

**W.P.(C) Nos.2777, 2261, 2430, 2274,
1306, 1257, 2016, 2330, 2030,
675 & 663 of 2007 and 7208 of 2006**

In the matter of an application under Article 226 of the Constitution of India.

| | |
|---------------------------------|---|
| M/s. Tata Steel Ltd. |Petitioner. [In W.P.(C) No.2777/2007] |
| M/s. Sourya Metals Pvt. Ltd. |Petitioner. [In W.P.(C) No.2261/2007] |
| M/s. Krishna Luxmi Steel Udyog. |Petitioner. [In W.P.(C) No.2430/2007] |
| M/s. B.M.C. Metal Cast Ltd. |Petitioner. [In W.P.(C) No.2274/2007] |
| M/s. Dinanath Hotels Pvt. Ltd. |Petitioner. [In W.P.(C) No.1306/2007] |
| M/s. Naiyadh Hitech Pvt. Ltd. |Petitioner. [In W.P.(C) No.1257/2007] |
| M/s. J. M. T. Auto Ltd. |Petitioner. [In W.P.(C) No.2016/2007] |
| M/s. Ram Krishna Forging Ltd. |Petitioner. [In W.P.(C) No.2330/2007] |
| M/s. Jamshedpur Metal Products. |Petitioner. [In W.P.(C) No.2030/2007] |
| M/s. Jamshedpur Metal Products. |Petitioner. [In W.P.(C) No.675/2007] |
| M/s. J. M. T. Auto Ltd. |Petitioner. [In W.P.(C) No.663/2007] |
| M/s. Ram Krishna Forging Ltd. |Petitioner. [In W.P.(C) No.7208/2006] |

Versus-

Jharkhand State Electricity Board & Ors.Respondents.
(In all cases)

| | | |
|---------------------------------------|---|---|
| For the Petitioners (In all cases) | : | M/s. M. S. Mittal and S. L. Agarwal, Advocates. |
| For the JSEB (In all cases) | : | M/s. V. P. Singh, Sr. Advocate Rajesh Shankar, Advocate. |
| For the JSERC | : | Mr. S. Srivastava, Advocate. |

Reserved on 23.07.2007

Delivered on 11.09.2007

PRESENT

HON'BLE MR. JUSTICE NARENDRA NATH TIWARI

Narendra Nath Tiwari, J. : This batch of writ petitions raises the common issue, questioning the respondents' right to recover the short charged amount of the Load Factor Rebate from the petitioners. All the writ petitions were heard together with the consent of the parties and are now being disposed of by this common judgment.

2. Reliefs prayed for in the said writ petitions, in summary, are



- (i) for setting aside the supplementary bill(s) raised towards the realizable amount of Load Factor Rebate as per the order of the Chief Engineer (Commerce & Revenue), Jharkhand State Electricity Board in the light of the revised guidelines of the Jharkhand State Electricity Regulatory Commission, Ranchi (for short JSERC);
- (ii) to refund the realized amount and issue current bill(s) on the basis of the Load Factor Rebate calculated by the Jharkhand State Electricity Board (for short JSEB) for more than two years before issuance of the letter dated 15th September, 2006 by the Chief Engineer (Commerce & Revenue), JSEB;
- (iii) to declare that the supplementary bill(s) cannot be raised for a period beyond two years in view of Section 56(2) of the Electricity Act, 2003;
- (iv) to refund the amount, which was realized by the JSEB as against the supplementary bill(s) with interest [this prayer is made in the case of M/s. Tata Steel Ltd.- W.P.(C) No.2777 of 2007 and M/s. Dinanath Hotels Pvt. Ltd.- W.P.(C) No.1306 of 2007]; and
- (v) for quashing Letter no.JSERC/01/388 dated 25th August, 2006 issued by the JSERC, whereby the JSERC has clarified Table 5.33 issued under its tariff order for 2003-04.

3. The writ petitioners are HTSS consumers of the Respondent-JSEB. The petitioner(s)-units are billed in terms of the Tariff determined by the JSERC, which also provides for Load Factor Rebate for such consumer.

4. JSERC has been constituted under Section 17 of the Electricity Regulatory Commission Act, 1998 vide notification dated 22nd August, 2002 issued by the Department of Energy, Government of Jharkhand. JSERC became operational with effect from 24th April, 2003.

5. The Government notified the functions and duties of the JSERC as per Section 22(1) and (2) of the Electricity Regulatory Commission Act, 1998.

6. The Parliament recently enacted the Electricity Act, 2003 (Act 36 of 2003). This new legislation has been brought to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

7. The said Act repealed the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. However, the said Act has saved some of the actions taken or purported to have been done, not inconsistent with the provisions of the said Act, as enumerated under Sub-section (2) of Section 185, which deals with repeal and saving.

8. The aforesaid Act 2003 recognises the State Electricity Regulatory Commission constituted under the Electricity Regulatory Commission Act, 1998.

9. In exercise of powers conferred by Section 181 of the Electricity Act, 2003, the JSERC framed tariff regulations, namely, 'Jharkhand State Electricity Regulatory Commission (Tariff) Regulations, 2003'. The JSERC in its power determined the new tariff to be applicable to the JSEB by its order dated 27th December, 2003, which was made effective from January 1, 2004. According to the said provision, the JSEB issued a tariff schedule with effect from 1st January, 2004.

10. With a view to encourage the higher consumption, the

industrial consumers. For HT and HTSS consumers certain rebates were provided, such as, Voltage Rebate, Load Factor Rebate and Power Rebate. The relevant text is reproduced hereunder:-

"For encouraging consumption, the Commission has also introduced a load factor rebate for all industrial consumers. For the entire consumption in excess of this defined load factor, a rebate is provided on the energy charges for such excess consumption. The Commission would have liked to align the tariff structure towards cost of supply during the current year itself, but it was constrained due to the huge tariff shock that it would translate into for other consumers and consequent increase that would have been required in tariff for other categories. Thus as a principle the Commission has taken the first step towards reducing this distortion in the tariff structure. The Commission is conscious of the fact that HT industry in Jharkhand has borne the brunt of cross subsidy in the past and the tariff applicable to them is above the cost of supply. The significance of this step should not, however, be judged by the quantitative decline but the signal and intent whereby the Commission intends to further rationalize the tariff in the future.

The tariff approved by the Commission for HTS consumers is as follows:

Table 5.31 : Approved tariff for HT Consumers

| DESCRIPTION | TARIFF* |
|----------------------|-------------------------------------|
| Rs./KVA/month | DEMAND CHARGE |
| HTS-I | 140 |
| HTS-II | 140 |
| EHTS | 140 |
| | ENERGY CHARGE |
| Rs./KWh/month | |
| HTS-I | 4.00 |
| HTS-II | 4.00 |
| EHTS | 4.00 |
| | Minimum Monthly Charge (MMC) |
| HTS-I and HTS-II | Rs.250/kVA/month |
| EHTS | Rs.400/kVA/month |

Table 5.32: Voltage rebate for HT consumers

| Load Factor | Voltage rebate |
|------------------|----------------|
| Supply at 33 kV | 5% |
| Supply at 132 kV | 7.5% |

Table 5.33: Load factor rebate for HT consumers*

| Load Factor | Load factor rebate |
|-------------|--------------------|
| 40-60% | 5% |
| 60-70% | 7.5% |
| Above 70% | 10% |

*The above rebate will be available only on monthly basis and consumer with arrears shall not be eligible for the above rebates.

Apart from the above, the Commission has also approved a TOD tariff for these consumers.

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This tariff schedule shall apply to all consumers who have a contracted demand of 300 kVA and more for induction furnace, however, it will not apply to casting units having induction furnace of melting capacity of 500 kg. or below.¹

Table 5.36: Approved tariff for HTSS consumers

| DESCRIPTION | TARIFF |
|---------------|------------------------|
| Rs./kVA/month | DEMAND CHARGE |
| HTSS | 300 |
| | ENERGY CHARGE |
| Rs./kWh/month | |
| HTSS | 2.50 |
| | Minimum monthly charge |
| HTSS | Rs.400/kVA/month |

The Commission has also approved certain rebate according to voltage of supply and load factor of these consumers. These are mentioned below:

Table 5.37: Voltage rebate for HTSS consumers

| Load Factor | Voltage rebate |
|------------------|----------------|
| Supply at 33 kV | 5% |
| Supply at 132 kV | 7.5% |

Table 5.38: Load factor rebate for HT consumers*

| Load Factor | Load factor rebate |
|-------------|--------------------|
| 40-60% | 5% |
| 60-70% | 7.5% |
| Above 70% | 10% |

*Consumers with arrears shall not be eligible for the above rebate. The above rebate will be available only on monthly basis."

11. The above rebates were made available only on monthly basis and to the consumers, who were not in arrears.

12. The rebates were given to the consumers by the JSEB from the date of introduction of 2004 Tariff on the entire value of the bill which continued till August, 2006. From the month of September, 2006 and onwards, current bills were raised granting substantially less Load Factor Rebate.

13. Subsequently, the petitioners were served with memo of demand(s) in the nature of supplementary bill(s), mentioning therein that the excess rebate than what was permissible was given to the petitioners and the balance short amount is payable by them by the month of March, 2007. The amount(s) of the bill(s) of some of the petitioners are as follows:-

| Name of the party | Case number | Amount |
|---------------------------|----------------------|--------------|
| M/s. Tata Steel Ltd. | W.P.(C) No.2777/2007 | 44,85,546.00 |
| Sourya Metals (P) Ltd. | W.P.(C) No.2261/2007 | 6,62,876.00 |
| Krisna Luxmi Steel Udyog | W.P.(C) No.2430/2007 | 11,39,989.00 |
| B.M.C. Metal Cast Ltd. | W.P.(C) No.2274/2007 | 7,61,979.00 |
| Dinanath Hotel (P) Ltd. | W.P.(C) No.1306/2007 | 3,39,722.00 |
| Naiyadhil Hitech (P) Ltd. | W.P.(C) No.1257/2007 | 20,38,720.00 |

So on and so forth

14. The basis of the said impugned bill(s) was Letter No.797 dated 15th September, 2006 issued by the Chief Engineer (Commerce & Revenue), JSEB, whereby the method of granting Load Factor Rebate was changed by the JSEB with retrospective effect from June, 2005 to August, 2006 in terms of the clarification furnished by the JSERC. The petitioners have challenged the said letter.

15. According to the impugned letter dated 15th September, 2006; (i) no rebate is to be granted for consumption upto 40% of Load Factor; (ii) 5% rebate is to be allowed on the excess consumption over 40% Load Factor, if the consumption is in between 40% to 60% of the Load Factor; (iii) if the consumption is between 60% to 70% of the Load Factor, 5% rebate will be given for excess consumption between 40% to 60% and 7.5% rebate will be given on consumption in excess of 60% of the Load Factor; and (iv) if the consumption is above 70% of the Load Factor, 10% rebate on the excess consumption over 70% of the Load Factor will be given.

16. The altered position is more clearly depicted in the following table:-

| Sl. Nos. | Particulars | Rebates |
|----------|---|---|
| 1. | For consumption upto 40% L.F. | No rebate. |
| 2. | For consumption between 40% to 60% L.F. | 5% rebate will be allowed on the excess consumption over 40% L.F. |
| 3. | For consumption between 60% to 70% L.F. | 5% rebate for excess consumption between 40% to 60% L.F. and 7.5% rebate for excess consumption over 60%. |
| 4. | For consumption above 70% L.F. | 5% rebate for excess consumption between 40% to 60% L.F. and 7.5% rebate for excess consumption over 60% to 70% L.F. and 10% rebate on excess over 70% L.F. |

17. The Chief Engineer (Commerce & Revenue) by the said letter dated 15th September, 2006 directed the concerned circles/offices to revise and raise the bill(s) on the basis of the available rebate on Load Factor, clarified by the JSERC by its Letter No.JSERC/01/388 dated 25th August, 2006.

18. The said letter of the JSERC was reply to Letter No.735 dated 24th August, 2006 of the JSEB. It is stated that the said letter was issued on realizing mistake by the JSEB in applying the schedule of the Load Factor Rebate. The JSEB had sought opinion/clarification from the JSERC regarding quantum of rebate available on the Load Factor for the HT Consumers. The JSERC replied by its letter dated 25th August, 2006, which reads as under:-

"No.JSERC/01/388
Date: 25th August, 2006

To

The Secretary,
Jharkhand State Electricity Board,
Engineering Building,
HEC, Dhurwa,
Ranchi-834004.

Sub:- Clarification regarding rebate in load factor.

Sir,

Please refer to your letter no.735 dated 24/08/2006 on the subject noted above, I am directed to clarify that the Tariff Order 2003-04 for JSEB had laid down clearly the quantum of rebate available on the load factor for the H.T. Consumers. The Tariff Order clearly indicates that for the entire consumption in excess of the defined load factor, rebate is to be provided for energy charges for such excess consumption which has been indicated in the Table (5.33). For load factor between 40-60%, 5% rebate is admissible on the energy charge in excess of 40% of the load factor up to 60%. If the load factor is between 60 to 70%, the load factor rebate is 5% for consumption between load factor 40% to 60% and 7.5% beyond 60% up to 70%. For consumption greater than 70%, the load factor rebate shall be 5% for consumption between load factor 40% to 60%, 7.5% for consumption beyond load factor 60% up to 70% and 10% for consumption beyond load factor of 70%. It is not clear as to how the assumption has been made that rebate was available on entire consumption if load factors were above 10%, 20% and 30% for HT I HT II EHT which is totally irrelevant for this purpose.

It is strange that the Board has sought the clarification after 2^{1/2} years of issue of Tariff Order. If the rebate has been allowed as indicated in your table then the loss sustained by the Board is the Board's responsibility.

Yours faithfully,
Sd/-
IA K Mehta I

19. The impugned revised bill(s) is/are the outcome of the letter of the JSERC dated 25th August, 2006, which prompted the Chief Engineer, JSEB, to direct its concerned officers to revise the bill(s), as aforesaid.

20. The petitioners assailed the impugned letter dated 25th August, 2006 as also the revised bill(s) on the following grounds:-

- (i) In the tariff of the JSEB, rebate was granted on entire bills, but all on a sudden, the JSEB has now brought down the amount of rebate to a very negligible amount.
- (ii) In the tariff of the JSEB, no condition was given for availing all the three rebates. The only condition for availing the Load Factor Rebate was that there should be no arrears.
- (iii) All the three rebates were being given on the entire value of the bill till September, 2006 to all the consumers.
- (iv) Suddenly this tariff has been changed with retrospective effect, which amounts to amendment/revision of the tariff, and the same cannot be made effective with retrospective effect. (The decisions in support are ***Bihar Chamber of Commerce Vs. Bihar State Electricity Board, reported in 1993(1) PLJR 36*** and ***Council for Protection of Public Life and Welfare Vs. State of Bihar & Ors., reported in 1994(1) PLJR 853***)
- (v) Any revision in the tariff can be made only when it is published in the official gazette and from the date of the notification. Reliance is placed on the decision in the case of ***M/s. Vikromatic Steel Pvt. Ltd. Vs. Jharkhand State Electricity Board, reported in 2003(4) JCR 247.***
- (vi) The revision cannot be made with retrospective effect. The demand in any case is subject to the provisions of Section 56(2) of the Electricity Act, 2003.

- (vii) Under the provisions of the said Section, no sum due from any consumer is recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut-off the supply of electricity.
- (viii) In most of the cases, demand for the first time has been raised with effect from 1st January, 2004, which is in violation of Section 56(2) of the Electricity Act, 2003.
- (ix) Raising supplementary bill(s) of past consumptions after long lapse of time is unjust.
- (x) The letter of JSERC dated 25th August, 2006 is contrary to the tariff published by the JSEB as well as the provisions of Electricity Act, 2003.
- (xi) JSERC cannot issue such direction without following the provisions of the said Act vide ***Hindustan Petroleum Corporation Ltd. Vs. Gujarat Electricity Board State Transmission Utility & Anr. (AIR 2005 Gujarat 164)***.
- (xii) After passing the tariff order under Section 64 of the Electricity Act, the JSERC became functus officio. It has no jurisdiction to clarify the table of the tariff and that too without inviting objection from all concerned parties, as contemplated under Section 64(2) of the Electricity Act, read with Regulation Nos.20 and 21 of the JSERC.
- (xiii) Clarification of Table 5.33 is hit by doctrine of *contemporanea expositio*, meaning thereby that how the table was understood by the then officials (the contemporary persons) and how the subsequent incumbents interpret the same. (The Apex Court's decision in the case of ***M/s. Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax & Anr., reported in (1978) 1 SCC 636*** has been referred)

- (xiv) Recovery of the deferential amount is against the principles of equity. The industries fixed their price on the basis of the cost in view of the rebate given to them and already sold their products. Deferential electricity cost cannot be realized from the buyers.
- (xv) JSEB is not entitled to recover the amount after three years putting the petitioners to loss for no fault on their part.
- (xvi) Rebate being an incentive or concessions to the industries, such concession clause should be interpreted in favour of the consumer and not in favour of the Board. If there are two possible interpretations of taxing statute, view which favours the assessee and acted upon, and accepted by revenue for a long period, should not be disturbed except for compelling reason. (The Apex Court's decision in the case of **M/s. Birla Cement Works Vs. Central Board of Direct Taxes & Ors.**, reported in AIR 2001 SC 1080 has been referred) The department has not shown any compelling reason for disturbing the earlier interpretations.
- (xvii) The provision for deduction, exemption or relief should be construed reasonably. (The Apex Court's decision in the case of **C.I.T. Bombay Vs. M/s. Gwalior Rayon Silk Manufacturing Co. Ltd.**, reported in (1992) 3 SCC 326 has been referred)

21. The respondents- JSEB as well as JSERC contested the claim of the petitioners. Common grounds taken by the respondents are as follows:-

- (i) Supplementary bills served on the petitioners are justified and in accordance with law.
- (ii) The rebate allowed by the JSEB from January, 2004 to all the HT Consumers was a result of wrong interpretation of Table 5.33 of HT Tariff.

- (iii) The mistake has been corrected on receiving the clarificatory letter of the JSERC dated 25th August, 2006.
- (iv) Pursuant to the clarification issued by the JSERC by letter dated 25th August, 2006, the Chief Engineer (Commerce & Revenue), JSEB, by his Letter No.797 dated 15th September, 2006 issued the directives for correct calculation of Load Factor Rebate to all the field offices of JSEB.
- (v) The Load Factor Rebate is to be calculated on the **excess consumption over 40% Load Factor** and not on the total consumption, as was wrongly calculated earlier.
- (vi) The Jharkhand Induction Furnace Association filed a case, bearing No.5 of 2006-07, before JSERC, challenging the action of the JSEB, which was disposed of by order dated 27th November, 2006, holding that the JSEB has correctly applied Load Factor Rebate to various categories of consumers. It has been further held that since the JSEB has misinterpreted the Load Factor Rebate earlier, no interest or surcharge on the short payment bill will be charged by the JSEB. Accordingly, no such charge has been included in the demand.
- (vii) The provisions of Section 56(2) of the Electricity Act, 2003 has got no application on the demands of arrears of short payment made for the first time as a due or arrear of charges of the electricity. It was not demanded earlier and cannot be said to be due or recoverable prior to the notice of demand. Moreover, provision deals with disconnection of electricity supply in default of payment.
- (viii) Sub-section (2) of Section 56 of the Electricity Act, 2003 provides that no sum due from any consumer under this section shall be recoverable

such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.

- (ix) The sum can only be said to be due, when a demand is raised for the same. Accordingly, the demand is raised by the JSEB in supplementary bills and the amount of such bills become due to the consumer for the purpose of payment on the date(s) mentioned in the bill(s).
- (x) Realization of the amount such as mentioned in the impugned bills is not barred under Section 56(2) of the Electricity Act, 2003.
- (xi) The supplementary bills are on the basis of correct interpretation of Tariff Order 2004, which was made effective from 1st January, 2004. Thus, the demand is made from the date when the said Tariff Order was made effective and not with retrospective effect.
- (xii) Load Factor Rebate was intended to encourage the consumption and was to be given on the consumption in excess of the defined Load Factor Rebate and on energy charge for such excess consumption.
- (xiii) The clarificatory letter of the JSERC dated 25th August, 2006 does not disclose any new concept in relation to the grant of Load Factor Rebate to the HT Consumer, nor the same is revision of the tariff, rather it was simply reiteration to what exactly was and what exactly should have been according to the Tariff Order.
- (xiv) The JSEB due to inadvertence wrongly extended the Load Factor Rebate to the HT Consumers on total consumption of the achieved Load Factor, though rebate should have been given on the excess consumption of the defined Load Factor.

- (xv) The contention of the petitioners that the Tariff Order 2003-04 has been amended (revised by the JSERC) is completely misconceived.
- (xvi) The highest Appellate Tribunal for the Electricity has decided the issue in the case of **Ajmer Vidyut Vitran Nigam Limited, Chittorgarh Vs. M/s. Sisodia Marble & Granites Pvt. Ltd. & Ors. (Appeal Nos.202 & 203 of 2006)** holding that a sum due to the consumer is realisable by issuing supplementary bills.
- (xvii) The decisions relied upon by the petitioners are not applicable to the facts of these cases.

22. In addition to the above, the JSERC has contended as follows:-

- (i) Under the provisions of the Electricity Act, 2003, the JSERC has determined the tariff for the distribution licensees the JSEB for 2003-04 to be made effective from the 1st January, 2004.
- (ii) After the implementation of the said tariff, none had challenged the same before any forum. The said tariff has, thus, become final and binding on the licensee as well as its consumers.
- (iii) After coming into force of the Electricity Act, 2003, none else other than the Regulatory Commissions are authorized to determine the tariff.
- (iv) Petitioners' contention that they are bound by Tariff Order issued by the JSEB is misconceived and contrary to the provisions of Electricity Act, 2003.
- (v) The JSEB cannot issue any tariff order of their own, rather they are governed by the tariff order issued by the JSERC vide **BSEB Ltd. Vs. Tata Power Co. Ltd. & Ors., reported in (2004) 1 SCC 195 (Paras 12 and 16)**.
- (vi) The JSERC stands by its Tariff Order 2003-04. The letter dated 25th August, 2006, is not the

modification of the said tariff order. The same does not amount to withdrawing the provisions of Table 5.33 of the tariff order.

- (vii) The JSERC though has clarified the provisions of the tariff order, it has held that the consumers cannot be made liable to pay interest or surcharge on the amount of short payments, which was not earlier made due to mistake in calculation and billing by the JSEB.
- (viii) The JSERC has also considered the objection filed by the representatives of the petitioners and passed reasoned order dated 27th November, 2006. The said order of the JSERC was challenged before the Appellate Tribunal for Electricity Appellate Jurisdiction, New Delhi in Appeal No.33 of 2007. Parallel proceeding for the same matter before this Court is not maintainable.
- (ix) The licensee JSEB committed mistake in raising the bills according to the prescribed Load Factor Rebate for more than 2½ years. Such mistake neither creates any right nor constitutes an estoppel against raising supplementary bills. Since the mistake was on the part of the JSEB, the JSERC has restrained the respondent-JSEB from realizing any penal amount on the short payment either by interest or surcharge.
- (x) The amount becomes due only after the service of the bills demanding the said amount not earlier. **(See H.D. Shourie Vs. Municipal Corporation of Delhi, AIR 1987 Delhi 219)**
- (xi) The equity has got no role to play in fiscal matter.
- (xii) The claim of the petitioners has no legal basis and writ petitions are liable to be dismissed.

23. It is relevant to mention that after the conclusion of the hearing, it was informed on behalf of the JSERC that Appeal No.33 of 2007 filed before the Appellate Tribunal for Electricity against the order dated 27th November, 2006 passed by the

JSERC has been also finally disposed of by dismissing the said appeal.

24. I have heard the learned counsel appearing on behalf of the parties at length and carefully examined and considered the facts, relevant provisions of law and the decisions referred to by the respective parties.

25. On the basis of rival claims and contentions, the following points arise for determination:-

Points:

- (i) Whether the letter dated 25th August, 2006 issued by the JSERC amounts to an amendment/revision/re-determination of the Tariff Order?
- (ii) Whether the demand made by the JSEB through the impugned bill(s) is barred under the provisions of Section 56(2) of the Electricity Act, 2003?
- (iii) Whether the petitioner(s) having already priced their end products for the period in question and sold the same, the demand of increased rate of electricity with retrospective effect is against the principle of equity and unjust?

Re. Point No.(i):

26. The writ petitioner(s) have claimed that the letter dated 25th August, 2006 issued by the JSERC amounts to amendment/revision of the Tariff Order 2003-04 and re-determination of Tariff, contrary to the provisions of law and is not sustainable. The respondents on the other hand contended that the said letter does not revise/modify the Tariff Order 2003-04, rather the same only clarifies the Table 5.33 of the said Tariff Order. For deciding the issue, certain legal provisions are required to be discussed and examined.

27. After coming into force of the Electricity Regulatory Commission Act, 1998, the power to frame tariff and to decide the tariff rests with the State Regulatory Commissions, as envisaged under Section 29 of the said Act.

28. After creation of State of Jharkhand under the provision of the Bihar Reorganisation Act, 2000, the State Government in exercise of its power under the Electricity (Supply) Act, 1948 read with Section 62(4) of the Bihar Reorganisation Act, 2000 constituted the Jharkhand State Electricity Board for the State of Jharkhand which became functional with effect from 1st April, 2001.

29. The JSERC has been constituted by the Government of Jharkhand under Section 17 of the Electricity Regulatory Commission Act, 1998, by notification dated 22nd August, 2002.

30. The Electricity Act, 2003, which came into force with effect from June 10, 2003, recognizes the State Electricity Regulatory Commissions constituted under Section 17 of the Electricity Regulatory Commission Act, 1998 besides providing for constitution of the State Commission.

31. Section 82 of the said Act reads as follows:

"82. Constitution of State Commission.- (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under Section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

Provided further that the Chairperson and other Members of the State Commission, appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government.

(2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.

(4) The State Commission shall consist of not more than three Members, including the Chairperson.

(5) The Chairperson and Members of the State

on the recommendation of a Selection Committee referred to in section 85."

32. As per the provisions of the Jharkhand State Electricity Regulatory Commission (Tariff) Regulations, 2003, the power to determine the tariff is with the JSERC. The JSERC, *inter alia*, has to determine as to what is to be charged by the licensee from the different class of consumers.

33. According to the provisions of the Electricity Regulatory Commission Act and Electricity Act, 2003 the licensee is bound by the decision of the JSERC in regard to the tariff. The licensee cannot make any modification or change in the tariff, determined by the JSERC. The decision of the JSERC, is binding on all concerned including the consumers.

34. The JSEB is a licensee and according to the said provisions, the decision of the JSERC regarding the tariff is binding on the JSEB.

35. Section 62 of the Electricity Act, 2003 provides for determination of tariff, as follows:

"62. Determination of tariff.- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity;

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor.

is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

36. The word "Tariff" has not been defined in the said Act. 'Tariff' according to:

Black's Law Dictionary- "a fee that a public utility or telecommunication company may assess for its services" or "a schedule listing the rates charged for services provided by a public utility";

Webster's New Dictionary- "a list of charges";

Compact Oxford Reference Dictionary- "a table of fixed charges made by a business";

Chambers Dictionary- "a list of standard rates charged for a service, eg. electricity or insurance".

37. Thus the tariff is a cartel of commerce or is a book of rates and in the context, means schedule of standard charges provided for the category or categories of the customers specified in the tariff.

38. In the said background, now it is to be seen as to whether the impugned letter dated 25th August, 2006 of the JSERC is a revision or change in the tariff and that the bill(s) sent to the petitioner(s) tantamounts to revision or change in the tariff.

39. It is evident from the record that the JSERC had issued its tariff order dated 27th December, 2003 for the year 2003-04 to be made applicable with effect from 1st January, 2004. The tariff order, *inter alia*, provided for Load Factor Rebate. On the basis of the said tariff order and the rebates provided therein, the JSEB

had been raising and issuing the bills for consumption of electricity to its HTSS Consumers.

40. The JSEB, however, raising some doubts regarding the extent of Load Factor Rebate admissible to the HT Consumers and the manner of their billing for which the JSEB sought clarification from the JSERC by its letter dated 24th August, 2006.

41. The JSERC by the impugned letter dated 25th August, 2006 clarified the said position observing that the JSEB has been short-charging the HT Consumers by allowing the rebates which is not admissible in the Tariff.

42. The JSEB, having received the clarification, realized that it has committed mistake by short-charging the HT Consumers in the past. The JSEB then raised the impugned bill(s), demanding the short-charged amount. According to the petitioners, the said demand is by way of changing/revising the tariff unilaterally by the JSEB, which cannot be done without following the prescribed procedure provided in law and the same is illegal and arbitrary.

43. As would be evident from the provision of the aforesaid tariff order, the Load Factor Rebate for industrial consumers was introduced for encouraging the consumption in excess of their defined Load Factor Rebate. The JSERC has clarified that the rebate given by the JSEB earlier was not in accordance with the said provision and the object of the said tariff order and the JSEB would be responsible for the loss sustained by such short billing.

44. The Chief Engineer of the JSEB faced with such situation directed its officers to revise the impugned bill(s) in terms of the permissible rebate on Load Factor in tariff order, as clarified by the JSERC by issuing letter dated 25th August, 2006.

45. The impugned bills were, thus, raised by the JSEB for recovery of the short payment from the petitioner(s)-consumer(s). The association of the petitioner(s)-consumer(s), namely, Jharkhand Induction Furnace Association challenged

46. Before the JSERC, the petitioners had taken the ground, *inter alia*, that the clarificatory letter dated 25th August, 2006 did not mention the HTSS Consumers and on the basis thereof, no bill(s) can be raised against the HTSS Consumers and that the consumers cannot be penalized on the basis thereof.

47. The JSERC examined the claim of the petitioner(s)' association and after due consideration held that the points raised by them are to be viewed and examined in the context of the provisions of the Act, Regulation/Order on the subject. The JSERC had issued the tariff order for JSEB on 27th December, 2003 to be made effective from 1st January, 2004 is recognised under the provisions of the Electricity Act, 2003. The tariff so determined is binding on the licensee for charging as well as on the consumers for paying the charge. The tariff fixed by the JSERC was recoverable by the licensee for the supply subject to the rebate to the consumers, as provided in the tariff order. However, the JSEB allowed rebate more than what was permissible. The JSEB, thus, short-charged the said consumers contrary to the provision of the tariff order.

48. However, the JSERC clearly observed that the JSEB is responsible for the short realization of the charges and for that the JSEB cannot now charge interest or surcharge on the short payment amount from the consumer(s).

49. The petitioner(s), being not satisfied with the said order of the JSERC, preferred appeal before the Appellate Tribunal for Electricity, New Delhi, being Appeal No.33 of 2007. By the time, the hearing of these writ petitions concluded, the said appeal was also disposed of by the Appellate Tribunal by its order dated 30th July, 2007. The Appellate Tribunal held that there was no change or revision of the tariff order in directing or raising supplementary bills for realizing short charged amounts from the petitioners. The Appellate Tribunal discussed the relevant aspects in detail and upheld the impugned demand and dismissed the appeal.

50. The said orders of the JSERC as well as the Appellate Tribunal have not been challenged in these writ petitions.

51. In **BSEB Ltd. Vs. Tata Power Company Ltd. [(2004) 1 SCC 195]**, it has been held that under the provisions of the Act and Regulations, the JSERC has exclusive power to determine the tariff after the enforcement of the Electricity Regulatory Commission Act, 1998. The tariff approved by the JSERC is final and binding and it is not permissible for the licensee or any one else to charge different from the prescribed tariff. It has been further held that charging of tariff, which has not been approved by the JSERC, is an offence punishable under Section 45 of the Electricity Regulatory Commission Act, 1998.

52. Section 62 of the Electricity Act, 2003 also provides that the appropriate commission shall determine the tariff in accordance with the provisions of the Act.

53. In view of the above, it is clear that the JSERC, being the statutory authority, has power to determine the tariff and to clarify the issue raised to that regard. In the instant case, the JSERC has not only clarified, but has reiterated in its subsequent order that the JSEB was not correctly charging and raising the bill(s) according to prescribed provision for the Load Factor Rebate admissible under the tariff order.

54. It has further been held that issuing the supplementary bills and demanding the amount short-charged in previous bills of the consumers is not contrary to the tariff order as the rebate shown in those bills were beyond the extent of rebates on Load Factor admissible to HTSS Consumers. The JSERC held that the JSEB is responsible for wrongly applying the tariff order and for short charging the consumers.

55. The power of this Court to review the decision taken by the expert and the statutory authority is limited. This Court can do so, if the decision of the expert authority is arbitrary, ^{colourable} ~~illegal~~ or contrary to the provisions of law.

56. On meticulous examination and consideration of the legal provisions, facts and submissions made by the parties, I come to the conclusion that no separate schedule of tariff has been brought about or made applicable by the JSERC by its impugned letter dated 25th August, 2006, but the same has simply clarified the Table 5.33 of the Tariff Order.

57. By the said letter, the JSERC has only reiterated the provisions of its tariff order and has not made any change/revision whatsoever in the tariff. The express object for such rebate on Load Factor is to encourage consumption in excess of the defined load factor. To quote "if the entire consumption is in excess of the defined load factor, the rebate is provided on the energy charges for such excess consumption." **(emphasis supplied)**

58. In my considered view, therefore, neither the impugned letter of the JSERC nor the impugned bill(s) raised by the JSEB tantamounts to any revision/change in the tariff order and the same is well within the jurisdiction of the JSERC as well as JSEB. At any rate any mistake in billing does not create/give any right to the petitioner(s).

59. Mr. Mittal, learned counsel appearing on behalf of the petitioners emphatically argued that the impugned letter of the JSERC and bill(s) raised by the JSEB ^{are} ~~is~~ modification/change/revision of tariff order and in support thereof, he relied upon the decision of **Hindustan Petroleum Corporation Ltd. Vs. Gujarat Electricity Board State Transmission Utility & Anr., reported in AIR 2005 Gujarat 164**. He also referred to and relied on the decision in **I.T.C. Limited & Anr. Vs. Union of India & Ors., reported in AIR 1989 Calcutta 294** in order to contend that in case of any ambiguity in the provision, benefit should be given to the consumer. But the said decisions are of no relevance in the context and are not applicable to the facts of these cases.

60. The decisions of the Supreme Court in **M/s. Polestar Electronics (Pvt) Ltd Vs Additional Commissioner Sales Tax &**

Anr., reported in (1978) 1 SCC 636; *M/s. Birla Cement Works Vs. Central Board of Direct Taxes & Ors.*, reported in AIR 2001 SC 1080 and *C.I.T. Bombay Vs. M/s. Gwalior Rayon Silk Manufacturing Co. Ltd.*, reported in (1992) 3 SCC 326 have also got no application to the facts of the instant cases.

61. The first point is, thus, answered against the petitioner(s).

Re. Point no.2:

62. The petitioner(s) have taken the next ground that even if there was some wrong billing, recovery of the short amount of the bills is barred under Sub-section (2) of Section 56 of the Electricity Act, 2003.

63. Section 56 of the said Act deals with disconnection of supply in default of payment and runs thus:

"56. Disconnection of supply in default of payment.-(1)
Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,-

- (a) an amount equal to the sum claimed from him, or
- (b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months,

whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

64. From the plain reading of Section 56 of the Electricity Act, 2003, it is evident that sub-section (1) thereof gives power to the

electricity or disconnect any electric supply line and discontinue the supply where the consumer neglects to pay any charge for electricity or any sum other than the charge for electricity due from him to a licensee or generating company in respect of supply, transmission, distribution or wheeling of electricity to him after giving him not less than 15 days clear notice to such person without prejudice to his right to recover such charge. The proviso to the section gives an exception by providing that the supply of electricity shall not be cut off if such person deposits, under protest- an amount equal to the sum claimed from him or the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, during the pendency of the dispute between him and the licensee.

65. Sub-section (1) of Section 56 of the said Act gives right to the licensee or the generating company to disconnect the electric supply line without prejudice to his right to recover the charge for electricity or any sum other than the charge for electricity due from him.

66. Sub-section (2) of Section 56 of the said Act deals with the recovery and provides that no sum due from any consumer under this section shall be recoverable after a period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied, and the licensee shall not cut off the supply of the electricity, notwithstanding anything contained in any other law for the time being in force.

67. In the instant case, the electricity supply has not been cut off or disconnected or disrupted on account of non-payment of any charge for electricity or any sum due for the electricity. The sum demanded from the consumer(s)-petitioners was not shown as due against them at any time earlier. The sum, which is being demanded by raising the impugned bill(s), was never demanded earlier. When the sum was not demanded earlier, there is no question of sum being due against the petitioner(s).

68. Learned counsel appearing on behalf of the petitioner(s) submitted that even for the sake of the argument, it is accepted that the JSEB has power to raise the bill(s) for the amount sought to be recovered, the same cannot be recovered after the period of two years from the date when such sum became first due, in view of the limitation under Sub-section (2) of Section 56 of the Electricity Act, 2003. And in most of the cases, the demand for the first time being raised in March, 2007, the amounts, which were due within a period of two years from the said date, only can be recovered. Any amount due before two years from March, 2007 cannot be recovered. Learned counsel submitted that the liability to pay electricity charges is created on the date electricity consumed and not after the bill is raised.

69. In my view, the liability may be said to be created earlier in accordance with the tariff order, but the amounts of short payment became due only after realization of mistake and the assessment of the short-charged amount and on raising the bill for the same by the JSEB.

70. Since the amounts of impugned bill(s) were never demanded earlier, the same cannot be said to be due at any earlier time. Almost, the same view has been taken by the Delhi High Court in the case of **H.D. Sori Vs. Municipal Corporation of Delhi**, reported in AIR 1987 Delhi 219.

71. In view of the above discussion, it is held that the recovery of the amounts of the impugned bill(s) cannot be said to be hit by the provisions of Section 56(2) of the Electricity Act, 2003, and the amount(s) of the impugned bill(s) cannot be said to be unrecoverable and barred under Section 56(2) of the said Act.

72. The Point No.2 is, thus, decided against the petitioner(s).

Re. Point no.3:

73. Mr. S. L. Agarwal, learned counsel, appearing on behalf of some of the writ petitioner(s), has raised the point of application of principle of equity and submitted that since the petitioner(s)-consumer(s) have already priced their end products and sold

to pay the increased electricity charges with retrospective effect, they shall suffer financial loss for their no fault and as such, the demand of short-charged amount is against the principle of equity.

74. Firstly, principle of equity hardly finds any place in fiscal matter. Reference may be made to the decisions of the Supreme Court in ***District Registrar & Collector Vs. Canara Bank, reported in (2005) 1 SCC 496*** and in ***CST Vs. Shri Krishna Engineering Co., reported in (2005) 2 SCC 692***. Secondly, where there is clear legal provisions dealing with the issue, application of equity has not been favoured. In the instant case, the bill(s) have been raised in terms of the tariff. Any demand, which can be justified under legal provisions, cannot be said to be inequitable.

75. In view of the above, it cannot be said that the demand against the petitioner(s) is inequitable. The said point is answered, accordingly.

76. Though in view of the aforesaid legal provisions, the points raised in these writ petitions have been answered against the petitioners, yet it cannot be denied that realization of accumulated sum towards the said short payment would certainly affect the petitioner(s)' financial balance and in some cases may cause hardship. The JSERC has also felt the same and in clear term had held that the JSEB is itself responsible for the short charging the category of consumers on misinterpretation and wrong application of rebate clauses for about 2½ years, they cannot penalize the consumers for short payment by charging any interest or surcharge on this account.

77. It is true that the JSEB has not charged any interest or surcharge on the said short payment of bill(s) yet realization of the huge amount at one go may cause a financial jolt, adverse to the interest of the writ petitioner(s)-consumer(s). Strict realization of the said amount would be also against the object of Load Factor Rebate given by the said tariff order.

78. Since the short charges due is a result of fault on the part of the JSEB, it is not reasonable to force realization of the amount at one go or/and by the dates mentioned in the impugned bill(s). The JSEB must consider the request of the petitioner(s)-consumer(s) for payment of the bill(s) in reasonable instalments, if such request is made by the petitioners.

79. In the facts and circumstances of the case, the following directions are made:-

- (i) The JSEB shall not insist the payment of the amounts of the bill(s) at one go, if any written request is made or representation is filed before the Competent Authority of the JSEB ^{for instalments,} by 30th September, 2007;
- (ii) Any representation made by the petitioner(s)-consumer(s) for fixing instalments shall be duly considered and the instalments shall be fixed considering present financial strength/condition ^{of the petitioner(s).}
- (iii) In case of any request for more than six monthly instalments, the JSEB shall grant at least six monthly instalments for payment of the amounts of the impugned bill(s), if the request for more instalments is not accepted by the JSEB.
- (iv) The JSEB shall not take any coercive measure for realization of the amounts of the impugned bill(s) against the consumer(s), whose representation/request for fixing instalments for payment of the amounts of the impugned bill(s) is received on or before 30th September, 2007.
- (v) The said direction shall not be applicable in the case in which the request/representation for fixing instalments is not made by 30th September, 2007.
- (vi) The JSEB shall be at liberty to take legal steps for non-payment of the amounts of impugned bill(s) after 30th September, 2007 in the cases in which written request/representation for fixing instalments for payment of the amounts of the impugned bill(s) is not received.
- (vii) The said directions be treated as the facility being provided to the petitioner(s) consumer(s) if

convenient payment of the amounts of the impugned bill(s), who intend to pay the amounts of the impugned bill(s) and the same would not be available to those who deny or dispute the liability of the impugned bill(s).

80. With the said observations and directions, these writ petitions are disposed of.

81. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/- Narendra Nath Tiwari,

JHARKHAND HIGH COURT
RANCHI
Dated, 11th September, 2007
Sanjay/AFR

Certified to be true Copy

[Signature]
17/9/07
Caring Officer

(Designated under Rule 252 (ii) of J.H.C Rules)
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