(2021) 03 P&H CK 0376

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 20161 Of 2020(O&M)

Punjab State Power Corporation Ltd. APPELLANT

Vs

M/S Arora Iron Steel Rolling Mills Pvt. Ltd. And Another RESPONDENT

Date of Decision : 26-03-2021

Acts Referred:

Electricity Act, 2003 — Section 3, 42, 42(5), 79(1), 82, 86, 86(1), 142, 181

Citation : (2021) 03 P&H CK 0376

Hon'ble Judges : Anil Kshetarpal, J

Bench : Single Bench

Advocate : Naveen S Bhardwaj, M.S.Saini

Final Decision : Allowed

Judgement

Anil Kshetarpal, J

The petitioner-Company, a public sector undertaking, is a distribution licensee in the State of Punjab in terms of the Electricity Act, 2003. It is in the business of supplying electricity to the consumers in the State of Punjab. The petitioner prays for issuance of a writ in the nature of Certiorari to set aside the order dated 16.09.2019 passed by Consumers Grievances Redressal Forum, Ludhiana ordering the refund of an amount of Rs.2,98,85,000 approximately to respondent no.1.

Before this Court proceeds to adjudicate upon the dispute, a brief background of the scheme of the Act, the scope of power of the Punjab State Electricity Regulatory Commission and the Consumer Grievances Redressal Forum, shall be required to be examined. Section 82 of Electricity Act, 2003 (hereinafter referred to as the '2003 Act') provides for constitution of the State Electricity Commission in each State. The functions of the State Electricity Commission are provided under Section 86 of the 2003 Act. Section 86 (1) enables the State Electricity Commission to determine the tariff. Section 86 is extracted as under:-

86. Functions of State Commission.-

(1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of Section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganisation and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that

Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3."

In accordance with the mandate of Section 82 of the 2003 Act, the State of Punjab has constituted the Punjab State Electricity

Regulatory Commission (hereinafter referred to as 'the Commission'). The Commission in exercise of its powers under Section 181 and other provisions of the 2003 Act has notified the Punjab State Electricity Regulatory Commission (Forum and Ombudsman) Regulations, 2016. Under the Regulations, a Forum for Redressal of Grievance of Consumers has been constituted in accordance with the mandate of Section 42(5) of the Act of 2003.

The order passed by such Forum has been assailed in the present writ petition.

In order to understand the controversy involved in the present writ petition, it would be necessary to notice certain facts. The distribution licensee faces reduced demand of electricity during particular hours of the day/night. In other words, the demand for supply of electricity falls below the electricity production or availability during lean hours. In order to increase/encourage demand of electricity during lean hours, the distribution licensee with the prior permission of the Commission issues sales circulars offering rebate in the tariff of electricity. In simple words, such rebate being offered can be equated with the discount offered by the restaurants during lean hours which are commonly known as "happy hours". Respondent no.1 is a high end consumer of electricity. It has got its sanctioned load extended from 2422 kw/2445 kva to 29500 kw/28500 kva on 29.05.2015.

On 05.08.2016, the petitioner issued commercial letter no. 31 of 2016. In this circular, it was provided that the piece tariff rate at 4.99 per kvah shall be permissible to large supply industrial category consumers who consume power above the threshold limit as per 'para A'. This revision of tariff or in other words the offer was for the financial year 2016-17. It was provided that the threshold limit shall be calculated on the basis of maximum annual consumption in any of the last two financial years. In case, the period is less than two financial years i.e if the connection has been released after 31.03.2014, the concessional tariff at the rate of 4.99 per kvah shall not be permissible. However, in case there is reduction or extension in load/demand, the threshold consumption for the financial year shall be calculated on pro rata basis.

Pursuant thereto, respondent no.1-Company was refunded Rs.58,58,563/- in the month of February, 2017 and Rs.72,36,481/- in the month of March, 2017. However, realizing that the excess amount has been refunded, respondent no.1-

Company was called upon to deposit Rs.90,45,743/- vide a communication dated 25.11.2017, which was duly deposited. Thereafter, audit party further raised objection and respondent no.1- Company was again called upon to deposit Rs.17,27,337/- which was also deposited.

On 07.03.2018, the Commission issued a clarification for the financial year 2017-18 regarding calculation of threshold limit in case of any change in the contract demand and capping of cumulative effect of DoD rebate and reduced energy charges for consumption beyond threshold limit as per the provisions of tariff order which reads as under:-

"PUNJAB STATE ELECTRICITY REGULATORY COMMISSION, SCO 220-221, SECTOR-34A, CHANDIGARH

To,

The Chief Engineer/Commercial

Fax:0175-2214495

PSEB, Head Office,

The Mall, Patiala

No.PSERC/Tariff/198/2388

Dated: 07.03.2018

Subject: Clarification regarding calculation of threshold limit in case of change in Contract Demand (CD) and capping of cumulative effect of ToD rebate and reduced enerty charges for consumption beyond threshold limit as per provisions of Tariff order for FY 2017-18.

In reference to your memo No.175/Clarification dated 16.02.2018 on the subject, observation/clarification of the commissioner is as under:-

i) Working out of threshold consumption for a financial year in case there is reduction or extension in load/demand.

i) The Commission in the Tariff Order for FY 2016-17 had decided as under:-

"7.4.2.....the commission approves bases tariff rate of Rs.4.99 per KVAH for Large Supply industry category consumers, who consume power above threshold limit as per para 7.4.3. All other surcharge and rebates as approved by the Commission and Govt. levies as notified by the State Government shall be charged extra".

And, in the Tariff order for FY 2017-18, the Commission, in order to further encourage the productive use of surplus power, decided to have reduced energy charges as under:-

"6.1.3......within Two Part Tariff structure, the Commission, in order to further encourage the industry for productive use of surplus power, decides to have reduced energy charges for FY 2017-18 @ Rs.4.45 per KWH for Small Power and Rs.4.23 per KVAH for Large Supply/Medium Supply consumers, for all categories of 'Industrial Consumers' who consume power above the threshold limit i.e. for the consumption in excess of the maximum consumption recorded during the FY 2015-16 and FY 2016-17. However, in case, the period is less than two financial year i.e. if the connection has been released after 31.03.2015, the reduced energy charges shall not be permissible. All other terms and conditions, including determining of threshold limit, shall remain same as approved in the Tariff order for FY 2016-17 read with order of the Commission dated 18.10.2016 in Petition No.64 of 2016".

As may be seen, above decisions of the Commission contained in Tariff orders does not provide for any adjustment in current year consumption due to any reduction/extension in load/demand.

ii) Further, the methodology for working out the threshold consumption was specified by the Commission under para 7.4.3 (i) of Tariff Order for FY 2016-17 reproduced below for ready reference:-

"It shall be allowed for any consumption during the financial year exceeding the consumption worked out on the following methodology.

The maximum annual consumption in any of the last two financial years shall be taken as threshold. In case, period is less than two financial years i.e. if connection has been released after 31.03.2014, tariff @ Rs.4.99/-per KVAH shall not be permissible. Further, in case, there is reduction or extension in load/ demand, threshold consumption for a financial year shall be worked out on pro-rata basis".

Perusal of the methodology specified under para 7.4.3 (i) of the Tariff order for FY 2016-17, reveals that, the provision for adjustment of consumption on pro-rata basis has been made only in case of reduction/extension in load/demand taking place in any of the last two financial years to work out the threshold consumption for that financial year i.e. in case of reduction/extension in load/ demand during any of the two previous financial years, the consumption of the relevant year shall be reduced/enhanced on pro-rata basis, as the case may be, for the purpose of working out of the threshold consumption of that year.

B. Capping of cumulative effect of ToD and Lowest Energy Charges limit of consumption beyond threshold limit.

The Commission, under para 6.1 of the Tariff order dated 23.10.2017, specified the reduced energy charges under TPT for FY 2017-18 @ Rs.4.45/-KWH for SP and Rs.4.23/KVAH for LS/MS consumers for consumption of power above the threshold limit. Further, under para

6.2.5 the Commission specified the ToD Tariff, and the capping of cumulative effect of ToD rebate and reduced energy charges for consumption beyond threshold limit.

Subsequently, the Commission vide its order dated 09.11.2017 decided to continue with Single Part Tariff from 01.04.2017 to 31.12.2017 and according amended the para 6.1 of Tariff Order to have the reduced energy charges under Single Part Tariff @ Rs.4.99/KVAH for LS/MS and Rs.5.25/-KWH for SP Industrial consumers.

It may be seen that the Commission in its order dated 09.11.2017, has only amended the para 6.1 and not touched/revised the para 6.2 of the Tariff Order dated 23.10.2017 containing the directions pertaining to capping of cumulative effect of ToD rebate and reduced energy charges for consumption beyond the threshold limit to Rs.4.23/KVAH, as it has been worked out on the basis of 'Pooled Cost of Purchase' of PSPCL during the year. As such, the capping of cumulative efect of 'ToD rebate and reduced energy charges for consumption beyond threshold limit' to the lowest energy charges of Rs.4.23/- per KVAH specified under para 6.2 holds good for both scenarios i.e. Two Part Tariff as well as Single Part Tariff, during the FY 2017-18.

Sd/-

Secretary

CC:

(i) The Chief Engineer/ARR & TR, PSPCL,

Patiala Fax NO.0175- 2302416.

(ii) Nahar Spinning Mills Ltd. Regd. Office 373,

Industrial Area-A, Ludhiana-141003, in reference to their representations dated 27.12.2017, 10.01.2018, 05.02.2018 and during the public hearings held at Ludhiana and Chandigarh."

On the basis of the aforesaid clarification issued by the Commission, respondent no.1-Company filed a complaint before the Consumers Grievance Redressal Forum constituted under the Punjab State Electricity Regulatory Commission (Forum) and Ombudsman) Regulations, 2016, for re-calculating the rebate for the financial year 2016-17 and refund of the amount to the extent of Rs.3,19,87,000 approximately. The aforesaid application has been allowed by the Forum vide an order dated 16.09.2019 which is the subject matter of challenge in this writ petition.

At this stage, it is appropriate to notice that ToD means time of day. This is in order to indicate the rate of tariff with respect to a particular time of the day.

In this writ petition, this Court is called upon to interpret the clarification dated 07.03.2018 issued by the Commission. The Court is further called upon to decide whether the aforesaid clarification is applicable to para 7.3, 7.4.3 (i) of tariff order for the financial year 2016-17 or not?

This Bench has heard learned counsel for the parties at length and with their able assistance perused the paper book. After hearing arguments on 04.03.2021, liberty was granted to the learned counsels to file their written synopsis alongwith the gist of their arguments. Learned counsel representing respondent no.1 has filed his written arguments.

Learned counsel representing the petitioner while reading in extenso the commercial letter no. 31 of 2016, dated 05.08.2016 (Annexure P-4 to the writ petition) and clarification dated 07.03.2018 which has already been extracted submits that the clarification is with respect to calculation of the threshold limit in case of any change in contract demand and capping of cumulative effect of ToD rebate and reduced charges of consumption beyond the threshold limit as per provisions of tariff order for the financial year 2017-18 and not with respect to the financial year 2016-17. He, hence, contended that the Forum was in error in reading clause (ii) of clarification dated 07.03.2018 out of context and therefore, the order is liable to be set aside.

Per contra, learned counsel representing the respondent has submitted that the writ petition is liable to be dismissed on the ground of concealment of facts in as much as the order dated 10.09.2020 passed by the Commission in a petition filed by the petitioner for clarification has been withheld from the Court. It is further contended that on reading of clause (ii) of clarification dated 07.03.2018 it is apparent that the methodology for working out threshold consumption specified by the Commission under para 7.3.4(i) of tariff order for the financial year 2016-17 was clarified and therefore, the Forum has correctly ordered the refund. The respondent also filed a complaint before the Commission alleging non-implementation of the order passed by the Forum which was allowed by the Commission with costs of Rs.25,000/-. The Chief Engineer, Commercial, has vide a letter dated 14.10.2020 directed the implementation of the order passed by the Forum in favour of respondent no.1. He, hence, prays for dismissal of the writ petition.

After having considered the arguments of the learned counsel representing the parties, this Bench now proceeds to critically analzye the same.

Before proceeding to interpret the communication dated 07.03.2018, it would be appropriate to carefully examine the commercial letter no. 31/2016 dated 05.08.2016. The caption of this letter is Revision of tariff (financial year 2016-17) Basic tariff rate for incremental consumption above the threshold limit for large supply industrial category consumers. This letter is issued by Deputy Chief Engineer/Sales II, circulated to all Chief Engineers/Chief Engineers (Distribution). This commercial letter refers to the order passed by the Commission in its tariff order dated 27.07.2016 for the financial year 2016-17. The order passed by the Commission has been extracted in the communication itself. On examination of the part which has been reproduced, it is apparent that the Commission approved base tariff rate of Rs.4.99 per kvah for large supply industrial category consumers who consume power above the threshold limit as per para (a). Para (a) thereafter defines what is the consumption above the threshold limit.

Now let us turn our focus to clarification dated 07.03.2018, which has been extracted above. From the reading of the subject, it is apparent that this clarification is regarding the calculation of the threshold limit for certain categories of the tariff order for the financial year 2017-18. It nowhere amends or modifies the tariff order 7.4.3 (i) of tariff order for the financial year 2016-17. Further on careful reading of the entire communication/clarification, it is apparent that no doubt a reference has been made to the financial year 2016-17, however, it is not provided that the method of calculation of the threshold limit with respect to the eventuality referred to in the letter would also be applicable for grant of rebate with respect to the financial year 2016-17. In para (ii) after reproducing the tariff order, the manner in which it is to be calculated for the year 2017-18 has been explained. Even in the concluding para, it is apparent that there is no provision for the refund of the amount to the consumers with respect to the financial year 2016-17. There is no direction for the revision of the electricity consumption bills of the consumers covered by the tariff order no.7.4.3(i) for the financial year 2016-17. In fact, on careful reading of the order passed by the Forum, it is apparent that the Forum held that the benefit of clarification issued vide CC 14 of 2018 and clarification issued by the office of the Deputy Chief Engineer, Sales II, Patiala, vide a letter dated 26.03.2019 will enure to the benefit of the consumers for the financial year 2016-17. In the considered view of this Court, the interpretation is not in accordance with the spirit of the communication dated 07.03.2018.

This matter can be examined from yet another angle. The financial year 2016-17 has come to an end. These circulars have been issued in order to encourage consumption of electricity beyond the threshold limit during the lean period of the day/night. These circulars have not been issued in order to confer bonanza upon the consumers subsequently. The object of issuing such circulars is to promote or encourage the consumption of electricity during the period when there is reduction in demand of electricity. In such circumstances, the letter issued on 07.03.2018, particularly, when the financial year 2016-17 came to an end almost one year prior does not subserve the cause.

Still further, this matter can be examined from yet another perspective. The circular dated 07.03.2018 cannot be made effective from retrospective date. The circular is in the form of a subordinate legislation or administrative instructions. In the absence of a provision in the Electricity Act, 2003 enabling the Commission to issue circulars with retrospective effect with respect to grant of rebate or concession in the tariff rate, it would not be appropriate to interpret the circular in a manner which defeats the very object sought to be achieved.

Now let us examine the arguments of the learned counsel for the respondent. First point is with respect to interpretation of circular dated 07.03.2018 which has already been discussed in detail. Second argument of the learned counsel is with regard to dismissal of the clarification by the Commission vide an order dated 10.09.2020. This Court has carefully gone through the order dated 10.09.2020. The Commission refused to admit the petition with the following observations:-

"The provisions of the tariff Order read with clarification issued by the Commission vide memo No. 2388 dated 02.03.2018 are clear and unambiguous. Having lost its case in the CGRF, PSPCL's request for interpretation of said provisions of the Tariff Order appears to be an afterthought. As per prevailing Regulations, PSPCL has no remedy to invoke the jurisdiction of the Commission against the Order of CGRF, Ludhiana by asking for the said clarification. Therefore, jurisdiction of the Commission is not attracted to entertain the issue raised in the present petition. The petition is not fit to be admitted for hearing and is dismissed accordingly."

Thus, it is apparent that the Commission refused to examine the application for clarification on the ground that the tariff order already issued does not require any further clarification. Therefore, the aforesaid order cannot be used to reject the writ petition. Next argument of the learned counsel is with regard to letter issued by the Chief Engineer (Commercial) dated 14.10.2020 Annexure R-1/2. On careful reading of the aforesaid letter, it is apparent that the Chief Engineer (Commercial) has only informed the officials with regard to the decision of the Forum. Such letter cannot be taken to be acceptance of the decision of the Forum and therefore, operate as estoppel against the petitioner.

Next argument of the learned counsel is with reference to the order passed by the Commission on 08.12.2020, Annexure R-1/3. By this order, the Commission, disposed of a petition under Section 142 of the Electricity Act, 2003 read with regulation 2.41 of the Regulations of 2016 filed by the respondent no.1. Section 142 of the Electricity Act provides for punishment for non-compliance of directions by the appropriate Commission. It is in the nature of jurisdiction to get the orders implemented. On careful reading of the order, it is apparent that the Commission did not examine the order passed by the Forum on merits. In view thereof, the aforesaid order does not espouse the cause of respondent no.1.

In the end, learned counsel representing the respondent while referring to order passed by the Forum on 25.01.2019 submits that the order already passed in favour of respondent no.1 is being followed by the Forum. It is apparent from the reading of the aforesaid order that the order passed by the Forum on 16.09.2019 has been relied upon which is the subject matter of challenge in this writ petition. Hence, the aforesaid order does not help the case of respondent no.1.

This Bench has also carefully gone through the relevant portion of CC 14 of 2018 reproduced at page 40 of the impugned order. On careful reading of the aforesaid clarification, it is apparent that the Commission did not amend the base tariff rate for incremental consumption upon the threshold limit for financial year 2016-17. Even the sentence which has been printed in bold letters does not provide that there would be any change in the base tariff rate notified by the Commission with respect to the financial year 2016-17. Second para of the reproduced portion of CC14 of 2018 is dealing with a different eventuality and does not modify the tariff order dated 27.07.2016 issued by the Commission for the financial year 2016-17.

Keeping in view the aforesaid discussion, this Court is of the considered view that the order passed by the Forum is not sustainable and consequently set aside. The writ petition is allowed.

