(2010) 06 OHC CK 0016

In the Orissa High Court

Case No : Writ Petition (Civil) No''s. 5076 of 2006 and 3497 of 2008

Executive Engineer (Electrical-I) and Another — APPELLANT

Vs

Emami Paper Mills Ltd. and Another — RESPONDENT

Date of Decision : 29-06-2010

Acts Referred:

Electricity Act, 1910 — Section 24, 56(2)
Orissa Electricity Regulatory Commission, Distribution (Conditions of Supply) Code, 2004 — Regulation 100, 94(2)

Citation : (2010) 110 CLT 548

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Judgement

A.S. Naidu, J.—The Order Dated 30.12.2005 passed by the Ombudsman (NESCO) in Consumer Representation No. 6 of 2005 quashing the demand made by the Executive Engineer, Electrical-I, Central Electrical Division of North Eastern Supply Company Ltd. (hereinafter to be called as "NESCO", in short) on the ground that the same is barred by limitation, is assailed in W.P.(C) No. 5076 of 2006. A portion of the said order, i.e., the observation made by Ombudsman that the demand made by the Executive Engineer is justified & Emami Paper Mills, in short, ''EMAMI'' is liable to pay the same is assailed by EMAMI in W.P.(C) No. 3497 of 2008.

2. Bereft of unnecessary details, the relevant facts, which are necessary for effectual adjudication, are stated here-in-below in brief.

3. In March. 1996 EMAMI entered into an agreement with NESCO for supply of 4990 KVA of energy to its factory for a period of five years. In the year 2001, to be more specific on 2.5.2001 the contract demand of EMAMI got reduced due to commencement of its own captive power plant, which was established after obtaining approval of OERC. Thereafter, EMAMI approached NESCO on 27.7.2001 with a prayer to reduce their contract demand from 4990 KVA. to 3500 KVA. After receiving the application, NESCO authorities visited the mill premises of

EMAMI, verified the load & found that the same, was reduced to 3468 KVA & referred the matter to the higher authorities for reduction of the load. The Superintending Engineer (Commercial) of NESCO in his letter dated 10.1.2002 intimated, EMAMI that their application for reduction of contract demand from 4990 KVA to 3500 KVA has been allowed. Pursuant to the said decision; fresh agreement was executed inter se between EMAMI & NESCO on 29.1.2002 with a stipulation that the same shall be given retrospective effect from 1.8.2001. For reduction of the contract demand, it appears, certain demands were made by NESCO & the same were duly paid by EMAMI.

4. The dispute however started on 29.4.2005 when NESCO raised a bill for an amount of Rs. 61.93.135 towards differential amount of tariff incentive availed by the Opp. Party. The said demand was resisted by EMAMI on several grounds, one of the same being that the demand was made much after the period stipulated u/s 56(2) of the Electricity Act, 2003 read with Regulation 94(2) & Regulation 100 of the Orissa Electricity Regulatory Commission, Distribution (Conditions of Supply) Code, 2004. After receiving objection, discussions took place between the authorities, but then, NESCO refused to withdraw the demand mainly on the ground that the same was justified & is strictly in consonance with the terms of the agreement.

5. Being aggrieved by such decision of NESCO, EMAMI approached the Grievance Redressal Forum by filing a petition on 30.6.2005. The Grievance Redressal Forum after hearing the parties, expressed the view that the dues raised by NESCO does not attract Section 56(2) of the Electricity Act since the same are neither settled dues nor unpaid dues & rejected the petition filed by EMAMI'' by Order Dated 16.9.2005.

6. Being aggrieved by the order passed by the Grievance Redressal Forum, EMAMI filed a petition before the Ombudsman (NESCO area), Balasore on 4.10.2005. After receiving the petition. Ombudsman issued notice to the parties, permitted them to file their counter affidavits & after discussing the materials available & hearing the parties came to the conclusion that NESCO had not committed any illegality or irregularity in raising the demand of Rs. 61,93,135 for the period February 2000 to December, 2000 & September, 2002 & October. 2002 & further held that EMAMI is liable to pay the said amount provided the claim is not barred by limitation in view of the provisions of Section 56(2) of the Electricity Act, 2003. The Ombudsman thereafter discussing the provisions of Section 56(2) of the Electricity Act, 2003 & interpreting the language of the said Section, came to the conclusion that no amount due from any consumer can be recovered after a period of two years from the date when such sum became first due unless the said sum has been shown continuously as arrear of charges for electricity supply. The Ombudsman, further observed that the relevant tariff order was passed on 30.12.1999 by OERC & the same became effective from 1.2.2000. The claim amount for the period from February. 2000 to December, 2000 became due on 10.1.2002. Similarly, the claim for the period of September

& October, 2002 became due in October & November, 2002 respectively. Admittedly, no steps were taken within two years for recovery of the aforesaid dues from EMAMI. The revised bill was served upon the EMAMI only on 29.4.2005, i.e. after expiry of more than two years from the dates when the claim amount became first due & as such, it held that in consonance with the provisions of Section 56(2) of the Electricity Act, 2003, the claim has become time barred & cannot be recovered. The said order, as stated earlier, is assailed in W.P.(C) No. 5076 of 2006.

7. After receiving rule, counter affidavits have been filed by respective Opp. Parties in both the cases repudiating each others claim. To appreciate the arguments advanced, this Court went through the pleadings & the documents annexed thereto meticulously. Most of the factual aspects are not disputed, EMAMI admittedly entered into an agreement with NESCO for supply of 4990 KVA of energy to its mill way back in March, 1996. In the year 1999 EMAMI decided to establish its own captive power plant. It applied for necessary permission. After the OERC accorded necessary approval, construction of the captive power plant commenced & it started operating with effect from 2.5.2001. After commencement of the captive power plant, EMAMI approached the NESCO authorities in 2001 with a prayer to reduce the contract demand from 4990 KVA to 3500 KVA. The same being acceded to, a fresh agreement was executed on 29.1.2002 giving effect retrospectively from 1.8.2001 & the contract demand was reduced to 3500 KVA. While the matter stood thus, NESCO raised a demand of Rs. 61,93,153 Towards revised energy charges for period from February, 2000 to December, 2000 & September, 2002 & October, 2002. The revised bill, according to NESCO, was raised in accordance with Orissa Electricity Regulatory Commission, Distribution (Conditions of Supply) Code, 2004 with the existing tariff as applicable to the consumer concerned. It is not disputed that as per the tariff notification dated 21.1.2000, incentive was available to those consumers who will not reduce their contract demand during three years. The contract demand of EMAMI having been reduced from 4990 KVA to 3500 KVA from 1.1.2002, the said company (EMAMI) was not entitled to get incentive benefit & it was liable to pay the revised bill amount in question. However, according to EMAMI, it did not reduce the load of its plant, but the demand got reduced, after the Captive Power Plant was commissioned after obtaining prior approval of the OERC as well as NESCO authorities. While reducing the contract demand, NESCO neither raised any demand nor there was any condition for revision of the past bills due to reduction of the contract demand. On the said ground, it resisted the extra demand.

8. After going through the records, it appears that in fact the bills for September & October, 2002 incentive tariff was allowed to EMAMI towards load factor higher than 50%. Fact remains, EMAMI has enjoyed the benefit of incentive tariff, which is available only if certain conditions are satisfied. In the case in hand, EMAMI was permitted to enjoy the incentives, but then after their contract demand was reduced, they were called upon to pay the amount demanded. The Ombudsman

in the order impugned has discussed the facts & the provision in detail. It categorically came to the conclusion that EMAMI having reduced the contract demand & enjoyed the incentives, NESCO was justified in issuing the bill for a sum of Rs. 61,93,135 & that EMAMI was liable to pay the said amount. After going through the entire order, this Court finds that the Ombudsman has not committed any error & the decision is just & in consonance with the terms of the agreement as well as the prevailing rules & regulations. This Court is, therefore, not inclined to interfere with the conclusions arrived at with regard to the liability of EMAMI to pay the amount demanded as per the revised bill. Consequently, W.P.(C) No. 3497 of 2008 fails.

9. The other controversy which needs to be decided in W.P.(C) No. 5076 of 2006 is as to whether the arrear differential dues for the period from February, 2000 to December, 2000 & September, 2002 & October, 2002 can be demanded in the year 2005. According to EMAMI, the contract demand was reduced only after the captive power plant was installed that too after obtaining due permission from OERC & after commencement of the same in the year 2001. The application filed by EMAMI for reduction of contract demand was allowed by NESCO without any conditions. Further, EMAMI did not reduce the load of its plant but the demand got reduced due to operation of captive power plant. Thus, the demand made by NESCO with regard to certain amounts, which according to it became payable in the year 2000 & 2003 was not justified. Further relying upon Section 56(2) of the Electricity Act, 2003, it is submitted that the amount had become grossly barred by time. In support of such submission, Learned Counsel for NESCO relied upon the decision of Bombay in Court in the case of Awadesh S. Pandey v. Tata Power Co. Ltd. and Ors. (W.P.(L) No. 2221 of 2006) decided on 5.10.2006 & submitted that the period for realizing any due from a consumer has been limited to two years from the date when such amount became due.

10. A perusal of the judgment however, reveals that in the said case the amount sought to be recovered became due between 2003 to 2005 whereas Section 56(2) was introduced in the year 2003 & the period of limitation of two years was prescribed. In the case at hand, the dues relate back to the year 2000 & 2001 when the provision u/s 56(2) was not in vogue. Thus, the bar imposed by Section 56(2) of the Electricity Act, 2003 shall not be ipso facto applicable to the present case.

11. To appreciate the inter-se arguments, it would be prudent to refer to Section 56(2) of the Electricity Act, 2003, which is quoted herein-below.

56(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this Section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied & the licensee shall not cut off the supply of the electricity.

12. Prior to introduction of Section 56(2) in the Electricity Act. 2003, Section 24 of the Electricity Act, 1910 was in vogue. The said Section granted power to the Board to issue demand & to discontinue supply to a consumer. who neglects to pay the charges. The prescribed period of limitation was three years for the Board to institute any suit for recovery. The argument of EMAMI that no demand can be raised for a period, which is more than two years after consumption of electricity as per Section 56(2) of the Act, is repudiated by NESCO. According to NESCO, the amount becomes due only after the bills are served & there is no provision under the Electricity Act, 1910 or 2003 stipulating the period when a bill can be served.

13. Unless & until a statute limits right of an authority to assess, compute or to serve a bill, it cannot be said that the authority loses its right to demand the money due to it, by serving a bill However, after service of a bill the period of limitation for recovery of the same would arise & if payment is not made within three years, the right of the undertaking to file a suit would be lost.

14. In the case at hand, as has been discussed earlier, the demand relates to incentive, which EMAMI has availed though it was not otherwise entitled to. The Ombudsman after discussing the materials available has rightly come to the conclusion that the demand raised was justified. Thereafter, however, it committed an error in relying upon Section 56(2) of the Electricity Act, 2003, which came at a later stage & held that the demand is barred by time. The said conclusion appears to be not correct & in consonance with law. In view of the discussions made above, neither the Electricity Act, 1910 nor the Electricity Act, 2003 limits or prescribes a time for raising a demand, it cannot be held that notice served in the year 2005 was barred by time. Serving a demand notice & recovery of amount is two different aspects. The Ombudsman did not keep the subtle difference in mind between the two. In view of the aforesaid infirmity, W.P. (C) No. 5076 of 2006 filed by NESCO is allowed & the observation made by the Ombudsman that the demand made in the year 2005 is barred by time being not in accordance with law, is set aside.

With the aforesaid observation & direction, both the Writ Petitions are disposed of.

