BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)
APPEAL NO.185 OF 2010

Dated : 22nd July, 2011

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

In the matter:

M/s. Entertainment World Developers Pvt.Ltd.,
6th floor, Treasure Island,
11, Tukoganj, M.G. Road,
Indore,
MADHYA PRADESH 452 001. ...Appellant (s)

Versus

1. Madhya Pradesh Electricity Regulatory Commission,
   4th & 5th floor, Metro Plaza,
   Bittan Market, E-5 Area Colony,
   Bhopal (M.P) 462 016.

2. Madhya Pradesh Paschim Kshetra
   Vidyut Vitran Co. Ltd., through its
   Superintending Engineer (O&M),
   G.P.H. Compound, Polo Ground,
   Indore (M.P) 452 001.

3. Sr. Accounts Officer,
   G.P.H. Compound, Polo Ground,
   Indore (M.P) 452 001. Respondent(s)

Counsel for the Appellant : Mr. K.Rai, Sr. Advocate
Mr. Niraj Sharma
Mr. Vikrant Singh Bais

Counsel for the Respondent: Mr. M.G.Ramachandran
Ms. Ranjitha Ramachandran
Ms. Surbhi Sharma
Ms. Shikha Ohri
Mr. Sanjay Kumar
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

The Madhya Pradesh Electricity Regulatory Commission (The Commission, for short), the respondent No. 1 herein passed an order on 3.10.2008 whereby the Commission directed that the tariff for single point supply to the appellant which is said to have taken HT connection of 4000 KVA from 33 KV supply system shall be charged as per tariff schedule HV 3.3 applicable to shopping malls with effect from 15.4.2008 and prior thereto, that is, from the date of connection till 14.4.2008 i.e. prior to the effective date of tariff order for FY 2008-2009, the tariff shall be charged as per the tariff schedule LV2 (for non-domestic users) as according to the Commission there was no tariff determined by the Commission for non-domestic

users availing supply at a single point as a group user in shopping mall.

2. After constructing shopping mall- cum – multiplex at Indore, M.P. the appellant provided for facilities like cinema halls, restaurants, coffee shops etc. and obtained HT connection by entering into an agreement dated 1.06.2005 and supplementary agreement dated 22.8.2005 with Madhya Pradesh Paschim Kshetra Vidyut Vitran Co.Ltd., the respondent No. 2 herein`, and for this purpose constructed 33 KV line for a distance of about a 1/2 kilometre and constructed 33 KV station at a cost of Rs.5.25crore. As per clause 19 of the agreement dated 1.6.2005 the appellant was required to pay monthly charges for electricity supplied on the basis of H.T. tariff No. HV -8 which was 'general purpose non industrial tariff' notified by

the Commission on 10.12.2004 and was applicable at the relevant point of time to railway stations, offices, hotels, institutions, townships of industries, hospitals, etc.; having mixed load. As such, there was no separate categorization for the aforesaid category of consumers. The character of service for the aforesaid tariff was as per Madhya Pradesh Electricity Supply Code, 2004 and the point of supply was at a single point for the entire premises. Clause 19 of the Agreement is reproduced in the schedule attached to this agreement" here under:

"19.Consumer shall pay to the Board every month charges for the electrical energy supplied to the consumer during the preceding month at the Board's tariff applicable to the class of service and in force from time to time. A copy of the current H.T. tariff of HV-8

General Purpose notified by MPERC Bhopal order.... Dated 10.12.2004 as amended applicable to the consumer set out.

3. On 23.4.2007, the Superintending Engineer, MPERC issued notice to the appellant for disconnection of power supply with reference to an order of the Commission in suo motto petition No. 13 of 2006 dated 31.10.2006 in which the appellant claims to had not been made a party. Such a notice was challenged by the appellant before the Madhya Pradesh High Court which by order dated 5.10.2007 directed the appellant to approach the Commission before whom the appellant filed a representation on 5.11.2007 and the Commission issued a public notice on 2.2.2008 and passed an order dated 22.4.2008. whereby the Commission directed

that the new tariff for shopping mall and multiplex will be applicable w.e.f. 15.4.2008. Notably, the Commission in the tariff order for the FY 2008-09 decided the tariff for the shopping malls for the first time. This is one aspect of the matter.

4. The appellant claims to had paid all the electrical energy bills raised by the utility as per the terms of the HT agreement. According to the appellant,as per the newly prescribed tariff for the shopping malls, the shopping mall is covered under Sl.No.3.3. in the tariff schedule HV-3 and there is a specific condition that the owner of the shopping mall shall pay to the utility as per tariff specified for such shopping mall and shall be entitled to recover from respective end users as per tariff prescribed for non-

domestic LT consumer under tariff schedule LV-2.

5. On the question as to what should be the tariff in the situation prior to 15.4.2008 there was a hearing upon issuance of the notice to the appellant who took the stand before the Commission that prior to this date there was no question of adjudication of any new tariff but the Commission passed the impugned order 03.10.2008 which is as follows:

"For the period from the date of connection to 14.4.2008 i.e. prior to the effective date of tariff order for FY 2008-09; The tariff may be charged as per the tariff Schedule LV-2 (for non-domestic users) as there was no tariff determined by the Commission for non-domestic users availing supply at single point as a group users in shopping malls. On the above tariff rebate equal to 5% of the total

units recorded by the HT meters be allowed on account of transformation losses, line losses, maintenance of 33/0.4 KV transformers, cables, expenditure on billing and collection activities etc.

For the period from 15.04.2008, the tariff is to be charged as per Tariff Schedule HV 3.3. applicable for shopping malls".

6. As a disconnection notice dated 29.04.2009 was issued following a demand notice dated 13.04.2009 issued by the respondent no.3, the Senior Accounts Officer to the respondent no.2 based upon the order dated 03.10.2008 passed by the Commission, the appellant moved the Madhya Pradesh High Court in Writ Petition No. 3108 of 2009 on 11.05.2009 which by order dated 08.07.2009 asked the appellant to move this Tribunal.

7. According to the appellant the HT agreement executed between the appellant and the respondent no.2 for supply of electricity under Tariff Category HV-8 was allowed to be continued by the Commission that directed that with the introduction of new category of shopping mall w.e.f. 15.04.2008 the consumer drawing electricity under HT agreement shall be charged electricity tariff as per the newly introduced category of shopping mall.

8. The appellant further contends that the Commission went against the terms of HT agreement executed between the appellant and the respondent no.2 and passed an order that for a period from the date of connection to 14.04.2008 the tariff may be charged as per tariff schedule LV-2 without assigning

any reason; as such the order which is retrospective in nature is arbitrary causing inconvenience to the appellant which invested an amount of more than Rs. 5.52 crores for availing itself of the HT connection from the respondent no.2. If the Commission was not sure about any irregularity, there was no reason for the Commission directing for levying the tariff as per notice dated 13.04.2009 which was not as per agreement between the appellant and the respondent no.2.

9. The respondent nos. 2 and 3 in their counter-affidavits contend as follows:-

i) The Commission rightly directed the respondent no.2 by order dated 31.10.2006 that it must discontinue the HT connection and provide instead

individual connections to all non-domestic consumers as the connections served through bulk supply to a group of non-domestic consumers are not in conformity with the 7th proviso to Section 14 of the Electricity Act, 2003.

ii) Consequent upon the High Court's order dated 05.10.2007 passed in Writ Petition No. 2749 of 2007 the appellant approached the Commission which passed the order on 3rd October,2008.

iii) The respondent no.2 was further directed on 08.04.2009 by the Commission to raise revised bills in accordance with the order dated 03.10.2008 and then demand notice was issued by the respondent no.2.

iv) It is wrong to suggest that appellant was not afforded opportunity of being heard. In terms of the order dated 03.10.2008 the appellant was in fact heard and the appellant is not entitled to challenge the determination of tariff by the Commission from the date of connection i.e. 01.06.2005.

v) The respondent no.2 in accordance with the scheme of Electricity Act, 2003 and the Rules and Regulations framed thereunder is required to charge its consumers in accordance with the tariff determined by the Commission and in this respect Section 45 of the Act is relevant.

vi) The proceedings conducted by the Commission in petition no. 67 of 2007 and suo motu petition no. 13 of 2006 were all to the knowledge of the appellant. Furthermore, the appellant did not challenge the order dated 31.10.2006 and the Hon'ble High Court also did not set aside the order.

vii) Since the Commission held in the order dated 31.10.2006 in suo motu petition no. 13 of 2006 that single point supply to multiple consumers is against the provisions of the Act such supply at a single point was beyond the competence of the respondent no.2.

viii) It is the State Commission's prerogative to determine tariff on consumers only by

following the procedure prescribed in the Act.

ix) Section 14 of the Electricity Act, 2003 and the Electricity (Removal of Difficulties) Eighth Order, 2005 recognize only two categories of consumer from single point supply, namely, a) Co-operative Group Housing Society and b) supply for a person for his employees.

The order dated 03.10.2008 was made applicable to a total of ten consumers of the respondent nos. 2 and 3 and all such consumers except the appellant have already cleared the outstanding dues in accordance with the order dated 03.10.2008.

10. The appellant in its rejoinder has contradicted the contentions of respondent nos. 2 and 3 and also filed a separate rejoinder to contradict a written note of submissions of the respondent no.1 Commission and in course of dealing with the appeal, we will traverse the contentions and submissions of the appellant as also of the respondent nos. 2 and 3.

11. The Commission did not file any counter-affidavit but filed a written note of arguments which we shall consider at appropriate place of the judgment.

12. The point for consideration is as follows:-

a) Whether, the State Commission having notified the tariff category HV-8 meant for General Purpose Non-Industrial category and making the same effective from the tariff year 2004-05 could issue an order on

03.10.2008 making the tariff schedule LV-2 applicable to the appellant with retrospective effect that is, from the date of connection to 14.04.2008.?

13. Certain facts need to be stated. The appellant Company took HT connection of 4000 KVA from 33 KV Supply System for its Shopping Mall-cum-Multiplex Building called "Treasure Island" under HT Agreement dated 01.06.2005 which was further supplemented by another agreement dated 22.08.2005. Within the complex, there are cinema halls, restaurants, coffee shops, anchors stores, etc. It is without dispute that the appellant constructed a 33 KV line for a distance of about 1/2 kilometre and was required to construct 33 KV station. It is also not in dispute that in terms of clause 19 of the Agreement dated

01.06.2005, the appellant paid monthly charges on the basis of the HT tariff no. HV-8 which is called "General Purpose Non-Industrial Tariff" which was notified by the Commission by order dated 10.12.2004 and this HV-8 category was applicable to railway stations, different offices, hotels, institutions, townships of industries and hospital having mixed load. The schedule attached to the Clause 19 of the HT agreement *inter alia* reads as follows:-

""General Purpose Non-Industrial Applicability-

1.193. This Tariff shall apply to:

(a) Primarily residential: This tariff is applicable for supply to townships including townships of industries, hospitals, MES when such supply is computed separately outside their premises having mixed load.

(b) Others: This tariff is applicable for supply to establishment like Railway Stations, Offices, Hotels and Institutions etc., having mixed

load. The contract demand shall be expressed in whole number only.

1.194 The character of service shall be as per Madhya Pradesh Electricity Supply Code, 2004.

1.195 The power will be supplied to the consumers ordinarily at a single point for the entire premises."

14. Annexure P-3 is the copy of the agreement dated 01.06.2005 between the appellant and the respondent no.2 for supply of electrical energy to the Shopping Mall-cum-Multiplex Building. This agreement refers to HT Tariff HV-8 meant for general purpose (others) notified by the Commission dated 10.12.2004. Annexure – P 4 is the supplementary agreement dated 22.08.2005 amending the original agreement to the extent of incorporation of 4000 KVA at 33 KV. When the Board issued disconnection notice on the ground of single point supply being

illegal with reference to an order dated 31.10.2006 of the Commission in suo motu petition no. 13 of 2006, the appellant moved the High Court which directed the appellant to approach the Commission and the Commission issued an order in petition no. 67 of 2007 on 22.04.2008. In this order, the Commission holds as follows:-

"2. The petition is in the matter of grant of permission to continue the supply of electricity as per the existing HT supply to the petitioner.

3. During the course of last hearing the Commission observed that as the petitioner has filed this petition following the directions given by the Hon'ble High Court, the Commission shall hear again the same after issuance of the tariff order."

15. The tariff order passed by the Commission for the financial year 2008-09 insofar as Shopping Malls are concerned reads as follows:-

Sl. No.	Sub-category of consumer	Fixed Charges (Rs./kVA of billing demand/month)	Energy Charges (paise per unit)
3.3.	**Shopping Malls**		
	11KV supply	125	435
	33 KV supply	205	405

16. The tariff order for the FY 2008-09 was passed evidently before the impugned order dated 03.10.2008 was passed, as such the second part of the order paragraph no.4 insofar as tariff for Shopping Mall is concerned does not contain anything new, for it simply says that for this category Schedule HV 3.3 will apply. The impugned order dated 03.10.2008 opens a controversy whether the Commission was justified in determining a tariff for the period from the date of connection to 14.04.2008 i.e. prior to the effective date of tariff order for FY 2008-09 in respect of non-domestic users for whom there was no tariff earlier determined by

the Commission and who are availing supply at single point as a group user in shopping mall. Then followed notice of disconnection dated 29.04.2009 which led the appellant to file again a writ petition being no. 3108 of 2009. The High Court by order dated 12.05.2009 directed the appellant to this Tribunal.

17. It is noticeable that the order dated 22.04.2008 only confirms that the end users availing electricity supply at single point within the shopping mall complex will be governed by the tariff order for the FY 2008-09 wherein Schedule HV 3.3 has been made applicable to Shopping Malls. Six months intervened between the order dated 22.04.2008 and the impugned order dated 03.10.2008. The appellant has no grievance for categorization of Schedule HV 3.3 relating to Shopping Malls but has serious grievance against determination of tariff for non-domestic users availing supply at single point under tariff schedule LV-2 for the period ranging between the date of connection and 14.04.2008.

18. Learned advocate for the appellant submitted that on the basis of HT agreement dated 22.08.2005 the appellant was required to pay charges on the basis of the HT Tariff No. HV-8 and the Petition No. 67 of 2007 was filed before the Commission for continuation of supply as per the agreement. Under the scheme of Electricity Act, 2003 the tariff for a particular year determined under Section 62 cannot be changed unilaterally suo motu without following the procedure laid down in the Act and rules made thereunder. Sub-Section (4) of Section 62 in relation to determination of tariff clearly provides that no tariff or part thereof 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, while sub Section (6) of Section 64 provides that a tariff order shall continue to remain in force for such period as may be specified by the Commission in the tariff order unless, of course, amended or revoked. Clause 7.24 of the MP Electricity Supply Code, 2004 categorically provides that change in tariff

category shall be done only if a consumer and the licensee agree to these amendments and the same are incorporated in a supplementary agreement. Our attention has been drawn to Clause 7.24 of the MP Electricity Supply Code, 2004 which reads as follows:-

"7.24. Any amendments for the purpose of change of name, shifting or premises, change in connected load or change of tariff category shall be done if both the consumer and the licensee agree to these amendments and the same shall be incorporated in the agreement by execution of supplementary agreement."

19. It is argued that no supplementary agreement as envisaged in the aforesaid provision has been executed for change of tariff category between the appellant and the respondent no.2 and therefore change could not be effected unilaterally. Learned Counsel for the appellant submitted that the stand taken by the Commission is contrary to the stand taken by Respondent No. 2 and 3 in as much as the respondent No. 2 and 3 admit that on the basis

of HT agreement dated 22.8.2005 the appellant was required to pay charges on the basis of HT tariff No. HV-8 and the petition No. 67 of 2007 before the Commission was filed by the appellant was for continuation of supply as per the agreement. No supplementary agreement as envisaged in clause 7.24 of the Supply Code 2004 was executed for change of tariff category between the appellant and the respondent No. 2 and no consent was obtained from the consumer. According to the appellant, the MP Electricity Supply Code 2004 has a statutory force in so far as it has been framed in exercise of the powers conferred by section 53 (1) read with section 181 (t), section 44, section 46 read with section 181 (1) section 47 (1) read with section 181 (v), section 47(4) read with section 181 (w), section 47 (2,3 and 5), section 48 (b), section 50 read with section 181 (2x) and section 56 of the Electricity Act 2003 (No. 36 of 2003) section 9(j) of Madhya Pradesh Vidydut Sudhar Adhiniyam 2000(No.4 of 2001) and all other powers enabling it in that behalf, and that the draft of the same having been previously published in the official gazette as required

under section 181 (3), the Madhya Pradesh Electricity Regulatory Commission enacted the supply code, 2004 to govern supply and retail sale of electricity by the licensees and procedures thereof, the powers, functions and obligations of the licenses and the rights and obligations of consumers, and matter connected therewith and incidental thereto. Thus the institution of the suo motto petition by the Commission is without jurisdiction.

20. The contract demand of the appellant during the relevant period was 4000 KVA and for such huge contract demand only HT connection could have been given. Therefore, if the load above 100 HP cannot be catered through LT connection the billing of LT cannot be made applicable to the high tension consumers having contract demand of 4000 KVA.
21. It is contended that the appellant is the sole owner of the premises and it obtained single point connection for his shopping mall in respect of which there was no category when the tariff category HV-8 was determined and which could be included subsequently because

the list is not exhaustive and the consumption may be similar to hotel, railway station or township etc.

22. Madhya Pradesh Electricity Regulatory Commission (Guidelines for reporting of regulatory compliance) Regulation, 2005 postulates that the distribution licensee has to intimate the Commission about the point of supply on half yearly basis.

23. It is further argued by the learned Counsel for the appellant that in the impugned order it has not been stated that the same is based upon the earlier order dated 31.12.2006 passed in suo motto petition No. 13 of 2006 in which the appellant was not a party. The scope and ambit of the suo motto proceedings being 13 of 2006 and the petition No. 67 of 2007 were distinct because in the former the appellant remained all along a HT consumer pursuant to bilateral agreement with respondent No. 2 and in that petition the issue was that it was the respondent No. 2 who violated the 7th proviso to section 14 of the Act while serving the single point connection, while in the latter the

question was whether the Commission was empowered to levy LT tariff on HT consumers and that too with retrospective effect. In the suo motto proceedings the Commission assumed a jurisdiction which was not vested into it under the laws because it was a dispute, if at all, between a consumer and a licensee which does not fall under section 85 (f) of the Act. In the latter the Commission illegally made the levy in respect of the period between the date of connection and 14.4.2008 retrospectively in violation of the supply code and of the agreement between the consumer and the licensee.

24. The HT tariff HV-8 does not provide for any circumstances whatsoever at present or in future, under which the consumer will be required to pay the charges for electricity as per tariff schedule LV-2 prescribed for non-domestic users.

25. Learned Counsel for the appellant takes us to certain decisions of which the decision *Hindustan Petroleum Corporation Ltd. v/s Gujarat State Electricity Board and Anr. reported in AIR 2005 Gujarat 164* is one wherein it was

held that the Board was not justified in changing the classification already made earlier without giving an a opportunity of hearing to the appellant and that the Commission has no power to adjudicate any dispute between individual consumer and the Board in view of the decision in the case of *Mardia Chemicals Ltd. Vs. Gujarat Electricity Board reported in AIR 2002 GUG 318.* In this decision reference has been made to sections 62 and 64 of the Act in support of the reasoning that any change in the category of tariff has to be made in compliance with the sections 62 and 64 of the Act. The second decision is of the Hon'ble Supreme Court in *Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Limited and Ors. and Maharashtra State Electricity Distribution Co. Ltd. Vs. Lloyds Steel Industry Ltd. Reported in (2007)8 SCC 381* which were two appeals against this Tribunal's order explaining the powers and functions of the Commission in relation to the licensees and others. This decision was cited only to show that at paragraph 13 of the decision it has been held that the State Commission has power to

adjudicate upon the disputes only between the licensees and the generating companies and that the powers do not extend to adjudication of disputes relating to grievances of individual consumers.

26. Learned Counsel for the Commission and also the learned Counsel for the respondent No. 2 and 3 submitted that before the introduction of new category of shopping mall we.f. 15.4.2008 vide order dated 22.4.2008 there was no category for shopping malls and as in terms of the order dated 31.10.2006 passed in suo motto proceeding No. 13 of 2006 the consumers of the shopping mall did not fall within the 7th proviso of section 14 of the Electricity Act, 2003 and the arrangement of providing of single point connection was not in accordance with the provisions of tariff order dated 29.6.2005 the Commission in the said order directed the respondent No. 2 to disconnect the single point HT connection and to provide individual connection to all such non-domestic consumers. The respondent No. 2 in the HT agreement dated 29.6.2005 had wrongly classified the consumer under HV-8 instead of

LV 2. The respondent No. 2 should have classified the consumers under the appropriate category i.e. LV 2 when there was no separate category for shopping mall existing in the tariff order for the FY 2005-2006. HV-8 is however not applicable to the shopping mall. The respondent No. 2 was without any authority to enter into any agreement with any consumer and enforce tariff structure contrary to the schedule of tariff and terms and conditions for retail supply issued by the Commission. Clause 1.52 of the then existing tariff order provided as follows:-

"All conditions prescribed herein shall be applicable to consumer notwithstanding the provisions, if any, contrary to the agreement entered into by the consumer with the licensee"

27. According to the Commission, clause 19 of the HT agreement provides that the consumer shall be billed as per HV 8 category whereas the consumer was eligible to be classified under LV 2. The Commission noticing these irregularities issued the order dated 3.10.2008 directing the

respondent No. 2 to issue bills from the date of connection levying the appropriate tariff under LV2. Any agreement which is neither legally tenable nor duly supported by regulations is null and void.

28. It is further argued that the Commission when noticed that there has been a violation of tariff order by the respondent No.2 in providing the single point HT connection, decided to initiate suo motto proceeding. The Commission has power to take action against any person who violates any Regulations or any order of the Commission under section 142 of the Electricity Act, 2003. In the instant case also when it was noticed that some arrangement has been done by the respondent No.2 which is not in accordance with the then existing tariff order, the Commission vide its order dated 31.10.2006, passed in SMP No.13/2006 directed to disconnect the single point HT connection. The Commission before passing the said order had carefully weighed all the facts. The Commission further directed the respondent No.2 to provide individual connection to all such domestic consumers as per the provisions of Electricity Supply Code, 2004 as amended. The

Commission while disposing of the case issued following directions in its order dated 31.10.2008:

"5. The Commission further directs the Commission Secretary to refer the matter to the State Government to consider investigating the circumstances and fixing responsibility for irregularity in providing single point HT connection to the Shopping Mall which was not permissible as per then prevailing tariff orders".

29. Having heard the submissions of the learned Counsel for the parties, we proceed to consider whether the impugned order to the extent as it is concerned with us and as is contained in paragraph 4 a. of the impugned order dated 3.10.2008 determining the tariff for the single point supply from the date of connection to 14.4.2008 under tariff schedule LV 2 is justified in law. The respondent No.2 and the appellant by the agreement dated 1.6.2005 agreed to supply power

to the shopping mall –cum-complex of the appellant according to the rate schedule HV-8. We have reproduced herein before the said schedule which falls under "general purpose non-industrial" Clause 1.195 of the agreement provided "the power will be supplied to the consumers ordinarily at a single point for the entire premises". This agreement was further supplemented by another agreement dated 22.8.2005. The fact remains that the said tariff HV -8 was notified by the Commission vide order dated 10.12.2004 and it was applicable to the railway station offices, hotels, institutions, townships of industries, hospitals etc. having mixed loads. The shopping mall owner who drew connection from 33 KV supply system by constructing 33 KV sub-station at his cost would pay supply charges according to that schedule and in turn receive charges for supplying electricity to the ultimate end users, innumerable in number,

who are occupiers in different premises within the same complex in different capacities. In the tariff order dated 10.12.2004 which was meant for the tariff year 2004-2005 there was no categorization separately for shopping mall complex. According to the Commission, the respondent No. 2 committed illegality by entering into agreement with the appellant to supply electricity at single point supply under the tariff schedule HV-8, instead of LV2. We must not miss to note that, to say that the proper tariff structure for supply of power to the multiplex owner would have been LV 2 instead of HV-8 at a single point supply system amounts to saying that the Commission affirmed the appellant's proposition that single point supply to the multiplex as such was not illegal, which in fact was not the original stand of the Commission. For it was on 23.4.2007 when the Superintending Engineer of the respondent No.2 Indore issued

notice for disconnection of power supply to the appellant that both the respondent No. 1 and 2 rose to the occasion. The respondent No. 2 initiated the move on the basis of the Commission's order dated 31.10.2006 passed in suo motto petition No. 13 of 2006. It is agreed by all the parties that the said order dated 31.10.2006 of the Commission was directed at the respondent No. 2 to discontinue the connection to all HT consumers who availed themselves of single point connection and supplying energy to members of the commercial complex and directed the respondent No. 2 to give individual connection to all such members. The notice dated 23.4.2007 issued by the respondent No. 2 refers to the order dated 31.10.2006 and this notice refers to section 13 (D) of the Electricity Act, 2003 but we do not find any such provision called 13 (D) in the statute. Be that as it may, as we get from 7th proviso to section 14

of the Act, a distribution licences has been given power to supply electricity through another person and that another person shall not be required to obtain a separate license from the Commission. Until the order dated 22.4.2008 was passed in petition No. 67 of 2007 when a new tariff schedule for the shopping malls was introduced w.e.f. 15.4.2008 it was the stand of the Commission that supply of electrical energy at a single point to HT consumer was illegal, being violative of the law because distribution of electricity to endless sub consumers by an HT consumer, occupying different premises in a large multiplex was not authorized by law. But this stand of the Commission which was prevailing till the end of the year 2006 has been given good bye by the Commission itself when in the tariff order for the year 2008-2009 a clause has been introduced, being 3.3 specifying the tariff structure in respect

of the shopping malls whereunder energy charges paise per unit against 11 KV supply and 33 KV supply are respectively 435 and 405 and fixed charges were respectively 125 and 205 paise. But, fixing a tariff structure for the shopping mall in the tariff year 2008-2009 is no answer to the question whether single point supply which hitherto according to the Commission was unlawful still remains unlawful or not with the framing of a new tariff structure w.e.f. 15.4.2008. If according to the Commission, single point supply to an HT consumer under a new tariff structure called HV-3 legalises the single point supply then, there remains a point with the appellant that single point supply as such is not illegal. If, on the other hand, according to the Commission, categorization of the HT consumer under HV-3 w.e.f. 15.4.2008 is independent of the question whether single point as such is legal or not, then we are impliedly asked

not to deliberate upon this question and none of the parties in course of hearing of the appeal urged the Tribunal to examine the issue from a legalistic point of view. But it is necessary to record that on the date of argument the Commission has taken the stand that HT consumer having multiplex or shopping mall who receives electricity supply at a single point and who supplies electricity to the people within the complex has to pay tariff schedule HV-3. This means that the Commission withdraws the legal question and the appellant also submits to the jurisdiction of the Commission's order that w.e.f. 15.4.2008 he would pay charges for supply of electrical energy at a single point under the category HV-3 as was decided in the tariff order for the year 2008-2009. Thus, the Commission's order dated 22.4.2008 passed in consequence of the High Court's direction dated 5.10.2007 is but reaffirmation of the tariff order for

the year 2008-2009 and the said order dated 22.4.2008 disposed of the point on single point supply by fixing the tariff of the appellant under HV-3. Therefore, we are no longer required, nor are we asked at this stage to go into the question whether single point supply is legal or illegal. The appellant, the Commission and the respondent No. 2 and 3 all agree to the point that an HT consumer receiving supply at single point has to pay w.e.f. 15.4.2008 in terms of tariff schedule HV-3 as decided in the tariff order for 2008-2009 and in terms of the order dated 22.4.2008.

30. After the order dated 22.4.2008 was passed , the Commission issued a fresh notice on 18.8.2008 to the appellant for a decision on the question as to what would be the tariff structure for such HT consumer prior to 15.4.2008 and upon hearing the Commission came out with the order

impugned dated 3.10.2008 wherein it said that for the period from the date of connection to 14.4.2008 i.e. prior to the effective date of tariff order for 2008-2009 the tariff for the appellant may be charged as per the tariff schedule LV-2 (for non-domestic users) on the ground that `` *there was no tariff determined for non-domestic users availing supply at a single point as a group user in shopping mall."* We have to answer whether the retrospectivity of the order is justifiable and that is the only point left to us. We have italicized the Commission's own words just to emphasize that when the Commission says by the order dated 3.10.2008 that tariff schedule LV 2 would be made applicable for HT consumer between the period from the date of connection to the 14.4.2008 the Commission explicitly affirms the validity of the single point supply by the respondent No. 2 to an HT consumer like the

appellant. Once such validity is affirmed, for the Commission does not say that it keeps the question for answer in abeyance at a later point of time, the ground against retrospectivity and that too at a distant point of time gains its ground because ordinarily as we find in section 62 (4) no tariff or part of a 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. The word 'specified' means specification through regulation. If according to the Commission, the agreement was unlawful because the tariff schedule HV-8 was not applicable to the case of the appellant and it was LV 2 which is the appropriate category then it could have said so in its order dated 31.10.2006. but it did not say so and on the contrary it was the case of the Commission on that date that

single point supply itself was illegal. If right in November 2006 the Commission would have said that the appropriate category for the appellant was LV 2 then the point of retrospectivity would not have arisen. In the circumstance, the submission of the learned Counsel for the appellant that the Commission itself was in dilemma during all these years as to whether the appropriate tariff structure would be LV 2 or HV 8 or whether there should not be any structure for the consumer like the appellant at all on the ground that the single point supply was not authorized in the law cannot be dismissed outright. Therefore, at a very distant point of time and that too after expiry of a number of tariff orders covering four financial years and after passing of the tariff order for the year 2008-2009 it is quite illegal for the Commission to say that from the date of connection till 14.4.2008 the

appropriate category for the consumer like the appellant would be LV 2.It is not denied that the law supersedes an agreement and to the extent of repugnancy the agreement would be of no effect. But is it so? The Commission's impugned order does nowhere say with any reason at all that the tariff schedule HV-8 which was made applicable to the appellant in terms of the agreement dated 1.6.2005 was illegal, nor the impugned order does say again with reason as to how the tariff schedule LV2 for non-domestic users would be applicable. The order itself says that in fact there was no tariff for non-domestic users availing supply at a single point as a group user in a shopping mall. The position now comes to this that the Commission

fails to prove that the agreement dated 1.6.2005 is illegal because the Commission itself affirms absence of any tariff structure for the consumer

like the appellant and equation of the appellant and the respondent No. 2 in the agreement of a multiplex with railway station, offices, hotels, institutions, townships of industries, hospitals etc. with mixed load cannot in such circumstances be said to be absurd and preposterous. Invocation of the clause 7.24 of the M.P. Electricity Supply Code, 2004 by the appellant does not become unreal in view of the fact that it could not be established that the agreement was contrary to the tariff order for the year 2004-2005. Unless it is established that the agreement offends explicitly and manifestly the tariff order for the year 2004-05 we cannot say that the Commission was justified in making its impugned order effective retrospectively and that too dating back to year 2005 when a tariff structure was prevalent in which in fact there was no tariff determined by the Commission in respect

of a shopping complex. We have read section 62 with section 64 of the Act and a combined reading of the two sections would reveal that tariff for a financial year has ordinarily to take effect with the commencement of that financial year and the process of determination of tariff has to commence towards the end of the month of November in terms of the regulations of various Commissions in order that by March-end a tariff order is made ready to be effective from the 1st of April. If for some reason or other a tariff order is passed sometime after the commencement of the financial year there is good reason to make the order effective from 1st of April. But that is not the case here. After a lapse of four consecutive tariff orders in respect of four financial years successively the Commission in its wisdom thought it fit to say that LV 2 category would be the appropriate tariff structure right from the date of the agreement

which was the middle of the year 2005. In our estimation, the law does not perhaps approve of this kind of treatment as the Commission has done. Under section 64 (6) of the Act a tariff order shall, unless amended or revoked, continue to be in force for such period of time as may be specified in the tariff order. No tariff order passed prior to the passing of the impugned order was amended or revoked by the Commission. A series of tariff orders attained their natural death with the passing of next tariff order. In fact, there was no tariff order at any point of time categorically saying as to what would be the tariff structure for HT consumer having a multiplex. The respondent No. 2 and 3 take recourse to the section 45 of the Act which has no relevance to the facts in issue.

31. The decisions cited by the learned Counsel for the appellant in so far as the retrospectivity of the order is concerned have to be relied on.

32. We in the circumstances are of the opinion that the order impugned is bad in law and is liable to be set aside.

33. Accordingly we allow the appeal and set aside the portion of the order under consideration dated 3.10.2008 but without cost.

(Justice P.S.Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Dated: 22nd July, 2011

Reportable/Non-reportable

PK/RKT