Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 197 of 2005

Dated: April 5, 2006

M/s. Pudumjee Pulp & Paper Mills Ltd. ... Appellant

Versus

Maharashtra State Electricity Board & Anr. ... Respondents

Present: Hon'ble Mr Justice. Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

Counsel for the appellant : Mr. Ramesh Darda & Mr. Satyajit A. Desai

Counsel for the respondents : Ms. Deepa Chavan, Ms. Alpana Dhake & Mr. Rajiv Nanda for R-1.

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

This appeal is directed against the order of the MERC dated February 7, 2005 in Case No. 17/2004. The facts giving

rise to the appeal are as under:

1. The appellant, a manufacturer of various types of paper, is a High Tension consumer of the Maharashtra State Electricity Board (MSEB) with contract demand of 13912 KVA at 22 KV. At the request of the appellant, the MSEB on September 22, 1998 awarded permission to it to set up a captive power generation plant of 6.4 MW. Pursuant to the permission granted by the MSEB, captive generating unit was set up by the appellant. On December 13, 1998, the power plant was synchronized with the MSEB's grid. Prior to the commissioning of the power plant and grant of the aforesaid permission, the MSEB in exercise of the powers conferred by Sections 46 and 49 read with Sub-sections 7(i) & (h) of Section 70 the Electricity (Supply) Act, 1948 (in short "the Act of 1948") and all other enabling provisions thereof, revised the high tension tariff w.e.f. September 1, 1998. The high tension tariff, inter-alia, provided as follows:-

"Tariff Rates:
Demand Charges Rs. 180/- per month per KVA of billing demand *PLUS*

Energy Charges	*350 p/u + FCA* *Fuel Cost Adjustment (FCA) Charges as applicable from time to time.* *Consumers having captive power plant synchronized with the Board's system shall pay demand charges at the rate of Rs. 200/- KVA/month."*

2. As per the aforesaid tariff formulation, the high tension consumers**,** whose captive power plants were synchronized with the MSEB's system, were required to pay demand charges @ Rs. 200 per KVA per month, instead of Rs. 180 per KVA per month of the billing demand. In other words, high tension consumers whose power plants were synchronized with the MSEB's system were required to pay additional charge of Rs. 20 per KVA per month of the billing demand. It is, however, not disputed on both sides that though the appellant is a high tension consumer and the captive power plant was syncyhronised with the MSEB's grid, the appellant was being billed in respect of demand charges @ Rs 180 per KVA per month of the billing demand and was not being billed for additional charge of Rs. 20/- per KVA per month.

3. On May 4, 1999, the MSEB presented a proposal to the Government of Maharashtra for revision of tariff w.e.f June 1, 1999. The Government of Maharashtra, however, asked the MSEB to submit its proposal to the Maharashtra State Electricity Regulatory Commission (MERC). This advice was tendered as the Electricity Regulatory Commission Act, 1998 (Act of 1998) had come into effect from April 25, 1998 and the MERC also stood constituted w.e.f. September 1, 1998.

4. Pursuant to the advice of the Government of Maharashtra, the MSEB presented its proposal (being case no. 01/1999) to the MERC. On April 28, 2000, the MERC passed an interim order determining the tariff for various categories of consumers. Thereafter, on May 5, 2000, the final tariff order was passed by the Maharashtra State Electricity Regulatory Commission. This tariff order, however, did not deal with the additional charges.

5. On May 23, 2000, an application was filed by the MSEB before the MERC for directions and clarification of the tariff order dated May 5, 2000. In the application it was stated,

amongst others, as under:-

> *"Demand Charges for captive power producer:*
>
> *The High tension consumers who have installed captive generation plants and wherever these plants were synchronized with the board system were billed demand charges at the rate of Rs. 200/KVA/Month (Rs. 20/- higher than HTP-1 demand charges) instead of demand charges then prevailing under HTP-I and HTP-II category. It is proposed to follow the same principles and such consumers shall now be charged demand charges at the rate of Rs. 320/KVA/Month."*

6. Pursuant to the aforesaid application, the MERC passed an order dated June 16, 2000, whereby it inter-alia, directed as under:-

> *"Demand charges for Captive Power Producers:*
>
> *The Commission clarifies that the High tension consumers who have installed captive generation plants and whenever these plants are synchronized with the Board system will be billed demand charges at the rate of Rs. 320/KVA/Month for HTP-1 and HTP-II categories. However, this matter will be taken up for further consideration at the time of taking up issues relating to Section 22(1) of the ERC Act, 1998."*

7. Thus, it is evident that the high tension consumers whose captive power plants were synchronized with the MSEB's system were permitted to be billed in respect of demand charges @ Rs. 320 Per KVA per month. It is also apparent that the final decision in the matter was to be taken by the MERC at the time of taking up determination of future tariff under Section 22(1)(a) of the Act of 1998. Armed with the order of the MERC, the MSEB on June 16, 2001, raised a supplementary demand of Rs. 60,52,330/- against the appellant on account of short billing from December 1998 to May, 2001 as per the following details :-

(i) For the period December, 1998 to April, 2000 @ Rs. 200/- Per KVA/per month; and

(ii) For the period May, 2000 to May, 2001 @ Rs. 320/- Per KVA/per month

8. The appellant protested against the supplementary bill through its communications dated July 6, 2001, September 12, 2001 and October 23, 2001. In these communications, it was, inter-alia stated to effect that the appellant was being correctly billed until the raising of the supplementary demand

by the MSEB, that the supplementary bill raised after a long delay of three years was totally unjust and not as per the policy of MSEB, that the appellant had never exceeded the contract demand of 13912 per KVA per month and that demand raised by way of supplementary bill be withdrawn. In a communication earliest in point of time, dated June 26, 2001, it was requested that the appellant may be granted the facility to pay the amount in instalments without payment of interest and delayed charges. It seems that the representations of the appellant seeking withdrawl of the supplementary bill did not have the desired effect on the MSEB.

9. The first respondent, the MSEB presented its ARRs before the MERC for initiating proceedings for determination of tariff for the year 2001-02 (being case no. 01/2001). On Dec., 28, 2001 and January 10, 2002, the MERC passed orders in Case no. 1/2001 determining the MSEB's tariff for the year 2001-2002. The orders, *inter-alia,* provided for additional demand charges in the following terms:

SS Standby Demand Charges

- *HT industrial consumers having captive generation facilities synchronized with the grid, will pay additional demand charges of Rs. 20 per KVA per month.*

10. It appears from the orders dated December 28, 2001 and January 10, 2002 that the MERC altered the nomenclature of the additional charges by calling them as 'standby charges'.

11. The appellant on February 28, 2002 filed a review petition (being case No. 30/2001) against the final tariff order of the MERC dated January 10, 2002. Besides, the appellant also filed a writ petition, being writ petition no. 2567/2002, on September 3, 2002 before the Bombay High Court challenging the supplementary bill dated June 16, 2001 for the period December, 1998 (wrongly mentioned as Feb. 1998 in some of the prayer clauses of the writ petition) to April, 2000 and for seeking, *inter alia,* refund of a sum of Rs. 45 lakhs paid by the appellant towards the demand created by the bill. The writ petition, however, was dismissed in limine by the Bombay High Court on June 9, 2003.

12. While the review petition was still pending, the MERC on December 12,2003 and March 10, 2004 passed orders whereby the tariff for various categories of consumers including for high tension industries was determined for the year 2003-04. The orders also provided for standby charges in the following terms:-

> *"1. High Tension Industries and other general High Tension consumers having captive generation facility synchronized with the grid will pay additional demand charges of Rs. 20/KVA/Month only on the extent of stand by demand component and not on the entire contract demand.*
>
> *2. Stand by charges will be levied on such consumers on the stand by component, only if the consumer's demand exceeds the contract demand.*
>
> *3. This additional demand charges will not applicable, if there is no standby demand and the captive unit is synchronized with the grid only for the export of power."*

13. Subsequently, the review petition was dismissed by the MERC on July 22, 2004. While dismissing the review petition,

MERC observed that there was no error apparent on the face of the record or any other mistake or any sufficient reason to review the order. In this regard, the MERC observed as follows:-

> *" 35. The Commission notes that both the issues of which review is sought viz. withdrawal of the additional charge of Rs. 20/- Per KVA and the reliability charge are substantive elements of the impugned tariff in the Commission's latest tariff hearing where required. Keeping in view the deliberations at the hearing held on 12.1.2001 and the observations made, the commission finds that the present Petition does not meet the test of the provisions in the regulations governing review, either in terms of any prima facie error apparent on the fact of record or any other mistake or new facts, or any other sufficient reasons. Under the regulation the ambit of review is circumscribed and the Commission cannot entertain what is essentially an appeal against its orders in the guise of such relief. That would amount to ascribing to itself the power of competent appellate authority under the law. Moreover, the Commission has waited for considerable time for further filing by Pudumjee, which has not been forthcoming until now.*

36. In view of the foregoing, the Commission declines to admit the petition. However, Pudumjee are at liberty to reapply with the further grounds for admission terms of the regulations governing review in case they are able to do so subsequently, keeping in view the position set out at paras 31 and 32 above."

14. While the appellant did not appeal against the order of the Bombay High Court, in the writ petition and allowed it to attain finality, it, however, feeling aggrieved by the order of the MERC dated July 22, 2004, filed a second review petition.

15. The second review petition was also rejected by the MERC by its order dated Feb. 7, 2005. While rejecting the Review Petition, the MERC noted that the appellant had filed a writ petition seeking to reopen the 1998 tariff before the Bombay High Court but was denied relief. The MERC felt that the matter related to the implementation of the tariff and could be dealt with by the parties separately. In this regard, the Commission observed as under:-

" *It is also a fact borne from the record that applicant have not run CPP through relevant period in synchronization*

with the MSEB grid and non applicant did not ascertain this fact at any point of time.

This point was not elaborated by Pudumjee further and indeed, it has nothing to do with the main arguments for review or for doing away with the charge but relates to the implementation of the tariff as applied from time and may be dealt with by the parties separately."

The Commission disposes of Pudumjee's petition accordingly."

16. Aggrieved by the order passed by the MERC dated February 7, 2005, the appellant has filed the instant appeal seeking the following reliefs:-

a) to call for record of Review Petition No. 17 of 2004 decided by the State Commission (respondent no.2) vide its order dated 7.2.2005 and after perusal of the same;

b) to quash set aside the order dated 7.2.2005, passed by the State Commission in Revision Petition No. 17 of 2004;

c) to hold and declare that issuance of supplementary bill dated 16.6.2001 by the respondent board demanding thereby sum of Rs. 60,52,330/- from the appellant towards short levy of electricity charges under the head of additional demand charge for the period from 1.5.2000 to May, 2001 amounting to Rs. 23,09,696/- is perse illegal and without any power conferred on the respondent no.1 in this regard;

d) and also declare that the bill amount of Rs. 37,40,646/- for the period December, 1998 to 30.4.2000 issued by respondent no. 1 is incorrect and illegal as also without any power conferred on the respondent no.1 in this regard for framing a tariff on its own after April, 1998;

e) to direct the respondent no.1 to refund the excess amount as may be determined by this Hon'ble Tribunal to the appellant with interest @ 24% p.a. till the date of its realization;

f) to grant such other suitable relief to which the appellant found entitled as this Hon'ble Tribunal deems fit and proper; and

g) to allow this appeal with costs".

17. Mr. Darda, the learned counsel appearing for the appellant, has vehemently contended that the appellant was not given any opportunity of hearing by the MERC before passing the order dated June 16, 2000, whereby MERC had clarified that High Tension consumers, who had installed captive generation plants and wherever plants were synchronized with the Board system will be billed demand charges @ 320/- per KVA per month. He pointed out that even after formulation of tariff by the MSEB, applicable w.e.f. September 1, 1998, the appellant was being billed in respect of demand charges at lower rate of Rs. 180/- per month per KVA of the billing demand and not @ Rs. 200/- per KVA per month. According to him, the appellant was being charged at lower rate of Rs. 180/- per KVA per month of billing demand as it had never exceeded the contract demand. It was also pointed out that in the tariff proposal of the MSEB, being case No.

1/99, there was no reference to the additional charge of Rs. 20/- per KVA per month. He also referred to the fact that even in the Tariff Order dated May 5,2000, which was passed pursuant to the tariff proposal of the MSEB, there was no mention of the additional levy. The learned counsel referred to the fact that it was only through the application of the MSEB dated May 23, 2000, pointing out certain difficulties in implementing the Tariff Order, a request was made for issue of appropriate directions/clarifications in respect of additional levy on account of demand charges for captive power producers. He further submitted that in the application it was not pointed out that the appellant was paying Rs. 180/- per KVA per month and, therefore, fell in a different category than those who were paying Rs. 200/- per KVA per month. The MSEB obtained the clarificatory order dated April 16, 2000 from MERC by misrepresenting the facts before it. He highlighted the fact that it was pursuant to the aforesaid application that the MERC clarified the Tariff Order on June 16, 2000, without, giving any opportunity of hearing to the appellant.

18. He also pointed out that long after the order of MERC dated June 16, 2000, a supplementary bill, requiring the appellant to pay additional sum of Rs. 60, 52,380/- w.e.f. December, 1998, was issued on June 16, 2001 without seeking its views in the matter. Mr. Darda canvassed that the orders of the MERC dated June 16, 2000 and Jan. 10, 2002 and the bill dated June 6, 2001 clearly violate the principles of natural justice. He referred to the fact that the appellant had challenged the bill dated June 16, 2001 to the extent it related to the period from Dec., 1998 to April, 2000 by means of a Writ Petition, being writ petition no. 2567/2002, before the Bombay High Court which was ultimately dismissed in limine. The learned counsel submitted that since the Writ Petition was dismissed in limine, the order of the Bombay High Court can not operate as res judicata.

19. Mr. Darda also contended that the Regulatory Commission Act, 1998 having come into force w.e.f. April 25, 1998, the MSEB did not have any jurisdiction to fix the tariff on September 1, 1998 and to levy additional demand charges of Rs. 20/- per KVA per month. Lastly it was submitted that

as per the tariff order dated March 10, 2004 for the year 2003-04, the standby charges are payable by a consumer, whose captive power plant is synchronized with the MSEB's system provided its demand exceeds the contract demand. Effect of this order ought to have been given in the proceedings pendentelite.

20. On the other hand, Ms. Deepa Chavan, learned counsel appearing for the first respondent submitted that decision of the Bombay High Court in Writ Petition No. 2567 of 2002 operates as res judicata and the appellant cannot mount a fresh challenge against bill dated June 16, 2001. Espousing the cause of the first respondent, the learned counsel further submitted that the clarificatory order of the Commission dated June 16, 2000 was not contrary to the principles of natural justice. The learned counsel canvassed that additional charge of Rs. 20/- per KVA was first prescribed by the MSEB by its tariff formulation dated Sept., 1, 1998 and the same was not challenged by the appellant. Thereafter the levy was continued by the clarificatory order of the MERC dated June 16, 2000.

21. The learned counsel for the first respondent further submitted that because of a mistake, which was discovered subsequently during audit, the appellant was not billed for the additional demand charges, though under the 1998 tariff formulation he was required to pay the same.

22. Ms. Deepa further contended that as per the tariff formulation of 1998, two conditions were prescribed for payment of additional charges by a consumer. Both the conditions namely, consumer has installed captive generation plant and the plant is synchronized with the Board system, stand satisfied in the case of the appellant. The additional levy was not dependent upon the condition that the consumer should exceed the contract demand. The learned counsel highlighted the fact that the appellant though required to pay additional charges, was erroneously being billed at Rs. 180/- per KVA per month/ Rs. 300/- per KVA per month instead of Rs. 200/-/Rs. 320/- per KVA per month before and after enhancement of tariff as the case may be. When the mistake was discovered by audit, supplementary demand was raised against the appellant. The general reference to the category of

High Tension consumers whose captive plants were synchronized with the system of the Board, in the application of the MSEB seeking clarification of the order of the MERC does not by any stretch of imagination show that the Board had mis-represented to the MERC by not bringing it to its notice that the appellant was being billed at Rs. 180/- per KVA per month of the billing demand. It was urged that the appellant was not justified in alleging that the MSEB had obtained the Tariff Order by exercising fraud on the MERC or by misrepresenting the facts before it. The MSEB not being aware of the mistake at that time of filing the application cannot be attributed with the intention to misleading the MERC. According to the learned counsel, the principles of natural justice have not been violated by the Commission in passing the clarificatory order or the subsequent Tariff Orders dated Dec., 28, 2001 and January 10,2002, whereby the additional charge was permitted to be levied under the nomenclature of stand by charges. The learned counsel also submitted that the appellant cannot again call in question the levy of additional charges from December, 1998 to April,

2000 as the levy for the said period was considered by the Bombay High Court and the writ petition was rejected.

23. We have considered the submissions of the learned counsel for the parties. In case the order of the Bombay High Court dated June 9, 2003 operates as res judicata, the appellant cannot challenge the levy of additional charges from December 1998 to April, 2000. Even if the order does not operate as res-judicata, the appellant still cannot succeed, in directing its salvo to bill dated June 16, 2001, clarificatory order of the MERC dated June 16, 2000, and the tariff order dated January 10, 2002, on the basis of the grounds urged before the Bombay High Court and which are being urged before us including those relating to the alleged violation of the principles of natural justice and misrepresentation. Before we enumerate our detailed reasoning for the aforesaid view, it may be necessary to have a clear picture of the prayers made in the writ petition preferred before the Bombay High Court, the grounds of challenge raised therein, application of the appellant for amendment of the writ petition, outcome of that

application, and the basis on which the Bombay High Court dismissed the writ petition in limine.

24. Before the Bombay High Court, the appellant in its writ petition partially impugned the supplementary bill dated June 16, 2001 issued by the MSEB. The prayer clause of the writ petition reads as follows:

a) for a writ certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case and, after perusing the same, to quash and set aside the impugned letter and bill dated June 16, 2001 (to the extent that it relates to the period from Feb., 1998 to April, 2000);

b) for a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the 1st respondent to forthwith cancel, withdraw and rescind the impugned letter and bill dated 16 June, 2001(to the

extent that it relates to the period from Feb., 1998 to April, 2000);

c) for a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the 1st respondent to forthwith refund to the Ist Respondent all amounts by the Ist Petitioner to the 1st Respondent under the impugned bill with or without interest as this Hon'ble Court deems fit;

d) that pending the hearing and final disposal of this Petition, the 1st Respondent by itself, its officers servants and agents be restrained by an order and injunction of this Hon'ble Court from demanding or recovering from the Petitioners any amount including interest under the impugned bill or impugned letter to the Petitioner or from taking any coercive steps by way of disconnection of electricity to the Petitioners or otherwise on the Petitioners adjusting the amount of Rs. 45 lacs illegally

recovered by coercion under the impugned Bill or impugned letter or for non-payment of the impugned bill or impugned letter or any part thereof and from raising any additional bill or demand for the said period December 1998 to April 2000.

e) for ad-interim reliefs in terms of prayer (d) above;

f) for costs; and

g) for such further and other reliefs as the nature and circumstances of the case may require.

As is apparent from the aforesaid prayer clause of the writ petition, the appellant not only challenged the supplementary bill to the extent of the amount, which was required to be paid, for the period Dec.,1998 to April 2000 but also questioned recovery of Rs. 45 lakhs by the MSEB in para (d) of the prayer clause of the writ petition.

25. A copy of the writ petition, which has been placed on record by the appellant, shows that the challenge to the supplementary bill was based on the following grounds:

a) The supplementary bill is ultra vires of Sections 18, 18-A and 44 of the Electricity (Supply) Act, 1948;

b) The bill is arbitrary;

c) The bill suffers from wednesbury unreasonableness;

d) The bill betrays a complete non-application of mind to the relevant criteria and factors;

e) The bill was in the nature of fine or penalty.

26. The appellant had also moved an application before the Bombay High Court seeking permission to amend the writ petition to challenge the legality and constitutionality of the tariff formulation of the MSEB Board dated September 1, 1998. But that the application was rejected by the Bombay High Court.

27. Ultimately the Bombay High Court by order dated June 9, 2003 dismissed the writ petition in limine and while doing so it held to the following effect:-

(a) It was too late in the day for the appellant to raise a grievance that the tariff fixed at the rate of Rs. 200 per KVA per month for consumers having captive power plant synchronized with the Board system was discriminatory;

(b) The high tension tariff was effective from September 1, 1998 and at no point of time the same was challenged;

(c) Earlier of course some mistake was committed by the Board in issuing the demand charges at the rate of Rs. 180/- per month per KVA but as soon as the mistake was detected in the month of May 2001, supplementary bill was issued;

(d) There was no justification in permitting the challenge to the legality and constitutionality of the high tension tariff effective from Sept. 1, 1998 at a belated stage;

(e) The consumer with captive power plant has his own power supply but the connection of the first respondent still exists and the Board has to incur a fixed expenditure in respect of the same; and

(f) No case for invocation of the writ jurisdiction was made out.

28. Thus, it is clear that the appellant before the Bombay High Court had challenged the bill dated June 16, 2001 to the extent indicated above, on several counts. It had also referred to the clarificatory order passed by the MERC dated June 16, 2000. But it had not challenged the bill which had its basis in the MSEB's tariff formulation of 1998 and the clarificatory order of the MERC dated June 16, 2000 on the ground of violation of the principles of natural justice or on the basis of the alleged misrepresentation brought out in the submissions of learned counsel for the appellant detailed in earlier part of this order (para-17). The challenges which were raised before the Bombay High Court at the time of the hearing of the case were squarely dealt with by the Division Bench in its oral order dated June 9, 2003 dictated in open court. It is not the case of the appellant that some pleas were raised during the arguments but were not considered or answered by the High Court. The bill was a subsequent event to the clarificatory order of the Commission dated June 16, 2000 and the same

was in consonance with the theme of the tariff formulation of the MSEB dated September 1, 1998. All pleas which were then available in law to the appellant ought to have been urged before the Bombay High Court. In case those were not urged, the matter would be concluded by the principles of constructive res-judicata. This position is well settled in law. In case any authority is needed for the proposition reference can be had to the decisions of the Supreme Court in Shri Nirmal Enem Horo Vs. Smt. Jahan Ara Jaipal Singh- (1973) 2 SCC 189 and Sangappa Gurulingappa Sajjan Vs. State of Karnataka & Ors. – (1994) 4 SCC 145.

29. Thus, the pleas that were raised before the Bombay High Court and those not raised though they were available to the appellant, cannot be advanced now to challenge the bill for the period in question in these proceedings as they are barred by the principles of res-judicata and constructive res judicata.

30. Once the bill to the extent it was challenged, was not interfered with by the Bombay High Court, it attained finality as no appeal was filed before the Supreme Court. Even the application seeking amendment of the writ petition for

challenging the tariff formulation of 1998 of the MSEB, providing for additional demand charges from consumers having captive power plant synchronized with the Board's system, was rejected by the Bombay High Court, but the appellant allowed the order to attain finality. Thus, the question relating to the liability of the appellant to pay additional charges from December 1998 to April, 2000 and to the extent of the aforesaid sum of Rs. 45 lakhs recovered by the Board ought to have acquired quietus. All challenges which were mounted or ought to have been mounted in the writ petition against the impugned bill & the tariff formulation of the MSEB dated September 1, 1998 cannot now be pressed into service. The learned counsel for the appellant referred to the decision of the Supreme Court in Joseph Pothen v. the State of Kerala–AIR 1965 Supreme Court 1514 to buttress the plea that additional levy from December 1998 to April, 2000 can be questioned in other proceedings as the writ petition by the Bombay High Court was dismissed in limine. The decision of the Supreme Court is not applicable to the facts of the instant case. In that case, initially a writ petition

filed by the petitioner was dismissed by a single Judge of the High Court of Kerala on the ground that the petitioner had sought for a declaration of title to the property in the writ petition and the relief prayed for was foreign to the scope of the proceedings under Article 226 of the Constitution. The Division Bench also took the same view and dismissed the appeal. The Kerala High Court did not go into the merits of the petitioner's contention, but proceeded on the basis that the petitioner had an effective remedy by way of a civil suit. In the subsequent writ petition filed by the petitioner before the Supreme Court under Article 32 of the Constitution, it was held that every citizen whose fundamental right is infringed by the State has a fundamental right to approach the court for enforcing his right. It was also held that if by a final decision of a competent court title of the petitioner to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it and in that context the principle of res judicata may be invoked. But where there is no such decision at all, there is no scope to apply the principle of res-judicata.

31. In the instant case however, the Bombay High Court has not only rejected the writ petition on the ground of laches but also on merits in as much as the High Court found that the captive power plant of the appellant was synchronized with the Board system and accordingly, it was liable to pay demand charges at Rs. 200/- per KVA per month and it was only by mistake that the appellant was billed at the rate of Rs. 180/- per month. Thus, in other words, the High Court was of the view that the liability to pay additional charges came into existence as soon as captive power plant installed by the appellant was synchronized with the Board's grid. The plea of the appellant that captive power plant synchronized with the system of the board did not place any additional burden on the Board's system and the levy was discriminatory, was rejected by the High Court on the ground that it was too late in the day to raise such a grievance. The High Court also took into consideration the plea of the MSEB that though the consumer with captive power plant has his own power supply, the connection of the first respondent still exists and the Board has to incur a fixed expenditure in respect of the same.

32. In the circumstances, it cannot be said that the Bombay High Court while dismissing the writ petition did not go into the merits of the case. Therefore, for all these reasons the Judgment of the Supreme Court has no bearing on the case in hand.

33. In view of the aforesaid analysis, we hold that the challenge to the supplementary bill dated June 16, 2001 to the extent of Rs. 45 lakhs is barred by the principle of res judicata.

34. We now proceed to examine the plea of the appellant that MSEB obtained clarificatory order dated June 16, 2000 from the MERC by misrepresenting the facts. Though we are of the view that the plea is barred by the principles of res judicata as the same ought to have been raised before the Bombay High Court, nevertheless we will examine it on merits. Here we will like to recapitulate the plea of the learned counsel for the appellant. It was urged that an order obtained by misrepresentation, is no order in the eye of law and would stand vitiated. In support of his submission he referred to the

decision of the Kerala High Court in Vellappan v. Peter Thomas – AIR 1979 Kerala 194.

35. There is no quarrel with the proposition advanced by the learned counsel for the appellant. But the plea of the appellant that the MSEB obtained clarificatory order of the MERC dated June 16, 2000 by misrepresentation is wholly misconceived. The MSEB went to the MERC with an application seeking clarification of the tariff order dated May 5, 2000 on various issues including general issue relating to demand charges for captive power producers, whose plants stood synchronized with the system of the Board. Just because in the application of the MSEB there was no mention of the case of a consumer, who was paying Rs. 180/- per KVA per month, inspite of the fact that his CPP was synchronized with Board's grid and he ought to have paid Rs. 200/- per KVA per month, is no ground to countenance the plea of misrepresentation. An aberration or a mistake which had gone un-noticed could not be pointed out to the Commission.

36. The learned counsel for the appellant pointed out that the appellant had filed a review petition before the MERC

against the Tariff Order dated January 10, 2002, whereby the concept of additional charge on account of contract demand charges had undergone change of terminology and the same were styled as stand by charges by the MSEB. According to the learned counsel, the review application was dismissed on the ground that there was no error apparent on the face of the record. Learned counsel also pointed out that in view of the liberty granted by the MERC, a fresh review application was filed, but this application was also rejected on Feb., 7, 2005 without considering the submission of the appellant, that it had no opportunity to place its stand before the MERC relating to standby charges before the passing of the tariff order dated January 10, 2002. According to the learned counsel this has resulted in violation of the principles of natural justice. Ms. Deepa Chavan controverting the submission of the learned counsel submitted that there was no violation of principles of natural justice.

37. We have given our deep consideration to the pleas of the learned counsel. As is evident from the clarificatory order of

the MERC dated June 16, 2000 the question of additional charges was not finally determined and was to be taken up for consideration at the time of taking up issues relating to Section 22(1) of the Electricity Regulatory Commission Act, 1998. In other words, the issue was to be taken up for final determination at the time of the next tariff formulation for the year 2001-02, irrespective of the fact whether or not additional levy was proposed in the ARR of 2001-02. It is not the case of the appellant that it was not aware of the clarificatory order dated June 16, 2000. When the tariff exercise for the year 2001 - 2002 was being undertaken, the general public was notified of the same. The appellant ought to have appeared before the Commission, even on its own, since the final determination as indicated in the clarificatory order dated June 16, 2000 was to be made when issues relating to Section 22(1) of Electricity Regulatory Commission Act, 1998 were to be taken up by the MERC especially when the question of refund of the amount paid under the bill of June 16, 2001 was also dependent upon the outcome of the proceedings for formulation of tariff for the year 2001-02. One who takes the

plea of violation of the principles of natural justice, must show that he did everything possible to avail of those principles before the concerned forum, when opportunity arose.

38. In any event it appears to us that the plea that opportunity was not given to the appellant by the MERC before determining the standby charges is an after thought as in the first review petition filed by the appellant, no such ground has been taken nor was the same urged before the MERC. In case the appellant would have been prejudiced on account of not being able to represent before the MERC, when exercise for the formulation of the tariff for the year 2001-02 was being undertaken before the MERC, the appellant would have certainly made a grievance of it in the aforesaid review petition.

39. In this appeal the tariff formulation of the MSEB dated Sept., 1, 1998 has also been challenged on the ground that Regulatory Commission Act, 1998 having already come into force w.e.f. April 25, 1998, the MSEB did not have any jurisdiction to fix the tariff. A reference in the appeal has also

been made to the decision of the Supreme Court in BSES Ltd. Vs. Tata Power Co. Ltd. & ors. (2004) 1 SCC 195. It needs to be noted that the review application being case no. 30 of 2001, was filed in respect of the orders of the MERC dated December 28, 2001 and January 10, 2002 read with orders dated May 5, 2000 as modified by the order dated June 16, 2000.

40. Therefore, the challenge to the tariff formulation of 1998 is beyond the scope of the appeal and the issue cannot be re-opened or enlarged as the same was finally decided by the Bombay High Court. It also requires to be pointed out that in the second review petition, being no. 17/2004, tariff formulation of 1998 by the MSEB was not specifically and directly challenged as is evident from the prayer clause of the review petition which reads as follows:

> "a) To declare that the coercive steps taken by the non applicant in sending supplementary bill dated 16.6.2001 to the sum of Rs. 60,52,330/- are illegal and unjustified; which is composite of two periods i.e. from 1.5.2000 to May 2001 and (ii) Dec., 1998 to April 2000;

b) To declare that issuance of supplementary bill dated 16.6.2001 for amount of Rs. 60,52,330/- by the non applicant to this applicant on the basis of Audit Report, is contrary to the law and amounts to the abuse of process of this Hon'ble Commission;

c) To quash and set aside the supplementary bill dated 16.6.2001 of Rs. 60,52,330/- issued by the non applicant to the present applicant under the guise of audit report;

d) To grant such other relief as this Hon'ble Commission deems fit and proper including directing the non applicant to refund the amount of Rs. 60,53,330/- with interest at Rs. 18% p.a.

e) To allow this application with costs".

41. In fact the tariff order of 1998 could not have been challenged belatedly in the review petitions filed in the years 2001 and 2004. Besides, the tariff formulation of 1998 was not made under the Electricity Act, 2003 and, therefore, the same could not be the subject matter of review petitions.

42. Therefore, the challenge to the bill dated June 16, 2001 and to the order of the MESC dated June 16, 2000 based on the aforesaid plea of appellant, fails and is hereby rejected.

43. Mr. Darda pointed out that the MERC by its Order dated March 10, 2003 for the year 2003-04 has formulated fresh tariff, which also provides for payment of standby charges by High Tension consumers whose power plants have been synchronized with the Board's grid. But according to the tariff order the standby charges can be levied only in the event of the consumers exceeding the contract demand. The learned counsel submitted that since demand of the appellant did not exceed the contract demand for the billing period in question, the appellant is not liable for additional charges, as the developments which take place pendentelite must be given effect to. In other words, the determination of MERC dated March 10, 2004 for tariff year 2003-04 should apply and the charges as per the bill dated June 16, 2000 for the period Dec., 1998 to April 2000 and for the remaining period of the bill are not leviable inspite of the dismissal of the writ petition by the Bombay High Court and rejection of the review

applications by the MERC. According to him, the aforesaid formulation for the year 2003-04 should have been taken into consideration by the MERC, while deciding the review application of the appellant. In this regard Mr. Darda relied on the decision of the Judicial Commissioner in Nripendra Chandra Dutt Vs. Administration of Tripura - AIR 1969 TRIPURA 62.

44. The argument of the learned counsel which has been pressed into service on the basis of the Tripura Judgment has no force. The matter covered by the decision of the Bombay High Court cannot be re-opened by a subsequent tariff determination by MERC. Besides the tariff formulation of the year 2003-04 cannot be applied retrospectively. It does not have the effect of amending the clarificatory order of the MERC dated June 16, 2001 and the tariff formulation of the year 2001-02. At the relevant time, two conditions were prescribed for levy of additional demand charges:

i) Consumer has a captive power plant; and

ii) The plant has been synchronized with Board's system.

Both the conditions in the case of the appellant stood satisfied. Therefore, the appellant was liable to pay additional demand charges prior to the tariff formulation of the year 2003-04.

45. In the ultimate analysis, we agree with the MERC that there was no error apparent on the face of the record and therefore, the review petitions filed by the appellant could not have been entertained. It needs to be noted that the instant appeal arises from the order passed in second review. Therefore, the considerations which apply for entertaining a review application also apply for entertaining an appeal from the order passed in review.

46. In view of the aforesaid discussion, the appeal fails and is hereby dismissed.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member