

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W. P. (C). No. 2613 of 2010

With

W. P. (C) No. 2626 of 2010

M/s. Laxmi Business & Cement Co. (P) Ltd.,
Hazaribagh Petitioner
(in W.P.C. No. 2613 of 2010)
M/s. Laxmi Ispat Udyog, Koderma Petitioner
(in W.P.C. No. 2626 of 2010)

Versus

1. Jharkhand State Electricity Board, Ranchi
2. General Manager cum Chief Engineer,
Hazaribagh Electric Supply Area, J.S.E.B.
3. Electrical Superintending Engineer,
Hazaribagh Electric Supply Area, J.S.E.B.
4. Electrical Executive Engineer,
Hazaribagh Electric Supply Area, J.S.E.B.
5. Jharkhand State Electricity Regulatory Commission,
Ranchi Respondents
(in both the cases)

Coram : THE HON'BLE MR. JUSTICE R. K. MERATHIA

For the Petitioner : M/s. M. S. Mittal, Senior Advocate &
N. K. Pasari & S. K. Deo,
Advocate

For the Respondent Nos. 1 to 4: M/s. V. P. Singh, Senior Advocate,
(J.S.E.B.) Rajesh Shankar, Deeraj Kumar
&

Abhay Prakash, Advocate
For the Respondent No. 5 : Mr. S. Srivastava, Advocate

C.A.V. ON - 27.08.2010

PRONOUNCED ON - 17.9.2010

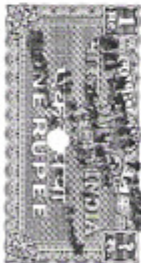
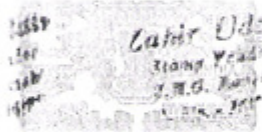
4/11.09.2010

Both the writ petitions involving similar questions are being disposed of by this common order.

2. Petitioners have prayed (i) for setting aside the energy bills from May 2005 onwards raised on the basis of 75% of their contract demand; (ii) to adjust/refund the excess amount realized with interest; & (iii) to revise the bills in terms of the existing tariff.

3. The following submissions were made on behalf of the petitioners:

After introduction of the Electricity Act 2003 w.e.f. 10.06.2003, the duty to frame tariff was taken away from the licensee - respondent- Jharkhand State Electricity Board ('the Board', for short) and only the



Jharkhand State Electricity Regulatory Commission ('JSERC', in short)

is authorized to frame tariff schedule for the Board. JSERC has already framed tariff schedule of the Board after following the procedure provided for the same namely 'Tariff Order 2003-04'. There is no provision in the Tariff Order 2003-04 for billing on the basis of minimum 75% of the contract demand, but in utter disregard to the tariff, the Board has raised the impugned bills on the basis of 75% of the contract demand though, the demand recorded was less. It was also submitted that the matter is fully covered by the order/judgment dated 17.04.2009 passed in W.P.(C) No. 5150 of 2007 in the case of Jharkhand State Electricity Board Vs. M/s. Kumardhubi Steels Pvt. Ltd. against which Special Leave to Appeal (Civil No. 20104 of 2009) was also dismissed on 29.09.2009. The orders dated 07.02.2006 and 18.12.2006 passed by JSERC were also referred.

4. The contentions of the respondent – Board is as follows:

The impugned bills are completely in accordance with the Tariff Order 2003-04 issued by JSERC. The provisions contained in Clause 15.2 (a) of 1993 tariff, and clause 4(c) of the supply agreement whereunder the Board could charge demand charges on the basis of 75% of the contract demand or the actual consumption recorded, whichever is higher; is still in vogue, in absence of any contrary provision in the Tariff Order 2003-04 (The Repeal and Saving Clause contained in Section 185 (2) of the Electricity Act 2003 was referred). The Tariff Order 2003-04 does not say that the demand charge will be on the basis of actual demand recorded in the meter. The terms and conditions of supply are integral part of the tariff and in view of the word 'etc.' occurring in Clause 1.4 of the terms and conditions of supply of Tariff Order 2003-04, the Board is justified in raising the impugned bills. The demand charge being a fixed charge is levied to meet, the fixed cost incurred by the Board in making supply of electricity to its consumers. (Different portions of the Tariff Order 2003-04 were referred to justify the impugned bills). The judgment of J.S.E.B. Vs. Kumardhubi Steels Pvt. Ltd. (supra) is not applicable in this case. If the demands in question are quashed, the financial

structure of Board will collapse as it has to make the electricity available for supply by purchasing it for different sources also. The judgments reported in 2003 (3) ILIR 38(SC)

in the case of Nipha Steels Ltd. & another Vs. West Bengal State Electricity Board and others and AIR 1982 Bombay 580 in the case of Mukund Iron and Steel Works Ltd. Vs. Maharashtra State Electricity Board and another, were relied.

5. The submissions on behalf of the JSERC-respondent no. 5 is as follows:

In exercise of its statutory powers, JSERC has determined the Tariff Order 2003-04 for the Board w.e.f. 01.01.2004 after following a well laid statutory process; which is final and binding on the Board as well as its consumers. After enactment of the Electricity Act 2003, none else than the regulatory commission is authorized and empowered to determine the tariff, and therefore, the contention of the Board that they can implement the earlier tariff issued by the Bihar/Jharkhand State Electricity Board, is misconceived, misleading and contrary to the provisions of the Electricity Act 2003. An appeal under Section 111 of the Electricity Act 2003 could be filed by the Board, but even after lapse of more than six years no such appeal has been filed. The Tariff Order 2003-04 became final and binding. The impugned bills are raised against the Tariff Order 2003-04.

Further, the respondent – Board itself, in its tariff petition filed before JSERC did not propose to continue the said provisions of charging on 75% of contract demand. The tariff approved by JSERC is contained in Annexure 5.1 of the Tariff Order 2003-04 which is self explanatory and is binding on the parties and save and except Annexure 5.1, other part of the Tariff Order 2003-04 are submissions, objections, considerations, deliberations, comments etc. with regard to Annual Revenue Requirements and tariff petition filed by the Board. The Board cannot be allowed to implement its own tariff on one or other pretext. The earlier tariffs became inoperational after the Tariff Order 2003-04 was made applicable since 01.01.2004. The Electricity Supply Code Regulations, 2005 were also made applicable w.e.f. 28.10.2005 and the terms and conditions of the supply of electricity is

governed under the provisions of the said regulations which also does not prescribe for charging of demand charges at 75% of the contract demand. Paragraph 12 and 16 of the judgment reported in (2004) 1 SCC 195 BSES Ltd. Vs. Tata Power Co. Ltd. and others, was referred.

6. The only question is whether the impugned bills raised on the basis of 75% of the contract demand are as per Tariff Order 2003-04, or they are illegal, arbitrary and malafide ?

7. The Tariff Order 2003-04 is divided in different sections. Section 1 is 'Introduction', Section 2 is 'ARR (Annual Revenue Requirement) and tariff proposal submitted by J.S.E.B.', Section 3 is 'Objections', Section 4 is 'Commission's Analysis on the Revenue Requirement of J.S.E.B.', Section 5 contains the 'Design of Tariff Structure and Analysis of Tariff', Section 6 contains the 'Directions to the J.S.E.B.' and Annexure 5.1 contains the "Tariff schedule of the Jharkhand State Electricity Board applicable w.e.f. January 1, 2004".

8. It can not be disputed that after promulgation of Electricity Act 2003, only JSERC is competent to frame tariff and that is has framed Tariff Order 2003-04 w.e.f. 1.1.2004 after considering the tariff petition of the Board, and the procedures prescribed, in accordance with law. Learned counsel for the Board referring some of the Clauses contained in 'Section 5' relating to the 'Design of Tariff Structure and Analysis of Tariff' contended that even as per this tariff, the Board can raise the impugned demands. The contention is wholly devoid of any merit, unacceptable and misleading. The JSERC has analysed and designed the tariff structure. The Board cannot be allowed to interpret/mis-interpret the Tariff Order 2003-04 in its own way as it suits it and on its own whims. Even from table 5.27 which is reproduced below, it will appear that the Board itself did not propose to continue with the then existing provisions of charging the monthly minimum demand charge bases on actual maximum demand of that month or 75% of the contract demand whichever is higher.

Table 5.27: Tariff for HTS – I consumers (Existing/Proposed)

DESCRIPTION	TARIFF*	
	DEMAND CHARGE	
	Existing	Proposed
Rs./KVA/month	125	200
	ENERGY CHARGE	
Rs./KWh/month	Existing	Proposed
All consumption	1.78	4.40
	FUEL SURCHARGE	
Rs./KWh/month	2.44	
	Annual minimum guarantee (AMG) charge	
	-subject to minimum contract demand for this category, monthly minimum demand charge as per appropriate tariff based on actual maximum demand of that month or 75% of the contract demand whichever is higher - Energy charges based on load factor of 25% and power factor 0.85 on contracted demand payable at the rate of Rs. 1.78/KWh	The following AMG charge shall be realized from the consumer as per appropriate tariff AMG charge based on load factor of 25% and power factor 0.9 on contract demand payable at the rate of energy charge applicable to HTS – I category

9. Further, table 5.31 - the approved tariff for HT consumers is reproduced below:

Table 5.31: Approved tariff for HT consumers

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

10. In this case, the petitioners are HTS-I category consumers. The minimum monthly charge (MMC) at the rate of Rs. 250 per KVA per month is applicable to them irrespective of their consumption. The

tariff schedule contained in Annexure 5.1, in relation to the High Tention Service (HTS) category does not provide for levying minimum monthly charge on the basis of 75% of the contract demand. What can be charged is mentioned in the tariff, and what is not mentioned, can not be charged saying that it is not mentioned. Trying to justify the impugned demands, on the basis of word 'etc.' occurring in Clause 1.4 of the terms and conditions of supply, and the Repeal and Saving Clause contained in Section 185(2) of the Electricity Act 2003 is simply misleading and mischievous.

11. The Board has also tried to justify the impugned demands on the basis of Clause 4(c) of the agreement which provided as follows:

"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."

But how the Board can ignore Clause 11 which clearly stipulates that:

"This agreement shall be read and construed as subject in all respects to the provisions of the Indian Electricity Act, 1910, rules framed thereunder and the Electricity (Supply) Act, 1948 together with rules, regulations (if any), tariffs and terms and conditions for supply of electricity framed and issued thereunder and for the time being in force as far as the same may respectively be applicable and all such provisions shall prevail in case of any conflict or inconsistency between them and the terms and conditions of this agreement."

Thus, the earlier Acts, rules, regulations and the tariff made thereunder were to prevail over the agreement, and now the Tariff Order 2003-04, made under Electricity Act 2003, prevails over the agreement. The agreement is statutory one and has to be in tune with the Act/rules/regulations, made from time to time. It may also be noted here that in Case No. 3 of 2006-07 - JSERC inter-alia held that the said agreement is not in accordance with the Electricity Act 2003 and the Regulations passed by the JSERC, and it is required to be prepared in accordance with law.

12. The judgment of Kumardhubi (supra) is fully applicable to the present case. That case related to a HTSS category (Induction Furnace Units), whereas these cases relate to HTS-I category. Similar

contentions were raised by the Board in that case that even as per Tariff Order 2003-04, it can raise bills on the basis of earlier tariffs. The Board's contentions were rejected, which were, inter alia, as follows:-

"4. 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 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."

It was also, inter alia, observed as follows:-

"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 under Section 111 of the Electricity Act, 2003. The same has not been challenged by the Board even after a lapse of five years."

It may also be noted that the Board's SLA (Civil) No. 20104, filed against the said judgment was also dismissed on 29.9.2009.

13. The judgments relied by the Board are not at all applicable to the facts and circumstances of the present case. They relate to the tariffs of other States made prior to enactment of Electricity Act 2003, whereas the present case is related with the new Electricity Act 2003; the Tariff Order 2003-04 made thereunder and the new Regulation.

14. One more aspect is to be noted, before parting with this order. On 17.8.2010 these writ petitions were heard at length as it was felt that counter affidavit was not needed, as both the parties were relying on Tariff Order 2003-04. After the order was dictated in Court allowing the writ petitions, learned counsel appearing for the Board, intensively insisted for adjournment, for filing counter affidavit. The prayer was allowed. In the counter affidavit, then filed by the Board, it is said that Board has moved JSERC on 19.8.2010 (i.e. during the pendency of these writ petitions) for a general clarification of charging of the demands in question which has been registered as Case No. 18 of 2010, and therefore, it would be desirable that petitioners should await the outcome of the said proceeding. Counsel for the Regulatory Commission produced a copy of said petition and submitted that surprisingly the Board has suppressed that the present writ petitions involving similar questions are pending in this Court. Counsel for the petitioner submitted that the Tariff Order 2003-04 has attained finality

as also observed in Paragraph 15 of the Judgment of Kumardhubi (supra) (quoted above), and now after 6 years, and that too during pendency of these writ petitions, the purported clarification has been sought mischievously.

15. Be that as it may, in the facts and circumstances noticed above and in view of the finality of judgment of Kumardhubi (supra), I am not inclined to keep these writ petitions pending on the ground of pendency of the said petition before the JSERC. Needless to say that, any order passed by the JSERC will be binding on all concerned, but in view of the factual and legal position obtaining as on today, the writ petitions have to be allowed.

16. Considering the entire matter from different angles, it has to be held that the impugned demands are absolutely illegal and arbitrary. The actions of the Board lacks bona fide. The Board is also bound by law, but it appears that the Board and it's officers have got no respect and in fact, they are violating the law and generating litigations, whereas they are obliged to implement the law and act fairly.

17. In the result, the impugned demands are quashed. The Board is directed to revise the bills on the basis of the Tariff Order 2003-04 and refund/adjust the amounts realized, if any, on account of the impugned bills, along with interest in terms of Clause 11.10.3 of the Supply Code Regulations 2005.

In order to avoid multiplicity of litigations, the Board is further directed to apply this order to all similarly situated consumers.

18. The Board is saddled with a token cost of Rs. 5,000/- (Rs. five thousand only) in each writ petitions to be deposited with the Secretary, District Legal Services Authority, Ranchi, within four weeks from today.

sd/- R.K. Merathia, J

S. Mitra
22/9/10

Kalpana
22-9-10

The SIM - Bhadra 1982
22-9-10