

A PUNJAB STATE ELECTRICITY BOARD
v.
M/S SIEL LTD. AND ORS.
(Civil Appeal Nos. 5380-5389 of 2005)

AUGUST 18, 2008

B [DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

C *Electricity Regulatory Commissions Act, 2003 – ss. 29, 61 and 82 – Electricity Regulatory Commissions Act, 1998 – s.9 – Determination of tariff by State Electricity Regulatory Commission – Challenge to – Statutory appeals by industrial consumers – Allowed by High Court – On appeal, held: Approach of High Court was not correct and analysis was not done by it in the correct prospective, inasmuch as it introduced the concept of ideal situation – The ideal situation test has no place in commercial evaluation – Hence, order of High Court set aside and matter remitted to Electricity Commission with direction to examine the matter afresh keeping in view the parameters of the 2003 Act.*

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E Respondent industrial consumers, challenged the determination of tariff by the Punjab State Electricity Regulatory Commission by filing statutory appeals before the High Court. The dispute related to (i) estimation of agricultural consumption and transmission and distribution loss (T & D loss) (ii) energy input and coal transportation, (iii) manpower requirement and (iv) investment and rate of return.

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G The High Court held that the Electricity Commission had not addressed itself to relevant parameters and allowed the appeal after stressing on certain aspects like cross subsidy and inadequacy of the materials produced. Hence the present appeals by the Punjab State Electricity Board.

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Allowing the appeals, the Court

HELD:1.1.The basic issue which the High Court tried to address related to cross subsidy. But it introduced a concept of ideal situation which is not the correct approach. The ideal situation test has no place in the case of commercial evaluation. Actual expenditure has to be the basis and not the hypothetical ideal situation. Ideal situation is essentially contemplation of the future. [Paras 7, 11, 18] [159, H; 160,A; 161,B; 163,G-H]

Hindustan Zinc Ltd. etc.etc. v. Andhra Pradesh State Electricity Board and Ors.(1991) 4 SCC 299; West Bengal Electricity Regulatory Commission v. CESC Ltd.(2002) 8 SCC 715 and Association of Industrial Electricity Users v. State of A.P. and Ors. (2002) 3 SCC 711 – referred to.

1.2. Since the High Court's approach is not correct and analysis was not done in the correct prospective, the order of the High Court is set aside and the matter is remitted to the Commission to examine the matter afresh keeping in view the parameters of the Electricity Regulatory Commissions Act, 2003. [Para 19] [164,A-B]

Case Law Reference

(1991) 4 SCC 299 referred to Para 15

(2002) 8 SCC 715 referred to Para 16

(2002) 3 SCC 711 referred to Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5389 of 2005

From the Judgment and final Order dated 21.11.2003 of the High Court of Punjab and Haryana at Chandigarh in F.A.O. Nos. 5371, 5243, 5298, 5557 of 2002, 216, 278, 371, 412, 508 and 875 of 2003

WITH

C.A. Nos. 5394, 5395, 5392, 5397, 5390, 5391, 5393, 5396, 5379 and 5398 of 2005.

A K.N. Bhatt, Ranjit Kumar, M.G. Ramachandran, Mohinder
Jit Singh Rupal, Kaadmbri, Sacchin Puri, Vikas (for M/s. Gagrat
& Co.), Suresh Chandra Tripathy, P.H. Parekh, Ajay K. Jha, Nitin
Thukral, (for M/s. P.H. Parekh & Co.) Nidhesh Gupta, Vinod
Shukla, Deepak Goel, S. Janani, Shobha, Rakesh K. Sharma,
B Madhukar Agarwal, Meera Agarwal, Ramesh Chandra Mishra,
B. Vijayalakshimi Menon, Shruti, Varuna Bhandari Gugnani and
Shalu Sharma for the Appearing Parties.

The Judgment of the Court was delivered by

C **Dr. ARIJIT PASAYAT, J.** 1. Challenge in these appeals is
to the judgment of the Division Bench of the Punjab and Haryana
High Court allowing the statutory appeals filed by the respon-
dents in these appeals questioning the order of the Punjab State
Electricity Regulatory Commission (in short the 'Commission').
D The determination of tariff by the Commission was the subject
matter of challenge.

2. The High Court held that the Commission had not ad-
dressed itself to the relevant parameters and, therefore, the
order suffers from infirmities. The matter was remitted to the
E Commission to decide the issues afresh keeping in view the
observations made and after eliciting the appropriate informa-
tion from the appellant-Punjab State Electricity Board (in short
the 'Board') wherever it has been found the deficient on the
part of the Board. Stress in these appeals, essentially is fo-
F cused on various conclusions on specific issues.

3. The dispute relates to the period from 1.8.2002 to
31.7.2003. The annual cost requirement as per the Board was
Rs.7,437.78 crores while the Commission allowed Rs.6,341.14
crores. The challenge was essentially by industrial consumers
G before the High Court. The dispute as noted above relate to (i)
estimation of agricultural consumption and transmission and
distribution loss (in short 'T&D Loss'), (ii) energy input and coal
transportation, (iii) manpower requirement, (iv) investment and
rate of return.

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4. So far as the last head is concerned, the rate claimed is 3% of net fixed assets and 14% of equity. A

5. The basic premises on which the Commission proceeds is to find out whether existing tariff generates surplus revenue or not. If it is more, then there is scope for reduction in tariff and if it is less it leads to increase in tariff. One of the basic issues relates to cross subsidization. In other words, industrial consumers pay more than actual average cost of supply and subsidize the consumers in the agricultural and domestic sectors. B

6. According to learned counsel for the appellant-Board cross subsidization is a tariff design issue. The Government has no role to play in cross subsidy. It is not an element of cost and essentially is redesigning of tariff. Hypothetically, High Court is not correct in saying it is a loss of revenue measure. C

7. Learned counsel for the respondents submitted that the High Court has rightly stressed on certain aspects like cross subsidy, inadequacy of materials produced, and rational and down to earth approach has been adopted. The Government has really no role to play. It is a legacy of the past and principally aims at progressively reducing the element of cross subsidy. The cost of supply is different to different classes of consumers. The average cost of supply can be categorized into (i) the average cost to every consumer and (ii) the average cost to a class of consumers. It is pointed out and in fact there is no dispute that cost of supply varies depending upon the consumption i.e. in case of lower voltage relatable to domestic consumers, the cost of supply is higher vis-à-vis the cost and at higher voltage by industrial consumers it is less. The technical and commercial losses are lower because of high voltage and it becomes higher if it is a case of low voltage. Till now, there appears to be no authoritative determination on a particular class of consumers. Thus, one of the methods can be by adoption of average cost principle. The basic issues which the High Court tried to address related to cross subsidy. But it introduced a D
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A concept of ideal situation which in our opinion is not the correct approach. Subsidy in essence is a privilege which can either be given or not to be given.

8. The Commission which has been appointed under the Electricity Regulatory Commissions Act, 1998 (in short the '1998 Act') or the Electricity Regulatory Commissions Act, 2003 (in short the '2003 Act') exercises the statutory powers for determination of tariff. The guidelines and parameters have been provided under Section 9 of 1998 Act and Sections 29, 61 and 82 of 2003 Act.

9. The Commission is primarily concerned with determining the annual revenue requirement (in short 'ARR'). The Commission designs the tariff and by rationalizing the same is sent to the Government which takes a decision annually as to the quantum of subsidy and the class of beneficiaries. Thereafter, the Commission finalises the tariff.

10. One of the basic issues raised in these appeals was whether the interest on borrowing because of non receipt of subsidies can be taken as a part of ARR. The Commission is required to work out the details. It was stated that being the first year of fixation of tariff, the Commission was faced with various problems. If it is established that the borrowings are general in nature it certainly forms parts of the ARR, but where it is apparently made because of non receipt of subsidy amount from the Government, the question may arise whether it can be taken into account by fixing the ARR. If the Board by cogent material established that the interest is relatable to general borrowing, it would definitely form part of the ARR. If on the other hand the consumer is able to establish that the interest is relatable to borrowing on account of non receipt of subsidy, the details have to be worked out by the Commission. The commercial expediency test has to be applied by the Commission. Difficulties arise when it relates to determination for the first year. At the beginning of the year the question of delay in receipt cannot be gone into. This is a matter for the subsequent period.

11. In relation to agricultural meter and T&D losses it is to be noted that in the past agricultural consumers were not having meters. Therefore, per force estimate had to be done. The Commission fixed 25.52% to be T& D losses. The High Court proceeded on the basis that meters should have been there. In the absence of meters, the consumers should not suffer. This is what is normally known as ideal situation test. Such test as indicated above has no place in the case of commercial evaluation.

12. In the case of industrial and domestic consumers, the exact figures are known because meters are there. It is pointed out that the technical loss is fixed at 15% whereas at the distribution level it is 10 to 11% and 4 to 5% loss on account of transmission.

13. So far as the commercial losses and un-metered agricultural consumers are concerned, the same cannot be precisely quantified for the losses.

14. It is to be noted that when the Board's stand was that the loss is less than the national level load factor and the energy input is best in the country, the High Court again proceeded to apply the ideal situation test to say that there was scope for improvement and found no defect in the conclusions of the Commission by stating that the production should be optimum.

15. The cross subsidy is an accepted principle. In *Hindustan Zinc Ltd. etc.etc. v. Andhra Pradesh State Electricity Board* and Ors. (1991 (4) SCC 299) in para 33 it was observed as follows:

"33. Shri Kapil Sibal appearing on behalf of some of the appellants confined the challenge to the mode of exercise of power by the Board. He laid great emphasis on the effect of absence of consultation with the Consultative Committee under Section 16 of the Electricity. (Supply) Act, 1948. He also claimed that the quantum of increase could at best be justified only to the extent of one-half and

A no more. Shri Sibal claimed that certain extraneous factors
had been taken into account for the purpose of revising
the tariffs. The irrelevant considerations, according to Shri
Sibal, taken into account are the capital sums owed by
B the Board and the overall losses incurred by the Board
which according to him is impermissible under Section
59 of the Electricity (Supply) Act. He also argued that the
upward revision of HT tariffs is intended to subsidise
C another class of consumers which is not permissible. His
arguments are already covered by our earlier discussion.
Similarly, the arguments of Shri K.N. Bhat, for the appellant
in C.A. No. 5379 of 1985 to the same effect need no
D further discussion. The details of the several factors taken
into account for the revision in tariffs, to the limited extent
they can be gone into within the permissible scope of
judicial review in such a manner also do not require any
further consideration.”

16. The observations of this Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd.* (2002 (8) SCC 715) need to be noted:

E “91. A perusal of Sections 29(2)(d), 29(3) and 29(5) of the
1998 Act shows that the consumers should be charged
only for the electricity consumed by them on the basis of
average cost of supply of energy, and the tariff should be
F determined by the State Commission without showing any
undue preference to any consumer. The statute also
obligates the State Government to bear the subsidy which
if it requires to be given to any consumer or any class of
G consumers, should be only on such conditions that the
Commission may fix and such burden should be borne by
the Government. However, the High Court in its judgment
has directed the Company to maintain its tariff structure in
regard to different types of supplies as it was prevailing
before the Commission fixed the new tariff. It also directed
H the increase in the average rate of tariff which it had
permitted to be distributed pro rata by the Company

amongst different consumers, so that the percentage of increase of each rate is the same. In effect, therefore, the High Court has directed the continuance of cross-subsidy. One of the reasons given by the High Court in this regard is that Calcutta Tramways which is otherwise running a cheap transportation system might have to increase its fare and the same cannot be permitted since Calcutta Tramways were not heard in the matter of fixation of tariff and there is, therefore, a likelihood of wide discontentment if the fares are to be increased. We have noticed that the object of the 1998 Act is to prevent discrimination in fixation of tariff by imposing cross-subsidy, but at the same time under Section 29(5) of the 1998 Act, if the State Government so chooses to subsidise the supply of energy to any particular class of consumers, the same can be done provided of course the burden of loss suffered by the Company is borne by the State Government and not imposed on any other class of consumers. In this view of the matter, we are of the opinion that while the Commission was justified in its view as to the non-applicability of cross-subsidy, the High Court was in error in issuing a direction to the Commission, contrary to the object and provisions of the 1998 Act to maintain a tariff structure which was prevailing prior to the Commission's report. It is still open to the State Government if it so chooses to direct the Commission to fix the tariff of supply of electricity to any class of consumers at a reduced rate provided the State Government itself subsidises the same".

17. In *Association of Industrial Electricity Users v. State of A.P. and Ors.* (2002 (3) SCC 711) also the position was examined in detail.

18. We make it clear that actual expenditure has to be the basis and not the hypothetical ideal situation. Ideal situation is essentially contemplation of the future. Additionally, the computation of input is the actual cost on the basis of per unit.

- A 19. Since the High Court's approach is not correct and analysis was not done in the correct prospective, we set aside the order of the High Court and remit the matter to the Commission to examine the matter afresh keeping in view the parameters of 2003 Act in the light of what has been stated above on specific issues.
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20. The appeals are allowed to the aforesaid extent.

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Appeals allowed.