Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 121 of 2008

Dated : 03rd March, 2009

Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF:

M/s. Tata Tea Ltd.
Regional Office,
Munnar, Idukki District,
Kerala ... Appellant

Versus

1. The Kerala State Electricity Board
Vydhyuthi Bhavan,
Pattom,
Thiruvananthapuram
Represented by the Special Officer (Revenue)

2. Kerala State Electricity Regulatory Commission
C. V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram – 695 010
Kerala ... Respondents

Counsel for the appellant : Mr. Joseph Kodianthara
Mr. Bhisham Singh and
Mr. M. P.Vinod

Counsel for the respondents: Mr. M. T. George, Ms. C. S. Rajani for Resp. No.1, KSEB
Mr. Tarun Satija, Ms. Nina Madhavan, Mr. Shwetank Sailokwal for Resp. No.2, KSERC

J U D G M E N T

Justice Manju Goel, Judicial Member

The present appeal is directed against an order of the Kerala State Electricity Regulatory Commission (Commission for short) dated 14.03.07 on petition No. 153 of 2007 under section 86 of the Electricity Act (the Act for short). The facts leading to the filing of the petition No. 154/2007 and the passing of the impugned order, as alleged by the appellant can be described briefly as under:

2) The appellant also referred to as TTL is a distribution licensee in the area called Munnar. The appellant receives power from the respondent No.1 viz. the Kerala State Electricity Board (KSEB for short) and pays grid tariff for the electricity supplied to it. The Commission revised the grid tariff vide a notification dated 09.04.2003 w.e.f 01.10.2002. The appellant challenged the revision in tariff before the High Court of Kerala in W.P.(C)No. 15833/03 and obtained an order of stay on 23.05.03. The stay order remained in force till 25.07.05. During the period of stay the appellant paid the

pre-revised tariff to the respondent No.1. Meanwhile the appellant filed its Annual Revenue Requirement & ERC petition for the year 2005-06 being petition No. TP 7/05 before the Commission which was disposed of vide an order dated 28.06.05. One of the factors for determination in that proceeding was the power purchase cost of the appellant. The Commission noticed that the appellant had been getting rebate of 5% on the grid tariff as the distribution area was the hilly terrain of Munnar and the respondent No.1 had been using the transmission / distribution network of the appellant for getting power supply without paying any wheeling charges. The Commission directed that the respondent No.1 shall continue to allow a rebate of 5% on the power purchase cost of the appellant. The Commission added a rider in the following language "*However, this is on the condition that TTL would make prompt payment against the bills raised by the KSEB for the electricity charges at the prevailing tariff.*"

3) The appellant and the respondent No.1 were, however, at variance as to whether the payments of pre-revised tariff during the period the revised tariff was stayed could be considered to be prompt payment. The appellant received the bill dated 03.05.06 for the period of September 1999 to November 2005. In that bill the rebate of 5% was disallowed for the period of October 2002 to November 2005. There were some other errors in the bill. The

appellant disputed the liability for interest on the outstanding for the period covered by the stay order. The appellant paid the entire amount claimed in the bill but raised several disputes by addressing a letter dated 12.05.06. The appellant filed the petition under section 86 (1)(f) of the Act on 19.07.06 on which the impugned order was passed. The Commission accepted some of the contentions of the appellant and rejected the rest. The only issue before us is that of rebate of 5% disallowed in the bill dated 03.05.06. The Commission held that for the period during which payment of electricity charges was made at the pre-revised rate, the appellant was not eligible for rebate. However, the Commission directed that for the period upto April 2003 the respondent No.1 was holding excess payment and for the period upto April 2003 rebate @ of 5% would be available to the appellant.

4) The respondent No.1 has filed a counter affidavit in which certain historical facts have been stated about how the appellant has come into the distribution business as a successor of M/s. Kannan Devan Hills Produce Co. Ltd. The respondent has also filed some documents. Copy of an agreement dated 01.01.90 between the respondent No.1 and the appellant shows that rebate of 5% on grid tariff was allowed to the appellant "*taking into consideration the back ground*" in which the agreement was executed and some other aspects. The agreement also provides for interest for late payment.

The respondent No.1 further says that on expiry of the agreement after 01.01.95, the supply of electricity by the respondent No.1 to the appellant continued but without execution of any formal agreement, that on an application filed by the respondent No.1 in this regard, the Commission directed the parties vide an order dated 14.01.04 to come to a consensus based on mutual discussion and that on 28th & 29th September, 2005 negotiations were held in which the consensus was arrived at and consequent upon the consensus the respondent No.1 issued an order No. B.O.(FB)No.3621/05 (PLG.COM.3545/98 dated 20.12.05) specifying the terms of the consensus arrived at. The bill dated 03.05.06 for Rs.7,60,52,634/- it is alleged that, was issued pursuant to the consensus arrived at. The terms of the consensus deals with the 5% rebate. As per the consensus, alleged by respondent No.1, no rebate was payable for the period October 2002 to October 2005. The other terms included enhancing of contract demand, reduction on interest on arrears and waiving of interest on the old arrears. It is alleged that the appellant is now going back on the consensus. The respondent No.1 has also filed a copy of the order of the Board dated 20.12.05. The respondent No.1 supports the impugned order.

5) The Commission has also filed a response to reiterate the position taken in the impugned order.

Impugned Order:

6) The Commission refers to negotiations and discussions between the appellant and the respondent No.1 over the issue of rebate of 5% for the period during which the said order of the High Court was in force and payment was made at pre-revised grid tariff. While narrating the facts the Commission said, *inter alia*, further discussions were held with the petitioner on 28th & 29th September, 2005 at Thiruvananthapuram and all issues reviewed but no consensus was arrived at. We extract the relevant part of the Commission's order as under :

> *"b. Board while replying to the petition stated as that Board had to withdraw rebate only because the petitioner did not make prompt payment. Further discussions were held with the petitioner on 28th and 29th September 2005 at Trivandrum and all issues reviewed. But no consensus was arrived at. In the next meeting held on 25th April 2006 the issues were discussed again and consensus arrived at. The arrear bill raised in May 2006 was based on the consensus arrived at. The settlement was a package similar to one tie settlement. Penal interest was reduced from 24% to 12%.*

c. Petitioner replied that there was no consensus. The payment of arrears was made under protest.

d. Commission enquired about the minutes of the meeting held on 25th April 2006. Board replied that it has to be checked whether there was any minutes prepared and signed by both parties. Petitioner stated there was no minutes prepared and signed. It was decided that a further sitting will be held on 19th December 2006 and Respondent agreed to produce a copy of the minutes of the meeting held on 25th April 2006.

In the hearing held on 19th December 2006, Board stated that a minutes was prepared and forwarded to Tata Tea. No objection was raised by Tata Tea. Board had issued an order based on the consensus.

Petitioner stated that consensus was arrived only in the matter of accepting grid tariff as per revision ordered in 2003. Petitioner further stated that no consensus was arrived on interest, rebate errors in billing. Petitioner stated that no interest should be charged as there was stay from the Hon High Court. Petitioner stated that they were making payments only as per Court directives and

imposition of penalty was not just as there was no default in payment.

*"**Commission's findings***

Rebate of 5% was given to Tata Tea on account of the difficult terrain in Munnar. Further Board has not been paying any wheeling charges.

Commission while allowing rebate specifically mentioned that Tata Tea should make prompt payment if rebate is to be given. As the petitioner has stated that consensus was arrived at regarding acceptance of grid tariff, payment of electricity charges at pre-revision rates cannot be treated as prompt payment and hence claim on rebate cannot be granted. But the excess payment made by Tata Tea has to be adjusted and the period of such adjustment is eligible for rebate. Also petitioner has to pay interest at 12%, which is reasonable.

Board did not challenge the contention of the petitioner that excess payment was enough for covering the arrears up to April 2003 and also the contention regarding the two instances of errors in billing. Hence if arrears were claimed for the period up to April 2003 also,

the same has to be adjusted. Also the error pointed out by petitioner has to be corrected.

Order

For the period during which payment of electricity charges was made at pre-revision rate. Tata Tea is not eligible for rebate. For the period upto April 2003 when KSEB was holding excess payment, the payment shall be admitted as prompt payment and rebate of 5% given for those payments. Also Tata Tea has to pay the arrears with interest at 12%. Errors in billing pointed out by Tata Tea has to be rectified. The arrear bill has to be repaid to Tata Tea Limited. Claims other than admitted above are rejected."

Decision with reasons:

7) Both parties have agreed that rebate of 5% on grid tariff was available to the appellant. It is not disputed that this rebate was available because of the difficult terrain in which the appellant was required to distribute electricity. There is no agreement between the parties requiring the appellant to make prompt payment in order to get this rebate of 5%. The agreement of 1990, copy of which has been produced by respondent No.1, does not relate prompt payment with the rebate of 5%. The question of prompt

payment came up for the first time only in the Commission's order dated 28th June, 2005 passed on the ARR and ERC petition of the appellant for the FY 2005-06. While dealing with power purchase cost the Commission said the following:

> *"d. **Power Purchase Cost**: The KSEB has hitherto been allowing a rebate of 5% on the total power purchase cost to Tata Tea Limited on account of the difficult terrain in the Munnar area over which the power supply is made. The Commission has not come across any change in the conditions on the basis of which the rebate has been allowed so far. Further, although the KSEB has been availing power at 13 points utilizing the distribution network of TTL, it has not been paying any wheeling charges for the usage of the distribution network. The KSEB has merely allowing a distribution loss of 4% as compared to the overall distribution loss of about 20% occurring in the distribution network of TTL. The Commission also notes that even after allowing a rebate of 5%. TTL are not in a position to eliminate the revenue gap which works out to more than 5% of the aggregate revenue requirement for 2005-06.*

Keeping all the above factors in view, the Commission would direct the KSEB to continue to allow a rebate of 5% on the power purchase cost to TTL. However, this is on the condition that TTL would make prompt payment against the bills raised by the KSEB for the electricity charges at the prevailing tariff."

8) The rebate of 5% on grid tariff was a part of original agreement between the appellant and the respondent No.1. The Commission was not dealing with, while passing the tariff order, any grievances of the respondent No.1 in respect of prompt payment. In any case, Commission's direction for prompt payment was not a contract between the parties. Since this rebate related to the nature of the distribution area, it was built into the power purchase cost itself. As mentioned earlier, the delay in payment was met by a clause of interest. Under the contract of the parties the appellant was entitled to the rebate and this rebate was not related to promptness of payment. The direction of the Commission that payment had to be prompt to get the rebate was entirely beside the issues involved in the tariff determination proceedings. The direction was an obiter dicta and has to be read as being advisory and not as being mandatory.

9) However, if the parties had actually arrived at a consensus in their meeting of 29th September, as claimed by respondent No.1, and the appellant had voluntarily given up the claim for 5% rebate. The Commission would be certainly right in disallowing the 5% rebate. The respondent No.1 issued an order dated 20.12.05 based on *"consensus arrived"* at in the meeting of the parties. Several benefits were allowed to the appellant by this order. The terms and conditions of the order dated 20.12.05 are mentioned below:

> "*1) The contract demand of M/s. TATA TEA shall be 7000 KVA from date of power allocation, ie. 09.09.1999 and the billing has to be regulated with reference to 7000 KVA from 09.09.1999.*
>
> *2) The combined maximum demand shall be assessed by taking the arithmetic sum of the Maximum Demands recorded at pallivasal and Madupetty instead of using the formula given in the Board order dated 07.04.1999 and the billing will be revised accordingly.*
>
> *3) The Maximum Demand at each feedback points of KSE Board consumption will be calculated in proportion to the reading at the TOD meter at Vaguvara and based on actual energy consumption from each of the feedback*

points till installation of TOD meter by M/s./TATA TEA Limited at their own cost.

4) 5% rebate in the tariff upto September 2002 is permitted as M/s.TATA TEA has remitted the dues at he then ruling rates.

5) The 5% rebate already granted from October 2002 to October 2005 is withdrawn and the licensee (M/s.TATA TEA) had not remitted the due sin accordance with the prevailing tariff since October 2002.

6) 5% rebate in tariff in future will be allowed from the date of payment of the existing arrears and be continued to the condition that M/s.TATA TEA make the prompt payment of bills raised by the Board at ruling tariff.

7) As a package to settle the long pending arrears and expedite collection of the arrears, interest on the old arrears of Rs.40,10,426/-) Forty lakhs Ten Thousand four hundred and twenty six only) (arrears for the period to 01.04.1998) waived.

8) As a package of one time settlement, interest on the past arrears be calculated at the rate of 12% per annum provided M/s. TATA TEA clears the arrears (as revised as per the above mentioned decisions) in one lumpsum within 15 days from the date of communication of the revised arrears. If they do not agree and make payment, the concession of interest will be withdrawn.

9) The Special officer (Revenue) shall issue revised demand for the arrears adopting the principles mentioned above M/s.TATA TEA should be requested to make payment in one lump within 15 days of the revised demand notice.

10) M/s.TATA TEA should be requested to withdraw cases, if any, pending in the courts.

11) M/s.TATA TEA should pay the bill on the due date at ruling tariff to continue to get 5% rebate in future.

12) Decided to incorporate the above mentioned decisions regarding power allocation and past arrears in the new agreement to be executed."

10) The appellant denied that there was any consensus. The Commission's order mentions a consensus of 26th April, 2006. However, there is no minutes of any such consensus. In any case, the disputed bill dated 03.05.06 was based on the order of 20.12.05 and not on any consensus arrived at on 25.04.06. The alleged consensus arrived at on 28th & 29th September is the main defence taken by the respondent No.1. The appellant wrote to the respondent KSEB a letter dated 25.11.05 demanding the rebate of 5% on the total demand charges which is indicative of pendency o the dispute rather than a consumers allegedly arrived at on 28th & 29th of September. This letter was not replied to by the respondent No.1. The appellant received copy of the order dated 20.12.05. The appellant did not immediately reply to or object to the order which may be interpreted as acceptance. The Commission has not given any categorical finding as to whether any consensus was arrived at on 28th & 29th September. Apparently the Commission has proceeded only on the basis of its own earlier order which required prompt payment for obtaining the rebate. The alleged consensus is a vital factor for arriving at a conclusion as to whether or not the appellant is entitled to rebate of 5%. The alleged consensus deprives the appellant of the rebate of 5% on grid tariff but gives it some other benefits. A related question is whether the appellant has availed of those benefits or can the appellant be entitled to the rebate of 5% as well as those benefits.

11) The alleged consensus was not reduced to writing. The order dated 20.12.05 of the respondent No.1 is an unilateral action and cannot take the place of an agreement. We feel that without a categorical finding on the issue of consensus between the parties in the meeting dated 28th & 29th September, 2005 or in the subsequent meeting on 25th April, 2006, it will not be fair and proper for us to give a ruling on the appellant's entitlement for the rebate. For arriving at a finding of fact, evidence is required to be taken. It will be appropriate that the Commission decides the petition No. 153 of 2007 after arriving at a finding arrived at on the existence of any such consensus either on 28th & 29th September, 2005 or 25th April, 2006. On taking evidence, documents and / or oral as may be necessary.

12) In view of the above, we being constrained to set aside the impugned order allow the appeal and direct the Commission to pass a fresh order after taking evidence, as mentioned above, and coming to a finding of fact about the existence of any such agreement between the appellant and the respondent No.1. This exercise be done as soon as possible and preferably within a period of three months.

Pronounced in open court on this ***03rd day of March, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member