

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 29 of 2007

Dated this 30th day of May, 2007

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Maharashtra State Electricity Distribution Co. Ltd.

Prakashgad, Bandra (East)

Mumbai – 400 051

...Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
Centre 1, 13th Floor, World Trade Centre,
Cuffe Parad, Mumbai – 400 005
2. Union of India
3. M/s. Eurotex Industries & Exports Ltd.
Raheja Chambers, 12th Floor,
213, Nariman Point, Mumbai – 400 021
4. M/s. N. R. C. Ltd.
Ewart House, Homi Mody St.
Mumbai – 400 001
5. M/s. Lupin Chemicals Ltd.
T-142, MIDC Industrial Area,
Tarapur, District Thane – 401506
6. M/s. Amit Spinning Industries Ltd.
Lotus House, 5th Floor,
33-A, New Marine Lines,
Mumbai – 400 020.

7. L&T Limited
L&T House, N. M. Marg,
Ballard Estate, Mumbai – 400 001. ... Respondents

For the Appellant : Mr. Shaiwal Srivastava, Advocate
Ms. Deepa Chauhan, Advocate,
Ms. Kiran Gandhi, Advocate,
Mr. H. S. Jaggi, Advocate
Mr. Anami Bhattacharyya, Advocate
Mr. Hargur Jaggi, Advocate

For Respondents : Mr. Haresh Jagtiani, Sr. Advocate with
Mr. Anil D'souza, Advocate for Resp.
Nos. 3, 5 & 6

Mr. Sudhir Chandra, Sr. Advocate
Mr. Bharat Sangal and Mr. Sachin
Chandana and Ms. Sanaya
Dadachanji, Mr. R. R. Kumar,
Mr. S. Chatterji, Mr. Bhagwati Prasad,
Advocates for Resp. No.7

Mr. A. N. Haksar, Sr. Advocate
Mr. U. A. Rana, Advocate with
Mr. Lebi Rubens and Mr. Arvind
Kumar, Advocates for Resp. No.4,

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is directed against the Order of Maharashtra State Electricity Regulatory Commission (MSERC) dated 21st May, 2004 quashing the Circular of Maharashtra State Electricity Board (MSEB) dated 02.09.1999 and giving certain other reliefs to the petitioners before the Commission. The five

petitions before the Commission which were disposed of by the impugned order were against Cases Nos. 31, 33, 34, 35 of 2002 and 49 of 2003. The five petitioners were **M/s. Eurotex Industries and Exports Ltd.** (“Eurotex” – Case No. 35 of 2002), **M/s. Amit Spinning Mills** (“Amit” – Case No. 34 of 2002), **M/s. Lupin Chemicals Ltd.** (“Lupin” – Case No. 33 of 2002), **M/s. NRC Ltd.** (“NRC” – Case No. 31 of 2002) and **M/s. Larsen & Toubro Ltd.** (“L&T” – Case No. 49 of 2003). All the five petitioners before the MERC, respondents before us, challenged the MSEB’s Circular dated 02.09.1999 applicable to the captive power plants.

2. The parts of the Circular dated 02.09.1999 which were under challenge before the Commission and now the subject matter of appeal before this Tribunal relate to the condition imposed by MSEB, the appellant, in respect of reduction in contract demand and drawal of power by CPP holders from MSEB. The circular debarred reduction of contract demand for any CPP holder with contract demand of less than 5 MVA. The other condition required that CPP holder shall draw atleast 25% energy from MSEB for their monthly consumption based on the preceding twelve months consumption before commissioning of CPP. It further provided that in case of drawal of less quantity from MSEB, they would be billed for 25% energy as mentioned above and further that this energy of MSEB would be billed @ 110% of the tariff applicable from time to time. This condition is generally referred to as take-or-pay condition.

3. The five petitioners before the Commission are respondents 3 to 7 in the present appeal. All the five respondents established captive power plants on various dates, before coming into force of The Electricity Regulatory Commissions Act, 1998, with permission under Section 44 of The Electricity (Supply) Act, 1948.

4. It may be mentioned before proceeding further that four of these CPP holders initially approached the High Court of Adjudication at Mumbai and the High Court vide order dated 18th October, 2002 disposed of their petitions directing them to file their petitions before the Maharashtra Electricity Regulatory Commission and also directing the MSEB to maintain status quo in the meantime. Accordingly, the CPP holders approached the MERC with respective petitions.

5. The reliefs claimed by all the five petitioners, namely respondents 3 to 7, were common to the extent that they challenged the Circular dated 02nd September, 1999. Eurotex, respondent No.3, in addition asked for reduction in the contract demand and for permission to supply electricity from its CPP to its own unit in a nearby plot. Since common questions were raised by the five CPP holders, the Commission dealt with them together and passed a common order. For our purpose it is not necessary to state in detail the facts in respect of each of the CPP holders. Only thing necessary to be stated is the peculiar fact for Eurotex which built its CPP at Plot No. E-23, MIDC, Gokul

Shrigaon, District Kolhapur. It wanted to supply power to its own plot at MIDC which was in the vicinity but across the road. According to Eurotex it was verbally assured by the Chairman in meetings held on 13.07.99 and 03.09.99 that no permission was required for extending the CPP supply to another plot of the same CPP holder. Eurotex accordingly laid the underground cables and started supplying power from its CPP at Plot No. E-23 to its Plot No. E-1. Subsequently, Eurotex received communication from MSEB asking Eurotex to discontinue the CPP supply to its unit at E-1 on the ground that it was unauthorized. Eurotex, therefore, asked MERC for permission to supply electricity to its Plot at E-1. Eurotex further wanted to reduce its contract demand. In view of the Circular dated 02.09.1999, Eurotex wanted to combine the contract demand for its two CPP plants which together was 5300 KVA but the individual capacity of each was less than 5 MVA. This was declined on the basis of circular dated 02.09.1999.

6. The MSEB contested the claims of all the aforesaid respondents (petitioners before the Commission). It contended that it was only guided by the policy of Government and was not bound by such policy directions; that the impugned circular was a matter of economic policy keeping in view the infrastructure cost for additional generation, strengthening of transmission network and distribution from time to time on the part of MSEB; that MSEB was entitled to earn a return from the facility set up by them to meet the demand of those CPP holders especially in

case of break down of the CPP's; that the MSEB's circular of 19.09.2000 partially modified its policy and withdrew the condition of compulsory drawal of 25% of energy of MSEB Grid by the CPP holders prospectively w.e.f. 28.04.2000, and that the withdrawal was applicable only in respect of CPP already commissioned within the valid period of the sanction letters issued by the MSEB under Section 44 of The Electricity Act, 1948. Coming specifically to the case of Eurotex, MSEB said that in its CPP application it had assured that it would ask for reduction in contract demand only after 8 to 12 months from the date of commissioning of the CPP and the CPP having been commissioned only on 29.08.1998 was not entitled to reduction in contract demand so soon. It further contends that Eurotex was not entitled to combine the contract demand of the two units which were for 3500 KVA and 4323 KVA and each individual connection being below 5 MVA reduction in the contract demand was prohibited by its circulars dated 25.05.1999 and 02.09.1999.

7. The Commission culled out the following issues from the Petitions filed by the five consumers named above.

- 1) Whether MSEB was authorized under law to require the consumers to maintain a certain level of contract demand and refuse revision in contract demand as was being sought by them,

- 2) Whether Eurotex could be allowed to supply electricity from its CPP at Plot No. E-23 to their unit at Plot No. E-1 and
- 3) Whether MSEB under law was authorized to unilaterally impose on all consumers the condition to draw a certain minimum power from it and in default to pay an additional tariff.

8. The Commission had considered the issue of MSEB's power to refuse reduction in contract demand, in the case of Oil and Natural Gas Commission (ONGC). The Commission settled the issue in that case (Case No. 26 of 2002), vide an order dated 13.02.2004. The Commission held that the permission to install the CPP was to be granted under Section 44 of the Electricity (Supply) Act 1948 and such consent can be given only when the Electricity Board is unable to show that electricity required by the applicant could be more economically obtained, within a reasonable time from another appropriate source. The Commission held that therefore the admission of the Board's inability to provide electricity from any other appropriate source is implicit in the grant of permission to install the CPP. The Commission also held that the requirement of Section 44 (2) of The Electricity (Supply) Act requiring an applicant to submit such particulars as the Board may reasonably require of the station, plant or works does not empower the Board to require the applicant to maintain the minimum level to demand irrespective of amount of power required. The Commission held that the

MSEB was not entitled to impose any condition in the grant of consent like that of compulsion to maintain the minimum level of contract demand as such condition would be extraneous and had no nexus with condition of Section 44.

9. The Commission in that order rejected the argument of MSEB that the proviso to Section 44(1) of the Electricity Supply Act 1948 which required consent for establishment to be given unless the Board was able to show “to the applicant that the electricity required by him pursuant to this application could be more economically obtained within a reasonable time from any other source” should have been given wider meaning so as to take into account the cross subsidy in MSEB’s tariff and economic rather than financial costing of power generation. MSEB further pleaded that under Section 49(1) of the Electricity (Supply) Act 1948, which entitled the Board to supply electricity upon such terms and conditions as it would think fit, entitled it to impose the aforesaid condition. This argument was not accepted by the Commission as the same was a misuse of its position as a monopoly supplier. Thus in the case of ONGC, the Commission held that the condition imposed by MSEB with regard to maintaining a certain level of contract demand irrespective of their captive generation, was untenable.

10. The Commission held the same opinion in the case of the above five Petitioners before it and held that the condition to maintain a certain level of contract demand, as was being

imposed by MSEB, was clearly extraneous to the limited scope of Section 44 of The Electricity (Supply) Act 1948, under which sanction to install a CPP was accorded to them. It also held that no provision of The Electricity Reforms Act 1988 or The Electricity Act 2003 authorises MSEB to do so. It further held that MSEB should allow Eurotex to reduce its contract demand to 3000 MVA. The Commission also noticed that the MSEB's sanctioned letter April 03, 1997 had contemplated that Eurotex was at liberty to decide its level of contract demand to the extent that it desired after 8 – 12 months of commissioning of CPP. It, therefore, directed the MSEB to refund to Eurotex, by adjusting in energy bills or otherwise, any excess amount paid by Eurotex on the basis of contract demand being 3000 KVA.

11. The Commission also found that there was no requirement for Eurotex to take sanction from MSEB to extend its supply from its CPP at Plot No. E-23 to its Plot No. E-1. The Commission said that there was no provision in law under which MSEB could require Eurotex to seek its permission for doing so.

12. The Commission accordingly squashed the Circulars dated 05th October, 2001, 25th May, 1999, 02nd September, 1999 and 19th September, 2000 in so far as it purported to impose the take or pay obligations and of minimum off take requirement as also of any additional tariff for CPP holders without the approval of the Commission.

13. The Commission also held that the cancellation of the Circular following the letter dated 28th April, 2000 of the Department of Industries & Labour, Government of Maharashtra and the MSEB's Circular dated 19th September, 2000, withdrawing the condition, would take affect with the date of issuance of Circular of 02.09.1999.

14. The Commission also took note of MSEB's contention that it was entitled to a reasonable return from the infrastructure facility set up by it to meet the demand of the aforesaid consumers. The Commission did not agree that imposition of the impugned condition was a legitimate way of recovering such cost of infrastructure for keeping in readiness to supply power as back-up or standby since the tariff system already provides for such recovery.

15. The first question which has been raised in this appeal is whether the MSEB could at all have issued the impugned circular of 02.09.99 after the enactment of the Electricity Regulatory Commissions Act. There is no dispute that the impugned order is in the nature of a tariff order. It not only requires the CPP holders to draw a minimum of 25% of its energy consumption of the previous twelve months but also requires payment of tariff at 110%. It is not disputed that the Electricity Regulatory Commission Act 1998 came into force on 25.04.1998. The MERC was established on 05.08.1999. The day the impugned circular was issued the MERC was in place. Therefore, no order in the

nature of tariff could have been issued by any authority or utility without the concurrence of MERC. The Supreme Court in BSES Ltd Vs. Tata Power Co. Ltd. & Others (2004) 1 SCC195 held that the Section 22(1), 29, 45 & 52 of The Electricity Regulatory Commissions Act 1998 read with Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations 1999 provide that the Commission had the exclusive power to determine tariff after enforcement of the Act. It is the Commission which has the jurisdiction and not the State Government to pass any order relating to tariff. It also held that it was no longer open to a licensee or a utility to unilaterally increase the tariff. It further held that charging of a tariff which was not approved by Commission was an offence punishable under Section 45 of The Electricity Regulatory Commissions Act, 1998. Since the circular of 02.09.1999 was issued by the appellant after coming into force of the Electricity Regulatory Commission Act, the same was without jurisdiction and hence liable to be quashed. Therefore on this short ground the appeal of the MSEB is liable to be dismissed.

16. A question has arisen as to whether the subsequent circular dated 19.09.2000 by which the condition of 25% drawal of energy by a CPP holder was withdrawn takes effect from 19.09.2000 or from 02.09.1999. Although the appeal is liable to be dismissed for reasons mentioned above, we will like to deal with the question, since the same has been heard in detail. Withdrawal of the condition of 25% compulsory drawal of energy was

withdrawn since it was not in line with GOM policy. The relevant part of the Circular dated 19.09.2000 reads as under :

“1) The condition of compulsory drawl of 25% of energy from MSEB grid by CPP owners shall be withdrawn since it is not in line with GOM policy in the following case from the date of GOM letter i.e. 28.04.2000.

- i) The CPP owners whose CPP is already commissioned*
- ii) The CPP holder to whom NOC is already issued and who shall commission the CPP within the validity period.”*

17. The GOM letter dated 28.04.2000 shows that the letter was issued after the GOM amended the policy regarding the captive power generation vide Resolution No. 1099/SN.455/Energy-7 dated 25.04.2000.

18. Section 78(A) of The Electricity (Supply) Act 1948 requires the Board to follow the policy direction of the government. As soon as the government changed its policy direction the MSEB acted by withdrawing the condition of compulsory drawal of 25% of energy. When the Impugned Circular of 02.09.1999 was issued there was no government policy direction which could be said to have been contradictory to it. The Circular of 19.09.2000 has to take prospective effect unless otherwise prescribed. The Circular of 19.09.2000 itself says that the withdrawal takes effect from the date of GOM letter i.e. 28.04.2000. There is no reason

why the Circular of 19.09.2000 should take effect from 02.09.1999.

19. So far as Eurotex's prayer for reduction of contract demand is concerned, the appellant Board says that Eurotex had, in its application for permission to set up the CPP, had assured that it will not reduce the contract demand for the next 8 to 10 months and, therefore, the contract demand could not be reduced immediately after the establishment of the CPP which Eurotex has prayed for. This argument does not hold any water as the NOC issued subsequent to the application which does not indicate any bar for reducing the contract demand. Infact the NOC dated 07.01.1998 has the following clause regarding contract demand :

“iv. You will have the liberty to decide the level of your contract demand to the extent you desire after commissioning of the set. For such reduction one month advance intimation may please be given to SE (O&M) Circle, Kolhapur. In case of increase in connected load / contract demand service line charges as per then existing rules will be payable. “

After the appellant issued an NOC with this condition it could not decline to reduce the contract demand on the plea mentioned above.

20. On 25.05.1999, the appellant issued a Circular saying that for existing CPP holders reduction in contract demand is not permitted.

21. Our attention has been drawn to two clauses of the NOC which are as under :

- “A(x). The NOC is as per the present policy of board. However, changes, applicable for paralleling interconnection etc. would be governed as per the board’s rules from time to time.*
- B(i) Operation of the captive power plant will be governed by the Government directives in force from time to time.*

None of these two clauses specifically refer to any minimum drawal of energy or reduction in contract demand. These two clauses refer to paralleling interconnection etc. and the operation of the captive plant. Both these matters will have to be governed by Board’s rules or by the government directives. Thus so far as the contract demand was concerned it was only to go by the term in the NOC.

22. Further, the Circular of 25.05.1999 is also in the nature of a tariff order. This Circular, having been issued after the coming into force of the Electricity Regulatory Commissions Act, 1998 is bad. It has been held in the case of BSES Vs. Tata Power Co.

Ltd. (supra) that after the Electricity Regulatory Act has come into force no tariff could be revised unilaterally by any utility. In that case the TPC issued a notice enhancing tariff on 30th September, 1998. At that time, the Electricity Regulatory Commissions Act had come into force but the appropriate commission has not been established. The Supreme Court said that the notice to enhance the charges which was subsequent to the enforcement of the Act had no legal effect.

23. In our present case also, the Circular of 25.05.1999 barring reduction in contract demand was issued after coming into force of the Electricity Regulatory Commissions Act 1998. Accordingly this Circular has no legal effect. If this be so, the parties will have to be governed by the terms and conditions of the original NOC. The appellant could not have declined to reduce the contract demand of the Eurotex. The Commission was therefore right in directing the appellant to reduce the contract demand for Eurotex.

24. The Respondents 3 to 7, applicants before the Commission, challenged the Circular dated 02.09.99 inter alia on the ground that the Circular had not been brought to their notice and such a fiscal liability could not have been fastened to them without the same being brought to their notice. Admittedly, the Circular dated 02.09.99 was not addressed to any of the CPP holders. MSEB considers that it was not so necessary. The Circular came to the notice of CPP holders only when the bills according to the

circular were raised in 2001, much after 19th September, 2000 the circular was actually withdrawn. MSEB considers it to be unnecessary to inform the CPP holders. It is difficult to accept the plea of MSEB in this regard. CPP holders are governed by an NOC or by a contract under which they have been permitted to install their CPPs. Assuming that MSEB had retained their right to make any change in the terms and conditions subsequent to the grant of NOC or the contract, it could never be accepted that MSEB could change any term or condition and enforce it on a later date with retrospective effect without informing the consumer of the changed term or condition.

25. Looking at the contractual obligation, the changed conditions would become operative when both parties agree to the same. In case MSEB considers itself as its statutory right to change the conditions, new tariff will have to be looked upon as subordinate legislation. If that be so, the new tariff would become effective only when due publicity is given to it and a plea likely to be effected by it which informed of the same. It will be sufficient to mention here that the judgments of Supreme Court in the case of *B.K.Srinivasan Vs. State of Karnataka 1987 (1) SCC 658* where the Supreme Court inter alia held “Where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and conditions made to it by various processes.” Since, effected parties in this case were not informed of the changed conditions of tariff they could not be bound by it

till they were actually informed. In this case, admittedly the information in respect of the new condition was given only in 2001. Therefore, the respondents 3 to 7 could not have been billed for any consumption or non-consumption for the years 1999 – 2001 on the basis of the Circular dated 02.09.99. In this view of the matter also MSEB could not have billed the respondents 3 to 7 for past consumption/non consumption. The present appeal cannot be allowed to permit the MSEB to do so.

26. The Commission based its opinion, impugned in the present appeal, mainly on its interpretation of Section 44 of the Electricity (Supply) Act. The proviso of Section 44 of the Electricity (Supply) Act stipulates as under :

1. *Notwithstanding anything contained in any other law for the time being in force or in any licence, but subject to the provisions of this Act, it shall not be lawful for a licensee, or any other person, not being the Central Government or any Corporation created by [a Central Act] [or any Generating Company] except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station :*

Provided that such consent shall not, except in relation to a controlled station, be withheld unless within three months from the date of receipt of an application-

- (a) *for consent to the establishment or acquisition of a new generating station, the Board –*
 - (i) *gives to the applicant being a licensee an undertaking that it is competent to, and will, within twenty-four months from the*

said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application; or

- (ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source;*
- (b) for consent to the extension of any major unit of plant or works as aforesaid, the Board-*
 - (i) gives to the applicant being a licensee an undertaking that within twenty-four months from the said date either the station to which the application pertains will become a controlled station in terms of section 34, or the Board will make a declaration to the applicant in terms of section 35 offering him a supply of electricity sufficient for his requirements pursuant to his application, or the Board will make a declaration to him in terms of section 36; or*
 - (ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means;*
- (c) for consent to the replacement of any major unit of plant or works, the Board –*
 - (i) gives to the applicant being a licensee an undertaking that within eighteen months from the said date either the station to which the application pertains will become a controlled station in terms of section 34 or the Board will make a declaration to him in terms of section 36; or*
 - (ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means.*

- 2.*
- 3. ...”*

27. The proviso to Section 44 stipulates that the permission to install the CPP is to be granted unless where the licensee is able to supply electricity required by the applicant within a reasonable time and more economically from any other source. The Commission held that when permission under Section 44 is granted there is an implicit admission of the licensee's inability to provide electricity from any other source within a reasonable time and on reasonable terms.

28. We are also of the opinion that despite this being the condition for grant of permission under Section 44 it will be contradiction in terms if the MSEB is allowed by a circular to impose upon the CPP holders a condition, after the CPP is installed, requiring them to consume a minimum amount of electricity or to pay the penalty for not doing so. We are in agreement with the view taken by the Commission in this regard.

29. In view of the forgoing we find no force in the appeal. The appeal is dismissed.

Pronounced in open court on this 30th day of May, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. A. A. Khan)
Technical Member

The End