Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 195 of 2009

Dated: 31st May, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,

Appeal No. 195 of 2009

In The Matter Of

Mumbai International Airport Pvt. Ltd.
Chhatrapati Shivaji International Airport,
1st Floor, Terminal 1B, Santa Cruz (East),
Mumbai-400 099

… Appellant(s)

Versus

1. **Maharashtra Electricity Regulatory Commission,**
   13th Floor, Centre No. 1, World Trade Centre,
   Cuffee Parade,
   Mumbai-400 005

2. **Reliance Infrastructure Limited,**
   Reliance Energy Centre,
   Santa Cruz (East)
   Mumbai-400 055

….Respondent(s)

Counsel for Appellant(s): **Mr. Vishal Anand**

Counsel for Respondent(s): **Mr. Buddy A. Ranganadhan for R-1**
Mr. Hasan Murtaza for R-2

JUDGMENT

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

1. Mumbai International Airport is the Appellant herein. The Maharashtra Electricity Regulatory Commission (State Commission) is the first Respondent. Reliance Infrastructure Limited (RIL) is the second Respondent.

2. The Appellant in this Appeal has challenged the impugned order dated 24.11.2009 by which the State Commission has determined the tariff payable by the Appellant for FY 2008-09 in the application filed by the RIL (R-2), being the Distribution Licensee.

3. The relevant facts required for the disposal of this Appeal are as under.

4. The Appellant, Mumbai International Airport Private Limited, was awarded contract for the Operation, Maintenance, Development, Design, Construction, Upgradation, Modernization, Finance and Management of the Mumbai Airport by the agreement dated 04.04.2006.

5. The development and modernization activities in the Airport carried out by the Appellant are depending upon the revenue earning of the Appellant. Mumbai Airport is a land-locked airport with a limited scope to expand the operation of the Airport. Under the terms of the Agreement, the Appellant has been allowed to levy aeronautic charges for the aeronautic premises at the Mumbai Airport. Airport services provided by the Appellant are essentially to be utility services.

6. The Appellant is obliged to provide services and facilities at the Airport at reasonable costs, at par with the international standards, to the travelling passengers. These activities require continuous supply of power by the Appellant. Therefore, the Appellant needs round-the-clock supply. The 25% of the operation cost of the Appellant in running the Mumbai Airport consists of expenses towards purchasing power from the RIL (R-2). Therefore, the power procured by the Appellant from the RIL (R-2) constitute a very important element of the day-to-day functioning of the Airport.

7. The RIL (R-2) filed an application before the State Commission for fixing Multi Year Tariff (MYT) in respect of the period FY 2007-08 to FY 2009-10. Accordingly, the State Commission passed the order fixing the MYT on 24.04.2007. In the above-said MYT order, the Appellant was included in the HT Industrial category. The State Commission in the very same order allowed certain commercial categories of consumers categorizing them LT-IX consumers with high cross subsidy and

imposed upon this category high cost of tariff. Some of the affected consumers, due to the imposition of higher rate of tariff under the category LT-IX, approached the Tribunal and filed the Appeal challenging the said order. By the order dated 19.12.2007, the Tribunal set aside formation of the LT-IX category with high tariff holding that the basis adopted by the State Commission by creating such category was not in line with the provisions of the Electricity Act, 2003.

8. Thereupon the RIL (R-2) filed an application before the State Commission to determine its distribution tariff for the FY-2008-09. The State Commission in that application passed the tariff order dated 04.06.2008, taking note of the decision of the Appellate Tribunal in the order dated 19.12.2007, which did away with the LT-IX category and reclassified those consumers under the category as the consumers in LT-II Commercial category.

9. In the said order, the State Commission further proceeded to create a new category namely HT-II Commercial. While doing so, the Appellant was removed from the category of HT-I Industrial Category and put into the new category namely, HT-II Commercial. The tariff prescribed for the new category HT-II Commercial was significantly higher than the HT-I Industrial category. The inclusion of the Appellant in the new category led to the increase in the tariff by 43.88% for the FY-2008-09 and increase in the cross subsidy to the tune of nearly 85%.

10. As against this order dated 04.06.2008, on being aggrieved over the same, the Appellant filed an Appeal before this Tribunal in Appeal No. 106/08. Ultimately, the Tribunal by its Judgment dated 26.02.2009, set aside the order dated 04.06.2008, passed by the State Commission to the extent it placed the Appellant in the newly created category of HT-II Commercial and remanded the matter holding that the Appellant should not have been put in the category of HT-II Commercial and directing the State Commission to re-determine the tariff of the Appellant taking

note of the nature of the functions carried out by the Appellant which require special consideration. In the very same order, the Tribunal directed the State Commission to complete the process of re-determination of tariff within a period of 8 weeks.

11. Pursuant to this Judgment dated 26.02.2009, the Appellant approached the State Commission and filed an application on 17.03.2009 for re-determination of tariff on the basis of the Judgment rendered by the Tribunal. However, the State Commission did not take any steps for re-determination of tariff within the prescribed period of 8 weeks.

12. Being aggrieved by the inaction on the part of the State Commission, the Appellant filed an application before the Tribunal on 30.04.2009 for issuing appropriate directions to the State Commission for early hearing of the application for re-determination of tariff. On receiving notice in the said application, the State Commission also filed an application before the Tribunal for giving a suitable direction, to the RIL

(R-2) to file its tariff proposal and requesting to extend the time for further 8 weeks. The Tribunal while disposing of both the applications directed State Commission to take immediate steps towards re-determination of the tariff of the Appellant in terms of the Judgment dated 26.02.2009 passed by the Tribunal.

13. Thereupon, the RIL (R-2) filed ARR Petition for re-determination of tariff in respect of the FY-2009-10 before the State Commission. The objections were filed by the Appellant on the basis of the Judgment of the Tribunal dated 26.02.2009. Ultimately, on 15.06.2009, the State Commission passed the order determining the distribution tariff for the FY-2009-10 by putting the Appellant in the same category of HT-II Commercial. However, State Commission did not take steps for re-determination in pursuance of this Tribunal's Judgment in respect of FY-2008-09. In the meantime, the Appellant preferred an Appeal against the said order passed on 15.06.2009 in respect of the year 2009-10 before the Tribunal in Appeal No. 144/09. While the said Appeal was pending before this

Tribunal, the State Commission conducted the hearing in terms of the Judgment dated 26.02.2009 rendered by the Tribunal in respect of the re-determination of the tariff for FY-2008-09. Ultimately on 24.11.2009, the State Commission passed the impugned order again putting the Appellant in the HT-II Commercial category, without taking note of the finding of the Tribunal in the Judgment dated 26.02.2009. Being aggrieved over this, the present Appeal namely Appeal No. 195/09 has been filed by the Appellant.

14. The Learned Counsel for the Appellant in this Appeal would urge the following grounds to assail the impugned order dated 24.11.2009:

(i) The Tribunal in its Judgment dated 26.02.2009 set aside the classification of the Appellant in the HT-II Commercial category and directed for re-determination of the Appellant's tariff having regard to the nature of the essential services carried out by it. However, the State Commission, while ignoring such

a binding direction of the Tribunal, has proceeded to classify the Appellant under the very same category namely, HT-II Commercial category on the ground that the franchise situated at the airport premises carry on the commercial activities and charge exorbitantly from the customers.

(ii) The State Commission has not only failed to comply with the directions of the Tribunal in its Judgment dated 26.02.2009 but also has completely disregarded the finding of this Tribunal while continuing to classify the Appellant as HT-II Commercial consumer in the distribution tariff order of the RIL (R-2) for the FY-2008-09.

(iii) The Tribunal by the Judgment dated 26.02.2009 has specifically set aside the categorization of Appellant under HT-II Commercial category holding that the Appellant should not be put to the said category as it is rendering a public utility service, and as such, it requires special consideration. This order becomes

effective immediately from 26.02.2009 and will operate with effect from the beginning of the tariff period. The State Commission by no stretch of imagination could have classified the Appellant under the same category namely HT-II Commercial that too after the Judgment was rendered by this Tribunal on 26.02.2009.

(iv) In fact, the other State Commission, namely, DERC (Delhi Commission) has provided preferential tariff for the Delhi International Airport Limited which is being developed through the privatization route as in the case of the Appellant. Therefore, the Airports have to be classified separately having regard to the essential nature of their services and also their contribution in the development of infrastructure within the State.

(v) The Electricity Act, 2003 mandates that the Appropriate Commission has to differentiate between consumers in the process of determination of tariff depending upon (a) load factor, (b) power factor, (c)

voltage, (d) total supply, (e) geographical position, (f) nature of supply and (g) purpose of supply. The State Commission in the impugned order failed to exercise the statutory power in accordance with the said mandate by failing to take into consideration the purpose of object for which the power was being supplied, i.e. the operation of public utility/essential service.

(vi) The State Commission has acted unjustly by classifying the Appellant under the HT-II Commercial category on the basis of minor consumption of electricity for commercial purposes in the airport premises, without having regard to the material put on record by the Appellant to show that the power procured by the Appellant is being substantially utilized in the airport premises for rendering essential services.

15. The Learned Counsel for both the State Commission (R-1) and RIL (R-2) would strenuously urge to justify the impugned order dated 23.11.2009, passed by the State Commission by stating that the order impugned contains the valid reasons to put the Appellant under the HT-II Commercial category on the strength of Section 62(3) of the Electricity Act, 2003 as well as the various observations made by the Tribunal as well as the Hon'ble Supreme Court in various decided cases..

16. Both the Learned Counsel have cited number of authorities, which we shall see later. In the light of the above rival contentions urged by the respective Counsels, the following questions may arise for consideration:

(i) Does the Electricity Act, 2003 mandate that the Appropriate Commission has to differentiate between the consumers in the process of determination of tariff depending upon the various factors like load factor, power factor, etc. including the purpose of supply while Section 62 mandates the Appropriate

Commission to take into account the factors under sub-section (3) of Section 62?

(ii) Was the State Commission justified to put the Appellant under the HT-II Commercial category for the FY-2008-09 and also to make observation on the tariff made applicable to the Appellant under HT-II Commercial category, when the Tribunal has given a specific finding that the Appellant should not have been put under the HT-II Commercial category loaded with the burden of high cross subsidy?

(iii) Whether the State Commission has acted justifiably and appropriately and in proper exercise of its jurisdiction by classifying the Appellant under HT-II Commercial category on the basis of consumption of the electricity for commercial purposes in the airport premises, without considering the materials placed by the Appellant before the State Commission showing that the electricity is substantially utilized in the airport premises for rendering essential services?

(iv) Whether the State Commission has not unjustifiably burdened the Appellant by classifying his entire activity as commercial though the burden to ensure the commercial activity consumption is metered and billed separately falls primarily on the RIL (R-2)?

17. The above questions would fall under two main aspects:

(a) It is complained by the Appellant that in the Judgment dated 26.02.2009, given by this Tribunal in Appeal No. 106/08, the Tribunal set aside the findings of the State Commission putting the Appellant under HT-II Commercial category for the FY 2008-09 holding that it cannot be put under HT-II Commercial category, at par with the other commercial establishments like Malls, etc; and that a special category has to be created with reference to the essential services which are being rendered by the Appellant as it requires a special consideration but this order has been given a go bye by the State Commission, which by putting

the Appellant again under HT-II Commercial category, contrary to the findings of the Tribunal by failing to observe the judicial propriety.

(b) Section 62(3) of the Electricity Act, 2003 empowers the Appropriate Commission to differentiate the tariffs on the basis of various factors like,. Load factor, power factor, voltage, total supply, geographical position, nature of supply and purpose of supply. The Appellant comes under the category whereof the object and purpose of supply is to render the essential services and hence, it cannot be put under a commercial category.

18. Let us deal with each one of the aspects now.

19. The first aspect would relate to the alleged conduct of the State Commission in not obeying the directions of the Tribunal. In order to deal with this aspect, it is necessary to refer to the

relevant facts to understand this case fully which has got a chequered history. They are as follows.

20. Pursuant to the Competitive Bidding Process, the Appellant was awarded a contract for the operation, maintenance, management, etc. of the Mumbai Airport. Accordingly, an Agreement was entered into between the Appellant and the State Government on 04.02.2006. The Appellant is a consumer procuring the power from the RIL (R-2). On the application filed by RIL (R-2), the State Commission by the order dated 24.04.2007 passed the MYT order for the period FY 2007-08 to FY 2009-10. In the above-said order, the Appellant was included in the HT-I Industrial category. In the said order, certain commercial consumers were put in LT-IX category which were loaded with high cross subsidy. Therefore, they filed an Appeal before the Tribunal. By the order dated 19.12.2007, the Tribunal set aside the creation of new category LT-IX.

21. The RIL (R-2) filed a petition for determining the distribution tariff for the FY 2008-09. On 04.06.2008, the State Commission taking note of the order of the Tribunal cancelled the LT-IX category and reclassified those consumers as LT-II Commercial category. In the very same order, the State Commission created a new category, namely HT-II Commercial and removed the Appellant from HT-I Industrial Category and put in HT-II Commercial category.

22. Aggrieved by the order dated 04.06.2008, passed by the State Commission, the Appellant filed an Appeal in Appeal No. 106/08 contending that the Appellant was providing essential services and, therefore, they cannot be put at par with the consumers falling in the HT-II Commercial category who carry on purely commercial activities.

23. On 26.02.2009, the Tribunal allowed the Appeal 106/08 and set aside the said order dated 04.06.2008 passed by the State Commission to the extent it placed the Appellant in the

newly created category of HT-II Commercial for the purpose of higher tariff and remanded the matter to the State Commission directing the State Commission to re-determine the tariff for the Appellant keeping in view the monetary implications, the nature of the consumption of the Appellant, loading of cross subsidy, etc. In the said order, the Tribunal has specifically directed that the said re-determination shall be carried out within a period of 8 weeks. Pursuant to the said Judgment dated 26.02.2009, the Appellant approached the State Commission on 17.03.2009 and filed an application for re-determination of tariff as directed by this Tribunal. There was no response. Therefore, the Appellant sent requisitions to the State Commission on 25.03.2009, 07.04.2009 and 17.04.2009 requesting the State Commission to intimate the Appellant about the final date of hearing in the re-determination process to enable it to represent its case before the State Commission. However, no date was intimated. Thus, the State Commission did not take any steps for the re-determination of the tariff between the prescribed period of 8 weeks as directed by the Tribunal.

24. Being aggrieved by the inaction on the part of the State Commission, the Appellant filed an application on 30.04.2009 before this Tribunal for issuing appropriate directions to the State Commission for early hearing of the application for re-determination of tariff. On receipt of the notice of such application, the State Commission also filed an application on 06.05.2009 before the Tribunal for giving a direction to the RIL (R-2) to file its tariff proposal and also for extension of time. On 19.05.2009, the Tribunal while disposing those applications observed that the State Commission had not taken the appropriate initiative that was expected of it to comply with the orders of this Tribunal and directed the State Commission to carry out the directions earlier given, as soon as possible.

25. Despite this order, no steps were taken by the State Commission. Therefore, the Appellant sent a reminder to the State Commission requesting to give an early date of hearing to

the Appellant to initiate re-determination process of the Appellant.

26. AT that stage, the RIL (R-2) filed ARR Petition for determination of the tariff for the FY 2009-10. This time in the ARR, RIL (R-2) proposed to create new category, namely “HT Public and Government” and proposed to place the Appellant in the said category. The Appellant filed its objections requesting the State Commission to re-determine the tariff in respect of FY 2008-09 as directed by the Tribunal in the Judgment, on 26.02.2009, before deciding the tariff for FY-2009-10. However, the State Commission, without re-determining the tariff of the Appellant in terms of the directions given by the Tribunal in its Judgment dated 26.02.2009, in respect of the FY 2008-09, passed the distribution tariff order for the FY 2009-10 on 15.06.2009. Thus, it is clear that the State Commission had not taken any steps to finish the determination process in respect of the FY 2008-09 despite the directions given by this Tribunal on 26.02.2009 and 19.05.2009.

27. On the other hand, as indicated bove, without taking any steps for initiating determination process in respect of FY 2008-09, the State Commission proceeded to pass the order in the ARR Petition filed by the RIL (R-2) for the FY 2009-10 on 15.06.2009. In this order, the State Commission did not choose to refer to the finding already given by the Tribunal in its order dated 26.02.2009 with regard to categorization but instead put the Appellant again under the HT-II Commercial category in violation of the Tribunal order dated 26.02.2009. Therefore, the Appellant challenged the said order dated 15.06.2009 passed by the State Commission before this Tribunal in Appeal NO. 144/09 and the same is pending.

28. Only at that stage, i.e. in August 2009, the State Commission fixed the hearing for re-determination of tariff in terms of the directions given by this Tribunal on 26.02.2009. Consequently, the State Commission conducted the hearing for re-determination and reserved the orders.

29. During this period, the Appellant was trying to change over its power supply from the RIL (R-2) to Tata Power. However, the RIL (R-2) made repeated efforts to delay the change over. Therefore, the Appellant filed a Writ Petition in 1854 of 2009 in the Bombay High Court praying for a direction to the RIL (R-2) to allow smooth switch over of Appellant supply from RIL (R-2) to Tata Power. In the meantime, on 15.10.2009, the State Commission passed an interim order setting out the operating procedure to be adopted by the RIL and Tata for supplying power to consumers in the area of the licensee (R-2)

30. On 20.10.2009, RIL (R-2) informed that the Appellant will have to make payments of entire arrears reflecting in the monthly bills before the change over takes place. Accordingly, on 01.11.2009, process of change over was completed. Thereupon the Appellant started taking supply from Tata instead of RIL (R-2). On 07.11.2009, i.e. immediately after the change over, the RIL (R-2) raised the final electricity bills on the

Appellant for Terminal I & II showing total arrears of Rs. 8,64,31,240.14 and started threatening the electricity disconnection of the Mumbai Airport. Then the Appellant approached the High Court of Bombay in W.P. No. 1854/09 and obtained a direction from the High Court on 18.11.2009 to the State Commission to re-determine the tariff payable by the Appellant within a period of 1 week in respect of the FY 2008-09. The High Court, however, directed the Appellant to make 50% arrears payment forthwith in order to avoid any disconnection. As against this order, the Appellant filed an SLP in the Supreme Court on 21.11.2009. By the order dated 24.11.2009, the Hon'ble Supreme Court stayed the arrears payment demanded by the RIL (R-2). Only at that stage, on coming to know of this order of the Hon'ble Supreme Court, the State Commission on the very same day i.e. on 24.11.2009 passed the impugned order putting the Appellant again in the HT-II Commercial category, without taking into account the directions given by the Tribunal in the order dated 26.02.2009.

31. The above details would give out 3 important factors. They are as follows.

(i) By the Judgment dated 26.02.2009, the Appellate Tribunal set aside the order of the State Commission putting the Appellant under HT-II Commercial category and directed the State Commission to initiate the re-determination process of the tariff by not putting him in the same category and to complete the said process within a period of 8 weeks. Admittedly, the said process was not even initiated within 8 weeks. On the other hand, there was no response in spite of the reminders sent by the Appellant. Therefore, the Appellant filed a petition for direction on 30.04.2009, i.e. after expiry of the 8 weeks. Ultimately by the order dated 19.05.2009, the State Commission was again directed by the Tribunal to comply with the said direction of the Tribunal by disposing the application

for re-determination of tariff as quickly as possible. Even then, there was no response.

(ii) Even though the Tribunal directed the State Commission to re-determine the tariff of the Appellant within 8 weeks by its order dated 26.02.2009, which was again confirmed on 19.05.2009, the State Commission did not initiate the re-determination process and on the other hand, the State Commission was anxious to fix the distribution tariff for the FY 2009-10 and passed the said order on 14.05.2009 without even initiating the process of re-determination in respect of FY 2008-09 despite the directions earlier given by the Tribunal.

(iii) By the Judgment dated 26.02.2009, the Tribunal set aside the order dated 04.06.2008 and observed that the Appellant would not be treated at par with the consumers falling under the HT-II Commercial category and directed the State Commission to re-determine the tariff by putting him in a special

category in the light of the fact that the Appellant was rendering the public utility services. Despite this direction, the State Commission again put the Appellant under the HT-II Commercial category.

32. On the basis of these factors, it has been strenuously contended by the Appellant that the conduct of the State Commission is unbecoming as the State Commission has been from the beginning bent upon disobeying the various directions given passed by this Tribunal.

33. In the light of the above accusation which is so serious, let us see the orders passed by this Tribunal both on 26.02.2009 and 19.05.2009. With reference to the time frame for the disposal, stipulated by the Tribunal for disposal of the re-determination of tariff, the Tribunal has passed the order on 26.02.2009 with the following observations:

"*We also direct the Commission to re-determine the tariff payable by the Appellant after affording the Appellant an*

opportunity of hearing on all relevant issues and keeping in view the monetary implications for the Appellant and the Respondent-2, nature of consumption of the Appellant and the observations made in this judgment within the next 8 weeks."

34. This order clearly shows that re-determination must be completed within 8 weeks. The State Commission was a party to the said order. Despite this direction, the State Commission did not initiate any re-determination process. On 17.03.2009, the Appellant approached the State Commission by filing an application for determination of the tariff in pursuance of the order dated 26.02.2009. Though the said application was entertained by the State Commission, no steps were taken for initiating the re-determination process. Therefore, the Appellant filed a petition for direction before the Tribunal on 30.04.2009. Almost 8 weeks had expired during this period. But even then no steps were taken for initiation of the process.

35. Ultimately, on 19.05.2009, the Tribunal was constrained to issue one more direction. While the said direction had been issued on 19.05.2009, the Tribunal expressed its displeasure over the inaction on the part of the State Commission. The relevant portions of Tribunal's observation are as follows:

> "*In our judgment dated 26th February, 2009, we had given direction to the Commission to re-determine the tariff payable by the Appellant after affording an opportunity of hearing on all aspects and keeping in view their monetary implication for the Appellant and the Respondent-2, the nature of consumption of the Appellant and the observations made in the judgment within the next 8 weeks. The Commission in its application i.e. IA 183 of 2009 has asked for extension of time to carry out the re-determination as directed by us. The Commission further wants us to direct the Respondent-2 to file its tariff proposal before the Commission.*"

"*having considered the submission of the Commission, we feel that the Commission itself could have discussed its own proposals regarding the new tariff to be fixed for the Appellant and any adjustment to be done to the revenue requirement of Respondent-2. The Commission, it appears, has not taken the initiative that was expected of it. The Commission has all the authority to call for further data and particulars from any of the two sides. It is expected that the Commission now carry out our directions as soon as possible.*"

36. Admittedly, after passing of the order dated 26.02.2009 till 30.04.2009, on which date the application was filed by the Appellant for direction to the State Commission for initiating the re-determination process, no steps were taken to comply with the directions of the Tribunal. Similarly, even subsequent to the order passed by the Tribunal on 19,.05.2009 till the tariff order was passed in respect of the next year, i.e. FY 2009-10 on 15.06.2009, no steps were taken for re-determination of tariff

process. Only in August, 2009, re-determination process was started but not completed. At that stage, the Appellant had approached the High Court which passed the order on 18.11.2009 directing the State Commission to pass orders on the re-determination of the tariff in respect of FY 2008-09 within one week from that date. Only then the State Commission passed the impugned order on 24.11.2009 putting the Appellant again under the same category i.e. HT-II Commercial.

37. These details would make it clear that the State Commission had not shown any interest to comply with the orders of the Tribunal dated 26.02.2009 with reference to the period of disposal in time. Further, despite the second order dated 19.05.2009, the State Commission initiated the re-determination process only in August, 2009, that too after 3 months and ultimately the final order had been passed on 24.11.2009, that too under the direction of the High Court. This conduct on the part of the State Commission would show lack of interest in making at least an attempt to comply with the orders

of the Tribunal. In addition to this, the State Commission also has not chosen to give any reason before this Tribunal as to why there was such a delay caused by the State Commission. It is unfortunate to notice that the State Commission was constrained to pass the orders only on the orders of the High Court. In other words, it is to be stated that the directions of the Tribunal have not been given due respect.

38. Let us now come to the next issue namely non-compliance of the directions given by this Tribunal by the Judgment dated 26.02.2009 regarding re-categorization on the basis of re-determination in Appeal No. 106/08.

39. According to the Learned Counsel for the Appellant, the Remand Order which had been passed by this Tribunal on 26.02.2009 would indicate that the finding and directions had been given by this Tribunal to the effect that the Appellant should not be put under the category of HT-II Commercial for the purpose of higher tariff but to re-determine the tariff keeping in

view the nature of consumption of the Appellant, monetary implications of the parties and in the light of the findings made in this judgment. In violation of the findings and directions made by this Tribunal, cancelling placing of the Appellant in the new category HT-II Commercial by setting aside the order passed by the State Commission dated 04.06.2008, the State Commission has again passed the impugned order dated 24.11.2009 putting the Appellant in the same category, namely HT-II Commercial resulting in the tariff increase. It is the specific case of the Appellant that the State Commission has exceeded its jurisdiction in not following the findings of the Tribunal rendered in the judgment of a limited Remand, but it has given its own reasonings to confirm its earlier order dated 04.06.2008 by putting the Appellant in the HT-II Commercial category.

40. In reply to this contention, both the Learned Counsel appearing for the State Commission as well as the Distribution Company (R-2) contended that it is not a limited Remand, but it is an Open Remand giving full liberty to the State Commission to

decide the issue afresh after considering the submissions made by the parties and as such the decision taken by the State Commission on the basis of Section 62(3) of the Act is perfectly valid as it is in consonance with the said provisions of the Act.

41. In the light of these rival contentions, we are called upon to decide whether it is an Open Remand as claimed by the Respondent or a limited Remand as claimed by the Appellant. To consider this question, it is appropriate to recall the brief background of the case.

42. As narrated above, on the application of the Distribution Company (R-2) requesting for the determination of the distribution tariff in respect of FY 2008-09, the State Commission passed order dated 04.06.2008, determining the said tariff by creating a new category namely HT-II Commercial. Through that order, the Appellant was placed under the said category from the earlier category of HT-I Industrial, at par with the commercial establishments such as Malls, Multiplexes, hotels, etc. In this

tariff order, the tariff of the HT-II Commercial category was higher resulting in the tariff increase of about 43% and cross subsidy element of about 85%. This tariff order dated 04.06.2008 was challenged by the Appellant in the Appeal No. 106/08 before this Tribunal in regard to re-categorization putting the Appellant under the HT-II Commercial category.

43. The details of the pleadings and its prayer made in the said Appeal 106/08 are quite relevant. Since it is the contention of the Learned Counsel for the State Commission that the criteria prescribed in Section 62(3) of the Electricity Act, 2003 was not raised in the Appeal nor referred to in the judgment dated 26.02.2009, it would be proper to quote the grounds and prayers urged in this Appeal filed by the Appellant. They are as follows:.

> "*(B) Learned MERC while carrying out re-categorization of the commercial establishments covered earlier under HT-II category, failed to appreciate the difference in the nature and purpose of consumption of electricity by the Appellant.*

The Appellant in the present case is carrying out essential services of operating and maintaining the Mumbai Airport."

"*(C) Learned MERC has failed to appreciate that the Mumbai Airport being an essential public utility service needs to be treated separately as in the case of other public utility services. The airport services provided by the Appellant are per se public utility services and the management of aerodrome is an essential service under the Essential Services Maintenance Act, 1968*."

"*(I) The MERC should have considered that the work carried out by the Appellant per se is a public utility service and the management of aerodrome is an essential service under the Essential Service Maintenance Act, 1968. Mumbai Airport is the country's top transport interchange and acts as a catalyst for economic growth and facilitator of commerce and industry on a national, regional and local scale.*"

"*(J) The MERC failed to consider that for the smooth functioning of the Airport and to maintain standards as per*

international norms, the Appellant is required to provide the requisite aviation infrastructure in terms of various aeronautical and non-aeronautical services and facilities to the airlines and the passengers. The Appellant cannot compromise or reduce any of these services as they form the part of his obligation on the basis of which he Appellant was granted the contract. The efficiency of these operations cannot be compromised under any circumstances. Therefore, the Appellant should be provided a tariff having regard to the necessity of consumption of power for these activities."

"*(L) The MERC failed to consider that the Appellant is also a regulated entity. The charges recovered by Appellant are regulated by Government of India and Airport Authority of India. If the hike in electricity tariff is disallowed by the Government of India and the Airport Authority of India, then the Appellant will have to compromise or reduce on other essential activities and functioning of Airport which*

may have serious bearing on normal functioning of the Airport."

"*(M) The MERC failed to consider that the loading of tariff on establishments like Malls and other commercial places is justifiable as per the tariff policy of the MERC, but the same logic does not hold good for increasing tariff of the public utilities discharging essential services. The Appellant is not in a position to take the additional load of increase in electricity tariff.*"

44. As per ground (B) above, the prayer of the Appellant is that the Appellant should be re-categorized on the basis of nature and purpose of the consumption of electricity by the Appellant as specified under Section 62(3) of the Electricity Act, 2003. The ground (C) indicates that the Appellant being an entity providing essential services needs to be treated separately as in the case of other similarly placed consumers. As per ground (I), the Appellant's claim is that the services provided by the Appellant are *per se* essential service under the Essential Services

Maintenance Act, 1968. As per ground (J), the Appellant has prayed that the Appellant should be provided the tariff having regard to the necessity of the consumption of power for the activities. The ground (F) would indicate that the Appellant has claimed that the State Commission failed to consider that the Appellant has also regulated entity as charges recovered by the Appellant are regulated by the Government of India and the Airport Authority of India. Similarly, ground (M) would indicate that the Appellant has raised the ground that the State Commission failed to consider that loading of tariff on establishments like Malls and multiplexes, though justifiable as per the Tariff Policy of the State Commission, but the same logic does not hold good for increasing the tariff of the entity discharging the essential services.

45. In the light of the above specific grounds of challenge in the Appeal, the Tribunal considered these grounds as well as the objections raised by the State Commission. The objection raised by the State Commission was that the purpose of creating of

new category for imposing higher tariff was that the consumers brought under this category were of non-critical services with higher capacity to pay and they potentially served energy and indulged in unwarranted consumption. On the other hand, the Appellant contended before the Tribunal that the Appellant was rendering essential services and, therefore, its consumption could not be said to be unwarranted consumption and as such the categorization of the Appellant as HT-II Commercial was violative of Section 62(3) of the Electricity Act, 2003. Having taken note of the above rival contentions, the Tribunal had rendered the judgment dated 26.02.2009 cancelling the categorization putting the Appellant in HT-II Commercial category.

46. Let us now refer to the relevant portions of the said judgment of this Tribunal dated 26.02.2009.in order to find out whether it is a mere Open Remand or a Limited Remand after giving finding with reference to the categorization:

"*17. The Appellant contends that the appellant has been made to pay a high level of cross subsidy under the new tariff fixation. The average cost of supply for the HT consumers has been worked out at Rs. 5.90 per unit as can be seen from para 5.4 (at page 125 of the impugned order_ with the new tariff imposed on the Appellant the cost of per unit electricity consumed by the appellant works out to Rs. 10.92 per unit. Therefore, there is cross subsidy of Rs. 5 per unit amounting to 84%. Therefore, the percentage increase in tariff for the appellant from the previous year is approximately 43% whereas the percentage increase for the HT-II Industrial category is only 9.7%. This is as against the required average increase in tariff caused by increase in the revenue requirement of only 10.22%.*"

"*18. The philosophy adopted is the same as adopted for LT (Commercial) consumers. The philosophy for raising the tariff for LT-II (Commercial) consumers is available at the same page and the same is as under:*

"In view of the ATE's decision in this regard, the Commission has done away with LT-IX category, the separate consumer categorization for shopping malls and multiplexes. All these consumers will henceforth be classified under LT-2 commercial category, as was being done earlier. Further, three new categories have been created under LT-2 category on the basis of sanctioned loan viz. 0 to 20 kW, 21 kW to 50 kW and above 50 kW sanctioned load. Further, based on the data submitted by REL-D, it appears that the consumption of commercial category consumers having sanctioned load above 20 kW load is increasing very rapidly, which in a way, is contributing to the increased quantum of costly power purchase. Hence, the Commission has determined the tariff for these new sub-categories at higher levels.

"19. The Commission apparently felt that the licensee has been required to purchase costly power as the

consumption of the commercial category of consumers having sanctioned load above 20 kW was increasing very rapidly. This reasoning for imposing a higher tariff on the LT-II category of consumers having sanctioned load of 21 kW to 50 kW and above 50 kW came to be challenged in the case of Spencer's decided recently i.e. on 27.01.2009 in Appeal No. 98 of 2008. This Tribunal has been consistently taking the view that no particular category of consumers can be made to pay higher tariff on the excuse that these consumers were responsible for purchase of costly power. The purchase of costly power depends upon the total consumption in the area of distribution of the distribution licensee. No particular category of consumers can be blamed for such increase. The appellant particularly wants to show from the data available in the Commission's order that the increase in consumption of the category HT-II (from which HT-III has been carved out has not increased as rapidly as certain other category of consumers. It has also to be seen that increase in total consumption can be

caused either by increase in the number of consumers or by increase in the consumption of each individual consumer. The Commission has made no effort to analyse whether the consumers of HT-III Commercial category have increased in number or has increased individual consumption on account of which hey can be penalized. We have already discarded the view that any category can be charged higher rate on account of purchase of expensive power on the excuse of that category being responsible for excess power."

"20. Accordingly, view of the Commission that HT-III category consumers are responsible for purchase of costly power for this category of consumers should pay a higher tariff has also to be discarded. In the case of Spencer's (supra) we held as under:

> *"12) So far as loading the appellant with the purchase of the costly power is concerned, the same also needs to be disapproved. The purchase of costly power*

depends upon the total demand for electricity at a particular area. No particular category can be burdened with the costly power. A similar situation was examined by this Tribunal in the case of Kashi Vishwanath Steel Ltd. Vs. Uttaranchal Electricity Regulatory Commission & Others in Appeal No. 124 of 2005, decided by this Tribunal on 02.06.2006. The Uttaranchal Electricity Regulatory Commission had fixed a very high tariff for the power intensive industries on similar grounds. We ruled as under:

> *"However, we are constrained to observe that this is not in line with the spirit of the Act wherein it is postulated that the cross subsidies have to be transparent and gradually brought down. Using the marginal cost of purchase of power for a particular category of consumers will perennially result in higher tariff for the category and, therefore, cannot be justified. At the same*

time, it is also not in the intent of the Act to inflict tariff shock to the consumers."

21) Our view expressed in the case of Kashi Vishwanath Steel Ltd. (supra) has not so far been set aside. Nor has the respondent argued that the view expressed by us calls for any change."

22) Another ground for interfering with the tariff order is increase in cross subsidy levels and tariff shock caused to the appellant as described in paragraph 17 above. The appellant, by virtue of nature of its business, has to consume huge quantity of electricity, it will be difficult for the appellant to reduce the electricity bill without affecting the quality of service provided by it. At the time of hearing it was stated to us at the bar that 25% of the operation cost of Mumbai International Airport, run by the appellant, is that of electricity bill. Keeping in view the nature of service provided by the appellant, it will not be advisable that the

appellant in any way reduce the quality of its service. Causing a tariff shock as well as raising the cross subsidy level are both opposed to the National Tariff Policy. The Commission is required to pay due regard to the National Tariff Policy. Accordingly, the impugned order is required to be interfered with also on this ground."

"24) The Commission will now have to re-determine the tariff for the appellant keeping in view the monetary implications for the two sides, the nature of the consumption of the appellant, as also the observations made by us in this judgment. It will be appropriate that the Commission affords the appellant an opportunity of being heard on all relevant aspects before the tariff is re-fixed. On such re-determination amounts found to have been paid in excess by the appellant to the Respondent No. 2 will have to be refunded. We have to keep in view that sudden refund of this amount will cause a resource crunch for the Respondent No. 2. At the same time, we have to remember

that it may not be possible for the appellant to recover he excess amount already paid to be passed on to its own consumers."

"26) In view of the above considerations, we allow the appeal and set aside the impugned tariff order to the extent of placing the appellant in the newly created category of HT-III for the purpose of higher tariff for the appellant. We also direct the Commission to re-determine the tariff payable by the appellant after affording the appellant an opportunity of hearing on all relevant aspects and keeping in view the monetary implications for the appellant and the Respondent No. 2, the nature of consumption of the appellant and the observations made in this judgment, within the next eight weeks. The excess amount recovered from the appellant will be adjusted in the future electricity bill of the appellant at the rate of not more than Rs. 1 crore per month."

47. The perusal of these paragraphs of the judgment would make it evident that the Tribunal, while passing the order dated 26.02.2009, would give the specific findings and would make the solid observations while setting aside the order of the State Commission putting the Appellant in the category of HT-II Commercial. The following are the findings and observations:

(i) The Appellant contends that the Appellant has been made to pay a higher level of cross subsidy under the new tariff fixation. This Tribunal has been consistently taking the view that no particular category of consumers can be made to pay a higher tariff on the ground that those consumers were responsible for purchase of costly power. The purchase of costly power depends upon the total consumption in the area of consumption of the Distribution Licensee. No particular category of consumers can be blamed for such increase. The increase in total

consumption can be caused either by increase in the number of consumers or by increase in the consumption of such individual consumers. The State Commission has not made any effort to analyse whether the consumers of HT-II Commercial category have increased in number or have increased individual consumption on account of which they can be penalized. Therefore, the view of the State Commission that the HT-II Commercial category of consumers are responsible for purchase of costly power or that this category of consumers should pay higher tariff is not correct.

(ii) According to the Appellant, there is an increase in cross subsidy level and consequently there is a tariff shock. The Appellant by virtue of the nature of the business, has to consume huge quantity of electricity. Keeping in view the nature of services being provided by the Appellant, it will not be

advisable that the Appellant should in any way reduce the quality of its services. Causing the tariff shock as well as the increase in cross subsidy are both opposed to National Tariff Policy. Therefore, the impugned order in respect of this aspect has to be interfered with.

(iii) According to the Appellant airport is a public utility service and therefore, it should be given special consideration and should not be exposed to commercial tariff. There is substance in this submission. However, Airport while having the essential service pertaining to aviation services has got variety of non-aviation commercial activities, such as shops, restaurants, duty-free shops, etc. Therefore, the State Commission may separately fix the tariff for the Appellant in respect of the aviation service such as run-way lighting, control towers, checking, baggage handling areas, waiting lounge, etc. and may determine different

tariff for the power consumed for commercial activities.

(iv) The State Commission will have to re-determine the tariff for the Appellant keeping in view the monetary implications for the two sides, the nature of the consumption of the Appellant as also the observations made by us in our judgment. On such re-determination, the amounts found to have been paid in excess by the Appellant to the Distribution Company will have to be refunded. The said excess amount instead of being refunded at one stroke will be adjusted as against the future electricity bills of the Appellant at the rate of not more than Rs. 1 crore per month.

48. The above findings and directions indicate 3 mandates:

(I) There should not be any increase in the cross subsidy level and consequent tariff shock;

(II) Since the airport being a public utility service, it should be given a special consideration and it should not be exposed to commercial tariff. The aviation activities which are essential services should not be put under the Commercial category. However, there are few commercial activities, such as duty-free shops, restaurant, etc. inside the airport. Hence the State Commission may determine the different tariff for these commercial activities and impose the same on them.. Therefore, the impugned tariff order to the extent placing the Appellant under newly created category of HT-II Commercial is set aside; and

(iii) Consequently, the State Commission is directed to re-determine the tariff payable by the Appellant by keeping in view the findings and observations made in this judgment.

49. The findings with reference to the airport having essential services pertaining to aviation activities should not be exposed

to the commercial tariff is not a mere observation but it is a finding reflecting the ratio.. That is the reason, this Tribunal set aside the impugned order to the extent of placing the Appellant in the newly created category of HT-II Commercial for the purpose of higher tariff for the Appellant. This ratio as laid down by the Tribunal is also confirmed by giving direction to the effect that, on such re-determination with reference to the aviation activities of the airport, the amounts which had been earlier recovered in excess by the RIL (R-2) from the Appellant will have to be refunded.

50. Thus, there was a specific finding through a direction to the State Commission by the Tribunal that the State Commission should not put the airport in a commercial category but it must be put in a separate category for the public utility services and in that event the tariff which has been paid as a commercial category will be naturally reduced and consequently the excess amount paid by the Appellant will have to be refunded.

51. Therefore, it cannot be said that it is an Open Remand but on the other hand, it can be construed as a limited Remand. The reading of the entire judgment would indicate that the Tribunal specifically directed the State Commission not to put the airport in commercial category but to put it in a different special category in respect of its aviation activities/services but in respect of other commercial activities inside the airport, it is open to the State Commission to put them under a commercial category. In the light of the above analysis and conclusions, the judgment dated 26.02.2009 of the Tribunal cannot be said to be an Open Remand but it is a limited Remand.

52. Let us now refer to the various principles laid down by the Tribunal as well as the Hon'ble Supreme Court as to how the lower court or lower authority have to deal with the matters which were remanded as a limited Remand or a Open Remand to them by the superior court or superior authority. These principles have been laid down in the following authorities. They are as follows:

(1) *Mohan Lal vs. Anandhibai* (1971) 1 SCC 813

(2) Paper Products Ltd. Vs. CCE *(2007) 7 SCC 352*

(3) *Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad*, AIR 2004 Calcutta 63.

(4) *K.P. Dwivedi vs. Tate of U.P.* (2003) 12 SCC 572.

(5) *Mr. Muneswar and Ors. Vs. Smt. Jagat Mohini Das*. AIR (1952) Calcutta 368.

(6) *Amrik Singh vs. Union of India*(2001 10 SCC 424.

(7) *Union of India and Anr. Vs. Major Bahadur Singh* (2006) 1 SCC 3670.

(8) *Prakash Singh Badal and Anr. Vs. State of Punjab and Ors.* (2007) SCC 1.

(9) *Tirupati Balaji Developers Private Limited vs. State of Bihar*. 2004 (5) SCC 1.

(10) *Jamshed Harmusji Wadia vs. Port of Mumbai* (2004) 3 SCC 214.

(11) *C.V. Rajendran vs. V. Mohmmed Kinhi* (2002) 7 SCC 447.

(12) AIR 1959 MP 161 *Kaluram vs. Mahtab Bai;*

(13) AIR 1972 AP 250 Balaswaraswami vs. Dorayya;

(14) AIR 1997 MP 90 *Rana Bai vs. Haribilas*

(15) AIR 2004 Cal 63 Bidya Devi vs. Commissioner of Income Tax, Allahabad.

53. In these cases referred to above, the following principles have been laid down.

(i) When a matter is remanded by the Superior Court to Subordinate Court for rehearing in the light of observations contained in the judgment, then the same matter has to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or *de novo* hearing.

(ii) The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) Remand Order is confined only to the extent it was remanded. Ordinarily, the Superior Court can set aside the entire judgment of the Court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the Court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(iv) If no appeal is preferred against the Order of Remand, the issues finally decided in the order of remand by the Superior Court attains finality and the same can neither be subsequently re-agitated before the Court below to which remanded nor before the Superior

Court where the order passed upon remand is challenged in the Appeal.

(v) In the following cases, the finality is reached:

(a) The issue being not challenged before the Superior Court.

(b) The issue challenged but not interfered by the Superior Court or

(c) The issue decided by the Superior Court from which no further appeal is preferred.

54. These issues cannot be re-agitated before the Court below.

55. In view of the above stated principles of law, the State Commission should comply with the directions of the Tribunal implicitly. In other words, it is incumbent upon the State Commission to re-determine the tariff for the Appellant strictly in view of the findings and observations made in the order dated 26.02.2009.

56. Let us now see the relevant portion of the impugned order dated 24.11.2009 of the State Commission in order to find out whether the directions given by the Tribunal has been followed in letter and spirit.

57. The main questions which were taken into consideration by the State Commission in the impugned order are (I) what would be the impact of setting aside the impugned order as regards consumers catergorization of the Appellant for the year in question? and (II) In view of the direction of the Tribunal that the State Commission may fix the differential tariff for electricity consumption pertaining to purely aviation services and different tariff for the pure commercial activities, can the differential tariffs be imposed for different activities undertaken by the Appellant? While dealing with these questions, the State Commission has observed as follows:

"*As regards the impact of the ATE judgment in setting aside the consumer categorization of the Petitioner for the year in*

question, the Commission has already clarified during the hearing that the ATE has ruled that the Commission has to re-determine the tariff and the difference, if any, between the newly determined tariff and the tariff charged earlier under HT-II Commercial has to be refunded to MIAI at a rate not exceeding Rs. 1 crore per month."

"As regards ATE's suggestion on levying differential tariff for electricity consumption pertaining to purely aviation services and pure commercial services, the issue is of appropriateness of such a step as well as the practical limitations for undertaking the same, as discussed below. The classification of each consumer within a specific category approved by the Commission is within the purview of the distribution licensee in accordance with the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, where the distribution licensee classifies the consumers in line with the definition of tariff applicability specified by the Commission under the approved Tariff Schedule. In the present case RInfra, the distribution

licensee concerned, could have classified the Petitioner only under the Commercial category since the Petitioner clearly does not fall under industrial category. As regards the practicality of levying differential tariff the distribution licensee records the electricity consumption by the Petitioner through specific meter(s) at the input points and there is no separate metering done by the distribution licensee for the actual consumption by the individual commercial establishment within the Petitioner's premises or the actual consumption by the pure aeronautical services provided by the Petitioner. In the absence of this metering data, the distribution licensee will not be able to charge differential tariff for the pure aeronautical services and the pure commercial services."

"As regards whether the Petitioner would be classified under the 'Industrial' category or 'Commercial' category in the present form, the Commission is of the view that in the absence of separate metering being done by the

distribution licensee for the aeronautical consumption and the commercial consumption as well as the fact that other comparable services like ports, etc. have also been classified under 'Commercial' category, it is appropriate to classify MIAL under the HT Commercial category."

"It is obvious that if the Petitioner was operating on a no- loss basis, then all the expenses would be passed on to the consumers, else the Petitioner would incur a loss. Moreover, Section 62(3) of the Act, 2003 does not permit differentiation between consumers on the basis of the ownership or whether they are loss making or profitable or running on a no-loss no profit basis. If these contentions were to be accepted, it would tantamount to saying that all commercial establishments that are not earning any profit should be categorized separately, as compared to commercial establishments that are earning some profit, and that the tariff should be different for these categories.

This is clearly not within the scope of Section 62(3) of the EA 2003.

"It is further clarified that the 'Commercial' category actually refers to all 'non-residential' purpose, or which has not been classified under any other specific category. For instance, all office establishments(whether Government or private) hospitals, educational institutions, airports, bus-stands, multiplexes, shopping malls, small and big stores, automobile showrooms, etc. are all covered under the categorization. Clearly, they cannot be termed as residential or industrial."

"As regards whether the categorization by the State/Central Government under any other statute/law, is binding on the Commission in the process of consumer categorization and tariff determination, the Commission is of the view that the State Government's/Central Government's Policies are with reference to matters within their respective jurisdiction and

while they may be considered, they are not binding on the Commission while deciding on the consumer categorization and tariffs for different consumer categories under the EA, 2003."

"In view of the rationale explained above, the Commission is of the view that there is neither any need, nor justification to create a separate category for the Petitioner as also no need to change the categorization from HT-II Commercial to HT-I Industrial category. Since there is no change in the categorization and tariff there is no question of any refund becoming due to the Petitioner.".

58. The perusal of the findings and observations, referred to above, given by the State Commission in the impugned order dated 24.11.2009 would indicate that the State Commission proceeded to adjudicate on the issue relating to the categorization under which the Appellant has to be put, which had already been decided by the Tribunal and as such it

exceeded its jurisdiction. Once the Tribunal in its judgment specifically set aside the categorization of the Appellant under HT-II Commercial category, holding that the said categorization is wrong and it should be put in a special category, there was no occasion for the State Commission to reconsider the said issues and put the Appellant in the very same category. By doing so, the Respondent Commission have, in fact, carried out re-examination of the correctness of the findings of this Tribunal which is not consistent with the judicial propriety.

59. It is contended by the Respondent Commission that since the Tribunal indicated in the order dated 26.02.2009 that the State Commission may like to have a differential tariff in respect of the different activities of the airport, it amounts to stating that it is for the State Commission to decide about the categorization as well as the tariff. This contention is misconveived. As a matter of fact, as indicated above, while accepting the submission made by the Appellant before the Tribunal to the effect that activities performed by the Appellant are of essential nature, the

Tribunal had specifically observed and directed that it should be given a special consideration and it should not be exposed to commercial tariff. In the next sentence, the Tribunal, having noticed the fact that the Appellant also have commercial activities, such as shops, restaurants, etc. apart from the essential aeronautic services had at that stage suggested to the State Commission that a solution should be arrived at by determining the special tariff in respect of the aeronautic services which are essential services and by determining the different tariff for the other commercial activities by putting the same under commercial category. This is a crucial observation made by the Tribunal which clearly establishes the basis by which the finding is recorded. As mentioned above, that is the reason, the Tribunal set aside the tariff order imposing heavy tariff on the Appellant to the extent of placing the Appellant in the newly created category of HT-II Commercial for the purpose of higher tariff and directing the excess amount recovered from the Appellant should be refunded after re-determination. Thus, this finding of the Tribunal to the effect that putting the Appellant in

HT-II Commercial category by the State Commission, is wrong, has attained finality. Despite this, the State Commission, without giving due respect to the Tribunal's finding, reflecting the ratio, has again put the Appellant under the same HT-II Commercial category for higher tariff. This approach of the State Commission in not following directions of the Tribunal on the basis of the findings, does not fit in with the judicial propriety.

60. It is mainly contended by the Respondent that the earlier judgment passed by the Tribunal on 26.02.2009 was not based upon the provisions under Section 62(3) of the Act and therefore the State Commission was mandated to follow Section 62(3) of the Act while passing the final impugned order.

61. Let us now elaborate on this issue.

62. To deal with this issue, it is necessary to understand the full meaning and effect of Section 62(3) of the Electricity Act, 2003. Section 62(3) reads as under:

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

63. The above section would indicate that the Appropriate Commission has a duty not to show undue preference to any consumer of electricity, but the Appropriate Commission may differentiate according to all/or any other factor mentioned therein, namely the consumer load factor, power factor, voltage, total consumption of electricity during a specified period or at the time at which supply is required or geographical position of any area, nature of supply and the

purpose for which supply is required. The Learned Counsel for the Respondent Commission submitted that the use of the word “shall” under sub-section 3 of Section 62 with regard to the factor undue preference to any consumer and the use of word “may” with regard to the factor that the Commission may consider differentiation between the consumer of electricity shows that there is an obligation not to show undue preference upon the Commission but gives discretionary powers to the Commission to differentiate on the basis of factors mentioned therein. On the basis of the word “shall” and “may”, contained in this section, it is strenuously contended by both the Learned Counsel for the Commission as well as the Distribution Company (R-2) that the :Legislature had deliberately used the word “shall” in the first part of the section specially mandating the Commission not to discriminate between the consumers and deliberately used the word “may” in the second portion of the section to indicate that it is possible for the Commission to differentiate amongst consumers on one or more of the criteria mentioned therein

and as such the Learned Commission is correct in not giving undue preference to the Appellant and putting the Appellant in the category of Commercial by way of exercising its discretion. In order to convey the meaning of the word “shall” and “may” reflecting the criteria exercised and discretion exercised respectively, the Learned Counsel for the Respondent have cited the following 3 decisions:

(i) 1998 (6) SCC 590 *Maharahtra Rice Mills and Others vs. State of U.P. and Others.*

(ii) 1992 (2) SCC 484 *Canara Bank vs. M.S. Jasra and Others.*

(iii) 1964(7) SCC 484 *Labour Commissioner vs. Burhanpur Tapti Mills and Others.*

64. On the other hand, it is vehemently contended by the Learned Counsel for the Appellant that the statutory obligation to determine the tariff in accordance with the criteria mentioned under section 62 (3) of the Electricity Act, 2003 is obvious from

the fact that the said determination should not lead to treat unequal as equal; as it would offend the Article 14 of the Constitution of India and expression “may” employed in the 2nd part of this section does not mean that the said term grants absolute discretion.

65. It is further contended by the Learned Counsel for the Appellant that section 62(3) mandates exercise of the power for determination of tariff only on the basis of the criteria which are mentioned in the section and if the said power is exercised without reference to such criteria, the courts of law would certainly set aside such order and direct the authority to take a decision on relevant considerations and in this case, the Appellant has not been put in the proper category by taking into consideration of the criteria namely ‘purpose of the supply’ but wrongly put in the category of commercial along with the malls, restaurants, etc., and as such, the authorities cited by the Respondent would not apply to this present case.

66. In the light of the rival contentions urged by the respective parties, it would be necessary to make a comparative study of the relevant sections of the Electricity Act, 2003, Indian Electricity Act 1910 and Electricity Supply Act 1948 to understand the scope of these sections.

67. The Electricity Act, 2003 mandates, as indicated above, that while determining the tariff, the Appropriate Commission shall not show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, the nature of supply of electricity and the purpose for which supply is required and other conditions.

68. Similarly, the Indian Electricity Act 1910 and the Electricity Supply Act 1948 also specify that there will be no discrimination to any consumer except under certain conditions. The relevant clauses of the 3 Acts in this regard are extracted below :

The Electricity Act, 2003 Sector 62 (3) :

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

The Indian Electricity Act, 1910 :

Clause 23(1): (1) " A licensee shall not, in making any agreement for the supply of energy, shown under reference to any person"

Clause 23(4): " Any charges made by a licensee under clause (c) of sub-section (3) may be based upon, an vary in accordance with, any one or more of the following considerations, namely –

a) The consumer's load factor, or

b) The power factor of his load, or

c) His total consumption of energy during any stated period, or

d) The hours at which the supply of energy is required.

The Electricity Act, 1948 :

Section 49. Provision for the sale of electricity by the Board to persons other than licensees:

1) Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely :

a) The nature of the supply and the purposes for which it is required;

b) The coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas of not for the time being served or adequately served by the licensee.

c) The simplification and standardization of methods and rates of charges for such supplies;

d) The extension and cheapening supplies of electricity to sparsely developed areas.

3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the

supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

4) In fixing the tariffs and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person.

69. One of the factors contained in Electricity Act, 2003 to be considered while determining the tariff is the purpose for which the supply is required. This factor has not been mentioned in Indian Electricity Act, 1910. But the same has been mentioned both in the Electricity Supply Act 1948 and the Electricity Act, 2003. The consumer of electricity power differ widely depending upon their requirement of power. Therefore, it is appropriate to categorize the consumers into various categories. The utility classifies the consumers into the following broader categories :

i) Residential

ii) Agricultural

iii) Industrial

iv) Commercial

v) Others.

70. All these 3 Acts require that no undue preference should be shown to any consumer but however different tariffs could be fixed depending upon the various factors; one of them being purpose for which supply is required. While referring to the various factors in Section 62 (3) of the Electricity Act 2003, there is a technical rationale behind setting different tariffs depending upon those factors. As far as categorization based on the purpose for which supply is required is concerned, it would give the following different meaning:

The use of electricity is mainly for lighting, heating or cooling and to power a motor by almost all categories of consumers. Thus heating/cooling, lighting, etc,. may not be the 'purpose' for which supply is required in terms of provision of the

Act. The purpose of supply is the object for which supply is taken, which may be for domestic use, agriculture, industry, education, research, public transportation, medical treatment, public water supply, public lighting, etc. Consumer categories could be classified on the basis of purpose of supply. For example, Railway Stations, Bus Terminus, and Airport could be classified together on the basis of common purpose of supply related to public transportation. The purpose in broader terms could also be public utility service which may combine different purposes such as transportation, such as Railway Station, Bus Terminus and Airport, water supply & sewage, etc., having similar power supply arrangements.

71. The Electricity Act, 2003, in view of the section 62 (3) can be invoked to categorize various consumers. The consumer category can be further extended in addition to the 4-5 main categories referred to above. In India various regulators have classified the consumers mainly into following categories :

(i) Domestic

(ii) Industrial

- Small
- Medium
- Large
- Power intensive

(iii) Commercial

(iv) Agricultural

(v) Railway Traction

(vi) Public lighting (street lighting)/local bodies (municipal Corporations)

(vii) Public Water Works & Sewage

In some States/Union Territories, some other consumer categories such as cold storages, Public Utility, coal mines, construction power supply, start-up power, single point supply for Group Housing Societies, etc., have been made based on the purpose of supply.

72. Keeping in mind the above, we shall now refer to the reasoning given by the State Commission or putting the Appellant in the category of HT-II Commercial in order to find out whether these reasonings are correct or not.

> "*26. As regards ATE's suggestion on levying differential tariff for electricity consumption pertaining to purely aviation services and pure commercial activities, the issue is of appropriateness of such a step as well as the practical limitations for undertaking the same, as discussed below. The classification of each consumer within a specific category approved by the Commission is within the purview of the Distribution Licensee in accordance with the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, where the Distribution Licensee classifies the consumers in line with the definition of tariff applicability specified by the Commission under the approved Tariff Schedule. In the present case, RInfra, the Distribution Licensee concerned, could have classified the*

Petitioner only under the Commercial category, since the Petitioner clearly does not fall under industrial category. As regards the practicality of levying differential tariff, the Distribution Licensee records the electrify consumption by the Petitioner through specific meter(s) at the input points and there is no separate metering done by the Distribution Licensee for the actual consumption by the industrial commercial establishments within the Petitioner's premises or the actual consumption by the pure aeronautical services provided by the Petitioner. In the absence of this metering data, the Distribution Licensee will not be able to charge differential tariff for the pure aeronautical services and the pure commercial services."

"33*. It is further clarified that the commercial category actually refers to all non-residential purpose or which has not been classified under any other specific category. For instance, all office establishments, (whether Government or private) hospitals, educational institutions, airports, bus-*

stands, multiplexes, shopping malls, small and big stores, automatic showrooms, etc., are all covered under the categorization. Clearly they cannot be termed as residential or industrial."

73. The above paragraphs would indicate the reason as to why the State Commission has put the Appellant in the commercial category. According to the State Commission, since the Appellant (Petitioner) does not fall under the agriculture, domestic or industrial category, it must be put in commercial category. It is also made clear by the State Commission in the above paragraphs that the "commercial category actually refers to all non-residential non-industrial purpose or which has not been classified under any other category", and as the Appellant cannot be termed as a residential or industrial, they should be categorized as commercial like any other offices/establishment, hospitals, educational institutions, bus-stands, multiplexes, shopping malls, small and big stores, automobile showrooms. etc. Thus, it is clear that the State Commission without going

into the question whether the Appellant could be put in a separate and special category other than HT-II Commercial as mandated by the Tribunal through the limited Remand Order and without considering the differentiating factors of “the purpose for which supply is required” for the purpose of categorization with reference to the same to the Appellant, the State Commission simply put the Appellant in Commercial category.

74. As indicated above, the main reason given by the State Commission in the impugned order for re-categorization in HT-II commercial category is that between the existing categories created by the State Commission, the Appellant could be put only under commercial category merely because it did not fall under the other categories created by the State Commission like domestic, agriculture, residential. etc. Such a simplistic approach adopted by the State Commission shows the failure of the State Commission to discharge its functions under Section 62(3) of the Act to put the Appellant in the proper category by

creating another category in the light of the differentiating factor of purpose for which supply is required.

75. The reading of the entire Section 62(3) of the Electricity Act, 2003 would clearly reveal that the section does mandate neither differentiating nor categorizing tariff to all the categories of consumers. On the other hand, the said section provides certain specified criteria as provided under Section 62(3) of the Electricity Act. As mentioned earlier, the word “may” used in the said section of the Act does not provide absolute discretion upon the State Commission to take other factor into account or not. The term “may” used in this section indicates that as and when situation arises, the Sate Commission in exercise of its judicial discretion shall utilize certain or all of the criteria specified under this section. When the discretion is being used as provided in the section, it has to be exercised in an appropriate manner having regard to relevant facts and circumstances to ensure that no undue preference is given to any consumer and no discretion is made against any consumer. Section 62(3) of the Act

embodies the same principle which is enunciated in Article 14 of the Constitution of India.

76. It is settled law that equality before the law does not mean that things which are different shall be treated as they were the same. In this case, the Appellant being an airport, extending services to the public, has been simply put along with the malls, restaurants, shops etc., merely because it does not come under other categories namely, domestic, agriculture and residential, etc. This, in our view, is a wrong approach.

77. The failure on the part of the State Commission to properly exercise the discretion vested under Section 62(3) of the Act not only is violative of the said section but also violative of Article 14 of the Constitution. As a matter of fact, the Appellant being treated equal with the malls, restaurants and commercial establishments would amount to treating unequal as equals.

78. The purpose for which supply is required by the Appellant, which is considered to be one of the factors, cannot be equated to that of the malls, multiplexes, restaurants, etc. In other words, the State Commission has not taken into consideration the differentiating factor of the purpose for which supply is required "for the categorization of the services rendered by the Appellant".

79. The State Commission has wrongly proceeded on the basis that the fact that the Appellant is carrying out its operations on no-profit no-loss basis cannot be the basis for differentiating since the profit motive for activity cannot be differentiating factor under Section 62(3) of the Act. This approach should not be adopted by the State Commission in this case. The Appellant never sought for a separate category on the basis that they are acting on no-profit no-loss basis. On the other hand, he sought tariff for supply of electricity in view of the essential infrastructure service carried out by it. It is clear in this case that the purpose for which the electricity is required by the Appellant is to perform

essential airport services and not on the basis of the motive of earning profit or no profit. It is made clear that the Appellant has not sought its re-categorization on the basis of profit or no-profit motive and on the other hand, the Appellant is seeking categorization on the basis of purpose for which electricity is consumed.

80. This Tribunal in its judgment in the case of Udyog Nagar Factory Owner Association vs. BSES Rajdhani Power Limited has held that the differential tariff can be fixed for the railway traction, Delhi Metro Rail Corporation as they stand on a different footing then the other class of consumers, i.e. the railway and Delhi Metro Rail Corporation drawing power to satisfy the needs of masses and therefore there can be separate category for railways and Delhi Metro Rail Corporation. The relevant portion of the judgment is as follows:

> "*The word "purpose" used in the above-mentioned sub-clause, as per Black's Law Dictionary means:*

"An objective goal or end; specify the business activity that a corporation is chartered to engage in"

"Thus, the Commission cannot accord any preferential treatment to any consumer of electricity in the determination of tariff. But different tariffs can be fixed for different consumers on the basis of their load factor, power factor, voltage, total consumption of electricity during any specified period of time or the time at which the supply is required or the geographical position of any area and the nature of supply and the purpose for which supply is required. The appropriate commission is also empowered to fix different tariffs on the basis of reasons for which electricity supply is required. The tariff for the Railway traction and DMRC stand on different footing than other classes of consumers. The railways and the Delhi Metro Rail Corporation draw power with the objective to satisfy the transportation needs of the masses (emphasis supplied).

81. As a matter of fact, the RIL (R-2) itself contended before the State Commission itself supporting the stand of the Appellant after Remand Order was passed stating that the Appellant was entitled to tariff different from the HT-II Commercial category and/or different category. During the re-determination process before the State Commission, the distribution company (R-2) itself proposed creation of new category HT-Public and Government for the Appellant in order to support its plea, the RIL (R-2) itself cited a judgment of DERC dated 28.05.2009 wherein special status was accorded to the Delhi International Airport.

82. Despite this, the State Commission had put the Appellant in the same category as commercial without considering the factors regarding the purpose for which supply is required by the Appellant.

83. As a matter of fact, as mentioned above, in the Remand Order passed by the Tribunal dated 26.02.2009, the Tribunal observed that the Commission may fix differential tariff for the Appellant on the basis of essential airport services and non-essential commercial activities undertaken at the airport. As explained in the foregoing paragraphs, the Tribunal had given a clear finding that aviation activities of the airport must be put in a separate category taking note of the purpose for which supply is required and it should not be put in the commercial category.

84. However, the State Commission simply ignored this finding by merely stating that in the absence of separate metering data for aeronautic service and commercial services, the distribution licensee will not be able to charge differential tariff for this. By adopting this reasoning, the State Commission violating the directions given by the Tribunal has proceeded to justify that in the absence of metering and differentiation of tariff having regard to the essential airport service, namely aviation activities

carried on by the Appellant, have to be treated under the HT-II commercial category.

85. As mentioned above, once the categorization of the Appellant under the HT-II commercial category is set aside by this Tribunal, it is not proper for the State Commission to put the Appellant in the same category by charging the commercial tariff from the Appellant. The scope for differential tariff was made in the Remand Order dated 26.02.2009 to allow the distribution licensee to charge commercial rate from establishments in the airport carrying out purely commercial activities. As discussed above, the absence of metering cannot be the reason to equate the airport services with the purely commercial activities and not re-determining the tariff of the Appellant.

86. Our findings are summarized below.

(i) The judgment dated 26.02.2009 of the Tribunal specifically directing the State Commission not to put the Appellant in Commercial Category but to put it in a different special category, was a limited Remand and not an open Remand.

(ii) The State Commission is bound to act within the scope of the Remand. It is not open to the State Commission to do anything but to carry out the terms of the Remand in letter and spirit.

(iii) The State Commission should re-determine the tariff for the Appellant strictly in view of the findings and observations made by the Tribunal.

(iv) The State Commission could have differential tariff for the aviation as well as for the purely commercial activities, such as shops, restaurant, etc., at the airport. However, if it is not feasible to have

separate metering arrangements for the aviation activities and purely commercial activities, then the State Commission could re-categorize the Appellant in a separate category other than HT Commercial II and determine the composite tariff for aviation and the commercial activities of the Appellant.

87. In view of the above reasonings, we deem it appropriate to set aside the order impugned and to allow the Appeal with the direction to the State Commission to pass appropriate consequential orders in term of the findings given in this judgment and to implement the same as expeditiously as possible, after hearing the parties.

88. Accordingly the impugned order is set aside. Appeal is allowed. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st May, 2011

REPORTABLE/NON-REPORTABALE