Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 154 & 155 of 2009

Dated: 28th April, 2010.

PRESENT : HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER

In the matter of:

1. Tata Motors Limited.
House 24, Homi Mody Street, Fort,
Mumbai-400 001.

2. M/s Niskalp Energy Ltd.,
DGP House, 4th Floor,
Old Prabhadevi Road,
Mumbai- 400 025. …Appellants

Versus

1. Maharashtra State Electricity Distribution Co. Ltd.
Stara Circle, Santara,
Maharashtra-415003.

2. Superintending Engineer, MSEDCL,
Santara Circle, Santara-415003.

3. Superintending Engineer, MSEDCL,
Ahmednagar Circle, Ahmednagar -414001.

4. Chief Engineer (Comm.),
MSEDCL, Prakashgad,
5th Floor, Station Road,
Bandra (E), Mumbai-400 051.

5. Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No. 1, 13th Floor,
Cuffe Parade,
Mumbai-400 005. … Respondents

Counsel for the Appellant(s) : . M.G. Ramachandran
Ms. Mansi Gupta
Ms. Ashlesha Srivastava

Counsel for the Respondent: Mr. Devdutt Kamat,
Mr. Abhisek Mitra &
Mr. Shrivenkatesh for R-2.
Mr. Buddy A. Ranganadhan for MERC
Mr. Sumanta Ghosh &
Mr. Arjit Maitra for R.1.
Mr. Ravi Parkash &
Mr. Varun Aggarwal for MSEDCL

Per Hon'ble Mr. Justice M. KARPAGA VINAYAGAM, Chairperson

JUDGMENT

1. Since common order dated 19.6.2009 is under challenge in these two Appeals the common judgment is being rendered.

2. Tata Motors Limited, the Appellant in Appeal No. 154 of 2009 and M/s Niskalp Energy Ltd., the Appellant in Appeal No. 155 of 2009 filed Petition before the Maharashtra Electricity Regulatory Commission praying for the monitory claims from the Respondent, the Distribution Company but the same was dismissed by the State Commission vide order dated 19.6.2009 on the ground that claims were barred by limitation and the Appellants had already consented for final settlements on the amount and the said issue cannot be reopened. Aggrieved by this order both the Appellants have filed these two separate Appeals.

3. Both the Appellants are Wind Power Developers. They were supplying electricity to the Respondents. The Appellants were receiving payments from the Respondents to the extent of 85% of the energy supplied by the Appellants. The remaining 15% was being retained by the Respondents on ad hoc basis. The State Commission by the order dated 24.11.2003 declared that the Appellants belong to the category of Group-2

relating to the wind power purchase. After the said order, the Respondents were required to pay to the Appellants for the units retained by it after adjusting transmission, distribution and wheeling charges during the relevant period.

4. With reference to the refund of the said amount, there were several meetings between the parties. There was also a letter correspondence on various dates. Ultimately the Appellants had consented to the adjustment of 8% of the retained units by the Respondents as per the HT tariff. Thereafter the Appellants claimed from the Respondents with reference to the balance amount but the payment was made only one portion of the said amount. Several letters had been sent for the payment of balance amount. There was no response.

5. Being aggrieved by the inaction on the part of the Respondents the Appellants approached the State Commission for necessary directions praying the State Commission to direct

the Respondents to pay the balance amount to the Appellants. However, the State Commission dismissed the said Petition on 19.6.2009 rejecting the claim of the Appellants on the ground that the same is barred by limitation and also on the ground that the Appellants have already consented for the final settlement and as such the issue cannot be reopened.

6. Assailing the said order, the learned counsel for both the Appellants would submit that the claims made by the Appellants before the State Commission were within the period of limitation and they made the claim of the balance payment only on the basis of the settlements reached between the parties which is evident from the letters sent by the Respondents to the Appellants.

7. Following questions are raised for the consideration in these two Appeals.:

(A) (i) What is the settlement reached in regard to the adjustments to be made for excess 8% units ?

(ii) Is that the adjustment should be based on the HTP-2 rates applicable during the financial year and

(iii) What is the latest HTP-2 rate applicable during the relevant financial year ?

(B) Is it fair on the part of the Respondents to take a stand that the adjustments shall be at the tariff rate applicable as on 31st March of the relevant financial year in regard to the 8% excess units adjusted on ad hoc basis pending decision by the State Commission ?

(C) Whether the claims rendered by the Appellants for implementing the settlement reached between the parties was time barred ?

8. On these questions, we have heard the learned counsel for the parties at length.

9. According to the Appellants, the claims made by the Appellants is not barred by the limitation because the

adjustment of 15% is subject to the determination of the applicable adjustment by the State Commission. The settlement was proposed by the Respondents on 23.3.2005 pursuant to the decision of the State Commission in the order dated 24.11.2003 and as per further orders dated 30.9.2004 and 31.5.2005. The settlement proposed on 23.3.2005 has clearly stipulated that the adjustment for the excess 8% units shall be as per the HT tariff (HTP-2) which could amount to tariff applicable from time to time during the financial year. In contrast, while dealing with the adjustment for excess banked energy i.e. out of the 85% and not out of the 15% in the same letter dated 23.3.2005, the Respondents stated "at the lowest slab of HT TOD tariff applicable on the 31st March of the financial year…" This would mean the tariff applicable on 31st March in contrast to different tariffs applicable at different months during the financial year. The learned counsel for the Respondents submitted in justification of the impugned order.

10. We have carefully considered the submissions made by both the parties. It is noticed that the proposal of the Respondents was duly accepted by the Appellants in June 2005. This is a binding agreement which was entered into and as such enforceable contract came into existence in June 2005 in regard to the settlement of the 8% units supplied by the Appellants to be compensated as per the applicable HTP-2 rates prevalent during the financial year. Admittedly, there is an agreement that such compensation shall be as per the latest HTP-2 rates as on 31st March of the financial year or as per the latest HTP rates prevalent during the financial year.

11. In respect of the 2nd issue, it is contended, that the excess 8% units were supplied to the Respondents by the Appellants only on ad hoc basis as per the interim order dated 3.6.2002 pending the final decision in the matter. It is noticed that the State Commission had to pass the said interim order required some time to decide the matter finally. Therefore, it cannot be contended that the excess units were allowed to be

retained by the Respondents due to any failure, default and other reasons which could be attributed to the Appellants.

12. As pointed out by the learned counsel for the Appellants, the excess 8% units were required to be compensated at the rates prevalent from time to time and not at the lowest rate, since the Respondents Utilities have taken the benefit of such 8% units from time to time at the prevalent tariff. If the State Commission had decided the applicable charges and the loss at the beginning at the rate of 7% instead of ad hoc 15%, the Appellant would have been able to sell the balance 8% to others. Thus, the Appellants were deprived of the above by reasons of the interim order passed by the State Commission.

13. It is a settled law that the Appellants cannot be prejudiced by the act of the Courts, as held by the Supreme Court in Calcutta Jute Manufacturing Co. Vs Commercial Tax

Officer (1997) (1) SCC 262 at Page 270 para 16). So the second question has also to be held in favour of the Appellants.

14. In respect of the 3rd question, it is stated that the Appellants through letter dated 7.6.2005 and 29.6.2005 consented for final settlement of their claim for the refund of the remaining 8% units as per the terms contained in the letter dated 23.3.2005 sent by the Respondent and duly consented by the Appellants in June 2005. Subsequently the invoices were raised by the Appellants and accepting those invoices an agreement was reached between the Appellants and the Respondents and consequently, the Respondents made the refund payment installments between October 2005 and March 2006. The last installment was paid on 10.3.2006.

15. The Appellants wrote several letters to the Respondents claiming the balance payment on the basis of the correct calculations.

16. However, there was no response from the Respondents. Hence the Appellants approached the State Commission in January 2008. So in these circumstances, the first cause of action arose for the first time on 23.3.2005 when the Respondents proposed settlement and in June 2005 when the Appellants accepted the said settlement.

17. The claim made by the Appellants for the enforcement of the agreement would come either under the Article 54 or 55 of the Limitation Act. Under Article 54 which deals with prayer for specific performance of the contract, the period of limitation is 3 years. Under Article 55 which deals with the claim for compensation for the breach of any contract, the period of limitation is 3 years.

18. Thus in either of cases it would be 3 years from the date of the settlement. The Appellants had not chosen to claim 8% compensation for excess supply prior to June 2005 in view of the pendency of the matter before the State Commission and

also the interim directions given by the State Commission to adjust 15% on ad hoc basis.

19. In those circumstances, the finding given by the State Commission that the claim is time barred is not legally valid, especially when the claim was made by the Appellant in January 2008 i.e. within 3 years.

20. Hence, order impugned is set aside. The Appellants are entitled to claim the balance amount as per the settlement reached between the parties. Appeal is allowed. No costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 28th April, 2010.

INDEX: Reportable /Non-Reportable.