 18 dated 24.5.2001, inter alia, bringing in and attempting to effect some modifications in their schedule of tariff as incorporated in their Terms and Conditions of Supply, 1998. Admittedly, the Terms and Condition of supply 1998, framed by the "Board can be modified and/or altered by the Board in consonance with the provisions of Clause 28(h) of the Terms and Conditions of, Supply, 1998 which reads as follows:

(ii) The Board reserves the right at any time to amend, subtract from or add to any of the above Terms and Conditions of Supply and to revise the schedule of tariff with prior notifications.

23. It is already settled proposition of law, as decided by the Division Bench of this Court in its Judgment and order dated 29.9.2003 passed in WP(C) No. 3116/2006 (supra) that the Terms and Conditions of Supply are framed by the Board in exercise of the powers conferred u/s 49(1) of the Act, 1948. These are not regulations u/s 79 of the said Act requiring to undergo the procedure laid down u/s 79(A) of the said Act. Nevertheless, the Terms and Conditions of Supply having been fixed in terms of the provisions of Section 49 of the Act 1948 and as per the mandate of provisions of Clause 28 of the Terms and Conditions of Supply, 1998, the Board being empowered "to amend, subtract from or add to any of the above Terms and Conditions of Supply and to revise the schedule of tariff with prior notifications", there is no escape from the conclusion that publication of the prior notice is a sine-qua-non for any valid exercise of powers conferred under Clause 28(h) of the Terms and Conditions of Supply, 1998. In the instant case, the Board having failed to bring any material on record so as to satisfy this Court that any notification was ever issued prior to the adoption of the resolution No. 18 dated 24.5.2001, as mentioned in the impugned circular dated 20.6.2001, the said resolution failed the test of validity and consequently,

all the actions taken in pursuance of the said circular dated 20.6.2001 deserves to be quashed which I accordingly do.

24. As a consequence of the quashing of the impugned circular dated 20.6.2001, the Board shall now refund the excess amount of payment received by it from the consumer petitioners, if any, by way of adjusting the said amount against the future energy bill of the consumer petitioners by way of 12 (twelve) equal installments within a period of 1 (one) year.

25. The writ petitions are allowed to the extent and terms as indicated above. No order as to costs.