
(2009) 04 JH CK 0032
In the Jharkhand High Court

The Jharkhand State Electricity Board	APPELLANT
Vs	
Kumardhubi Steels Pvt. Ltd.	RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 42(6), 46

Citation : (2009) 04 JH CK 0032

Hon'ble Judges : Ajit Kumar Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ajit Kumar Sinha, J.—The present writ petition has been preferred for following reliefs:

- a) For quashing/setting aside the order/judgment dated 06.06.2007 passed by the Electricity Ombudsman, Jharkhand in case No. EOJ/02/2007 and the order/Judgment dated 22.11.2006 passed in case No. 43/2006 by Vidyut Upbhokta Shikayat Niwaran Forum (in short VUSN), Jharkhand State Electricity Board (JSEB), Ranchi whereby the petitioner JSEB has been directed to revise the bills of the consumer respondent in relation to demand charges for the first 12 months i.e. from February, 2004 to January, 2005 on the basis of the actual consumption recorded in the meter.
- b) For a declaration from this Hon'ble Court that the induction furnace consumers(covered under HTSS Tariff) of JSEB including the respondent are to be governed by the tariff notification dated 6.4.2000 published by Bihar Electricity Board and duly adopted by Jharkhand State Electricity Board, which comprehensively contains the terms and conditions of supply to the Induction Furnace Consumers and the new tariff order published by Jharkhand State Electricity Regulatory Commission (in short to be referred as JSERC) w.e.f. 01.1.2004 does not contain the said terms and conditions of supply to the said categories of consumers.

c) For a further declaration that the demand charges in relation to induction furnace consumers including the respondent are to be levied by the petitioner on the basis of actual maximum demand recorded in the meter or 100% of the contract demand whichever is higher, from the very first day of commencement of supply.

2. The facts in brief are set out as under:

The petitioner Jharkhand State Electricity Board (hereinafter referred to as Board) is a deemed licensee cum transmission utility which is engaged in the business of generation, transmission and distribution of electricity to its consumers within the territorial jurisdiction of the State of Jharkhand. The respondent set up its factory at Kumardhubi, Dhanbad for sanctioned load of 2400 KVA and executed agreement with the Board and the power supply was energized on 03.02.2004 as mentioned in the agreement. The respondent consumer filed an application before the Court of Vidyut Upbhokta Shikayat Niwaran Forum (hereinafter referred to as Forum) for quashing the energy bills issued by Board for the period February, 2004 to January, 2005 on the ground that as per the terms of Clause 4(c) of the agreement for supply of electricity, the Board cannot charge more than the actual consumption recorded in the meter whereas the Board raised the energy bill at the rate of 100% of the contract demand which is illegal. It is also prayed to revise the bills from January, 2004 to January, 2005 on the actual KVA recorded for the first 12 months from the date of energisation from February, 2004 till January, 2005.

3. The learned Forum vide its order dated 22.11.2006 while setting aside the impugned bills directed the Board to serve the revised bill to the petitioner for the aforesaid period on the basis of actual KVA recorded in the meter from February, 2004 to January, 2005 within a period of one month and adjust the excess payment made along with interest. Being dissatisfied with the aforesaid order of the Forum the petitioner Board filed an appeal before the Electricity Ombudsman, Ranchi, Jharkhand u/s 42(6) of the Electricity Act, 2003 challenging the aforesaid order dated 22.11.06 passed by the Forum. The learned Electricity Ombudsman after hearing the parties vide its impugned order dated 6.6.2007 held that there was no merit in the appeal and accordingly dismissed it and directed JSEB to comply with the order of the learned Forum. The present writ petition has been preferred challenging the aforesaid order passed by the learned Forum as well as Electricity Ombudsman, Jharkhand.

4. The main contention raised by the learned Sr. Counsel Sri V.P. Singh, appearing for the petitioner Board is that the learned Ombudsman as well as the learned Forum have committed serious error in holding that the Induction Furnace Tariff Notification dated 6.4.2000 does not survive in view of the Tariff Order issued by Jharkhand State Electricity Regulatory Commission (hereinafter referred to as Commission) w.e.f. 1.1.2004. The learned Sr. Counsel further submits that the learned Ombudsman and the Forum failed to appreciate that the Tariff Order 2003- 04 published by the Commission contained a saving clause

with respect to the terms and conditions of the supply including the Induction Furnace Consumer. He also submits that the consumer being Induction Furnace Unit has to be built as per the provision of Clause (5) of the Special Induction Furnace Tariff dated 6.4.2004 which clearly provide that the demand charges are to be levied on the basis of the actual maximum demand recorded in the meter or 100% of the contract demand whichever is higher. It is also submitted that in the Tariff Order, 2003-04 there are provision for charging demand charges on the basis of minimum of 75% of the contract demand for general HT consumers and 100% of the contract demand for consumers having Induction Furnace. It has further been submitted that the letter by the Secretary to the Commission bearing no.3/BNP/617 JSERC, dated 19.12.2005 is a letter written by him in his individual capacity and the said letter cannot be termed as an order of the Commission. The said letter of the Secretary to the Commission cannot be said to be an order u/s 86 of the Electricity Act 2003. Moreover, the Secretary to the Commission is not an adjudicating officer within the meaning of Section 111 of the Act. The letter dated 19.12.2005 is in direct conflict and contrary to the Tariff Order 2003-04 published by the Commission as it has been written in the said letter that the Board did not submit its tariff schedule dated 24.9.1999 and 7.5.2001. It is further submitted that paragraphs 3.6, 3.6.1. 3.6.2 (Page 117-118) clearly reveals that the said Tariff schedule were before the Commission while considering the Tariff order 2003-04. It is further submitted that the rate/schedule of charges of H.T. and Induction furnace Consumers were left out to be decided in future, saying that those terms and conditions needed in-depth for study and analysis.

5. Sri Ajit Kumar, learned Counsel appearing on behalf of the respondent consumer in reply submits that the consumer has been billed for the period February, 2004 to January, 2005 against maximum demand KVA as 100% of the contract demand and not on the actual maximum demand recorded in the meter for the first 12 months of power supply energisation. He further submits that as per Clause (4)(c) of the Agreement as well as Clause 15.1 (B) of Tariff, 1993 the maximum demand charges for the first 12 months of energisation of power supply for a new connection has to be based on the actual monthly maximum demand recorded in the meter for those months. According to the learned Counsel for the respondent the Electricity Act, 2003 has been enacted w.e.f. 10.6.2003 which repealed Electricity Act, 1910 and Electricity Supply Act, 1948 and the Commission so constituted was only empowered to frame tariff/ conditions of supply with respect to the Board which is now functioning merely as a licensee and once the electricity tariff has been framed by the commission it becomes applicable w.e.f. 1.1.2004. He also submits that the electric connection was taken by the respondent consumer on 3.2.2004 i.e. much after of the declaration of the electricity tariff by the Commission for the JSEB.

According to the learned Counsel for the respondent there are specific provision in the tariff wherein it is provided that the Board is bound to charge the bills @ Rs. 2.50 per KWH on actual consumption of unit and Rs. 300/- per KVA on actual

consumption of maximum demand both subject to a monthly maximum charge of Rs. 400/- per KVA for the full contract demand.

6. In the aforesaid background, according to the learned Counsel for the respondent the reliance upon earlier tariffs dated 24.9.99 or 7.5.2001 cannot be legally permitted and the same is no more valid. He also submits that in this regard an attempt was made by the Board to get the approval to correct their wrong from the Commission and a letter was written on 5.12.05 to which the Commission replied on 19.12.2005 rejecting the proposal of the petitioner. This letter was issued by the Secretary on behalf of the Commission which pointed out that the tariff schedule dated 24.9.99 and 7.5.2001 of BSEB was not valid and cannot be taken cognizance of after the notification of the new Tariff Order, 2003-04. It is further submitted that the petitioners themselves executed a HT agreement with the respondent consumer first on 29.12.2003 and thereafter in October, 2004 and Clause 4(b) & (c) categorically prescribed as under:

4(b) For the purpose of this agreement the minimum demand of the consumer for each month shall be largest total amount of Kilovolt amperes(KVA) delivered to the consumer as the point of supply during any consecutive 30 minutes in the month.

4(c) Maximum demand charges for supply in any month will be based on the maximum KVA demand for the month or 75 percent of the contract demand whichever is higher subject to provision of Clause 13. For the first twelve months? service the maximum demand charges for any month will however, be based on the actual monthly maximum demand for that month.

7. It has also been contended that in an another identical order issued by the Commission on 7.2.2006 it has been categorically held that no conditions of the old tariff may apply after the notification of the Tariff Order, 2003-04 and Electricity supply (Code) Regulations. The learned Counsel further submits that the Board has adopted double standard and it has not chosen to challenge the aforesaid order of Commission dated 19.12.2005 and 7.2.2006 even though they could have challenged the same u/s 111 of the Electricity Act, 2003 and thus, the view expressed by the two authorities below has attained finality.

8. I have considered the rival submissions, pleadings and the relevant statutory provisions under the Electricity Act, 2003 and the case laws. It will be relevant to bring on record the submissions made in Rejoinder filed on behalf of the petitioner Board as well as the supplementary counter affidavit filed on behalf of the respondent consumer during the course of hearing.

9. In the aforesaid affidavits filed on behalf of the Board and the respondent consumer it has been pointed out that a letter No.846 dated 5.12.05 was written by the Board to the Secretary of the Commission with regard to the terms and conditions of supply to be applied upon induction (HTSS) furnace consumer, wherein, it has intended to explain its claim for applying the condition of whole tariff upon the HTSS consumers on the basis of Clause 1.4 of the Tariff. The

Commission through its Secretary gave a reply on 19.12.2005 clarifying the entire position and specifically pointed out that the earlier tariff schedules cannot be taken cognizance of at this stage after promulgation of tariff order 2003-04 which has become effective and binding. It has also stated in its reply letter that the documents pertaining to tariff schedule of 24th September, 1999 and 7.5.01 were not applicable with effect from 01.01.2004. The Board through its Secretary again wrote a letter after a lapse of 3 years on 15.7.2008 seeking clarification once again regarding the applicability of all the terms and conditions, specially minimum billing on account of the demand charges. When the present matter was part heard another letter dated 20.3.2009 has been written by the Secretary to the Board to the Chairman, of the Commission seeking clarification once again with regard to the terms and conditions of supply of electricity and charging of the demand charges by the licensee to the H.T. consumer including HTS and HTSS and in reply the Secretary to the Commission vide its letter dated 21st March, 2009 as directed by the commission reiterated its earlier stand. It further pointed out that its stand was clear and the commission has already filed a counter affidavit in this behalf specifying and clarifying the whole issue.

10. In exercise of powers conferred by Section 181 of the Electricity Act, 2003, the Commission framed tariff regulations, namely, ?Jharkhand State Electricity Regulatory Commission (Tariff) Regulations, 2003?. The Commission in its power determined the new tariff to be applicable to the Board by its order dated 27th December, 2003, which was made effective from January 1, 2004 and thus the Board was bound by it. The power is vested with the Commission alone to determine the tariff and once they have clarified it and held that the new tariff schedule of 2003-04 was applicable and if there was any grievance or the Board was aggrieved by the order of Commission the remedy available to the licensee Board was to invoke Section 111 of the Electricity Act, 2003. Even otherwise after passing of the tariff order u/s 64 of the Electricity Act, 2003 the Commission becomes functus officio.

11. Besides, Section 86(1)(f) of the Electricity Act, 2003 lays down the adjudicatory function of the State Commission which does not encompass within its domain complaints of individual consumers. It only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. This does not include in it an individual consumer. The proper forum provided for resolving consumer dispute is u/s 42(5) and thereafter the ombudsman u/s 42(6) read with the aforesaid 2003 Regulations which has been invoked and complied with in the instant case.

12. u/s 111 of the Electricity Act 2003 a statutory appeal is provided and the said appeal is in the nature of 1st appeal and the appellate tribunal is required to examine the entire grounds of appeal and record its reasons on each ground while disposing of the appeal. In 2006 (9) SCC 233 (H.P. Electricity Regulatory Commission v. H.P. State Electricity Board) an appeal was preferred by the

Commission before the Hon^{ble} Supreme Court against an interim order passed by the High Court in a Writ Petition rejecting the objection of the appellant to avail of the alternative efficacious remedy of approaching the Appellate Tribunal in terms of Section 111 of the Electricity Act. In that case the High Court had observed that at the time when the writ petition was filed by the respondent, the Tribunal was not constituted and in any case it was not functional. The Hon^{ble} Supreme Court allowed the appeal and also dismissed the pending Writ Petition before the High Court and directed the respondent to approach the Appellate Tribunal u/s 111 of the Electricity Act, 2003 since by that time the Appellate Tribunal had been constituted and was functional. Again in *Chattisgarh Vidyut Mandal Abhiyanta Sangh Vs. Chattisgarh State Electricity Regulatory Commission and Another*, the Hon^{ble} Supreme Court at paragraph 12 held that the appeal u/s 111 before the Appellate Tribunal is in the nature of 1st Appeal. The Tribunal therefore must examine the entire grounds of appeal and record its reasons on each ground while disposing of the appeal.

13. In the instant case at the time of filing of the writ petition by the Board the Appellate Tribunal was very much functional and the efficacious statutory remedy available was to file an appeal u/s 111 of Electricity Act instead of filing the present writ petition. However, considering the following admitted facts it will not be in the interest of justice at this stage to remit the dispute to the Appellate Tribunal.

14. The letter by the Secretary to the Commission dated 19.12.2005 was in reply to letter of Board dated 5.12.2005 wherein it was specifically clarified that the documents relating to earlier tariff schedule dated 24.09.1999 and 07.05.2001 were neither valid nor applicable after notification of new Tariff order 2003-04. The Board has till date neither assailed it nor challenged it and the same has thus attained finality. The Board after a lapse of 3 years on 15.07.2008 has again sought the same clarification followed by another letter dated 20.03.2009 which was duly replied by the Secretary to the Commission on 21.03.2009 reiterating its earlier stand as replied on 19.12.2005. Thus, till date the petitioner Board has neither challenged the Tariff order 2003-04 or even the Electricity Supply Code Regulation nor has it challenged the order of the Commission dated 19.12.2005 or 21.03.2009.

15. Be that as it may, even otherwise the Board is bound by the Agreement and the Tariff of 2003-04 and its schedule thereto and in case of any grievance or dispute it could have approached the Appellate Tribunal u/s 111 of the Electricity Act, 2003. The same has not been challenged by the Board even after a lapse of five years.

16. There is another factor which needs consideration with regard to the double standard and discrimination meted out to the respondent by the petitioner Board. A similar order has been passed in favour of the consumer in *Sourya Metals and Ors. v. JSEB* and the Board has accepted the order given by the Court/ Forum and has admittedly chosen not to challenge it.

17. Considering the aforesaid facts and circumstances of the case, the concurrent finding, the stand of the Commission which has not been challenged and the admitted fact that the Board has implemented the order of Forum in identical case of HTSS Induction furnace consumer Surya Metal & Others, this Writ Petition under Article 226 of the Constitution of India is devoid of any merit and is even otherwise not maintainable and the same is accordingly dismissed without any order as to cost.