Appellate Tribunal for Electricity
(Appellate Jurisdiction)

OP NO.2 OF 2011

Dated: 20th Oct, 2011

Present: **Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson,**
Hon'ble Mr.V J Talwar, Technical Member

Maharashtra State Electricity Distribution Co. Ltd.,
Plot No.G-9, Prakashgad,
Bandra (East),
Mumbai-400 051

… Appellant

Versus

1. Maharashtra Electricity Regulatory Commission,
Centre 1, 13th Floor,
World Trade Centre,
Cuffe Parade,
Mumbai-400 005

2. Committee for Finalisation of Reports for Road Map
for Cross Subsidy Reduction and Open Access,
Centre 1, 13th Floor,
World Trade Centre,
Cuffe Parade,
Mumbai-400 005

.....Respondents

Counsel for Appellant(s): Mr. Vikas Singh, Sr Advocate
Mr. Abhishek Mitra
Mr. Varun Pathak
Ms. Amrita Narayan
Mr. Ravi Prakash
Mr. Samir Malik

Counsel for Respondent(s): Mr. Buddy A Ranganadhan,

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

Maharashtra State Electricity Distribution Company Limited, is the Petitioner herein. The Petitioner is a distribution licensee, authorised to operate and maintain a Distribution System for supplying electricity to the consumers in its area of supply.

2. The Petitioner has filed this Original Petition Under Section 121 of the Electricity Act 2003 (the Act) before this Tribunal praying to quash the draft Regulations issued by the Maharashtra Electricity Regulatory Commission (State Commission) on Open Access and to direct the State Commission to circulate the Minutes of the Meeting and thereafter to frame the Draft Regulations.

3. This Petition came-up for the admission on 12.7.2011. The Learned Counsel for the Petitioner took an adjournment on that day. Therefore, the matter was posted to 18.7.20011. On 18.7.2011, the Learned Counsel for the Petitioner, argued the matter contending that the Draft Regulations on Open Access have been finalised without circulating the minutes of the meeting as envisaged in Regulation 27 of MERC (Conduct of Business) Regulation 2004 and as such, the transparent

procedure Under Section 86 (3) had not been followed and that, therefore, these Draft Regulations have to be quashed.

4. However, we entertained the doubt with regard to maintainability of the Petition seeking for the quashing of the Draft Regulations Under Section 121 of the Act. Therefore, we issued notice on 22.7.2011 to the Respondents with reference to maintainability of the Petition. The matter again came-up for hearing 3.8.2011 and thereafter on 12.8.2011. The Learned Counsel appearing for the State Commission raised objections with regard to the maintainability of this Petition by contending that the Draft Regulations cannot be sought to be quashed Under Section 121 of the Act by this Tribunal in the light of the judgement of the Hon'ble Supreme Court in PTC Vs Central Electricity Regulatory Commission 2010 ELR 269. He also pointed out the unfair conduct of the Petitioner in suppressing the material fact that the Petitioner invoked the Writ Jurisdiction seeking similar relief before the Bombay High Court in two Writ petitions which are still pending.

5. In the light of the specific objections raised by the Learned Counsel for the Commission we directed both the parties to file their written submissions. Accordingly, they filed the same.

6. We have heard the submissions made by the Learned Counsel for both the parties, who argued at length.

7. According to the Learned Counsel for the Respondent State Commission, the Draft Regulations of State Commission cannot be challenged Under Section 121 of the Act as the finalisation of the Draft Regulations is made under the authority of delegated legislation and their validity cannot be tested in the Tribunal.

8. Per contra, the Learned Senior Counsel for the Appellant submitted that the prayer in this Petition is not to quash the Draft Regulations but to merely direct that the draft regulations be finalised only after the release of minutes of the meeting of the Committee which was constituted to look into the questions relating to the road map for reduction of cross subsidy surcharge and as such the petition is maintainable.

9. In the light of this rival contention, we may now refer to actual prayer made by the Petitioner in this Petition Under Section 121 of the Act:

> "*To quash/set aside the Draft Regulations issued by MERC on Open Access and to further direct the MERC to circulate Minutes of Meeting as envisaged in Regulation 27 under Conduct of Business*

Regulations, 2004 and thereafter to frame Draft Regulations in consonance in Minutes of Meeting in a time bound manner"

10. In the light of the wordings contained in the prayer, it cannot be contended now by the Learned Senior Counsel for the Petitioner that he has not asked for quashing of the Draft Regulations but merely asked for the directions as the specific prayer in this Petition is to quash the Draft Regulations.

11. As pointed out by the Learned Counsel for the Commission, the Regulations of the State Commission cannot be questioned/challenged Under Section 121 of the Act as held in the Judgement of Constitution Bench of Hon'ble Supreme Court in PTC India Ltd Vs. Central Electricity Regulatory Commission and Ors reported in 2010 ELR 269. The relevant portion of the observations made by the Constitution Bench is as follows;

"*A Regulation Under Section 178 is made under the Authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the Courts and not by way of Appeal before the Appellate Tribunal for Electricity Under Section 111 of the said Act". .....* ***In the Present 2003 Act, the power of judicial review of the validity of the Regulations made Under Section 178 is not conferred on the Appellate Tribunal for Electricity****".*

12. In the light of the said judgement, we are to hold that the Petitioner can not seek the relief of the quashing of the Regulations that too the Draft Regulations.

13. If the Regulations after having been framed cannot be questioned in the proceedings under Section 121 of the Act, naturally, such Regulations cannot at all questioned at the Draft stage. We cannot permit the said prayer to quash the draft Regulations under Section 121 of the Act since it would tantamount to permitting to something to be done indirectly which cannot be done directly. Furthermore, the finalisation of the Draft Regulations and framing of the Regulations is being done by the Commission under authority of the delegated legislation and not under the adjudicative Jurisdiction.

14. As correctly pointed out by the Learned Counsel for the Commission on the strength of the judgement of the Constitution Bench reported in PTC India Ltd Vs. Central Electricity Regulatory Commission and Ors reported in 2010 ELR 269, this petition is liable to be rejected as not maintainable. Accordingly, rejected.

15. However, before parting with this case, we are constrained to deal with the sad feature relating to the conduct of the Petitioner in

approaching this Tribunal, suppressing the material fact relating to the Petitioner's invoking the writ jurisdiction of the Bombay High Court with the similar prayer.

16. Let us now deal with this issue.

17. As mentioned earlier, the prayer made in the present petition Under Section 121 of the Electricity Act is for quashing the Draft Regulation issued by the State Commission on Open Access and for consequent directions to the State Commission.

18. According to Learned Counsel for the State Commission, the Petitioner approached the Bombay High Court and filed Writ Petition No.553 of 2011 and the Writ Petition No.666 of 2011 raising substantially the same issues that have been raised in the Present Petition. In addition to that, it is pointed out by the Learned Counsel for the Commission that the Petitioner filed a Review Petition before the Respondent Commission on 25.8.2010 seeking a Review of the Commission's order dated 5.9.2006 in case No.43 of 2010 and even before the disposal of the said Review Petition, the present Petition Under Section 121 of the Act had been filed on 17.3.2011. In the meantime, as mentioned above, the Petitioner filed the above two Writ Petitions numbered as Writ Petition No.553 of 2011 and Writ Petition No.666 of

2011 before the Bombay High Court. The following directions were sought for in the Writ Petition Number 553 of 2011:

(a) For giving directions to the State Commission to expeditiously dispose of the Review Petition case No.43 of 2010,

(ii) Directions to restrain the State Commission from finalising the draft Open Access Regulations, 2011 till such time Case No.43 of 2010 is disposed of;

(iii) Directions to restrain the State Commission from disposing of any further applications seeking open access filed by the consumers till such time the Respondent Commission has dealt with the issues before it in the case No.43 of 2010.

19. Thus, the prayer in this Writ Petition related to the finalisation of Draft Open Access Regulations. We will now see the prayer in Petition No.666 of 2011 which is as under:

(i) For directions to the State Commission to review its existing Regulations to consider the grievances of the Petitioner viz-a-viz sourcing of power through power exchanges and also to make the same conducive to exchange related transactions.

(ii) For directions to the State Commission from disposing any further applications for open access being filed by consumers for sourcing power through power exchanges till such time the Respondent Commission has dealt with the issues raised before it by framing appropriate Regulations.

20. Thus, this prayer would also relate to the framing of the appropriate Regulations on Open Access. However, the Petitioner has not chosen to divulge these facts before this Tribunal when the matter came up for first hearing on 18.7.2011.

21. As a matter of fact, the Petitioner prayed for interim relief in these Writ Petitions but the said Petitions were dismissed by the High Court of Judicature at Bombay on 4.5.2011. Thereupon, the Petitioner filed a Special Leave Petition before the Hon'ble Supreme Court challenging the interim order rejecting the interim relief dated 4.5.2011 passed by the Bombay High Court. The Hon'ble Supreme Court on 23.5.2011 dismissed the said SLP with a request to the High Court to make endeavour to dispose off the main Writ Petition as early as possible. Thereafter, the matter came up before the High Court on 20.7.2011. On that date, the High Court deferred the final hearing of Writ Petition No.553

of 2011 so as to enable the State Commission to take a considered view in the case No.43 of 2010.

22. All these have taken place before the Hon'ble High Court as well as the Hon'ble Supreme Court where the Petitioner was unable to get an interim relief. At that stage, the Petition Under Section 121 of the Electricity Act which was filed on 17.3.2011 got it numbered and was brought before this Tribunal for admission on 18.7.2011. The matter was heard on 18.7.2011 and 22.7.2011.

23. The Petitioner has neither informed this Tribunal through his Additional Affidavit giving the further details of the events nor referred to the same through his Learned Counsel at the time of hearing on these dates.

24. Thus, it is clear that even though the Writ Petitions were filed by the Petitioner before the High Court which were directed against the very same Draft Open Access Regulations, the Petitioner has chosen not to mention the same in the present Petition seeking for the quashing of the said draft regulations for the best reasons known to the Petitioner.

25. The Learned Counsel for the Petitioner now only contends that too after the objections raised by the Learned Counsel for Commission that

his prayer made in the petition can not be construed to be a relief for quashing the Draft Regulations but a mere prayer to direct the State Commission that the Regulations be finalised only after following the transparent procedure. This submission as mentioned above is completely contrary to the categorical prayer that has been made by the Petitioner in this Petition which has sought to quash the Draft Regulations and to pass consequent directions. In this context, we would extract the relevant portion of the Writ Petition No.553 of 2011 where the Petitioner has sought relief in respect of the finalisation of the Draft Regulations:

> *"However, all of a sudden, in January 2011, the Commission came up with draft regulations on the issue of Open Access, which the Petitioner herein was not only shocked but was also at a loss as the provisions of the draft regulations published by the Commission were completely contrary to the several issues which had been raised by the Petitioner at the meetings of the above mentioned Committee and were in total disregard to the consensus which had emerged at the meetings held by the Committee constituted by the Commission to revisit regulations on the issues pertaining to Open Access".*

26. We will now refer to the relevant portion of the statement made by the Petitioner in WP No.666 of 2011 which is as under:

"It is submitted that the main terms of reference of the above mentioned committee was pertaining to the issues and the practical difficulties with respect to Open Access Consumers. It is submitted that the above mentioned Committee deliberated on several issues pertaining to Open Access, and pursuant to discussions held in the said meeting, general consensus emerged on various issues amongst the Committee Members including the fact that there were various lacunae existing in the present regulations pertaining to Open Access. However, till date no steps have been taken by the Respondent in addressing these grievances and the Petitioner is being made to suffer continuously".

27. Thus, it is clear that in both the Writ Petitions, the Petitioner has raised the issues which have been raised in this the Petition before this Tribunal also.

28. The Petitioner has now submitted that suppression of the above said facts before this Tribunal was irrelevant since the Petitioner was not seeking any interim relief etc., Taking this stand that too by a public utility which is the Petitioner herein is quite preposterous. The Petitioner being a public utility has to place all the materials and relevant facts before the Tribunal while seeking the relief. On the other hand, by way of justifying his failure to furnish the relevant details, the Petitioner has taken an yet another stand to the effect that the failure to furnish those details in the present petition cannot be said to be suppression but it can at the most

addressed to be considered as a error of judgement on the part of the Counsel. This conduct of the Petitioner putting blame on his own Counsel is most unfair. In addition to this, the Petitioner is seeking to justify the said error of judgement by relying on the difference between the prayers in the Writ Petition before the Bombay High Court and in the present Petition before this Tribunal. This is quite unfortunate.

29. It cannot be disputed that if the prayer as raised in this Petition is allowed, then at least one of the prayers before the Bombay High Court would be rendered infructuous. Similarly, if the prayer before the Bombay High Court is allowed, then the prayer before this Tribunal would be rendered infructuous.

30. Therefore, the petitioner ought to have mentioned all the events before this Tribunal relating to his attempts to get the similar relief before the High Court and the Supreme Court. The failure to give those particulars in this Petition in our view is a deliberate suppression.

31. The Learned Counsel for the Commission has pointed out the following authorities to show that the consistent view of the Hon'ble Supreme Court and other High Courts in the country on suppression and

concealment of facts is well settled as may be seen from a catena of judgements as under:

(i) ***S.P. Chengalvaraya Naidu Vs Jagnath and Others (1994) 1 SCC 1 at Para 6*** *the relevant portions of which are extracted as under:*

> *"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".*

(ii) ***T. Arivandandam Vs T.V. Satyapal & Anr. (1977) 4 Supreme Court Cases 467 at para 4 and 5 at page 469-470*** *the relevant portions of which are extracted as under:*

> *" The next chapter in the litigative acrobatics of the Petitioner and father son followed since they were determined to dupe and defy the process of the Court to cling on to the shop. The trick they adopted was to institute another suit before another Munsif making a carbon copy as it were of the old plaint and playing upon the likely gullibility of the new Munsif to grant an ex parte injunction. He first respondent entered appearance and exposed the hoax played upon the court by the Petitioner and the Second Respondent".*
>
> *"We have not the slightest hesitation in condemning the Petitioner for the gross abuse of the process of the Court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgement of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The Learned Munsif must remember that if on a meaningful vexatious, and meritless, in the sense of not disclosing a clear right o sue, he should exercise his power under Order VII, Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting, has created the illusion of a cause of action, nip it in the bud at the first hearing by*

examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining in party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the Learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

'It is dangerous to be too good'.

(ii) ***Amar Singh Vs Union of India & Ors (2011) 7 Supreme Court Cases 69, at Para 53 to 58*** *the relevant portions of which are extracted as under:*

"53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

54. In Dalglish Vs. Jarvie 10 the Court, speaking through Lord Langadale and Rolfe B., laid down: (Mac & G p.231: ER p.89)

" It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward".

55. In Castelli Vs. Cook 11 Vice-chancellor Wigram, the same principles as follows: (Hare p. 94: ER p.38)

"……a plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that and the Corut finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told

that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go,"

56. In Republic of Peru Vs. Dreyfus Bros. & Co. 12 Kay, J. reminded us of the same position by holding: (LT p. 803)

"….if there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made".

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in R.V. Kensington Income Tax Commr, ex. P. Princess de Polignac 13 K.B. Scrutton, L.J. formulated as under: (KB p 514).

".....and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- facts, not law. He must not misstate the law if he can help if-the court is supposed to know the law. But it knows nothing about the facts. And the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated it, the court will set aside any action which it has taken on the faith of the imperfect statement".

*58. **It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction**. A prayer for injunction, which is an equitable remedy, must be governed by the principles of "uberrima fides".*

(iv) ***Holy Health and Educational Society (Regd) Vs Delhi Development Authority 8 80 (1999) DLT 1207 at para 14,15 and 16*** *the relevant portions of which are extracted and read as under:*

"14. I have carefully perused the principles laid down in the aforesaid decision by the Division Bench of this Court and on perusal thereof, I find that the facts of that case and the present case are almost identical. In the said proceedings also two suits came to be filed by the plaintiff. In the earlier suit filed by the plaintiff, the Court did not grant any stay in its favour whereas, in the second case, the plaintiff did not mention and disclose to the Court about the rejection of the prayer for stay in its favour. The facts, therefore, in the present suit are identical and similar to that of the said case. In paragraph 14, ***the Division Bench of this Court posed a question as to whether it was not obligatory on the part of the Respondent to disclose to the Court that in an earlier suit filed by it, the Court had not granted any stay in its favour and if on such a disclosure having been made the Court still granted stay in favour of the Respondent, it could be said that the Respondent had not concealed any material fact from the Court ? The Division Bench also referred to the decision of the Supreme Court in S.P Chengalvaraya Naidu (supra) wherein, it was held by the Supreme Court that the Courts of Law are meant for imparting justice between the parties and that one who comes to the Court, must come with clean hands.*** *In the said decision, it was held that it could be said without* ***that a person whose case is based on falsehood has no right to approach the Court and that he could be summarily thrown out at any stage of the litigation****. It was further held thus:-*

"A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation*. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party".*

In the said decision, it was also held that by withholding the plaint the application in the earlier suit from the Court and by not disclosing to the Court about the proceedings in the earlier suit and the same having not been granted to it, the plaintiff had tried to get an advantage from the Court and was,

therefore, guilty of playing fraud on the Court as well as on the Respondent.

15. In fact, it was held by the Division Bench that the Respondent had not come to the Court with clean hands and had also suppressed material facts from the Court with a view to gain advantage in the second suit, which amounted to over-reaching the Court and in that view of the matter, the Division Bench directed for dismissal of the suit itself.

16. The Principles laid down in the said case and the ratio of the decision, in my considered opinion, are fully applicable to the facts and circumstances of the present case. ***The plaintiff while filing the present suit did not disclose to the Court about the plaint and the application in the earlier suit and also did not disclose to the Court about the proceedings in the earlier suit, particularly, the fact of rejection of the prayer for interim injunction and dismissal of the Appeal there from to the Court. The plaintiff did not disclose to the Court either in the plain or in the application as to what had transpired in the Court on the dates when the said suit was fixed, not it was disclosed to the Court that injunction had not been granted in its favour by the Court and the relief claimed in the application in the earlier suit was almost similar to the relief as claimed in the present suit for the earlier suit was based on the show cause notice issued to the plaintiff whereas, the present suit is based on the final notice issued to the plaintiff cancelling the lease.***

(v) Satish Khosla Vs. M/s. Eli Lilly Ranbaxy Ltd & Anr. 71 (1998) DLT1, at para 14 *read as under:*

"14. Was it not obligatory on the part of the Respondent to disclose to the Court that in an earlier suit filed by it, the Court had not granted any stay in its favour and if on such a disclosure having been made the Court still granted stay in favour of the Respondent it could be said that the Respondent had not concealed any material fact from the Court? **But not mentioning anything about the Court having not granted**

> **any stay in similar circumstances in favour of the Respondent in the earlier suit, it appears to us that the Respondent had not only concealed material facts from the Court but had also tried to over reach the Court.** Being unsuccessful in obtaining stay in Suit No.3064/96, it was not permissible to the Respondent to file the subsequent suit and seek the same relief which had not been granted to it in the earlier suit".

32. These decisions would lay down that a fundamental rule which has to be followed that the litigants must in their pleadings give all the relevant details to show that they have come to the Courts and Tribunals with clean hands. Per Centra, the Learned Senior Counsel for the Petitioner cited following two judgements where the findings have been rendered by the Hon'ble Supreme Court, on this issue:

(i) **<u>Arunima Baruah Vs UOI & Ors (2007) 6 SCC 120</u>**

It is submitted that:

(a) The factual matrix in the said judgement as mentioned in para 8 wherein it is clearly stated that as on the date of hearing of the Writ Petition, the earlier suit filed by the Petitioner therein already stood withdrawn. In the present matter the Petitioner is admittedly and unabashedly prosecuting both the matters before the High Court and this Hon'ble Tribunal.

(b) In para 21 of the said judgement it is clearly held by the Supreme Court that even in that case, the petitioner therein had suppressed a material fact as regards the previous suit and the refusal of the injunction. The Supreme Court in that case however held that since the said earlier suit

had been withdrawn the petitioner therein could not be left remediless. In the present case, the Petitioner still continues to prosecute both the proceedings and to make bold to say that neither one is relevant to other.

(c) It is further submitted that in the present matter if the prayer as raised before this Hon'ble Tribunal were allowed, at least one of the prayers before the Bombay High Court would be rendered infructuous. Equally, if the prayer before the Bombay High Court were allowed the prayer before this Hon'ble Tribunal would also be rendered infructuous.

(ii) MCD Vs Nirmal Sachdeva (2001) 10 SCC 364

It is submitted that:

(a) In para 8 of the judgement it is clearly noted that since the facts in that case did not specifically bring out any concealment, the court was not inclined to dismiss the matter in limine.

(b) In the said judgement the Court did not have sufficient material before it to make out a clear case one way or other as to whether there was concealment or not. In the present matter there is no such difficulty. The concealment is writ large on the face of the record and the only real defence of the petitioner is that the pendency of one proceeding was not relevant to the other. It is, therefore, submitted that neither of the two judgements relied upon by the Petitioner are even remotely applicable to the facts of the present case.

33. These judgements would not apply to the present case because in those judgements, the Court did not find sufficient materials before it to

make out a clear case one way or other to find out as to whether there was any concealment or not. But that is not the case here. In the present matter there is no such difficulty since the concealment of relevant fact is writ large on the face of the record. This conduct is highly reprehensible.

34. Under the above circumstances, we cannot but express our 'Displeasure' over the unfair conduct of Petitioner having caused inconvenience to this Tribunal as well as to the Commission who had to engage a Counsel before this Tribunal who argued the matter at length exposing the conduct of the Petitioner.

35. Therefore, while dismissing this Petition we deem it fit to impose a penalty of Rs.1 lakh to be paid to the 1st Respondent, the State Commission within four weeks from the date of this order. Accordingly directed.

36. The Petition is thus dismissed as not maintainable.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 20th Oct, 2011

REPORTABLE/NON-REPORTABALE