
(2002) 08 OHC CK 0029

In the Orissa High Court

Case No : Miscellaneous Appeal No's. 651 of 1999 and 138 of 2000

National Aluminium Company Ltd.

APPELLANT

Vs

Orissa Electricity Regulatory Commission and Another

RESPONDENT

Date of Decision : 19-08-2002

Acts Referred:

Orissa Electricity Reforms Act, 1995 — Section 26(4), 39

Citation : (2003) 1 OLR 77

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : I. Mohanty, B.K. Sharma, A. Mohanty and B. Dash, in M.A. No. 651 of 1999 and I. Mohanty, B.K. Das and B.K. Sharma, in M.A. No. 138 of 2000, for the Appellant; N.C. Panigrahi, S.C. Dash and G.S. Dash and B. Mishra, in M.A. No. 651 of 1999 and N.C. Panigrahi, S.C. Dash, G.S. Dash, N.K. Tripathy and D. Tripathy and Samareswar Mohanty, in M.A. No. 138 of 2000, for the Respondent

Judgement

P.K. Mohanty, J.—In these two appeals u/s 39 of the Orissa Electricity Reform Act, 1995 filed by the appellant M/s. National Aluminium Company Ltd. common question of law and facts being involved for determination, with the consent and on agreement of the learned counsel for the parties, they were heard analogous and are being disposed of by this common judgment.

2. Misc. Appeal No. 651 of 1999 is directed against the order of the Orissa Electricity Regulatory Commission (hereinafter called "Regulatory Commission") rejecting the appellant's application for review/clarification of its order dated 21.11.1998, passed by order dated 13.5.1999 in Case No. 4 of 1999, whereas the order dated 30.12.1999 passed by the Regulatory Commission in Case No. 12 of 1999, rejecting the objection of the appellant, regarding legality of levying wheeling charges and transmission loss in view of the purported agreement dated 15.1.1991 and 1.6.1994 with the erstwhile O.S.E.B. is under challenge in Misc.Appeal No. 138 of 2000.

3. The brief fact of the case, giving rise to the present appeals is that the

Respondent-Grid Corporation of Orissa Limited (hereinafter referred to as "GRIDCO") as the sole licensee for distribution and retail supply of power, submitted its proposal u/s 26 of the Orissa Electricity Reforms Act, 1995 (hereinafter called "the O.E.R.C. Act") to the Regulatory Commission for fixation of tariff for the financial year 1998-99. On receipt of the application, the Regulatory Commission, invited public objections. The appellant-NALCO filed its objection before the Regulatory Commission on 25.9.1998, a copy whereof is Annexure-2 and a supplementary objection on 14.10.1998, a copy of which is Annexure- 3 (in Misc. Appeal No. 651 of 1999) contending inter alia that the revision of tariff in general was not applicable to NALCO in view of its agreement with the erstwhile Orissa State Electricity Board, the power and function of which has subsequently been transferred to and vested with the newly formed GRIDCO and . the Principal Secretary, Department of Energy, Government of Orissa, enclosing therein the minutes dated 1st June, 1994. It was contended further that in view of the agreement, NALCO was not liable to be charged with any more or any other tariff or charges, other than that has been stated in the memorandum dated 25.1.1991 clarified and amended vide memorandum dated 1.6.1994 and that NALCO could not be equated with any other consumer since it was supplying in bulk approximately on an average of 1000 million units of electricity from its captive power plant to the GRIDCO and is purchasing at the time of emergency back up power upto 5 million units. It is alleged that even though the Regulatory Commission considered all objections including that of the appellant and the learned counsel for the appellant was heard in extenso, it did not deal with such objection in its order dated 21.11.1998 nor recorded any finding on such objection for which, the appellant-NALCO filed a review application which was numbered as Case No. 4 of 1999 before the Regulatory Commission.

4. In the review application, the appellant, apart from contending that its objection was not considered by the Regulatory Commission, it reiterated its stand that in view of the bilateral arrangement between the appellant-NALCO and the O.S.E.B., subsequently the functions of which got transferred to GRIDCO, the appellant-NALCO was to be excluded from the review of the tariff set out by the Commission, since the arrangement made in the year 1991 and subsequently amended at the High Level Meeting held in June, 1994, continued to subsist, as would be evident from the notification issued by the GRIDCO, in various newspapers indicating therein that the tariff effective from 11.12.1998 would not be applicable to the parties with whom bilateral agreement. exists, which obviously included appellant, the NALCO. It was the further stand that the GRIDCO having admitted the bilateral arrangement in terms of the memorandum dated 1.6.1994. the Regulatory Commission ought to have considered the same in its proper perspective in accordance with law and could not have said that it is beyond the purview of any objection.

5. Mr. Indrajeet Mohanty, learned counsel for the appellant- NALCO strenuously submitted that the proposal for revision of tariff made by the GRIDCO cannot be

made applicable to the objector inasmuch as both the parties to the aforesaid agreement are bound by the terms of the agreement. Sri Mohanty contends that the minutes of the meeting held on 25.1.1991 and the revised agreement reached and incorporated in the minutes of the meeting held on 1st June, 1994 between the appellant-erstwhile O.S.E.B. and the State Government, binds the parties since the business and activities of the O.S.E.B. got transferred to the GRIDCO and, therefore, the GRIDCO would be bound by such agreement and the tariff and other charges stipulated in the memorandum are only leviable on the appellant. Contention is made that the appellant-NALCO cannot be equated with that of a consumer since it is supplying in bulk approximately on an average of 1000 million units per annum to the GRIDCO and is purchasing at the time of emergency back up power of about 500 million units on an average, which has been highlighted in the agreement between the parties, incorporated in the memorandum dated 1st June, 1994. Reference has been made to the Gazette Notification dated 23.1.1992 increasing the wheeling charges of 15% and as to how an objection from NALCO, the Chief Engineer (Commerce). O.S.E.B. in their letter No. 4264 dated 29.3.1994 informed the NALCO that wheeling charges @ 5% as agreed to by the parties in their minutes of meeting dated 25.1.1991 would continue so far as NALCO was concerned. Sri Mohanty however argued that since the Regulatory Commission had categorically held that the scope of tariff proceeding did not extend to the bi-lateral issues and therefore could not be considered, while considering the general tariff order, the Commission could not have further dealt with the merits of the case to erroneously hold that no contractual agreement was produced to substantiate the case of the appellant.

6. Sri N.C.Panigrahi, learned Senior Advocate for the Respondent-GRIDCO contended that the order dated 30.12.1999, which is under challenge in Misc. Appeal No. 52 of 1000, Misc. Appeal No. 97 of 2000 and Misc. Appeal No. 70 of 2000, the High Court, after hearing the parties by its judgment dated 22.12.2000, set aside the order and remitted the matter back for re-determination by the Commission and in view of such position, Misc. Appeal No. 138 of 2000 has become infructuous. It is submitted that the appeals are not maintainable in law since the scope of an appeal u/s 39 of the Reform Act is limited inasmuch as. the application for review/clarification has rightly been rejected since the order dated 21.11.1998 is not vulnerable. Sri Panigrahi, learned Senior Advocate, submitted that u/s 10 of the Reform Act for the purpose of any enquiry and proceeding, the Commission has the same power as are vested in a Civil Court under the CPC while trying a suit in respect of the matter enumerated under Clauses (a) to (f) of Section 10 (1), which includes the power of reviewing a decision, direction or orders. Section 11 of the Act deals with functions of the Commission including that of regulating the purchase, distribution, supply and utilisation of electricity, the equality of service, tariff and the charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless charges for the electricity supplied are reasonably levied and collected. Section

26 of the Reform Act prescribes that on an application submitted by a licensee, the Regulatory Commission shall fix tariff on different classes of consumers as defined in Clause 80 of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 and the said tariff is a fixed one applicable to various consumers of electricity and the licensee/supplier has no choice to fix any tariff in respect of a consumer or class of consumers ignoring the tariff fixed by the Regulatory Commission, it is therefore contended that the Commission is not authorised and empowered to decide the individual disputes between the consumer and the licensee.

7. In view of the rival contentions raised by the learned counsel for the parties, the moot question for consideration is as to whether the appellant's objection before the Regulatory Commission was maintainable in law and as to whether non-consideration of the objection would vitiate the order so far as the appellant is concerned. It is also to be determined, as to whether the Regulatory Commission has committed any illegality in holding that the bi-lateral issues between the appellant-NALCO and the respondent No. 2-GRIDCO was not within the scope and ambit of the proceeding before the Regulatory Commission and thus, needed no consideration.

8. The admitted facts are that the Respondent-GRIDCO as the sole licensee for distribution and supply of electricity in the State of Orissa, submitted its proposal on 17.8.1998 u/s 26 (4) of the Reform Act for fixation of tariff by the Regulatory Commission for the financial year 1998-99. On receipt of the aforesaid proposal of GRIDCO. the Regulatory Commission invited public objection and NALCO was one of the objectors. The Regulatory Commission rejected the contention of NALCO as invalid as would be evident from the order dated 21.11.1998 at paragraphs 1.13 to 1.17. The contention of the respondent-GRIDCO and the findings of the Regulatory Commission is that since the Regulatory Commission was going to determine the tariff for various consumers as a whole and M/s. NALCO's objection was individual in nature for enforcement of a bi-lateral agreement, such dispute was beyond the scope of Section 26 of the Reform Act.

9. Section 26 of the Reform Act, 1995 provides for licensee's revenues and tariffs and the Regulatory Commission is the authority competent to determine the tariff and other charges leviable from a consumer by the licensee. In exercise of power conferred on it by Sub-section (2) of Section 9 and Section 54 of the Reform Act, the Regulatory Commission made the Regulation called "Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 1996" laying down the procedure to be followed by it while considering the different applications and objections. The Regulatory Commission also framed "Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 in exercise of power conferred by Section 54 of the Orissa Electricity Reforms Act, 1995 to govern distribution and supply of electricity and procedures thereof, like the system of billing, modality of payment of bills, the powers, functions and obligations of the suppliers and the rights and obligations of consumers and

matters connected therewith and indicated thereto. In Chapter VII thereof, classification of consumer is made, Clause 80 relates to, more particularly, classification of consumers and Sub-clause (p) of Clause 80 relates to industries owning generating plants (captive power plants) availing emergency supply only. Clause 80 and Sub-clause (p) thereof are quoted herein for better appreciation.

"80. Licensee may classify or reclassify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. The present classification is as follows :

(a) to (o) xxx xxx xxx

(9) Industries owning Generating Plants (Captive Power Plants) Availing Emergency Supply only.

This category relates to supply of power to industries with generating plants or including captive power plants only for start-up of the unit or to meet their essential auxiliary and survival requirements in the event of the failure of their generation capacity. Such emergency assistance shall be limited to 25% of the rated capacity of the largest unit in the Captive Power Plant or Generating Plant. In case any special provision is made in Power Purchase Agreement, approved or accepted by the Commission, such provision shall apply in such cases, subject to the provisions of this Code."

Clause 81 of the Conditions of Supply Code, 1998 relates to consumers under Special Agreement, which may be quoted hereunder :

"81. The licensee may, having regard to the nature of supply and purpose for which supply is required, fix special tariff and conditions of supply for the consumers not covered by the classification enumerated in this Code. For such purpose licensee may enter into special agreements with the approval of the Commission with suitable modifications in the Standard Agreement Form. The tariff in such cases shall be separately approved by the Commission."

On a conjoint reading of the aforesaid provision of Clause 80, Sub-clause (p) of Clause 80 and Clause 81, there cannot be any manner of doubt that a licensee has the right and authorised underlaw to classify or reclassify a consumer subject to approval of the Regulatory Commission, fix different tariffs and conditions of supply for different class of consumers. One of the categorised consumer may be and in an industry owning generating plants or captive power plants availing emergency supply of power only. For start up of the unit or to meet their essential auxiliary survival requirements. These rules also contemplate that the licensee may enter into any special power purchase agreement"either approved or accepted by the Regulatory Commission. In such an event, the tariff has to be separately approved by the Commission.

Thus, it is abundantly clear that the rules contemplates that with the class of consumers like industries owning generating plants or captive power plants,

there may exist a special arrangement or agreement between the licensee and such industries, subject however to the approval or acceptance of the Regulatory Commission and in those of cases, a separate tariff may be fixed by the Commissioner keeping in view the arrangements reached.

10. In the case at hand, it is not disputed by the Respondent- GRIDCO that there did exist some arrangements or settlement between the former Orissa State Electricity Board, the assets and liabilities of which has been transferred to the Respondent- GRIDCO and that the GRIDCO had been dealing with the appellant on the basis of such arrangement as per the memorandum dated 1st June, 1994. But the stand taken by the Respondent-GRIDCO is that under the provision of law, individual disputes between a licensee and a consumer cannot be gone into and decided by the Regulatory Commission in the present petition for fixation of tariff. It is further contended by Sri Panigrahi, learned Senior Advocate for the Respondent-GRIDCO that Section 26 (vi) of the O.E.R.C. Act does not contemplate any hearing of consumers" rather it prohibits hearing of any party except Commission Advisory Committee. The contention has to be rejected, because, Sub- section (vi) of Section 26 of the O.E.R.C. Act does not prescribe procedure as to how and the manner in which the application shall be considered for fixation of any tariff on an application by a licensee rather it puts an embargo on amendment of tariff more than once in a year and the exception thereto. The procedure to be followed in any proceeding before the Regulatory Commission has been prescribed by the Regulatory Commission itself under the powers conferred on it by the provisions of Sub-section (2) of Section 9 and Section 54 of the O.E.R.A. Act in "Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 1996". Proceedings before the Regulatory Commission has been defined under Regulation 2 (g) of the said Regulation to include proceedings of all nature that the Commission may hold in the discharge of its functions under the Reform Act in as much as u/s 52 of the Reform Act, 1995, all proceedings before the Commission shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure. Under Regulation 17 of the Conduct of Business Regulations, all matters, the Commission is required to do under the Act are to be done through proceeding and unless, otherwise decided by the Commission with reasons to be recorded in writing, the matter concerning fixation of tariff, approval of power procurement process, approval of power purchase agreement and proposal u/s 41 of the Act shall be done to proceed in the same manner as provided under Part II of the O.E.R.C. (Conduct of Business) Regulation, 1996. There is no dispute that the Commission did invite objections from affected persons by publication of notice to the proposal of the licensee-GRIDCO for revision of tariff and the NALCO as a consumer had filed its objection, inasmuch as it was heard in extenso, but the Regulatory Commission appears to have proceeded to consider only with regard to procedural objection raised by the appellant and did not address itself to the other question and the prayer with regard to the tariff applicable for emergency

power supply to NALCO in view of the agreement/arrangement reached in the High Level Committee meeting held in June, 1994 and recorded in its resolution dated 1.6.1994 and with regard to penalty and demand charts payable by the NALCO.

11. It has already been held that in view of the provisions of Sub-clause (p) of Clause 80 and Clause 81 the licensee has the right and authorised under law to classify or reclassify the consumer, but however subject to the approval of the Regulatory Commission and fix different tariff and conditions supply for different class of consumers. The O.S.E.B., the assets and functions of which has been transferred in favour of the GRIDCO by the Orissa Electricity Reform (Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996 read with Schedule- B thereto, more particularly Clause (v) of Schedule-B reached an understanding/arrangement with the appellant alongwith the State Government for supply, fixation of some tariff. The permissibility of any such specific arrangement or otherwise is always subject to the approval and/or acceptance of the Regulatory Commission and as such, the Regulatory Commission was required under law to consider the contention with regard to such arrangement and take a decision thereon. But it appears from the impugned order dated 2 1.11.1998 that the said matter had not specifically been considered by the Regulatory Commission, for which the appellant-NALCO filed a Review Application. A contention was raised by Sri Panigrahi as to the maintainability of a Review Application against the order of the Commission, but the contention has to be rejected in view of the specific provision of Section 10 of the Reforms Act. Sub-section (f) of Section 10 (i) empowers the Commission to review its own decision, direction and orders as vested in a Civil Court under the CPC while trying a suit in respect of matters stated therein.

12. In that view of the matter, the Regulatory Commission having not considered the contention raised by the appellant NALCO with regard to the applicability of the general tariff and acceptance of it in view of the Memorandum of Understanding, was required to be considered by the Commission and that having not been done, the Review Application was filed before the Regulatory Commission. The Regulatory Commission in its order on the Review Application in Case No. 4 of 1999 dated 13.5.1999 (Annexure-7) of Misc. Appeal no. 651 of 1999, at paragraph-6 thereof has observed that the appellant (petitioner No. 2) has not produced any fact and evidence, which was not placed or could not be placed during the elaborate hearing by the Commission in determining the distribution and Retail supply tariff and passing the order dated 21.11.1998 in Case No. 19 of 1998, but only pointed out in course of his elaborate arguments that the Commission has omitted to give a finding that there is a special bilateral arrangement between the licensee and the petitioner and that in view of the said bilateral arrangement, the tariff order dated 21.11.1998 whether is to be applicable in case of the appellant. The Commission was of the view that there has been no omission whatsoever of any relevant issue for determination and since the case was for determination of the licensees' tariff for the year 1998-99.

The Commission considered it appropriate to obtain objections, observations and interventions from any affected party in the State of Orissa only to give chance to a wide cross section of the consumers to get as much information as possible for determining tariff of the licensee balancing the interest of all sectors of the consumers and as such, the scope of tariff proceeding did not extend to deal with bilateral issues between the licensee and one of the consumers. This finding of the Commission cannot be sustained in law and has to be set aside, since in view of the Sub-clause (p) of Clause 80 and Clause 81, the licensee was competent and authorised to classify a consumer subject to approval of the Regulatory Commission and fix different tariff and conditions of supply to different classes of consumers. Undisputedly, the appellant-NALCO was coming within the Sub-clause (p) of Clause 80 of a class of consumer by itself being a Generating Plant or captive power plants availing emergency supply only for start up of the unit or to meet their essential auxiliary and survival requirements in the event of the failure of their generation capacity. The special agreement or arrangement as contemplated under the aforesaid clause is of course subject to the acceptance and/ or approval of the Regulatory Commission. It was therefore incumbent upon the Regulatory Commission to consider the aforesaid undisputed bilateral arrangement between the licensee and the consumer- NALCO for the purpose of acceptance and/or approval of the same. The Commission, on such consideration was free to either accept the arrangement if it was in accordance with the law or reject the same if it offended any provisions of the Reform Act or the Rules and/ or Regulations thereof or otherwise not permissible/ acceptable.

Thus, the Commission erred in law in observing that such a bilateral arrangement was beyond the purview of the proceeding. It may be reiterated that the existence of the bilateral arrangement between the parties was not in dispute and what in dispute was whether any such arrangement is permissible and/or acceptable while considering the tariff. In any event, the Regulatory Commission was also required to consider as to whether any such arrangement was acceptable and for which a separate or different tariff is required to be fixed, since it enjoyed with the power to approve any agreement/arrangement and consequently fix a separate tariff.

13. In such view of the matter, I deem it appropriate that the matter should be remitted back to the Regulatory Commission for consideration of the matter afresh in accordance with law keeping in view the observations made hereinafter affording adequate opportunity to the parties to have their say and if required by producing materials, if any.

In the circumstances, both the appeals are allowed in part to the extent indicated above. There shall however be no order as to cost.