

Before The Appellate Tribunal for Electricity
APPELLATE JURISDICTION, NEW DELHI

Appeal No. 158 of 2006

And

AFR No. 1255 of 2006

Dated this 19th day of October, 2006

Vidarbha Industries Association
First Floor, Udhog Bhavan,
Civil Lines, Nagpur
(Represented through its Secretary)

... Appellant in Appeal
& Petitioner in AFR

Versus

1. Maharashtra State Electricity Distribution Co. Ltd.
Hong kong Building,
Fort, Mumbai – 440 001
(Represented by the Secretary)

 2. Maharashtra Electricity Regulatory Commission
Mumbai
- ... Respondents in both

Counsel for the Appellant : Mr. G. B. Lohiya, Advocate
Mr. Amol Suryawanshi, Advocate
For Mr. Satyajit Desai, &
Mr. A. A. Desai, Advocates with
Mr. Raja Goenka, Representative of
Association

Counsel for the Respondents : Mr. Jayant Bhushan, Sr. Advocate
Mr. Arijit Maitra, Advocate
Mr. Buddy Ranganadhan, Advocate
Ms. Deepa Chawan, Advocate
Ms. Alpana Dhake, Advocate
Mr. Amit Sharma, Advocate
Mr. Ugen Bhutia, Advocate

JUDGEMENT

1. In appeal No. 158 of 2006, the appellant has prayed this Appellate Tribunal to direct respondent to refund amount of Load Management Charges collected from various consumers in the State of Maharashtra during the months of May, June and July, 2005 as per the directions of 2nd respondent Commission dated 4.2.2005 made in case No. 4/2005 as the same is illegal, void and without jurisdiction and not permissible under section 23 of The Electricity Act, 2003 under section 62 (6) read with 94 (f)) of The Electricity Act, 2003

2. The respondents filed reply. The appellant moved a revision purported to be one under Section 111 (6) of The Electricity Act 2003 in AFR No. 1255 of 2006 (i) to call for and quash the proceeding in case No. 4 of 2005 passed on 4.5.2005 by the second respondent (ii) to examine legality, propriety and correctness of the order dated 26.4.2005 and 4.5.2005 passed in case No. 4/2005 and set aside (iii) to direct first respondent to refund load management charges collected, to the consumers.

3. Obviously, it is clear from the review petition, to get over objections of limitation and other legal contentions, present revision has been preferred by the appellant in Appeal No. 158 of 2006 As the contentions and the

points in issue are identical, the appeal and revision were taken up jointly for hearing.

4. Heard Mr. G.B. Lohiya, learned counsel appearing for the appellant in appeal No. 158 of 2006 as well as Petitioner in Revision AFR No. 1255 of 2006, Mr. Jayant Bhushan Sr. Advocate for Mr. Arjit Maitra, Buddy Ranganadhan for first respondent and Ms. Deepa Chawan, Ms. Alapana Dake and Amit Sharma for respondent No. 2 in both the matters.

5. The factual matrix leading to the appeal and revision can be summarized conveniently. The appellant M/s. Vidarbha Industries Association, representing its members came forward with the above appeal and revision. According to the appellant during the months of May and June, 2005, as per the directions of MSERC the area discom collected load management charges, which the appellant are not liable to pay and the respondents are not entitled to recover and consequently they are liable to refund the said amount in terms of Section 62 of The Electricity Act, 2003. It is the contention of the appellant that without following the procedure prescribed under Section 64 of The Electricity Act 2003, tariff cannot be increased by the Regulatory Commission and the order of the commission dt. 4.5.2005 is illegal. It is also contended that there should be no imposition of the penalty by the commission nor there should be a

revision in tariff without following the procedure under Section 64 of The Electricity Act 2003. Imposition of load management charges either amounts to levy of penalty or a revision of tariff, which is not determined in terms of section 62 and 64 of The Electricity Act 2003.

6. The learned counsel for the appellant contended that the load management charges recovered by the area discom on the orders of the Regulatory Commission in purported exercise of powers conferred under Section 23 of The Electricity Act 2003 is prima-facie illegal and arbitrary. The appellant advanced the following further contentions:

- (i) The introduction of load management charges and recovery, thereof is in effect revision of tariff, which revision is illegal without following the procedure prescribed under section 64 of The Electricity Act 2003.
- (ii) No load management charges can be levied under Section 24 of The Electricity Act 2003.
- (iii) The levy of load management charges is beyond the scope of Section 23 and hence it is illegal, void and without jurisdiction.
- (iv) There is no justifiable reason or ground to impose load management charges by the Regulatory Commission. The imposition of load management charges is arbitrarily illegal,

violative of principles of natural justice and the recovery thereof is not authorized by law and

(v) The amount of load management charges collected is liable to be refunded to the consumers from whom it has been collected by the first respondent.

7. Per contra on behalf of the respondents, while referring to the earlier proceedings before the commission as well as before the Nagpur bench of the Bombay High Court and the Supreme Court, the load management charges were introduced to regulate the distribution of power during periods of shortage of power generation as against the demand, and that load management charge is not part of the tariff but it has been imposed validly under Section 23 of The Electricity Act 2003.

8. It is contended that identical load management charges levied under Electricity Supply Act 1948, since repealed by various courts including Supreme Court and Section 23 being inparemateria, the levy and collection of load management charges is valid in law. It is further pointed out that levy of load management charge is a regulatory measures and the levy so collected is kept in a separate fund administered by the commission and it is not appropriated by the discom which collects these charges on the orders of the Regulatory Commission. The load

management charge is not an addition to annual revenue requirement of the discom but it is credited to a special fund created and managed for the special purpose, as has been ordered by the Regulatory Commission.

9. It is further contended that as the appellant has not chosen to challenge the order of the commission imposing load management charges, it is too late for the appellant to seek for refund of the amount collected from its members towards load management charge. Collection of load management charge is authorized by law nor it is arbitrary and the commission after affording necessary opportunity, has fixed the load management charge for the period, during which there was shortage of power. It is incorrect to contend that the load management charge is part of the tariff. Section 64 of The Electricity Act 2003 does not take in load management charges, which is collected and levied under Section 23 of The Electricity Act 2003 and therefore it is not necessary to resort to the procedure prescribed under Section 63; 64 of The Electricity Act 2003. Load Management charge is not a penalty nor it is an increase or revision in tariff as sought to be contended by the appellant.

10. The learned counsel for the discom took this tribunal through the earlier orders passed by the Nagpur Bench of the Bombay Court, the Supreme Court and the orders of the Regulatory Commission by which load

management charge was introduced and ordered to be recovered. It is also pointed out by the learned counsel for the discom that the appellant has not challenged the orders passed by the Regulatory Commission ordering collection of load management charge for over two years and it is too late for the appellant to approach this Appellate Tribunal at this stage and the appeal is liable to be dismissed. So, also the revision. It is contended that they have failed to prefer the appeal within the period of limitation prescribed. It is too late for petitioner to come forward by way of revision and such a revision is not maintainable apart from being belated.

11. On a consideration of various contentions advanced by Mr. G.B. Lohia, Ms. Deepa Chawan, Ms. Alapana Dake, Mr. Jayant Bhushan, Sr. Advocate, Mr. Ranganadhan, we frame the following points for consideration:

- A. Whether the imposition and collection of load management charge is permissible under Section 23 of The Electricity Act 2003?
- B. Whether the imposition and recovery of load management charge is illegal without jurisdiction and not authorized by law?

- C. Whether load management charge imposed forms part of the annual revenue requirement and tariff?
 - D. Whether before levy of load management charge ordered under section 23 of The Electricity Act 2003, the procedure prescribed under Section 64 of The Electricity Act 2003 is required to be followed?
 - E. Whether the load management charge collected from the members of the appellants' association is liable to be refunded to the members in terms of Section 62 (6) of The Electricity Act 2003?
 - F. Whether the appellant association had taken part in the proceedings of the MERC before its decision to impose load management charges?
 - G. To what relief, if any?
12. Except the last two points, points A to E can be considered together conveniently. Here and now, it is to be pointed out that the appellant has failed to disclose the material facts in the appeal and as contended by the counsel for the first respondent discom,

the appeal is liable to be dismissed for suppression. However, we deem it appropriate to decide the appeal on merits.

13. We have considered the appeal memorandum as well as revision petition filed by the appellant/petitioner and we have also considered the reply filed by the respondents 1 & 2 besides the rejoinder- affidavit filed on behalf of the appellant.

14. On 10.3.2004, the second respondent commission passed tariff order in case No. 2 of 2003, wherein the said commission issued certain directions in respect of insufficiency of power and load shedding. Petition No. 2 of 2005 was filed before the commission by M/s. Viji Grah Sangathan, wherein the said sangathan prayed for directions of the commission with respect to load shedding. After affording necessary opportunities and issue of public notices, the commission also held a public hearing as well as a technical validation session, ultimately passed orders dt. 4.3.2005 with respect to load shedding and other related issues. MSEB moved the commission under Section 23 of The Electricity Act, 2003 for evolving appropriate measure arising out of the demand and supply gap of electricity in the state in case No. 4 of 2005. After hearing all the concerned including the consumers representatives and the

members of the appellant association, the commission issued a summary of directions as an emergent measure on 26.4.2005, which included the introduction of levy of load management charge.

15. In the interregnum, W.P. 2097 of 2005 was filed by Mr. Anil Murdikar and others on the file of The Nagpur Bench of Bombay High Court seeking for certain directions with respect to load shedding policy, its implementation and also to change the arbitrary policy by which the residents of Nagpur and the nearby residents are discriminated, to direct the respondents to stop load shedding in Vidarabha region, to direct the respondents herein to take effective steps to prevent loss of electricity by mismanagement, theft etc., besides seeking interim reliefs.
16. The consumers' representatives also filed W.P. 2097 of 2005. Certain directions were issued by the Hon'ble High Court. Erstwhile MSEB went before the Hon,ble Supreme Court and vide order dated 4.5.2005, the Hon,ble Supreme Court issued further directions. The erstwhile MSEB submitted its revised proposal on the principle and protocol of load shedding. The commission issued a public notice, conducted public hearings on various dates and

various places in the state of Maharashtra, in which the appellant association also took part. The erstwhile MSEB was unbundled into three different companies on 6.6.2005. On 16.6.2005, the Regulatory Commission passed an order after due consideration of various proposals /submitted before it, ordered collection of load management charges and it was subsequently clarified and the review petition moved, also came to be rejected.

17. MERC passed an order on 17.1.2006 under Section 23 of The Electricity Act 2003 and issued further clarifications and corrigendum in respect of load management directives on 21.2.2006, The order, by which load management charge was introduced is self-explanatory and it is not necessary to examine or go into the same in the present appeal/revision. There is force in the objection raised by the learned counsel for the first respondent. However, we proceed to discuss the points already framed on merits, though we would be justified in rejecting the appeal as belated as well as on the grounds that the appellant has suppressed the material facts.

18. Section 23 of The Electricity Act 2003 reads thus:

“ If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and

promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof."

In terms of the above section, the commission is empowered to regulate the supply, distribution, consumption or use of power, if it is necessary or expedient to do so for maintaining efficient supply, securing the equitable distribution of electricity and promoting competition.

19. Thus, on a reading of Section 23 of The Electricity Act, 2003, we have no hesitation to hold that the commission is empowered to regulate supply, equitable distribution and consumption of power. It is true that section 23 does not spell out any levy of penalty or additional tariff. Though the expression 'tariff' has not been defined, the meaning of 'tariff' is well understood as held by the Supreme Court in BSES Vs. Tata Power reported in 2004 I.SCC. 195. The Supreme Court held that 'tariff' means 'charges for consumption of electricity'.

20. On the filing of annual revenue requirement, the tariff is fixed by the Regulatory Commission after adopting the procedures prescribed under Section 64 of The Electricity Act 2003. The tariff determined in terms of Part VII (Section 61 to 64) of The Electricity Act 2003. The tariff is determined under Section 62 after following the procedures prescribed under Section 64 of The Electricity Act 2003. On a consideration of the

Part VII of the Act and in particular Sec. 61 to 64, we hold that the levy and collection of load management charges will not take part the character of tariff nor it forms part of the cost of power, generation or transmission or distribution by the respective utility.

21. In the circumstances, we hold the contentions of the learned counsel for the appellant, that load management charge forms part of the tariff and that it is an increase in tariff schedule, cannot be sustained. It, therefore follows that there is no requirement at all for the Regulatory Commission to follow section 64 of The Electricity Act 2003 before ordering or imposing load management charge and recovery thereof.

22. The plea of the learned counsel appearing for the appellant that the entire amount collected by way of load management charges is liable to be refunded in terms of Section 62 (6) of The Electricity Act 2003, cannot be sustained and it deserved to be rejected as load management charge is not part of the tariff and Sec. 62 (6) has no application at all to load management charge. The second respondent Commission has rightly rejected such a contention and no exception could be taken in this respect.

23. Taking up the next point, the load management charge has been levied and collected under Section 23 of The Electricity Act 2003. As rightly pointed out by the learned counsel for the respondents, this point is no longer resintegra and it is covered by the earlier decision of the Hon'ble Supreme Court.
24. A Constitution bench of the Supreme Court in Adoni Cotton Mills Ltd. vs. A.P. Electricity Board reported in 1976.(4). SCC 68 upheld the plea of the Electricity Board that it has right to stagger or curtail supply of electricity to any consumer according to operational and other exigencies. It can also impose sanctions, which can take any reasonable form either disconnection in case of gross and persistent defaults or the lesser sanction of enhanced tariff.

In this respect the Supreme Court also held thus:

“ The recognition of the fact that the Board can introduce rationing by making a regulation under Section 79 (j) of the 1948 Act necessarily involved a concession that the Board has the power to enforce rationing and to enunciate the principle for determining the scheme of such rationing. A regulation can be made only in the exercise of a power which exist in the Act. The making of a regulation is not a new source of power but regulates the exercise of power which exists. Section 49 (1) of the 1948 Act therefore gives a general power which could be regulated by making of a regulation. The language of Section 49 of the 1948 Act shows that

the power can be exercised without making any regulation. The expression 'regulation' occurring in Section 49 (1) is qualified by the expression "if any". It is, therefore, manifest that if the power is existing, it must be exercised according to valid principles consistent with the provisions of Section 49 (4) of the 1948 Act. This court rejected the suggestion that the President or the Governor cannot settle terms and conditions of the public servants without making rules under Article 309 of the Constitution. If regulations were made, such regulations would have to be in conformity with Section 49 (4) of the 1948 Act and in the exercise of its power the Board would have to abide by regulations."

X X

" Section 49 (4) of the 1948 Act casts a duty on the Board not to show any undue preference in fixing the tariff and terms and conditions. Clause 6.7 and 6.8 of the Power Tariff show that the Board shall have the right to stagger or curtail supply of electricity to any consumer according to operational and other exigencies. The Board can therefore release supply or block the same area-wise and has no means of enforcing the quota except through sanctions. Such sanctions can take any reasonable form either disconnection in case of gross and a persistent defaults or the lesser sanction of enhance tariff".

25. The above pronouncement of the Supreme Court has been followed in Jiyajee Rao Cotton Mills Ltd. Vs. M.P. Electricity Board reported in 1989 Supp (2) SCC 52. In this pronouncement, the Supreme Court while

considering an identical provisions Viz. Section 22 (B) of The Electricity Supply Act 1948 ruled thus:

“We may not in these circumstances detain ourselves on this question except mentioning the decisions in Adoni Cotton Mills Ltd. Vs. APSEB; State of U.P. Vs. Hindustan Aluminum Corporation and New Central Jute Mills Vs. UPSEB, showing in unambiguous terms that the power is there. Section 22-B permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. The expression ‘regulate’ occurs in other statutes also, as for example, The Essential Commodities Act, 1955, and it has found difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object to be achieved and the mischief sought to be remedied. The necessity for issuing the two orders arose out of the scarcity of electricity available to the Board supplying to its customers. The situation did not leave any option to the Board but to make limited supply of electricity to its consumers, and it must be held to have, in the circumstances the right to stagger or curtail the supply. The orders were issued in this background and to to make the direction mentioned therein effective it was considered essential to impose sanctions which could take any reasonable form; either disconnection in case of gross violation or the lesser sanction of enhanced tariff. By the order issued under Section 22-B and quoted in paragraph 7 of the judgment in Adoni Cotton Mills case-1 the State Government directed a reduction in supply of electricity to the extent of 75 per cent of the previous average monthly demand and provided for

payment of the charges for excess consumption at double the tariff rate. The Electricity Board thereafter proceeded to impose further restrictions. Aggrieved by these measures the Adoni Cotton Mills, an aggrieved consumer approached the court, but its challenge was repelled. On behalf of the appellant Mr. Gupta attempted to distinguish the decision on the ground that the fixing of a higher tariff for the excess consumption was against public policy and that this aspect was not considered by this Court in Adoni Cotton Mills. We do not find any merit in this argument. The demand of higher charges/tariff for electricity consumed beyond legally fixed limit is a reasonable deterrent measure providing an appropriate sanction- not as harsh as disconnection of supply energy altogether- and cannot be opposed on the ground of the public policy. We, therefore, hold that none of the two orders is illegal or unreasonable."

26. The learned counsel for the appellant contended that the power to regulate will not confer or take in the power to collect load management charge. This aspect has already been considered by the Supreme Court in the said two pronouncements. That apart while considering the expression 'regulate' in U.P. Cooperative Cane Unions Federations Vs. West U.P. Sugar Mill and Association & Others reported in 2004 Vol 5 SCC 430, after analyzing pronouncement in Giyajee Rao Cotton Mills Ltd. and the entire case the law, majority of the judges held that the power to 'regulate' shall include full power over the thing and the power must be regarded as plenary over the entire subject. It was further held that

'regulate' means to control or to adjust by rule or to subject to governing principles. Their Lordships held that it is a word of broad impact having wide meaning comprehending all facts not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute.

27. In the light of above pronouncement, there is no doubt that levy of the load management charge under Section 23 of The Electricity Act 2003 is a regulatory measure, which the Regulatory Commission is empowered to levy and recover. We hold that the Section 23 of The Electricity Act 2003 confers the power to regulate equitable distribution of power etc. and it also confers the power to collect load management charges by way of the regulatory measure. The contentions advanced by the appellant to the contra cannot be sustained.

28. On a perusal of the order passed by the MERC with respect to load management charges, we do not find any illegality or arbitrariness and error of justification in orders passed by MERC in levying the load management charge. Levy of load management charge has also been affirmed by this Appellate Tribunal, while examining the tariff order passed by the same MERC.

29. In the light of the above discussions, points A, B & D are answered against the appellant and in favour of the respondents, holding that the load management charge has been validly ordered under Section 23 of The Electricity Act 2003 by the Regulatory Commission and it does not form part of the tariff. Neither tariff nor annual revenue requirement include load management charge, as load management charge is distinct and separate from tariff and it does not form part of the cost of energy distributed.
30. As the load management charge has been validly ordered in exercise power conferred under Section 23 of The Electricity Act 2003, the question of refund will not arise and the relief prayed for in this behalf deserves to be rejected.
31. On point E, it is clear from the orders placed before this Appellate Tribunal, the appellant association has taken part in the proceedings before the Regulatory Commission on various stages as seen from the order of MERC dated 17.1.2006 in case No. 34 of 2005 and it took part in the public hearings held on 19.12.2005 and on other dates as well. The appellant has taken part in the proceedings before the Regulatory Commission. Therefore, it follows that there has been a fair compliance

of principles of natural justice and denial of opportunity advanced, cannot be sustained factually.

32. In the revision also identical points have been raised and it is not necessary to traverse the same once again. The validity of the order of the Regulatory Commission ordering collection of load management charge deserves to be up-held following the judgment of the Supreme Court and hence we held that there are no merits in the revision itself.

33. In the result we hold that there are no merits in the contentions advanced both in the appeal and revision and accordingly they are dismissed but without cost.

Pronounced in the open court on this 19th day of October, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member