

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal Nos. 111, 114, 119, 120, 127, 128, 129,
130, 131, 141 of 2010**

Dated: 11-01.2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**Appeal No. 111 of 2010
I.A. Nos. 149 & 162 of 2010**

In the matter of:

**The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

.... Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002**

.... Respondents

**Counsel for Appellant(s): Mr. R.S.Pandiyaraj
Mr. Anil Kaushik,
Mr. Arunima Dwivedi**
**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 114 of 2010

In the matter of:

**The South India Spinners Association,
Represented by its President,
Mr. G. Soundararjan,
Flat No. 103, A Block,
Raheja Centre,
1073 & 1074, Avinashi Road,
Coimbatore-641 018,
Tamil Nadu.**

.... Appellant(s)

Vs.

- 1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**
- 2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**
- 3. Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound,
Dindugul-624 003,
Tamil Nadu.**

... Respondents

**Counsel for Appellant(s): Mr. M.S.Kriashnan,Sr.Advocate
with Mr. Senthil Jagadesan
Vipin Nair & Mr Jaykumar
Mr. Sriram**

**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 119 of 2010

In the matter of:

**Tamil Nadu Electricity Consumers' Association,
Represented by its President,
No. 8/732, Chamber Towers,
Avinashi Road,
COIMBATORE-641 018.**

.... Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**

... Respondents

**Counsel for Appellant(s): Mr. N.L. Rajah, Mr. Nikhil Nayyar
Mr. Arun Anbumani &
Mr. TVS Radhavendra**

**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 120 of 2010

In the matter of:-

**Madras Steel Re-Rollers Association,
Represented by its President,
C-404, Shivalaya Building,
Ethirajsalai,
Chennai-600 008,
Tamil Nadu.**

....Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**

**3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

.... Respondents

**Counsel for Appellant(s): Mr. A.R.L. Sundaresan, Sr. Adv. with
Mr. R.S. Pandiyaraj**

**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed Rafi
for TNEB**

Appeal No. 127 of 2010
I.A. Nos. 172 & 173 of 2010

In the matter of:

**M/s. SCOPE INTERNATIONAL PVT. LTD.,
Represented by its Company Secretary,
H.T.S.C. A/c. 352,
No. 1/364, Old Mahabalipuram Road,
Padur Village,
Kelambakkam,
Kancheepuram District, Chennai-600 103. Appellant(s)**

Vs.

- 1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**
- 2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**
- 3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu. Respondents**

**Counsel for Appellant: Dr.A.Francis Julian,Sr. Advocate
for Mr. Danish Zubair Khan,
Advocate**

**Counsel for Respondent: Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 128 of 2010
I.A. Nos. 174 & 175 of 2010

In the matter of:

**Mr. R. Ramanathan,
H.T.S.C. A/c. 2445,
Senar Riviera,
Mo. 70, Spur Tank Road,
Chennai-600 031,
Tamil Nadu**

.... **Appellant(s)**

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmipathy Salai,
Marshall Road,
Chennai-600 002.**

**3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

.... **Respondents**

**Counsel for Appellant: Dr.A.Francis Julian,Sr. Advocate
for Mr. Danish Zubair Khan,
Advocate**

**Counsel for Respondent: Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 129 of 2010
I.A. Nos. 176 & 177 of 2010

In the matter of:

**M/s. SCOPE International Pvt. Ltd.
H.T.S.C. A/c. 2289,
No. 1, Haddows Road,
Chennai-600 006,
Tamil Nadu**

.... Appellant(s)

Vs.

- 1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**
- 2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**
- 3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

Respondents

**Counsel for Appellant: Dr.A.Francis Julian,Sr. Advocate
for Mr. Danish Zubair Khan,
Advocate**

**Counsel for Respondent: Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed
Rafi for TNEB**

Appeal No. 130 of 2010
I.A. Nos. 178 & 179 of 2010

In the matter of:

**M/s. R.K. Investments,
H.T.S.C. A/c. 2281,
No. 476, Anna Salai,
Chennai-600 034
Tamil Nadu.**

.... Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**

**3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

.... Respondents

**Counsel for Appellant. Dr.A.Francis Julian,Sr. Advocate
for Mr. Danish Zubair Khan,
Advocate**

**Counsel for Respondent: Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed Rafi
for TNEB**

Appeal No. 131 of 2010 &
I.A. Nos. 180 & 181 of 2010

In the matter of:

**M/s. Raheja Towers Owners Association,
Represented by its Chief Secretary,
Mr. M. Senthilnathan,
H.T.S.C. A/c. 2354,
No. 177, Anna Salai,
Chennai-600 002,
Tamil Nadu.**

.... Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshall Road,
Chennai-600 002.**

**3. The Tamil Nadu Spinning Mills Association,
Represented by its Chief Advisor,
No. 24, 11th Cross Street,
Thiruvalluvar Nagar,
Spencer Compound, Dindigul-624 003
Tamil Nadu.**

.... Respondents

**Counsel for Appellant(s): Dr. A. Francis Julean, Sr. Adv.
Mr. Danish Zubair Khan**

**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed Rafi
for TNEB**

Appeal No. 141 of 2010

In the matter of:

**Sundram Auto Components Ltd.,
Plastic Division,
Represented by its Vice-President,
Having Office at Plastic Division,
Belagondapalli,
Hosur-635 114.**

....Appellant(s)

Vs.

**1. Tamil Nadu Electricity Board,
Rep. by its Chairman,
No. 144, Anna Salai,
Chennai-600 002.**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19-A, Rukmani Lakshmipathy Salai,
Marshall Road,
Chennai-600 002.**

....Respondents

**Counsel for Appellant(s):Mr. M.S.Krishnan,Sr.Adv.
with Mr. Vipin Nair & Mr. P.B. Suresh**

**Counsel for Respondent (s): Mr. P.S. Raman, Advocate General
Tamil Nadu & Mr. H.S. Mohamed Rafi
for TNEB**

JUDGMENT

PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

**The Appellants, The HT Industrial and
Commercial Consumers aggrieved by the order dated**

4.5.2010 passed by the Tamil Nadu State Commission, have filed all these Appeals. By this Order, the State Commission dismissed the petitions in M.P. nos.4 and 7 of 2010, filed on behalf of the Appellants holding that the Tamil Nadu Electricity Board, 1st Respondent herein is entitled to collect Excess Demand Charges and Excess Energy Charges from H.T. Industrial and Commercial Consumers, the Appellants herein during the evening peak hours with respect to the quota fixed for the evening peak hours.

2. Since all these Appeals involve the same issues arising out of the same impugned order, a common judgment is being rendered.

3. The facts which are relevant for the disposal of these Appeals are given below:

- (i) The Appellants are the HT Industrial and Commercial consumers of electricity. The 1st Respondent is the Tamil Nadu Electricity Board which supplies electricity to the consumers. The 2nd Respondent is the Tamil Nadu Electricity Regulation Commission (State Commission).**
- (ii) The Government of Tamil Nadu issued a Notification dated 22.10.2008 putting restrictions on the consumption of power relying on Regulation 38 of the Tamil Nadu Electricity Distribution Code 2004 and directing the Tamil Nadu Electricity Board to impose 40% demand and energy consumption restriction on HT Industrial and Commercial Consumers with effect from 1.11.2008. The Notification also stipulated that all HT industrial and commercial consumers should not draw power during the evening peak**

hours from 6 P.M. to 10 P.M. and in case of violation of restriction by consumers, TNEB would disconnect service connection for 48 hrs. In pursuance of the above said direction, the Tamil Nadu Electricity Board imposed 40% cut from 1.11.2008 onwards on Industrial and Commercial consumers of electricity including the Appellants. Accordingly, the demand quota and energy quota were revised. However, the HT Industrial/commercial consumers were allowed 5%/10% of quota fixed for demand and energy during the evening peak hours for essential lighting and security purposes.

- (iii) While so, Tamil Nadu Electricity Board on 5.11.2008 filed a petition in M.P. No.42 of 2008 before the State Commission seeking necessary amendment to the Tariff Order dated 15.3.2003**

as well as to the Tamil Nadu Electricity Supply Code and praying for the permission for collecting Excess Demand and Excess Energy Charges for HT Industrial & Commercial Consumers at 5 times the normal rate consumption exceeding demand and energy quota fixed for excess demand and 4 times the normal rate for excess energy for enforcing effectively various restrictions and control measures on the basis of the Government Notification dated 22.10.2008.

- (iv) The State Commission entertained this petition and conducted the enquiry by following the requisite procedures. A public notice was also issued by the Board regarding the consumption restriction and proposed levy of Excess Demand and Excess Energy charges. Ultimately, the State**

Commission passed the order dated 28.11.2008 giving direction to the Electricity Board to collect the Excess Demand Charges and Excess Energy Charges at 3 times the normal rate from both HT Industrial and Commercial Consumers from the date of this order. The State Commission also accepted the proposal of TNEB to restrict demand of HT industrial and commercial consumers during the evening peak hours from 6 P.M. to 10 P.M. to 5% & 10% respectively. In case of violation of the restrictions of demand and energy the consumer would be liable to force the restricted demand of 5% or 10% as the case may be for the following 48 hrs.

- (iv) Having not been satisfied with the order of the State Commission, the Tamil Nadu Electricity**

Board filed a Review Petition in R.P. No.2 of 2008 in December, 2008 before the State Commission praying that the Excess Demand Charges may be ordered at a rate 5 times the normal rate instead of 3 times the normal rate for the violation of Restriction and Control Measures and such charges should be made applicable from 1.11.2008, the date of imposition of restriction.

- (v) However, the State Commission was not inclined to grant such relief. Consequently, the said Review Petition was dismissed by Order dated 24.12.2008. While dismissing this petition, the State Commission observed that the Excess Demand Charges and Excess Energy Charges are leviable in addition to the penalty of reduction of electricity supply to 5% or 10% during the**

following 48 hours for violation of the Restrictions and Control Measures.

- (vi) In the meantime, i.e. on 15.12.2008, the State Commission made an amendment in Regulations 4 and 5 of the Principal Supply Code providing for the levy of Excess Demand Charges and Excess Energy Charges during restriction and control of supply.**
- (vii) While the matters stood thus, Tamil Nadu Electricity Board after a lapse of more than about 10 months from the date of dismissal of the Review Petition, i.e.24.12.2008 suddenly started levying penalty for Excess Demand & Energy consumption of electricity during evening peak hours in excess of the peak hour restriction. This levying of penalty was done without any notice issued to the Appellants.**

(viii) Aggrieved by the said levy of penalty, some of the consumers including the Appellants filed the Writ Petitions before the High Court of Madras. Ultimately, the High Court of Madras in November, 2009 passed the orders setting aside levy of penalty and remanding the matter to the Tamil Nadu Electricity Board to pass orders afresh after giving due notice to the Appellants and hearing them.

(ix) Accordingly, Tamil Nadu Electricity Board once again issued the demand notices to the consumers. Some of the Appellants again approached the High Court of Madras and filed Writ Petition challenging the said notices. The Hon'ble High Court on 10.2.2010, after hearing the parties again set aside all such demand notices and transferred the Writ Petition to the

Tamil Nadu State Commission and requested the State Commission to consider the issue raised in the Writ Petition and pass appropriate orders after giving opportunity of hearing to the Appellants as well as to the Electricity Board.

- (x) In the meantime, some of the Appellants have filed petitions before the State Commission in M.P. Nos. 4 of 2010 and 7 of 2010 in January, 2010 praying for punishing the Tamil Nadu Electricity Board under Sections 142 and 146 of the Electricity Act, 2003 for having levied the penalty for exceeding the quota during evening peak hours in violation of Rule 38 of the Electricity Supply Code and the order dated 28.11.2008 passed by the State Commission in M.P. No.42 of 2008.**

(xi) The State Commission after hearing the parties concerned passed a Common impugned Order on 4.5.2010 dismissing both the petitions, i.e. M.P. Nos. 4 of 2010 and 7 of 2010 holding that Tamil Nadu Electricity Board is entitled to impose the Excess Demand Charges and Excess Energy Charges during evening peak hours also in excess of peak period quota as it was in consonance with the earlier order dated 28.11.2008. On being aggrieved over the same, the Appellants being the HT Industrial and Commercial Consumers have filed these Appeals.

4. The learned Counsel for the Appellants while challenging the Common impugned order have urged the following contentions:

(i) The State Commission has no jurisdiction and authority to give permission or to approve any

levy on Excess Demand and Excess Energy Charges. None of the provisions in the Act give power to the State Commission to impose such levy which is penal in nature. The impugned levy without any power and that too of a penal nature, as per the order dated 4.5.2010 is not sustainable as the required Tariff Procedure had not been followed.

- (ii) The State Commission's order dated 28.11.2008 in M.P. No.42 of 2008 does not authorize levy of Excess Demand Charges and Excess Energy Charges in the event of violation of Restrictions and Control Measures during the evening peak hours. The order dated 28.11.2008 only allows Excess Demand Charges and Excess Energy Charges for violation of 40% cut during non-peak hours. The clarification and interpretation made**

by the State Commission in the impugned order dated 4.5.2010 about the earlier order dated 28.11.2008 is not in consonance with the spirit of the said order.

(iii) Even assuming that the Electricity Board has got the power to demand Excess Demand Charges and Excess Energy Charges for exceeding evening peak hour restriction in pursuance of the order passed by the State Commission on 28.11.2008, the Electricity Board has not taken immediate steps to collect those charges from the consumers. They kept silent for about 10 months. Only after 10 months, the Board suddenly started issuing bills claiming Excess Demand Charges and Excess Energy Charges. This conduct on the part of the Electricity Board should be construed that the Electricity Board

has waived its rights of collecting the said charges from the consumers.

- (iv) Even assuming that the State Commission or the Electricity Board in pursuance of the order of the State Commission dated 28.11.2008 has got powers to collect Excess Demand Charges and Excess Energy Charges, such powers and right would come into effect only prospectively. The State Commission cannot pass order giving effect to the permission granted by the State Commission retrospectively, i.e. from 28.11.2008 through its order dated 4.5.2010. At the most, this order would give effect only prospectively, i.e. from 4.5.2010 and not retrospectively.**

To support the above contentions, the Appellant have cited the following authorities:

- 1. 1990 (1) SCR 909 – Sita Ram Sugar Co. Ltd Vs. UOI**
- 2. AIR 1998 SC 1731 – State of UP Vs. Renu Sagar**
- 3. 2010 (3) Scale 55 – PTC India Vs. Central Commission**
- 4. 2007 Energy Law Report (APTEL) 1592 - Spencer Retail Limited Vs. Maharashtra State Commission (Tribunal) (Appeal No.146/2007 dated. 19.12.2007)**
- 5. (2007) Energy Law Report (APTEL) 116 – Vidarba Industries Association Vs. Maharashtra Distribution Co. (Appeal No.158/2006 dt. 19.10.2006;**
- 6. 2007 (5) SCC 77 – Vice Chancellor MD University Vs. Jahan Singh**
- 7. 2009 (2) SCC 589 – Panchi Devi Vs. State of Rajasthan**

- 8. (2009) 16 SCC 659 – Tata Power Co. Ltd Vs. Reliance Energy Ltd.**
- 9. (2008) 17 SCC 183 – Punjab State Electricity Board Vs. SIEL Ltd.**
- 10. (1981) 1 SCC 600 – Laxmi Khandsari Vs. State of UP**
- 11. (2009) 3 SCC 754 – Batri Kedar Paper Pvt Ltd Vs. UP State Commission**
- 12. (2009) 6 SCC 235 – UP Power Corporation Ltd Vs. NTPC**
- 13. 2009 (11) SCC 556 – Central Commission Vs. Gajender Haldia**
- 14. (1010) 4 SC 603 – PTC India Ltd Vs. Central Commission**
- 15. 2005 (5 SCC 390 – Shakuntala Devi Vs. Kamla & ors.**

**16. 2003 (6) SCC 230 – Dwarka Pd. Agarwal Vs. BD
Agarwal**

**17. (2004) 1 SCC 497 – Ramnik Ballabhdas
Madhwani Vs. Tara Ben Parvin Lal Madhvani**

**18. 2005 (3) SCC 232 – Sona Pit Cooperative Sugar
Mills Ltd Vs. Ajit Singh**

**5. Refuting the contentions raised by the Appellant,
the Learned Senior Counsel Mr. P.S. Raman, Advocate
General of Tamil Nadu for the Respondent, namely,
Electricity Board has made the following reply
submissions:**

**(a) Sections 23, 30, 45, 50, 61, 62, 80 and 86
of The 2003 Act and the Distribution Supply
Code would provide powers to the State
Commission to issue such direction for enforcing
Restrictions and Control Measures and for
levying Excess Demand Charges and Excess**

Energy Charges in case of any violation by HT consumers.

(b) The State Commission imposed Restrictions and Control Measures in view of the acute shortage of power and in order to ensure equitable distribution of available power among the general public as suggested by the Electricity Board on the basis of the directions given by the State Government. Therefore, there is no merit in the contention urged by the Appellants to the effect that the State Commission nor the Electricity Board have no power to direct or to collect Excess Demand Charges and Excess Energy Charges. This is not penalty. The State Commission by the order dated 28.11.2008 in M.P. No.42 of 2008 and the order dated 24.12.2008 passed in review Petition No.2/2008

specifically held that the various provisions contained in the Regulations as well as the relevant Sections of the Electricity Act and the Supply code confer the power to levy and collection of the Excess Demand Charges and Excess Energy Charges from the HT consumers.

(c) Further, the Supply Code also has been amended by Order dated 15.12.2008. Admittedly, neither the order dated 28.11.2008 nor the amendment order dated 15.12.2008 nor the order dated 24.12.2008 passed in the Review Petition have been challenged by the Appellants before the Appellate Authority. Therefore, the orders referred to above have become final and conclusive.

(d) The question of waiver does not arise in this case. There is no material placed before the

Commission to show that the Electricity Board has voluntarily surrendered its rights so as to establish that there is a waiver. Further, the Electricity Board is well within its rights to claim the said charges from the consumers within two years under Section 56 of the Act. It is settled law that the issue of estoppel or the waiver as against the statute would not be applicable.

(e) The contention urged by the Appellants in regard to retrospective effect is not correct. As a matter of fact, the order passed by the State Commission in M.P. No.42/2008 on 28.11.2008 would make it clear that the permissions had been granted on 28.11.2008 itself permitting the Electricity Board to collect those charges from the date of the order. As such, only prospective

effect has been given by the State Commission from the date of the order, namely, 28.11.2008.

On behalf of the Respondents, the following authorities have been cited:

- 1. (2004) 8 SCC 1 – Kirshna Bahadur Vs. Purna Teatre**
 - 2. (2001) 5 SCC 8 – Sikkim Subba Associates Vs. State of Sikkim**
 - 3. (2009) Energy Law Report (APTEL) 2010**
 - 4. (2009) 1 SCC 44 BSES Ltd Vs. Tata Power C. Ltd.**
 - 5. (2009) 9 SCC 54 Uttrakhand Power Co. Vs. ASP Sealina Products Ltd**
 - 6. (2009) 12 SCC 73 – Bengal State Electricity Board Vs. Gajinder Haldia.**
- 6. In the light of the rival contentions, the following questions would arise for consideration:**

- I) Whether the State Commission has the power under the provisions of the Electricity Act, 2003 or under the Rules and Regulations framed thereunder to permit the Tamil Nadu Electricity Board for imposition of Excess Demand and Energy Charges for exceeding the restriction in demand and energy consumption when the same was in the nature of penalty?**
- II) Whether the State Commission was justified in not considering the fact that even assuming that the Electricity Board had powers to levy Excess Demand Charges and Excess Energy Charges in pursuance of the order dated 28.11.2008, passed by the Commission, when they have failed to exercise that right immediately in the first week of the power cut period, i.e. 1.11.2008 itself, the Electricity**

Board was clearly estopped from making any claim for Excess Demand Charges and Excess Energy Charges for exceeding evening peak hour restriction as they waived their right?

III) Whether the imposition of levy of Excess Demand and Excess Energy Charges, even if permissible, could be given retrospective effect or it ought to have been restricted and made prospectively applicable?

7. Let us now discuss each of these issues:

(i) The 1st issue is relating to the power of the State Commission and the right of the Electricity Board to collect Excess Demand Charges and Excess Energy Charges. At this stage, it is worth while to refer to the various provisions of the Act and Regulations providing

for the said powers to the State Commission and to the Electricity Board.

The Respondent-1 has brought to our notice the various provisions to substantiate their plea that State Commission has got powers to permit the Electricity Board to collect those charges. Section 23 of the Act provides power to the State Commission to regulate supply, distribution and consumption of electricity so as to maintain the efficient supply and for securing equitable distribution of electricity. Section 23 of the Electricity Act, 2003 is reproduced below:

“Section 23. (Directions to licensees):

If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply,

securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

Under Section 30 of the Act, State Commission shall facilitate and promote transmission, wheeling for the transmission and supply of electricity by economical and efficient utilization of electricity.

Section 30 of the Act is reproduced hereunder:

***“Section 30. (Transmission within a State):
The State Commission shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity.”***

Under Section 45 of the Act, the power to recover charges is provided to the State Commission whereby the fixation of tariff from time to time is

contemplated. The said Section 45 is reproduced below:

“Section 45. (Power to recover charges): --- (1) Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 shall be in accordance with such tariffs fixed from time to time and conditions of his licence.

(2) The charges for electricity supplied by a distribution licensee shall be -

(a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission ;

(b) published in such manner so as to give adequate publicity for such charges and prices.

(3) The charges for electricity supplied by a distribution licensee may include

(a) a fixed charge in addition to the charge for the actual electricity supplied;

(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

(4) Subject to the provisions of section 62, in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons.

(5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission.”

Under Section 50 of the Act, State Commission is authorized to specify electricity supply Code to provide for levy and recovery of electricity charges.

Section 50 of the Act is reproduced as under:

“Section 50. (The Electricity Supply Code):

***The State Commission shall specify an electricity supply code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity; measures for preventing tampering, distress or damage to electrical plant, or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter; entry for replacing, altering or maintaining electric lines or electrical plants or meter and such other matters.*”**

Section 61 deals with the Tariff Regulations and the State Commission is empowered to specify the terms and conditions for the determination of tariff and set out the guiding principles. Section 61 of the Act is reproduced as under:

“Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are

specified under this section, whichever is earlier.”

Under Section 62 of the Act, the Appropriate Commission while determining the Tariff may differentiate according to the consumers’ load voltage, total consumption of electricity during any specified period and the time during which supply is required and the nature of supply and the purpose for which supply is required. Section 62 of the Act is reproduced as under:

“Section 62. (Determination of tariff):

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of

electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in

respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating

the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

Under Section 80 of the Act, the Central Commission by notification shall establish a Central Advisory Committee to represent the interests of commerce, industry, transport, agriculture, labour, consumers, non-governmental organisations and academic and research bodies in the electricity sector. Section 80 of the Act is reproduced below:

“Section 80. (Central Advisory Committee):

(1) The Central Commission may, by notification, establish with effect from such date as it may specify in

such notification, a Committee to be known as the Central Advisory Committee.

(2) The Central Advisory Committee shall consist of not more than thirty-one members to represent the interests of commerce, industry, transport, agriculture, labour, consumers, non-governmental organisations and academic and research bodies in the electricity sector.

(3) The Chairperson of the Central Commission shall be the ex-officio Chairperson of the Central Advisory Committee and the Members of that Commission and Secretary to the Government of India in charge of the Ministry or Department of the Central Government dealing with Consumer Affairs and Public Distribution System shall be the ex-officio Members of the Committee.”

Under Section 86 of the Act, the State Commission is empowered to regulate purchases, supply and distribution of electricity within the State. Section 86 of the Act is reproduced below:

“Section 86. (Functions of State Commission):

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon,

if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees

including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any if the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

8. According to the Appellants, Section 23 of the Act cannot be pressed into service as it finds place in Chapter IV of the Act which deals with Licensing only. Section 23 of The 2003 Act empowers the State Commission to regulate supply, distribution, consumption or use of electricity for equitable distribution. The regulation of supply could be enforced either by levy of additional charges for excessive consumption or by disconnection of supply for violation of the restrictions. The Board had earlier proposed disconnection of supply for violation of the control and restriction measures. However, State Commission by its order did not permit disconnection for violation of restriction quoting provisions of the Act that disconnection of supply was not permissible under such conditions and approved Excess Demand and Excess Energy charges to ensure enforcement of the

Control and Restriction Measures. The excessive drawal by the Electricity Board over and above its scheduled entitlement from the Regional Grid is also resulting in levy of Unscheduled Interchange (UI) charges on the Electricity Board, as notified by the Central Commission from time to time. The excess drawal by consumers over and above the restrictions in force may result in excess drawal by the Board from the Regional Grid attracting UI charges. Thus for ensuring enforcement of the control and restriction measures levy of excess demand and excess energy charges are in order. In our opinion power to regulate would include power to levy excess demand and excess energy charges if there is any violation.

9. There are also other Sections found in other chapters that deal with the present situation. It is to

be stated that those provisions would make it evident that the State Commission is the Competent Authority to levy Excess Demand Charges and Excess Energy Charges for the violation of restriction and control measures during peak hours and non-peak hours. In addition to these powers, Clause 38 of the Distribution Code framed by the State Commission as well empowers the Electricity Board to impose Restrictions and Control Measures.

10. Thus, from the conjoint reading of all the provisions of the Act and the Regulations, it is clear that the State Commission has got powers to issue such directions for enforcing restriction and control measures and for levying Excess Demand Charges and Excess Energy Charges in case of any violation by the consumers. The State Commission imposed these restrictions and control measures only in the light of the

existing acute shortage of power and in order to have equitable distribution of available power among the general public as suggested by the Electricity Board on the basis of direction given by the State Government. Therefore, there is no merit in the contention urged by the Learned Counsel for the Appellant that neither the State Commission nor the Electricity Board has such power to direct or to collect Excess Demand Charges and Excess Energy Charges.

11. The Agreement entered into by the HT consumers with the State Electricity Board provided for the restricted usage of electricity and for the levy of Excess Demand Charges and Excess Energy Charges. Those Agreements are still in force since the provisions of the Electricity Supply Act, 1948 are saved under Section 185 of the Electricity Act, 2003 as long as these are not inconsistent with the provisions of The

2003 Act to show that the Electricity Board has got power to collect Excess Demand Charges and Excess Energy Charges in addition to the powers available to the State Commission under the Electricity Act, 2003.

12. In the present case, while disposing of MP No.42 of 2008 on 28.11.2008, the State Commission followed the procedures that are mandatory and essential for determination of the charges under Section 64 of the Act by causing Public Notice to the consumers and also inviting views of the State Advisory Committee. Accordingly, the State Commission amended the Tariff Order, 2003 and the Supply Code through Notification on 15.12.2008 in pursuance of the Order passed by the State Commission on 28.11.2008 in MP No.42 of 2008.

13. That apart, the State Commission, on 24.12.2008, passed order in Review Petition No.2 of

2008, filed by the Electricity Board, reiterating the power to levy and collection of the Excess Demand Charges and Excess Energy Charges from the HT consumers. Admittedly, the Order dated 28.11.2008, passed in MP No.42 of 2008 and the amendment of the Supply Code through Notification dated 15.12.2008 have not been challenged before the Appropriate Authority. Therefore, the amendment on Supply Code becomes final and conclusive.

14. In fact, the Electricity Board while filing the petition in MP No.42 of 2008 has specifically prayed to permit the Electricity Board for the levy of Excess Demand Charges and Excess Energy Charges. In fact, in the said petition, the Electricity Board has pleaded and prayed for two deterrent measures, i.e. (i) restriction on consumption of electricity to 5% or 10% of the quota fixed for the next 48 hours for violation during peak

hours; and (ii) collection of levy of Excess Demand Charges and Excess Energy Charges.

15. In the order referred to above, the State Commission has specifically held that the Electricity Board is entitled to impose the levy of Excess Demand Charges and Excess Energy Charges. In other words, the State Commission has specifically authorized the Electricity Board to collect Excess Demand Charges and Excess Energy Charges during the non-peak hours. The Appellants admittedly have not challenged the levy of Excess Demand Charges and Excess Energy Charges imposed by the State Commission during the non-peak hours.

16. As a matter of fact, the HT consumers have paid Excess Demand Charges and Excess Energy Charges for non-peak hours violations. This shows that the

Appellants have not chosen to challenge the power of the State Commission to impose Excess Demand Charges and Excess Energy Charges for non-peak hours. Having paid the excess charges towards the Excess Demand Charges and Excess Energy Charges for non-peak hours without any demur, the Appellants are not entitled to question the power of the State Commission for imposing excess charges during peak hours restriction alone.

17. By not challenging the Order dated 28.11.2008 passed in MP No.42 of 2008 as well as subsequent amendment to the Tariff Order and Electricity Supply Code, the Appellants have virtually acquiesced the jurisdiction of the State Commission and power of the State Commission in this regard.

18. The Appellants during the arguments pleaded that there is no provision or power for the State Commission to levy any excess charges which is in the nature of penalty. This is also not correct. Under the Tariff Order 2003, there are specific provisions for imposing compensation charges for not maintaining the power factor. Similarly, there is also a provision for excess demand charges over the sanctioned load at double the normal rate in the Supply Code in case of HT supply. For excess or over drawal, the Southern Regional Load Dispatch Centre (SRLDC) is also empowered to levy Unscheduled Interchange Charges which increase substantially at low frequency, according to the Regulations of the Central Commission.

19. The State Commission while passing the impugned order has quoted the specific findings rendered by the

State Commission in the Order dated 28.11.2008 passed in MP No.42 of 2008 and Order dated 24.12.2008 passed in RP No.2 of 2008, and also the amendment notified by the State Commission on 15.12.2008. In its order dated 4.5.2010, the State Commission also has given specific finding that the Electricity Board is entitled to recover any sum due to them within a period of two years provided under Section 56 of the Act.

20. As a matter of fact, Electricity Board in application filed before the State Commission in MP No.42 of 2008 has specifically prayed for the necessary amendment to the Tariff Order dated 15.3.2003 and Tamil Nadu Electricity Distribution Code to give effect to various restrictions and control measures proposed by the Electricity Board. The Electricity Board had

specifically prayed the State Commission to permit the Tamil Nadu Electricity Board to levy Excess Demand Charges and Excess Energy Charges for exceeding the quota. In this petition, the State Commission conducted public hearing after giving wide publicity and sought their views and also obtained opinion of the State Advisory Committee and passed order in MP No.42 of 2008 dated 28.11.2008 and directed that the order should be enforced from the date of the order, i.e. from 28.11.2008. The relevant portion of the Order is as follows:

“29. If the excess demand is charged at a rate thrice the normal rate as at present and if excess energy consumption is charged thrice the normal rate, the excess consumption is liable to be charged at a rate equivalent to Rs.13.20 per unit for HT Industrial Consumers, if both the

demand and energy quota are exceeded. We believe that this is fair and just to the consumer and the licensee and therefore the commission directs that excess demand shall be charged at a rate thrice the normal rate and excess energy consumption be charged at thrice the normal rate for both HT industrial and commercial consumers.”

21. The perusal of the above paragraph would indicate that the State Commission specifically accepted the proposal of Electricity Board to levy Excess Demand Charges and Excess Energy Charges. This order, as indicated above, has not been challenged. Similarly, the Electricity Board thereafter filed Review Petition No.2 of 2008 before the State Commission praying to review the said order relating to certain

issues and to levy the Excess Demand Charges 5 times instead of 3 times for the violation of restrictions and control measures. The State Commission while dismissing the Review Petition confirmed the order earlier passed permitting the Electricity Board to levy the Excess Demand Charges and Excess Energy Charges at 3 times of the normal rate. The relevant portion of the order dated 24.12.2008, passed in RP No.2 of 2008 is reproduced as under:

“3.9 The Petitioner Board had reiterated the demand for excess demand charges at 5 times the normal rate as against the three times approved by the Commission. There was severe resistance from the advisory committee and the consumers for the levy of 5 times the normal charges. The Commission has balanced the interest of the consumers and

the distribution licensee and moderated the charges to 3 times the normal rate. It must be borne in mind that excess demand charges and excess energy charges are leviable in addition to the penalty of drastic reduction of electricity supply to 5% or 10% during the following 48 hours, as the case may be for violation of restriction and control measures. Raising the excess demand charges to five times the normal rate, in such a context, would be draconian. The Commission does not see merit in this argument.”

After pronouncement of the order dated 28.11.2008, the State Commission has made an amendment in the Regulation 5 of the Principal Supply code by the order dated 15.12.2000. This is as follows:

“In regulation 5 of the Principal Code, after sub-regulation (12), the following sub-regulation shall be added namely, (13) Excess demand charges and excess energy charge during Restriction and control of supply;

(i) The maximum demand charges for HT supply shall be based on the actual recorded demand at the point of supply or at 90% of the demand quota as fixed from time to time through restriction and control measures whichever is higher. In case the maximum recorded demand is in excess of the quota fixed, the demand in excess of the quota fixed shall be charged at rates specified by the Commission from time to time.

(ii) The energy consumption over and above the energy quota fixed shall be charged at the rates specified by the Commission from time to time in respect of such class of consumers upon whom the restriction and control measures apply.”

22. It was specifically contended by the Appellants before the State Commission that there is no provision for levying penalty for exceeding quota during evening peak hours except issuing an advance Notice to the consumers not to run the industry for the next 48 hours as set out in the order dated 28.11.2008. It was also contended that neither the Electricity Act nor Rule 38 of the Electricity Supply Code permit levy of this nature which is in the nature of penalty and was not cost based and that the levy of penalty in the name of

Excess Demand Charges and Excess Energy Charges was without any authority of law and also this is against the direction given by the State Commission in paragraph 33 of its Order dated 28.11.2008.

23. This contention was rejected by the State Commission by giving reasons. In this context, it would be appropriate to refer to the relevant observations and reasons made by the State Commission on this issue in the impugned order dated 4.5.2010 as under:

“Para 11.7: It must be borne in mind that excess demand charges and excess energy charges are leviable in addition to the penalty of drastic reduction of electricity supply to 5% or 10% during the following 48 hours, as the case

may be for violation of restriction and control measures.”

“Para 11.8:The Amendment to the Tamil Nadu Electricity Supply Code 2004 notified by the Commission on 15.12.2008 is reproduced below:

In regulation 5 of the Principal Code, after sub-regulation (12), the following sub-regulation shall be added namely,

(13) Excess demand charges and excess energy charge during Restriction and control of supply;

(i) The maximum demand charges for HT supply shall be based on the actual recorded demand at the point of supply or at 90% of the demand quota as fixed from

time to time through restriction and control measures whichever is higher. In case the maximum recorded demand is in excess of the quota fixed, the demand in excess of the quota fixed shall be charged at rates specified by the Commission from time to time.

- (ii) The energy consumption over and above the energy quota fixed shall be charged at the rates specified by the Commission from time to time in respect of such class of consumers upon whom the restriction and control measures apply.***

Para 11.9: The amendment prescribes excess demand and excess energy charges for exceeding the demand quota and energy quota. Since different quotas

have been fixed for peak hour and non-peak hour excess demand charges and excess energy charges would be liable in case of violation, whether the violation occurs during peak hours or non-peak hour. The Electricity Supply Code does not restrict the excess demand charges to non-peak hour violation alone.

Para 11.10: The contention of the petitioner that penalty was proposed only for welding operations in the public announcement and that excess demand and excess energy charges would not apply to evening peak hour violation as per the public announcement is not correct. The

public announcement did mention that excess demand charges and excess energy charges would apply for exceeding the quota fixed by the TNEB. Since separate quotas have been fixed for peak hours and non peak hours, it is axiomatic that excess demand charges and excess energy charges would be attracted, if the quota is exceeded.”

Para 11.11: Therefore, it is clear that the Order of the Commission in MP No.42 of 2008 prescribed that excess demand charges and excess energy charges for evening peak hour violation also.

24. The above reasonings and observations, made by the State Commission would clearly indicate that the State Commission has discussed this aspect of the matter in the order dated 4.5.2010 and has clarified the earlier Order dated 28.11.2008 passed in M.P. No.42 of 2008 and quoted amendment of the Supply Code dated 15.12.2008 and held that State Commission is empowered to give permission to the Electricity Board to collect the Excess Demand Charges and Excess Energy Charges.

25. As indicated above, neither the Order dated 28.11.2008 passed in MP No.42 of 2008 nor the amendment of the Supply Code dated 15.12.2008 giving powers to the State Commission to impose extra charges have been challenged. So, the impugned order is only clarification of the orders dated 28.11.2008 passed in MP No.42 of 2008 whereby the Electricity

Board was permitted to collect extra charges even for evening peak hours violations.

26. Further, as per Clause 38 of the Tamil Nadu Electricity Distribution Code, a consumer shall curtail, stagger, restrict, regulate or cease to use electricity whenever it is directed by the licensee, if the power position or any other emergency so warrants in the licensee's power system.

27. As per the provisions of the Electricity Act, 2003, as noted above, the State Commission is Competent Authority to regulate the affairs relating to generation, transmission and distribution of electricity. In exercise of these functions, the State Commission is vested with powers to authorize imposition of excess charges for the non peak and peak hours consumption. Imposition of extra charges have been introduced only as a

measure to prevent excessive consumption of power as long as restriction and control measures are in force. Excess charges are levied only with the intention to discourage the HT consumers to draw over and above the quota in view of the shortage of power.

28. One more aspect is to be noticed in this context. Originally, the Appellants approached the State Commission through the application Nos.4 and 7 of 2010 specifically complaining that the Electricity Board has no authority to levy Excess Demand Charges and Excess Energy Charges without permission from the State Commission. Now, the Appellants have taken a different stand that the State Commission itself has no authority to give such permission. In view of the above, the contention urged on behalf of the Appellants would fail. We are thoroughly convinced that the State Commission has authority to give permission to the

Electricity Board to collect Excess Demand Charges and Excess Energy Charges for both Peak hours and Non-Peak hours. The authorities cited by the Appellants which have laid down the settled principles would not be of any use to the Appellants.

29. The Appellants have raised another issue, namely, the point of waiver. According to the Appellants, even assuming that the Electricity Board has got the power to demand Excess Demand Charges and Excess Energy Charges in pursuance of the permission granted by the State Commission by virtue of the order dated 28.11.2008, the Electricity Board has not taken immediate steps to collect those charges; they kept quiet for about 10 months; Only after 10 months, it suddenly started issuing bills claiming Excess Demand Charges and Excess Energy Charges for exceeding evening peak hour restriction also and, that

therefore, this should be construed that the Electricity Board has waived its right of collecting the charges. This contention is refuted by the Electricity Board by stating that there is no waiver in this case as there is no material to show that the Board voluntarily and completely surrendered their right and on the other hand they claimed the charges within time as provided under Section 56 of the Act.

30. Let us now discuss this issue:

- (i) This issue has been dealt with by the State Commission in the impugned order dated 4.5.2010. The relevant portion of the finding by the State Commission is as follows:**

“11.12 A plea has been raised by the petitioners that peak hours and non peak hours have been raised by the TNEB belatedly

as late as one year after the order. The excess demand charges and excess energy charges being in the nature of penalty, ought to have been levied promptly, in which case the petitioner would have desisted from consuming excess power. The conduct of TNEB, according to them, in raising the demand almost a year after the order of the Commission amounts to waiver of claim for penal charges.”

“11.14. Section 56 makes it clear that a licensee is empowered to claim its demand up to a period of two years from the date when such sum became due. The “charge of Electricity” mentioned in Section 56(1) refers to the electricity tariff, ‘any sum other than a charge for electricity’ referred to in section

56(1) means charges other than tariff charges such as capacitor compensation charge, excess demand charge, belated payment surcharge, additional security deposit, name transfer charge, reconnection charge, meter related charges, etc mentioned in Clause 4 of Tamil Nadu Electricity Supply Code 2004 notified by the Commission. Therefore, we have to conclude that the TNEB is entitled to recover any sum due to them within a period of two years.”

- (ii) On the basis of the above reasoning, the State Commission has given specific finding that the Electricity Board is entitled to recover any sum due to them under the**

Heading “Charge for Electricity” mentioned in Section 56(2) within a period of two years.

(iii) According to Electricity Board-Respondent No.1, there is no delay as contended by the Appellants and on the other hand, necessary instructions have been given to various officers of the 1st Respondent immediately after the order dated 28.11.2008 was passed.

(iv) It is also contended that the Electricity Board had been issuing several Circulars and instructions to the Field Engineers from time to time from the Headquarters. It is noticed that the 1st Respondent-Electricity Board has started implementing the order dated 28.11.2008 in various Circles from January, 2009 itself. This is clear from the Notice

issued by the Electricity Board to the Distribution Circle in January.

- (v) It is also seen from the records that the 1st Respondent-Electricity Board initially wanted approval of the State Commission for the disconnection of supply of electricity for exceeding the quota during the restriction and control measures. Therefore, the Electricity Board approached the State Commission for the same but the State Commission did not grant such permission for disconnection on the ground that the power to disconnect is available only under Section 56 of the Act for non-payment of the bills and, therefore, the bills had been subsequently issued to the consumers and this cannot be claimed as estoppel or waiver.**

(vi) The Respondent in order to substantiate that the claim for the waiver as projected by the Appellants would not apply to the present case has cited various decision of this Tribunal as well as the Hon'ble Supreme Court. They are as follows:

- (1) 2009 Energy Law Reports 2010
(Appeal No.176/2009 dated 18.5.2010)**
- (2) (2009)1 SCC – BSES Limited Vs. Tata Power Company Ltd Pages 44-63;**
- (3) (2009) 9 SCC – Uttarakhand Power Company Vs. M/s ASP Sealina Products Ltd Page No.64-72**
- (4) (2009) 12 SCC – Bengal State Electricity Board Vs. M/s Gajendra Haldia & ors. Page No.73-75**

(vii) A perusal of the above decisions would reveal that the essential requirements are voluntary

and complete surrender of their rights to satisfy the concept of waiver. In the present case they are absent. Therefore, this contention also would fail.

31. The next issue raised by the Appellants is - assuming that the State Commission or the Electricity Board has got powers to collect Excess Demand Charges and Excess Energy Charges, such power comes into effect only prospectively and the State Commission cannot pass order to give effect to the permission granted for collection of Excess Demand Charges and Excess Energy Charges retrospectively through the order passed on 4.5.2010. According to the Appellant there was no clarity about Excess Demand Charges and Excess Energy Charges for exceeding evening peak hour restriction of 5/10% also in the State Commission's order dated 28.11.2008.

32. Let us first discuss over the issue as to whether the order dated 28.11.2008 has clearly indicated Excess Demand Charges and excess energy charges for exceeding evening peak hour restriction also in addition to restriction of supply to 5/10% during the next 48 hours.

33. Para 29 of the State Commission's order dated 28.11.2008 reproduced above in para 20 indicates approval of the State Commission for levy of excess demand charges and excess energy charges at thrice the normal rate. It also indicates that excess consumption at three times the normal rate would result in a rate equivalent to Rs.13.20 per unit for HT industrial consumers which will be fair and just to the consumer. The Learned Counsel for the Appellants have given calculation that

the figure of Rs. 13.20 per unit is derived with energy rate of Rs. 3.50 per unit for non peak hours. The energy rate for peak hours is Rs. 4.20 per unit and rate for excessive demand and energy at this rate would work out to be more than Rs. 13.20 per unit.

34. Para 30 of the order dated 28.11.2008 deals with Excess Demand and Excess Energy Charges as applicable to LT industrial and commercial consumers. Para 31 of the said order deals with ban on welding during evening peak hours and if a consumer is found using welding set charging of levy three times the average weekly consumption in addition to normal rates. Para 32 deals with charges for LT industrial and commercial consumers. Para 33 of the order which is relevant deals with evening peak hour restriction.

Let us quote now:

“33. `The TNEB has proposed to restrict the demand of HT industrial and HT commercial consumers to 5% to 10% respectively during the evening peak hours from 6 PM to 10 PM. They have further proposed that consumers violating the restrictions and the demand and energy quota should be liable to face the restricted demand of 5% or 10% as the case may be for the following 48 hours. The Commission accepts the above proposals in view of the acute shortage of power.”

35. The plain reading of the relevant paras of order dated 28.11.2008 referred to above does not make it very clear that for the evening peak hours restriction

excess drawal over and above the restriction of 5/10% will attract Excess Demand and Excess Energy Charges over and above restriction of demand of 5% or 10% as the case may be for the following 48 hours.

36. Subsequent to the order dated 28.11.2008 the Supply Code was modified vide notification dated 15.12.2008. The relevant para of the notification dated 15.12.2008 is reproduced below:

“13 Excess demand charges and excess energy charges during restriction and control of supply:

(i) The maximum demand charges for HT supply shall be based on the actual recorded demand at the point of supply or at 90% of the demand quota as fixed from time to time through restriction and control measures whichever is higher. In case the maximum recorded

demand is in excess of the quota fixed, the demand in excess of the quota fixed shall be charged at rates specified by the Commission from time to time.

(ii) The energy consumption over and above energy quota fixed shall be charged at rates specified by the Commission from time to time in respect of such class of consumers upon whom the restriction and control measures apply.

(iii) The services which draw electricity from TNEB grid for using welding sets during the restricted hours shall be charged at rates specified by the Commission from time to time.”

This amendment only provided an enabling clause for Excess Demand and Excess Energy Charges but did not give a very clear picture about the scheme of things applicable to HT industrial and commercial consumer by order dated 28.11.2008.

37. Subsequent to order dated 28.11.2008, TNEB filed a review petition RP No. 2 of 2008 for levy of demand charges at 5 times the normal rate. This review petition was dismissed on 24.12.2008 by the State Commission. In the detailed order dated 24.12.2008, the Commission has noted that the Excess Demand Charges and Excess Energy Charges are leviable in addition to the penalty of drastic reduction of electricity supply to 5% (or 10%) during the following 48 hours for violation of restriction and control measures.

38. Thus only in its order RP 2 of 2008 dated 24.12.2008 the State Commission indicated that restriction of power for following 48 hours to 5/10% is in addition to the Excess Energy and Demand Charges. But the Appellants were not the parties in this Review Petition. This position was finally clarified in the impugned order dated 4.5.2010 that too in the Petition filed by the Appellants.

39. When Excess Demand Charges and Excess Energy Charges over and above the normal charges are levied the scheme has to be very clearly notified in unambiguous terms so that the consumers are not put to inconvenience at a later date. In this case the billing for penal charges was also done by the Electricity Board after 10 months.

40. According to the Electricity Board, the 1st Respondent, Electricity Supply code was amended to provide for vesting of permanent power with regard to levy of Excess Demand Charges and Excess Energy Charges only by virtue of the order dated 15.12.2008 and it was retrospectively amended from 28.11.2008 and hence, the State Commission has power to pass orders relating to Excess Demand Charges and Excess Energy Charges by virtue of the amendment order dated 15.12.2008. On the other hand, it is contended by the learned Counsel for the Appellants that when the order had been passed on 28.11.2008 in MP No.42 of 2008, there was no power vested with the State Commission to levy Excess Demand Charges and Excess Energy Charges for peak hours since, at that time, Electricity Supply Code had not been amended and unless the Statute itself provides power to delegate legislation for

retrospective amendment of the Supply Code, it can only have prospective application and not retrospective application.

41. While dealing with this issue, we have to bear in mind the following 3 principles:

- (i) The State Commission is delegated under The Electricity Act, 2003.**
- (ii) A delegate does not have power to issue any order which has retrospective effect unless specifically authorized under the demand enactment.**
- (iii) In the present case, none of the provisions contained in The Electricity Act, 2003 dealing with the powers, duties and functions of the authorized State Commission to pass order with retrospective effect.**

42. Bearing these principles in mind, we have to analyse the issue as under:

(i) As mentioned above, there is no provision either in the Act nor in the Regulations providing for retrospective application of those provisions. The power to make Regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. So, the order amending the Electricity Supply Code was passed on 15.12.2008 giving a retrospective application of the amendment of Supply Code even from 28.11.2008 even though the said Supply Code was not amended on that date.

(ii) In this context, it is to be pointed out that when the prayer was made by the Electricity

Board to give effect to this proposal from 1.11.2008, the State Commission negated such a contention by saying that the publication was made only on 15.11.2008 and had the public been made aware of such demand, they would have desisted from drawing excessive power.

(iii) The same reasoning would apply to the present situation also with reference to the retrospective application adopted by the State Commission. If the order is very clear to have a prospective effect from 28.11.2008, and if the clear proposal in unambiguous terms was made known to the consumers, they would have desisted from acting so.

- (iv) As indicated above, in the present case, none of the provisions contained in the Electricity Act, 2003 deal with the powers, duties and functions of the State Commission, authorizes the State Commission to pass orders with retrospective effect.**
- (v) Admittedly, on the date of the order, i.e. 28.11.2008, the Supply Code had not been amended. The Supply Code was amended only on 15.12.2008 retrospectively w.e.f. 28.11.2008. No further clarification was given regarding Excess Demand and Excess Energy Charges as applicable for evening peak hours. The Review Petition No. 2 of 2008 order dated 24.12.2008 did not have the Appellant as party.**

(vi) If the Appellants or the public knew clearly about the Excess Demand and Excess Energy Charges are applicable for evening peak hours also, they would not have filed application such as 4 of 2008 and 7 of 2008 seeking for the punishment of the Electricity Board for collection of the Excess Demand Charges and Excess Energy Charges for evening peak restrictions also without any permission from the State Commission.

(vii) As a matter of fact, the prayer in application No.4 of 2008 and 7 of 2008 is that as no permission had been granted by the State Commission or no power had been conferred on the Electricity Board by the State Commission to collect these charges, the Board is liable to be punished. Prayer made

by the Appellants in M.P. Nos.4 and 7 of 2008 are as follows:

“Prayer in MP No.4 of 2010:

The prayer in MP No.4 of 2010 is to punish the Respondent by imposing maximum punishment by passing appropriate orders in exercise of powers conferred in Sections 142 and 146 of the Electricity Act, 2003.”

“Prayer in MP No.7 of 2010:

The prayer in MP No.7 of 2010 is to order that the Respondent Board or the Officials of the Board are not having such an authority to levy penalty in terms of money for the alleged excess use of demand and

energy during evening peak hours except for the reduction of demand to the level of 5% for the following 48 hours as more specifically stated in para 33 of the Order passed in MP No.42 of 2008 dated 28.11.2008.”

(viii) This would clearly indicate that the Appellants had been given the impression by the State Commission through the order dated 28.11.2008, passed by the Commission in MP No.42 of 2008 that there was no permission or direction to collect Excess Demand Charges and Excess Energy Charges for excess drawal over the evening peak restrictions over and above the restrictions of 5/10% to be imposed for the next 48 hours.

(ix) As a matter of fact, it was the contention of the Appellant/petitioner in MP No.4 of 2010 that the Electricity Board has no authority of law to levy Excess Demand Charges and Excess Energy Charges without prior approval of the State Commission who is competent statutory authority under The Electricity Act, 2003 in issue in hand and as such, the impugned Demand Notice issued by the Electricity Board, is without authority of law and as such the action of the Electricity Board in levying such penalty is in violation of the order of the State Commission in MP No.42 of 2008 dated 28.11.2008 and, therefore, the Electricity Board is liable to be punished as per Sections 142 and 146 of the Electricity Act.

(x) Similarly, the contention of the Appellant/petitioner in MP No.7 of 2010 is that the Demand Notice issued by the Electricity Board imposing Excess Demand Charges and Excess Energy Charges exceeding peak hour quota was against the orders of the State Commission dated 28.11.2008 as there is no approval given by the State Commission conferring any right to the Electricity Board for levying such a penalty for exceeding quota during evening peak hours.

(xi) Thus, the contention of the Appellant/Petitioner raised in M.P. No.7 of 2010 would make it clear that impression had been created in the minds of the public that no right or power has been conferred on

Electricity Board to collect Excess charges for exceeding the peak hour quota by the order dated 28.11.2008.

(xii) In view of the fact that such a power was not available in order dated 28.11.2008, the State Commission itself thought it fit to amend the Supply Code by Order dated 15.12.2008.

(xiii) Moreover, only in this Impugned Order dated 4.5.2010, the order of the State Commission in MP No.42 of 2008,dated 28.11.2008, it was clarified that Excess Demand Charges and Excess Energy Charges for evening peak hours violation were leviable as per its order dated 28.11.2008.

(xiv) Further the order had been passed by the State Commission giving retrospective effect only in the Review Order passed by the State Commission on 24.12.2008 in R.P. No.2 of 2008. Under the Order dated 28.11.2008, passed in MP No.42 of 2008, the State Commission has specifically held as under:

“In para 43, it is stated that excess energy consumption charges which are introduced for the first time will have prospective effect from the date of the order.”

It is also stated in para 36 that “amendment to the Tariff Order 2003 and Tamil Nadu Electricity Code, 2004 are being notified by the Commission.”

(xv) Despite this order dated 28.11.2008, the Notification regarding amendment of Supply Code has come only on 15.12.2008. In that amendment, a retrospective effect has been given, i.e. from the date of Order dated 28.11.2008. As indicated above, in the Order dated 24.12.2008, the State Commission was not inclined to give effect to the orders from 1.11.2008 as claimed by the Electricity Board. This has been clarified only in the impugned order dated 4.5.2010.

The above discussion would make it evident that on the day when the order was passed in MP No.42/2008,i.e. on 28.11.2008 there was no power vested with the State Commission to levy Excess Demand charges and excess energy charges since the Electricity Supply Code had not been amended. This

power was vested only on 15.12.2008 when the Electricity Supply Code was amended. As mentioned above, the Excess Demand Charges and Excess Energy Charges for evening peak restriction were clarified only in the impugned order dated 4.5.2010.

As mentioned above, it is a clear rule of law that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the Regulations can only have prospective application. This principle has been laid down in the following decisions:

- 1) 2009 (2) SCC 589 – Panchi Debi Vs. State of Rajasthan**
- 2) 2007(5) SCC 77 – Vice Chancellor MD University Rohtak Vs. Jahan Singh**

The power to make regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. This provision neither expressly nor by implication provides for retrospective operation of the regulations.

43. In the above circumstances, the order amending the Electricity Supply Code retrospectively from 28.11.2008 is invalid in so far as it is applied retrospectively. Therefore, the said order dated 28.11.2008 in pursuance of which the Electricity Supply Code has been amended only on 15.12.2008. Further the Excess Demand Charges and Excess Energy Charges for evening peak restrictions is to be given effect to only from 4.5.2010 wherein it has been clearly stated that such charges are leviable in addition to restriction of 5/10% for 48 hours for exceeding the evening peak quota. Accordingly, we hold that the

order passed by the State Commission on 28.11.2008 and the amendment order dated 15.12.2008 would come into effect only from 15.12.2008 and the excess demand and excess energy charges for evening peak hours in excess of evening peak quota are given effect to only from 4.5.2010 bearing in mind that the State Commission has clarified the position on 4.5.2010. Therefore, the Appellants are liable to pay the Excess Demand Charges and Excess Energy Charges for evening peak restriction prospectively, i.e. from 4.5.2010 and not retrospectively from 28.11.2008 as ordered by the State Commission. Accordingly, the impugned order amending the Electricity Supply Code retrospectively from 28.11.2008 is set aside. The order regarding the amendment giving the powers to the State Commission would come into effect prospectively only from 15.12.2008.

44. Having decided the these questions of law regarding excess demand and excess energy charges, we observe that the proposal made by the Electricity Board in Petition NO. 42 of 2008 was for Restriction and Control Measures for indefinite period. Such drastic cuts on industrial and commercial establishments that too for indefinite period indicates lack of planning on the part of the Electricity Board to meet the consumer demand. The Act permits regulation of power supply but such regulations have to be an exception for conditions such as unforeseen outages of generating units or excessive increase in demand of power due to abnormal weather conditions or due to any other unforeseen contingency or event. The system has to be planned for normal planned outages, normal load growth and credible contingencies. The National Electricity Policy lays emphasis for meeting the

increasing demand requirements in an optimum manner and well coordinated approach in development of the power sector for providing reliable uninterrupted quality power supply to all consumers. In the interest of the consumers, we direct the State Commission to initiate suo moto proceedings regarding short term, medium term and long term plan for meeting the requirement of power both peak hours and energy in the state of Tamil Nadu. The Electricity Board/Utilities in Tamil Nadu may be directed by the State Commission to submit their comprehensive proposal before the State Commission. We expect this exercise to be completed within a period of six months. The State Commission may also take measure to encourage open excess in transmission and distribution so that the consumers could arrange power directly to meet their demands.

45. SUMMARY OF OUR CONCLUSIONS:

1. (A) The conjoint reading of all the relevant provisions of the Act, Regulations and the Supply Code would make it clear that the State Commission has got powers to issue such a direction or to grant permission to the Electricity Board for enforcing Restrictions and Control Measures and for levying Excess Demand Charges and Excess Energy Charges in case of any violation by the consumers.

(B) In the present case, the State Commission has imposed these Restrictions and Control Measures only in the light of the existing acute shortage of power and in order to have equitable distribution of available powers among the general public as proposed by the Electricity Board on the basis of the direction given by the State Government.

Therefore, there is no merit in the contention urged by the learned counsel for the Appellants that neither the State Commission nor the Electricity Board has such power to direct or to collect Excess Demand Charges and Excess Energy Charges.

2.(A) According to the Appellants, even assuming that the Electricity Board has got the power to demand Excess Demand Charges and Excess Energy Charges in pursuance of the permission granted by the State Commission, the Electricity Board has taken no immediate steps to collect those charges for 10 months, but suddenly, started collecting the Excess Demand Charges and Excess Energy Charges after 10 months; and as such the said conduct would amount to waiver of its rights.

(B) To establish the concept of waiver, the Appellants who claim waiver are required to satisfy the various ingredients of the waiver. In the present case, no waiver can be pleaded as there is no material to show that the Electricity Board completely and voluntarily surrendered their rights. On the other hand, they have claimed Excess Demand Charges and Excess Energy Charges within the time prescribed under Section 56 of the Act. So, the question of waiver does not arise in this case.

3.(A) According to the Appellants, even assuming that the State Commission has got powers to grant permission to the Electricity Board to collect Excess Demand Charges and Excess Energy Charges, such a power comes into effect only prospectively, i.e. from the order dated 4.5.2010 and not from the order dated 28.11.2008

retrospectively. According to the Electricity Board, the Supply code was amended as early as 15.12.2008 and the retrospective effect has been given in that amended Code from 28.11.2008 and hence the State Commission has got the power to pass orders relating to the Excess Demand Charges and Excess Energy Charges on 28.11.2008 itself.

(B) We are unable to accept this contention of the Electricity Board. There is no provision either in the Act or in the Regulations providing for retrospective application of those provisions. In the present case, by virtue of the Notification dated 15.12.2008, the State Commission has given retrospective application to the amendment in the Supply Code even from 28.11.2008 even though the said Supply Code was not amended on that date. Thus the order of the State Commission dated

28.11.2008 for excess demand and excess energy charges will take effect only from 15.12.2008.

(C) Further there is no clarity in the State Commission's order dated 28.11.2008 about Excess Demand Charges and Excess Energy Charges for evening peak hours restriction besides restriction to 5/10% during the succeeding 48 hrs. When such drastic charges for excess demand and excess energy charges are levied the scheme of things has to be clearly notified unambiguously.

(D) Only in the impugned order dated 4.5.2010 the State Commission made it clear that Excess Demand Charges and Excess Energy Charges for evening peak hour restrictions were also applicable w.e.f. 28.11.2008. This retrospective effect cannot be given by the State Commission. Therefore, the excess demand charges and excess energy charges

for evening peak restriction has to be given effect to only from 4.5.2010, the date of the Impugned Order wherein the position was clearly stated.

46. In view of the above findings, we dispose of these Appeals directing the State Commission to pass consequential order in terms of this judgment.

47. During the pendency of these Appeals in the interim applications filed by the Appellants, this Tribunal directed the Appellants concerned to pay the amount to the Respondent as per the Impugned Order dated 04.05.2010 in instalments in every month. Accordingly, they paid the amount to the Respondent in compliance with our interim directions.

48 In view of our above conclusions, the amount so far paid by the Appellants to the Respondent during the

pendency of these Appeals should be adjusted in the future bills. With these observations all the interim Applications are disposed of.

49. The State Commission is also directed to take action on the directions given in para No. 44 of this judgment.

50. Thus the Appeals are partly allowed. No orders as to costs.

**(JUSTICE P.S. DATTA)
JUDICIAL MEMBER**

**(RAKESH NATH)
TECHNICAL MEMBER**

**(JUSTICE M. KARPAGA VINAYAGAM)
CHAIRPERSON**

DATED: 11.01.2011

REPORTABLE/NON-REPORTABLE