2020 INSC 230

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4304 OF 2007

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION CO. LTD. ....APPELLANT

VERSUS

UNION OF INDIA AND OTHER ....RESPONDENTS

J U D G M E N T

Arun Mishra, J.

1. The appeal has been preferred by Maharashtra State Electricity Distribution Company Limited (for short, 'the MSEDCL') against the order dated 30.5.2007, passed by Appellate Tribunal for Electricity (for short, 'the APTEL'), dismissing the appeal against the order dated 21.5.2004 passed by Maharashtra State Electricity Regulatory Commission (for short, 'the MERC'), quashing Circular No.602 dated 23.7.1998, Circular No.619 dated 25.5.1999, Circular No.627 dated 2.9.1999, Circular No.651 dated 19.9.2000 and Circular No.663 dated 5.10.2001, insofar as they purport to impose "take or pay" obligation and minimum off-take requirement as also of any additional tariff for captive power plant holders on the ground that there was no approval of the MERC constituted in terms of the provisions of the Electricity

Regulatory Act, 1998 (for short, 'the Act of 1998'). The aforesaid circulars dealt with Captive Power Plant Policy (for short, 'the CPP Policy'). The appellant-MSEDCL has been directed to make refund to respondent nos.3 to 7. The financial liability has been imposed upon the appellant-MSEDCL. The MERC was constituted on 5.8.1999. The appellant-MSEDCL had submitted all its circulars to MERC for approval and the MERC after four years has quashed the circulars with retrospective effect. The financial condition of the appellant-MSEDCL is not sound enough to sustain such kind of liability for refund. It was unable to pay a sum of Rs.504 crores as against liability to other parties.

2. Respondent no.3-M/s. NRC Ltd. initially had its two units on Plot No.E 23. Unit Nos.1 and 2 had a contract demand of 3500 KVA and 1800 KVA respectively. In 1995, an independent connection was sought by respondent no.3 for its Unit No.2. Representation was made that two units were separate units and on that basis, two independent connections were given. After that, respondent no.3 filed an application dated 5.4.1997 to set up a CPP of 7MW capacity. In respect of contract demand, it was proposed to retain total contract demand for 8-12 months after the CPP was fully operational and to surrender around 50% of the contract demand after that. Prayer was also made to provide stand-by power.

3. The Government of Maharashtra issued a notification dated 20.12.1997, whereby it empowered Maharashtra State Electricity Board (for short, 'the MSEB') to finalise the technical and commercial arrangements between captive power purchasers and their party purchasers. No objection certificate dated 7.1.1998 was issued by appellant-MSEDCL subject to the Condition No.4, which permitted respondent no.3 to decide the level of contract demand after the commissioning of the set and any changes for interconnection would be governed as per the Board's Condition of Supply framed from time to time and its policies as no rules were framed.

4. Circular No.602 dated 23.7.1998 was issued vesting power with the Board to permit the CPP holder for sale of their CPP power to any third party through the Board's grid, grant of permission to those persons to use their CPP power for self use only and to charge wheeling and transmission loss charges.

5. The Act of 1998 was enacted on 25.4.1998. Before that, field of electricity was regulated by Electricity Supply Act, 1948 (for short, 'the Act of 1948'). Section 49 of the Act of 1948 empowered the respective Electricity Boards to come up with their tariffs, which could have differential. Section 79(j) of the Act empowered the Board to make regulations pertaining to supply of electricity to the licensees under

Section 49. Section 44 further provided that for establishing the CPP unit, prior consent of the Board was mandatory. MSEB was regulating the field of CPP as per notifications issued by the Government and the provisions contained in the Act of 1948.

6. On 23.9.1998, respondent no.3 sought clubbing of the contract demand and subsequent reduction to 3000 KVA for both the units. The clubbing of two units would increase the total contract demand to 5300 KVA and would necessitate the installation of an EHV Line. Thus, the same could not be done. Respondent no.3 was not entitled to reduction of contract demand in view of the application dated 5.11.1997. Hence, it was not permitted as per letter dated 23.9.1998.

7. MSEB submitted a proposal on 4.5.1999 to the Government of Maharashtra for revision of its retail distribution tariff w.e.f. 1.6.1999, keeping in view the requirements of Section 59 of the Act of 1948. The proposal for revision of tariff was under consideration of the State Government in the year 1999. Still, no final decision was taken and the delay was owing to the imposition of Model Code of Conduct due to elections and on 5.8.1999 MERC was constituted. The Government advised the MSEB to submit proposal for tariff revision to Commission for its approval and accordingly, the proposal was submitted to the MERC.

8. Circular No.619 dated 25.5.1999 was issued by the Board to grant permission for installation of CPP for self use only, reduction in contract demand to CPP holders would not be permitted and levy of penal charges at the rate of 2 times/3 times the prevailing tariff to the CPP holders in their energy bills for over drawal of power on their agreed contract demand under planned/unplanned shutdown as stipulated in the Government of Maharashtra resolution dated 20.12.1997. On 29.8.1998, respondent no.3 had commissioned its CPP and withdrew its earlier application dated 18.6.1999 for reduction in contract demand and resubmitted two applications and sought reduction in contract demand of Unit No.1 from 3500 KVA to zero and increasing contract demand of Unit No.2 from 1800 to 3000 KVA. The fresh application could not be granted as the then existing policy of the appellant-MSEDCL was not to grant any reduction in contract demand to existing CPP holders as notified vide letter dated 18.6.1999.

9. Vide circular dated 2.9.1999, the policy contained in circular dated 25.5.1999 was partially modified insofar as it related to a reduction in contract demand. It permitted CPP holders to reduce contract demand to 2.5 MVA or 50% of the contract demand of 5 MVA or above. It was specifically provided that CPP holders with a contract demand of less than 5 MVA would not be permitted reduction in

contract demand. As respondent no.3 had two independent connections, each having a contract demand of less than 5 MVA, it was not entitled to reduction in contract demand. As per policy contained in the aforesaid circular, all the CPP holders were required to draw at least 25% energy of their monthly consumption from the appellant-MSEDCL and in case of drawal of less quantity of electricity, they would be billed for 25% of the energy. The energy supplied would be charged at the rate of 110% of the tariff applicable was the condition of supply for interconnection and stand-by power. Respondent nos.3 to 7 had sought stand-by power. The appellant-MSEDCL had invested huge amount for establishing the necessary infrastructure. It was incumbent upon the appellant-MSEDCL to keep available at all material time the requisite infrastructure for supply of electricity to respondent nos.3 to 7. The NOC was issued as per the prevailing policy subject to the condition of supply for paralleling connection or further changes in policy. Thus, circular dated 2.9.1999 was issued.

10. On 28.4.2000, the State Government issued a guidance to the appellant-MSEDCL to withdraw the said condition for compulsory drawal of 25% energy as it was not in line with the Government of Maharashtra policy decision as mentioned in the resolution dated 25.4.2000.

11. It was submitted on behalf of appellant-MSEDCL that MERC passed an order on 5.5.2000, pointing out that it would look into the matter of sale of surplus power by CPPs to MSEB at a later stage under Section 22(1)(c) of the Act of 1998. The Commission directed the MSEB to follow Section 44 of the Act of 1948 in its true spirit and clear all pending applications by 30.6.2000. Refusal to the captive units, on the other hand, was contradictory.

12. The appellant-MSEDCL modified their policy dated 19.9.2000 in line with Government of Maharashtra CPP Policy reflected in the resolution dated 25.4.2000 and withdrew the condition of compulsory drawl of 25% of the energy of MSEB grid by CPP holders prospectively with effect from 28.4.2000. No sanction for connecting the additional load of the unit at Plot No.E-1 to the CPP was granted. Respondent no.3, however, illegally connected the said load of the unit at Plot No.E-1 to the CPP.

13. On 31.8.2001, the appellant-MSEDCL submitted its proposals to MERC along with a tariff petition. The circulars dated 23.7.1998, 25.5.1999, 2.9.1999 and 19.9.2000 were submitted to MERC for its approval. MERC passed order dated 10.1.2002 on the tariff petition of the appellant-MSEDCL, in which it was held:

> "The Commission is of the opinion that the 'Captive Power Policy' is a policy matter under the jurisdiction of the Government of Maharashtra, and the Commission has very recently been conferred with additional powers under S. 22[2] of the ERC Act, 1998, which includes the power to aid and advise the GoM in the formulation of the State Power Policy. The Commission would not like to comment on the captive power policy at this stage, but would like to state that the MSEB has appended the captive power policy along with the Tariff Proposal for the information of the consumers, and the Commission's silence on this policy should not be taken as approval of the same."

14. Respondent nos.3 to 6 had filed writ petitions before the High Court. The High Court relegated them to MERC. It was not pointed out that there was a provision as to arbitration in case of dispute between the appellant-MSEDCL and CPP holders. It was also submitted that on 3.3.2004, MERC has passed an order in Case No.55 of 2003, in which it observed:

> "7. …The Commission was seized of the matter relating to the CPP Policy as a whole, but the previous Circulars continue to operate since the Commission had not kept them in abeyance, and they are also not the subject to challenge in the present proceedings."

15. Ultimately, vide order dated 21.5.2004, the MERC allowed the petition filed by respondent nos.3 to 7 and set aside the abovementioned circulars issued by appellant-MSEDCL from 1998 onwards on the issue of CPP. Even though MERC was not in existence at the time when certain circulars were issued, they have been quashed on the ground that no approval from MERC had been obtained. Aggrieved thereby, an appeal was preferred before the APTEL and the same was dismissed. Hence, the appeal.

16. It was submitted by the learned counsel appearing on behalf of appellant-MSEDCL that policy for CPP was evolved by the Government resolution dated 20.12.1995 onwards. Thus, circular dated 25.5.1999 provided for contract demand and "take or pay" obligations were result of the policies of the State Government. Circular dated 25.5.1999 provided for charging of energy drawn from the appellant-MSEDCL by CPP at the rate of 110% of the applicable tariff. It was altered to 125% vide circular dated 2.9.1999 of the energy from the appellant-MSEDCL of the monthly consumption based on preceding 12 months before the commissioning of CPP.

17. The MERC was established on 5.8.1999 though the Act came into force w.e.f. 25.4.1998. MERC observed that it was within the power of State to continue with or alter tariff related decisions/arrangements to decide about the continuance of tariff on the ground that CPP policy was in the domain of the State Government as observed in tariff order dated 5.5.2000 (Case No.1 of 1999), tariff order dated 10.1.2002 (Case No.1 of 2001) and order dated 3.3.2004 (Case Nos.55 and 56 of 2003). It was submitted that MERC was constituted on 5.8.1999, its approval was not required with regard to two circulars were issued before the said date. Reliance

has been placed on *Binani Zinc Limited v. Kerala State Electricity Board and Ors.,* (2009) 11 SCC 244.

18. It was also submitted on behalf of appellant-MSEDCL that it incurred costs for additional generation, strengthening of transmission network and distribution system and for establishing of EHV sub-station transformation. The appellant-MSEDCL has taken various decisions. The circulars had not imposed an additional financial burden on CPP holders. The appellant-MSEDCL agreed to allow CPP holders, who consented for expansion load, for using against the existing load and also reduction in contract demand, as such, it is clear that financial health was affected.

19. It was further submitted on behalf of appellant-MSEDCL that circulars as per the policy of the State Government could not have been invalidated. The Commission could have passed appropriate order on merits concerning matters after its constitution. It could not have quashed the circulars issued before its establishment. The appellant-MSEDCL had the power to alter the tariff when the Commission was not established and the Government has authorised it also. Under Section 44 of the Act of 1948, the CPP industry would be bound by the policy of the Board and directions of the Government of Maharashtra. The APTEL has failed to consider that circular dated 2.9.1999 does not amount to a revision of tariff, it pertained to the

policy regarding the CPP. The APTEL did not consider that huge amount has been spent on infrastructure which was to be kept available for the standby facility. The Government of India letter dated 22.8.1994 contemplated both the units of respondent no.3 as separate units. The policy decision dated 20.12.1997 of the Government of Maharashtra has also not been considered. The APTEL failed to take note of the letter dated 13.10.1999 issued by the appellant-MSEDCL to respondent no.3 in respect of unauthorised act of connecting supply from Plot No.E-23 to Plot No.E-1 without any sanction from the appellant-MSEDCL. The APTEL also failed to consider that circulars, which have been quashed, were only explanations/clarifications to the earlier notifications coercing the policy of CPPs.

20. It was submitted that the APTEL did not consider order dated 10.1.2002 passed by MERC, in which it observed that CPP is a policy matter under the jurisdiction of the Government of Maharashtra and the Commission has been recently conferred with the additional power under Section 22(2) of the Act of 1998, which includes the power to aid and advise the Government of Maharashtra in the formulation of the State Power Policy. The Commission kept silent on CPP at that stage. It was further submitted that Commission mentioned in the order that it was conferred with the powers under Section 22(2) of the

Act of 1998 recently, thus, the Commission should not have struck down the CPP and the circulars regarding that.

21. The copies of the circular were forwarded as in the case of all other circulars issued by appellant-MSEDCL to its field officers. The appellant-MSEDCL had the power to alter the tariff, the circular dated 25.5.1999 was authorised one, which was partially modified on 13.8.1999. One of the modifications was that CPP holders were required to draw at least 25% of their monthly consumption from the appellant-MSEDCL. There was no additional financial burden imposed on CPP holders. The policy contained in the circular was a matter of economic policy. It was also submitted on behalf of appellant-MSEDCL that all the circulars relating to CPP generation were submitted to Tribunal for approval. The Tribunal did not decide the validity thereof vide order dated 10.1.2002. The Tribunal could not have declared the said circular to be bad in law only on the ground that prior approval of the Tribunal was not taken without deciding the issues on merits. Even if the Commission had the power, it ought to have gone into the merits of the case and reasonableness of the claim made by the appellant-MSEDCL as reflected in circulars. The Government's advice dated 28.4.2000 was non-binding advice upon the appellant-MSEDCL under Section 78A of the Act of 1948.

22. It was submitted on behalf of respondents that after enforcement of the Act, there was no power with MSEB to issue circulars under the Act of 1998. The Commission had sole and exclusive power to frame the tariff. Thus, no case for interference is made out in the appeal. The Government also directed MSEB to cancel its circular as it was not in consonance with the policy of the State. Circulars could not be said to be enforceable. The change in policy as per circular dated 2.9.1999 was not informed; thus, the exercise of power was arbitrary and void. The levy of tariff for minimum consumption at 25% of the energy consumed in the preceding 12 months before the commissioning of the CPP at the rate of 110% of the tariff is wholly and utterly unreasonable. Therefore, it was unsustainable. It was also submitted that neither Section 44 nor any other provisions of the Act of 1948 enabled MSEB to impose any condition in the grant of consent, such as maintenance of contract demand at a particular level. The Board cannot unilaterally revise the charges in breach of such stipulations fixing the special tariff. A notification cannot be inconsistent with the terms of the agreement. If subsequent notification is quashed, it will not revive earlier notification.

23. An affidavit in compliance with the order dated 11.7.2019 has been filed on behalf of appellant-MSEDCL stating that supply of electricity, made available, was used by respondents to manufacture

their products. The cost incurred on production has been passed on to the buyers/consumers buying their products. Hence, it would tantamount to unjust enrichment in case a refund is ordered.

24. The first question for consideration is whether the Commission could have quashed circulars issued by the appellant-MSEDCL before its formation. The Commission was constituted under the Act of 1998 on 5.8.1999. The circular issued before that could not have been quashed on the ground that MSEB had no power to issue them without the approval of the Commission. The decisions in that regard of Commission as well as of APTEL are liable to be set aside. In *Binani Zinc Limited* (supra), this Court held that before Commission came into existence, the power was to be exercised by the State Electricity Board. This Court held thus:

-

> **"31.** The State Electricity Boards are entitled to frame tariff in terms of the provisions contained in the 1948 Act. The tariff so framed is legislative in character. The Board, as a statutory authority, is bound to exercise its jurisdiction within the four corners of the statute. It must act in all fields, including the field of framing tariff by adopting the provisions laid down in the 1948 Act or the Rules and the Regulations framed thereunder.
>
> **32.** It is one thing to say that while framing tariff the Board can only take into consideration the provisions laid down in the Schedule appended to the Act and/or the directions contained in the policy decisions issued by the State as also other statutory principles governing the same but then a tariff framed by it cannot be held to be ultra vires only because it did not take into consideration certain principles laid down in clauses (*c*) to (*g*) of sub-section (2) of Section 29 of the 1998 Act.
>
> ***

> **41.** We have, however, no hesitation in finding that the State Electricity Board had the requisite jurisdiction to revise a tariff till such time as the Commission was constituted and the purposes of the 1998 Act could be achieved through it. Till the time the Regulatory Commission was not constituted by the State of Kerala, the power to determine tariff remained with the Board under the Electricity (Supply) Act, 1948 as it was not repealed by the Electricity Regulatory Commissions Act, 1998. Parliament could not have intended to bring about a situation where no authority would be empowered to determine the tariff between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the tariff."

The decision of *BSES Ltd. v. Tata Power Co. Ltd.,* (2004) 1 SCC 195, has been explained in *Binani Zinc Limited* (supra).

25. Concerning circular dated 2.9.1999, which remained in force till 28.4.2000, the Commission as well as the APTEL were required to consider impact of Commission earlier order passed on 10.1.2002 and also its observations made in the said order that CPP is a policy matter and that Commission was recently conferred with the power under Section 22(2) of the Act of 1998, it ought to have gone into the merits of the claim. It was also pointed out on behalf of appellant-MSEDCL that it had submitted circulars for approval to Commission, which has not gone into the merits of the subject matter and later quashed circulars on the ground of competence. The MSEDCL filed circulars along with tariff proposal for approval as that was an essence of the tariff.

26. It has also been pointed out that in subsequent orders also, circulars as to CPP were relied upon by the Commission. It was incumbent upon the Commission to consider the effect of its orders and the prayer made by the appellant-MSEDCL to consider merits of various circulars while fixing the tariff.

27. As dispute pertains to the period from 2.9.1999 to 28.4.2000, and it is apparent from the additional affidavit filed by the appellant-MSEDCL that the respondents used supply of electricity to manufacture their products. The cost incurred on production has been passed on to the buyers/consumers buying their products. Hence, it would tantamount to unjust enrichment in case a refund is ordered. In the peculiar facts of the case, as the Commission earlier opined in order dated 10.1.2002 that CPP is a policy matter and it did not decide as to the merits of subject matter as prayer for approval was made by the appellant-MSEDCL. The Commission observed that it would consider the matter in the future, but later on, without considering on merits the reasonableness of the demand, the Commission quashed the circulars. It is apparent that the liability was passed on to the buyers/consumers by the respondent nos.3 to 7 as electricity was used to manufacture their products sold in the market, working out the price based on expenditure. It would not be appropriate in the peculiar facts of the case to direct refund to be

made by the appellant-MSEDCL of the amount recovered by it as it would tantamount to unjust enrichment. Thus, in the peculiar facts and circumstances of the case, it is not considered appropriate to remit the matter to decide the dispute on merits after two decades for the period from 2.9.1999 to 28.4.2000, during which circular dated 2.9.1999 was in force.

28. Consequently, we set aside the orders passed by the Commission as well as the APTEL and hold that circulars and the policy decisions issued before the establishment of the Commission were illegally set aside and in the peculiar facts and circumstances of the case we set aside the order concerning refund of amount recovered by MSEB.

29. The appeal is allowed to the aforesaid extent. The parties are directed to bear their own cost incurred.

.....J.
(Arun Mishra)

.....J.
(M.R. Shah)

.....J.
(B.R. Gavai)

New Delhi;
February 28, 2020.