

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 7 of 2008

Dated : 20th November, '09

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

IN THE MATTER OF:

Binani Zinc Limited

Binanipuram – 683 502

District Ernakulam

Kerala

(Represented by its Whole Time Director
and Unit Head Mr. Roy Kurian K. K.)

...Appellant(s)

Versus

1) The Kerala State Electricity Board

Vydhyuthi Bhavan,

Pattom,

Thiruvananthapuram – 695 004,

Kerala

(Represented by its Chairman)

2) Kerala State Electricity Regulatory Commission

C. V. Raman Pillai Road

Vellayambalam,

Thiruvananthapuram – 695 010

Kerala

(Represented by its Chairman)

3) State of Kerala

Through its Principal Secretary (Power)
Secretariat,
Thiruvananthapuram – 695 001
Kerala

... Respondent(s)

For the Appellant : Mr. Sudhir Gupta,
Mr. Syed Shahid Hussain Rizvi and
Ms. Hina Rizvi, Advocates

For Respondents : Mr. M. G. Ramachandran, Ms. Swapna
Seshadri, Mr. Anand K. Ganesan,
Mr. M. T. George, Ms. Smitharani M.R
Mr. Sivaprasad P. V., Ms. Bina
Madhavan, Mr. Shwetank Sailokwal,
Mr. Hemal K. Sheth and Ms. C. S. Rajani,
Advocates for KSEB

Mr. Akhil Sibal, Mr. Tarun Satija,
Mr. Salem Imamdar, Ms. Ananya Kar,
Mr. Vaibhav Mishra and Mr. Manish
Kumar, Advocates for KSERC

Mr. Amarjit Singh Bedi, Advocate for
HT&EHT
Mr. Dinesh Kumar

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is directed against the order of the Kerala State Electricity Regulatory Commission (the Commission for short) dated 24.11.07 in truing up petitions No. TP No. 20 of 2006 and TP

No. 22 of 2006 filed by the Kerala State Electricity Board (KSEB), respondent No.1. The appellant is an extra high tension consumer of electricity in its factory which is engaged in the manufacture of zinc metal and has a target demand of 18,000 KVA with an annual consumption of around 140 million units. On 10.10.07, the KSEB filed two petitions, mentioned above, requesting the Commission to compensate the gap in revenue and expenses to the extent of Rs.450.97 Crores for 2003-04 and Rs.46.31 Crores for 2004-05 leading to a total gap of Rs.497.28 Crores. Objections to the truing up petitions were filed by the appellant as well as by the HT and EHT Industrial Electricity Consumers Association. The Commission approved the gap of Rs.360.06 Crores to be recovered in the ERC of 2007-08. It is contended by the appellant that the impugned truing up order dated 24.11.07 is not consistent with the principles of the Electricity Act 2003. It is contended that the Commission issued the truing up order without carrying out any prudence check on issues like capital invested, revenue variation etc. as the order was passed without requisite information in respect of controllable and uncontrollable factors which the respondent No.1 failed to provide. It is pointed out that the Commission in fact forwarded the objection raised by HT and EHT Industrial Electricity Consumers Association to the KSEB but KSEB did not respond to the letter and that the Commission passed the truing up order without the data called for by it. The Commission

has disallowed certain interest expenses pertaining to borrowing to cover deficit and regulated asset and despite such disallowance the Commission has considered Rs.725.60 Crores for true up as against actual of Rs.726.32 Crores. The grievance of the appellant is that the disallowance should have been much higher. It is then contended that the Commission has allowed premium paid for swapping of loans in the truing up exercise without making an assessment of the benefit achieved by swapping against the premium paid. It is contended in this regard further that the benefit given thereby should be passed on across the years rather than only one year as the interest cost pertains to multiple years which has not been done. The Commission allowed Rs.14.44 Crores as carrying cost for delay in subsidy payment. According to the appellant this amounts to double counting of interest cost. The appellant contends that the cost caused by delay in subsidy payment by the Government should be borne either by the Government or the subsidized consumer and not by the subsidizing consumer like the appellant. It is further contended in this context that the Government should provide a budget for subsidy in advance so that there is no carrying cost to be burdened on the consumers.

02) The appellant also objects to inclusion of prior period expenses saying that on this account there is double counting inasmuch

as the Commission has included the cost of power purchase for the year 2003-04 in trueing up and has thereafter included prior period dues in the year 2004-05. The Commission has capitalized expenses on actual basis. The appellant contends that there is a reduction in capitalisation expenses when compared to approved levels whereas only approved capitalisation expenses should have been allowed. The appellant also expresses a grievance that he was not fully heard by the Commission and hence principle of natural justice has been violated. Further the appellant contends that by allowing a revenue deficit for 2003-04 & 2004-05 the Commission has deprived the consumers of the benefit of surplus in the subsequent years by passing on the revenue gap in the ARR for 2007-08.

03) The appeal is hotly contested by the Commission as well as by the KSEB. In response the Commission has contended that the appellant cannot maintain the appeal as it is not an aggrieved person inasmuch as there is no change in tariff consequent to the order dated 24.11.07 and the appellant has been paying the same tariff from 2002 onwards. It is further contended by the Commission that the appellant is a habitual litigator and has various litigations pending in various courts. It is contended that before passing the true up order the objections filed by the appellant were heard and considered on merit during the public

hearing on 23.10.07. The audited accounts reflect the actual expenses incurred by the licensee whereas in the truing up exercise approved level of expenses and performance target are considered for passing of truing up order. It is contended that the truing up exercise in question has been done perfectly in line with the provisions of section 61 (b), (c), (d) and (e) of the Electricity Act, 2003. KSEB is entitled to recover the legitimate cost based on final accounts after statutory audit. It is contended by the Commission that the Commission carried out prudence check before passing the true up order. The Commission contends that it has duly considered the cost and benefit of swapping of loans and that there was no double counting on any account. It is pointed out by it that the Electricity Act 2003 does not allow Government subsidy to be factored in for general determination of tariff. The cost saving achieved by KSEB, it is contended, rightly goes to the utility as incentive. It is further contended that rules have been followed in capitalisation of expenses. It is generally alleged that the appellant has made submissions contrary to facts and has misunderstood certain parts of the impugned order, for example, in respect of benefit of swapping of loans and treatment given to the savings due to such swapping. The Commission further contends that KSEB could reduce the outstanding debt liability and reduce the double interest burden and therefore the Commission rewarded the respondent No.1 by allowing it to keep the excess interest cost

saved. It is denied that there is any double counting on prior period expenses. The Commission says that it had some difficulties on account of lack of data as the impugned order was the maiden order of its nature passed by it but that it said in so many words that proper consideration shall be given to such factors whenever appropriate data were available.

04) The respondent No.1 KSEB has also defended the order. It proclaims that it is one of the best integrated electricity utility and has been able to provide electricity at much lower cost than many other utilities. It reiterates the plea of the Commission that there has been no change in tariff so far as the appellant is concerned despite the revenue gap approved by the Commission and expenses disallowed by the Commission and therefore the appellant not being a person aggrieved cannot be allowed to present the present appeal. The respondent No.1 also contends that the true up petition had been filed well before it filed the petition for ARR and ERC for the year 2007-08 and so it clearly shows that there was no oblique motive of depriving consumers of benefit of any surplus in any year subsequent to 2004-05. About failure to submit data, it contended that the Commission did not provide sufficient time to provide data but that the Commission can always make suitable amendments in the subsequent orders when the data is actually available. The respondent No.1 contends that the objections of the appellant

regarding inadequate disallowance of interest expenses, objections regarding the premium paid on swapping of loans etc. are altogether misconceived.

Decision with reasons:

05) The appellant has filed the written submission in order to crystallize the grounds raised in appeal. As per the written submission the issues raised are as under:

- i) Is the Commission right in not carrying out the prudence check and in haste approving the 2003-04 and 04-05 Truing up order to ensure surplus is not passed to consumers?
- ii) Is the Commission right in assuming government subsidy without any specific request from the State Government and not approving tariffs without considering subsidies?
- iii) Is the Commission right in including the loss or cost on account of non-payment of subsidies to subsidizing consumers?

- iv) Is the Commission right in double counting the interest cost?
- v) Is the Commission right in not analyzing the impact of delay or non-payment of government subsidies so as to give appropriate treatment?
- vi) Is the Commission right in passing the carrying cost of delay or non-payment of subsidy payments indirectly to subsidizing consumers by including in the expenditure in truing-order?
- vii) Is the Commission right in not analyzing the interest costs before passing implicit savings as incentives to the licensee?

06) On the first issue, the appellant contends that the Commission carried out the truing up in spite of the failure of the respondent No.1 utility to supply the relevant information regarding the objections raised by the HT-EHT Industrial Electricity Consumers Association. The respondent No.1 utility contends that the Commission did not wait for it to supply necessary information. Nonetheless, it is contended, that the audited financial statement had been made available and the truing up was based on the

audited accounts. The appellant has nowhere contended that there were any mistake or slip in the accounts. The appellant has not raised any objection to the accuracy of the accounts. It is not denied that the accounts were duly audited and thereafter approved by the Comptroller and Auditor General of India. The Commission did not blindly accept the contention of the respondent No.1, made in the true up petition. The Commission has applied its mind and has disallowed some of the claims of respondent No.1. The Commission had conducted a detailed hearing after providing opportunity to the appellant after undertaking true up exercise. We found that the appellant has failed to substantiate the ground that the natural justice was not followed or that the Commission has carried out the prudence check in haste or has deprived any surplus going to the consumer. There is nothing on the record from which it can be said that the respondent No.1 was in surplus. In fact, the respondent No.1 had a net revenue gap which was required to be recovered through revenue. Since the appellant has failed to show that the appellant had a net revenue surplus it cannot have any grievance in respect of the impugned trueing up order. In fact with the net revenue gap the appellant could not have demanded a reduction in tariff. Although the appellant is a subsidizing consumer the burden of cross subsidy is within the limit of 20% which has been approved by the National Tariff Policy.

Hence, we find no substance on the issue No.(i) above, raised by the appellant.

07) So far as the second issue is concerned, we fail to understand how the Commission's assumption of Government subsidy causes any prejudice to the appellant. The Commission recommended that Rs.200 Crores be adjusted against the duty payable to the Government and the balance Rs.96 Crores be recovered through tariff. It appears that the appellant wants the entire revenue gap to be covered by the Government subsidy and says that the Commission should have insisted that the Government pays the entire revenue gap of Rs.296 Crores as subsidy. The plea of the appellant has no force since the Electricity Act 2003 does not give the Commission any authority to demand Government subsidy. One of the objections of the Electricity Act 2003 was to reduce the subsidies and to fix tariff on commercial principles. We, therefore, have no hesitation in rejecting the second plea of the appellant.

08) The third issue as to whether the Commission was right in including the loss or cost on account of non-payment of subsidies to the subsidizing consumers is based on an incorrect understanding of the law, as mentioned in the above issue. The utility is not entitled, as a matter of right, for Government subsidy. If utility has a revenue gap, it has to meet its requirement of fund

by borrowing and therefore, it is also entitled to carrying cost. This cost is not the same as the cost for non-payment of subsidies. We find the third issue raised as misconceived as the second issue.

09) On the fourth issue the contention of the appellant is that the Commission has double counted the interest cost. It is interesting to note that the utility on the other hand has a grievance that the interest and financial charges have not been fully allowed to be recovered through revenue. The appellant has not disputed the accuracy of account. It is not shown by the appellant how there was any double counting on account of interest cost. The respondent No.1 made efforts to reduce the interest costs by swapping the high cost loans for cheaper ones on account of which the Commission allowed a premium of Rs.31.90 Crores. The Commission mentions in its order that due credit has to be given to the Board for efforts made to reduce the interest burden and that the premium paid on swapping of loans should be allowed as pass though as the same is a genuine item of expense.

10) The respondent No.1 contends that the Commission has not admitted the interest on borrowing to meet the revenue deficit and the interest on borrowing to meet the regulatory asset and has allowed an amount of Rs.679.26 Crores only towards interest and finance charges. The Commission has only partly allowed the

interest that the respondent No.1 claimed. We find no evidence of double counting of the interest allowed to the appellant.

11) On the fifth and sixth issues – as to whether the Commission was right in not analyzing the impact on delay of non-payment of Government subsidy is concerned, we have to say nothing more than what we have said in our discussion on the second issue, above.

12) So far as the last issue raised is concerned, the same is related to swapping of loan which has resulted in annual saving of Rs.35 Crores. The appellant contends that this saving should benefit the consumer. There can be no two opinions that savings on account of swapping should benefit the consumer. However, we see no reason why this should bother us at this moment. As stated above, the respondent No.1 did not have any net revenue surplus. All loan liability goes into the ARR. Obviously the interest element in the subsequent ARR will be lower and the benefit accordingly will go to the consumer. The impugned order does not call for any interference on account of objections raised by the appellant.

13) As stated earlier, despite the revenue gap the tariff for the appellant has not gone up. The appellant has failed to establish that the account approved by the Comptroller and Auditor General

of India is incorrect. There is absolutely no merit in the appeal and accordingly, the same is dismissed with costs assessed at Rs.5 Lacs payable to the respondent No.2, KSEB.

14) Pronounced in open court on this **20th day of November, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable ✓ / Non-reportable