

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 71 OF 2020 &
IA NOS. 1758 OF 2019 & 489 OF 2020

Dated: 21st May, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

1. Sea Shell

Through its Partner, Mr. Girish Arora
02, Govind Nagar Beach Havelock Island,
Andaman and Nicobar Islands 744211
Represented by its Manager, E. Kodanda Rao ... Appellant No.1

2. TSG Hotels and Resorts

Through its Partner, Mr. G. Bhaskar
No 7 Radhanagar Beach Road
Swaraj Dweep (Havelock Island)
Andaman and Nicobar Islands - 744211
Represented by its Manager, M. Murali ... Appellant No.2

Versus

1. Joint Electricity Regulatory Commission

State of Goa and Union Territories
3rd and 4th Floor, Plot No. 55-56
Sector -18, Udyog Vihar-Phase IV
Gurugram-122015 Haryana ... Respondent No.1

2. The Electricity Department

Through its concerned officer
Andaman and Nicobar Islands
Port Blair – 744101 ... Respondent No.2

3. Superintendent Engineer

Through the Secretary
Andaman and Nicobar Islands
Port Blair – 744101

... Respondent No.3

4. Assistant Engineer (SH/SW)

Office of the Assistant Engineer
Shaheed Swaraj Sub-Division
Haddo, Port Blair-744102

... Respondent No.4

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Krishna Datta Multani
Ms. Devina Sehgal
for Appellant No.1 & 2

Counsel for the Respondent(s) : Mr. Pradeep Misra
for Respondent No.1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER (ORAL)

1. This matter was taken up upon request on application for urgent hearing by video conference, physical presence being not possible due to National Lockdown imposed for containing spread of coronavirus (Covid-19).

2. The Appellants are establishments engaged in Hospitality sector operating certain hotels in different parts of Andaman and Nicobar Islands (UT). Feeling aggrieved against the Order dated 20.05.2019 passed by Joint Electricity Regulatory Commission (hereinafter referred to variously as “JERC” or “the Commission”) for the States of Goa and

Union Territories (UTs) in Petition No. 274/2019, which is Tariff Order captioned as Approval of True-up of Financial Year (FY) 2015-16, Aggregate Revenue Requirement (ARR) for 2nd MYT Control Period (FY 2019-20 and 2021-22) and Determination of Retail Supply Tariff for FY 2019-20, they have filed the instant appeal under section 111 of the Electricity Act, 2003 before this Tribunal.

3. It was explained, also during the course of hearing, that the challenge by this appeal is directed against a “Note” appearing in the last column under the heading “*Point of Supply News*” in para no. 7.2 “*Applicability*” (internal page 93) of the impugned order, which reads thus:

“7.2 Applicability:

S.No.	Category	Applicability	Point of supply news
3	Commercial	This schedule will apply to all consumers, using electrical energy for light, fans, and appliances like pumping sets, motors of up to 3 HP used for commercial purpose, central air conditioning plants, lifts welding sets, small lathe machines, electric drills, heaters, battery chargers, embroidery machines, printing presses, ice candy, dry cleaning machines, power presses, small motors in commercial establishments/non-residential private premises such as printing presses, hotels, rest houses, restaurants, hostels, nursing homes, bus stands, clubs, auditoriums, communication, cinema theatres, operas, circus, exhibitions, and bakeries, and grinders and installations for private gains, etc. Commercial supply will also be applicable to multi-consumer complex including commercial complexes as defined in the Electricity Supply Code Regulations notified by JERC. This schedule will also apply to the places of	Note: It has <u>come to notice of the Commission that the hotels are being charged industrial tariff though as per the rate schedule approved by the Commission, categories it under Commercial Category.</u> Therefore, the Commission <u>directs the Petitioner to charge tariff applicable for Commercial category to all the hotel establishment, failing which, the Commission may take an appropriate view</u> considering the in-compliance of Commission's direction.”

		worship like temples, mosques, churches, gurudwaras, Buddhist Pongj Chung (except residential areas), public Pooja celebrations and religious ceremonies. No separate circuit/connection for power load including pumping set/central air conditioning plant, lifts, etc, is permitted.	
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(emphasis supplied)

4. The JERC which passed the impugned order has been impleaded as the first respondent, the second respondent being the Electricity Department of Andaman and Nicobar Islands, it being the licensee for the purposes of distribution of electricity in the territory of Andaman and Nicobar Islands. The other respondents are functionaries of the said Department of the Administration of Andaman and Nicobar Islands.

5. For reasons which have not been explained in any manner to us, the licensee despite due notice has neither put in appearance nor chosen to participate nor even submitted any response to the appeal.

6. As would be clear from the narration of facts set out briefly hereinafter, the appeal brings out that the consumers engaged in the business of "Hotel" in Andaman and Nicobar Islands have all along in the past been billed by the licensee under the industrial tariff category even though (on its own initial proposal) they had been put by the Commission in the category of commercial tariff, this giving rise to discrepancy or default seemingly in enforcement of the tariff order(s) on

the part of the licensee and on which account this Tribunal would have expected some explanation from the latter.

7. During the course of hearing, it was brought out, and these facts are not disputed, that JERC was constituted for Union Territories by the Central Government by notification issued on 02.05.2005. Later, by notification dated 30.05.2008, the State of Goa was also brought under the regulatory control of JERC. Thus, JERC for the State of Goa and Union Territories started functioning w.e.f. August, 2008.

8. Prior to the establishment of JERC in the year 2008, the electricity tariff was determined by the executive branch of the Andaman and Nicobar Administration for Andaman and Nicobar Islands. The said tariff continued to be valid and operative till JERC made its first determination by its Order dated 04.06.2012.

9. It is also not disputed that prior to passing of the said first Tariff Order on 04.06.2012, JERC had directed the UT Administration on 09.02.2011 to file a petition for such determination for FY 2011-12. The petition came to be filed eventually on 28.11.2011 for FY 2012-13. It is not disputed by the appellants that, in the said petition, the Electricity Department of the UT Administration, it being the licensee, had

proposed that hotels be placed in the “*Commercial Category*”. It is also not in dispute that by the Order dated 04.06.2012, which was the first Electricity Tariff Order passed by the JERC, “Hotels” were placed in the commercial category, concededly no objection having been raised in any manner there-against by any stakeholder or interested party.

10. The reply of JERC has brought out vividly, and the appellants do not dispute this to be the factual position, that after the Order dated 04.06.2012, the tariff orders for the subsequent periods have been only adopting the said categorization viz. “commercial” for establishments operating as “Hotels”, from year to year till date. For completion of narration, and at the cost of repetition, it may be mentioned that the Orders dated 31.03.2013, 11.04.2014, 31.03.2015, 06.04.2016, 29.03.2017 and 26.02.2018 for FYs 2013-14, 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19 respectively have continued to place an entity doing business as a “Hotel” in the category of commercial tariff. In contrast, and this not being disputed by the respondents - the Licensee having conspicuously kept itself away from these proceedings – that Hotels (which include the appellant herein) have for long been charged industrial tariff from month to month, this on the basis of a circular issued on 24.05.2011 by the Electricity Department of Andaman and Nicobar Islands whereby the power tariff under industrial category was granted to

Hotels the only pre-condition being that such entities seeking said power tariff must be registered under the relevant law pertaining to the industries.

11. Concededly, no objection was raised with regard to the above-mentioned determination by the JERC in the previous orders nor any challenge thereto by appeal or any other proceedings brought till date by the appellant or any of other similarly placed entities questioning the propriety of their inclusion in the commercial category. The said categorization of commercial tariff for hotels seems to have been adopted, almost by way of continuity, in the impugned order, JERC noting for the first time that the billing of the hotels under the industrial category was wrong and in the teeth of previous determination. It is the said discrepancy which has been adversely commented upon by the impugned note the legality and validity of consequent directions thereby given being challenged by the appellants on the grounds of breach of principles of natural justice, their plea being that it is a case of improper re-categorization the procedure for such purposes not having been followed, there being no prior notice given for affording opportunity to submit objections, the direction being illegal as not supported by any reasons, the general prohibition against “tariff shock” not having been kept in mind.

12. By way of rejoinder, and during the course of the hearing, the appellants pressed an additional argument of the impugned note suffering from the vice of arbitrariness referring in this context to a different dispensation by the same Commission vis-à-vis hotels operating in the State of Goa which, as we have noted earlier, is also under the regulatory jurisdiction of JERC. Reliance in this regard is placed particularly upon Order dated 23.05.2017 passed by JERC it being a tariff order determining tariff for FY 2017-18, Annual Performance Revenue for FY 2015-16 and FY 2016-17 and True-up for FY 2011-12 and FY 2012-13 for Electricity Department of the Government of Goa. It appears, upon perusal of the said Tariff Order dated 23.05.2017 pertaining to the State of Goa, that hotels have been placed under the category of industrial tariff. It is the submission of the learned counsel for the Appellant that hotels in Goa with HT connections have all along availed the benefit of industrial tariff whereas, by the aforesaid Order dated 23.05.2017, hotels with LT connections have also been conferred with similar privilege of industrial tariff, it concededly being lower than that for commercial category subject to each particular consumer qualifying by producing some certification from the Tourism Department of the Government of Goa.

13. During the course of hearing, learned counsel for the appellant, on instructions, submitted that the appeal on the grounds it was presented is not pressed, the appellants instead seeking liberty to approach the JERC by way of appropriate petition invoking its jurisdiction to review under Section 94 of the Electricity Act read with its power to revise or amend the tariff order under Section 62the Electricity Act. The appellants seek to pursue such course craving for revisit/review on the subject of categorization of hotels in Andaman and Nicobar Islands on the plea of the impugned direction being arbitrary owing to a different dispensation by the same Commission vis-à-vis hotels in the State of Goa, the intendment also being to rely in context of such argument upon the views expressed by JERC vis-à-vis establishments in the business of *Bakery* drawing its attention to its tariff order dated 31.03.2015 passed in Petition nos. 152/2014 and 155/2014. While pressing the modified prayer limited to grant of liberty as aforesaid, the learned counsel for the appellants confirmed that the appellants understand that by withdrawing the appeal they are forfeiting the grounds on which the appeal was presented and further that when they approach the JERC by petition for review or revisit to the subject, they would be entitled to press only on the ground of arbitrariness with reference to dispensation for hotels operating in State of Goa and the views expressed by JERC vis-à-vis *bakeries* operating in the Andaman and Nicobar Islands, other grounds

earlier taken not surviving, and also that such liberty, if granted, will not be construed as reopening the dispensation by JERC on the subject of tariff for Hotels for any of the previous periods i.e. Financial Years prior to FY 2019-20.

14. Learned counsel for the first respondent/JERC, having taken instructions, fairly conceded that while the appeal may be dismissed as withdrawn and liberty as aforesaid may be granted, the Commission being inclined to revisit the issue in light of such plea of arbitrariness, as noted above, the effect whereof would be only prospective – that is to say effective from FY 2019-20 to which the impugned determination of retail supply tariff order relates.

15. Learned counsel have pointed out to us the ruling of the Hon'ble Supreme Court reported as *UP Power Corporation Ltd v NTPC Ltd (2009) 6 SCC 235* which makes it clear that while exercising its power of review so far as alteration or amendment of a tariff is concerned, the electricity regulatory commission does not exercise *strictosensu* power akin to Section 114 of the Code of Civil Procedure, 1908. The Commission concededly has the requisite power under section 62 of Electricity Act to amend the tariff for any financial year though ordinarily not more than once, there being some exception respecting fuel

surcharge formula. It will not be appropriate for us to subject the Goa dispensation to scrutiny as to its legality or propriety in the present proceedings. *Prima-facie*, however, we find some contrast in the approach of JERC to the subject of tariff category for Hotels in State of Goa as against those operating in Andaman and Nicobar Islands. This, we find, is a ground sufficient enough to grant the liberty prayed for by the appellants.

16. For the foregoing reasons, while the appeal at hand is dismissed as withdrawn, liberty restricted to the ground noted above is hereby granted to the appellants. They may approach JERC by a petition under Section 94 read with Section 62 of Electricity Act, and any other enabling power under the law or the regulations framed there-under, for revisit on the subject of tariff categorization of hotels in Andaman and Nicobar Islands for FY 2019-20 (and periods subsequent thereto, if deemed proper by the Commission). At the cost of repetition, we say again that grant of such liberty as aforesaid will not be construed as expression of opinion on the subject by us inclusive of the correctness or propriety of the view taken by JERC vis-à-vis hotels in the State of Goa or, for that matter, in UT of Andaman and Nicobar Islands. Further, the grant of such liberty will not be construed as permitting re-opening the subject of categorization or leviable tariff for purposes of any period anterior to FY

2019-20 the tariff determination for which was sought to be impugned before us by the appeal at hand. The petition for review/revisit or reconsideration of the matter, as above said, may be filed by the appellants albeit expeditiously but not later than within four weeks of today.

17. The instant appeal, and applications, pending if any, are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 21ST DAY OF MAY, 2020.**

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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