

**JOINT ELECTRICITY REGULATORY COMMISSION
(FOR THE STATE OF GOA AND UNION TERRITORIES)
GURGAON**

CORAM

Alok Tandon, Chairperson
Jyoti Prasad, Member (Law)

Petition No. 103/2023

Date of Hearing: 06.03.2024

Date of Order: 06.05.2024

IN THE MATTER OF:

PETITION UNDER SECTIONS 142 AND 146 OF THE ELECTRICITY ACT, 2003, FOR TAKING ACTION AGAINST THE RESPONDENT AND ISSUANCE OF APPROPRIATE DIRECTIONS IN TERMS THEREOF, FOR DELIBERATE CONTRAVENTION OF THE DIRECTIONS PASSED BY THIS HON'BLE COMMISSION ON 02.12.2020 PASSED IN REVIEW PETITION NO. 30 OF 2020, ON 02.12.2020 PASSED IN REVIEW PETITION NO. 31 OF 2020, ON 31.05.2021 PASSED IN THE TARIFF PETITION FOR FY 2021-22 AND ON 23.08.2021 PASSED IN REVIEW PETITION NO. 50/2021

And in the matter of:

SEA SHELL HOTELS AND RESORTS

..... Petitioner

VERSUS

ELECTRICITY DEPARTMENT

ANDAMAN AND NICOBAR ADMINISTRATION

..... Respondent

Present for the Petitioner

1. Sh. Krishna D. Multani, Advocate, Sea Shell Hotels & Resorts.

Present for the Respondent

1. Sh. Vikrant N Goyal, Advocate, Electricity Department, Andaman & Nicobar Administration.

2. Sh. Karuna Jayadhar, Superintending Engineer, Electricity Department Andaman and Nicobar Administration.

3. Ms. Usha Kapoor, AE (Planning), Electricity Department, Andaman & Nicobar Administration.

4. Ms. K. Jayashree, JE (PR), Electricity Department, Andaman & Nicobar Administration

ORDER

1. The petitioner has filed a petition under section 142 and section 146 of the Electricity Act, 2003 for taking action against the Respondent due to deliberate contravention of the orders passed by the Commission on 2.12.2020 in review petition No 30/2020, 31/2020 and order passed on 31.05.2021 in tariff petition for FY 2021-22.
2. The petitioner has prayed that the action be taken under section 142 and section 146 of Electricity Act 2003 for the deliberate contravention of the orders of the Commission with maximum penalty and direct the Respondent to refund the excess amount paid by the Hotels towards Electricity Tariff charged under Commercial category with immediate effect.
3. The Commission heard both the parties at length.
4. The Submissions of the Petitioner in brief are as under: -
 - I. The Respondent (Electricity Department, Andaman and Nicobar Administration) filed the tariff petition No 274/2019 before the Commission for approval of retail supply tariff for FY 2019-20. The Commission passed the

impugned tariff order approving the tariff for FY 2019-20 and inter alia directed the Respondent to ensure applicability of tariff of “Commercial category” to all the Hotel establishments.

- II. An appeal No 71 of 2020 was preferred before the APTEL by the petitioner against the tariff order dated 20.05.2019. The APTEL dismissed the said appeal granting liberty to the petitioner to file a review petition before the Commission. The petitioner along with another Hotel (TSG Hotel) filed a review petition No 30 of 2020 in terms with order dated 21.05.2020 of the APTEL order. A similar review petition No 31 of 2020 was also filed by Aparupa Sands Marina Hotel challenging the tariff order dated 18th May, 2020 for FY 2020-21. The Commission allowed review petition No 30 of 2020 and 31 of 2020 directing inter alia the Respondent to charge the Hotels in Industrial category in place of Commercial category as directed by the Commission in the impugned order dated 20th May 2019. The Respondent has challenged both these orders before the APTEL in appeal No 296 and 297 of 2022.
- III. The Respondent issued notice to the petitioner after it paid tariff as per the Industrial category on 8th May 2021.
- IV. On dated 31st May 2021 the Commission passed the tariff order for FY 2021-22 inter alia directing the Respondent to comply with the old orders of charging the Hotels under the Industrial tariff. The Respondent has challenged the said order before the APTEL in appeal No 298 of 2022.
- V. On 23rd August 2021 the Respondent challenged the order dated 2nd December 2020 before the Commission in a common review petition No 50/2021. The said review petition was dismissed by the Commission as being barred in law in terms of section 114 read with order 47 Rule 9 of the Code of Civil Procedure. Despite this and the above directions the Respondent continued to charge the Petitioner and other Hotels under Commercial category.
- VI. The above issues were also brought to the notice of the Hon’ble Calcutta High Court in writ petition No 148 of 2021 and writ petition No 172 of 2021 wherein

the Calcutta High Court in its order dated 31st August 2021 has noted that the Respondent are now taking steps to prefer appeals against the orders dated 2nd December 2020 of the Commission before the APTEL in New Delhi. Further, the writ petitioner shall pay the Respondent against the number of units consumed after 2nd December 2020 as per the bills raised, only as per the Industrial rates and not the Commercial rates. Upon payment of the said amount within a period of one month from date, the Respondent shall not disconnect the electricity line of the petitioners.

Needless to mention that the payment by the writ petitioners at the Industrial rate and any claim that the Respondent may have against the writ petitioners, shall abide by the results of any appeal that the Respondent may prefer against the orders dated 2nd December 2020 and the order dated 31st May 2021.

- VII. The Respondent has challenged above mentioned orders before the Hon'ble APTEL in appeal No 296 of 2022, 297 of 2022 and appeal No 298 of 2022 which are pending adjudication. It is pertinent to note that the APTEL has not granted any interim relief and the same continue to be binding on the Respondent.
- VIII. The petitioner has submitted that the Respondent has placed inconsistent and contradictory stands before this Commission to justify their wilful disobedience of the subject matter. While in their Review Petition No. 50 of 2021 filed before this Commission, the Respondent took a stand that it had failed to take the approval from the competent authority, ie., the Lt. Governor, in the Counter Affidavit filed before this Commission. The Respondent stated that the concerned officer had disobeyed the directions passed by the Lt. Governor and that the view of the Law and Finance Department of the Administration were not obtained before filing the reply.
- IX. In response to the query posed by this Commission on 21.09.2023, the Respondent had filed month-wise billing details of the Petitioner, which however were not correct / complete and the Respondent, for reasons best

known to them, chose to only present part calculation pertaining to one of the five meters registered under the Petitioner's name!

- X. The petitioner has prayed that the action be taken under section 142 and section 146 of Electricity Act 2003 for the deliberate contravention of the orders of the Commission with maximum penalty and directs the Respondent to refund the excess amount by the Hotels towards Electricity Tariff charged under Commercial category with immediate effect.

5. The Submissions of the Respondent in brief are as under: -

- I. That the District Industries Centre vide letter dated 02.03.2010 stated that as per the Micro, Small and Medium Enterprises Development Act, 2006, Tourism related activities including Hotels and Restaurants, registrable as MSME under service sector, are eligible for all facilities & incentives available to MSME and therefore should be charged as per rates applicable to industrial sector
- II. That the Respondent issued a circular stating that it was decided that the Hotels declared as industry by the Industries Department shall be charged Tariff applicable to Industrial consumers. The circular further stated that the Directorate of Industries had submitted a list of 10 Hotels presently declared as Industry.
- III. The A&N Administration vide letter dated 27.05.2011 conveyed its administrative approval for realizing power tariff under Industrial category from Hotels and Restaurants registered under Industrial Act.
- IV. The Commission vide tariff order dated 20th May 2019 based on the tariff petition filed by the Respondent herein directed to ensure applicability of tariff of Commercial category to all the Hotel establishments, failing which, the Commission may take an appropriate view considering the noncompliance of Commission's directions."

Accordingly, all Hotels were charged under Commercial category thereafter.

- V. The APTEL vide its order dated 21st May 2020 dismissed the appeal filed by Sea Shell Hotel and TSG Hotels & Resorts and granted liberty to the appellants to

approach the Commission in review under section 94 of Electricity Act 2003. The Commission vide its orders dated 2.12.2020 in review petition 30/2020 and 31/2020 directed the Respondent to charge the Hotels under Industrial category in place of Commercial category as directed by the Commission through its impugned order dated 20.05.2019.

- VI. The Hon'ble LG after perusing the order dated 02.12.2020 and the replies filed by the Respondent, observed that all relevant facts and examples of other UT's were not placed before the Commission. It was further observed that views of the Law Department and the Finance Department were not obtained before filing reply before the Commission.
- VII. The Hon'ble LG approved the tariff proposal for FY 2021-22 and also directed that submissions be made before the Commission that the Respondent intends to include Hotels under 'Commercial' category, as charging them under 'Industrial' category would have huge financial implication on the state exchequer.
- VIII. The Respondent has challenged the orders dated 2nd December 2020 in review petition No 30/2020 , 31/2020 and order dated 31st May 2020 in tariff order for FY 2021-22 before the APTEL in appeal No 296, 297 and 298 of 2022.
- IX. The Respondent has prayed that the current petition filed by the petitioner be temporarily withheld until the outcome of the appeal filed before the Hon'ble APTEL.

6. Commission's Analysis and Findings

The Commission has considered entire records placed before it. The Commission has also examined sections 142 and 146 of the Electricity Act 2003 under which this complaint/petition has been filed. The Commission has also examined sub-sections 1 & 6 of section 111 of the Electricity Act 2003.

Section 142 provides as under:

In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the

provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

Section 146 provides as under:

Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one lakh rupees, or with both in respect of each offense and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offense:

Section 111 provides as under:

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

The Commission has noted that the petitioner has stated that the Respondent has deliberately violated the directions/orders dated 2nd December, 2020 passed in review petition 30/2020, and 31/2020 and order dated 31st May, 2021 in tariff petition of FY 2021-22 wherein the Commission has directed that Sea Shell Hotels and Resorts, Aparupa Sands Marina Hotel and Hotels registered under MSMED shall be charged under Industrial category. However, in spite of clear directions of the Commission in the said orders the Respondent has charged commercial tariff from these hotels.

The Commission has further noted that the contravention on the part of the Respondent regarding above mentioned orders is for a limited period i.e. when the Commission has specified a separate category of tariff for Hotels & Resorts in Tariff order for FY 2022-23.

The Commission has further noted that the Circular issued by the Administration of Andaman and Nicobar Islands to the Department on 10.10.2014 categorically directed the Department to extend Industrial Tariff to certain hotels, including the Petitioner herein. When the Petitioner in furtherance of the order dated 2.12.2020 and order dated 31.05.2021 of the Commission, paid the tariff as per the Industrial category, they were threatened with disconnection notices. This conduct was assailed before the Hon'ble Calcutta High Court. In its order Dated 22nd November 2021 the court ordered that the electricity supply to the petitioner (Hotel Sea Shell) shall not be disconnected during subsistence of its 31st August 2021 order. The petitioner however, continue to pay the demand raised based on the number of units at the Industrial rate. The Respondent shall communicate the outstanding dues to the petitioner at the Industrial rate within a period of 7 days from today.

The Calcutta High Court in its order dated 31st August 2021 has ordered that

“the Respondent is now taking steps to prefer an appeal against the Commission’s order dated 2nd December 2020 before the APTEL in New Delhi.

This Court is of the view that since there is a subsisting order by a statutory authority, which has not been interfered in review, the respondents are bound to comply with the same and shall do so forthwith.

The arguments of the counsel for the respondents that the petitioners have alternative remedy of seeking penalty and imprisonment under Section 146 of the Electricity Act and hence a writ Court should not entertain the writ petition, is not accepted.

A penalty order for non-compliance, does not effectively constitute an alternative remedy. Even assuming for the sake of arguments that it does, this Court cannot allow a statutory authority to continue to flagrantly violate the directions of the first executive authority, which has been confirmed in review.

The writ petitioners shall pay the respondents against the number of units consumed after December 2, 2020 as per the bills raised, only as per the industrial rate described and not the commercial rate. Upon payment of the said amount within a period of one month from date, the respondents shall not disconnect the electricity line of the petitioners.

Needless to mention that the payment by the writ petitioners at the industrial rate and any claim that the respondents may have against the writ petitioners, shall abide by the result of any appeal that the respondents may prefer against the order dated December 2, 2020 and the order passed in Review dated August 23, 2021.

With the aforesaid observations, the writ petition is disposed of.”

The Commission is relying on the order of the Hon'ble Supreme Court dated 9.08.2019 in the matter "State of Andhra Pradesh and Ors Versus B Ranga Reddy (D) by L.Rs and Ors " (Civil Appeal No 17486, 17487 of 2017 and Contempt petition (Civil) No 204 of 2014)

The challenge in the present appeals is to an order passed by the High Court of judicature of Andhra Pradesh at Hyderabad on October 01, 2012 whereby an appeal filed by the Appellants was found to be hit by the principle of res judicata and was dismissed.

The brief facts leading to the present appeals are that three separate suits were filed against the Defendants including the State: first, Original Suit No. 274 of

1983 in respect of 6.08 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; second suit bears Original Suit No. 276 of 1983 in respect of 3 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village, and third suit bears Original Suit No. 141 of 1984 which has been filed in respect of land measuring 19.23 guntas in respect of land falling in Survey Nos. 49 and 50 in Rasoolpura Village. The stand of the State in all the suits is that the land in all the three suits falls in Survey No. 43 of Village Bholakpur, which is a Government Shikkam Talab measuring 145 acres 35 guntas, popularly known as Hussain Sagar Talab. All three suits were tried together.

The said judgement of the High Court of Andhra Pradesh has no applicability to the facts of the present case as the decree in Civil Suit No. 274 of 1983 or 276 of 1983 has not attained finality and the same a still subject matter of appeal before the First Appellate Court wherein, the findings recorded by the trial court can be set aside while maintaining ultimate decree of dismissal of the suit. Therefore, in the absence of finality of judgments, there cannot be any question of such finding binding in the third suit.

Ld Counsel for the Respondents vehemently argued that res judicata in terms of Section 11 of the Code is not about a decree but to a finding in the former suit. It is argued that the first suit and second suit are the former suits in which the findings were written against the State, therefore, such findings will operate res judicata. The said argument proceeds on the basis that the Court would mean the High Court and, therefore, finding in the first and second suit would bar the subsequent proceedings arising out of the third suit in appeal. We find that such an argument is not tenable. As mentioned above, that the decree of dismissal of the first and second suit has not attained finality which are under challenge by the Plaintiffs and the Defendants-State are entitled to dispute findings on Issue No. 1 even without filing cross objections or in terms of Order XLI Rule 33 of the Code that the decree of dismissal of suit on the grounds other than what weighed

with the learned trial court. All the issues are open for consideration before the First Appellate Court.

As per facts on record, Original Suit Nos. 274 of 1983 and 276 of 1983 have been dismissed. The Plaintiffs are in appeal in both the suits before the First Appellate Court. Therefore, such decree including the finding on Issue No. 1 has not attained finality as the Appellate Court is seized of the entire controversy including the findings of fact on Issue No. 1. The Defendants have a right to dispute such findings by filing cross-objections Under Order XLI Rule 22 of the Code as amended in the year 1976 or even in the exercise of the powers conferred on the Appellate Court Under Order XLI Rule 33 of the Code.

The decree is of dismissal of the suit, whereas, the reasons for passing such decree is judgment as defined in Section 2(9) of the Code. In terms of Section 11 read with Explanation I, the issue in a former suit will operate as res judicata only if such issue is raised in a subsequent suit. Since, the issue of title has not attained finality, therefore, it is not a former suit to which there can be any application of Section 11.

In view of the above, we allow the present appeals, set aside the order passed by the High Court in the first appeal filed by the State, as the findings on Issue Nos. 1 and 2 in the first and second suit do not operate as res judicata. The pending applications, if any, shall stand disposed of.

From the above mentioned order dated 31st August 2021 of the Hon'ble High Court of Calcutta the Commission infers that the impugned orders of the Commission, in review petitions 30/2020, 31/2020 and tariff petition for FY 2021-22 have not yet attained finality as these impugned orders have been challenged before the Hon'ble APTEL and are pending for final disposal. The Commission is of the considered view that it is not correct to impose penalty under section 142 and section 146 of Electricity Act 2003 on the Respondent at this stage due to contravention of any of the provisions of the Act or the Rules or Regulations made thereunder or any directions/orders issued by the Commission.

The Commission's view that penalty should not be imposed on the Respondent at this stage is duly supported by the above mentioned order of the Hon'ble Supreme Court wherein it was held that the decree in Civil Suit No 274 of 1983 or 276 of 1983 has not attained finality as the same were still subject matter of appeal before the First Appellate Court.

In light of above discussions the petition is disposed off with the liberty to the Petitioner to approach the Commission after the issue attains finality.

Ordered accordingly.

Sd/-
(Jyoti Prasad)
Member (Law)

Sd/-
(Alok Tandon)
Chairperson