

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 215 OF 2017

Date: 01.11.2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

PUNJAB STATE POWER CORPORATION LIMITED

Through its Chairman,

The Mall, Patiala,

Punjab – 147 001.

... Appellant(s)

VERSUS

1. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

Through its Secretary,

SCO No. 220-221, Sector 34-A,

Chandigarh – 160 022

2. NATIONAL FERTILIZERS LIMITED

Through its authorized representative,

Shri R. Mishra, D.G.M. (Electrical),

Nangal Unit, Naya Nangal,

District Roopnagar,

Punjab – 140126.

... Respondent(s)

Counsel for the Appellant (s) : Mr. Tajender K. Joshi

Counsel for the Respondent (s) : Mr. Deepak Khurana
Mr. Ashwini Tak for R-2

J U D G M E N T (Oral)

PER HON'BLE MR. JUSTICE R. K. GAUBA, OFFICIATING CHAIRPERSON

1. The first respondent, *National Fertilizers Limited* (“NFL”) is indisputably a Central Government undertaking under the Ministry of Fertilizers and

Chemicals, engaged in the manufacture of Urea, a commodity covered under the *Essential Commodities Act, 1955*, having its plants at Nangal and Bhatinda, Punjab, required to run continuously, with two power connections availed from the appellant, *Punjab State Power Corporation Limited* (“PSPCL”), maintaining continuous one line operation, and having regard to concerns inclusive of food security in the country, it having been granted 100% peak load exemptions.

2. The provision contained in Section 23 of the Electricity Act, 2003, empowers the regulatory commissions to regulate the “*supply, distribution, consumption or use*” of electricity by issuing orders if in its opinion it is “*necessary or expedient so to do*” for maintaining “*efficient supply, securing the equitable distribution of electricity and promoting competition*”.

3. The erstwhile *Punjab State Electricity Board*, the predecessor of PSPCL, had approached the first respondent, *Punjab State Electricity Regulatory Commission* (“the State Commission”), by a petition (No. 7 of 2009), invoking its jurisdiction under Section 23 of the Electricity Act, seeking authorization for imposing “*power cuts, peak load hours restrictions and take other power regulatory measures*” for the period 2009-10, the reasons for the same being mis-match between availability of power from all sources and likely increased demand for power in the State. The Commission, by its order dated 27.05.2009, granted the said request, acknowledging that conditions prevalent

justified such authorization to be accorded “to bridge the gap between demand and supply of power”. While granting the request, however, the Commission observed that the “measures” shall be taken “only to the minimum extent to ensure least disturbance, dislocation and inconvenience to consumers and the general public while keeping in view their requirement of Grid stability and security”. The conditions attached to the order included the following:

“6. ...

(ii) *The Board will make adequate arrangements for furnishing prior information to consumers of scheduled power cuts including written intimation when possible to Trade & Industry Associations. However, the unscheduled power cuts may be imposed in emergent situations even without prior information. It should also nominate a Nodal Officer at Distribution Circle level to attend to all issues arising out of the imposition of power cuts and give wide publicity thereto.*

...

(vi) *The Board will not withdraw peak load exemptions where already granted while imposing power restrictions during peak load hours. It will also review its own policy regarding grant of such exemptions and seek the approval of the Commission for the same.*

... ”

(Emphasis supplied)

4. It appears that PSPCL having secured such authorization as above, by order dated 27.05.2009 from the State Commission, issued a Circular (P.R. Circular No. 23 of 2009) on 27.06.2009, *inter alia*, directing as under:

“2. Peak Load Exemption allowed to Category-IV Continuous Process L.S. consumers and L.S. consumers feeding from Category-II and III feeders are hereby reduced to the extent of 50% allowed to them by this office or by SE/DS concerned w.e.f. 28.06.09.”

5. It also appears that some representations were made and by a communication dated 12.10.2009, NFL was informed by PSPCL that it was allowed “to use 100% peak load exemptions”.

6. The dispute concerns the imposition of restrictions affecting the operations of NFL during the period beginning with the issuance of circular on 27.06.2009 and ending with the communication dated 12.10.2009 lifting the restrictions vis-à-vis NFL. PSPCL found NFL to have violated the peak load restrictions and, thus, raised demand on account of penalty in the sum of Rs.4,45,92,364/-. This was challenged by NFL before the forum for redressal of grievances of consumers by a Petition (Case No. CG-58/2015). The grievance redressal forum did not agree and held the amount of penalty to be correct and recoverable.

7. The respondent NFL took the matter to the Ombudesman by Appeal No. 61 of 2015. The Ombudesman dismissed the appeal observing, *inter alia*, thus:

“While scrutinizing the documents placed on record and considering oral arguments, I have observed that PR Circular no: 23/2009 dated 27.06.2009 was issued by the Competent Authority of respondents, copy of which was also sent to PSERC, Chandigarh. Neither any industrial consumer including petitioner, challenged this circular for its validity nor PSERC took any suo-moto action. The declaration of any circular as legal or illegal is not under my jurisdiction, and is in the purview of PSERC, thus in case the petitioner feels that PR circular no. 23/2009 was illegal, he should have challenged its validity before the Appropriate Commission. I have to adjudicate whether or not; the charges levied are in accordance with the existing Regulations. During further investigations of the case, I have observed from the

documents on record that this PR circular, restricting the allowed PLE to 50% w.e.f. 28.06.2009, was issued in emergency when there was acute shortage of power and mismatch between demand and power supply. I have also gone through the order dated 27.5.2009 of PSERC (in the Petition No. 7 of 2009) that the Board will not withdraw peak load exemption where already granted while imposing power restrictions during PLH but Clause 6 (ii) of this order empowers the Licensee to impose un-schedule power cuts in emergent situations even without prior information. Thus I could not find any ambiguity in imposing power restrictions vide PR no.23/2009. Moreover, in my view the PR circular issued for Power Regulatory Measures is not a policy decision but the Licensee is bound to issue such instructions on day to day / hours to hour basis to keep grid discipline and to avoid complete power failure. Now coming back to the validity of levy of PLV charges for the period from 29.06.2009 to 08.10.2009 as per DDL reports dated 09.07.2009, 15.08.2009, 16.09.2009 and 25.11.2009, the PLE limit of the Petitioner remained restricted to 50% as per PR circular no:23/2009, which was duly noted by him but the Petitioner has failed to observe these restrictions due to their compulsions and without getting necessary approval from the Competent Authority, therefore it is held that the PLVs as pointed out by MMTS in the above DDLs are chargeable and recoverable and I have no hesitation to upheld the decision taken by CGRF in its order dated 09.09.2015.”

8. Eventually, NFL was constrained to take the matter to the State Commission by a Petition (No. 36/2016) invoking the provisions contained in Section 142 read with Sections 23, 57 and 86(1)(i) of the Electricity Act, 2003 questioning the validity of the circular dated 27.06.2009. The State Commission, by its order dated 03.11.2016, has observed, *inter alia*, as under:

“7. ...

(c) ...

The Board withdrew Peak Load Exemption allowed to NFL to the extent of 50% vide the above mentioned PR Circular No.23/2009. This was in clear violation of the order of the Commission dated 27.05.2009 wherein it was ordered that peak load exemptions where already granted while imposing power restrictions during peak load

hours will not be withdrawn. Also, no approval of the same was taken by the Board before issuing Circular No.23/2009, and even post facto approval from the Commission was not sought by the erstwhile Board/PSPCL.

(d) PSEB filed Review Petition in case of Order in Petition No.7 of 2009, which was decided along with Petition No. 3 of 2010, vide Commission's Order dated 30.04.2010. Para 3 of Annexure II, of the *ibid* order reads as under:-

"3. Curtailment of PLH Exemptions:

There will be no curtailment in exemptions or enhancement of peak load restrictions in the case of any of the categories at 1 above. Situations of emergent power shortage will be met by imposition of rotational power cuts on other categories of consumers. Any increase in PLH restrictions will be effected only with the prior approval of the Commission...

(e) ...

PSPCL has only reproduced the beginning lines of para 6 of the Order dated 27.05.2009 in Petition No.7 of 2009. Para 6 of this Order should be read in toto. The Commission has clearly mentioned in this para that the approval granted in this respect was subject to observations (as contained in the Order dated 27.05.2009). The observation at sub-para (vi) of this para specifies that the Board will not withdraw peak load exemptions where already granted while imposing power restrictions during peak load hours. If it was altogether necessary to impose such power restrictions, then the erstwhile Board could have taken prior/post facto approval of the Commission, which it did not.

(f) *The Commission further observed that NFL is a Central Government Undertaking under the Ministry of Fertilizers & Chemicals, manufacturing Urea, which has been declared essential commodity under the Essential Commodities Act, 1955. The Fertilizer Plant has to run during peak load hour restrictions, upto 100% peak load exemptions granted, so that the country's requirement for fertilizer required for the Nation's food security is not jeopardized."*

9. Primarily, on the basis of above conclusions, the State Commission found merit in the petition of NFL and decided as under:

“h) In view of the above, the Commission finds merit in the Petition and hence allows the Petition filed by NFL and decides as under :-

(i) PR Circular No. 23/2009 dated 27.06.2009 is set aside, to the above extent, along with subsequent communications/series of telephonic messages and circulars. The original letter/bill dated 05.02.2010 vide which demand for Rs.4,45,92,364/- was raised towards penalty for Peak Load Violations along with subsequent letters/bills dated 02.02.2015, 04.11.2015 and 21.04.2016 are also set aside;

(ii) To refund the total amount deposited by the Petitioner. The interest on this amount is not payable to the Petitioner as the delay is on the part of the Petitioner in approaching the appropriate judicial authority i.e. the Commission, as the Petitioner earlier pleaded its case before judicial bodies/authorities, under whose jurisdiction this matter did not fall...”

10. PSPCL is in appeal against the above decision of the State Commission. Having heard the learned counsel for the State Commission, and learned counsel for NFL, we find no merit in the appeal. The findings returned by the State Commission are based on reasons which are correct and need only to be endorsed. It may be that PSPCL had been given the liberty to impose unscheduled power cuts in emergent situations. But, the fact remains that in the authorization under Section 23 granted by the Commission on 27.05.2009, there was a clear inhibition that peak load exemptions wherever already granted will not be withdrawn. The discretion to do otherwise did not lie with

PSPCL. If the situation obtaining was such that even entities enjoying peak load exemptions were to be affected by peak load restrictions, or power cuts, the proper course was to approach the State Commission with further request for suitable modification of the earlier order. The Appellant assumed for itself the authority to issue the circular which was general in nature and violative of the authorization that had been granted, particularly the exception vis-à-vis withdrawal of peak load exemptions enjoyed prior to such authorization for such entities such as the second respondent.

11. For the foregoing reasons, the appeal is found devoid of substance and is dismissed.

**Pronounced in open court on this 01st day of
November, 2022**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Officiating Chairperson**

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