A MAHARASHTRA STATE ELECTRICITY DISTRIBUTION CO. LTD.

v.

UNION OF INDIA AND OTHER

B (Civil Appeal No. 4304 of 2007)

FEBRUARY 28, 2020

[ARUN MISHRA, M. R. SHAH AND B. R. GAVAI, JJ.]

Electricity Regulatory Act, 1998 – The Maharashtra State
C *Electricity Regulatory Commission (MERC) quashed circular No. 602 dated 23.07.1998, Circular No. 619 dated 25.05.1999, Circular No. 627 dated 02.09.1999, Circular No. 651 dated 19.09.2000 and Circular No. 663 dated 05.10.2001, insofar as they purport to impose "take or pay" obligation and minimum off-take requirement as also of any additional tariff for captive power plant holders on*
D *the ground that there was no approval of the MERC constituted in terms of the provisions of the Electricity Regulatory Act, 1998 – The appellant-MSEDCL was directed to make refund to respondent nos. 3 to 7 – Appeal preferred by MSEDCL was dismissed by the Appellate Tribunal for Electricity (APTEL) – Before the Supreme*
E *Court, the appellant-MSEDCL contended that MERC was constituted on 05.08.1999, its approval was not required with regard to two circulars issued before the said date – Held: The circular issued before the Commission was constituted could not have been quashed on the ground that Maharashtra State Electricity Board (MSEB) had no power to issue them without the approval of the*
F *Commission – In Binani Zinc Limited, the Supreme court held that before Commission came into existence, the power was to be exercised by the State Electricity Board – Therefore, the circulars and the policy decisions issued before the establishment of the Commission were illegally set aside – Insofar as refund order is*
G *concerned, it is apparent from the additional affidavit filed by the appellant-MSEDCL that the respondents used supply of electricity to manufacture their products – The cost incurred on production has been passed on to the buyers/ consumers buying their products – In the peculiar facts of the case, as the Commission earlier opined in order dated 10.01.2002 that Captive Power Plant Policy is a*
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policy matter and it did not decide as to the merits of subject matter as prayer for approval was made by the appellant- MSEDCL – The Commission without considering on merits the reasonableness of the demand, quashed the circulars – It would not be appropriate in the peculiar facts of the case to direct refund to be made by the appellant-MSEDCL of the amount recovered by it as it would tantamount to unjust enrichment – Consequently, the orders passed by the Commission as well as the APTEL set aside and in the peculiar facts and circumstances of the case, the order concerning a refund of amount recovered also set aside.

Allowing the appeal, the Court

HELD:1. The first question for consideration is whether the Commission could have quashed circulars issued by the appellant-MSEDCL before its formation. The Commission was constituted under the Act of 1998 on 5.8.1999. The circular issued before that could not have been quashed on the ground that MSEB had no power to issue them without the approval of the Commission. The decisions in that regard of Commission as well as of APTEL are liable to be set aside. In *Binani Zinc Limited*, this Court held that before Commission came into existence, the power was to be exercised by the State Electricity Board. [Para 24][1058-F-G]

Binani Zinc Limited v. Kerala State Electricity Board and Ors. **(2009) 11 SCC 244 – relied on.**

2. Concerning circular dated 2.9.1999, which remained in force till 28.4.2000, the Commission as well as the APTEL were required to consider impact of Commission earlier order passed on 10.1.2002 and also its observations made in the said order that CPP is a policy matter and that Commission was recently conferred with the power under Section 22(2) of the Act of 1998, it ought to have gone into the merits of the claim. It was also pointed out on behalf of appellant-MSEDCL that it had submitted circulars for approval to Commission, which has not gone into the merits of the subject matter and later quashed circulars on the ground of competence. The MSEDCL filed circulars along with tariff proposal for approval as that was an essence of the tariff. [Para 25][1059-G-H; 1060-A]

3. It has also been pointed out that in subsequent orders also, circulars as to CPP were relied upon by the Commission. It was incumbent upon the Commission to consider the effect of its orders and the prayer made by the appellant-MSEDCL to consider merits of various circulars while fixing the tariff. [Para 26] [1060-B]

4. As dispute pertains to the period from 2.9.1999 to 28.4.2000, and it is apparent from the additional affidavit filed by the appellant-MSEDCL that the respondents used supply of electricity to manufacture their products. The cost incurred on production has been passed on to the buyers/consumers buying their products. Hence, it would tantamount to unjust enrichment in case a refund is ordered. In the peculiar facts of the case, as the Commission earlier opined in order dated 10.1.2002 that CPP is a policy matter and it did not decide as to the merits of subject matter as a prayer for approval was made by the appellant-MSEDCL. The Commission observed that it would consider the matter in the future, but later on, without considering on merits the reasonableness of the demand, the Commission quashed the circulars. It is apparent that the liability was passed on to the buyers/consumers by the respondent nos.3 to 7 as electricity was used to manufacture their products sold in the market, working out the price based on expenditure. It would not be appropriate in the peculiar facts of the case to direct refund to be made by the appellant-MSEDCL of the amount recovered by it as it would tantamount to unjust enrichment. Thus, in the peculiar facts and circumstances of the case, it is not considered appropriate to remit the matter to decide the dispute on merits after two decades for the period from 2.9.1999 to 28.4.2000, during which circular dated 2.9.1999 was in force. [Para 27][1060-C-F]

5. Consequently, this Court set aside the orders passed by the Commission as well as the APTEL and hold that circulars and the policy decisions issued before the establishment of the Commission were illegally set aside and in the peculiar facts and circumstances of the case this Court set aside the order concerning a refund of amount recovered by MSEB. [Para 28] [1060-G]

Case Law Reference A

[2009] 4 SCR 636 relied on Para 17

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4304 of 2007.

From the Judgment and Order dated 30.05.2007 of the Appellate Tribunal for Electricity in Appeal No. 29 of 2007. B

Abdulrahiman Tamboli, Abdulazeem Kalebudde, Preetam Shah, Pratik Bombarde, G. Umapati, Ravi Prakash, Varun Agarwal, Ms. Krishna Dayama, Lakshmi Raman Singh, Advs. for the Appellant.

Sudheer Chandra, Bharat Sangal, Sr. Advs., K.V. Viswanathan, Ms. Liz Mathew, Ms. Sonali Jain, R. Venkat Raman, Navneet R., Ravindra Kumar Verma, Anmol Chandan, A.K. Verma, G.S. Makker, Nagorkathi Kartik Uday, Vijender, Ms. Babita Kushwaha, Anuj Bhandari, Kinshuk Chatterjee, Kushal Bansal, Shijit Chakravarty, Arjun Harkauzi, Bhargava V. Desai, U.A. Rana, Himanshu Mehta, M/s. Gagrat & Co., Advs. for the Respondents. C D

The Judgment of the Court was delivered by

ARUN MISHRA, J.

1. The appeal has been preferred by Maharashtra State Electricity Distribution Company Limited (for short, 'the MSEDCL') against the order dated 30.5.2007, passed by Appellate Tribunal for Electricity (for short, 'the APTEL'), dismissing the appeal against the order dated 21.5.2004 passed by Maharashtra State Electricity Regulatory Commission (for short, 'the MERC'), quashing Circular No.602 dated 23.7.1998, Circular No.619 dated 25.5.1999, Circular No.627 dated 2.9.1999, Circular No.651 dated 19.9.2000 and Circular No.663 dated 5.10.2001, insofar as they purport to impose "take or pay" obligation and minimum off-take requirement as also of any additional tariff for captive power plant holders on the ground that there was no approval of the MERC constituted in terms of the provisions of the Electricity Regulatory Act, 1998 (for short, 'the Act of 1998'). The aforesaid circulars dealt with Captive Power Plant Policy (for short, 'the CPP Policy'). The appellant-MSEDCL has been directed to make refund to respondent nos.3 to 7. The financial liability has been imposed upon the appellant-MSEDCL. The MERC was constituted on 5.8.1999. The appellant-MSEDCL had submitted all its circulars to MERC for approval and the E F G H

A MERC after four years has quashed the circulars with retrospective effect. The financial condition of the appellant-MSEDCL is not sound enough to sustain such kind of liability for refund. It was unable to pay a sum of Rs.504 crores as against liability to other parties.

2. Respondent no.3-M/s. NRC Ltd. initially had its two units on B Plot No.E 23. Unit Nos.1 and 2 had a contract demand of 3500 KVA and 1800 KVA respectively. In 1995, an independent connection was sought by respondent no.3 for its Unit No.2. Representation was made that two units were separate units and on that basis, two independent connections were given. After that, respondent no.3 filed an application C dated 5.4.1997 to set up a CPP of 7MW capacity. In respect of contract demand, it was proposed to retain total contract demand for 8-12 months after the CPP was fully operational and to surrender around 50% of the contract demand after that. Prayer was also made to provide stand-by power.

3. The Government of Maharashtra issued a notification dated D 20.12.1997, whereby it empowered Maharashtra State Electricity Board (for short, 'the MSEB') to finalise the technical and commercial arrangements between captive power purchasers and their party purchasers. No objection certificate dated 7.1.1998 was issued by appellant-MSEDCL subject to the Condition No.4, which permitted E respondent no.3 to decide the level of contract demand after the commissioning of the set and any changes for interconnection would be governed as per the Board's Condition of Supply framed from time to time and its policies as no rules were framed.

4. Circular No.602 dated 23.7.1998 was issued vesting power F with the Board to permit the CPP holder for sale of their CPP power to any third party through the Board's grid, grant of permission to those persons to use their CPP power for self use only and to charge wheeling and transmission loss charges.

5. The Act of 1998 was enacted on 25.4.1998. Before that, field G of electricity was regulated by Electricity Supply Act, 1948 (for short, 'the Act of 1948'). Section 49 of the Act of 1948 empowered the respective Electricity Boards to come up with their tariffs, which could have differential. Section 79(j) of the Act empowered the Board to make regulations pertaining to supply of electricity to the licensees under Section 49. Section 44 further provided that for establishing the CPP unit, prior H consent of the Board was mandatory. MSEB was regulating the field of

CPP as per notifications issued by the Government and the provisions contained in the Act of 1948.

6. On 23.9.1998, respondent no.3 sought clubbing of the contract demand and subsequent reduction to 3000 KVA for both the units. The clubbing of two units would increase the total contract demand to 5300 KVA and would necessitate the installation of an EHV Line. Thus, the same could not be done. Respondent no.3 was not entitled to reduction of contract demand in view of the application dated 5.11.1997. Hence, it was not permitted as per letter dated 23.9.1998.

7. MSEB submitted a proposal on 4.5.1999 to the Government of Maharashtra for revision of its retail distribution tariff w.e.f. 1.6.1999, keeping in view the requirements of Section 59 of the Act of 1948. The proposal for revision of tariff was under consideration of the State Government in the year 1999. Still, no final decision was taken and the delay was owing to the imposition of Model Code of Conduct due to elections and on 5.8.1999 MERC was constituted. The Government advised the MSEB to submit proposal for tariff revision to Commission for its approval and accordingly, the proposal was submitted to the MERC.

8. Circular No.619 dated 25.5.1999 was issued by the Board to grant permission for installation of CPP for self use only, reduction in contract demand to CPP holders would not be permitted and levy of penal charges at the rate of 2 times/3 times the prevailing tariff to the CPP holders in their energy bills for over drawal of power on their agreed contract demand under planned/unplanned shutdown as stipulated in the Government of Maharashtra resolution dated 20.12.1997. On 29.8.1998, respondent no.3 had commissioned its CPP and withdrew its earlier application dated 18.6.1999 for reduction in contract demand and resubmitted two applications and sought reduction in contract demand of Unit No.1 from 3500 KVA to zero and increasing contract demand of Unit No.2 from 1800 to 3000 KVA. The fresh application could not be granted as the then existing policy of the appellant-MSEDCL was not to grant any reduction in contract demand to existing CPP holders as notified vide letter dated 18.6.1999.

9. Vide circular dated 2.9.1999, the policy contained in circular dated 25.5.1999 was partially modified insofar as it related to a reduction in contract demand. It permitted CPP holders to reduce contract demand to 2.5 MVA or 50% of the contract demand of 5 MVA or above. It was specifically provided that CPP holders with a contract demand of less

A than 5 MVA would not be permitted reduction in contract demand. As respondent no.3 had two independent connections, each having a contract demand of less than 5 MVA, it was not entitled to reduction in contract demand. As per policy contained in the aforesaid circular, all the CPP holders were required to draw at least 25% energy of their monthly consumption from the appellant-MSEDCL and in case of drawal of less
B quantity of electricity, they would be billed for 25% of the energy. The energy supplied would be charged at the rate of 110% of the tariff applicable was the condition of supply for interconnection and stand-by power. Respondent nos.3 to 7 had sought stand-by power. The appellant-MSEDCL had invested huge amount for establishing the necessary
C infrastructure. It was incumbent upon the appellant-MSEDCL to keep available at all material time the requisite infrastructure for supply of electricity to respondent nos.3 to 7. The NOC was issued as per the prevailing policy subject to the condition of supply for paralleling connection or further changes in policy. Thus, circular dated 2.9.1999 was issued.
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10. On 28.4.2000, the State Government issued a guidance to the appellant-MSEDCL to withdraw the said condition for compulsory drawal of 25% energy as it was not in line with the Government of Maharashtra policy decision as mentioned in the resolution dated 25.4.2000.

E 11. It was submitted on behalf of appellant-MSEDCL that MERC passed an order on 5.5.2000, pointing out that it would look into the matter of sale of surplus power by CPPs to MSEB at a later stage under Section 22(1)(c) of the Act of 1998. The Commission directed the MSEB to follow Section 44 of the Act of 1948 in its true spirit and clear all pending applications by 30.6.2000. Refusal to the captive units, on the
F other hand, was contradictory.

12. The appellant-MSEDCL modified their policy dated 19.9.2000 in line with Government of Maharashtra CPP Policy reflected in the resolution dated 25.4.2000 and withdrew the condition of compulsory drawl of 25% of the energy of MSEB grid by CPP holders prospectively
G with effect from 28.4.2000. No sanction for connecting the additional load of the unit at Plot No.E-1 to the CPP was granted. Respondent no.3, however, illegally connected the said load of the unit at Plot No. E-1 to the CPP.

13. On 31.8.2001, the appellant-MSEDCL submitted its proposals
H to MERC along with a tariff petition. The circulars dated 23.7.1998,

25.5.1999, 2.9.1999 and 19.9.2000 were submitted to MERC for its approval. MERC passed order dated 10.1.2002 on the tariff petition of the appellant-MSEDCL, in which it was held:

> "The Commission is of the opinion that the 'Captive Power Policy' is a policy matter under the jurisdiction of the Government of Maharashtra, and the Commission has very recently been conferred with additional powers under S. 22[2] of the ERC Act, 1998, which includes the power to aid and advise the GoM in the formulation of the State Power Policy. The Commission would not like to comment on the captive power policy at this stage, but would like to state that the MSEB has appended the captive power policy along with the Tariff Proposal for the information of the consumers, and the Commission's silence on this policy should not be taken as approval of the same."

14. Respondent nos.3 to 6 had filed writ petitions before the High Court. The High Court relegated them to MERC. It was not pointed out that there was a provision asto arbitration in case of dispute between the appellant-MSEDCL and CPP holders. It was also submitted that on 3.3.2004, MERC has passed an order in Case No.55 of 2003, in which it observed:

> "7. …The Commission was seized of the matter relating to the CPP Policy as a whole, but the previous Circulars continue to operate since the Commission had not kept them in abeyance, and they are also not the subject to challenge in the present proceedings."

15. Ultimately, vide order dated 21.5.2004, the MERC allowed the petition filed by respondent nos.3 to 7 and set aside the abovementioned circulars issued by appellant-MSEDCL from 1998 onwards on the issue of CPP. Even though MERC was not in existence at the time when certain circulars were issued, they have been quashed on the ground that no approval from MERC had been obtained. Aggrieved thereby, an appeal was preferred before the APTEL and the same was dismissed. Hence, the appeal.

16. It was submitted by the learned counsel appearing on behalf of appellant-MSEDCL that policy for CPP was evolved by the Government resolution dated 20.12.1995 onwards. Thus, circular dated 25.5.1999 provided for contract demand and "take or pay" obligations

A were result of the policies of the State Government. Circular dated 25.5.1999 provided for charging of energy drawn from the appellant-MSEDCL by CPP at the rate of 110% of the applicable tariff. It was altered to 125% vide circular dated 2.9.1999 of the energy from the appellant-MSEDCL of the monthly consumption based on preceding 12 months before the commissioning of CPP.

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17. The MERC was established on 5.8.1999 though the Act came into force w.e.f. 25.4.1998. MERC observed that it was within the power of State to continue with or alter tariff related decisions/arrangements to decide about the continuance of tariff on the ground that CPP policy was in the domain of the State Government as observed in tariff order dated 5.5.2000 (Case No.1 of 1999), tariff order dated 10.1.2002 (Case No.1 of 2001) and order dated 3.3.2004 (Case Nos.55 and 56 of 2003). It was submitted that MERC was constituted on 5.8.1999, its approval was not required with regard to two circulars were issued before the said date. Reliance has been placed on *Binani Zinc Limited v. Kerala State Electricity Board and Ors.,* (2009) 11 SCC 244.

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18. It was also submitted on behalf of appellant-MSEDCL that it incurred costs for additional generation, strengthening of transmission network and distribution system and for establishing of EHV sub-station transformation. The appellant-MSEDCL has taken various decisions. The circulars had not imposed an additional financial burden on CPP holders. The appellant-MSEDCL agreed to allow CPP holders, who consented for expansion load, for using against the existing load and also reduction in contract demand, as such, it is clear that financial health was affected.

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19. It was further submitted on behalf of appellant-MSEDCL that circulars as per the policy of the State Government could not have been invalidated. The Commission could have passed appropriate order on merits concerning matters after its constitution. It could not have quashed the circulars issued before its establishment. The appellant-MSEDCL had the power to alter the tariff when the Commission was not established and the Government has authorised it also. Under Section 44 of the Act of 1948, the CPP industry would be bound by the policy of the Board and directions of the Government of Maharashtra. The APTEL has failed to consider that circular dated 2.9.1999 does not amount to a revision of tariff, it pertained to the policy regarding the CPP. The APTEL did not consider that huge amount has been spent on infrastructure which was

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to be kept available for the standby facility. The Government of India letter dated 22.8.1994 contemplated both the units of respondent no.3 as separate units. The policy decision dated 20.12.1997 of the Government of Maharashtra has also not been considered. The APTEL failed to take note of the letter dated 13.10.1999 issued by the appellant-MSEDCL to respondent no.3 in respect of unauthorised act of connecting supply from Plot No.E-23 to Plot No.E-1 without any sanction from the appellant-MSEDCL. The APTEL also failed to consider that circulars, which have been quashed, were only explanations/clarifications to the earlier notifications coercing the policy of CPPs.

20. It was submitted that the APTEL did not consider order dated 10.1.2002 passed by MERC, in which it observed that CPP is a policy matter under the jurisdiction of the Government of Maharashtra and the Commission has been recently conferred with the additional power under Section 22(2) of the Act of 1998, which includes the power to aid and advise the Government of Maharashtra in the formulation of the State Power Policy. The Commission kept silent on CPP at that stage. It was further submitted that Commission mentioned in the order that it was conferred with the powers under Section 22(2) of the Act of 1998 recently, thus, the Commission should not have struck down the CPP and the circulars regarding that.

21. The copies of the circular were forwarded as in the case of all other circulars issued by appellant-MSEDCL to its field officers. The appellant-MSEDCL had the power to alter the tariff, the circular dated 25.5.1999 was authorised one, which was partially modified on 13.8.1999. One of the modifications was that CPP holders were required to draw at least 25% of their monthly consumption from the appellant-MSEDCL. There was no additional financial burden imposed on CPP holders. The policy contained in the circular was a matter of economic policy. It was also submitted on behalf of appellant-MSEDCL that all the circulars relating to CPP generation were submitted to Tribunal for approval. The Tribunal did not decide the validity thereof vide order dated 10.1.2002. The Tribunal could not have declared the said circular to be bad in law only on the ground that prior approval of the Tribunal was not taken without deciding the issues on merits. Even if the Commission had the power, it ought to have gone into the merits of the case and reasonableness of the claim made by the appellant-MSEDCL as reflected in circulars. The Government's advice dated 28.4.2000 was

non-binding advice upon the appellant-MSEDCL under Section 78A of the Act of 1948.

22. It was submitted on behalf of respondents that after enforcement of the Act, there was no power with MSEB to issue circulars under the Act of 1998. The Commission had sole and exclusive power to frame the tariff. Thus, no case for interference is made out in the appeal. The Government also directed MSEB to cancel its circular as it was not in consonance with the policy of the State. Circulars could not be said to be enforceable. The change in policy as per circular dated 2.9.1999 was not informed; thus, the exercise of power was arbitrary and void. The levy of tariff for minimum consumption at 25% of the energy consumed in the preceding 12 months before the commissioning of the CPP at the rate of 110% of the tariff is wholly and utterly unreasonable. Therefore, it was unsustainable. It was also submitted that neither Section 44 nor any other provisions of the Act of 1948 enabled MSEB to impose any condition in the grant of consent, such as maintenance of contract demand at a particular level. The Board cannot unilaterally revise the charges in breach of such stipulations fixing the special tariff. A notification cannot be inconsistent with the terms of the agreement. If subsequent notification is quashed, it will not revive earlier notification.

23. An affidavit in compliance with the order dated 11.7.2019 has been filed on behalf of appellant-MSEDCL stating that supply of electricity, made available, was used by respondents to manufacture their products. The cost incurred on production has been passed on to the buyers/ consumers buying their products. Hence, it would tantamount to unjust enrichment in case a refund is ordered.

24. The first question for consideration is whether the Commission could have quashed circulars issued by the appellant-MSEDCL before its formation. The Commission was constituted under the Act of 1998 on 5.8.1999. The circular issued before that could not have been quashed on the ground that MSEB had no power to issue them without the approval of the Commission. The decisions in that regard of Commission as well as of APTEL are liable to be set aside. In *Binani Zinc Limited* (supra), this Court held that before Commission came into existence, the power was to be exercised by the State Electricity Board. This Court held thus:

"31. The State Electricity Boards are entitled to frame tariff in terms of the provisions contained in the 1948 Act. The tariff so

framed is legislative in character. The Board, as a statutory authority, is bound to exercise its jurisdiction within the four corners of the statute. It must act in all fields, including the field of framing tariff by adopting the provisions laid down in the 1948 Act or the Rules and the Regulations framed thereunder.

32. It is one thing to say that while framing tariff the Board can only take into consideration the provisions laid down in the Schedule appended to the Act and/or the directions contained in the policy decisions issued by the State as also other statutory principles governing the same but then a tariff framed by it cannot be held to be ultra vires only because it did not take into consideration certain principles laid down in clauses (*c*) to (*g*) of sub-section (2) of Section 29 of the 1998 Act.

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41. We have, however, no hesitation in finding that the State Electricity Board had the requisite jurisdiction to revise a tariff till such time as the Commission was constituted and the purposes of the 1998 Act could be achieved through it. Till the time the Regulatory Commission was not constituted by the State of Kerala, the power to determine tariff remained with the Board under the Electricity (Supply) Act, 1948 as it was not repealed by the Electricity Regulatory Commissions Act, 1998. Parliament could not have intended to bring about a situation where no authority would be empowered to determine the tariff between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the tariff."

The decision of *BSES Ltd. v. Tata Power Co. Ltd.,* (2004) 1 SCC 195, has been explained in *Binani Zinc Limited* (supra).

25. Concerning circular dated 2.9.1999, which remained in force till 28.4.2000, the Commission as well as the APTEL were required to consider impact of Commission earlier order passed on 10.1.2002 and also its observations made in the said order that CPP is a policy matter and that Commission was recently conferred with the power under Section 22(2) of the Act of 1998, it ought to have gone into the merits of the claim. It was also pointed out on behalf of appellant-MSEDCL that it had submitted circulars for approval to Commission, which has not

A gone into the merits of the subject matter and later quashed circulars on the ground of competence. The MSEDCL filed circulars along with tariff proposal for approval as that was an essence of the tariff.

26. It has also been pointed out that in subsequent orders also, circulars as to CPP were relied upon by the Commission. It was B incumbent upon the Commission to consider the effect of its orders and the prayer made by the appellant-MSEDCL to consider merits of various circulars while fixing the tariff.

27. As dispute pertains to the period from 2.9.1999 to 28.4.2000, and it is apparent from the additional affidavit filed by the appellant-C MSEDCL that the respondents used supply of electricity to manufacture their products. The cost incurred on production has been passed on to the buyers/consumers buying their products. Hence, it would tantamount to unjust enrichment in case a refund is ordered. In the peculiar facts of the case, as the Commission earlier opined in order dated 10.1.2002 that CPP is a policy matter and it did not decide as to the merits of subject D matter as prayer for approval was made by the appellant-MSEDCL. The Commission observed that it would consider the matter in the future, but later on, without considering on merits the reasonableness of the demand, the Commission quashed the circulars. It is apparent that the liability was passed on to the buyers/consumers by the respondent nos.3 to 7 as electricity was used to manufacture their products sold in the E market, working out the price based on expenditure. It would not be appropriate in the peculiar facts of the case to direct refund to be made by the appellant-MSEDCL of the amount recovered by it as it would tantamount to unjust enrichment. Thus, in the peculiar facts and circumstances of the case, it is not considered appropriate to remit the matter to decide the dispute on merits after two decades for the period F from 2.9.1999 to 28.4.2000, during which circular dated 2.9.1999 was in force.

28. Consequently, we set aside the orders passed by the Commission as well as the APTEL and hold that circulars and the policy decisions issued before the establishment of the Commission were illegally G set aside and in the peculiar facts and circumstances of the case we set aside the order concerning refund of amount recovered by MSEB.

29. The appeal is allowed to the aforesaid extent. The parties are directed to bear their own cost incurred.

Ankit Gyan Appeal allowed.

HARYANA POWER PURCHASE CENTRE

v.

MAGNUM POWER GENERATION LIMITED & ANR

(Civil Appeal Nos. 4407-4408 of 2011)

JANUARY 21, 2020

[R. F. NARIMAN AND V. RAMASUBRAMANIAN, J]

Electricity Act – A Power Purchase Agreement (PPA) dated 12.08.1998 was entered into between the appellant and the respondent for sale by the appellant of energy produced by it after setting up of a power plant – The Commission issued a tariff order dated 12.08.2003 and held that the fixed costs were to be paid to the generator irrespective of whether energy is purchased or not – Despite this order, the HERC by order dated 23.3. 2010 dismissed the appellant's appeal filed u/s. 86(1)(F) of the Act – An appeal from this order was also dismissed by the Appellate Tribunal – Appellant demanded fixed cost from the respondent – On appeal, held: The Commission's tariff order of 12.8.2003 had made it clear that fixed costs during the currency of the agreement for generating electricity must be paid despite no supply having been made because the tariff order itself interdicted such supply in consumer interest – It is also clear that fixed cost that was demanded by the appellant from the respondent has in fact been collected from the consumer but not paid over to the appellant, which would result in an unjust windfall for the respondent – On this ground, therefore, the impugned order of the Appellate Tribunal set aside and it is declared that the demanded amount by the appellant towards fixed cost of running their unit @ 1.29 per unit be paid by the respondent.

Disposing of the appeals, the Court

HELD: These appeals can be disposed of on the short ground that the Commission's Tariff Order of 12.08.2003 had made it clear that fixed costs during the currency of the agreement for generating electricity must be paid despite no supply having been made because the tariff order itself interdicted such supply in consumer interest. This Court has also noted that the fixed cost that has been demanded by the appellant from the respondent has in fact been collected from the consumer but not paid over to

A **the appellant, which would result in an unjust windfall for the respondent. On this ground, therefore, the impugned order, is set aside and it is declared that the demanded amount by the appellant towards fixed cost of running their unit @ Rs. 1.29 per unit be paid by the respondent. [Para 4][1070-B-C]**

B CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4407-4408 of 2011.

From the Judgment and Order dated 16.03.2011 of the Appellate Tribunal for Electricity in I.A. No. 57 of 2011 in DFR No. 270 of 2011.

With

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Civil Appeal Nos. 7446-7447 of 2012.

Jayant Bhushan, Ranjit Kumar, Gurinder Singh Gill, Sr. Advs., Mohit Paul, Prashant Mehta, Ms. Neha Tanwar, Ms. Sunaina Phul, Kelan Paul, Tushar Bhushan, Amartya Bhushan, Shekhar Raj Sharma, P.P. Nayak, Ajay Pal, S. S. Shroff, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

R. F. NARIMAN, J.

Civil Appeal Nos. 7446-7447 OF 2012:

E 1. The present appeals arise from an Appellate Tribunal for Electricity order dated 23.03.2012, which, in turn, upheld the HERC order dated 23.03.2010. The brief facts necessary for decision of these appeals are as follows:-

(i) A Power Purchase Agreement (PPA) dated 12.08.1998 was F entered into between the appellant and the respondent for sale by the appellant of energy produced by it after setting up of a power plant. The salient terms of this PPA are as follows:-

"5.1. Terms of Agreement: This Agreement shall become effective upon execution and delivery by the Parties here to and unless G earlier terminated pursuant to Article 5 shall have a term from the date here of until fifteen (15) years from the Synchronization Date of last Unit. (180) days prior to the end of the full (15) Year term described above the HSEB shall have the right for an extension of this Agreement for an additional period as required on the same

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terms except the Tariff (as defined in Schedule 4) which shall be re-negotiated. Such extension shall begin upon the end of the full fifteen (15) Year term.

In the event the term is not extended, the company shall have the option to sell power to third party.

In the alternative HSEB shall have the first right to refusal to buy the Project at the book value.

5.2. Company Default

The following events unless occurring as a result of a breach by HSEB of its obligations under this agreement or an event of force majeure, shall constitute an event of default by the Company:-

(a) The Company is adjudicated bankrupt or dissolved or a receiver is appointed for its assets or proceedings for the company's liquidation (except for the purpose of amalgamation or restructuring on terms not detrimental to HSEB) are continuing more than 120 days after they were commenced.

(b) Any license or consent required by the company to perform its obligation under this Agreement is revoked or is not renewed because of the company's default.

(c) The Company fails to commence construction of the Power station to a material extent within (6) months after the date of financial closing or abandons the Power Station due to the company's default or repudiates this Agreement, contrary to the terms of this Agreement.

(d) The Company declares neither generating unit available, or no generating unit is capable of generating any electricity due to company's default for a continuous period of six (6) months.

(e) The Company commits a serious breach of this Agreement and which results in the Company being unable to carry out its obligations and where the breach is capable of being remedied it has not been remedied within 60 days after HSEB notified the company in writing of the nature of the breach and required it to be remedied.

5.3 HSEB DEFAULT

A The following events unless occurring as a result of a breach by the company of its obligations under the agreement or an event of Force Majeure, shall constitute an event of default by the HSEB.

(a) HSEB is adjudicated bankrupt or dissolved or a receiver is appointed of the whole or any part of its assets or proceedings for
B its liquidation (other than for the purpose of amalgamation or restructuring on terms not detrimental to the company) which are continuing more than 120 days after they were commenced.

(b) If an amount due equal to one months billing at 75% PLF, payable by HSEB to the company shall remain unpaid more than
C 60 days after the payment became due.

(c) Any license or consent required by the HSEB or any of its entitled successors pursuant to clause 18.10 to purchase electricity in bulk from the company or to transmit that electricity for the purpose of supplying electricity to consumers or any licensee in
D the State of Haryana is revoked or expires for any reason whatsoever.

(d) HSEB commits a serious breach of this Agreement which results in the company being unable to carry out its obligation and where the breach is capable of being remedied it has not been
E remedied within 60 days after the company notified HSEB in writing of the nature of the breach and required it to be remedied.

(e) HSEB fails to provide, maintain, restore or replenish the letter of Credit and Escrow Account as per provisions of this Agreement."

F ii) The appellant covenanted and agreed with the HSEB to design, construct and complete the Project, arrange fuel for the Plant and make available to the HSEB not later than the Required Synchronization Date, the Contracted energy and the Contracted Operating Characteristics of each Unit. Clause 8.2 which deals
G with "operation" is important and is set out herein below:

"8.2 Operation

(a) The HSEB shall issue daily Dispatch Instructions directing the Company's generating plant operator to comply with clause 5.2(a) of Schedule 6 but ensuring annual PLF of 75% failing which
H the Company will be compensated for the Constant Component

of the tariff for the short fall. The adjustment for PLF will be on semi annual basis. However, if in subsequent six months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year.

(b) Procedures for despatch of the Project shall be in accordance with despatch procedures set out in Schedule 6.

(c) The HSEB shall have the right to request that the Project be shutdown subject to ensuring annual PLF of 75%.

(d) The company shall not be required to operate the Project other than in accordance with Prudent Utility Practices or except as provided in Section 8.4, the Technical Limits as such limits may be temporarily modified.

(e) The company shall make reasonable efforts to employ qualified personnel preferably from within the State of Haryana in the operation and maintenance of the Project and to institute appropriate training programs for such personnel; provided, however, that the Company shall have sole discretion as to the personnel employed for the operation and maintenance of the project within the bounds permitted by law."

(iii) Schedule-3 of the PPA laid down a Formula for Contracted Electrical Output as well as Annual Plant Load Factor as follows:-

"3.1 Formula for Contracted Electrical Output

Contracted Electrical output per year in Million KWH (MU)

$$= \frac{(8760 \times 0.75 \times 1000)}{1000000} (1\text{-Aux Cons\%}) \times \text{Tested Capacity in MW}$$

3.2 Annual Plant Load Factor (PLF) shall be calculated as under:

$$\text{PLF\%} = \frac{\text{Actual net electrical output in interconnection point, in MU by theproject} \times 100}{\text{Net electrical output plant is capable of delivery at the interconnection point as per tested capacity of the project.}}$$

Note: Auxiliary consumption maximum allowed 3.5% including transformation losses."

A (iv) Schedule-4 which spoke of "determination of tariff" laid down the tariff as the applicable rate upto 75% Plant Load Factor (PLF) which shall be Rs. 2.40 for every KWH respondent delivered out of Rs.2.40; Rs. 1.29 shall be the constant component during the term of the PPA and Rs. 1.11 is adjustable as per a certain formula with which we are not directly concerned.

B (v) Under Schedule-6, which speaks of Despatch Procedure, the appellant is first to make an Availability Declaration as follows:

> "Availability Declaration:
>
> C Magnum Power Generation Ltd. shall, by not later than 10.00 hrs each day, submit HSEB an Availability Declaration, prepared as a best estimate on good faith, in respect of an Availability Period during the following Scheduled Day."

The respondent is then to give the appellant a Generation Schedule under Clause 5 as follows:-

D "5. Generation Schedule

5.1. HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the proceeding Day, E provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such proceeding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17.00 hrs. on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

F 5.2 Each Generation Schedule will contain the following information in respect of each relevant Schedule day:

(a) The level of Active Power which the Power Plant is required to produce by way of base load generation. The level of Active Power shall be within (-) 10% (minus ten per cent) of the Declared G Availability of that Schedule Day; subject to minimum of 75% of the contracted energy.

(b) HSEB shall ensure that the Power Station is despatched as per the Generation Schedule given to the Company for the Schedule Day.

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(c) In exceptional cases during the monsoon season, HSEB shall have the right to despatch below 75% PLF, irrespective of the provisions of Clause 5.2 (a) above." A

(vi) The Commission issued a Tariff Order dated 12.08.2003 in which it heard the Haryana Vidyut Prasaran Nigam Limited, the HERC and members of the public. In the finding insofar as the present appellant is concerned, the Commission in sub-para (G) held as follows:- B

"G. Availability of power from IPPs (Magnum)

Magnum (liquid fuel based plant) provided 94.9 MUs to HVPNL during FY 2002-03. HVPNL has proposed to procure 160 MUs from this source. This being the most expensive source is being dis-allowed by the Commission." C

The Commission then held as follows:-

"The Commission has not allowed any power to be sourced from Magnum. However, against the volume of 160 MUs proposed by the licensee the fixed cost at the rate of Rs. 1.29 per unit is being allowed." D

Ultimately, the Commission concluded:

"For Magnum, the fixed cost of Rs. 206.4 million based on the HVPNL projected volume of 160 MUs and per unit fixed charge of Rs. 1.29 has been considered. The Commission has not approved any purchase from this source in FY 2003-04, however, Commission recognizes the Fixed Cost that has to be paid to the generator irrespective of the fact whether any energy is purchased or not." E F

(vii) This Tariff Order which binds both parties was a final order, not being challenged by either party.

(viii) Despite this order and the clear direction of the Commission that fixed costs have to be paid to the generator irrespective of whether energy is purchased or not, the HERC order dated 23.03.2010 ultimately dismissed the appellant's appeal filed under Section 86(1)(f) of the Electricity Act as follows:- G

"Final Order

The above order of the Commission on each issue needs to be given a concrete shape by calculating the due amount payable H

to the either party and whatever is the net to be paid to the petitioner as per the following directions:-

After calculating the due amount within a period of one month, first instalment of the same may be paid within a period of two months and the balance amount two months thereafter. This amount however would not be reimbursed by HERC through any claim or through FSA since the respondents have been claiming FSA in respect of MPGL under the head "Deemed Generation Charges" and the same stands recovered from the electricity consumers. Hence, whatsoever the excess recovery they have made from the consumer on this account, after settlement of account with MPGL in the light of the findings in the earlier paragraphs, the remaining amount either be refunded back to the consumer or to be adjusted against the future filing with the prior approval of HERC. FSA formula approved by the Commission itself provides for subsequent adjustment of/under/over recovery of the same.

In passing, the Commission would wish for the revival of the plant to augment the generating capacity in the State. It is advised that both the parties may request a generation expert at the Central Electricity Authority (CEA) Govt. Of India to pay a visit to the site to check up the present state of the plant in presence of both the parties. The fees for this maybe equally shared. Thereafter the parties may work out a scheme for operationalising the plant for the benefit of all the stakeholders by entering into a fresh PPA/renegotiating the existing one which is workable and takes into account the financial interest of both the parties and the interest of the consumers of Haryana at large.

(ix) An appeal from this order was also dismissed by the Appellate Tribunal by judgment dated 23.03.2012 in which after setting out the various clauses of the PPA, the Appellate Tribunal held as follows:-

"33. The above analysis of Article 8.2 would indicate that the Appellant was under obligation to make available the plant to generate atleast 148.79 MU at 75% PLF. This conclusion is supported by Article 6.1(j) & (k) under which the Appellant has undertaken to supply the Contracted Capacity as defined in Schedule 3 of the PPA and works out to 143.79 for tested capacity

of the Plant. These provisions are reproduced below for better understanding and completeness.

(i) Make available to HSEB not later than the Required Synchronization Date, the Contracted energy and the Contracted operating Characteristics of each Units; and

(k) Operate and maintain the Project so as to provide the HSEB with the Contracted energy and the Contracted Operating Characteristics of the Units reliably over the Term of this Agreement, taking into account permissible degradation.

3.1 Formula for Contracted Electrical Output

Contracted Electrical output per year in Million Kwh (MU) =

$$\frac{(8760 \times 0.75 \times 1000)\,(1\text{-AuxCons.}\%) \times \text{Tested Capacity in MW}}{1000000}$$

$$= 8760 \times 0.75 \times 0.965 \times 22.67/1000 = 143.79 \text{ MU.}$$

34. In the light of above analysis, we hold that the Appellant was under obligation to declare annual availability of the plant to atleast 75% of tested capacity so as to obtain an annual PLF of 75%."

2. Mr. Jayant Bhushan, learned senior counsel appearing on behalf of the appellant has argued that because of the Commission's order of 12.08.2002 and because the power generated by the appellant would impact the consumer as electricity charges would then become very high, the Commission made it clear that the appellant's electrical energy was not a source of power which could at all be tapped as a result of which not even a single mega watt of power was supplied or sold by the appellant to the respondent. He, however, contended that this very Commission's order made it clear that this was in the consumer interest, but that the appellant would be entitled to recover its fixed cost, which unfortunately has been missed by both the Commission as well as the Appellate Tribunal in the impugned order. He also argued that both the orders were faulty in their reading of Clause 8.2 of the PPA which cannot be read so that supply at atleast 75% of the Plant Load Factor be made a condition precedent for claiming fixed energy charges, as that clause when properly read makes it clear that the PPA itself made it clear that once the power project has been set up by the appellant, the fixed energy cost will have to be paid in any event.

A 3. As against this, Mr. Gurinder Singh Gill, learned senior counsel appearing on behalf of the respondent, supported the judgments of the Commission and the Tribunal, and argued that a proper reading of Article 8.2 would make it clear that it would become operative only when declared availability is more than 75% of the Plant Load Factor.

B 4. Having heard learned counsel for both sides, these appeals can be disposed of on the short ground that the Commission's Tariff Order of 12.08.2003 had made it clear that fixed costs during the currency of the agreement for generating electricity must be paid despite no supply having been made because the tariff order itself interdicted such supply in consumer interest. We have also noted that for the years in question it C is clear that the fixed cost that has been demanded by the appellant from the respondent has in fact been collected from the consumer but not paid over to the appellant, which would result in an unjust windfall for the respondent. On this ground, therefore, we set aside the impugned order and declare that for the years in question the demanded amount D by the appellant towards fixed cost of running their unit @ Rs. 1.29 per unit be paid by the respondent within a period of 3 months from today.

5. Given the fact that the appellant has lost in both the original forum as well as the appellate forum, and which has taken over 15 years to decide, and given the fact that the respondent is a Government-E Company, we deem it appropriate that this amount be paid with simple interest @ 3% per annum. In case the amounts are not paid within three months from today, the interest component shall become 6% p.a. for payment made beyond 3 months. The impugned judgment is set aside to the extent that the appeals are decided against the respondent. The appeals are accordingly allowed.

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Civil Appeal Nos. 4407-4408 OF 2011:

6. The appeals before the Appellate Tribunal were dismissed on the ground that 327 days delay be not condoned. In any case, we find that nothing survives in these appeals after we have partly allowed the G appeals in Civil Appeal Nos. 7446-7447 OF 2012. These appeals are disposed of accordingly.

Ankit Gyan Appeals disposed of.