

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 260 OF 2014

Dated: 30th April, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

Association of Approved and
Classified Hotels of Kerala,
Represented by its President Sri. G. Gopinathan,
14/1350, Sea Gull Road, Willington Island,
Cochin-682 003, Kerala State Appellant/Petitioner

VERSUS

1. Kerala State Electricity Regulatory Commission,
represented by its Secretary,
KPFCC Bhavanam, C.V.Raman Pillai Road,
Vellayambalam, Trivandrum- 695 010,
Kerala State.

2. Kerala State Electricity Board Ltd.,
represented by its Secretary,
Vydhuthi Bhavan, Pattom Post,
Trivandrum-695004,
Kerala State. Respondents

Counsel for the Appellant ... Mr. Ramesh Babu, Sr. Adv.
Mr. James P. Thomas

Counsel for the Respondent(s)... Mr. Ramesh Babu M.R. for R-1
Mr. M.T. George for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by the Association of Approved and Classified Hotels of Kerala (in short, the '**Appellant/Petitioner**'), against the Impugned Order, dated 4.6.2014, passed by the Kerala State Electricity Regulatory Commission (in short, the '**State Commission**)/Respondent No.1 herein, in Petition No. 257/CT/2014, refusing to review or reconsider the Tariff Order, dated 30.4.2013, in O.P. No. 2 of 2013 as requested by the Appellant/petitioner.

2. According to the Appellant, when the State commission was considering O.P. No. 2 of 2013, it was brought to the notice of the State Commission that the then existing tariff was under challenge before this Appellate Tribunal and the learned State Commission, at that time, after referring to the pendency of the appeal, directed in the tariff order that follow up action, if necessary, based on the judgment/order of this Appellate Tribunal would be taken. After the judgment of this Appellate Tribunal on the earlier tariff order and its affirmation by the Hon'ble Supreme Court, the State Commission was moved by the Appellant seeking follow up action as promised. However, the State Commission, by the impugned order, has rejected the petition for reconsideration on the ground that it had been filed beyond 90 days, and it is barred by limitation in terms of Regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003.

3. According to the Appellant, the earlier tariff order, dated 25.7.2012, passed by the State Commission in O.P. No 23 of 2012 determining tariff for HT-IV commercial at Rs.5.50/unit upto 30,000 units and Rs.6.50/unit for above 30,000 units was challenged by the appellant Association before this Appellate Tribunal in Appeal No. 10 of 2013. Pending the appeal, the

State Commission proposed revision of tariff for the subsequent period in O.P. No 2 of 2013. The basis for determining various factors including cross subsidy, moving towards cost of supply and tariff shock was based on the tariff for the earlier year which was under challenge before this Appellate Tribunal. Hence, in the course of hearing of O.P. No. 2 of 2013, the pendency of the Appeal No. 10 of 2013 before this Appellate Tribunal was pointed out by the Appellant Association. The State Commission, in the tariff order, dated 25.7.2012, in O.P. No. 23 of 2013, after referring the pendency of the appeal before this Appellate Tribunal, promised that follow up action, if necessary, would be taken based on the final outcome of the appeal.

4. Appeal No. 10 of 2013 was allowed by this Appellate Tribunal vide judgment, dated 25.10.2013, modifying the tariff rates for HT IV commercial. The appeal by the State Commission before the Hon'ble Supreme Court was dismissed with modifications on 27.1.2014. Just thereafter, the Appellant Association brought to the notice of the State Commission the modification to O.P. No. 23 of 2012 ordered by this Appellate Tribunal and confirmed by the Hon'ble Supreme Court and requested the State Commission to take follow up action as promised by the State Commission in its subsequent order, dated 30.4.2013 in O.P. No. 2 of 2013. However, by a curious reasoning namely that the impugned petition was one for review of its order, dated 30.4.2013, the State Commission rejected the said petition holding the same to be barred by limitation under Regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003. Thus, the order, dated 30.04.2013, is under challenge in the instant appeal before this Appellate Tribunal.

5. The appellant is the Association of approved and classified hotels of Kerala, which is a consumer under HT-IV category of consumers. The

Respondent No.1 is the State Commission and Respondent No.2 is the Distribution Licensee in the State of Kerala.

6. The relevant dates, for the purpose of deciding this Appeal, are as under:

- (a) The State Commission, vide its tariff order, dated 25.7.2012, in Original Petition, being O.P. No. 23 of 2012 fixed tariff for consumers under the Distribution Licensee, Respondent No.2.
- (b) Against the Tariff Order, dated 25.7.2012, Appeal No. 10 of 2013 was filed before this Appellate Tribunal.
- (c) The Tariff Petition being O.P. No 2 of 2013 was filed before the State Commission for revising tariff of various consumers and during hearing, the Appellant Association brought to the notice of the State Commission the facts regarding pendency of Appeal No. 10 of 2013 before this Appellate Tribunal and then the State Commission assured in writing in the proceeding of O.P. No. 2 of 2013 that the follow up action, if necessary, would be taken in compliance of the order of this Appellate Tribunal as may be passed by this Appellate Tribunal.
- (d) This Appellate Tribunal, vide its judgment, dated 25.10.2013, in Appeal No.10 of 2013 allowed the Appeal modifying the tariff rates for HT-IV consumer category in O.P. No. 23 of 2012 to the extent it concerned to the Appellant Association category of consumers namely; HT IV category of consumers. The State Commission challenged the judgment/order, dated 25.10.2013, of this Appellate Tribunal by filing Civil Appeal No. 84 of 2014 against the aforesaid modification before the Hon'ble Supreme Court and the Hon'ble Supreme Court, vide its judgment/order, dated 27.1.2014, dismissed the appeal against the judgment of this Appellate Tribunal.

- (e) The Appellant Association filed the impugned petition before the State Commission reminding the State Commission of its earlier order promising follow up action based on the outcome of the appeal. According to the Appellant, the State Commission misconstruing the petition as one of the review dismissed the same vide impugned order holding the same to be barred by limitation under Regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003.

7. The Appellant Association filed the said petition being Petition No. 257/CT/2014 before the State Commission praying to review or reconsider the order, dated 30.4.2013, in OP No. 2 of 2013 and the tariff of HT IV commercial category of consumers and particularly in respect of members of the Appellant Association be appropriately modified in the light of the judgment of this Appellate Tribunal, dated 25.10.2013, in Appeal No. 10 of 2013, on the following grounds:

- (a) that in the said order, dated 30.4.2013, the State Commission approved the ARR and ERC for 2013-14 assessing the revenue gap of Rs.1049.91 crores and estimating the average cost of supply at Rs.5.04/Unit. Based on the same, tariff revision for all categories of consumers was approved. In respect of HT IV Commercial consumer category which is the category in question, by paragraph no. 107 and 108 along with Table No. 8.34, the State Commission had approved energy charges at Rs.6.10/unit up to 30,000 units and Rs.7.20/unit for above 30,000 units. This was on the premise that the existing tariff as regards energy charges was Rs.5.50/unit up to 30,000 units and Rs.6.50/unit for above 30,000 units. In the Appeal No. 10 of 2013 challenging the order, dated 25.7.2012, of the State Commission in OP No. 23 of 2012, this Appellate Tribunal had, by order, dated 25.10.2013, set aside the tariff for HT IV Commercial category on the ground that the tariff of HT IV

Commercial category consumers had been increased giving them tariff shock. It was offered by the Appellate Tribunal that they will be charged at the tariff rate proposed by the Electricity Board in their petition to the State Commission i.e. fixed charges at the rate of Rs.400/kVA/month and energy charges at the rate of Rs.5.50/kWh. The KSEB pursued the matter before the Hon'ble Supreme Court in Appeal No. 84 of 2014 and the Hon'ble Supreme Court, vide its judgment, dated 27.1.2014, dismissed the appeal confirming the order of this Appellate Tribunal's order, dated 25.10.2013 in Appeal No. 10 of 2013.

- (b) that the learned State Commission, after hearing both the parties, considering and citing the relevant part of the judgment, dated 25.10.2013, of this Appellate Tribunal, has disposed of the said petition of the Appellant by the impugned order, 4.6.2014, holding as under:

“Analysis and decision of the Commission

6. *The petition is for review / reconsideration of Tariff Order of the Commission dated 30-04-2013 in OP No 2 of 2013. The regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 states as follows;*

“The Commission may, either on its own motion or on an application made by any interested or affected party, within 90 days of the making or issuing any decision, direction, order, notice or other documents or the taking of any action in pursuance of these regulations; review, revoke, revise, modify, amend, alter or otherwise change such decision, direction, order, notice or other documents issued or action taken by the Commission or any of its officers”.

The petition was received in the Commission on 11-02-14 and hence it is badly delayed. Further the petitioner has not requested to condone the delay in filing the petition.

The relief sought for is to reduce the tariff of HT IV commercial category by redetermination of tariff for the Financial Year 2013-14. The above relief was sought by the petitioner based upon the order of the Hon: APTEL dated 25-10-2013 in Appeal No 10/2013 on the tariff applicable for the Financial Year 2012-13. The Hon: APTEL in the said order had set aside the tariff fixed by the State Commission for HT IV consumers for 2012-13 and directed that they will be charged at the rates proposed by KSEB. This directive cannot be extended to the subsequent Financial Year as sought by the petitioner. Tariff determination has to be done for

each financial year in accordance with the procedures specified for it which include pre-publication of tariff proposal and public hearing. The tariff is determined for all the consumers of the licensee and the tariff petition is not a dispute between two contending parties. The Hon: Appellate Tribunal for Electricity and the Hon: Supreme Court have clarified that the tariff determination process is a quasi-legislative process. Therefore petitions of individual consumers against tariff order cannot be considered in a petition like this. Any person aggrieved by the tariff order issued by the Commission can only approach the Appellate Tribunal by filing an appeal. Therefore the petition is not maintainable on this ground also.

Decision of the Commission.

The review petition having been filed beyond the period of 90 days, is barred by limitation as specified in regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 and hence the Commission orders that the petition is not admissible. It is ordered accordingly."

8. We have heard Mr. Ramesh Babu, the learned Sr. Counsel for the Appellant, Mr. Ramesh Babu M.R, the learned Counsel for the Respondent No.1 and Mr. M.T. George, the learned Counsel for the Respondent No.2. We have gone through the written submission filed on behalf of the Appellant including the impugned order and other material available on record.

9. The only issue involved in this Appeal is **whether the State Commission after making mention of the pendency of appeal against the previous tariff order for previous Financial Year (2012-13) during the course of hearing of the ARR and tariff petition for the subsequent Financial Year (2013-14) is bound to reconsider the impact/effect of judgment of this Appellate Tribunal in that appeal, to be pronounced subsequently, particularly when the Appellate Tribunal had not given any direction to the State Commission to consider the effect of the judgment of this Appellate Tribunal, while determining tariff for the subsequent Financial Year?**

10. The following submissions have been made by the Appellant in support of his contentions:

- (a) that though the issue relates to FY 2013-14, to appreciate the same the consideration of tariff order, dated 25.7.2012, in OP No. 23 of 2012, passed by the State Commission for FY 2012-13 is necessary because the tariff for FY 2012-13 in respect of HT IV was fixed at 69% above the average cost of supply, well above the $\pm 20\%$ prescribed in the Tariff Policy and the dictum of this Appellate Tribunal in earlier cases.
- (b) that since the fixation of tariff for HT-IV Commercial category for FY 2012-13 was challenged before this Appellate Tribunal in Appeal No. 10 of 2013 assailing the tariff order, dated 25.7.2012, of the State Commission and in the course of hearing of the ARR petition for 2013-14, before the State Commission, this fact was pointed out before the State Commission that since the tariff order for FY 2012-13 was challenged in Appeal before this Appellate Tribunal and was pending, it would not be proper to take the figures for 2012-13 for fixation of tariff for FY 2013-14 and hence it was requested to defer fixation of tariff for HT-IV commercial category till decision in the said appeal. The State Commission, however, proceeded with the tariff fixation for 2013-14 based on the figures for 2012-13 with the promise that, if necessary, the issue would be reconsidered depending on the outcome of the appeal. This Appellate Tribunal vide judgment, dated 25.10.2013, in Appeal No. 10 of 2013, ultimately, set aside the tariff fixed for HT-IV commercial for the year 2012-13 holding that the average tariff for the category was fixed at 69% of the average cost of supply which is contrary to the provisions of the Tariff Policy which envisages that the tariff should progressively reflect the prudent cost of supply of electricity and latest by 2010-11 all categories of consumers except the consumers below poverty line should be within $\pm 20\%$ of the average cost of supply. However, the Appellant had agreed to the tariff rate of Rs.5.50 instead of Rs.6.50 per unit. Accordingly, the Tribunal

ordered to fix the rate of tariff for the said category at R.5.50/unit for the year 2012-13 which was confirmed by the Hon'ble Supreme Court in Civil Appeal No. 84 of 2014.

- (c) that in view of the promise of the State Commission to reconsider the matter based on the outcome of the Appeal, the Appellant filed the instant petition being Petition No. 257/CT/2014 seeking review/reconsideration of the tariff fixation for HT-IV commercial category for the year 2013-14 based on the figure of Rs.5.50/unit (Rs.7.07 average tariff) instead of Rs.6.50/unit (7.85 average tariff).
- (d) that, however, by a curious reasoning namely; that the petition was one for review, the State Commission relying on Regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003, dismissed the said petition by the aforesaid impugned order. The State Commission was under a mistaken assumption that the said petition was for review of the tariff order, dated 30.4.2013 *stricto-sensu*.
- (e) that by filing the instant petition, the State Commission was reminded of its obligation to reconsider the fixation of tariff for HT-IV as it had promised in the earlier tariff order for reconsideration based on the outcome of appeal before this Appellate Tribunal.

11. **Per contra**, the learned counsel for the Respondents have justified the impugned order and argued as under:

- (a) that none of the consumer namely; members of the Appellant Association had not appealed against the tariff order, dated 30.4.2013, before this Appellate Tribunal and hence, the said tariff order, dated 30.4.2013, having attained finality is binding on the parties.

- (b) that the State Commission had issued a tariff order, dated 30.4.2013, much before the deliberation in Appeal No. 10 of 2013 and in the said Appeal before this Appellate Tribunal, the Appellant had not raised any issue against the tariff order, dated 30.4.2013, before this Appellate Tribunal. However, the Appellant Association filed the impugned petition before the State Commission to review/reconsider the tariff order, dated 30.4.2013 of the State Commission in O.P. No. 2 of 2013 for HT-IV commercial category of consumers in the light of the judgment of this Appellate Tribunal in Appeal No. 10 of 2013.
- (c) that the Appellant Association had not filed any objection or comments against the tariff petition filed by KSEBL for the year 2013-14 and the Appellant had not participated in the public hearing on the ARR and tariff petitions filed by KSEBL for the year 2013-14. Hence, the Appellant, who had not filed any objection at the time of public hearing, could not challenge the tariff order, dated 30.4.2013, of the State Commission for FY 2013-14.
- (d) that the petition in question filed before the State Commission was filed after 276 days from the date of the tariff order, dated 30.4.2013, applicable for the year 2013-14 and the said petition of the Appellant before the State Commission is truly a 'review petition' on the tariff order, 30.4.2013.
- (e) that the State Commission has, by the impugned order, dated 4.6.2014, rightly, legally and correctly dismissed the petition discussing limitation as well as merits of the said impugned petition.
- (f) that the impugned petition, dated 4.2.2014, was filed before the State Commission seeking review of the tariff order, dated 30.4.2013, with retrospective effect from 1.5.2013.

(g) that this Appellate Tribunal, vide its judgment, dated 25.10.2013, in Appeal No. 10 of 2013, filed against the tariff order for the year 2012-13, had not given any direction to the State Commission to re-determine the tariff for the year 2013-14 based on the said judgment of this Appellate Tribunal.

Our discussion and consideration

12. We have considered the aforementioned rival contentions raised by the parties and we do not find any substance or merit in any of the contentions raised on behalf of the Appellant Association because the relief sought for in the impugned petition seeking review/reconsideration of the tariff order, dated 30.4.2013, cannot be legally granted to the Appellant Association. The relief sought for by the Appellant is for reducing the tariff for HT-IV commercial category by re-determination of tariff for FY 2013-14 on the basis of the judgment, dated 25.10.2013 in Appeal No. 10 of 2013 of this Appellate Tribunal on the tariff applicable for FY 2012-13. This Appellate Tribunal in its judgment dated 25.10.2013, had set aside the tariff fixed by the State Commission for HT-IV consumers for the period 2012-13 and directed that they will be charged at the rates proposed by KSEB. This directive cannot be extended to the subsequent Financial Year as sought for by the Appellant/petitioner because the tariff determination has to be done for each Financial Year in accordance with the procedures specified for it including pre-publication of tariff proposal and public hearing. The tariff is determined for all the consumers of the licensee and the tariff petition is not a dispute between two contending parties. The dismissal of the Appeal by the Hon'ble Supreme Court, against the judgment, dated 25.10.2013, of this Appellate Tribunal, cannot by any stretch of imagination, allow the said benefit of the judgment, dated 25.10.2013, of this Appellate Tribunal for the next tariff period i.e. 2013-14. The tariff determination process is a quasi-legislative process and, therefore, petitions of individual consumers against tariff order cannot be considered in the instant petition like the present one. Any person or

consumer aggrieved by the tariff order of the State Commission can only approach this Appellate Tribunal by way of filing an appeal under Section 111 of Electricity Act, 2003.

13. We find that the State Commission determined the tariff for FY 2012-13 by tariff order, dated 25.7.2012, in OP No. 23 of 2012. The Appellant Association challenged the tariff order, dated 25.7.2012, by filing Appeal No. 10 of 2013 before this Appellate Tribunal. During the pendency of appeal before the Appellate Tribunal against the tariff order for FY 2012-13, the ARR/Tariff Petition for FY 2013-14 was filed before the State Commission, i.e. O.P. No. 2 of 2013 and during the hearing of the petition for FY 2013-14, the Appellant Association pointed out the fact of pendency of the aforesaid appeal before this Appellate Tribunal requesting not to proceed with the tariff petition i.e. O.P. 2 of 2013, for the next FY 2013-14 till the disposal of the said appeal. The State Commission, during the course of hearing in OP No. 2 of 2013 for the next Financial Year, noted this fact of pendency of appeal before this Appellate Tribunal, in which the tariff order for FY 2012-13 was in challenge, assured the Appellant Association to reconsider the impact of the judgment of this Appellate Tribunal to be pronounced subsequently. Thereafter, this Appellate Tribunal, vide judgment, dated 25.10.2013, in Appeal No. 10 of 2013 allowed the Appeal directing the State Commission to re-determine the tariff for HT-IV commercial category of consumers according to the proposal that had been put before the State Commission by the KSEBL (Electricity Board of Kerala State).

14. The State Commission, vide order, dated 30.4.2013, in OP No. 2 of 2013, determined the tariff for the FY 2013-14. Thereafter, when the Appellant Association filed the impugned petition being Petition No. 257/CT/2014 before the State Commission requesting to review/reconsider the tariff order, dated 30.4.2013, in the light of the judgment of this Appellate Tribunal. The State Commission has dismissed the aforesaid impugned petition of the Appellant Association by the

impugned order, dated 4.6.2014 on the ground that this Appellate Tribunal in its judgment, dated 25.10.2013, in Appeal No.10 of 2013 relating to tariff order for FY 2012-13 had not directed the State Commission to re-determine or reconsider the tariff of the HT-IV category of consumers for the subsequent FY 2013-14 apart from the finding the petition having been barred by the limitation.

15. In the fact situation described in the preceding paragraphs, we hold that the State Commission was not bound to reconsider or review the tariff order, dated 30.4.2013, in O.P. No. 2 of 2013 for FY 2013-14 just on the ground that the State Commission had referred during the course of the hearing of the ARR/Tariff Petition for next FY 2013-14 the fact of pendency of appeal before this Appellate Tribunal relating to tariff order for the previous Financial Year i.e. FY 2012-13 and assured to consider the effect of the judgment to be pronounced subsequently in the said Appeal. After considering the rival contentions, we do not find any substance or merit in any of the contention raised by the Appellant Association because the relief sought for in the impugned petition could not legally be granted to the Appellant Association.

16. We clearly hold that the State Commission was justified in dismissing the impugned petition filed by the Appellant Association seeking review or re-consideration of the said tariff order, dated 30.4.2013 for FY 2013-14 because this Appellate Tribunal had not directed the State Commission to consider the impact or effect of this Appellate Tribunal's judgment, dated 25.10.2013, for the purpose of determination of tariff for the next tariff year and in the absence of such direction, the State Commission could not legally consider the request of the Appellant Association. The tariff for the category of the Appellant Association for FY 2012-13 was challenged before this Appellate Tribunal in the aforesaid Appeal and in the absence of any direction in the judgment of the Appellate Tribunal regarding the implementation of the findings recorded for FY 2012-13, for the next tariff period i.e. 2013-14, the State Commission

could not legally grant the relief sought for by the Appellant in the instant Appeal. **The sole issue is decided against the Appellant and this Appeal is liable to be dismissed.**

ORDER

In view of the above, we do not find any merits in the Appeal and the instant Appeal, being Appeal No. 260 of 2014, is hereby dismissed without any order as to costs. The impugned order, dated 4.6.2014, passed by the Kerala State Electricity Regulatory Commission in Petition No. 257/CT/2014, is hereby affirmed

PRONOUNCED IN THE OPEN COURT ON THIS 30TH DAY OF APRIL, 2015.

**(T Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ REPORTABLE/NON-REPORTABLE

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