

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

**APPEAL No.124 of 2011**

**Dated: 20<sup>th</sup> Nov, 2012**

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**U.P. Power Corporation Limited,  
'Shakti Bhawan', 14, Ashok Marg,  
Lucknow-226 001(U.P).**

**...Appellant**

**Versus**

- 1. M/s. Basti Sugar Mills Coompany Limited  
Post Office Sugar Factory, Basti,  
District Basti 221 004(U.P.)**
- 2. U.P. Electricity Regulatory Commission,  
'Kisan Mandi Bhawan', 2<sup>nd</sup> Floor,  
Gomti Nagar, Lucknow-226 010(U.P.)**

**...Respondent(s)**

**Counsel for the Appellant(s) : Mr. Pradeep Mishra  
Mr. Daleep Kr. Dhayani**

**Counsel for the Respondent(s): Mr. R. N. Sharma,  
Mr. Abeer Kumar  
Mr. Alok Aggarwal  
Mr. Sanjeev Singh  
Mr. Raunak Dhillon  
Mr. Siddharth Kochhar  
Mr. Ishan Gaur for R-1**

**J U D G M E N T**

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

1. UP Power Corporation Limited (Power Corporation ) is the Appellant herein.
2. M/s Basti Sugar Mills Co. Ltd.,(Sugar Mills) is the 1<sup>st</sup> Respondent.
3. UP Electricity Regulatory Commission (State Commission) is the 2<sup>nd</sup> Respondent.
4. The Appellant has filed this Appeal as against the order dated 4.9.2003 passed by the State Commission.
5. The short facts leading to the filing of this Appeal are as follows:-
  - i) M/s Basti Sugar Mills Co. Ltd(Sugar Mills), the 1<sup>st</sup> Respondent is the old consumer of the Appellant(Power Corporation).
  - ii) On 16.2.1976 Sugar Mills requested for a Power connection. Accordingly, the Sugar Mills was getting electricity supply from the then UP State Electricity Board, the predecessor of the Appellant.
  - iii) The Sugar Mills was having 275 KVA load for its factory and 101 KVA load for its residential colony.
  - iv) As requested, the load was released on 16.2.1976 and two meters were installed – one for the factory of

the Sugar Mills and the other for residential colony of Sugar Mills.

- v) An agreement was entered into between Sugar Mills and UP State Electricity Board. As per the agreement, power was to be supplied continuously and the bills were raised as per the applicable tariff and the same had been paid by the Sugar Mills(R1) periodically.
- vi) The then State Electricity Board in exercise of statutory powers under section of 49 of the Electricity Supply Act, 1948, passed a new tariff order on 18.1.1992. By this tariff order, the clause that provides that the residential supply for the purpose of factory lighting etc will be charged as per the domestic rate had been deleted.
- vii) On the strength of this order, from 16.7.1994 onwards the domestic line supplied to the Sugar Mills(R1) started getting bill at the industrial rate(HV-2 category). At this stage, an internal circular was issued by the Electricity Board to all its Chief Engineers. Through the said circular all the Chief Engineers were informed that since the provision for the factory lighting etc., had been deleted from the tariff by the tariff order dated 18.1.1992, wherever there are separate lines for factory and residential

area, two separate agreements have to be entered into so that there will not be any chance of dispute.

- viii) With reference to the bills being made under the industrial rate for the entire consumption since 16.7.94, the Sugar Mills(R1) continuously disputed the same before the authorities. One such representation disputing this Bill was made by the Sugar Mills before the State authorities on 13.1.98.
- ix) Office of the Chief Engineer(Distribution) of the Appellant disposed of the said representation sent by Sugar Mills by the order dated 28.01.98 in favour of the Sugar Mills by directing the Appellant to amend the disputed bill and charge for the domestic supply separately.
- x) The Sugar Mills(R-1) thereupon submitted another representation dated 02.11.98 to the Chief Engineer requesting to treat Sugar industry as non continuous process industry and praying for the supply of residential colony be charged as per the rate applicable to residential area.
- xi) There was no response to this representation made by the Sugar Mills. Therefore, the Sugar Mills (R1) filed a writ petition in the High of Court of Allahabad challenging this uniform billing for both the factory and the residential colony.

- xii) The said writ petition was disposed of by Allahabad High Court on 17.11.1998 directing the authorities of the Appellant to consider the representation dated 02.11.1998 sent by the Sugar Mills and decide the matter within a month.
- xiii) However, the General Manager, Distribution Section of the Appellant decided the matter and passed an order only on 28.9.2002 i.e. after 4 years holding against the Sugar Mills to the effect that the industry be treated as continuous process industry and the billing has to be done as per HV-2 tariff.
- xiv) Against the said order dated 28.9.2002, the Basti Sugar Mills (R1) filed a petition before the State Commission under the UP Electricity Supply Code,2002 and sought for declaration that the Basti Sugar Mills be declared as non continuous process industry and also for issuance of direction directing the Electricity authorities of the Appellant to charge electricity consumption of residential colony, recorded by separate meter under relevant rate schedule LMV-1 w.e.f. 16.7.1994 and to refund the excess amount collected, with interest. The Appellant filed a reply to the said petition before the State Commission in Jan,2003.

- xv) After hearing both the parties, the State Commission passed the impugned order dated 4.9.2003, holding against the Sugar Mills declaring that the Sugar industry was a continuous process industry. However, it gave a direction to the Electricity authorities of the Appellant, in favour of the Sugar Mills asking them to enter into a separate agreement with the Sugar Mills(R1) within a month for a residential consumption and held that two different rates should be charged for the domestic as well as the and industrial power supply and consequently, the electricity bills since 1994 should be revised.
6. Aggrieved by the portion of this order dated 4.9.3004 passed in favour of the Sugar Mills, the Appellant filed a Review petition in RP No.149/ 2003 before the State Commission on 11.12.2003 raising various grounds. Strangely even during the pendency of the Review petition, the Appellant had filed an Appeal also as against the impugned order dated 4.9.2003 before the High Court of Allahabad in Appeal No.145/2003 on 18.12.2003 raising the very same grounds of the Review.
7. Though the impugned order was challenged in the Review Petition before the State Commission as well as in the Appeal before the High Court of Allahabad, the Appellant had decided to comply with the impugned order of the State

Commission. Accordingly, the Appellant complied with the said directions given in the impugned order in favour of the Basti Sugar Mills by entering into a separate agreement with the Sugar Mills on 27.2.2004 and by revising the bills since 1994. Although the impugned order was thus fully implemented and complied with, the Appellant pursued both the proceedings i.e. Review before the State Commission as well as the Appeal before the High Court challenging the impugned order dated 04.9.2003.

8. Ultimately, the State Commission after hearing the parties rejected the Review petition on 13.4.2005 by confirming the earlier order dated 04.9.2003.
9. The Appeal No.145/2003 was taken up for final disposal by the High Court in the year 2011 i.e. on 28.3.2011. At that stage, the High Court, having noticed that alternative remedy of Appeal was available before the Tribunal to file an Appeal as against the impugned order dated 4.9.2003, dismissed the Writ Petition giving the liberty to the Appellant to approach the Tribunal to file the Appeal as against the impugned order. Accordingly, the present Appeal was filed on 21.4.2011 assailing the main order dated 4.9.2003.
10. When the Appeal came up for Admission on 08.9.2011, it was pointed out by this Tribunal to the learned Counsel for the Appellant that the application for condonation of delay

in filing this Appeal was required to be filed. Therefore, the Appellant took permission to file a separate application for condonation of delay. Accordingly, the Appellant filed an application to condone the delay of 2777 days in filing the Appeal as against the impugned order dated 04.9.2003. On this application, we ordered notice to the Respondents and adjourned the matter.

11. On the next date of hearing, the learned Counsel on behalf of Sugar Mills(R1) appeared and vehemently opposed the application to condone the delay mainly on the ground that the Appeal itself was not maintainable in the absence of the Appeal as against the Review order passed on the Review petition dated 13.4.2005.
12. However, this Tribunal thought it fit to condone this delay of 2777 days holding that the Appeal as against the main impugned order dated 4.9.2003 had already been appealed before the High Court, Allahabad in Appeal No.145/2003 and the said Appeal was kept pending for a long number of years and ultimately the High Court, Allahabad passed an order on 28.3.2011 directing the Appellant to approach this Tribunal to file an Appeal and only thereafter the Appeal was filed and that was how the delay was caused and as such, the Appellant was not responsible for the delay. Accordingly, we have condoned the delay despite objection. However, in the said order, we have given the



liberty to the Sugar Mills(R-1) to raise the issue of maintainability of the Appeal at the time of admission of this Appeal and posted the matter for admission at a later date. Accordingly, Registry posted the Appeal before this Tribunal for Admission on the adjourned date.

13. On that date, we have heard the learned Counsel for both the parties both on the question of maintainability of the Appeal as well as on the merits of the Appeal. Elaborate arguments were advanced by the learned Counsel for both the parties on various dates.
14. According to the Appellant, the Appeal is maintainable and the Appeal has got merits. On the other hand, the Sugar Mills(R1) submitted that the Appeal is not only not maintainable since no Appeal had been filed as against Review Order and but also it has no merits. In the light of the rival contentions, urged by the both the parties we frame two questions for our consideration, which are as follows:-

- i) Whether this Appeal is maintainable as against the main order dated 4.9.2003 in the absence of the Appeal filed as against the Review order dated 13.4.2005?
- ii) Whether the direction issued by the State Commission to the Appellant to supply power to residential colony

which should be billed under LMV-1 category after entering into separate agreement with the Sugar Mills(R1) is valid?

15. On these questions both the learned Counsel for the parties made lengthy submissions and cited number of authorities to substantiate their respective pleas.
16. We carefully considered those submissions and gave our thoughtful consideration to these issues.
17. Let us first take up the 1<sup>st</sup> issue regarding maintainability of the Appeal.
18. The short submission made by the Sugar Mills (R1) questioning the maintainability of the Appeal filed by the Appellant is quoted below:-

“The present Appeal is not maintainable under section 111 of the Act,2003 which provides for an Appeal against any order made by the appropriate Commission. The ‘order’ referred to in section 111 would include the Review order as well. In this Appeal, the Review order has not been challenged. In fact, the State Commission passed an order on 13.4.2005 dismissing of the Review petition. This order dated 13.4.2005 is a speaking order touching all the merits of the case. No Appeal has been filed against this order. So, in the absence of Appeal against the Review order dated 13.4.2005, the Appellant cannot be permitted to file an Appeal as against the earlier order dated 4.9.2003.”
19. In support of the above contention, the learned Counsel for the Sugar Mills(R1) cited the decision of Hon’ble Supreme

Court reported in 1963(1) SCR Page-1 i.e. in the case of UP Vs Dr. Viyanand Maharaj and the decision of the Andhra Pradesh High Court reported in 2002(1) ALT 135 i.e. in the case of Kondal Reddy Vs Central Bank of India.

20. In reply to the above contention regarding the maintainability of the Appeal, the learned Counsel for the Appellant made the following submissions:-

“ Order 47,, Rule-7 of Civil Procedure Code(CPC), rejecting the review petition can not be appealed. The State Commission under section 94(1) (f) has the powers to review the decision as that of Civil Court under CPC. Section 94(1) (f) provides that the appropriate Commission shall have the same powers as are vested in the Civil Court in respect of the matter reviewing its decision, directions and orders. From the above provision, it is clear that the State Commission can exercise power of review only under CPC and this order rejecting the Review petition is not appealable. Since the Appellant has already challenged the main order dated 4.9.2003, the order dismissing the Review petition will have no effect. Therefore, the Appeal is maintainable.”

21. In order to substantiate this plea, the Appellant cited Supreme Court Judgement in 1994(2)SCC 753, Shanker Moti Nale Vs Shislal Singh Gannu Singh Rajpur.

22. Having heard and considered these submissions made by both the parties on this issue, we are of the opinion that the Appeal is maintainable and the submission made by the

learned Counsel for the Sugar Mills(R1) questioning the maintainability of the Appeal has no legal basis. The reasons are as follows:

23. It is clear that the Appeal against the order passed in the review petition confirming the main order is not appealable under order 47, Rule-7 of CPC. We will quote the same as under:-

“Order 47, Rule7 : Order of rejection not appealable. Objections to order granting applicable – (1) An order of the court rejecting the application for Review shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order grating the application or in an appeal from the decree or order finally passed or made in the suit.”

24. Under section 94(1)(f), the State Commission has been conferred with the powers specifically to review its decision under the powers as are vested with Civil Court under the Code of Civil Procedure. Therefore, the State Commission can exercise its powers of Review only under the CPC. The decision of the Hon'ble Supreme Court in 1963(1) SCR Page-1 cited by the Sugar Mills(R1) is not applicable to the present facts of the case because in the said judgment, a statutory injection was imposed upon a Court to review the order regarding the assessment made by the authority as the assessment had been validated in the judgement.

25. In this judgment the Hon'ble Supreme Court interpreted the High Court Rules and came to the conclusion that the order of learned single Judge was to be construed to be the judgment on the facts of the case and on the said basis, the Hon'ble Supreme Court came to the conclusion that the Appeal as against the said Review order would lie to the Division Bench. In the very same judgment it has been specifically mentioned that the question relating to the interpretation of order 47, Rule-7 of CPC was left open. Therefore, the above decision relied upon by the Sugar Mills(R1) is not applicable to the present case.
26. In the same way, the decision of the Andhra Pradesh High Court reported in 2002(1)ALT 135 is also not applicable to the present case because in the said case, the High Court had considered the power of the High Court under Letters and Patent Act and not under 47, Rule-7 of CPC. In the said judgement, the High Court held that CPC is not applicable to writ proceedings and hence, the orders passed by the single Judge rejecting the Review petition would be appealable under Letters and Patent Act. Therefore, this decision also would not be applicable to the present case.
27. As pointed out by the learned Counsel for the Appellant, this Tribunal in a number of Appeals earlier decided, had held that the Appeal as against the order passed in the

Review Petition confirming the main order is not appealable and the main order alone would be appealable as per order 47 of Rule-7 of CPC.

28. As pointed out by the Appellant, the Hon'ble Supreme Court in 1994(2) SCC 753, Shanker Moti Ram Nale Vs. Shislal Singh Gannu Singh Rajpur also had held that since the Review Petition has been dismissed and the main order had not been challenged, the Appeal against the Review order was not maintainable.
29. In view of the above, we are of the opinion that the Appeal is maintainable only as against the main order and the Appeal against the Review Order is not maintainable. Thus, the first question is answered accordingly in favour of the Appellant.
30. Let us now deal with the 2<sup>nd</sup> question regarding the merits of the Appeal.
31. This case has got a chequered history. In order to understand the core of the issue it would be better to recall the relevant facts. They are as follows: -

(A) M/s Basti Sugar Mills Co. Ltd., the Respondent-1 was supplied by the then UP State Electricity Board, the predecessor of the Appellant from the year 1976 under a composite agreement. The Sugar Mills(R1)

was having 275 KVA load for its industry and 101 KVA load for its residential colony. Two meters were installed in the premises of the Respondent, one for the factory and other for the residential colony.

- (B) Earlier there was no difference in the rate of charge for the continuous as well as non continuous process industries. But in the subsequent tariff order passed by the then U.P State Electricity Board under Electricity Supply Act,1948, different tariffs were fixed for continuous as well as non continuous process industries w.e.f. Feb.1986. However, Sugar Mills(R-1) was billed under non continuous process industry till October,1989.
- (C) Thereafter, it was billed as a continuous process industry. The Sugar Mills(R-1) then made a representation to the Executive Engineer, who in turn decided in favour of the Sugar Mills holding that the Sugar Mills(R1) should be billed under non continuous process industry and directing for adjustment of surplus amount paid by the Respondent-1, for the period from Nov.1989 to August,1997.
- (D) Despite this, from September, 1998, the Sugar Mills(R1) was again charged as continuous process industry. That apart, the Basti Sugar Mills, Respondent-1 was charged at uniform rate under rate

schedule HV-2 both for the industry as well as the residential colony.

- (E) Aggrieved over this, the Basti Sugar Mills(R1) sent a representation on 02.11.1998 to the officers of the Appellant requesting to treat the Sugar industry as a non continuous process industry and to treat the domestic and industrial use as two separate supplies. However, there was no response to this representation dated 02.11.1998. Therefore, the Basti Sugar Mills(R1) filed a Writ Petition No.38405 of 1998 before the Allahabad High Court challenging the uniform rate under Rate Schedule HV-2.
- (F) The Writ Petition was heard by the High Court. Ultimately the High Court by order dated 17.11.1998 disposed of the said Writ Petition by giving direction to the authorities of the Appellant to decide the representation dated 02.11.1998 sent by the Basti Sugar Mills Co.Ltd to the Appellant within a month. However, the authority of the Appellant namely General Manager, Distribution took four years to decide the said representation dated 02.11.98 sent by the Sugar Mills(R1) through the order dated 26.9.2002 holding against Sugar Mills(R1) through the order dated 23.6.2002 that the industry shall be treated as continuous process industry and the billing was to be



done as per HV-2 tariff. Thus, on both these issues, authority of the Appellant held against the Sugar Mills.

- (G) Challenging the said order dated 26.9.2002, the Sugar Mills filed a petition before the State Commission on 11.10.2002 seeking for the declaration that the Sugar Mills be treated as a non continuous process industry and also seeking for a direction to the Appellant that separate billing under LMV-1 for the residential colony be made.
- (H) The State Commission after hearing both the parties passed the impugned order dated 04.9.2003 holding against the Sugar Mills(R1) that it is a continuous process industry. However, in the very same order, the State Commission held in favour of the Sugar Mills(R1), to the effect that the two different rates should be charged for the domestic use of residential colony and industrial power supply for the industry.
- (I) By this order, the State Commission further directed the Appellant that the electricity authorities should enter into a separate agreement within a month for a residential consumption with the Sugar mills and that the electricity bill since 1994 should be revised. Thus, though the prayer made by the Sugar Mills(R1) in respect of the claim that it was non continuous process industry, was rejected, the State Commission

held in favour the Basti Sugar Mills(R1) to the effect that there must be separate billings for domestic and industrial supply.

- (J) As against this order dated 04.9.2003, the Appellant filed a Review petition on 11.12.2003 raising various grounds before the State Commission. Strangely, even when the Review petition was pending before the State Commission, the Appellant rushed to the High Court at Lucknow Bench, Allahabad and filed an Appeal in Appeal No.145/2003 dated 18.12.2003 challenging the very same order dated 04.9.2003 raising the vary same grounds of the Review Petition.
- (K) While the Appeal was pending in the High Court, the State Commission heard the parties in the Review petition and passed an order dated 13.4.2005 dismissing the Review petition as there was no ground made out for Review. The Appeal before the High Court, came up for final disposal only in the year 2011. At that stage, the High Court having noticed that there was an alternative remedy available before the Tribunal, dismissed the Writ Petition directing the Appellant to approach this Tribunal to file an Appeal. Accordingly, the Appellant filed this Appeal on 21.4.2011 before this Tribunal.

(L) As indicated earlier, the Appellant also filed application for condoning the delay. It was ultimately condoned by this Tribunal. Since maintainability of this Appeal has been questioned by the Respondent-1, as discussed in the earlier paragraphs, we answered the said question and found that Appeal is maintainable.”

32. Having entertained this Appeal as maintainable we are to now consider the merits of the grounds of this Appeal in the light of above facts of the case.

33. Before dealing with the grounds of Appeal, it is necessary to point out three aspects which reflect sad features regarding the conduct of the Appellant.

i) The Appellant having chosen to file a Review before the State Commission, as against the portion of the order dated 4.9.2003 on 11.12.2003 raising various grounds , there was no reason as to why the Appellant rushed to the High Court, Allahabad and filed an Appeal as against the same order raising the very same grounds. Similarly, there was no reason as to why the Appellant having filed the Review petition before the State Commission had not mentioned its proposal for filing Appeal in the High Court raising the same grounds. Similarly, even in the Appeal filed

before the High Court, there was no mention about the pendency of the Review Petition before the State Commission as against the said order dated 04.9.2003.

- ii) In fact, the Appeal had been filed before the High Court as against the order dated 04.9.2003 along with an application to condone the delay in filing the Appeal. In that application, for explaining the delay, he mentioned that the concerned officer who was entrusted with the matter for filing Appeal had been transferred and the papers have been later entrusted to the new officer who was in-charge and that was how the delay was caused. The relevant portion of the statement of the Appellant/Petitioner in the petition to condone the delay is quoted as below:-

*“That the concerned Officer who was entrusted to study the impugned order and thereafter, if necessary to challenge the same by filing appeal before this Hon’ble Court was transferred in October,2003 and the above file could not be handed over to the new incumbent. It was only when the attention of the deponent was drawn by the Head Office at Lucknow to file the appeal that the file was traced and after obtaining legal advice the appeal is being preferred.”*

If that is so, how the Review petition had been prepared and filed on 11.12.2003 before the State Commission? This has not been explained.

Moreover, the Review petition which had already been filed before the State Commission had not been referred to, in the application to condone the delay in filing this Appeal.

iii) The Review petition which had been filed by the Appellant before the State Commission was dismissed as early as on 13.4.2005. As mentioned earlier, the very same grounds which were raised in the Review petition had been raised in the Appeal filed before the High Court. Even then, the Appellant did not care to inform the result of the Review so that High Court could have passed appropriate orders in the Appeal long back. This was not done. There was no explanation for this.

34. Bearing these factors in our mind, let us now come to the merits of the grounds of the Appeal.

35. The issue in question raised now in this Appeal is as to whether the direction issued by the State Commission to the Appellant to supply power to the residential colony of the Respondent-1(Basti Sugar Mills) which should be billed under LMV-1 category after entering into the separate agreement is valid or not.

36. The crux of the grounds raised by the Appellant is that the Appellant has insisted the Sugar Mills(R1) for entering into a fresh agreement from 1994 onwards through several letters including the letter dated October,1994 but the Respondent did not respond to it and consequently it did not enter into fresh agreement and in fact, the copy of the said letter No.4570 dated Oct.1994, sent by the Appellant to Sugar Mills was produced before the State Commission to prove their plea, but the same was not considered by the State Commission and therefore, the portion of the impugned order dated 4.9.2003 giving a direction in favour of the Sugar Mills(R1) has to be set aside.
37. As mentioned earlier, that the very same ground had been raised by the Appellant in the Review petition. The relevant portion of the Review petition is as follows.

**“The attention of the Hon’ble Commission is drawn to letter No.4570 written to the consumer in the month of October,1994. By the above letter the concerned Executive Engineer had informed the consumer to, inter alia, enter into agreement by furnishing a copy of Power of Attorney and the consumer was requested to comply with the requirement in one month from the date of the above letter. The opening lines of the above letter reveals that the above letter was written in response to the consumer’s letter No.213 dated 2.8.94 which indicates that necessary exercises for entering into a fresh agreement for L&F load was already under way back in 1994. A copy of**

the above letter was annexed along with the counter affidavit filed by the licensee before the Hon'ble Commission. It appears that the above piece of evidence furnished by the licensee before the Hon'ble Commission has missed the attention of the Hon'ble Commission while passing the above order dated 4.9.2003. The applicant is confident that the above piece of evidence, if considered, will alter the decision of the Hon'ble Commission to the effect that the licensee had failed in his responsibility to enter into a separate agreement with the consumer for L&F load.”

38. Similarly, the very same grounds had been raised by the Appellant in the first Appeal No.145/2003 filed before the Allahabad High Court. The said grounds are as follows:-

“5. That during the course of proceedings before the Commission the Appellant had furnished the above letter before the learned Commission and also advanced arguments in support of the initiative taken by it with the consumer to enter into afresh agreement. However, the Commission has not considered the above piece of evidence and also the arguments advanced by the Appellant. A copy of the above letter is appended to this memo of appeal as its Annexure No.4.

6. That the Appellant is challenging the above impugned order, on the same grounds, which are as follows:-

- i) The State Commission has grossly erred in not considering letter No.4570 dated October, 1994(Annexure No.4) while passing the impugned order dated 4.9.2003(Annexure No.2).

- ii) The State Commission has failed to appreciate that the Appellant had been pursuing since 1994 the issue of entering into afresh agreement with the respondent consumer with regard to light and fan load for residential colony of the respondent.
  - iii) The State Commission has failed to appreciate that the respondent is a sugar mill and has sufficient experience with regard to the maters related to electricity and 1<sup>st</sup> Respondent was duty bound to enter into a fresh agreement with the Appellant for light and fan consumption for its colony.
  - iv) The State Commission has failed to appreciate that the Respondent had been making payment of its bill as per HV-2 tariff for a long time. It had never raised any objection, whatsoever, prior to the filing of the petition before the State Commission.
  - v) The State Commission has failed to appreciate that the respondent has been drawing power from its factory to be used for light and fan load of its residential colony without entering into separate agreement with the Appellant.
  - vi) The State Commission has failed to appreciate that the consumer has been deliberately avoiding to enter into a fresh agreement with the Appellant for light and fan load for its colony.
39. The perusal of the Review Petition before the State Commission as well as the Appeal before the High Court,



would make it clear that the grounds raised in the Appeal before the High Court and the grounds raised in the Review are one and the same. While considering the merits of the said ground raised in the Review Petition the State Commission had given the following finding while disposing of the Review petition through its Review order dated 13.4.2005.

“The only ground of review filed by Review Applicant i.e. the licensee is that the licensee has since 1994 been pursuing with the consumer the issue of entering into separate agreement for L&F consumption both verbally and through proper official correspondence. In proof, the Review Applicants have enclosed letter No.4570 written to the consumer in October 1994 in reference to some of his letter dated 2.8.94 requiring the petitioner to execute a separate agreement for residential consumption within a month. The review applicant further states that this letter 4570 was filed by the applicant along with its counter affidavit in the petition No.20/2002. The Applicant, therefore, for grounds of review of the order dated r.9.2003 submitted as follows;-

“A copy of the above letter was annexed along with the counter affidavit filed by the licensee before the Hon’ble Commission. It appears that the above piece of evidence furnished by the licensee before the Hon’ble Commission has missed the attention of the Hon’ble Commission while passing the above order dated 4.9.2003. the applicant is confident that the above piece of evidence, if considered, will alter the decision of the Hon’ble Commission to the effect that the licensee had failed in

his responsibility to enter into a separate agreement with the consumer for L&F load. However, a copy of the above letter is again being enclosed herewith as its Annexure No.R-2 for perusal for the Hon'ble Commission”

6. The review respondent/petitioner in its objection to the maintainability of Review Application of the licensee has categorically denied that Applicant licensee ever filed letter Nol.4570 in any of the pleadings before the Regulatory Commission in petition No.20/2002. The review respondent/petitioner vehemently challenged, in its objection affidavit, the maintainability of Review Application and submitted as follows:-

- i) That the licensee review application has challenged the same order in First Appeal No.145/2003 in the Hon'ble High Court at Allahabad, Lucknow Bench, Lucknow. The Appeal has not yet been admitted and is still pending disposal. The Review petition is, therefore, not maintainable as per provisions of Rule 1 of Order-47, Review petition has not disclosed the fact of filing Appeal against the order dated 4.9.2003, hence, the applicant has concealed this fact and has not come out with clean hands.
- ii) That the only ground of review is the letter No.4570 written to the petitioner requiring him to execute separate agreement without referring to any reminder thereafter including reply of the consumer, if any. The respondent/petitioner further contended that this letter has not been brought on record in the original proceedings. The sole letter 4570 without any communication thereafter cannot establish that the licensee has been persistently

pursuing the petitioner to executive separate agreement. Even the alleged letter 4570 does not state that if the consumer fails to execute separate agreement, the licensee shall switchover to imposition of higher rate of charge for consumption of electricity by residential colony. Further, this letter dated October, 1994 does not mention the purpose of requiring execution of separate agreement. The review respondent/petitioner further states that the Commission, after having well considered the counter affidavit, and rejoinder affidavit & other pleadings in the petition filed by rival parties, had passed its judgment & order dated 4.9.2003 and as such the review application is not maintainable as per law declared by Hon'ble Supreme Court.

- iii) That para 29 of the order dated 4.9.2003 has elaborately dealt with the responsibility of getting separate agreement executed for residential colony power and the respondents are trying to get the case reheard for fresh adjudication of the dispute on the same very ground, which has already been determined & decided through speaking order dated 4.9.2003 by the Commission.
- iv) That it is further stated that the Hon'ble Supreme Court, understandably with the view to avoiding abuse of the process of review, has in no uncertain terms laid down that if the very same contentions, which are made the grounds of the review petition were advanced in the petition and have been dealt with in the judgment under review, the review petition strict sensu is not maintainable and is liable to be dismissed summarily. The petitioner,

therefore, prays that this review application may be dismissed outright.

*8. In hearing proceedings dated 7.4.2005, the learned counsel for Review Applicant while stating that letter 4570 was not filed with counter affidavit in petition No.20/2002 showed one more letter (which is also not on record in any of their pleading including in this application) written to the consumer for executing agreement thereby alleging to establish that the licensee has been persistently pursuing the petitioner to execute separate agreement.*

*9. The learned counsel for the petitioner while emphatically denying the contention of the review applicant reiterated that there is no apparent error on the face of record nor any glaring omission or patent mistake in the judgment & order dated 4.9.2003 leading to likely judicial fallibility. Hence, Review petition against the order dated 4.9.2003 passed by Commission is not maintainable as declared by Hon'ble Supreme Court in a number of cases. The learned counsel further stated that taking cognizance of letter 4570 or some other letter shown to the Commission during hearing on 7.4. 2005 which firstly were not brought on record of the original petition No.20/2002 and secondly, these are on the same subject which has already been elaborately dealt with by the Commission in its order dated 4.9.2003, will amount to rehearing of the case, which is not permissible under review proceedings as declared by Hon'ble Supreme Court.*

*The Commission has found that the letter 4570 dated October, 1994 has not been put on record in the original proceedings of the claim petition 20/2002 by the review*

*applicant as stated by them. No reasons for not filing this letter in the original proceedings have been given by the licensee. The Commission is of the opinion that proceedings under review can not be justified on this evidence. In any case, the Commission in para 29 of its order dated 4.9.2003 has dealt at length with the alleged efforts made by licensee for entering into separate agreement, which has been reproduced mentioned in para-3 of this order.*

*10. The Commission therefore, is of the view that the very same contentions, which have been made grounds of review in this application by the licensee, were advanced in the original petitioner and were dealt with in the judgment and order dated 4.9.2003 at length and therefore, this review petition is not maintainable.*

40. Thus, in this detailed order, the ground which had been raised by the Appellant had been elaborately dealt with the by the State Commission in the Review Order and a clear finding had been given to the effect that the grounds of Review are untenable.
41. As a matter of fact, the State Commission has clearly observed in the Review order dated 13.4.2005 as referred to above, that the State Commission had found that the letter dated No.4570 dated October,1994 alleged to have been sent by the Appellant to the Respondent was not available in the original proceedings of the main petition even though the Review Petitioner/Appellant had claimed that the copy of the letter sent in Oct,1994 to the 1<sup>st</sup>

Respondent was produced before the State Commission in the original proceedings.

42. The State Commission in fact held that no reasons were given for the non filing of the said letter in the original proceedings by the Appellant. As such, there was a specific finding by the State Commission in the Review order as against the Appellant to the effect that the claim made by the Appellant with reference to the said letter was utterly false.
43. But, unfortunately, in the present Appeal, the Appellant has neither referred to the said order dated 13.4.2005 nor raised any ground to show that the reasonings given in the Review Order to reject its ground are not legally valid.
44. It is true that the Appeal has been filed only against the main order dated 4.9.2003. It is also true that Appeal against the Review order dated 13.4.2005 is not appealable as we held earlier. But, the Appellant should have brought to the notice of this Tribunal about the attempt to get the impugned order set aside through Review Petition by the State Commission and the fact that the prayer in the said Review petition, was rejected by the State Commission by giving detailed reasons. The Appellant had failed to mention those things in this Appeal for the best reasons known to the Appellant.

45. We are of the considered view that the Appellant should have filed the copy of the Review petition as well as Review order as additional documents in this Appeal and brought to our notice about the result of the Review petition for the proper appreciation of the actual facts. This was not done.
46. Hence, we are constrained to feel that there is a suppression of material facts in this Appeal. Only when the Respondent filed a reply in response to the Appeal, bringing to the notice of this Tribunal that there was a Review order giving finding as against the Appellant on the same grounds, thereafter the Appellant has filed a written submissions admitting those facts. This is quite unfortunate.
47. Let us now come to the merits of the present Appeal in the light of the findings given by the State Commission.
48. According to the Appellant, the copy of the letter dated October 1994 said to have been sent by the Appellant to the Sugar Mills(R1), was produced before the State Commission but the same was not considered and if the State Commission had considered the said letter, the State Commission would have given a different finding which would be against the Sugar Mills(R1). On this point, as mentioned above, the State Commission while dismissing the review petition has categorically held that the letter No.4570 October,1994 was not put on record in the claim

proceedings as alleged by the Appellant and the said claim was factually incorrect.

49. As a matter of fact, the State Commission in the main order dated 4.9.2003 has specifically held that it did not find any evidence on record advanced by the licensee to claim that it took efforts asking the Sugar Mills(R1) to execute separate agreement for residential colony but there was no response from the Sugar Mills. When this claim was stoutly denied by the Sugar Mills(R1), the Appellant must have established before the State Commission or at least before this Tribunal that there was an attempt made by the Appellant to get the agreement executed. This was not done.
50. It is the specific case of the Appellant before this Tribunal that the letter No.4570 dated October,1994 had been sent by the Appellant to the Sugar Mills(R1). If that was so, as mentioned above, it must have been established that not only it was sent but also the same was received by Sugar Mills. This alone would show that the Appellant took efforts to insist the Sugar Mills to execute separate agreement for residential colony. The Appellant has miserably failed to establish the same. This aspect had been elaborately dealt with by the State Commission given in the impugned order dated 4.9.2003. The relevant portion of the order is as follows:



“Since the petitioner’s L&F load has been undisputedly used for the purposes of residential colony, as observed by Director, Electrical Safety also, and it has an independent metering facility therefore, there is absolutely no doubt, whatsoever, that his L&F load consumption had to be billed under LMV-1 rate of charge provided the licensee gets a separate agreement executed this effect within one month of the issuance of the letter. However, the requirement of executing a separate agreement by giving notice to the concerned consumer was a responsibility cast on the field officials and any failure in this respect could not be attributed to the departmental document, the responsibility of getting the agreement executed can not be fixed with the consumer. The respondent’s claim, that the petitioner did not execute the agreement in spite of several reminders, does not hold ground as in such a situation they could have taken recourse to other punitive measures, which they have failed to do. Therefore, there is nothing on the records to suggest that the respondents have ever made a serious attempt to get the agreement executed, which was their undivided responsibility from which they can not wriggle out by casting the same on the petitioner.

Before concluding, it may be summed up that the documents/arguments on record as well as the findings of the Director, Electrical Safety clearly establishes that the L&F load has been undisputedly used for residential colony; consumption under which was to be billed under LMV-1/LMV-2 rate of charge without any requirement of a separate agreement prior to 1992 and subsequent to that the said consumption had to be billed under LMV-1 tariff under a separate agreement to be executed on the initiative of the licensee. Therefore, the objection of the respondents regarding the requirements of separate agreement before

1992 is not tenable and there after it was their own responsibility in which they have failed. In view of the above, the respondents are directed to revise 1994 onwards electricity bill and charge the petitioner under LMV-1 rate of charge. However, the revision of the bill would be carried out after the petitioner has signed an agreement to the effect of getting his billing done against residential usage under LMV-1 rate of charge.

51. Thus, in this impugned order, there is a categorical finding that it is the responsibility of the licensee of getting the agreement executed and this responsibility can not be fastened on the consumer. In such a situation, as indicated above, the licensee should have established that they had taken steps for getting the agreement executed. But they have failed to establish the same. On the basis of this, the State Commission has clearly held that there was nothing on record to suggest that the licensee had ever made any serious attempt to get the agreement executed which was their responsibility and that this was not discharged by them.
52. Apart from this, as mentioned earlier, no material had been furnished to show that the letter dated October, 1994, which was undated and unsigned said to have been sent by the Appellant to the Respondent was received by the Sugar Mills(R1). Prior to the year 1994, admittedly, the Sugar Mills(R1) entered into a common agreement for two

separate supplies i.e. residential and industrial supply. In the present case, admittedly, two separate meters were in place from the date of inceptional supply.

53. Therefore, we are to conclude that there is no infirmity either in the finding in the impugned order dated 4.9.2003 or in the Review order dated 13.4.2005.
54. At this stage, we are to point out one more factual development which took place during the pendency of the Review and the Appeal before the High Court. We are informed that the impugned directions given in the order dated 4.9.2003, had been fully complied with by the Appellant by getting the agreement entered into with the Respondent-1 by the document dated 27.2.2004. In addition to this, the bills also had been revised through a new agreement dated 27.2.2004 as per the agreement for domestic supply of 130 KVA load in accordance with the direction issued on 4.9.2003. Consequently, the consumption is being charged as per the rate applicable to residential colonies. Accordingly, appropriate adjustment had been made since 1994 as directed by the State Commission by the order dated 4.9.2003. Thus, the impugned order is fully implemented.
55. In view of this factual development which is not disputed, it is submitted by the Respondent-1(Basti Sugar Mills) that the Appeal has virtually become infructuous. We find merit

in this contention made by the Sugar Mills. As such, we feel that nothing survives in this Appeal apart from the fact that the Appeal has no merits. That apart, we are at a loss to understand as to why the Appellant, after complying with the directions in the impugned order, pursued the matter both before the High Court and then before this Tribunal. for all these years. We can not but express our displeasure over the conduct of the Appellant who ventured to abuse the process of both the High Court as well as this Tribunal.

56. There is one more surprising feature in this case. At the end of the hearing, the learned Counsel for the Appellant raised a new issue. This issue relates to the jurisdiction of the State Commission to decide the dispute in question.
57. According to the Appellant, the State Commission had no powers to decide the dispute in question which is between an individual consumer and the licensee and that the appropriate forum for solving the dispute in question was only Grievance Redressal Forum and Ombudsman established under Section 42(5) and 42(6) of the Electricity Act and not the State Commission.
58. The Appellant has cited several authorities decided by the Hon'ble Supreme Court as well as the various judgments rendered by this Tribunal, in which it is held that consumer disputes shall be decided only by the Grievance Redressal

Forum and not by the State Commission. Elaborating this issue, the Appellant has highlighted three situations in which the consumer can initiate action:-

- i) Before 14.1.2000, the U.P Electricity Reforms Act 1999, was not in force. In that period, if the consumer had any grievance he shall notify to the supplier in writing about the dispute.
- ii) After enforcement of the Act,1999 i.e. after 14.1.2000, if a consumer has got any dispute regarding the billing, then the consumer should make a complaint before the licensee and against its decision, he could make a complaint to the Commission under the Supply Code, 2002.
- iii) The Electricity Act, 2003 came into force on 10.6.2003. Under this Act, the consumer should approach before Consumer Grievance Redressal Forum and if not satisfied with this, the consumer should approach the Ombudsman and not to the Commission.

59. On pointing out these situations, it is submitted by the Appellant that the State Commission can not decide the dispute in question as on 4.9.2003 since the Act, 2003 came into force on 10.6.2003 itself.

60. This issue regarding the jurisdiction of the State Commission, admittedly had neither been raised before the State Commission nor raised in the grounds of Appeal filed before the High Court. On the other hand, the Appellant without raising the question of jurisdiction, filed the Review Petition as against the order dated 4.9.2003 seeking for modification and thereby, submitting itself to the jurisdiction of the State Commission. That apart, this issue has never been raised in the present memorandum of the Appeal. Only at the time of final hearing, this issue has been raised for the first time before this Tribunal.
61. In this memo of Appeal, as stated above, the ground regarding jurisdiction had not been raised. This issue has been raised by the learned Counsel for the Appellant only during the course of hearing and raised in the written submission which was filed after the hearing was over. Thus, this issue has been raised belatedly at the end of hearing without making a pleading in the Appeal.
62. It is settled law that the statement made in the oral hearing or in the written submission can not be construed to be a pleading. There is no reason adduced by the Appellant as to why this issue had not been raised either before the State Commission in the original proceedings or in the Review Petition before the State Commission or in the Appeal before the High Court or at least raised in the

Appeal grounds filed before this Tribunal. This is yet another strange feature which is unexplained.

63. However, we deem it proper to deal with the said issue, though it was not pleaded in the Appeal, in the light of the reply made by the learned Counsel for the Sugar Mills(R1) on this issue.
64. It is case of the Appellant that before 14.1.2000, the Sugar Mills should have filed a representation regarding its grievance to the licensee or at least after 2003 Act, it should have approached Consumer Grievance Redressal Forum and this was not done and therefore the petition before the State Commission was not maintainable.
65. This ground, in fact, has no legs to stand. As indicated above, as early as in the year 1998, the Respondent disputed the bills being made under HV-2 industrial rate by sending a representation to the electricity authorities. By the order dated 13.1.98 agreeing with the claim of the Sugar Mills, the office of the Chief Engineer, Distribution of the Appellant decided the said representation in favour of Basti Sugar Mills(R1) and directed the Appellant to amend the disputed bill and charge for the domestic supply separately. Even then separate bills were not issued. Therefore on 2.11.98 another representation was sent by the Sugar Mills(R1) to the Appellant seeking for treating the residential colony as well as industry as domestic and

industrial use as two separate supplies. There was no response. Hence, Sugar Mills(R-1) filed a writ petition before the Allahabad High Court challenging the uniform HV-2 billing. The High Court by the order dated 17.11.1998 directed the Appellant authority to consider the representation dated 2.11.98 sent by the Sugar Mills to the Appellant and decide the matter within a month. Strangely, the Appellant authorities took 4 years to decide the said representation. Ultimately, by the order dated 28.9.2002, the General Manager, Distribution Section of the Appellant passed an order as against the Sugar Mills(R1) holding that the billing was to be done as per HV-2 tariff.

66. Aggrieved by this on 11.10.2002 the Basti Sugar Mills(R-1) filed a petition before the State Commission seeking for the direction for separate billing for the residential colony under LMV-1 tariff. On the date of filing the petition i.e. on 11.10.2002 , the Electricity Act,2003 was not in force. Only on 10.6.2003, the Electricity Act came into force. Under this Act, the Consumer Redressal Forum had to be established within 6 months from the appointed date. As a matter of fact, the said Forum was not established till 2004.
67. In the present case, as mentioned earlier the impugned order was passed on 4.9.2003. Only thereafter, i.e. on 9.12.2003 rules were framed for establishing the office of the Consumer Redressal Forum as also the Ombudsman



Forum. In pursuance of the said Rules, Consumer Grievance Redressal Forum was established on 12.5.2004 and the Forum of Ombudsman was established on 6.8.2004. This would make it clear that on the date when the impugned order was passed i.e. on 4.9.2003 there was no Consumer Grievance Redressal Forum established as per the mandate of Act,2003.

68. As a matter of fact, there is no provision with regard to the transition of the proceedings in the new Act and the provision of the new Act did not infringe the jurisdiction of the State Commission which validly exercised the same on 4.9.2003. Therefore, the ground raised by the Appellant with regard to the issue of jurisdiction has no basis.
69. At this stage, again we are constrained to refer to three disturbing features, as mentioned in the earlier paragraphs regarding the conduct of the Appellant.
  - i) The Appellant, having decided to file an Appeal before the High Court as against the order dated 4.9.2003, there was no reason as to why it had approached the State Commission for filing the review as against the same order.
  - ii) Similarly, when the Review had been filed on 11.2.2003 raising the grounds cited supra, there was no reason adduced as to why the Appellant rushed to the High Court to file an Appeal raising the very same

grounds in the review that too along with an application to condone the delay in filing the Appeal.

- iii) The Appellant has neither mentioned in the Appeal before the High Court about the pendency of review before the State Commission nor it had referred to in the Review petition its proposal to file an Appeal before the High Court as against the impugned order especially, when the very same grounds of the Review had been raised in the Appeal. The scope of Review is limited whereas powers of Appellate jurisdiction are wide. Once the Appeal had been filed before the High Court, the Appellant must have withdrawn the Review petition from the State Commission and pursued the Appeal with wide jurisdiction before the High Court which has already been admitted. Even after the disposal of the Review, the Appellant did not care to inform this request of the Review to the High Court. This was not done.

70. These three disturbing features reflecting the conduct of the Appellant would disclose that the Appellant had not only indulged in Forum shopping but also suppressed the material facts before the Forums including this Tribunal. In addition to this, the Appellant, having implemented the impugned order, has been dragging on the matter from the year 2004 i.e. from 27.2.2004 the date of implementation,

upto 2012. This shows that the Appellant has not come with clean hands and it has got an oblique motive to drag on the matter for a long number of years. Consequently, we feel that it is the fit case where exemplary cost has to be imposed on the Appellant who indulged in the Forum Shopping and abused the process of the several forums causing great inconvenience to the parties as well as the authorities.

**71. Summary of our findings:-**

**a) This Appeal is maintainable. The objection raised by the Respondent that in the absence of the Appeal against the Review order, this Appeal is not maintainable, is not sustainable under law. It is settled law that impugned order alone is Appealable and not the Review order by which the impugned order was confirmed.**

**b) This Appeal has no merits. The impugned order in which direction had been issued by the State Commission to the Appellant to supply power to the residential colony of the Basti Sugar Mills under LMV-1 category after entering into a separate agreement is perfectly justified.**

**c) The only ground raised in the Appeal is that the Appellant had insisted the Basti Sugar Mills to enter into a separate agreement through its various letters including the letter sent in October, 1994 to the Basti Sugar Mills had not been considered by the State Commission even though the copy of the said letter was produced before the Commission. This claim made by the Appellant is factually incorrect since the State Commission has elaborately dealt with this issue and found that no such copy of the letter was produced before the State Commission and the claim that the State Commission has not considered the said document was utterly false. Thus finding with reference to the conduct of the Appellant given by the State Commission has not been established before this Tribunal that it is wrong. Therefore, the said finding is, in our view, is quite justified**

**d) The Appellant has not come with clean hands before this Tribunal. On the other hand, several relevant materials and facts have been suppressed by the Appellant for the best reasons known to it. In addition to that, the materials available on record would clearly reveal that the Appellant has not only indulged in Forum-shopping but also abused the**

**process of the different Forums. Thus, the conduct of the Appellant is not fair. Despite the fact that the impugned order dated 4.9.2003 had been fully implemented and complied with as early as on 27.2.2004 by entering into an agreement with Basti Sugar Mills and revising the bills as per the direction of the State Commission, the Appellant has no justification to pursue the proceedings as against the impugned order dated 04.9.2003 both in the High Court as well as before this Tribunal by which the proceedings were dragged on upto the year 2012. This conduct also would show that the Appellant had got an oblique motive to cause hardship and inconvenience to the Sugar Mills, the Respondent.**

- e) Strangely, the Appellant had raised fresh issue before this Tribunal during the course of oral hearing even without refusing the said issue in the memorandum of grounds of Appeal to the effect that the State Commission had no jurisdiction to decide the dispute in question which is between the individual consumer and the licensee. This issue also has no legal basis since the application by the Basti Sugar Mills has been filed before the State Commission as early as on 11.10.2002 raising the**

**disputed question even before the Electricity Act,2003 which came into force only on 10.6.2003 and the Grievances Redressal Forum was established only in 2004 but the impugned order had been passed as early as on 4.9.2003.**

72. In view of our above findings, though we hold that Appeal is maintainable, we deem it fit to dismiss the Appeal as it is devoid of merits. Accordingly, the Appeal is dismissed.
73. In this case, as narrated earlier, both the Respondent-1 (Basti Sugar Mills) as well as State Commission(R2) have been dragged on to the High Court as well as to this Tribunal and consequently they were made to suffer hardship and inconvenience and made to incur expenditure to face the proceedings before these Forums.
74. In view of the above conduct of the Appellant, which is not fair, it would be appropriate to direct the Appellant to pay the cost of 2 lakhs to the Basti Sugar Mills(R1) and Rs.1 lakh to the State Commission(R2) within 60 days from the date of this judgment.
75. The State Commission is directed to ensure that this direction is complied with by the Appellant in time and send the report of compliance to this Tribunal.

76. With these directions, the Appeal is dismissed.

77. Pronounced in the open court on 20<sup>th</sup> of November,2012.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 20<sup>th</sup> Nov. 2012

√REPORTABLE/~~NON-REPORTABLE~~