

(2015) 04 GAU CK 0048
In the Gauhati High Court
Case No : WP (C) No. 4291 of 2009

NECEM Cements Limited and Others APPELLANT
Vs
The Central Assam Electricity Distribution Company Limited RESPONDENT
and Others

Date of Decision : 21-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 56
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 14, 33, 34

Citation : (2015) 3 GLT 359

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : K.R. Surana, for the Appellant; B.D. Das, and S.G. Baruah,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Biplab Kumar Sharma, J—By means of this writ petition, the petitioners have disputed the electricity consumption bill of Rs. 10,21,874/- of which Rs. 9,18,893/- is the principal amount and remaining Rs. 1,02,981/- is the surcharge on the principal amount. The period in question is 01/09/1998 to 01/07/2006. According to the petitioners, the respondents wrongly calculated the demand charge @ Rs. 150/KVA/Month instead of Rs. 110/KVA/month.

2. The petitioner No. 1 is a Cement Manufacturing Company and is a consumer of electricity energy under the respondent No. 1 under Consumer No. 167/3 under category VII(C) H.T. industries. The industry is situated at Umrangshu in the N.C. Hills District of Assam. The petitioners are aggrieved by the Annexure-5 revised billing statement that was served on him demanding a sum of Rs. 10,21,874/- (Rs. 9,18,893/- + Rs. 1,02,981/-). As disclosed in the said statement, the demand charge was @ Rs. 150/- per KVA per month.

3. After the said revised billing statement, correspondences followed by and

between the parties and thereafter the respondent No. 2 by its Annexure-6 letter dated 25/11/2008 furnished the petitioner No. 1 Company the break-up of outstanding dues as on November, 2008. Total outstanding dues upto November, 2008 inclusive of aforesaid principal amount of Rs. 9,18,893/- and surcharge upto July, 2006 of Rs. 1,02,981/- was shown as Rs. 14,06,482/-. Responding to the said letter, the petitioner informed the Chief General Manager (D) as follows:-

"a. That for the period from 01.08.1998 to 04.03.1999, an excess of Rs. 1,76,160/- was charged over the published Tariff and request was made for correction.

b. Payment was made as per bill, and Company on its own did not make excess payment. Excess payment was shown even in their statement as bills were charged at higher rates than tariff.

c. as per statement, ASEB deducted surcharge before principal amount whereas as per ASEB Terms & Conditions, deduction should have been done first against revenue arrears (i.e. principal amount) than interest/surcharge on revenue arrears. Therefore, the statement needs correction.

d. The petitioner informed that they were ready to present their case on the above points with your higher officials, and request for meeting was made in this regard after 16.12.2008."

4. As stated in the writ petition, the petitioner No. 1 company became a sick company within the meaning of Sick Companies (Special Provisions) Act, 1985 and a proceeding for rehabilitation was under consideration by the Board of Industrial and Financial Reconstruction (for short BIFR). In this connection, the petitioner has referred to case No. 87/1997 with the statement that during the pendency of the said proceeding, no coercive measures could be adopted by the respondents against it. Referring to the summary record proceedings of the BIFR, the petitioner has stated thus in paragraphs 15 and 16 of the writ petition, which are quoted below:-

"15. That the petitioners state that the learned BIFR in the Summary Record of Proceedings of the hearing held on 29/07/2009 had recorded that the matter between the Petitioner No. 1 Company and the ASEB was taken up for hearing held on 19.06.2008 and 05.01.2009. Further directions were issued by the learned BIFR on 29.07.2009 to the effect that the Bench directed the Facilitator to look into the issue of charging @ 1.50 per unit whereas the tariff rate was quoted @ Rs. 1.10 per unit and would also submit its report within further 30 days. The decision of the Facilitator would be binding on both the parties.

16. That the Petitioners state that the ASEB and CAEDCL are fully conscious and aware that the next date of the BIFR Proceedings is scheduled on 12.11.2009, wherein the Facilitator appointed by the learned BIFR may submit his finding on the contentions issued of levy of "Demand Charge" @ Rs. 110/- or Rs. 150/- per KVA per month before the BIFR. Hence, with an oblique motive the Sub

Divisional Engineer, CAEDCL (Respondent No. 3), served a disconnection notice dated 19.09.2009 to the Petitioner No. 1 Company's Factory Plat at Umrangshu, on 22.09.2009, whereby the Petitioner was threatened of disconnection of electricity energy supply for non-payment of its alleged dues of Rs. 14,27,406/- (Rupees Fourteen lakh twenty seven thousand four hundred and six only) within 15 days from the date of service thereof. At the cost of repetition it is reiterated that he said disconnection notice dated 19.09.2009 was actually served on the Petitioner on 22.09.2009 and, as such, it is contemplated that the Respondents may disconnect electricity supply to the Petitioners at any time on or after 07.10.2009."

5. Annexure-14 is the disconnection notice dated 19/09/2009, in response to which the petitioners vide its Annexure-15 letter dated 23/09/2009 requested the respondent No. 2 to withdraw the notice, more particularly, in view of the BIFR proceedings. It was also contended that such coercive measure was barred under Section 56 of the Electricity act, 2003. In paragraph 22 of the writ petition, the petitioner has contended that the respondents being aware that the petitioners' claims were adjudicated by the BIFR could not have undertaken the coercive measures even to the extent of issuance of the disconnection notice. According to the petitioners, the respondents taking advantage of the fact that the BIFR proceeding was scheduled only on 12/11/2009, adopted the coercive measures. According to the petitioners, they are not liable to pay anything to the respondents except the current electricity energy dues for the period from 01/08/1999 to 01/09/2009 amounting to Rs. 10,41,642/-.

6. The prayers made in the writ petition is to set aside and quash the revised billing statement (Annexure-2) for the period from 01/09/1998 to 01/07/2006 for the aforesaid amount of Rs. 10,21,874/-; bill dated 10/09/2009 (Annexure-16) for arrears except current energy charges of Rs. 10,41,642/- for the period 01/08/2009 to 01/09/2009; disconnection notice dated 19/09/2009 (Annexure-18) and to set aside and quash the Annexure-18 letter dated 14/09/2009, by which the Chief General Manager (d) directed the Deputy General Manager, Kanch Electrical Circle (CAEDCL) Diphu to serve disconnection notice on the petitioners against arrear dues for the aforesaid period i.e. 01/09/1998 to 01/07/2006, amounting to Rs. 14,27,106/- (principal Rs. 9,18,893/- + Rs. 4,94,730/- as surcharge).

7. In the counter affidavit filed by the respondents, the proceedings before the BIFR including the appeal proceedings have been brought on record. According to the respondents, the petitioners are bound by the orders passed in the said proceedings and cannot take recourse to this proceeding.

8. I have heard Mr. K.R. Surana, learned counsel for the petitioners and have also heard Mr. B.D. Das, learned senior counsel assisted by Ms. S.G. Baruah, learned counsel representing the respondents. Mr. K.R. Surana, learned counsel for the petitioners in his long and elaborate arguments has submitted that the respondents could not have raised the aforesaid bills/demand notice based on

wrong calculation. According to him, the tariff that was applicable at the relevant point of time was Rs. 110/KVA/month and not Rs. 150/-. He further submits that the revised tariff having not been notified, the respondents could not have raised the demand notice/energy charge on the basis of the revised rate @ Rs. 150/KVA/month. In this connection, he has referred to the relevant documents annexed both to the writ petition as well as the counter affidavit.

9. Countering the above argument, Mr. Das, learned senior counsel representing the respondents submits that the period in question being covered by the revised rate i.e. Rs. 150/- KVA/month and all other companies like that of the petitioner company having paid the energy charge on the basis of the said revised rate, there cannot be an exception only to the case of the petitioner. Referring to the BIFR proceedings, he submits that the matter having attained finality in the said proceeding and there being no challenge to the same, the writ petition in its present form is misconceived. He also submits that disputed question of fact having been raised in the writ petition, on that score alone the writ petition is liable to be dismissed. Referring to the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, more particularly, to Section 14, he submits that the proceedings before the BIFR being a judicial proceeding and there being no challenge to the orders passed therein, the writ petition is not maintainable.

10. I have given my anxious consideration to the submissions made by the learned counsel for the parties and have also perused the entire materials on record. In the writ petition, it is the petitioners have referred to the BIFR proceedings and in fact, at the time of filing the writ petition on 30/0-9/3/2009, one of the pleas raised was that since the matter was being adjudicated upon by the BIFR, the respondents could not undertake any coercive measures against the petitioner company even to the issuance of disconnection notice. Irrespective of the pendency of the instant writ petition, BIFR proceedings continued with due participation of the parties.

11. As submitted by Mr. Das, learned counsel for the respondents, the issue involved in the writ petition stood conclusively decided with the passing of the Annexure-12 order dated 31/10/2009 annexed to the counter affidavit in which a finding was recorded that the petitioner company should abide by the circulars dated 26/07/1998 and 16/03/1999 and pay the tariff @ Rs. 150/- for the period 01/09/1998 to 28/02/1999. However, Mr. Surana, learned counsel for the petitioners referring to the last paragraph of the order dated 21/10/2009 submits that irrespective of the purported findings recorded in the said order, the issue is still open and it require to be adjudicated upon in this proceeding. For a ready reference, the aforesaid Annexure-12 dated 31/10/2009 is reproduced below:-

"GOVERNMENT OF ASSAM INDUSTRIES AND COMMERCE DEPARTMENT BLOCK-"C", IInd FLOOR DISPUR :::: GUWAHATI-6

ORDER

Dated, Dispur the 31st October 2009.

As per order of the Hon"ble Bench of BIFR dated 29.07.2009 the facilitator appointed by the Government of Assam was required to look into the dispute on account of tariff of Electricity between CAEDCL and the Company and submit a report within 30 days. Accordingly the undersigned called both the parties and held discussion with them. Their points of view were recorded.

The contention of M/s. NECEM Cements Ltd. is that the Demand Charge from 01.09.1998 to 31.03.1999 should be 110/- KVA/month as per Schedule of Tariff (w.e.f. 01.09.1998) with amendment upto 01.08.2001. The circular dated 26.07.1998 notified the Tariff as Rs. 150/KVA/month is not reflected in the Schedule of Tariff (w.e.f. 01.09.1998) with amendment upto 01.08.2001.

ASEB had issued a circular dated 26.07.1998 notifying the tariff w.e.f. 01.09.1998. In the said Schedule of tariff the rate of Demand Charge for Category VII(C) II.T Industries was Rs. 150/KVA/month. The same circular was published in local newspapers. Subsequently the rate of tariff for certain category of consumers was partially modified w.e.f. 01.03.1999 vide circular dated 16.03.1999. Accordingly, the Demand Charge of this category was reduced from Rs. 150/- to Rs. 110/- w.e.f. 01.03.1999. This circular was also published in the local newspapers.

It is a fact that ASEB had not published the revised rate of Tariff (w.e.f. 01.09.1998 to 28.02.1999 @ Rs. 150/KVA/month) in the Schedule of Tariff (w.e.f. 01.09.1998) with amendment upto 01.08.2001 although both the amendments were published in local newspapers.

It appears that M/s. NECEM Cements Ltd. is relying on the Schedule of Tariff (w.e.f. 01.09.1998) with amendment upto 01.08.2001 totally glossing over the circular of 26.07.1998 wherein the Demand Charge was fixed at Rs. 150/KVA/month and the circular dated 16.03.1999 through which Demand Charge was reduced from Rs. 150/KVA/month to Rs. 110/KVA/month.

To be fair to both parties it would be in the fitness of things to refer to the Tariff paid by other companies during the period 01.09.1998 to 28.02.1999. Accordingly ASEB submitted the billing statements of M/s. Umrangshu Cements Ltd. and two bills of same category of consumers viz M/s. Prag Siva Cement Pvt. Ltd. and M/s. Assam Hardboard which shows that these companies were billed @ Rs. 150/KVA/month during the period 01.09.1998 to 28.02.1999 and from 01.03.1999 onwards bills were raised @ Rs. 110/-. As such the billing statement in respect of M/s. NECEM Cements Pvt. Ltd. prepared by taking Demand Charge as Rs. 150/- KVA/month for the period 01.09.1998 to 28.02.1999 appears to be in order. Thus NECEM Cement should also abide by the circulars dated 26.07.1998 and 16.03.1999 and pay the tariff @ Rs. 150/- for the period 01.09.1998 to 28.02.1999.

It transpires that the Company is not accepting the circular dated 26.07.1998

wherein revised tariff of Rs. 150/- KVA/month was notified, whereas they are accepting the circular dated 20.06.2001, wherein billable demand applicable for these categories was modified. Both these circulars have not been published in the schedule of Tariff (w.e.f. 01.09.1998) with amendment upto 01.08.2001. This seems anomalous and, therefore, cannot be accepted. For any other grievances M/s. NECEM/Cement may approach ASEB.

Sd/- Joint Secretary to the Government of Assam Industries & Commerce Department Dispur, Guwahati-6."

12. If we go by the above quoted order dated 31/10/2009, the petitioner is to abide by the relevant circulars and pay the tariff @ Rs. 150/- for the period in question. As regard the observations made in the last para of the said order, the same is in respect of the alleged non-publication of the circulars dated 26/07/1998 and 20/06/2001. While observing that the same was such non-publication was anomalous, the petitioner was granted liberty to approach the respondents in respect of its "other grievances". On a plain reading of the said order, would reveal that the petitioner was categorically held liable to pay the tariff @ Rs. 150/- for the period 01.09.1998 to 28.02.1999. The BIFR in its order dated 04/04/2013 referring to the facilitator's report, recorded the following:-

"2.2 The Id. consultant representing the company stated that the company has filed appeal against two BIFR orders dated 13.05.2010 and 02.06.2010. AAIFR vide order dated 30.05.2012 has remanded the case back to BIFR. In the meantime, the company has filed a writ petition before Hon"ble High Court of Guwahati vide WP(C) No. 8306/2001 praying for direction to Govt. of Assam regarding extension of benefit under Industrial Policies, 1986 and 1991 for tax concession and revival of the viable sick industrial unit. Hon"ble High Court of Guwahati vide its order dated 28.01.2013 has heard both the company and State Govt. and has directed that Govt. of Assam to pass such final decision in the matter within three months from the date of receipt of a copy of this order. The company has taken up the direction of High Court with Industries and Commerce Department, Govt. of Assam and after personal meeting with the concerned official of the State Govt., the company has been informed that, a decision will be taken on completion of the Assembly session. He added that the company has no dispute regarding Facilitator's report with regard to Assam State Electricity Board. There is a dispute with regard to Sales Tax and applicability of interest rate. The company is seeking interest rate at 4% whereas the Sales Tax Department demands 12%."

13. In the above quoted portion of the order dated 04/04/2013, the reference that has been made to the Facilitator's report is the Annexure-12 order dated 31/10/2009 quoted above. As per the said order, the petitioner company have no dispute regarding Facilitator's report with regard to the respondents which was earlier known as ASEB now as APDCL. The only dispute that was referred to was in respect of Sales Tax and applicability of interest rate. Finally the BIFR in its proceeding held on 11/12/2013 referring to all its earlier proceedings. Orders

also referred to the appeal proceeding that as arisen out of the BIFR proceeding in which it was observed ".....If their dues were recovered, the same could have been used for lending to others, thereby increasing the production as well as employment. The delay of 14 years is far beyond any reasonable time required for revival of a company. As such, reference of company pending for such a long period is liable to be dismissed on this ground alone....."

14. In the proceeding of the BIFR held on 11/12/2013 and as indicated in the said order, in the hearing held on 11/09/2013, it was observed that ".....the company has been in BIFR since 1997. No effective progress was made so far towards the revival of the company. In the hearing held on 24.9.2008, the Bench had directed the company to file fully tied up DRS within a period of 30 days, but the company did not do so. Despite ample opportunities extended to the company, the company failed to show its seriousness regarding the rehabilitation of the company. The company is found guilty of deliberate deception with design of seeking unfair advantage at the cost of causing loss to the creditors. The creditors of the company are placed since the last several years with no light in sight at the other end of the tunnel....."

15. The BIFR finally recorded the following:-

"2.3 Having considered the submissions made in the hearing and material on record, the Bench observed that much more than reasonable period of time has elapsed to achieve the objective of SICA in the present reference. And further delay will encourage the extension of un-due protection of SICA. Accordingly, the Bench confirmed its prima facie opinion that the company is de-registered from the purview of SICA/BIFR since the company could not submit any convincing reason to the show cause notice for de-registering the company."

16. The BIFR has already adjudicated the matter and there being no formal challenge to the findings recorded coupled with the fact that the petitioners themselves took the plea in the writ petition about the non-availability of any remedial measures for the respondents. In view of the pendency of the said BIFR proceeding, this Court exercising its jurisdiction under Article 226 of the Constitution of India cannot sit on appeal over the said findings, more particularly, in view of the agreement arrived at by and between the parties in the hearing held on 02/03/2009 and 29/07/2009, which are reproduced below:-

"2.3.1999

(i) As Govt. of Assam (GOA) had announced a scheme for liquidation of arrears of sales tax, the company might avail this opportunity to settle the dues on account of sales within stipulated time frame.

(ii) The facilitator appointed by the GOA would intervene to sort out the issue relating to the dues of CAEDCL. The decision of the facilitator would be binding on CAEDCL and the company.

(iii) The Bench reiterated its direction that State Bank of India would charge

interest at PLR only as per RBI guidelines, and excess interest if any charged in the past would be refunded to the company.

(iv) IDBI was exempted from attending the future hearings of the company.

(v) The next hearing of the case would be held on 7.5.2009. However, the hearing was postponed due to Lok Sabha Elections in Delhi.

29.7.2009

(i) The facilitator appointed by the GOA will look into the dispute on account of tariff of electricity between the CAEDCL and the company. The Facilitator will submit its report within 30 days.

(ii) The Bench reiterates its direction that the decision of the Facilitator would be binding on both the parties, and the Bench will have to consider acting under sections 33 and 34 of SICA if the Facilitator's decision/award remain unimplemented.

(iii) IFCI (OA) will hold a joint meeting (JM) to consider the DRS submitted by the company. IFCI(OA) will invite the representatives of SBI, Govt. of Assam (GOA), company, Commercial Tax Deptt., Assam State Electricity Board and other concerned Deptts of Central/State Govts. In the joint meeting to resolve disputed claims and discuss the DRS.

(iv) The Bench reiterates that the Certificate Officer (Taxation), Guwahati will not initiate any coercive measures for the recovery of disputed dues against the company till the next date of hearing.

(v) The next hearing in the case will be held on 12.11.2009."

17. As noted above, in the proceeding held on 04/04/2013, the consultant representing the petitioner company categorically submitted that the company has no dispute regarding facilitator's report with regard to ASEB (now APDCL). This being the position and in absence of any formal challenge to the BIFR proceedings and the orders thereon, I am of the considered opinion that the prayers made in the writ petition cannot be allowed.

18. In view of the above, the writ petition is dismissed. Interim order operating in this proceeding stands vacated. There shall be no order as to costs.

19. At this stage, Mr. Surana, learned counsel for the petitioners submits that he case of the petitioners is required to be considered favourably as regard the surcharge in view of the pendency of the present proceeding. It is expected that the respondents will consider this aspect of the matter taking note of the fact of pendency of the presenting proceeding with an interim order as regard the payment to be made by the petitioner. A reasonable period of time may also be given to them by the respondents.