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

**Appeal No. 35 of 2006**

Dated: July 10, 2006

M.P. Poorv Kshetra Vidyut Vitran Co. Ltd. … Appellant

Versus

Birla Corporation Ltd. … Respondent

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

Counsel for the Appellant : Mr. M.L. Jaiswal
Mr. P.V. Sathe (Rep.)

Counsel for the Respondent: Mr. Parag Tripathi, Sr.Advocate
Mr. Sanjay Grover
Mr. S.S. Tanwar & Mr. R.G. Srivastava (Reps.)

**JUDGMENT**

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

This appeal is directed against the Order of the M.P. Electricity Regulatory Commission dated January 4, 2006. The facts giving rise to this appeal lie in a narrow compass.

2. The Respondent, Birla Corporation Ltd. has two cement plants at Satna, namely Birla Vikas Cement, Satna and M/s. Satna Cement Works. Electricity is supplied by the appellant to M/s Birla Vikas Cement, Satna and M/s. Satna Cement Works through two separate connection nos. S/32-CD and S-01 respectively.

3. In respect of Satna Cement Works, the parties had entered into an agreement dated September 21, 1985, which was for a contract demand of 10,000 KVA at 33 KV. Subsequently, on June 4, 1987, under an agreement, the power was required to be supplied to the respondent at 132 KV in place of 33 KV. On November 16, 1989 a supplementary agreement for increasing the contract demand from 10,000 to 12,000 KVA was executed. Thereafter, on May 19, 1992 another supplementary agreement for increasing the contract demand to 15000 KVA was entered into by the parties. On February 10, 1998, the parties entered into yet another agreement and this time the agreement was for

reduction of contract demand from 15000 KVA to 13000 KVA. The agreement was made effective from January 1, 1998.

4. In respect of the Birla Vikas Cement, the parties entered into an agreement on March 1, 1989 for contract demand of 21,000 KVA. At the request of the respondent, the contract demand was reduced to 20,000 KVA on May 22, 1989. Thereafter, a new agreement was entered into on January 1, 1995, whereby the contract demand was further reduced w.e.f. Nov. 1, 1994 to 17,000 KVA. Thereafter, on December 12, 1997, a supplementary agreement was entered into whereby contract demand was brought down to 15,000 KVA. On November 3, 1998, by yet another supplementary agreement, the contract demand was reduced from 15,000 KVA to 13,000 KVA.

5. On October 4, 2005 the respondent by two separate applications to the appellant applied under clause 7.12 of the Electricity Code 2004 for further reduction of contract demand

from 13,000 KVA to 6500 KVA in respect of its aforesaid cement plants w.e.f. January 1, 2006.

6. At this stage it needs to be pointed out that the respondent had set up a captive power generation plant with a capacity of 27 MW. This plant was commissioned on October 22, 2005. It was for this reason that the respondent applied for reduction of the contract demand from 13,000 KVA to 6,500 KVA.

7. The application of the respondent in respect of Satna Cement Works was rejected on December 2, 2005 on the ground that the contract demand for the last six months was 10,000 KVA and the respondent was required to restrict its power demand to 6,500 KVA for at least six months in order to be able to apply afresh.

8. The application of the respondent in respect of Birla Vikas (Unit of Birla Corporation), Satna, was rejected by the Superintending Engineer on December 2, 2005 on the ground that according to clause 7.12 of the MPERC Supply Code

2004, there was no provision for allowing reduction in contract demand third time, since the respondent had already availed of the reduction in contract demand twice vide agreements dated December 12, 1997 and November 3, 1998.

9. Aggrieved by the action of the appellant herein, the respondent filed a petition before the Madhya Pradesh Electricity Regulatory Commission under clauses 7.9 to 7.14 M.P. Electricity Supply Code 2004 for reduction of contract demand in respect of Satna Cement Works and Birla Vikas Cement. The Commission was of the view that there was no force in the contention of the appellant that the respondent was not entitled to reduction in the contract demand as it had already availed of the facility of reduction of contract demand three to four times. It was pointed out by the Commission that the last reduction in contract demand was permitted by the Board before coming into force of the M.P. Electricity Supply Code 2004 on Sept., 16, 2004. Accordingly, by the impugned order the Commission directed the appellant to allow the respondent to reduce its contact demand from

13,000 KVA to 6,500 KVA in respect of both the plants. The order of the Commission was to be complied with by the appellant within 15 days.

10. Not satisfied with the impugned order of the Commission dated January 4, 2006, the appellant, M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd. has filed the instant appeal. We have heard the learned counsel for the parties. It was submitted on behalf of the appellant that since the respondent had been permitted to reduce the load in respect of Birla Vikas Cement plant, Satna in 1989, 1995, 1997 and on November 3, 1998, the application for further reduction of load was not competent in view of the clause 7.12 of the M.P. Electricity Supply Code 2004, which permits reduction of contract demand only two times. On the other hand, the learned counsel appearing for the respondent submitted that the old clause 7.12 before its amendment on January 24, 2006 does not ban reduction of contract demand after it is reduced twice. According to the learned counsel for the respondent, the interpretation placed by the appellant on the said clause is erroneous. It was also

pointed out that on January 24, 2006 new clause 7.12 has been substituted for the old clause 7.12 and according to the new clause it is more than clear that the contract demand can be reduced after two years from the date of the earlier reduction of contract demand.

11. We have considered the submissions of the learned counsel for the parties. In order to determine the question whether the respondent was entitled to seek reduction of contract demand beyond two times, it is necessary to refer to old clause 7.12 and its new substitute. The two clauses read as follows:

> ***"Old Clause 7.12:***
>
> *After the expiry of the initial period of agreement the consumer may apply for and reduce his contract demand upto 50% of the existing contract demand. The consumer may reduce his contract demand* ***ONCE MORE ONLY*** *after two years from the date the new contract demand becomes applicable, by a maximum of 50% of the contract demand as applicable on that day. The above reductions are subject to permissible minimum contract demand specified in clause 3.4. In case the consumer reduces the contract demand with the utility and sources power from another supplier he shall be liable to pay additional surcharge as provided in Section 42(4) of the Electricity Act 2003.*

***New Clause 7.12:***

*After the expiry of the initial agreement period of 2 years, the consumer may apply for reduction of his contract demand up to 50% of the existing contract demand. The consumer may request for reducing his contract demand* ***AGAIN,*** *after two years from the date the revised contract demand becomes applicable, by a maximum of 50% of the contract demand as applicable on the date of application. The above reductions are subject to permissible minimum contract demand specified in clause 3.4".*

12. In so far as old clause 7.12 is concerned, it is apparent that the consumer can apply for reduction of contract demand upto 50% of the existing contract demand. Second time again i.e. *"once more only"* the consumer can again ask for reduction of his contract demand after two years from the date the new contract demand becomes applicable upto maximum of 50% of the contract demand as applicable. The reduction is subject to permissible minimum contract demand specified in clause 3.4 of the Electricity Supply Code 2004. The words "*once more only"* are significant and clearly mean that besides the first time the consumer can reduce his contract demand for the second time only and not thereafter.

13. It was submitted by the learned counsel for the respondent that the M.P. Electricity Supply Code came into force in the year, 2004 while the reduction in contract demand was made much before its application. He further submitted that clause 7.12 is prospective in operation and therefore, it will not cover the earlier reduction in contract demand. The conditions laid down in clause 7.12 will apply only where the reduction in contract demand has taken place after the date when the M.P. Electricity Supply Code 2004 came into force. The learned counsel for the appellant countered the submission advanced on behalf of the respondent by submitting that clause 7.12 has no retrospective operation but the requisites for its operation can be drawn from time antecedent to its coming into force. In support of his submission, he relied upon the decisions of the Supreme Court in Sajjan Singh *vs.* State of Punjab, AIR 1964 SC 464, Bashiruddin Ashraf *vs.* The Bihar Subai Sunni Majlis-Awaqf & Anr., AIR 1965 SC 1206 and Kapur Chand vs. B.S. Grewal, Financial Commissioner, Punjab, Chandigarh & Ors., AIR 1965 SC 1491.

14. It is true that the old clause 7.12 has no retrospective operation but there is nothing in it which makes it possible for us not to take into consideration the condition that the consumer can reduce his contract demand only twice. The clause does not say that the condition of two reductions will not apply if the reduction has taken place earlier to the application of the M.P. Electricity Supply Code 2004. A statute cannot be held to retrospective in operation because a part of the requisites for its actions is drawn from a time antecedent to its passing or the power conferred by it is grounded on conduct prior to its coming into force. In Sajjan Singh *vs.* State of Punjab (supra), the Supreme Court applied this principle. In this regard the Supreme Court observed as follows:-

> *"13. A statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing" (Maxwell on Interpretation of Statutes, 11th Edition., p. 211; see also State of Bombay v. Vishnu Ramchandran, AIR 1961 SC 307. Notice must be taken in this connection of a suggestion made by the learned counsel that in effect sub-section (3) of Section 5 creates a new offence in the discharge of official duty, different from what is defined in the four clauses of Section 5(1). It is said that the act of being in possession of pecuniary resources or property disproportionate to known sources of income, if it cannot be satisfactorily accounted for, is said by this sub-section to constitute the offence of criminal misconduct in addition to those other acts mentioned in clauses a, b, c and d of Section 5(1) which*

*constitute the offence of criminal misconduct. On the basis of this contention the further argument is built that if the pecuniary resources or property acquired before the date of the Act is taken into consideration under sub-section (3) what is in fact being done is that a person is being convicted for the acquisition of pecuniary resources or property, though it was not in violation of a law in force at the time of the commission of such act of acquisition. If this argument were correct a conviction of a person under the presumption raised under Section 5(3) in respect of pecuniary resources or property acquired before the Prevention of Corruption Act would be a breach of fundamental rights under Article 20(1) of the Constitution and so it would be proper for the court to construe Section 5(3) in a way so as not to include possession of pecuniary resources or property acquired before the Act for the purpose of that sub-section. The basis of the argument that Section 5(3) creates a new kind of offence of criminal misconduct by a public servant in the discharge of his official duty is however unsound. The sub-section does nothing of the kind. It merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in Section 5(1) for which an accused person is already under trial. It was so held by this Court in C.D.S. Swamy v. State, 1960-1 SCR 461 (AIR 1960 SC 7) and again in Surajpal Singh v. State of U.P., AIR 1961 SC 583. It is only when a trial has commenced for criminal misconduct by doing one or more of the acts mentioned in clauses (a), (b), (c) and (d) of Section 5(1) that sub-section (3) can come into operation. When there is such a trial, which necessarily must be in respect of acts committed after the Prevention of Corruption Act came into force, sub-section (3) places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.*

*14. Looking at the words of the section and giving them their plain and natural meaning we find it impossible to say that pecuniary resources and property acquired before the date on which the Prevention of Corruption Act came into force should not be taken into account even if in possession of the accused or any other person on his behalf. To accept the contention that such pecuniary resources or property should not be taken into consideration one has to read into the section the additional word "if acquired after the date of this Act" after the word "property". For this there is no justification.*

*15. It may also be mentioned that if pecuniary resources or property acquired before the date of commencement of the Act were to be left out of account in applying sub-section (3) of Section 5 it would be proper and reasonable to limit the receipt of income against which the proportion is to be*

*considered also to the period after the Act. On the face of it this would lead to a curious and anomalous position by no means satisfactory or helpful to the accused himself. For the income received during the years previous to the commencement of the Act may have helped in the acquisition of property after the commencement of the Act. From whatever point we look at the matter it seems to us clear that the pecuniary resources and property in possession of the accused person or any other person on his behalf have to be taken into consideration for the purpose of sub-section (3) of Section 5, whether these were acquired before or after the Act came into force.*

15. Again in Bashiruddin Ashraf Vs. The Bihar Subai Sunni Majlis-Awaqf & Anr. (supra), the Supreme Court while taking a similar view, held as under:-

***"10.*** *The contention of the appellant was that as this amendment was not retrospective the power could only be exercised in respect of orders and directions of the Majlis given after the date on which amended Act came into force and not in respect of orders and directions issued previously. According to him, the amending Act is being given retrospective operation which is not permissible. We do not see any force in these contentions. The amendment, no doubt, conferred jurisdiction upon the Majlis to act prospectively from the date of the amendment but the power under the amendment could be exercised in respect of orders and directions issued by the Majlis and disobeyed by the Mutwalli before the amendment came into force. To hold otherwise would mean that in respect of the past conduct of the Mutwalli neither the Majlis nor the District Judge possessed jurisdiction after the amendment came into force. This could hardly have been intended. The enquiry had already commenced before the Majlis and it would have reported to the District Judge for removal of the appellant but this was unnecessary because the Majlis itself was competent to act. A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right which was taken away but there could be no vested right to continue as Mutwalli after mismanagement and misconduct of many sorts were established. The Act contemplates that such a Mutwalli should be removed from his office and that is what is important. This argument was rightly rejected by the High Court and the Court below".*

16. In Kapur Chand vs. B.S. Grewal, Financial Commissioner, Punjab, Chandigarh & Ors. (supra), the Supreme Court held that a statute is not applied retrospectively just because a part of the requisites for its action is drawn for a moment of time prior to its passing.

17. In view of the aforesaid decisions of the Supreme Court, we do not agree with the Commission that since M.P. Electricity Supply Code came into force on September 16, 2004 and the last reduction of contract demand was permitted by the Board on November 3, 1998, the fresh demand of reduction is not hit by old clause 7.12 thereof. The earlier action of reduction in contract demand is covered by the provisions of clause 7.12 of the M.P. Electricity Supply Code 2004. Having taken this view, we hasten to add that the appeal cannot be allowed on this ground.

18. Old clause 7.12 appears to be unreasonable. It does not permit reduction of contract demand after two requests for reduction of contract demand are allowed by the Board. There can be compelling circumstances which require a consumer to

ask for reduction of the contract demand. To disallow request for reduction in contract demand for genuine reasons is unjust and unfair. Probably it was for this reason that on January 24, 2006, new clause 7.12 was inserted in the M.P. Electricity Supply Code 2004 in place of the old clause 7.12, which is no longer in vogue. According to the new clause 7.12 after the expiry of the initial agreement period of 2 years, the consumer can apply for reduction is his contract demand up to 50% of the existing contract demand. The consumer can request for reducing his contract demand again, after two years from the date the revised contract demand becomes applicable, by a maximum of 50% of the contract demand as applicable on the date of application. The words "once more only" occurring in the old clause 7.12 are missing from new clause 7.12. This omission is significant. The change was effected for reducing the rigor of the rule. The change must be given effect to as the omission of these words cannot be ignored. They have been omitted for giving relief to the consumers who wish to reduce their contract demand after two years from the date the revised contract demand is

applicable. In appeal cognizance needs to be taken of the new development which has taken place because of the substitution of old clause 7.12 by new clause 7.12. The respondent on the touch stone of the new clause is entitled to reduction in the contract demand.

19. There is one more factor on the basis of which the decision of the Superintending Engineer communicated to the respondent vide fax message dated December 2, 2005 is flawed. In the said fax message, a request for reduction in the contract demand for Satna Cement Works was rejected on the ground that contract demand of last six months was 10,000 KVA and the same is to be restricted before demand for reduction could be considered. This reason even on the application of the old clause 7.12 does not hold good. In respect of the Satna Cement Works reduction in contract demand has taken place only once. Under the old clause 7.12 the contract demand could be reduced twice. That apart the reason that the respondent had applied for reduction of contract demand earlier in respect of Satna Cement Works

and four times in respect of Vikas Cement Works is not on the basis on which two fax messages dated December 2, 2005 issued by the Superintending Engineer were based. In the case of Satna Cement Works, there is no mention of the earlier reduction in contract demand. In so far as Birla Vikas Unit is concerned, it is stated in the fax message dated December 2, 2005 that the respondent had availed of reduction in contract demand on two occasions. It is now being asserted that the contract demand was reduced three to four times. It is well settled that the decision of the administrative and quasi judicial authority cannot be improved upon by giving supplemental reasons in support thereof in the shape of affidavit or otherwise. In Mohinder Singh Gill & Anr. *v.* Chief Election Commissioner, New Delhi & Ors. (1978) 1 SCC 405, the Supreme Court in regard to this principle observed as follows:

> *" The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional*

*grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji:*

*Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".*

20. In view of the aforesaid discussion, the respondent must be allowed to reduce its contract demand from 13,000 KVA to 6,500 KVA in respect of Birla Vikas Cement and on the same reasoning the respondent is also to be allowed to reduce its contract demand from 13,000 KVA to 6,500 KVA in respect of Satna Cement Works.

21. In view of the aforesaid discussion, we find no force in the appeal. Accordingly, the same is dismissed.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member