Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

Review Petition No. 5 of 2008 in Appeal No. 135 of 2007

Dated: 30th April, 2009.

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF :

Maharashtra State Electricity Distribution Co. Ltd., Prakashgad, Bandra (East), Mumbai-51. …Applicant

Versus

1. M/s. Eurotex Industries & Exports Ltd.

2. Maharashtra Electricity Regulatory Commission ….. Respondents

Counsel for the Appellants : Mr. Jitendra Singh, Sr. Advocate with
Mr. C.P. Rajwar,
Mr. Ravi Parkash,
Mr. Varun Agarwal
Mr. Vikrant Ghumare &
Mr. Rahul Sinha

Counsel for the Respondents : Mr. Haresh Jagtiani, Sr. Advocate with
Mr. Anil D' Souza
Mrs. Vandana Mehta
Mr. Siddhesh Bhole
Mr. Hamed Kadiani
Mr. Banusri
Mr. Ramni Taneja

Order

Maharashtra State Electricity Distribution Co. Ltd (to be referred as 'the Distribution Company'/'MSEDCL') has filed a Review Petition No. 5 of 2008 under Section 120 (g) of the Electricity Act, 2003 ('The Act') seeking review of the order dated

12.05.2008 passed by this Tribunal in Appeal No. 135 of 2007 wherein the Applicant is the Respondent No. 1. M/s Euortex Industries & Export Ltd. herein respondent No.1 was the Appellant in appeal No. 135 of 2007 by which it had challenged the Maharashtra Electricity Regulatory Commission (hereinafter refer to as 'the Commission') tariff order passed on 19.09.2007.

2. As per Section 120 (2) (f) the Appellate Tribunal has the same power as are vested in a civil court under the Code of Civil Procedure, 1908 for reviewing its own decision. The Order 47 Rule 1, of CPC allows review on the following grounds:

(i) *discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him,* ***or***

(ii) *on account of some mistake or error apparent on the face of the record* ***or***

(iii) *for any other sufficient reason.*

3. The Applicant, the Distribution Company, has claimed the review on the ground of **'error apparent on the face of the record'.** The issue relates to inappropriateness of the clause 7.4 (g) of the tariff order dated 18.5.2007 passed in case No. 65 of 2006 as clarified by the Commission vide its clarificatory orders dated 14.08.2007 and 11.09.2007. The impugned Clause 7.4 (g) as clarified by the Commission is reproduced 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 third occasion of the consumer utilizing at least 75% of the increased sanctioned load/contract demand after increasing the Contract Demand is recorded, which ever is earlier".***

4. The impugned order dated 12.05.2008 has modified the above clause 7.4 (g) as under :

" 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".

5. The Applicant has sought for review of the impugned order on the ground of error apparent on the face of the record contending that the impugned order has modified the clause 7.4 (g) of the said tariff order without merit. The applicant has raised the following points:

(a) Since clause 7.4 (g) of the tariff order dated 18.05.2007 was framed keeping in view the statutory guidelines under Section 61 to 64 of the Act and Maharashtra Electricity Regulatory Commission (conduct of business) Regulations, 2004, it was not open for judicial interference.

(b) The Appeal is based on the individual inconvenience of one industrial consumer of a class and no other consumer from the same class has challenged it. This Appeal should not have been entertained.

(c) The impugned order under review providing for a time frame for normalizing the production process based on unsubstantiated statement of the appellant would confine only to its unit but it makes it applicable across the board for all the consumers in that class.

(d) The order under review has wrongly assumed that the Reference Period for bench marking of Additional Supply Charge (ASC) in the billing period after six months of increase in sanctioned load/contract demand is to provide stabilization of energy consumption in operation of expanded system.

6. For admission of the Application for Review, we have heard Mr. Jitendra Singh, Learned Sr. Advocate for the Appellant and Mr. Haresh Jagtiani, Learned Sr. Advocate for the Respondent No. 1 and given our serious consideration to their submissions made at length.

7. We will examine the above points briefly herein below.

I. **In Point (a)** above, the Applicant is wrong in stating that since clause 7.4 (g) of the tariff order dated 18.5.2007 was formulated keeping in view the statutory provisions under Sections 61 & 62 of the Act and Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, it is not open for judicial interference. It is to be pointed out that the Act under Section 111 provides the liberty for any person to appeal against the order of the adjudicating officer and it is the bounden duty of this Tribunal under the Act to hear the appeal and provide relief in accordance with law. As regards Point (b) above, the remedy provided in the instant case to a consumer belonging to a specific class against the tariff order will surely be applicable to other consumers in the same class as it pertains to modification of Clause 7.4 (g) of the tariff order, which will be applicable without any discrimination to all the consumers of that class. Consequently, Applicant's apprehension that the relief provided will be limited to suit the convenience of an individual consumer is ill founded. **Points (a) & (b**) are, therefore, not sustainable and are rejected.

II. With reference to the **Points (c) & (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 18.05.2007 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 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 prudence 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. Six months period appears to have been given for trial and re-trial after fault rectification of newly installed system to help achieve steady state operation; system normalization; stabilization of expanded systems; optimal energy consumption etc. Learned Senior Counsel for the Applicant, when enquired about the purpose of giving six months period, has responded by saying that it was to normalize the system. The impugned order has assumed it to be for the purpose of achieving stabilization of energy consumption. The fact remains that the Commission had considered six months to be a reasonable period for expanded system before the next billing period is taken as Reference Period for ASC computation. Also the respondent No. 1 had submitted data of energy consumption and maximum demand for the period April to October 2006 before the Commission and this Tribunal, which indicate

that the percentage of consumption of maximum energy has attained the level between 91% to 94% during 4^{th} to 6^{th} months of increase in contract demand. This data adequately substantiate that the industries in the instant class required up to 6 months period for normalization/stabilization. **Points (c) & (d)** are, therefore, not maintainable and are rejected.

8. The Applicant has cited the following Supreme Court judgments to support its line of arguments:-

(a) *Mohd. Akram Ansari Vs Chief Election Officer and others. (2008) 2 Supreme Court Cases 95.*

(b) *AIR (1980) Supreme Court 674 M/s Northern Indian Caterers Vs Lt. Governor of Delhi.*

(c) *Grindlays Bank Ltd. Vs. The Central Government Industrial Tribunal & others, AIR 1981 Supreme Court 606.*

9. The judgment at para 9 (a) relates to the practice and procedure wherein certain points may have been raised before the court but not dealt with in impugned order. It has held that there is a presumption in law that a judge deals with all the points, which have been pressed before him. A party who has grievance must approach the same court which passed the judgment and rejected the contention that the court did not deal with the other points which were pressed by the Party. It is not applicable to the instant case as there is no point, which was pressed in the main appeal that was not considered by the Tribunal in its judgment.

10. The judgment in para 9 (b) highlights that the party is not entitled to seek review of the judgment delivered merely for the purpose of a re-hearing and a fresh decision of the case. It also says that it is beyond dispute that a review proceeding can not be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered by the court except 'where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility'. We are of the view that the original judgment in the instant case is passed on facts and logical analysis keeping in view the equity and justice. Hence, the said case is of no help to the Appellant.

11. The judgment referred to in para 9 (c) is in the context of competency of Industrial Tribunal to pass an order if it thought fit in the interest of justice. The Tribunal had passed an ex-parte award. The judgment held that the award without notice to a party is nothing but a nullity. In such circumstances, the Tribunal has not only the power but also the duty to set aside the ex-parte award and to direct the matter to be heard afresh. The present case does not find its application as the case was heard by giving opportunity to all parties before the impugned judgment, was passed.

12. We find that the learned Sr. counsel for the applicant has neither succeeded in its application nor in the points raised in his argument before us in establishing any material that could be construed as an error apparent on the face of record. We, therefore, do not

find any ground to admit the application for review of the impugned order dated 12.05.2008.

13. Before parting with the order we may clarify that the billing periods for bench marking of Reference Periods for ASC computation in both the alternatives of the modified clause 7.4 (g) are to be identically same as there is no rationale for stabilization period to be different for the same system. It further specifies that the additional consumption in the increased sanctioned load/contract demand recorded during the Reference Period should, in percentage pro-rata basis, be equivalent to at least the same ratio of energy consumption as percentage of contract demand that existed prior to the increase in sanctioned load or contract demand. Thus, the billing period after six months of increase in sanctioned load/contract demand load will be treated as Reference Period for the purpose of ASC computation and even if, the expanded system has not recorded any consumption in the Reference Period, it will be deemed to have at least utilized the energy in the same ratio that existed prior to increase in sanctioned load or contract demand. The differentiation between two alternatives in original clause 7.4 (g) being due to different time-periods for stabilization (one time period linked to achievement of 75% of contract demand) having been dispensed with in the order under review, both alternatives become equal in effect. The energy consumption in Reference Period for increase in the contract demand is deemed to be at least on pro-rata basis equal to that existed prior to the increase in sanctioned load or contracted demand.

14. In view of the above, the application for review is not maintainable and is rejected at the admission stage itself. No costs.

(A.A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:30th April, 2009.

Reportable/Non-reportable.