IN THE HIGH COURT OF JHARKHAND AT RANCHI

L.P.A. No. 466 of 2010
with
L.P.A. No. 465 of 2010

1.Jharkhand State Electricity Board
2.The General Manager cum Chief Manager,
Hazaribagh Electric Supply Area
3.The Electrical Superintending Engineer,
Hazaribagh Electric Supply Area,
4.The Electrical Executive Engineer,
Hazaribagh Electric Supply Area.... Appellants in both cases

Versus

1.M/s. Laxmi Business & Cement Co. Pvt. Ltd.
2.Jharkhand State Electricity Regulatory Commission.... .....
Respondents (In L.P.A 466/2010)

1.M/s Laxmi Ispat Udyog
2.Jharkhand State Electricity Regulatory Commission.... ...
Respondents (In L.P.A 465/2010)

CORAM: **HON'BLE THE ACTING CHIEF JUSTICE**
HON'BLE MR. JUSTICE P.P. BHATT

For the Appellants : M/s Anil Kr. Sinha, V.P. Singh, Sr. Adv
R. Shankar, V.K. Prasad, D. Kumar,
A. Prakash, P.K. Singh.
For the Res.No. 1 : M/s M.S. Mit tal, Sr. Adv.
A. Kumar, N.K. Pasari
For the Res. No. 2 : S. Srivastava.

Reportable **Dated 05th July, 2011**

By Court Heard learned counsel for the parties.

2. The appellant-Jharkhand State Electricity Board, Ranchi, is aggrieved against the oder passed by the learned Single Judge dated 17th September, 2010 in W.P.(C) No. 2613 of 2010 and W.P.(C)2626 of 2010, by which both the writ petitions were allowed, holding that after coming into force of the new tariff as prescribed by the Jharkhand State Electricity Regulatory Commission, the appellant-Board cannot fall back upon either tariff of the year 1993 and insertion of Schedule to the tariff in they year 1999 or upon the contract on the basis of which the appellant-Board used to charge “Demand Charge” from the

respondent-consumer obviously under the tariff of 1993 as well as by virtue of the condition in the contract.

3. Brief facts of the case are that before coming into force of the Electricity Act, 2003, there was Indian Electricity Act, 1910 and Electricity Supply Act, 1948 and the parties were governed by the Act of 1910 and 1948. The respondent-consumers entered into a contract with the appellant-Electricity Board and agreed that they would be liable to pay the "monthly minimum demand charge on the basis of the actual minimum demand of the month or 75 % of the contract demand, whichever is higher and energy charges based on load factor of 25%, 30 %, 50 % etc." That condition is incorporated in the tariff of the year 1993 in Column 15.2. and in consonance with that condition, the same condition was incorporated in the agreement executed by the respondent-Jharkhand State Electricity Regulatory Commission in Clause 4(C).

4. The condition 4(C) is that *"maximum Demand Charges for supply in any month will be based on the maximum KVA demand for the month or 75 % of the contract demand, whichever is higher subject to provisions of Clause 13. For the twelve months' service, the maximum Demand Charges for any month will however be based on the actual monthly maximum demand for that month."* The respondents were paying the Demand Charges according to the tariff of the year 1993 as well as under the terms of the contract referred above.

5. The new Electricity Act, 2003 came into force from 10.06.2003 and as per Section 85 of the Act of 2003 the State Regulatory Commission in the State of Jharkhand was also constituted and by invoking the provision of Section 86 of the Act of 2003, the new electric Tariff Order was issued and was made

effective form 1st January, 2004. The contention of the respondent-writ petitioner in the writ petition was that after coming into force of the new Tariff Order 2003-04, the appellant-Electricity Board can charge any amount from the respondent which is provided in the Tariff Order of 2003-04 and not as per tariff order/Schedule of 1993 or under the agreement executed between the Board and consumer.

6. The contention of the Electricity Board was that the all acts done and contract executed between the parties prior to coming into force of the Act of 2003 have been saved by Section 85 of the Act of 2003, therefore, the respondent is bound by the terms of contract which has been executed under the provisions of the Electricity Act, 1993 as well as Electricity Supply Act, 1948 and the condition contained in that contract has not been challenged by the respondents. It is also submitted that not only that, but the Jharkhand State Electricity Regulatory Commission itself was fully conscious of the fact that some of the issues have been left by the Commission while giving out the Tariff Order of 2003-04 and it has been made clear in the last column i.e., column no. 1.4 in the Tariff Order 2003-04 itself, it was made clear specifically that “all other terms and conditions in respect of Meter Rent, Supply at Lower Voltage, Capacitor Charge, Circuit-Breaker Charge, Electricity Duty, rebate, security deposit, surcharge for exceeding contract demand etc. shall remain the same as existing in the State”. Therefore, by clause 1.4 referred above, the Commission declared that the issues which have not been dealt with and decided by the tariff 2003-04 are made to continue as they were prevailing prior to Tariff Order 2003-2004 as they were existing in the State. It is submitted that the Jharkhand State Electricity Regulatory Commission has not

decided and deleted the condition of the payment of the Demand Charges in the manner as given in Clause 5.2 of the Tariff Order/Schedule 1993 as well as the contract entered into between the parties. It is also submitted that the learned Single Judge has wrongly held that the Clause 4(C) of the agreement cannot operate in view of Clause 11 of the agreement which provides that the agreement shall be construed in consonance with the amendment made in law in future and, therefore, after coming into force of Act of 2003 and the Tariff Order of 2003-04, the appellant cannot take benefit of Clause 4(C) or the condition contained in Clause 15.2. of the Tariff Order of 1993.

7. Learned counsel for the Board also submitted that the learned Single Judge wrongly relied upon the earlier judgment of this Court delivered in W.P.(C) No. 5150 of 2007, Jharkhand State Electricity Board Vs. M/s KumarDhubi Steels Pvt. Ltd decided on 17th April, 2009 and dismissal of the S.L.P against the said judgment dated 17th April, 2009 is of no consequence as the judgment of this Court has not been upheld by the Hon'ble Supreme Court on merit and only S.L.P has been dismissed. It is submitted that in the said case, M/s KumarDhubi Steels Pvt. Ltd, the issue was with respect to the dispute about the charging of the amount at different rates for initial first twelve months and the said judgment had not laid down the law on this issue that the Electricity Board cannot charge the amount which has not been prescribed as such in the said Tariff Order and which has not been denied specifically by the Electricity Regulatory Commission in such order.

8. We have considered the submissions of the learned counsel for the parties and perused the facts of the case. It is true that the Electricity Regulatory Commission in the Tariff

Order of 2003-04 at page 84 observed that, the difference between fixed charge and minimum charges is that while fixed charges are charged from consumers irrespective of consumption, minimum charges are levied only when the bill of the consumer is less than a pre-specified amount. And thereafter the Commission considered the question of levying of fixed/Demand Charges and observed as follows:

> ***"Ideally, the fixed, Demand Charge should be levied in proportion to the demand placed by an individual consumer on the system. This is so because it facilitates the utilitity in designing an appropriate system to cater to the supply needs of the consumer and is, therefore, a just and fair mechanism for recovering fixed costs of the system. Thus, the fixed/Demand Charge should be proportionally related to the load of the category. In the existing tariff structure, all consumer categories are paying a fixed charge on the basis of their load except the domestic consumers and unmetered commercial consumers who are paying a fixed charge on a part connection basis. The Commission has not change the basis for levying fixed charge on this category in this Tariff Order as the information and database of the Board is not adequate. The Commission, however, intends to move in this direction in future and directs that the Board should made efforts to update its existing database on connected load."***

9. The Electricity Board submitted proposal for prescribing the tariff which is incorporated at page 111 and in the column in the form of Table 5.27, in which there is a reference of Demand Charge and it has been stated that the existing Demand Charge is Rs. 125/- per KVA per month and the Electricity Board proposed to increase it to Rs. 200/- from Rs. 125/-. In the said proposal as mentioned in Table 5.27, there is one more component I.e. *"Annual minimum guarantee (AMG) charge"*. In the Table 5.27 under the heading "AMG" charges in column no. 2 there is mention as to how this amount is being charged, which is the similar mode of calculating of charge as of Demand Charge but there is no confusion to us because annual minimum guarantee "AMG" charge is separate and distinct than the

Demand Charge and the AMG has been abolished by the specific Tariff Order of 2003-04 as ordered by the Commission in the Tariff Order 2003-04 at page No. 119.

10. We are concerned with the Demand Charge only, rather to say not concerned with the Demand Charge itself but the manner in which the Demand Charge can be calculated for the purpose of raising demand against the consumer charging of the Demand Charge “has been allowed in Tariff Order 2003-04 @ Rs. 140/- as mentioned at page 141 of the Tariff Order. As we have already noticed that a formula was given in Clause 15.2 in the tariff of 1993 as well as in the contract on the basis of which the Board was charging the Demand Charge on the basis of the actual consumed units but was charging the said amount irrespective of the consumption of the units of electricity. Now the contention of the respondent-writ petitioner is that they are liable only according to the units consumed by them and not according to the formula. We found from Board's proposal contained in Table 5.27 that the Electricity Board consciously (or may inadvertently) submitted its proposal only to the effect that existing annual Demand Charge is Rs. 125/- per KVA per month and the Board wants to increase it to Rs. 200/- per KVA per month. This proposal of the Board was considered and ultimately the Demand Charge was allowed by the Tariff Order of 2003-04 which is mentioned at page 141 by which only it has been approved that the Electricity Board shall be entitled to charge Rs. 140/- per KVA per month. It appears that so far quantum is concerned, instead of increasing it from Rs. 125/- to Rs. 200/- per KVA per month as proposed by the Board, the Tariff Order of 2003-04 increased it to Rs. 140/- only.

11. In view of the above reasons, we cannot hold that

Electricity Regulatory Commission has not considered the proposal of the Electricity Board with respect to their claim for Demand Charge and the manner in which it will be charged. At this juncture, we may observe here that the Electricity Board repeatedly approached the Electricity Regulatory Commission and every time it was made clear to the Board by the Commission that the Commission has not allowed the Electricity Board to charge beyond what has been given in the Tariff Order of 2003-04 and that fact has been taken note of by the Single Bench of this Court earlier in the case of M/s KumarDhubi Steels Pvt. Ltd then again in the impugned judgment passed by the learned Single Judge. It is also clear that even then during pendency of the writ petition before Single Bench, the Electricity Board approached the Electricity Regulatory Commission again by submitting a representation to the Commission to give clarification in this regard and it is not in dispute that the representation of the electricity Board has been rejected again by the Regulatory Commission.

12. In view of the above facts, we are of the considered opinion that the appellant-Board cannot take help of Clause 5.1. wherein Electricity Regulatory Commission wherein it has been observed that some of the matters have not been dealt with and they shall continue to be the same as they were in existence in the State because of the reason that there is a specific proposal made by the Electricity Board for the Demand Charge as well as the manner in which it will be charged and this proposal was considered by the Electricity Regulatory Commission and thereafter Tariff Order has been issued. Even if it was an inadvertent mistake on the part of the Electricity Board in submitting its proposal of non-disclosure of the manner, in which

Board wanted to charge Demand Charge from the consumer, then that mistake must have come to the knowledge of the Board long back when the dispute arose for the first time; therefore, they had opportunity to challenge the Tariff Order by preferring an appeal which remedy admittedly they have not availed and the Tariff Order of 2003-04 has attained its finality. At this juncture, we may also observe that in the Tariff Order 2003-04 all financial aspects have been considered by the Electricity Regulatory Commission and specifically it has been mentioned at many places what would be the loss to the Board and how it stands compensated. Therefore, the Electricity Regulatory Commission must have taken into consideration the revenue which the Electricity Board would receive by charging Rs. 140/- per KVA per month on account of Demand Charge and we cannot presume that this amount has not been calculated while issuing Tariff Order of 2003-04.

13. The order of the Hon'ble Supreme Court in the case of BSES Ltd. Vs. Tata Power Co. Ltd. & Ors reported in (2004) 1 S.C.C 195 laid down that the Electricity Board can charge only such tariff which has been approved by the Commission and charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act and the provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff and that the tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or any one else to charge a different tariff.

14. Therefore, after the Act of 2003 and constitution of the Electricity Regulatory Commission and issuing Tariff Order by the said Commission, the Electricity Board has no jurisdiction to

charge as per the earlier Tariff Order of 1993 or the contract which has been made a live contract by Clause 11 and contains not only stagnant conditions and those terms and conditions mentioned in the contract in consonance of Tariff Order/Schedule stand automatically changed and modified in accordance with the amendment in Tariff Order. The clauses like Clause 11 are made in the contract so that upon change in law or bylaw, the parties need not to execute fresh contract again and again.

15. It would be worthwhile to mention here that in view of provisions of Section 61 and 62 of the Electricity Act, the jurisdiction to prescribe tariff has been exclusively given to the Electricity Regulatory Commission and in view of the laws laid down by the Hon'ble Supreme Court in BSES Ltd. Vs. Tata Power Co. Ltd. & Ors (supra), the Electricity Board has no jurisdiction to charge beyond the Tariff Order of 203-04.

16. In view of the above reasons, so far merit in the L.P.As is concerned, we find none.

17. Learned counsel for the Board submitted that the award of interest cannot be justified in the matter where the consumer paid the Demand Charges as demanded by the Electricity Board and has raised dispute by filing writ petition in the year 2010. We find some force in the submission of the learned counsel on this count because of the simple reasons that the respondents approached this Court by preferring writ petitions in the year 2010 only and, therefore, the respondents cannot be held entitled to interest for all the amount which they have already paid to the appellants whenever they received the electricity bills. In view of the above reasons, we are of the considered opinion that the respondents shall be entitled to the interest over the excess recovery made by the appellants from 17th

September, 2010 i.e, from the date of the order passed by the learned Single Judge. The award of the cost is also quashed.

18 Hence, the L.P.As are partly allowed to the extent of revision in interest in the terms aforesaid.

(Prakash Tatia, A.C J)

(P.P. Bhatt, J)

Dey/-Alankar/-