

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal 51 of 2008

Dated: 02nd April, '09

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

IN THE MATTER OF:

Tamil Nadu Electricity Board

800, Anna Salai,
Chennai – 600 002
Through its Chairman

... Appellant

Versus

1. **Tamil Nadu Electricity Regulatory Commission**
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet
Chennai – 600 018.
2. Netaji Apparel Park
62, Appachi Nagar Main Road,
508, Kongu Nagar,
Tirpur – 641 607.
3. Palladum Hi-Tech Weaving Park
SF No. 337/1A, SAB Complex,
No. 164, Trichy Road,
Palladam – 641 664
Coimbatore Distt.
Tamil Nadu
4. Tirupur Export knitwear Industrial Complex

Tea Nagar,
Tirupur – 641 606

... Respondents

Counsel for the appellant : Mr. Ramji Srinivasan, Sr. Advocate
Ms. Vartika Sahay
Ms. Mandakini Singh
Mr. Anand K. Ganesan
Mr. Harsh Kaushik

Counsel for respondents : Mr. Jayanth Muth Raj
Mr. N. R. Shanker
Mr. Malauika G
Mr. Rangapasayam
Mr. K. Raju

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

This appeal is directed against the order dated 06.02.07 passed by the Tamil Nadu Electricity Regulatory Commission (the Commission for short) in Review Petition No. 4 of 2006. The review petition No. 4 of 2006 sought review of order dated 20th March, 2006, by which the Commission allowed the representations of M/s. Nethaji Apparel Park, Tiruppur and Palladam Hi-tech Weaving Park as well as that of M/s Tirupur Export Knitwear Industrial Complex (TEKIC) seeking bulk supply from TNEB so as to distribute the power among the members through the distribution network erected by them and also to seek clarification as to whether they would need distribution license for maintaining and operating the distribution network. The Commission by order dated 20th March,

2006 amended its earlier tariff order dated 15th March, 2003 by adding condition IX under paragraph 2.0 dealing with high tension tariff. *Inter alia*, it directed that single point HT supply may be permitted to industrial parks subject to certain conditions. The appellant filed the review petition seeking review of the order on the ground that the order was contrary to law and was vitiated by an error apparent on the face of the record. *Inter alia*, it submitted that it had informed the Commission vide its letter dated 28.02.06 that it had no objection to give distribution license to the two industrial parks, Nethaji Apparel Park and Palladam Hi-Tech Weaving Park provided revenue loss caused to it was taken care of, that the order dated 20th March, 2006 would lead to revenue loss to the appellant Board, that in case the existing consumers formed a group and avail of single point HT supply the existing infrastructure of the appellant would have to be dismantled without getting the return from it and that if TEKIC gets the right to wheel as directed by order dated 20th March, 2006, that would amount to circumventing rules. The appellant gave the details of the revenue loss caused to it by the order dated 20th March, 2006. This review petition was dismissed on the ground that no error apparent has been pointed out and that the challenge to the order dated 20th March, 2006 was in the nature of an appeal.

2) The main contention of the appellant before this Tribunal is that the appellant did not get sufficient opportunity to present its views before the Commission on the representations made by the

three industrial parks, respondents herein and, therefore, the order was void and needs to be reviewed. It is pointed out that in the order dated 20th March, '06 the Commission mentioned that on the applications of Nethaji Apparel Park and Tiruppur and Palladam Hi-Tech Weaving Park the comments of the appellant had been called for but the order does not mention that on the application of TEKIC any such comment was called for. The Commission, though a party in this appeal, has not put in any appearance or filed any counter and therefore, there is no denial of the allegation that the appellant did not receive the notice of the applications filed by TEKIC. It is admitted by all the parties that apart from sending a notice asking for comments on the application of the Nethaji Apparel and Palladam Hi-Tech Weaving Parks no other opportunity of hearing was given to the appellant. It is also noticed that the order dated 20th March, '06 modified a tariff order dated 15th March, '03 and such modification could not be done on certain representations without following the same procedure which is required to be followed for determination of tariff. It is noticed that the revenue loss caused to the appellant on account of order dated 20th March, '06 will have to be recovered from the other consumers which will raise the tariff for others. Thus there is full justification for a public notice followed by a public hearing before the tariff order was reopened and a new dispensation was added for the industrial parks seeking single point HT connection. It may be added here that the condition for single point HT connection given in order

dated 20th March '06 do not make any provision for any charge, cross subsidy or compensation for the appellant.

3) Apart from taking the above grounds, the appellant further pleads in the appeal that the order is in contradiction with a policy declaration by State Government of Tamil Nadu that the Commission ought to have carried out a detailed study and examination of various factors relating to the responsibility of the appellant to provide services to the lowest strata of society while the industries are allowed to gain by the proposed single point connections and that the order dated 20th March, '06 would open flood gate of similar requests and consequent gross revenue loss to the appellant.

4) The learned counsel appearing for the respondent Nos. 2 to 4 do not dispute that a tariff order cannot be amended on representation of certain consumers without notice to all the stake holders. The Electricity Act 2003 and Regulations framed thereunder by various Commissions categorically provide for notice to public and opportunity to consumers of all sections to represent their views before the tariff is determined by appropriate commissions. Therefore, once the tariff is actually determined it would amount to violation of the procedures laid down if the tariff so determined is subsequently altered to the disadvantage of the distribution company and / or the other consumers on the representation of a few specific consumers.

5) So far as the application of TEKIC is concerned, the prayer was somewhat different from prayers of other two industrial parks in as much as TEKIC also wanted to wheel power from its own generating plant. To the extent that there is no averment in the order dated 20th March, '06 that notice was also issued on the representation of TEKIC it appears that the appellant was not invited to give its views on the petition of TEKIC.

6) There can be one view that by giving notice on the applications of the two industrial parks, namely Nethaji Apparel Park and Palladam Hi-Tech Weaving Park, the principle of *audi alteram partem* was satisfied. The principle of *audi alteram partem* is based on the requirements of being fair to both sides. In the order dated 20th March, 2006, we find, that the Commission has ignored the most important comment made by the appellant in its response to the representation namely that it will suffer great revenue loss. The Commission has noted that the appellant had expressed no objection in granting distribution license to the apparel park or weaving park but it did not notice that the appellant had specifically submitted that such 'no objection' was subject to the condition that "*revenue loss to TNEB such as gross subsidy, other charges are taken care of as per the Electricity Act 2003*". It thus appears that although a notice was issued and the response was taken, the principal issue involved from the point of view of appellant, was entirely ignored. This is equal to denial of a right of the appellant to represent its case before the Commission. If the

Commission had fully gone into all the issues involved, we could have said that the right of a fair hearing had been provided by simply obtaining the comments. As it turns out the comments given were not given their due recognition and therefore, we are of the view that in the present case the principle of natural justice was violated.

7) On behalf of the respondents, two points have been raised: the first is that the grounds for review, raised before the Commission, did not include the grounds related to non observance of procedure or to violation of principle of *audi alteram partem*. The second is that the appellant has challenged only the order on the review petition and not the principal order of 20th March, '06 and the principal order having become final the review application has to be necessarily dismissed.

8) In this connection, we have to say that both the objections raised are highly technical in nature. The appellant in the review petition, had raised a plea that there were errors apparent in the face of the record although those errors were not specifically pointed out. The appellant, having said that there was error apparent in the order, proceeded to give the details of the losses suffered by the appellant on account of order dated 20th March, '06. The appellant was virtually pleading that the Commission while passing the impugned order did not notice the fact that the appellant would suffer severe financial losses.

9) Further the Commission was amending the tariff order and therefore, the tariff implication of the new dispensation was a *sine qua non* of such an order. What the appellant was pointing out in the review petition was the losses to it which were required to be taken care of by the Commission. No doubt the review petition suffers from drafting defects but the same does draw attention to certain apparent errors.

10) So far as the second objection is concerned, the learned counsel Mr. Jayanth Muth Raj has supported his plea by citing a Supreme Court judgment in the case of *S. K. Saldi Vs. General Manager, U.P. State Sugar Corporation Ltd. And Another (1997) 9 SCC 661*. Having carefully gone through the judgment, we do not think that the ratio of the judgment was that an appeal from the order dismissing review petition is not maintainable unless the main order is also challenged in appeal. As can be seen from the facts before us, the main order was challenged in review and on the review being declined the appellant has come up here in appeal. Thus the main order i.e. order dated 20th March, '06 has not become final. In any case, the objection taken by the respondent is too technical in nature and we in this Tribunal do not strictly follow the procedural laws laid down by either by Civil Procedure Code or any High Court Rules etc. Accordingly, we cannot dismiss the appeal only on the ground that the principal order has not been challenged. We, however, hasten to add that in case the appeal is

allowed it will automatically mean that the principal order dated 20th March, '06 will be affected. The appellant initially mentioned in the appeal that the principal order was also under challenge. However, the challenge in this appeal is not directly against the principal order but is only limited to the impugned order on the review petition but in the process the principal order can also be reopened.

11) In our opinion, the failure to adhere to the procedure for passing a tariff order is an error apparent and can be set aside in review. Secondly, as mentioned above, sufficient opportunity to represent its case was not given to the appellant. This has resulted in failure of justice to the extent the principal order dated 20th March, '06 has ignored all revenue implications for the appellant. The impugned order can therefore, be said to be suffering from apparent error. In any case, this lapse can be covered by a third ground for review namely 'any other sufficient reason'. In the case of *Board of Control For Cricket in India And Another Vs. Netaji Cricket Club And Others in case No. (2005) 4 SCC 741*, the Supreme Court, inter alia, observed the following:

“90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would

constitute sufficient reason would depend on the facts and circumstances of the case. The words “sufficient reason” in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “actus curiae neminem gravabit”.

12) In this judgment, the Supreme Court also said that justice is a virtue that transcends all barriers and rules or procedures or technicalities of law cannot stand in the way of administration of justice. The Supreme Court observed if the court finds that an error pointed out was such that an earlier judgment would not have been passed but for erroneous assumptions and that its perpetration would result in miscarriage of justice, it can be rectified by the court under its power of review.

13) The Commission lost sight of the fact that it was revisiting the tariff order and while doing so the tariff implication of the amendment had necessarily to be taken care of. The Commission also lost sight of the fact that while amending the tariff order long time after the tariff order was passed, the procedure provided for passing such an order given by the law was required to be followed. We have also observed that sufficient opportunity was not given to the appellant to make its submissions. Thus we find that there were apparent errors as well as sufficient cause for reviewing the

principal order dated 20th March, '06. The Commission should have agreed to review its order dated 20th March '06. The appeal is accordingly allowed.

14) Consequently the review petition is allowed and the order dated 20th March, '06 set aside. The Commission is now required to reconsider the three representations and pass an order according to law and in the light of the above observations. This exercise be completed within a period of next three months.

15) Till then the connections granted to the respondents 2 to 4 will not be disturbed.

Pronounced in open court on this 02nd day of April, 2009.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member