

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTION, NEW DELHI**

Appeal No. 40 of 2006

Dated this 17th day of November 2006

Present : **Hon'ble Mr. Justice E. Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

Chhattisgarh State Electricity Board
P. O. Sunder Nagar, Danganiya,
Raipur, Chhattisgarh

... Appellant

Versus

1. Chhattisgarh State Electricity Regulatory Commission
Civil Lines, GE Road,
Raipur (Chhattisgarh) – 492 001
(through its Secretary)

2. The Bharat Aluminium Co. Ltd. (BALCO)
Balco Nagar, Korba,
Chhattisgarh

... Respondents

Counsel for the Appellant : Mr. K. Gopal Chaudhary and
Ms. Suparna Srivastava, Advocates

Counsel for the Respondents : Mr. M. G. Ramachandran, Advocate for
Respondent No.1,
Dr. A.M. Singhvi with Mr. P.C. Sen,
Advocates for Respondent No.2

J U D G M E N T

1. The Chhattisgarh State Electricity Board is the appellant in this appeal. Appellant has come forward with the present appeal under Section 111 of The Electricity Act, 2003, seeking to set aside the order dated 17.10.05 passed by The Chhattisgarh State Electricity

Regulatory Commission in Petition No. 16 of 2005 (M) and for a direction directing the said Commission to make alternative arrangement to compensate the loss arising out of the said Impugned Order dated 17.10.05.

2. Heard Mr. Gopal Chaudhary and Ms. Suparna Srivastav learned counsel appearing for the appellant, Mr. M.G.Ramachandran appearing for the 1st respondent, Mr. Singhvi Senior counsel appearing for the 2nd respondent.

3. The 1st respondent, Commission, passed the tariff order dated 15.06.05. The Tariff also has been notified. On 14.07.05, the 2nd respondent, M/s. Bharat Aluminium Co. Ltd. (BALCO), moved a Petition seeking review of tariff order or to recall the said order. The 2nd respondent, review petitioner, filed additional submissions on 05.08.05 and 27.08.05. The appellant contested the Review Petition by filing replies. By the Impugned Order dated 17.10.05, passed in Petition No. 16 of 2005 (M), the 1st respondent, Commission, allowed the review petition. Being aggrieved by the said review order dated 17.10.05 passed in Petition No. 16 of 2005 (M) the appellant-Electricity Board, has come forward with this appeal before this Appellate Tribunal.

4. In this appeal, the following points arise for consideration :

- A) Whether the 1st respondent, Regulatory Commission, exceeded in its jurisdiction and acted illegally in allowing the Review Petition ?
- B) Whether direction to make alternative arrangements to compensate the loss of revenue to the appellant arising out of the order appealed against is called for ?

5. Both the above points could be considered together conveniently. It is contended by Mr.Gopal Chouduri, learned counsel appearing for the appellant that the order allowing review either is in excess of or without jurisdiction and suffer with illegality. Per contra, Mr. M.G.Ramachandran, learned counsel appearing for the 1st respondent, Commission, and Mr. Singhvi, learned senior counsel appearing for the 2nd respondent contended that the Commission has exercised the jurisdiction vested in it, that no interference is called for with the order passed in Review Petition and that the Commission is well founded in allowing the Review Petition. Mr. Gopal Chaudhary, learned counsel for the appellant, alternatively contended that consequent to the review being allowed, the appellant is bound to sustain loss of revenue and therefore suitable direction ought to have been issued by the Regulatory Commission in the alternative. With respect to the 2nd point, Mr. M.G.Ramachandran, the learned counsel for the appellant, pointed out that the Commission has taken note of this contention but concluded on facts that the appellant will not suffer loss of revenue and therefore the alternative relief prayed for by the appellant deserves to be rejected as unsustainable.

6. With respect to the exercise of power of review by the 1st respondent, Commission, here and now, as rightly contended by the learned counsel appearing for the respondents we do not find any illegality or error of jurisdiction on the part of Regulatory Commission. In fact, it is the omission on the part of the appellant, which was noticed by the Commission and the Commission after being satisfied that grounds have been made out, entertained the Review Petition and allowed the same after hearing the contesting parties.

7. The 2nd respondent sought to raise contention with respect to parallel operation charges, which aspect the Commission had made it clear that it is pending consideration on its file in a separate petition in respect of CPPs [Petition No. 17 of 2005 (M)]. In the circumstances, we hold that we are not called upon to examine the contentions advanced with respect to levy of parallel operation charges and levy of the same on the contract demand. We make it clear that it is open to the 2nd respondent to agitate its right in the pending Petition No. 17 of 2005 (M) on the file of first Respondent and we will not be justified in examining such a contention in this appeal when the matter is pending consideration before Regulatory Commission.

8. It is not in dispute that in terms of Section 94 of The Electricity Act, 2003 the appropriate commission shall have the same powers as are vested in a Civil Court under The code of civil procedure 1908 in

respect of matters enumerated in Sub Section (1) of Section 94 of the Electricity Act which includes the power of review. Clause 94 (1) (f) confers specific powers on the 1st respondent, Commission, to review its decisions, directions and orders. The Regulation framed by the Chhattisgarh State Electricity Regulation Commission confers power on the said Commission to review its order or decision etc. The Regulation provides for review of tariff order. Regulation 33 and 34 of The Chhattisgarh State Electricity Regulatory Commission (Details to be furnished by licensee / generating company for determination of tariff and manner of making application) Regulations 2004 provide for review of tariff order by the Regulatory Commission.

9. The said Regulation reads thus :

“33. All application for the review of tariff shall be in the form of petition accompanied by the prescribed fee. A petition for review of tariff can be admitted by the Commission under the following conditions:

a) the review petition is filed within sixty days from the date of the tariff order, and

b) there is an error apparent on the face of the record.

34. *On being satisfied that there is a need to review the tariff of any generating company or the licensee, the Commission may on its own initiate the process of review of the tariff of any generating company or the licensee. The Commission may also, in its own motion review any tariff order to correct any clerical error or any error apparent on the face of the record”*

10. On a reading of the said Regulations, and Section 94 (1)(f) of The Electricity Act, 2003, it is clear that the Commission is conferred with power to review its tariff order in case, an error apparent on the face of the record is made out. Apart from the said provisions, the Commission has the power to review its order in terms of Chhattisgarh State Electricity Regulatory Commission (Conduct of Business) Regulation 2004. There is no doubt that the Regulatory Commission has powers of review of its own order and it has not acted in excess of jurisdiction. The contention that the order is without jurisdiction or in excess of jurisdiction cannot be sustained on facts as well on the statutory provisions.

11. Nextly, it has been pointed out by the learned counsel appearing for respondents and rightly too that there is an error apparent on the face of the record of the tariff order. The Commission has recorded a definite finding in this respect and in our view it is a well considered and a balanced finding. Concedingly, the appellant has failed to

disclose in its tariff application, material facts which omission constitute a valid ground namely error apparent on the face of the record warranting exercise the power of review. Hence, the contention fails.

12. The annual revenue requirement of the appellant was approved by the 1st respondent, Commission, for the year 2005-06 at Rs. 3133.02 crore as against Rs. 3200.75 crore as proposed by the appellant. The appellant has not challenged the said approval of ARR and determination of total annual revenue requirement. The appellant had to face a deficit of Rs. 46.01 crore for the year 2005-06 as seen from the tariff order dated 15.06.05. The said deficit is on an overall tariff increase of 1.47% over and above the then prevalent tariff. As seen from the tariff order, the 1st respondent, Commission, rationalized the tariff for various categories and this determination resulted only a marginal increase with respect to some of the categories in its tariff design to make up the said deficit. This is clear from Chapter VI of the Tariff Order dated 15.06.2005.

13. The 1st respondent, Commission, determined the tariff for HT Industries at 132 / 220 KV as seen from the tariff order, for tariff year 2005-2006, and in particular to "HV4 Heavy Industries". On the estimated sales of 1501.82 Mu at Rs.567.27 crores while fixing the tariff for Heavy Industries including the 2nd respondent, the 1st respondent, Commission, estimated recovery of the 3.78 per unit

average tariff to 2nd respondent as seen from the parameters set out in page 123 of the Tariff order. The said parameter would include 40% load factor on the contract demand of the 2nd respondent. In other words, the 2nd respondent will have to pay minimum charge corresponding to 40% load factor notwithstanding the actual load factor being less than 40%. The 1st respondent proceeded on the assumption of 40% load factor to be maintained by 2nd respondent and proceeded as if tariff increase would not result in steep hike. The considered and consistent view of the Commission being 1.47% increase and in respect of HT Industries at 132 /220 KV the view indicated by the Commission with more or less overall tariff remains the same.

14. The 2nd respondent by its review petition rightly moved the 1st respondent and brought to the notice of 1st respondent that the 2nd respondent has been taking electricity from the appellant with load factor of less than 20%. In other words, the 2nd respondent has to pay significantly towards minimum charge and demand charge on the unit of electricity consumed by it, while energy charges payable will be lower. The said tariff has resulted in an overall increase of more than 100% to 2nd respondent, at about 20% load factor and more than 120% increase at 10% load factor. This resulted in an anomalous situation viz. the aggregate charges payable by 2nd respondent to the appellant doubled when compared to tariff which prevailed immediately before the revision. The respondents are well founded in

this respect in placing a calculation memo and tariff comparison of the 2nd respondent.

15. The 1st respondent, Commission, required the appellant to furnish the details of bills issued by the appellant to the 2nd respondent during the tariff period 2005-06, which the appellant has failed to furnish. According to the respondents, the actuals would show that the 1st respondent has not suffered any financial loss on account of revision consequent to Review Petition being allowed. The finding of the Commission in this respect is clear and the calculation, which it has appended, speaks for itself. As there has been an error apparent on the face of the record the Commission rightly reviewed the order and we do not find any illegality or error of jurisdiction.

16. In *Raja Shatrunji v. Mohd. Azmat Azim Khan*, (1971) 2 SCC 200 the Hon'ble Supreme Court held thus : *"The principles of review are defined by the words "any other sufficient reason". In Or. 47 of the Code would mean a reason sufficient on grounds analogous to those specified immediately previously in that order. The grounds for review are the discovery of new matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or the review is asked for on account of some mistake or error apparent on the face of the record.*

17. The learned counsel appearing for respondents rightly placed reliance on the following binding pronouncements, which apply on all focus to the present appeal:

i) Board of Cricket Control of India Vs Netaji Cricket Club AIR 2005 SC 592

ii) Jamna Kaur Vs. Lal Bahadur AIR 1950 F.C. 131

18. In fact, the Commission recorded a finding that in exercise of powers of review as a result of error apparent on the face of the record, which error has been caused by the omission on the part of the appellant here in, the 1st respondent, Commission, ordered reduction of demand charge to 50% of the approved tariff if the load factor of the 2nd respondent remains upto 20% and for consumption beyond 20% the 2nd respondent shall be billed at an approved tariff. In other words, the 2nd respondent is being guaranteed a minimum monthly payment of charges of unit equivalent to 20% load factor on the contract demand plus demand charges on the billing demand as has been set out in paragraph 10 to 14 of its Review Order. In our considered view, there is neither error of jurisdiction nor error nor illegality in the Review Order passed by the 1st respondent, Commission.

19. As regards the 2nd point, as rightly pointed out by Mr.M.G.Ramachandran, learned counsel appearing for the 1st respondent, Commission, and Dr. Singhvi, learned senior counsel

appearing for 2nd respondent, the revision of tariff consequent to review in no manner effect the recovery of Rs. 567.27 crore at 132 / 220 KV to meet the revenue requirement as envisaged in tariff order dated 15.06.2005. Mr.Gopal Chaudhary, learned counsel for the appellant, though sought to advance very attractive arguments, we are not persuaded to sustain the same nor there is merit in it. In fact, the State Commission called upon the appellant to furnish the details of the bills issued by it to the 2nd respondent during the tariff period 2005-06 but the appellant deliberately failed to comply even though without much effort it could furnish the same despite it being in possession of the same. It is rightly pointed out that the appellant has not suffered any financial losses on account of revision of tariff consequent to the review of the order, which is impugned in this appeal.

20. That apart, concedingly the State Commission by its order dated 06.02.06, has laid down the Captive Power Policy addressing important issues relating to captive power plants. The 2nd respondent is also a large CPP and which was also party to the said proceedings initiated by the captive generators in which an order has already been passed. The Commission has given a liberal dispensation to all the CPPs and CPP holder industries in its order dated 06.02.06, which include the 2nd respondent here-in. As a result of such a dispensation the resultant position being the review order, stands withdrawn and has been rendered otiose. It is clear that the tariff order for the 2nd

respondent stands revised upwards with effect from 01.03.2006 as here under :

- Demand Charge Rs. 380/- Per KVA
- Energy Charge Rs. 3.15 Per Unit
- Minimum Charge - Demand Charge on Contract Demand

21. A parallel operation charge also have been slashed down for captive power units from Rs. 16/- to Rs. 10/- per KVA. Thus viewed from any angle, we hold that no case has been made out by the learned counsel for the appellant to interfere with the Impugned Order passed by the 1st respondent.

22. We also hold that no interference is called for in this appeal as justice has been rendered by the Commission, 1st respondent, Regulatory Commission, by exercise of powers of review, which the statutory provisions of The Electricity Act, 2003 and the statutory Regulations framed there under specifically provides for. This is not a fit case for interference where we would not be justified in interfering with the order as justice has been rendered by the 1st respondent, Commission. There is neither illegality, nor want of jurisdiction nor loss of income for the appellant.

23. With respect to parallel operation charges, as already pointed out we do not propose to examine the same as a comprehensive Petition is pending on the file of 1st respondent, Commission and we have

already issued directions in this respect in an appeal arising out of the order of the 1st respondent, Commission. Though the learned counsel for the 2nd respondent placed detailed written arguments, we decline to entertain and decline to examine the contentions relating to levy of parallel operation charges. In the result, the appeal is dismissed but without cost.

24. The appeal is dismissed with the above directions and the parties shall bear their respective costs in this appeal.

Pronounced in open Court on this 17th day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

The Last Page