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APPEAL PETITION No. P/080/2015
(Present: Sri. V.V. Sathyarajan)
Dated: 12th June 2015

Appellant	:	M/s Hotel & Allied Trades Pvt. Ltd. Unit Casino Hotel Matt. Halt, Willington Island, Cochin – 682 003
Respondent	:	Cochin Port Trust, Willington Island, Kochi – 682 009

ORDER

Background of the case

The appellant is an Association of Classified Hotels and Restaurants within the state of Kerala. The KSERC had issued tariff order dated: 25-07-2012 vide OP No. 23 of 2012, whereby it had revised the retail tariff of all consumers in the State. The Association had filed Appeal No. 10 of 2013 before the Hon'ble Appellate Tribunal for Electricity challenging the tariff order dated: 25-07-2012 in the matter of fixation of tariff as regards HT IV commercial category and particularly in respect of the members of the Association aforesaid. By judgment dated: 25-10-2013 in the aforesaid appeal, the Hon'ble APTEL set aside the tariff as determined by the KSERC for HT IV commercial category and declared that they should be charged at Rs. 400.00 per kVA per month and energy charges at Rs. 5.50 per kWh for all units consumed. Further there is a direction to refund the excess charge from all consumers of HT IV commercial category in their bills from the month of November 2013 to April 2014 in equal installments. The aforesaid order was confirmed by the Hon'ble Supreme Court in Civil Appeal No. 84 of 2014 except for modifying the dates of refund.

The Cochin Port Trust, the Licensee is liable to charge the appellant at the rate fixed in OP No. 23 of 2012 in terms of the direction in paragraph 166 (b) wherein it has been ordered that the tariff approved in OP No. 23 of 2012 ***shall be applicable to the consumers of all other licensees in the state from 01-07-2012 till 31-03-2013*** and that the existing categorization / classification of tariffs for consumers of the licensees shall be realigned accordingly. But the licensee has taken a stand that since Cochin Port Trust, the respondent is not a party to the proceedings before the APTEL, the judgment of the Appellate Tribunal is not binding on them. Against the stand so taken by the Cochin Port Trust the appellant filed a complaint before the CGRF of the Licensee. But the Forum rejected the petition as devoid of merits. Hence the appellant filed this appeal before this Authority.

Arguments of the appellant

The appellant argued that by judgment dated: 25-10-2013 in the appeal No. 10 of 2013, the Hon'ble APTEL had set aside the tariff determined by the Hon'ble KSERC for HT IV commercial category and declared that they should be charged at Rs. 400.00 per kVA per month and energy charges at Rs. 5.50 per unit of all units consumed. There was a further direction on the said appeal to refund excess charges from all consumers of HT IV commercial category in their bills from the month of November 2013 to April 2014 in equal installments. The aforesaid order of APTEL was upheld by the Hon'ble Supreme Court of India except for modifying the dates of refund.

But the respondent, Cochin Port Trust being the Licensee of power in Willington Island area is obliged to refund the excess amount collected over and above Rs. 5.50 per unit by way of adjusting the excess amount against the future electricity bill due to them. The respondent has taken a stand that since they were not a party to the proceedings before the Hon'ble APTEL in appeal No. 10 of 2013, the judgment of APTEL is not binding on them and there was no direction in the said appeal to the Cochin Port Trust. According to the appellant the stands so taken by the respondent is unsustainable and will not stand scrutiny of law. Hence the appellant requested the respondent to refund the excess amount collected vide letter dated: 04-12-2013, which has been replied negatively by the respondent.

The main contention of the appellant is that the tariff order issued by the Hon'ble KSERC dated: 25-07-2012 in OP No. 23 of 2012 is applicable to the consumers of the respondent by the strength of Para No. 166 (b) of said order. Hence any modification to the order either by the Hon'ble APTEL or Hon'ble Supreme Court will have an automatic impact on the tariff payable by the appellant. The rate under OP No. 23 of 2012 has been made applicable to the Cochin Port Trust and its consumers by the Hon'ble Commission without any independent consideration of ARR and ERC of the respondent. Hence there would be no adverse impact on the financials of the respondent subsequent to the modification.

Since the order dated: 25-07-2012 in OP No. 23 of 2012 was modified by the Hon'ble APTEL the respondent is liable to comply with modified order of APTEL and refund the excess amount collected from the appellant or adjusted in the future energy bills payable by the appellant.

Arguments of the respondent

The respondent's contention is that the appeal No. 10 of 2013 had been filed by the Association of Classified and Approved Hotels of Kerala against the order dated: 25-07-2012 passed by the Hon'ble KSERC regarding the Retail Supply Tariff for Kerala State Electricity Board and not against the order No. 507/CT/KSERC/2012/1078 dated: 05-12-2012, according to which the tariff of appellants were fixed. The said appeal No. 10 of 2013, the Hon'ble KSERC and KSEB were the respondents and not the Cochin Port Trust, the respondent. By the judgment dated: 25-10-2013 in the aforesaid appeal the Hon'ble APTEL has set aside the tariff for HT IV commercial as determined by Hon'ble KSERC. The judgment has also given direction to the KSEB only being the second respondent in the appeal to refund the excess amount charged by the KSEB from all the consumers of HT IV

commercial category in their bill from November 2013 to April 2014 in equal installments and no direction was given to the respondent in this regard.

The Hon'ble APTEL had considered the arguments of KSEB only and no chance was given to the respondent because it was not included as a party in the said appeal. The appellant in appeal No. 10 of 2013 is a resident of Willington Island where the respondent is a power distribution licensee and was filing the said appeal the appellant had deliberately avoided the respondent and misrepresented the facts before the Hon'ble APTEL. Thus the respondent was not given the opportunity of being heard before the Hon'ble APTEL while disposing the appeal No. 10 of 2013. The denial of opportunity being heard before the judicial platform while agitating some issues is against natural justice to be opposed to all canons of justice and fair play.

The Hon'ble KSERC has finalized the Bulk Supply Tariff of the respondent based on the ARR and ERC of the respondent and based on the Retail Supply of Tariff of consumers under appropriate tariff. Any reduction in Retail Tariff would distort the approved ARR of the respondent at the revenue implication due to the refund of amount was not factored in the approved ARR. Had it been given the chance to the respondent in the appeal before the Hon'ble APTEL the BST of the respondent would have been reduced further and the burden on the account of changes in RST would have been shouldered by the KSEB also.

The respondent has not collected any excess amount from the appellant over and above the tariff fixed by the Hon'ble Commission from the HT IV commercial category and then there is no liability for the respondent for adjusting or reimbursing any amount. As per the Regulation 7 of ***"KSERC (Consumers Grievance Redressal Forum and Electricity Ombudsman) Regulation, 2005",*** the kind of grievances that can be taken up by the Forum is confined to the grievances / complaints as defined in Regulation 2 (1) (f), which includes charging of a price in excess of a price fixed by the Commission for supply of electricity and allied services, vide 2 (f) (iii) of Regulation 7. According to the respondent, the appellant is agitating the issues other than those specified in the Regulation, this Authority has no jurisdiction to entertain this appeal.

The Retail Supply Tariff applicable to the appellant is based on the tariff order of Hon'ble Commission dated: 05-12-2012 which was not set aside by any of the judicial forum. The judgment in OP No. 10 of 2013 has specifically directed to refund the excess amount charged by the Board only and not by the respondent and hence the extant appellant. Here, the issues agitated by the appellant are purely a matter to be dealt with the question of law rather than facts for which this Authority has no jurisdiction and hence requested to dismiss the petition.

Analysis and findings

The Hearing of the case was conducted on 11-05-2015 in my chamber at Edappally, Kochi and Krishna Prasad N., Advocate appeared for the appellant and Sri M.M. Abdul Rahim, Executive Engineer (Electrical), Cochin Port Trust and Sri C. Rajasekharan, Superintendent Engineer (Electrical), Cochin Port Trust appeared for the respondent's side. On examining the petition and the argument note filed by the appellant, the statement of facts of the respondent, perusing the documents attached and considering all the facts and

circumstances of the case this Authority comes to the following conclusions leading to the decisions.

Tariff in respect of the consumers coming under the Kerala State Electricity Board as also other small distribution licensees including the respondents herein were uniformly fixed by the order dated: 25-07-2012 of the Kerala State Electricity Regulatory Commission in OP No. 23/2012. All the distribution licensees had been put on notice by the Commission indicating its decision to have a uniform tariff throughout the State. Accordingly, tariff has been fixed in respect of the HT IV commercial category also. Pertinently, the other distribution licensees including the respondent herein consented to having a uniform tariff.

The order dated: 25-07-2012 was subject to challenge before the Hon'ble Appellate Tribunal for Electricity. By its judgment in Appeal No. 10/2013, the Hon'ble Tribunal modified the order of the KSERC to the extent it concerned the tariff for HT IV commercial category. Resultantly, tariff for HT IV commercial consumers was fixed at Rs. 5.50 per unit for the current charges and demand charges at Rs. 400.00 per kVA in respect of the consumption. The said judgment was carried in appeal before the Hon'ble Supreme Court which ended in an order of dismissal.

It is pertinent to note that the Hon'ble Tribunal in the above judgment declared that the order of the Commission to the extent it concerned the tariff for HT IV commercial category is unsustainable. Consequent directions were also issued KSEB to reimburse the excess amount collected. The Hon'ble Supreme Court in its judgment modified the judgment of the Hon'ble Tribunal to the extent of difference in the commencement of payment of monthly installments to a later period. In effect, the finding of the learned Tribunal was confirmed by the Hon'ble Supreme Court. The contentions of the appellant are therefore liable to be examined in the light of the aforesaid background. In so far as the tariff fixed by way of order dated: 25-07-2012 was applicable to all distribution licensees including the respondent herein, any change to the above order necessarily applies to such licensees also.

According to the appellant, there is no merit in the contention that judgment of the Hon'ble Appellate Tribunal will not bind on the respondent. As indicated above, the tariff in respect of the appellant and other consumers under the respondent were fixed only in terms of the order dated: 25-07-2012, which is clear from the order itself. Except for the order dated: 25-07-2012, there is no basis for the levy and collection of tariff by the respondent. The order referred to in the written statement is one merely one consequential to the general order dated: 25-07-2012. Once the tariff order dated: 25-07-2012 has been modified by the Appellate Tribunal, the former gets merged with the latter. So much so any changes to the order of the Commission apply automatically to the other licensees including the respondent.

According to the respondent the appeal No. 10 of 2013 has been filed by the Association of Classified and Approved Hotels of Kerala against the order dated: 25-07-2012 of KSERC regarding the retail supply tariff for KSEB and not against the order No. 507/CT/KSERC/2012/1078 dated: 05-12-2012 to which the tariff of appellant's were fixed. Also contented that in appeal No. 10 of 2013 the Hon'ble KSERC and KSEB were the respondents and the respondent, Cochin Port Trust was not a party in that case. By the

judgment dated: 25-10-2013 in the aforesaid appeal the Hon'ble APTEL has set aside the tariff for HT IV commercial as determined by the KSERC. The judgment has also given direction to the KSEB only being the second respondent in the case and to refund the excess amount charged by the KSEB from all consumers of HT IV commercial category in their bills from November 2013 to April 2014 in equal installments and no directions were given to the respondent i.e. Cochin Port Trust is found true.

The appellant in appeal No. 10/2013 who is a consumer under the respondent and while filing the said appeal, the respondent was not included as a party in the case. Hence the arguments that the respondent was not given an opportunity of being heard before the Hon'ble APTEL while disposing the appeal No. 10 of 2013 is also found correct. Another contention raised by the respondent is that the Hon'ble KSERC has finalized the BST of the respondent based on the ARR and ERC of the respondent and based on the RST of consumers under appropriate tariff. Any reduction in retail tariff would distort the approved ARR of the respondent as the revenue implication due to the refund of amount was not factored in the approved ARR. Had it been given the chance to the respondent in the appeal before the Hon'ble APTEL, the BST of the respondent would have been shouldered by KSEB also.

On going through the above order it would clearly indicate that the tariff fixed pursuant thereto was extended to all licensees uniformly without specific reference to the distribution licensees on an individual basis. In this context it may be pointed out that had there been an independent evaluation as to the necessity of tariff revision based on the approved ARR and ERC of the respective licensees, the appellant can easily establish that no revision is warranted for the consumers under the respondent.

The respondent also stated that they have not collected any excess amount from the appellant over and above the tariff fixed by the Hon'ble Commission from the HT IV commercial category and hence there is no liability for the respondent for adjusting or reimbursing an amount. This argument of the respondent is an implicit acceptance of the position that the order dated: 25-07-2012 forms the basis of fixation of tariff for the various categories of consumers of the respondent. Further, the lack of propriety on the part of Appellate Tribunal ought to have been taken up by the licensee before the appropriate Forum.

Summary of findings

Based on the tariff petition filed by KSEB on 29-03-2012, Commission conducted public hearing and also convened a meeting of small licensees on 18-06-2012 to discuss the issue of revision of BST and differential BST considering the different consumer mix of the licensees. In the meeting the licensees in general expressed the opinion that the uniform Retail Supply Tariff is preferable in the State and that the Bulk Supply Tariff is to be fixed in such a way that the licensees recover their costs and earn a reasonable surplus. The Commission has carefully considered the views of objectors and stake holders on all matters related to cross subsidy, cost of supply and the tariff shock.

After considering the petition filed by the KSEB, the views of stake holders, additional submissions, clarifications etc. filed by the KSEB, the Commission in exercise of

the powers under Section 62 and Section 86 (1) of Electricity Act, 2003 and after taking into consideration, the stipulations in National Electricity Policy, tariff policy and KSERC (Terms & Conditions of Retail Sale of Electricity) Regulations, 2006 has decided to revise the retail tariff applicable to the consumers of KSEB with appropriate modifications with effect from 01-07-2012 till 31-03-2013. The Commission has clearly indicated that the retail tariff approved as per the above order shall be applicable to the consumers of all other licensees in the State from 01-07-2012 to 31-03-2013 and the existing categorizations / classifications of tariff for consumers of the licensee shall be realigned accordingly.

The sum and substances of the arguments on the part of respondent is that the order dated: 25-07-2012 is not applicable to Cochin Port Trust is not justifiable on the grounds that the tariff in respect of appellant and other consumers under the respondent were fixed only in terms of order dated: 25-07-2012. It is also admitted that once the order of Commission has been modified by the Appellate Tribunal by an authoritative declaration the same ipso facto applies to all licensees. Therefore, the contention of the respondent is no longer relevant in the matter. Further, there were no separate proceedings in respect of fixation and revision of tariff exclusively for the respondents in a manner contemplated by the extant statute makes it clear that the order dated: 25-07-2012 will apply squarely to all the distribution licensees including the respondent. The order of Hon'ble Commission in OP No. 23/2012 which is modified by the Hon'ble APTEL and that order is challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court in its judgment dated: 27-01-2004 in Civil Appeal No. 84/2014 confirmed the order of Hon'ble APTEL with some modifications. The judgment of the Hon'ble Supreme Court is the law of the land. Everybody is bound to obey and accept the judgment of Hon'ble Supreme Court irrespective of whether a party or not in the proceedings.

Decision

Tariff in respect of consumers under the Kerala State Electricity Board as also other small distribution licensees including the respondent herein were uniformly fixed by the order dated: 25-07-2012 of the Kerala State Electricity Regulatory Commission in OP No. 23/2012. As the Commission, while issuing the order dated: 25-07-2012 it is specifically indicated in Para 166 (b) which reads as follows: ***The retail tariffs approved as per this order shall be applicable to the consumers of all other licensees in the State from 01-07-2012 till 31-03-2013 and the existing categorizations / classifications of tariffs for consumers of the licensees shall be realigned accordingly.*** When the order of the Hon'ble Commission dated: 25-07-2012 is revised as per the order of Hon'ble APTEL, which has confirmed by the Hon'ble Supreme Court such revision is applicable to all other licensees as well.

The Hon'ble APTEL has set aside the tariff thus fixed by the State Commission for HT IV commercial category and directed to charge at the tariff as proposed by the Electricity Board in their petition to the State Commission i.e. fixed charges of Rs. 400.00 per kVA per month and energy charges of Rs. 5.50 per kWh. The excess amount charged by the Electricity Board from the consumers of HT IV commercial category has to be refunded in equal installments. Accordingly it is also noted that KSEB has complied the above order. Further the Hon'ble Supreme Court in its judgment dated: 27-01-2014 in Civil Appeal No. 84/2014 confirmed the order of Hon'ble APTEL with some modifications.

In view of the above discussions it is held that the findings of the CGRF of the licensee is not in order and hence set aside. The respondent is hereby directed to collect the fixed charges of Rs 400.00 per kVA per month and energy charges of Rs. 5.50 per kWh. The excess amount charged by the respondent from the appellant shall be refunded as per the judgment of Supreme Court of India in Civil Appeal No. 84 of 2014 dated: 27th January 2014. The appeal is allowed as indicated above. However, there is no order as to costs.

ELECTRICITY OMBUDSMAN

No. P/080/2015/ /Dated:

Forwarded to:

1. M/s Hotel & Allied Trades Pvt. Ltd., Casino Hotel, Matt. Halt, Willington Island, Cochin – 682 003
2. Cochin Port Trust, Willington Island, Kochi – 682 009

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, Thiruvananthapuram.
3. The Chairperson, Consumer Grievance Redressal Forum, Cochin Port Trust, Willington Island, Kochi – 682 003