BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)

APPEAL NO. 175 OF 2010

Dated : 8th March, 2011

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

In the matter:

M/s. Ispat Industries Ltd.
'Casablanca' Plot No. 45,
Sector-11, CBD Beloapur,
Navi Mumbai-400 614
Maharashtra. …Appellant (s)

Versus

1. Maharashtra State Electricity Distribution Company Ltd.
   Prakashgad,
   Bandra (East), Mumbai-51.

2. Maharashtra Electricity Regulatory Commission,
   World Trade Centre No.1,
   1st floor, Cuffe Parade,
   Mumbai-400 005. Respondent(s)

Counsel for the Appellant : Mr. G. Umapathy
Mr.Rohit Singh
Mr. Sudha Umpathy

Counsel for the Respondent: Mr. Abhishek Mitra for R-2
Mr. Ashish Bernad for R-1

JUDGMENT

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

The Appeal is directed against the judgment and order dated 3rd August, 2010 passed by the Respondent No. 2, Maharashtra Electricity Regulatory Commission in Case no. 92 of 2009 whereby the Appellant's prayer for not visiting the Appellant with additional supply charge with retrospective effect was rejected.

2. Before going to the case of the Appellant the back ground requires narration. Way back in October 2006 the Respondent No. 2 introduced a concept of additional supply charge (ASC) in its earlier tariff order for Maharashtra State Electricity Distribution Co.Ltd. (MSEDCL), Respondent No. 1 herein and the basic premise of such additional supply charge was that the consumers having reduced load shedding hours vis-à-vis the uniform load shedding hours are required to pay for the costly power to mitigate the load shedding through additional supply charge in addition to the base retail tariff.

The additional supply charge was specified at Rs.5.15 per kwh in the Commission's order in case No. 54 of 2005.

3. The Commission simplified the method of levy of ASC, by allocating the costly power only to industries connected at EHV levels or express feeders like the Appellant, railways and industries facing one day load shedding, in accordance with the quantum of costly power considered for the purpose of ASC determination. ASC was worked out to be levied on 24% of the consumption for continuous industries as compared to 42% earlier and 11% of the consumption for industries facing one day staggering as compared to 28% earlier..

4. The Commission continued with the approach of incentivizing consumers to respond to the levy of Additional Supply Charge, by reducing their consumption with respect to the consumption in the previous period. Similarly, the Commission felt that disincentive has also to be introduced so that the consumers are encouraged to at least restrict their consumption to the benchmark levels.

5. What will be ‘bench mark level’ and what is to be called ‘reference period ‘ have been and still are the subject matter of controversy right from the beginning when the Respondent No.2 introduced this scheme.

6. The order dated 18th May, 2007 which is the first in the series of the orders in Case No. 65 of 2006requires mention. The Commission observed as follows:

‘’The reference period for comparison of the consumption is elaborated below, to enable MSEDCL to pass on the incentive/disincentive appropriately by following a common methodology across its billing units. The Commission is also of the opinion that it will not be fair to consider the benchmark average consumption levels of the previous year, January 2006 to December 2006, for this purpose, as the consumers cannot be expected to continuously year-on-year reduce their consumption. Hence, the Commission has retained the provision of benchmarking the current consumption levels against the monthly average consumption during January 2005 to December 2005, while billing Additional Supply Surcharge to the consumers’’

7. The Commission under paragraph 7.4 of the order as aforesaid determined as to what would be reference period for comparison of the consumption in different situations and circumstances in item No. (a), (b), (c), (d), (e) and (f) of paragraph 7.4 under the heading ADDITIONAL SUPPLY CHARGE (ASC) MATRIX. For the purpose of disposal of the appeal, it is not necessary to examine the situations described in a, b, c, d, e and f. What is relevant is item No. (g) of the said paragraph 7.4. which we quote below:

> '' *In case of consumers whose sanctioned load/contract demand had been duly increased after the billing month of December 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which the consumer has utilized at least 75% of the increased sanctioned load/Contract Demand, whichever is earlier".*

8. The MSEDCL (Respondent No.1) filed a clarificatory petition for clarification on the question as to what will be the modality in case sanctioned load/contract load Is increased after the billing month of December 2005. Thus the Commission amended its sub-

para 7.4 under para 7 of its original order dated 18.5.2007 by an order dated 24.8.2007 with the following:-

''The Commission is further of the opinion that increase in Contract Demand will be sought only when there is a significant increase in scale of operations, and hence, clarifies that ***clause (g) of the order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December 2005. In case of change in contract Demand during the above reference period, then the Contract Demand during December 2005 will be considered as the reference Contract Demand, for operationalisation of this clarification. The Commission further clarifies that in case the Contract Demand is reduced subsequent to increase of Contract Demand, such that the revised Contract Demand is less than 25% higher than the original Contract Demand, during the reference period, then this clause will not be operative for such consumers, and the***

reference consumption during January to December 2005 will be applicable, (eg. CD during January to December 2005= 100 kVA; CD increased during May 2006=200 kVA; Current CD=120 kVA; reference period is average monthly consumption during January to December 2005"

9. Then the Commission issued a second clarificatory order dated 11th September, 2007 where the Commission held as follows:

''Reference consumption to be considered for levy of ASC

a) *Cases of increase in Contract Demand/Sanctioned load*

In the context of the reference period in case of consumers, where the Contract Demand has been increased subsequent to the billing month of December 2005, the Commission had clarified on page 25 and 26 of the clarificatory order under the heading ''Reference bill period for HT foundries in cases of increase in Contract Demand" as under:

''In case of consumers whose sanctioned load /contract demand had been duly increased after the billing month of

December, 2005 the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which the third occasion of the consumer utilizing at least 75% of the increased sanctioned load/Contract Demand after increasing the Contract Demand is recorded, whichever is earlier".

The Commission had also clarified at page 14 and 15 of the Clarificatory Order that

'' clause (g) of the Order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December 2005.."

In continuation, the Commission clarifies as under:

a) The above clarifications on pages 14, 15, 25 and 26 of he Clarificatory Order dated August 24, 2007 are to be read in conjunction, and not independently.

b) Though the heading under which the clarification has been given may appear to indicate that the clarification is applicable only for HT Foundries, the detailed

clarifications make it clear that it is applicable for all consumers where the Contract Demand/sanctioned load has been increased.

c) *The reference to sanctioned load is applicable only to consumers where the demand is yet to be contracted, and the fixed charges are being billed on the basis of sanctioned load.*

d) *The clarification effectively means that in cases where the increase in Contract Demand/sanctioned load is equivalent to 25% or more of the Contract Demand during the month of December 2005, the consumer will get at least three months time (grace period), since the third incidence of utilizing at least 75% of the increased Contract Demand/Sanctioned Load can occur at the earliest in the third month, as the maximum demand meter records only the highest recorded demand in the month, and does not record each individual incidence when the recorded demand is higher than a specified limit.*

e) *Further, till the reference period is reached under this clause (billing period after six months of the increase in the Contract Demand/sanctioned load or the billing period of the month in which the third incidence of utilization of at least 75% of the increased Contract Demand/sanctioned load), the ASC will be levied at the stipulated proportion of 11% and 24%, as the case may be. Thereafter, the ASC on the increase/decrease in consumption vis-à-vis the reference consumption will be charged in accordance with the Commission's orders in this regard.*

f) *Accordingly, the illustration given on page 15 of the claificatory Order dated August 24, 2007 in the context of the sample cases put forth by MSEDCL, stands modified as follows:*

Sl.No.	Sample Case	Contract Demand in 2005	Current Contract Demand	Reference Period	Basis
		kVA	kVA	Month	
1.	Case I	5000	9500	July 2006	Since it is not possible to cross 75% of increased CD within 6 months
2.	Case II	9000	10500	Average of 2005	Contract Demand has not increased by at least 25% over 2005 levels.
3.	Case III	10000	7000	Average of 2005	
4.	Case IV	10000	7000	Average of 2005	

(b) <u>Cases where the consumers are availing credit for captive generation at different location through renewable sources or otherwise.</u>

The Commission had clarified that '' the billing of increase/reduction in ASC units will be done by comparing the reference consumption and current consumption on 'gross' basis, rather than 'net' basis"

10. The Commission came then with the 3rd clarificatory order dated 17.12.2007 where the Commission repeats its earlier orders and then says as follows:

''In continuation, the Commission clarifies that the above clarifications are also applicable for determination of reference period in cases where the increase in Contract Demand has

occurred during the period from January 2005 to December 2005 vis-à-vis the Contract Demand in January 2005."

11. Now, during the intervening period between the 2nd clarificatory order and the 3rd clarificatory order a consumer of MSEDCL called M/s. Eurotex Industries and Exports Ltd. (for short, Eurotex) which is a HT continuous process industry filed a petition being case No. 28 of 2007 before the Commission explaining the apparent practical difficulties in complying with the order on ASC as it stood by 2nd amendment on several grounds and they are as follows:

a) During the period from April 2006 to June 2006, M/s. Eurotex carried on trial runs of the various production machines for quality stabilization and establishing the requisite parameters and standards of its processing activity. During the said period, though the maximum recorded demand of M/s. Eutotex was nearly 88% to 95% of 4900 kVA, the actual consumption was in the vicinity of 61% to 74% of the maximum energy. On and

from July 2006, the actual energy consumption was proportionately in line with the increased load of 4900 kVA and was steady thereafter.

b) The process of determining the increased Contract demand and the process of determination of unit consumption are separate. So far as utilization of increased Contract Demand is concerned, all the new machinery for which increased Contract Demand has been increased, are first installed and then connected to the supply for trial runs. Thus, the additional demand may be utilized within a few hours of being connected to the supply system, which may be in the vicinity of 75%. Thereafter, after a few days of trial run, all the new installed machinery are stopped for thorough inspection considering (i) whether every moving part of the new machinery is functioning well, lubricants are reaching to every bearing and there is no excessive heating; (ii) whether the finished products manufactured from the new machinery adheres to quality and consistency standards- which may require change of parts, technical adjustments-which process requires a few days time; (iii) the quantum of unit consumption per new machinery- which

requires several trial runs and re-runs of short durations. This entire process of stabilizing the production process with the revised Contract Demand requires a duration of three to six months. The time taken for stabilization of increased contractual demand is thus quite different from the time taken for stabilization of unit consumption. M/s. Eurotex has contended that the direction to consider either of the two time periods as the reference period for computation of applicable ASC is an error apparent on the face of the record.

c) As per Clause 7.4 (g) of the impugned Order, the benchmark units for calculation of ASC applicable to M/s Eurotex have been fixed by MSEDCL on the basis of its unit consumption during April 2006, which being only 61% of the maximum level of consumption does not qualify as proper reference consumption. Adoption of this process for computation of applicable ASC would defeat the purpose of M/s. Eurotex behind increasing its contractual demand. If such a process is adopted, it would lead to stoppage in the utilization of new machinery and idling of labour force.

d) If the benchmarking for calculation of the ASC applicable to M/s. Eurotex is fixed at low levels, it acts as a fetter to M/s. Eurotex to avail the incentive for reduced ASC units, as also provided under the impugned Order.

e) The effect of the provisions under Clause 7.4 (g) of the impugned Order, so far as the criterion for calculation of ASC units is based on energy consumption and the reference period be based on the consumer reaching 75% of the Contract Demand, would lead to an anomalous situation.

12. Thus, Eurotex pleaded that either the provisions ‘‘*or the billing period of the month in which the consumer has utilized at least 75% of the increased sanctioned load/Contract Demand, whichever is earlier”* be deleted from the impugned order or in the alternative, a clarification may be provided that Clause 7.4(g) in the impugned Order shall be applicable only after the expiry of six months from the date of increase in the sanctioned load/Contract Demand. Further, M/s. Eurotex sought directions upon MSEDCL to refund the amounts of energy charges and other incidental charges that M/s. Eurotex has paid to the MSEDCL on the basis of

erroneous benchmarking of applicable ASC during the month of April 2006.

13. The prayer of the Eurotex was rejected by the Commission by an order dated 19th September, 2007 passed in case No. 28 of 2007 on the ground that the application was devoid of any merit and the Commission observed as follows:-

''*In the aforesaid circumstances, the Commission observes that reconsideration of the same issue is not necessary under the present proceedings. So far as benchmarking the units for calculation of ASC is concerned, the clarification provided under the aforesaid clarificatory Order dated August 24, 2007 and September 11, 2007, will have general effect. The revised criterion on the reference period for calculation of ASC applicable on HT foundries thereunder, is applicable mutatis mutandis on all HT industrial consumers."*

Be it mentioned here that the third clarificatory order on the issue dated 17th December, 2007 came after the rejection of the prayer of Eurotex. But, the said third clarificatory order dated 17th

December, 2007 did not alter the basic situation so far as M/s. Eurotex is concerned.

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14. Now, M/s. Eurotex filed an appeal before this Tribunal being Appeal No. 135 of 2007 against the order dated 19th September, 2007 and this Tribunal (Coram : Justice Anil Dev Singh, Chairperson, Mr. A. K. Khan, Technical Member) disposed of the appeal on 12th May, 2008 modifying clause 7.4 (g) of the original tariff order dated 18th May, 2007 as follows:

> ''*In the case of consumers whose sanctioned load/contract demand had been duly increased after the billing month of December, 2005 the reference period may be taken as billing period after six months of the increase and the sanctioned load/contract demand OR the billing period after six months in which the consumer has utilized at least the same ratio of energy consumption as percentage of increase contract demand that has been recorded prior to the increase in sanctioned load /contract demand"*
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> The Tribunal further gave a direction as follows:-

''We also direct the first respondent to refund and adjust against future billings, the amount of energy charges and other incidental charges paid by the Appellant on the basis of the benchmark units fixed in the third month (i.e. June 2006) and additional supply charges be calculated accordingly."

15. MSEDCL Respondent No. 1 herein however, filed a review petition being No.5 of 2008 seeking for review of this Tribunal's order dated 12th May, 2008 in Appeal No. 135 of 2007 on the ground of error on the face of the record and this Tribunal (Coram: Justice M. Karpaga Vinayagam, Chairperson and Mr. A.A. Khan, Technical member) by an order dated 30th April, 2009 dismissed the review petition. We are told that Respondent No. 1 MSEDCL filed a Civil Appeal being No. 6198 of 2009 against the order of review passed by this Tribunal before the Supreme Court which is said to have been disposed of on 7th September, 2009 and a disposal slip was placed before us on the date of hearing of this Appeal and it is submitted that the appeal was dismissed (though the disposal slip simply expressed 'disposed'.)

16. Be that as it may, we have finished our introduction and now, we proceed to see the case of the Appellant who admittedly was not a party in case No.65 of 2006, 26 of 2007, 28 of 2007 (Eurotex) Appeal No. 135 of 2007 and review petition No. 5 of 2008. As said above, the Appellant is an industry drawing power at EHV i.e. 220 KV. The Appellant filed a petition before the Respondent No.2 herein, the Commission when it was served with notice for payment of additional supply charge in tune with the tariff order dated 18th May, 2007 since modified by the Tribunal's order dated 12th May, 2008 amounting to Rs.14 crores.

17. Upon receipt of the notice, the Appellant filed a petition praying for keeping the Appellant outside the purview of the order for payment of ASC in terms of the formula as it stood modified by the Tribunal's order dated 12th May, 2008 principally on two fold grounds:-

a) It was not a party to any of the above proceedings and it should not be penalized with such an exorbitant amount of money.

b) The tariff order of the Commission or any of the three clarificatory orders which stood modified by the Tribunal while disposing of the appeal of the M/s. Eurotex may not be retrospectively applied for in the case of the Appellant.

18. The Commission by order dated 3rd August, 2010 dismissed the application of the Appellant M/s. Ispat Industries Ltd. On the ground that after the Tribunal's judgment the matter has stood settled and the additional supply charge is applicable to all consumers, and the question of the appellant not being made party is irrelevant.

19. The Appellant M/s. Ispat Industries Ltd. is now the appellant before us urging the same things as were urged before the Commission and it is now worthwhile to narrate all its points in its memo of Appeal.

20. The memo of Appeal consists of two parts- the first part relates to the factual background that has already been narrated in the preceding paragraphs, while the second part is the case of the Appellant. Now it is the contention of the Appellant that the

judgment of this Tribunal in Appeal No. 135 of 2007 dated 12th May, 2008 was peculiar to the facts and circumstances of the Appellant of this appeal namely Eurotex before the Tribunal. Yet, the said order was not communicated to this Appellant nor was this Appellant a party to the said Appeal No. 135 of 2007 before the Tribunal nor a party before the Commission in series of proceedings namely Case No. 65 of 2006, 26 of 2007 and 28 of 2007 in connection with which the order of ASC and series of clarifications were made, and out of which, the appeal of Eurotex arose, so much so that the present Appellant had no scope to ventilate its points and attack the very innovative scheme introduced on Additional Supply Charge which in fact, has been prejudicial to the Appellant, who all of a sudden was only served with a bill dated 15th September, 2009 whereby ASC has been charged and demand has been made for payment of Rs. 14.38 crore. According to the Appellant, the Appellant was informed that as per the order the benchmark consumption i.e. October 2006 is considered for charging of ASC units for the billing month of May 2007 to June 2008 as against June 2006 where the maximum consumption was of the order of 165 million units as against

October 2006 of 158 million units. The Appellant had filed an application being IA No. 319 of 2009 in connection with Appeal No. 135 of 2007 seeking clarification with prayer that the Tribunal's judgment in Eurotex dated 12th May, 2008 in Appeal No. 135 of 2007 was not applicable to the present Appellant. The Tribunal by order dated 13th November, 2009 disposed of that petition directing the Appellant to approach the Commission. Then, the Appellant submitted a petition being No. 92 of 2009 on 24th December, 2009 under section 92 of the MERC (Conduct of Business) Regulations 2004 seeking inter alia clarification on the benchmark consumption for charging ASC in case of the consumers whose sanctioned load/contract demand had been duly increased after the billing month of December 2005 before the Commission. The Commission by its impugned order dated 3rd August, 2010 in case No. 92 of 2009 disposed of the application of the Appellant holding that there was no illegality in the claim raised by MSEDCL. Hence the Appeal.

21. The MSEDCL, Respondent No. 1 herein in its counter affidavit provided in detail all such facts as were narrated so long in preceding paragraphs, as such, no repetition of the same is

necessary. It is contended that this Tribunal has already taken a view in the matter and cannot sit in appeal over its own judgment and it is not open to the Appellant to challenge the Tribunal's order dated 12th May, 2009 before the same Tribunal. That apart, contract demand of the Appellant was enhanced from 205 MVA to 300.77 MVA with effect from April, 2006; as such the reference period for charging ASC was determined as per the original clause No.7.4 (g) of the tariff order. Accordingly, the MSEDCL issued the energy bills to the Appellant from May 2007 considering the reference period consumption at 158.79 million units which is based on energy units consumption in April, 2006. Clarificatory orders were made effective from energy bills of September 2007 considering the fact that the Appellant's contract demand was enhanced in April, 2006 and the reference period was determined as consumption in the energy bill of June 2006 i.e. 164.85 million units which was the third occasion of utilization of at least 75% of the increased contract demand. The clarifications were made applicable with retrospective effect from 1st May,2007 and hence, the bills for the period from May 2007 to August 2007 were revised as per the order and credit due to revision of bills amounting to

Rs.2.45 crore was given in the monthly bills from November 2007. Following the judgment of this Tribunal dated 12th May , 2008 the MERC in its orders in case No. 21 of 2008 dated 5th August, 2008 and in case No. 30 of 2008 dated 29th September, 2008 held as under:

> ''*Since ATE has modified the relevant paragraph of the impugned clarificatory order MSEDCL has to revise the bills of all similarly placed consumers and accordingly refund /adjust the amount of energy charges of ASC with effect from May 1, 2007"*

Accordingly, the criteria modified by the Tribunal was made applicable to all the eligible consumers of the MSEDCL who have increased the sanctioned load/contract demand after the billing month of December 2005. In case of the Appellant, the reference period for charging of ASC units was considered as the consumption of October 2006 energy bill i.e. the consumption after six months of the increase of the contract demand, and therefore, the energy bills for the period from May

2007 to June 2008 were revised and the recovery amount of Rs.14.38 crore was charged in September, 2009. The MSEDCL has given credit of amount of ASC refund of Rs.18.72 crore and has raised the debit bills on account of ASC refund to the extent of Rs.39.78 crore in view of the fact that Tribunal's judgment has been made applicable to all the consumers who are similarly placed as the Eurotex. Out of a sum of Rs.39.78 crore of the debit bills, a sum of Rs.14.38 crore is payable by the Appellant and all the credits had been passed on and since the recovery was being made with retrospective effect the Appellant had been permitted to pay in installments.

22. The Respondent No. 2, Maharashtra Electricity Regulatory Commission did not file any counter. The issues that arise for consideration are as follows:

a) Whether the issues relating benchmark consumption period for calculation of additional supply charge can be re-opened without affording any opportunity to the Appellant of being heard?

b) Whether the order dated 12th May, 2008 passed by this Tribunal in the case of Eurotex Is prospective or retrospective?

c) Whether the additional supply charge determined by the Commission in its order dated 18th May, 2007 with all its amendments and with modification of this Tribunal in its order dated 12th May, 2008 can be made applicable to the Appellant?

23. A broad discussion presented herein below covers all the three issues. Mr. G. Umapathy, learned Counsel for the Appellant submits that the applicability of the order dated 12th May, 2008 of this Tribunal rendered in Appeal No. 135 of 2007 filed by Eurotex against the Commission's order dated 19th September, 2007 rejecting the Review Petition filed by the Eurotex to the present Appellant is a question and requires answer by the Tribunal in view of the present Appellant not having found any chance or scope to be a party to the series of proceedings on the question of determination of additional supply charge before the Commission or before the Tribunal. The disposal of the Appeal No. 135 of 2007 by this Tribunal whereby

modification was made of the reference period no doubt fortifies the stand of the Commission and is binding on the MSEDCL so far as the Appellant is concerned. The benchmark consumption charges were levied and paid by the Appellant in accordance with the prevalent tariff order. With the Appellant having paid the charges as were levied in accordance with the prevalent tariff order the issue cannot be revived again to put the Appellant in double jeopardy and it is against the cannons of rules that the matter once disposed of cannot be revived once again to the determent of lawful interest of a party when its account books were closed and who conducted its economic affairs in accordance with rules that were prevalent at that time. Again, applicability of Commission's order since modified by the Tribunal to the present Appellant is subject to the question whether the law permits opening of the matter in relation to a party who was not a party to the protracted litigation on the issue of additional supply charge. Mr. Umapathy in this connection, refers a decision of the Supreme Court in Polychem Ltd. & Anr V/s State of Maharashtra & Others reported (1998) 6 SCC 196 where upward revision of supervision charges and making demand of the differential amount of supervision charges with retrospective effect on account of such

retrospective revision of salary is beyond the powers of the Government. Mr. Umapathy's submission is, therefore, three fold namely

a) Non applicability of the order of the Commission since modified by the Tribunal's order is on the ground of the Appellant not being made party to the litigation

b) Applicability of the Commission's order or for that matter the order of this Tribunal as aforesaid with retrospective operation.

c) The issue relating to benchmark of the reference period for calculation of ASC has already been acted upon and cannot be reopened.

24. According to Mr. Umapathy, the Tribunal's judgment as aforesaid was confined to Eurotex in relation to the facts and circumstances of the case. Mr. G. Umapathy argues that this Tribunal's judgment cannot be made applicable to the Appellant thereby unsettling the settled issue regarding the benchmark consumption and the reference period unless the party was afforded an opportunity of hearing whereby the issue was sought to be reopened. It is submitted that as the matter relates to amendment of

the tariff order affecting the people at large it could have been remanded to the Commission but it is against the cannon of justice and fair play that the Commission's order since modified by the Tribunal should be made applicable to the Appellant. Neither the Tribunal who heard the Appeal considered it proper to issue a public notice to all the concerned consumers nor the Commission did rise from its slumber. Way back in the year 2006, the Appellant Company achieved the consumption of 70% of the contract demand in June 2006 and units consumed in the month of June 2006 was Rs. 16.48 crore; and now by implementation of Tribunal's order dated 12th May, 2008 in the matter of Eurotex the benchmark consumption is sought to be reduced, and consequently demand was made which is against the interest of the Appellant and the consequent additional burden of Rs.14.38 crore has been saddled upon it unjustly. The Tribunal's order directing the MSEDCL to refund the amount of energy charges and other incidental charges on the basis of the benchmark fixed as per the tariff order dated 18th May, 2007 cannot be made applicable to other consumers without any notice and that too with retrospective effect against the law laid down by the Supreme Court in several cases which is to the effect that any order involving commercial

implications cannot be levied with retrospective effect. The goods manufactured by the Appellant during the relevant period have been sold to the consumers, and accounts in respect of the relevant financial year have also been closed. The electricity charges are a major component of the production and it affects all the commercial and financial position and viability of the manufacturing units. Hence, the demand is legally unsustainable.

25. The Respondent No. 1 begins its delivery of oral submissions with the question of jurisdiction of this Tribunal because of it having now become functus officio following the dismissal of the special leave petition by the Supreme Court that was preferred against this Tribunal's order passed in Review Petition No. 5 of 2008 that arose out of the judgment and order in Appeal No. 135 of 2007. With respect to retrospectivity of operation of this Tribunal's judgment in Appeal No. 135 of 2007, reference has been made by the Respondent No. 1 to para 22 of the judgment whereby direction has been made to the 1st Respondent to refund and adjust the amount of energy charges and other incidental charges against future bills. It has been explained that the word ''refund" used in para 22 of the

judgment of the Tribunal makes it explicit that the judgment was intended to be retrospective in operation; more so, the tariff orders under which ASC falls can have retrospective operation in respect of the relevant tariff period.

26. Thirdly, the question of applicability of the Tribunal's judgment that modified the Commission's order has been answered by the first Respondent with reference to the order of this Tribunal in the Review Petition which we shall presently see. The Appellant cannot be allowed to challenge this Tribunal's order dated 12th May, 2008 before this Tribunal itself instead of seeking redressal of all its grievances before the Supreme Court.

27. Fourthly, the Tribunal's order dated 12th May, 2008 was passed within the tariff period of FY 2007-08. The tariff order of the subsequent period i.e. 2008-09 was issued on 20th June, 2008 and was effective from 1st June, 2008. Therefore, the tariff period having been very much in operation when the order modifying the tariff order was issued, the Appellant is precluded from taking the defence that the modified tariff order could not be enforced against it. Further, estoppel against the judgment of the Tribunal is not legally permissible.

28. Lastly, it is brought to the notice of the Tribunal that the Appellant has acquiesced to the revision of the tariff order and has paid the revised charges. Subsequent to the first clarification issued by the Commission on 24th August, 2007, the first Respondent raised a bill claiming additional amount from the Appellant who without demur paid the bill for.

29. There has been no contribution from the Commission in this matter as none appeared for the Commission.

30. Whatever we have in our minds on the legal points raised by the Appellant, we do not think that we have had much to say in the matter. As indicated in the preceding paragraph of the judgment, the concept of introduction of additional supply charge rests on the premise that the industry getting power during load shedding is to pay such additional charge because costly power is procured to mitigate its load shedding. Attack is not made against the theoretical premise but is against the working out of the modalities for implementation of the theory. To recapitulate:

a) History of evolution of determination of the benchmark of the consumption vis-à-vis the reference period for the purpose of working out the quantum of additional supply charge traced out to the first order dated 18th May, 2007 which as contained in para 7.4 is retention of the provision of benchmarking the current consumption levels against the monthly average of consumption during January 2005 to December,2005 while billing the additional supply charge to the consumers. Clause (g) of the para 7.4 which is relevant for the purpose of disposal of appeal is

> ‘’*(g) in case of consumers whose sanctioned load /contract demand had been duly increased after the billing month of December 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which the consumer has utilized at least 75% of the increased sanctioned load/Contract Demand, whichever is earlier”*

The other clauses of this para are not of so much relevance for the purpose of disposal of the appeal. However, the order dated 18th May, 2007 continued to say, in essence, that the ASC will be levied on the share of costly power consumption so specified in the order subject to the comparison of monthly consumption with the consumption in the reference period.

a)The first amendment of the orderdated 18th May, 2007 which is called otherwise a clarificatory order dated 24th August, 2007 as it relates to clause (g) of para 7.4 of the order dated 18th May, 2007 is as follows:

''The Commission is further of the opinion that increase in Contract Demand will be sought only when there is a significant increase in scale of operations, and hence, clarifies that ***clause (g) of the order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December 2005. in case of change in contract Demand during the above reference period, then the Contract Demand during December 2005 will be considered as the reference Contract Demand, for operationalisation of this clarification. The Commission further clarifies that in case the Contract Demand is reduced subsequent to increase of Contract Demand, such that the revised Contract Demand is less than 25% higher than the original Contract Demand, during the reference period, then this clause will not be operative for***

such consumers, and the reference consumption during January to December 2005 will be applicable, (eg. CD during January to December 2005= 100 kVA; CD increased during May 2006=200 kVA; Current CD=120 kVA; reference period is average monthly consumption during January to December 2005"

b) The 2nd clarificatory order dated 11th September, 2007 again clarifies by reiteration of the clause (g) (ibid) is thus

'' *clause (g) of the Order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December 2005…"*

Thereafter the Commission made certain clarifications what we have noted at pages 8 to 11 of the judgment.

c) The 3rd clarificatory order provides that the above mentioned clarifications are applicable for determination of reference period in cases where contract demand has increased during the period from January, 2005 to December 2005 vis-à-vis contract demand in January, 2005.

31. Consequent upon dismissal of the application of M/s. Eurotex the clause (g) at it originally stood and as it came to be clarified from time to time got its seal of approval by this Tribunal in connection with Eurotex's appeal being No. 135 of 2007 by modification that in the case of consumers whose sanctioned load/contract demand increased after December 2005, the reference period has to be reckoned as the billing period six months after such increase and the sanctioned load/contract demand or the billing period would be six month after the consumer utilized atleast the same ratio of energy consumption as percentage of increase of contract demand which was recorded prior to the increase in sanctioned load/contract demand.

32. Noticeably, there is direction of the Tribunal to the MSEDCL to refund and adjust the amount against future billings on the basis of benchmark units fixed in June, 2006. It is true that the Appellant was not a party nor it could be heard in any of the cases namely 26 of 2007, 65 of 2006, 28 of 2007 and appeal No. 135 of 2007 but the fact remains that the order dated 18th May, 2007 passed in case No. 65 of

2006 whereby ARR and MYT of the MSEDCL was disposed of came to be effective in the manner as laid down in the succeeding three clarificatory orders with retrospective effect. The modifications made by this Tribunal is, as the order itself shows retrospective. This Tribunal's judgment does not reveal that modification of the original clause 7.4. (g) is only confined to M/s. Eurotex and this position was made further clear when Maharashtra State Electricity Distribution Co., Respondent 1 herein filed a review petition under Review Petition No. 5 of 2008 where this Tribunal by order dated 30th April, 2009 held as follows;

> ''*With reference to the points (c) and (d) above, it is to be emphasized that since the criterion for determining the* ***Reference Period has to apply uniformly to all industries with distinctive business, it is bound to be broad-based taking into account the requirements of all sectors.*** *The Commission has decided the Reference Period considering the requirements of various industries in its order dated 18.5.2007 and its first clarificatory order, inter alia, for Seasonal Industries; Units under lock out/strike; Consumers availing captive*

generation facilities; Wind generation and New Industries. We are of the view that that the aforesaid decisions were reached as a result of Prudence Check/due-diligence process undertaken by the Commission. The formulation of 7.4 (g) in the instant case and modifying it by clarificatory orders is evident enough for the produce check undertaken by the Commission. Thus, in the instant case finalizing the Reference Period being the billing period six-months after the increase in contract demand has resulted due to prudence check by the Commission"

33. This Tribunal was clearly of the view that criterion for determination of reference period has to apply uniformly to all the industries. This view having been taken already by this Tribunal, it is not permissible for us to re-open the points raised by Mr. Umapathy howsoever force he may have in his arguments and the appropriate remedy for the Appellant would have been to move to the Hon'ble Supreme Court. Read between lines of memorandum of Appeal as also the written submission filed in connection therewith it appears that the Appellant virtually has to attack before us against what has been said

by this Tribunal earlier. Retrospectivity is germane in all the Commission's order and is also so in this Tribunal's order as aforesaid; and sans retrospectivity such orders would be rendered inherently meaningless.

34. Accordingly, we hold the appeal as being not maintainable. The Appeal is dismissed without cost.

(Justice P.S.Datta) **(Mr. Rakesh Nath)**
Judicial Member **Technical member**

Dated 8th Marc`h, 2011

Index: Reportable/Non-Reportable

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