

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Dated:22<sup>nd</sup> Aug , 2014**

**Present:**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**Appeal No. 295 of 2013**

**Tata Motors Limited**  
**House No. 24, Homi Mody Street**  
**Fort, Mumbai – 400 001**

**... Appellant**

**Versus**

- 1. Maharashtra Electricity Regulatory Commission**  
**World Trade Centre**  
**Centre No. 1, 13<sup>th</sup> Floor,**  
**Mumbai – 400 005**
  
- 2. Maharashtra State Electricity Distribution**  
**Company Limited**  
**Prakashgad, Bandra (East)**  
**Mumbai 400 051**  
**Maharashtra**

**.....Respondent(s)**

**Counsel for the Appellant (s) : Mr. M.G. Ramachandran**  
**Ms. Swagatika Sahoo**  
**Ms. Anushree Bardhan**  
**Ms. Poorva Saigal**

**Counsel for the Respondent (s) : Mr. Jayant Bhushan, Sr. Adv.  
Mr. Buddy A. Ranganadhan for R-1  
Mr. Atul Nanda, Sr. Adv.  
Mr. Gaurav Pathania, Sr. Adv.  
Mr. Ravi Prakash  
Mr. Samir Malik for R.2  
Mr. Subodh S. Patil  
Ms. Supriya Deshpande  
for Intervener  
(I.A. 42/14)  
Mr. Amit Kapur  
Mr. Apoorva Misra  
Mr. Abhishek Munot for Intervener  
(I.A. 12 of 2014)  
Mr. G. Umapathy for Chamber of  
Melathwada Industries**

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Tata Motors Limited is the Appellant herein.
2. Aggrieved by the impugned Order dated 05.09.2013, whereby the Maharashtra State Commission *Suo Motu* determined the supplemental charges payable by the Consumer of the Distribution Company by substantially revising the Retail supply tariff, the Tata Motors Limited being one of the consumers has filed this Appeal.
3. The short facts are as follows:

(a) The Appellant, Tata Motors Limited is carrying on the business of manufacturing of vehicles in the State of Maharashtra.

(b) The Appellant is a consumer of the Maharashtra State Electricity Distribution Company Limited (MSEDCL), Respondent No.2. The Appellant is being supplied with electricity by the MSEDCL- the Distribution Company on the terms and conditions decided by the State Commission from time to time.

(c) The State Commission determined the tariff for the Retail supply of electricity by the Distribution Company-MSEDCL by the Order dated 16.08.2012. As per this Order, the tariff came into effect from 01.08.2012.

(d) Thereupon, on 08.02.2013 the State Commission decided the Petition No. 77 of 2012 filed by the Maharashtra State Power Generation Company Limited. This Generating Company has been selling the entire power generated by it to the Distribution Company-MSEDCL. By this Order dated 08.02.2013, the State Commission allowed the Review and permitted the Generating Company for the recovery of additional money over and above the tariff

determined earlier by the Order dated 21.06.2012 in case No. 6 of 2012.

(e) Consequently, the Distribution Company (R.2) on 01.03.2013 filed a Petition in Case No. 32 of 2013 before the State Commission seeking for Recovery of additional amount from the consumers on account of the revision in the tariff as per the Order dated 08.02.2013 payable by the MSEDCL, the Distribution Company to the Generating Company.

(f) The State Commission after going through the Petition dismissed the same through Order dated 30.04.2013 thereby rejecting the claim of the Distribution Company- MSEDCL holding that unless the mandatory provisions of Section 64 of the Act, 2003, with regard to the procedure, such as the publication and the receipt of objections and comments from the Public etc., are satisfied, claim for revision in the tariff could not be entertained.

(g) The State Commission, however, permitted and directed the Distribution Company-MSEDCL to include the impact of the Order dated 08.02.2013 passed in the Petition filed by the Generating Company for the next control period.

(h) At that stage, the Maharashtra Transmission Company Limited filed a Petition in Case No. 56 of 2013 for fixing the Transmission tariff for the intra State Transmission system. The State Commission, in this Petition, passed the Order dated 13.05.2013 approving the multiyear tariff payable by the Distribution Company-MSEDCL to the above Transmission Company for the financial year 2013-2014 to 2015-2016. This Order dated 13.05.2013 provided for an increase in the monthly transmission tariff payable by the consumers from 01.04.2013 onwards.

(i) In the mean time, the Appeals were filed before the Tribunal in Appeal Nos. 34 of 2012 and 47 of 2012. In these Appeals, some directions were issued to the State Commission by this Tribunal. On that basis, the Generating Company filed a petition in Case No. 28 of 2013 for implementation of the directions issued by this Tribunal for the payment of the amounts due to the Generating Company by the Distribution Company-MSEDCL. In this Petition, the Order was passed by the State Commission on 03.09.2013 allowing the Generating Company to recover the amount of Rs. 628.90 Crores.

(j) In another Application filed by another Generating Station i.e., Khaperkheda Generating Unit, the State Commission decided the final tariff on 04.09.2013, for the financial year 2012-2013. As a result of the Order dated 04.09.2013, the Distribution Company-MSEDCL was directed to pay to the Generating Company and to the Transmission Company by primarily determining the charges. However, in this Order, the State Commission did not determine the Retail supply tariff.

(k) But, the State Commission on the next day itself i.e. on 5.9.2013 initiated *Suo Motu* proceedings in Case No. 95 of 2013 and passed the impugned Order on the same day, permitting the Distribution Company-MSEDCL to recover the two additional charges from its consumers in the form of additional energy charge by revising the Retail supply tariff.

(l) On the basis of this impugned Order, dated 05.09.2013, the Distribution Company-MSEDCL issued a Commercial Circular dated 07.09.2013 proposing to recover those additional charges from its consumers.

(m) On coming to know of this impugned Order passed by the State Commission, through the

Commercial Circular dated 07.09.2013, the Appellant has filed this Appeal, on being aggrieved.

4. The learned Counsel for the Appellant while assailing the impugned Order dated 05.09.2013 has urged the following grounds:

(a) The State Commission passed the impugned Order dated 05.09.2013 in complete contravention of the provisions of the Electricity Act, 2003, particularly Sections 62, 64 and 86 (3) of the Act.

(b) The State Commission had initiated *Suo Motu* proceedings in Case No. 95 of 2013 on 05.09.2013 and decided the matter revising the retail supply tariff on the same day itself without any public notice, public hearing or giving an opportunity to the consumers at large to make objections, comments and suggestions etc.

(c) The State Commission has not followed the procedure specified under Section 64 of the Act while revising the tariff for the MSEDCL – Distribution Company and thereby substantially burdening the consumers at large. The revision and re-determination of tariff amounts to determination of tariff under Section 64 of the Act. Therefore, the State Commission mandatorily is required to give public

notice, invite comments, hold public hearing and decide the matter after considering all suggestions, objections etc., in a transparent manner. This has not been done in the present case.

(d) Section 86 (3) of the Act provides that the State Commission shall ensure transparency while exercising its powers and discharging its functions. The State Commission in the present case has acted in gross violation of the principles of Natural Justice and transparency while passing the impugned Order dated 05.09.2013 thereby burdening the consumers at large causing tariff shock on them.

(e) The State Commission committed gross errors in the calculation of the amount to be payable by the consumers to the Distribution Company-MSEDCL. In fact, the State Commission proceeded to allow substantial recovery of money by the Distribution Company-MSEDCL from the consumers at large without considering the fact that there will be an aspect of double payments.

(f) It is not open to the State Commission to merely approve the aggregate amount to be recovered from the consumers and leave the methodology of determining the tariff for each category of consumers

to the Distribution Company-MSEDCL as the same would amount to delegation of essential regulatory functions by the State Commission. This is not permissible under Law. In fact, there are apparent computational errors while revising the retail supply tariff.

(g) In terms of the impugned Order dated 05.09.2013, the Distribution Company-MSEDCL has been permitted to recover Rs. 4524.63 Crores from the consumers in proportionate to the approved billing rate of the respective consumers category. The determined rates as referred to in the Circular are not in accordance with the requirement of determining the charges proportionate to the approved average billing rate of consumers' category. The State Commission ought to have decided on the per unit tariff to be recovered from each category of consumers, instead of leaving the tariff design and tariff rate to the Distribution Company-MSEDCL.

(h) The impugned Order of the State Commission has resulted in a significant tariff shock to the consumers i.e., upward of 20 % hike. The huge amount of under recovery was on account of the deficiencies on the part of the Distribution Company-MSEDCL in not properly placing the materials before

the State Commission at the relevant point of time for passing appropriate tariff Orders.

5. On these grounds, the learned Counsel for the Appellant has strenuously argued that the impugned Order which suffers from various infirmities is liable to be set aside.
6. During the pendency of the Appeal, several impleading Applications have been filed by the various Companies, the consumers, who are similarly situated with that of the Appellant. They also made submissions in support of the submissions made by the Appellant assailing the impugned Order and cited several authorities.
7. In reply to the above submissions made by the learned Counsel for the Appellant and the interveners, the State Commission has made the following submissions:
  - a) The impugned Order is only a consequential Order to formalise the recovery of amounts already considered and there has been no double counting.
  - b) The Order dated 05.09.2013 is only an interim Order under Section 94 (2) of the Electricity Act, 2003. This Order is subject to verification at the stage of final tariff Order. Therefore, there is no need for public hearing as the same would be an empty formality.

- c) The State Commission passed the impugned Order on the basis of the earlier Orders, in which methodology for recovering the amount from the different category of consumers was approved by the State Commission.
- d) Even assuming that Section 64 of the Act was not complied with, none of the Appellants could escape from the conclusion that even if a public hearing process had been conducted, there is nothing left for the State Commission to decide upon regarding such amounts, since all such recoverable amounts have already been approved by the State Commission by its various Orders. At no point of time, the Appellant has been able to point out as to what prejudice has been caused to the Appellant by virtue of the impugned Order.
- e) In the impugned Order, the State Commission has maintained the *inter se* balance between the various tariff categories by directing that the additional amount would be recovered in terms of the proportionate average billing rate of each consumer category. Thus, the State Commission has not modified the tariff design by means of the impugned Order.
- f) The issue of computational error raised by the Appellant is with regard to computation of additional energy charges per unit. This has not come before the State Commission

prior to filing of this Appeal by the Appellant. This error is not in relation to the impugned Order but in relation to the computation done by the party by the relevant additional energy charges. Therefore, the same does not create a ground for setting aside the impugned Order as the matter does not point to any error in the Order of the State Commission.

On the basis of the above reply, the learned Counsel for the State Commission has justified the impugned Order.

8. In defending the impugned Order, the learned Counsel for the MSEDCL also submits that the impugned Order is only an executorial Order passed in pursuance of the earlier Orders of the State Commission, and that therefore, no infirmity could be found out in the impugned Order.
  
9. In the light of the rival contentions, the following questions may arise for consideration.

***(a) Whether the State Commission is right in proceeding Suo Motu in a matter to pass the impugned Order revising the Retail supply tariff without giving a public notice or public hearing and without following the procedure specified under Section 64 of the Electricity Act, 2003 ?***

***(b) Whether the State Commission has acted in violation of the principles contrary to Section 86 (3) of the Act, 2003, providing for the transparency to be maintained ?***

***(c) Whether the State Commission is right in allowing the entire claim of the Distribution Company-MSEDCL as a pass through in the tariff within six (6) months after passing the tariff Order, resulting in substantial increase in the tariff causing the tariff shock to the consumers ?***

***(d) Whether the State Commission has correctly determined the unit rate to be applied by MSEDCL – R.2 for recovery of the amount from the consumers ?***

10. The learned Counsel for the Appellant as well as the intervener to substantiate the grounds urged by him has cited the following decisions:

(a) Hooghly Chamber Of Commerce and Industry and Anr. V. W.B. Electricity Regulatory Commission And Ors. (Judgment Dated 04.04.2011 Of Ate In Appeal No. 173 Of 2010;

(b) W.B. Electricity Regulatory Commission V. CESC Limited (2002) 8 SCC 715;

(c) Swadeshi Cotton Mills V. Union Of India (1981) 1 SCC 664;

(d) Vidarbha Industries Association V. MERC And ORS (Judgment Dated 03.05.2013 In Appeal No. 197 Of 2011 & 119 Of 2012);

(e) Essar Power Limited V. UPERC & Anrs (2012 ELR APTEL 182);

(f) Tariff Revision (Suo-Moto) O.P. No. 1 Of 2011 (ELR APTEL 1742);

(g) N C Dhoundial V. Union Of India (2004 (2) SCC 579);

(h) Cellular Operators Association of India V. Union of India (2003 (3) SCC186);

(i) State Of Punjab V. Devans Modern Breweries Limited (2004 (11) SCC 26)

(j) State of Assam V. Barak Upatyaka D.U Karmachari Sanstha (2009) 5 SCC 694.

11. The learned counsel for the State Commission also while defending the impugned Order has cited the following Judgments:

(a) S.L. Kapoor Vs. Jagmohan (1980 (4) SCC 379);

(b) Union Of India Vs. Alok Kumar (2010) 5 SCC 349;

(c) ECO; Vs. B. Karunakar (1993 (4) SCC 727);

(d) Aligargh Muslim University Vs. Mansoor Ali Khan (2000 (7) SCC 529);

(e) Mohd Sartaj Vs. State Of Up (2006 (2) SCC 315);

12. Similarly the learned Counsel for the MSEDCL has also cited the following authorities:

- (a) Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan (2000 (7) SCC 529);
- (b) Managing Director, ECIL Hyderabad & Ors. Vs. B. Karunakar & Ors; (1993 (4) SCC 727);
- (c) State Of U.P. Vs. Harendra Arora (2001 (6) SCC 392);
- (d) Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Haryana Electricity Regualtory Commission (APTEL Judgment Dated 18.04.2011 In Appeal No. 118 Of 2011);
- (e) Maharashtra State Power Generation Co. Ltd. Vs. Maharashtra Electricity Regualtory Commission (APTEL Judgment Dated 27.04.2011 In Appeal No. 191 Of 2009);
- (f) Regina Vs. Secretary Of State For Transport Ex Parte Gwent County Council ( 1987 (1) AER 161;
- (g) Malloch Vs. Aberdeen Corporation ( 1971 (1) WER1578).

13. Let us refer to the ratio of these Judgments at the appropriate stage later.

14. All these questions framed above, would relate to the issues which are inter connected. we shall deal with these issues together.

15. It cannot be debated that the impugned Order has been passed on 05.09.2013 revising the Retail supply tariff by increasing the tariff by permitting the Distribution Company for recovery of the additional charges from its

consumers, without public notice or public hearing; and without inviting the suggestions, comments, objections etc., from the consumers and stake holders. On this point, elaborate arguments have been advanced by the learned Counsel for the Appellant as well as the learned Counsel appearing for the interveners. Their main contention is that the State Commission while passing the impugned Order has not followed the mandatory provisions under Section 62, 64 and 86 (3) in violation of the principles of natural justice and transparency and this would vitiate the impugned Order.

16. Per contra, the learned Counsel for the State Commission in defending the impugned Order submitted that public hearing which is an empty formality is not necessary in the present case as this Order dated 05.09.2013 is only an interim Order under Section 94 (2) of the Electricity Act as this Order would be subject to the verification at the stage of the final tariff Order.
17. We have carefully considered the submissions of the parties on this issue.
18. At the outset, it shall be observed that this submission for justifying the impugned Order mentioning that it is only an interim Order has no basis whatsoever.
19. A reading of the entire impugned Order would show that it neither refers to Section 94 (2) nor mentions about the

nature of the Order which is considered to be interim Order pending final tariff Orders.

20. It is settled law that an interim Order is passed during the pendency of the proceedings and the same operates till the final Order is passed, unless otherwise specified in the final Order. In the instant case, the impugned Order is not an interim Order as the impugned Order has decided the issues finally. As laid down by the Hon'ble Supreme Court, it is a settled legal principle that an interim Order is supposed to be in the nature of temporary arrangement. It is primarily on the basis of *prima facie* finding to preserve the status quo till the matter is finally decided.
21. In the present case, the *Suo Motu* Order which has been passed by the State Commission on 05.09.2013 has finally determined the issues by passing on the burden to the consumers in the nature of additional energy charges to be recovered from the consumers by revising and increasing the Retail supply tariff. As mentioned above, it is nowhere mentioned in the impugned Order that it is an interim Order. Moreover, the *Suo Motu* proceedings was taken up on 05.09.2013 and the same was disposed of on the same day by passing the impugned Order. Thus, both, the initiation of *Suo Motu* proceedings and disposal of the same without any Application from any party and without hearing any party concerned have been done on the very same day, that too

without mentioning the reasons for the same. This is quite strange. As a matter of fact, the State Commission has failed to explain the urgency for issuing the so called interim Order. There is no cause of action, whatsoever, for the State Commission to initiate *Suo Motu* proceedings suddenly on 05.09.2013 and to pass the Order in favour of the Distribution Company on the same day permitting them to recover the additional charges from the consumers at large, thereby passing on the additional burden on the consumers. Had there been any urgency, the Distribution Company would have filed a Petition before the State Commission mentioning the urgency. In that event, the State Commission would very well entertain the Petition, pass the appropriate Order taking note of the so called urgency, after recording the same in the impugned Order. But that is not the case here. Hence, it has to be observed even at the threshold that the State Commission has initiated *Suo Motu* proceedings hurriedly and passed the impugned Order in favour of the Distribution Company on the same day without hearing any party and without mentioning any reasons whatsoever either in the impugned Order or in the submissions made by the learned Counsel for the Respondents.

22. In the above context, we are constrained to record our disapproval over the hurried approach of the State Commission in deciding the very serious issues without

hearing any party especially the consumers and without mentioning any urgency, which is not appreciable.

23. Let us now deal with the issue of the violation of principles of natural justice and the lack of transparency while passing the impugned Order, in the light of the grounds raised by the Appellant.

24. By virtue of the impugned Order, the State Commission directed the Distribution Company to recover two additional charges from its consumers. In the form of additional energy charges by the impugned Order, the State Commission directed the Distribution Company to recover Rs.3450.12 Crores from its Consumers. By this Order, the State Commission has *Suo Motu* revised the previous tariff Order and determined or re-determined the tariff payable by all the consumers to the Distribution Company. According to the learned Counsel for the Appellant, the directions were issued by the State Commission through the Impugned Order in blatant violation of Sections 62, 64 read with Section 86 (3) of the Electricity Act, 2003.

25. First let us first refer to Section 62 of the Act.

***“Determination of Tariff:***

***(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.”***

As per this provision, the tariff determined earlier should not be amended more frequently. It can be amended more than once in a

financial year in respect of any changes in terms of fuel surcharge formula as may be specified. Since it is specifically mentioned that “fuel surcharge formula as may be specified”, the State Commission is permitted to amend tariff more than once in a year only in respect of fuel surcharge, with reference to the formula which has already been specified.

26. Let us refer to Section 64 of the Act.

**64. Procedure for tariff order:**

*(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

*(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.*

*(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-*

*(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;*

*(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made there under or the provisions of any other law for the time being in force:*

*Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.*

*(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.*

*(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor:*

*(6) A tariff order shall, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order.*

A perusal of Section 64 in entirety would show that it specifically mentions that while determining the tariff, there must be publication inviting the public, so that public will be given an opportunity to make their suggestions and objections for consideration by the State Commission, which in turn will determine the tariff within 120 days.

27. Let us refer to Section 86 (3) of the Act.

**“86. Functions of State Commission**

*The State Commission shall ensure transparency while exercising its powers and discharging its functions.*

This Section would refer to the transparency to be ensured while exercising the power of determination.

28. According to the learned Counsel for the Appellant as well as the learned Counsel for the Intervener, this mandatory procedure contemplated under Sec. 64 & 86 of the Act have not been complied with. According to these Sections, the State Commission was required to initiate a proceeding for revision of tariff, and the Distribution Company as a licensee was required to publish the proposed revision, and the notice of the Petition was required to be advertised and an opportunity should have been provided to the consumers at large to file their objections and suggestions. This Tribunal has earlier held that the tariff can be revised without following the procedure under Section 64 provided the revision in tariff is in terms of fuel surcharge formula as specified by the State Commission through Regulations or Tariff Order. No such revision through fuel surcharge mechanism has been carried out by the State Commission in the Impugned Order.
29. Admittedly, as indicated above, the State Commission initiated the *Suo Motu* proceedings in Case No. 95 of 2013 only on 05.09.2013 and decided the matter on the same day without any public notice, and public hearing and without giving the opportunity to the consumers to make the representations, objections or suggestions in the matter.

30. According to the Respondent, the impugned Order passed on 05.09.2013 was only based upon earlier Orders passed on 03.09.2013 and 04.09.2013, and that therefore public hearing is not necessary, since it would be only an empty formality. To understand this concept, we have to see the factual background of the case.
31. The State Commission on the Application filed by the Distribution Company – MSEDCL in case No. 19 of 2012 determined the tariff for Retail supply of electricity by the Order dated 16.08.2012. By this Order, the Retail supply tariff was determined for the financial year 2012-2013. The said previous tariff Order came into effect from 01.08.2012. It was in force till the time of passing the impugned Order dated 05.09.2013. The said previous tariff Order was passed after duly complying with the due procedure prescribed under Section 64 of the Act in a transparent manner.
32. Thereafter, the Review Petition had been filed by the Generating Company against the earlier Order dated 21.06.2012 passed by the State Commission relating to the final true up for the financial year 2010-11 and also approval of the aggregate revenue requirement and tariff for the financial years 2011-12 and 2012-13. The State Commission allowed the Review Petition filed by the Generating Company and approved the recovery of additional amount by the Generating Company from the Distribution Company by the Order dated 08.02.2013.

33. The Generating Company has been selling all the electricity generated by it to the Distribution Company, as such, the Distribution Company is the only beneficiary of Generating Company. Therefore, the Generating Company's cost has to be entirely recovered from the Distribution Company. Accordingly, the additional amount was approved by the State Commission in its Order dated 08.02.2013.
34. The orders passed in the Review Petition filed by the Generating Company, could not be factored into Distribution Company tariff approved through the previous tariff Order issued on 16.08.2012, because this Order had been passed even prior to the Order dated 08.02.2013. In view of the same, the MSEDCL – R.2 filed a Petition in Case No. 32 of 2013 on 01.03.2013 seeking the mechanism for recovery of this additional amount by the Distribution Company from its Consumers, which became payable by the Distribution Company to the Generating Company in accordance with the directions of the State Commission in its Review Order dated 08.02.2013 .
35. However, the State Commission did not allow the said Application filed by the Distribution Company in Case No. 32 of 2013, on the ground that the mechanism of pass through of additional expenses would amount to amendment of existing tariff, and the same cannot be allowed, unless the mandatory procedure of tariff determination like issuing

public notice, public hearing, consideration of the suggestions and objections etc., were complied with. Therefore, the State Commission without allowing the said claim directed the Distribution Company-MSEDCL to include the impact of the Order dated 08.02.2013 passed in the Review Order in the tariff Petition to be filed for the next control period. This Order had been passed on 30.04.2013. The relevant portion of the Order is as follows:

*“7. Heard the Petitioner. The Commission observed that the process of Tariff Determination of MSEDCL for second control period i.e., FY 13-14 to FY 15-16 has been started. MSEDCL has filed the Business Plan for second control Period. Subsequent to the approval of Business Plan MSEDCL will require to file its MYT Tariff Petition. The sort of pass through that the Petitioner is seeking through the present Petition would amount to an amendment to the existing tariffs. Section 62 (4) of the Electricity Act, 2003 provides as follows:*

*(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*

*9. The proposed pass through is not on account of fuel related expenses. Hence, keeping in view the provisions of Section 62 (4) as well as the need to go through the mandatory procedure of tariff determination; public notices; public hearings; consideration of suggestions and objections etc., MSEDCL may include the financial impact of additional payment to be made to the MSPGCL in the determination of tariff for the second control period. In this manner, the requirements of law can be fulfilled.”*

36. A perusal of this Order would clearly indicate that the State Commission was of the view that there cannot be any automatic revision of tariff on the basis of increase in the revenue requirements of the Distribution Company-MSEDCL

in pursuance of the Orders passed by the State Commission. The only exception as provided in Section 62 (4) of the Act is only with regard to the charges expressly permitted under the terms of any fuel surcharge formula as may be specified. The terms specified indicates that it must be specified through the Regulations. Accordingly, the State Commission is required to notify a Regulation setting out the fuel surcharge formula for any automatic adjustment of tariff. This Tribunal has earlier held that the Fuel Surcharge Formula can also be decided through the Tariff Order.

37. The State Commission, admittedly, has not notified any Regulations with regard to adjustment in the tariff to be made as per the increased amount payable by the Distribution Company-MSEDCL to the Generating Company or to any other utilities in regard to the additional fixed charges or the capacity charges. Only on the basis of that view, the State Commission has correctly passed the Order earlier on 30.04.2013 holding that the claim for revision of Retail supply tariff could not be automatic, and therefore, the State Commission thought it fit to reject the said Petition and directed the Distribution Company-MSEDCL to include the impact of additional payment during the determination of tariff in the tariff Petition to be filed for the next control period.
38. Having held so in the Order dated 30.04.2013, the State Commission after passing the Orders on 03.09.2013 by way of implementation of the directions given by this Tribunal for

payment of the amounts due to the Generating Company, and the Order dated 04.09.2013 in respect of the payment to be made to the another Generating Company, has hastened to take up the matter by way of *Suo Motu* proceedings on 05.09.2013 and on the same day passed the impugned Order permitting the Distribution Company-MSEDCL to collect additional charges from the Consumers at large. In other words, the State Commission, having held on 30.04.2013 that the revision of retail supply tariff cannot be an automatic one on the basis of the earlier Orders passed in favour of the Generating Company without complying with the mandatory procedure, the State Commission has now taken a complete U-turn stand on 05.09.2013 to take up the matter *Suo Motu* and to pass the Order in favour of the Distribution Company without any Application from any party, without hearing the persons concerned and without any reasons whatsoever.

39. This conduct on the part of the State Commission, in our view, does not sound well. The only reason given by the Respondents, both the State Commission as well as the Distribution Company-MSEDCL which is not referred to in the Impugned Order is that no prejudice had been caused to the Appellant and the other Consumers due to this Order as they cannot escape from the conclusion arrived at by the State Commission. It is further stated that even if a public hearing process had been conducted in the present case there is nothing left for the State Commission

to decide upon any further issues as all the recoverable amounts have already been approved by the State Commission, and as such, the public hearing is only an empty formality.

40. In order to substantiate the plea about this empty formality test, the learned Counsel for the State Commission as well as the Distribution Company-MSEDCL have cited the following decisions:

- (a) S.L. Kapoor Vs. Jagmohan (1980 (4) SCC 379;
- (b) Union Of India Vs. Alok Kumar ((2010) 5 SCC 349);
- (c) Mohd Sartaj Vs. State Of U.P. (2006 (2) SCC 315);
- (d) Viveka Nand Sethi Vs. Chairman, J & K Bank Ltd & Ors. (2005 (5) SCC 337;
- (e) Managing Director, Ecil, Hyderabad & Ors Vs. B. Karunakar & Ors. ( 1993) 4 SCC 727.

41. The learned Counsel laid emphasis on the observation made in **S.L. Kapoor Vs. Jagmohan's case**, wherein it was held that "on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because Courts do not issue futile Writs". But certain exceptions were laid down to this ruling, namely "if upon admitted or indisputable facts only one conclusion was

possible, then in such a case the principle that breach of natural justice was in itself prejudice, would not apply". In **Union of India Vs. Alok Kumar's** case reliance was placed on S.L. Kapoor's case, which followed the principle in **RIDGE VS. BALDWIN (1964 AC 40, 68: 1963 2 All ER 66, 73)** , wherein it was further observed that "if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in itself prejudice would not apply. Thus every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings." In the case of **Mohd Sartaj Vs. State of UP's** case reliance was placed on M.C. Mehta Vs. UOI (1999 (6) SCC 237, wherein it was held that "there can be certain situation in which an Order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India". Further, in **Viveka Nand Sethi Vs. Chairman, J & K Bank Ltd. & Ors.** (2005) 5 SCC 337 it was held that "when facts are admitted, an enquiry would be an empty formality." In **Managing Director, ECIL Vs. B. Karunakar's** case the Hon'ble Supreme Court had observed that " .....if the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures."

42. On going through these decisions, it is evident that these decisions would be of no relevance to the questions raised by the Appellant in the present case, as we are mainly concerned with the question of violation of principles of natural justice and the lack of transparency as provided under Sections 62, 64 and 86 (3) of the Act.
43. According to the learned Counsel for the Appellant, revising the Retail supply tariff would amount to re-determination of tariff fixed recently, and while such a re-determination process has been taken up by the State Commission, the State Commission ought to have followed the mandatory provisions of Sections 62, 64 & 86 (3) of the Act by following the principles of natural justice in a transparent manner.
44. As mentioned earlier, there cannot be any automatic revision of tariff on the basis of the increase in revenue requirement of the Distribution Company in pursuance of the earlier Orders passed by the State Commission. Even to adopt Fuel Surcharge Formula, the State Commission has to frame Regulations under Sec. 62 (4) setting out the fuel surcharge formula for any automatic adjustment of tariff. In this case, as indicated above the State Commission has not notified any Regulation in regard to adjustment in the tariff to be made as per the increased amount payable by the Distribution Company either to the Generating Company or to the Transmission Company or

to any other utilities, particularly, in regard to the additional fixed charges, which has been ordered by the State Commission in the impugned Order without following the mandatory provisions.

45. It is important to point out, at this juncture, that the State Commission cannot proceed on the assumption that the Consumers in the State could not have any objection to the tariff increase pursuant to the earlier Orders passed on 03.09.2013 & 04.09.2013 and in other cases relating to the liability of Distribution Company-MSEDCL. It is also strange to notice that in the impugned Order, the State Commission has left the entire responsibility of determination of per unit tariff to be charged from different categories of Consumers to the Distribution Company-MSEDCL. Admittedly, this has been done without hearing the Consumers on the aspect of impact of significant increase in the tariff. According to the Appellants, to deny the affected consumers an opportunity to be heard would lead to gross injustice and would be blatant violation of the principles of natural justice. We find force in this contention of the Appellants.

46. The Appellant has pointed out one more aspect in this case. The Appellant has submitted that by the impugned Order the State Commission directed the Distribution Company-MSEDCL to recover Rs. 3450.12 Crores from its Consumers. Thus, the State Commission has *Suo Motu*

revised or amended the previous tariff Order and determined or re-determined the tariff payable by all the Consumers of the State to the Distribution Company-MSEDCL. The Appellant's grievance is that by the order of the State Commission, whereby straight away re-determining the tariff has not only violated Section 64 read with Section 86 (3) of the Act, in which the mandatory procedure has been provided for determination of tariff, but also its own Regulation 6, 8, 10 of the MERC (Terms and Conditions of Tariff Regulations), 2005. It is pointed out by the learned Counsel for the Appellant that these Regulations would provide the following procedure.

- a) The Application for determination of tariff shall be made in such a form and manner and accompanied with such fees as prescribed under the tariff Regulations. Thus, these Regulations have specifically used the term "shall" making its compliance mandatory in nature, as provided under Sec. 64 (1) of the Act.
- b) Upon intimation from the State Commission that the Application is ready for publication; Application shall be published in two English and two Marathi News Papers of wide circulation in the area, for which the Application pertains. These Regulations provide for other methodologies also, in which the Application could be

published. These provisions also specifically used the term “shall” like that of Sec. 64 (2) of the Act.

c) These proceedings to be conducted for the determination of tariff in accordance with the procedure under the MERC (Conduct of Business Regulations), 2004.

d) The tariff Order shall be passed by the State Commission after considering the objections and suggestions of the Consumers.

Admittedly these procedures have not been followed in this case.

47. The tariff Regulations of the Electricity Act do not exempt the State Commission from complying with the mandatory procedure like public hearing as prescribed above. Once the right of opportunity for submitting the suggestions or objections has been provided to the Consumers by the Electricity Act as well as by the tariff Regulations, the same cannot be thrown away just like that on account of any urgency by passing an Order passing on additional burden on the Consumers.

48. The question of empty formality would not arise in this case because this is a case where the State Commission even without an Application filed by the Distribution Company-MSEDCL took up the matter *Suo Motu* on

05.09.2013 and passed an Order permitting the Distribution Company to recover the additional charges from the Consumers even without hearing the parties including the Consumers, who are the real affected parties. The provisions under the Act as well as the Regulations mandate the State Commission to consider the objections and suggestions of the public and decide the matter. In fact, the relevant Sections cast a duty upon the State Commission to apply its mind on the objections and suggestions made by the public at large before approving or rejecting the Applications for re-determination of tariff.

49. This ratio has been rendered by this Tribunal in the Judgment in Appeal No. 173 of 2010 dated 04.04.2011 in the matter of ***Hoogly Chamber of Commerce and Industry & Anr. Vs. West Bengal Electricity Regulatory Commission & Ors.*** The relevant observation is as follows:

“we deem it appropriate to remand the matter to the State Commission for re-determination of tariff with the following directions:

1)The State Commission shall direct West Bengal discom to file composite tariff in accordance with the Tariff Regulations and to publish the same inviting objections and suggestions from the public.

2)The State Commission shall give reasonable time to public to file their objections and suggestions.

3)State Commission shall consider the pleadings and documents and pass a revised tariff order for West Bengal discom within the stipulated time as prescribed under Section 64 of the Act. We make it clear that the State Commission is required to follow the procedure contemplated under Section 64 of the Act and pass the final order in accordance with law by invoking the powers conferred under Section 86 of the Act. The State

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*Commission is required to deal with the matter and decide the issues by observing the required procedure as expeditiously as possible.”*

50. It was also held by the Hon’ble Supreme Court laying down the principles relating to the right of consumers representation in the electricity sector in the case of **WEST BENGAL ELECTRICITY REGULATORY COMMISSION VS. CESC LIMITED (2002 (8) SCC 715)**, the relevant paragraphs are as follows:

*“...though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable, the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned.”*

In this context, it is relevant to mention that the Act of 1998 brought about a substantial change in the manner of determination of tariff and conferred the said power on the Commission, the relevant provision is as follows:

*“....the primary object of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interest of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interest of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff.*

*“.....it may be worthwhile to notice the mandate of Parliament in Section 37 of the 1998 Act to the Commission that the Commission should ensure transparency while exercising its*

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**powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, itself, shows participation by interested persons.”**

**“....a combined reading of these provisions of the Act, Rules and regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission.”**

51. Similarly, this Tribunal has held that the principles of transparency and natural justice requires that the State Commission should grant opportunity of making suggestions to the Consumers before passing any Order detrimental to the said Consumers. The reference is 2012 ELR APTEL 182 in the case of **ESSAR POWER LIMITED V. UPERC & ANR.**

52. In this context, the learned Counsel for one of the Interveners brought to our notice about one more important aspect of the matter. In the Impleading Petition filed by one Shri Ravindra Chavan, a consumer – impleader has mentioned as follows:

*“ It is submitted that the MSEDCL had filed a Business Plan for the period in question and the same was dealt with by the MERC in Case No. 134 of 2012. It is further submitted that the MERC, after considering the same, vide its Order dated 26.08.2013 passed in Case No. 134 of 2012, had directed the MSEDCL to submit its MYT Petition within 60 days from its Order. The relevant part of that Order is quoted hereunder:*

**“6.1.2. The Current approved business plan of MSEDCL shall form the basis for filing the MYT Petition for the second control period, MSEDCL shall submit the MYT Petition within 60 days from the date of issuance of this Business Plan Order.”**

**It is pertinent to note that the period granted to the MSEDCL was supposed to expire on 25.10.2013. However, the impugned Order has been passed in a Suo Motu Petition on 05.09.2013, which shows that even before the period granted to the MSEDCL expired, the Suot Motu Order has been passed.**

**4. That it is further submitted that undoubtedly, the MERC has Suo-Motu power to determine the tariff as per Regulation 16.2 of the MYT Regulations. However, only one mode of determination of tariff has been provided there under. In other words once the Business Plan Order is passed, the tariff can only be decided as per Regulation 18 of the MYT Regulations. This also means that Suo Motu power is available to the Commission when there is no petition filed by any party. This is evident from the words “either on Suo Motu basis or on a petition filed by any interested party” used in Regulation 16.2. In the present case, there is already a petition filed by MSEDCL and an Order is also passed thereon by the Commission directing the MSEDCL to file MYT Petition within 60 days. Therefore, the impugned Order is also bad on this count also”.**

53. The facts given in the impleading Petition filed by one of the impleaders would indicate that the Distribution Company-MSEDCL has already filed the business plan for the period in question in Case No. 134 of 2012. The State Commission by its Order dated 26.08.2013 in Case No. 134 of 2012 had directed the Distribution Company-MSEDCL that the current approved business plan must be filed in the form of MYT Petition for the second control period and the same shall be submitted within sixty days from the date of the Order, namely, 26.08.2013. It is evident from the above that the sixty days time given had expired only on 25.10.2013. Even

before the date of expiry, the State Commission took up the matter as *Suo Motu* proceedings on 05.09.2013 and passed the impugned Order.

54. Though Regulations would confer *Suo Motu* power to determine the tariff, once a business plan Petition filed by the Distribution Company-MSEDCL and Order is passed directing the Distribution Company to file MYP Petition within sixty days, the tariff can be re-determined only as per Regulation 18 of the MYT Regulations. When there is already a Petition filed by the Distribution Company-MSEDCL and an Order passed by the State Commission in that Petition on 26.08.2013 directing the Distribution Company-MSEDCL to file MYT Petition within 60 days, there is no necessity for taking up the matter *Suo Motu* without any Application filed by the Distribution Company-MSEDCL, which was actually directed to file MYT Petition within 60 days of passing the Business Plan order i.e. by 25.10.2013 and for passing the impugned order dated 5.9.2013 on the same day permitting the Distribution Company to recover the additional charges from the Consumers without following the procedure for determining the tariff as prescribed in the Regulation 18 of the MYT Regulations. Admittedly none of the procedural mandates as per Regulation 18 have been followed in the present case.

55. Passing the tariff Order hurriedly considering the financial health and unforeseen financial difficulties of the Distribution

Company which was not pleaded in the *Suo Motu* proceedings cannot be the proper reason to pass this impugned Order. The State Commission has necessarily to ensure that no unnecessary burden is passed on the Consumers resulting in the tariff shock with a view to balance the interest of both the parties. These mandatory procedure as contemplated under the Act of 2003 and the Regulations have been completely ignored by the State Commission while passing the impugned Order.

56. As mentioned earlier, it was strenuously contended by the Respondents that merely because there was no public hearing, no prejudice had been caused to the Appellants since the impugned Order was purely based upon the earlier Orders passed by the State Commission. It is also contended that the Appellants have failed to establish before this Tribunal merely because public hearing has not been conducted, the Appellants/Consumers have been greatly prejudiced.

57. The State Commission in the impugned Order directed the Distribution Company to recover the additional charges from its Consumers in the form of additional energy charges. The details of the directions given in the impugned Order are as follows:

**(i) *Accumulated under-recovery of Rs.2037.78 Crore accrued till the month of August 2013, which was to be***

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**levied by Maha Discom for a period of six (6) months with effect from the month of September 2013 till the month of February, 2014. This additional charge was to be levied to all consumer categories in the proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Ld. Maharashtra Commission.**

- (ii) Fixed expenses of Rs.235.39 Crore. This was to be levied by Maha Discom from the month of September 2013 to its consumers on a monthly basis till further determination of Maha Discom's tariff by the Ld. Maharashtra's Commission. This additional charge was to be levied to all consumer categories in the proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Ld. Maharashtra Commission.**
- (iii) Further, the Ld. Maharashtra Commission directed that from the Impugned Order onwards, Maha Discom shall recover the variation in energy charge component of the amount billed by Maha Genco to Maha Discom as approved by the Ld. Maharashtra Commission from the consumers through the FAC mechanism. Similarly, the Ld. Maharashtra Commission allowed Maha Discom to recover the variation in fixed charge component of the amount billed by Maha Genco and amount billed by Maha Transco to Maha Discom as approved by the Ld. Maharashtra Commission from the consumers in proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Ld. Maharashtra Commission.**

58. The above direction was issued by the State Commission on the basis of the following reasons:

- (i) Since the Ld. Maharashtra Commission regulates the power procurement of Maha Discom including the price thereof, these costs need to be allowed to Maha Discom in the next exercise of tariff determination under Section 62, as these costs have been**

*determined by the Ld. Commission vide Order dated 8 February 2013. The accumulated under recovered amount till August 2013 is therefore Rs. 2037.78 Crore. These costs have already been incurred as per the provisions of the Orders. Maha Discom's consumers have already consumed the power supplied by Maha Genco from the identified units. Furthermore, Maha Discom will have to continue to pay an incremental amount of Rs. 235.39 Crore per month (Rs 42.86 Crore towards Bhusawal Unit No. 4 and Rs. 192.53 Crore towards Transmission Cost) even after August 2013 towards overall power purchase cost. For these entire items tariff for FY 2013-14 has not been approved so far for Maha Discom. (ii)*

- (ii) *It is imperative that Maha Discom is allowed to recover the costs identified in the foregoing paragraphs while determining its tariff. Almost one year has elapsed from the time the last tariff Order was determined and the MYT tariff order will take some time to get notified. The accumulated under recovery has been quite high and it will continue to accumulate further at least at the rate of Rs. 235.39 Crore per month culminating into a huge amount of under recovery and financial problems for the Maha Discom. Also huge amount of under recovery may accumulate a substantial amount of avoidable carrying cost by Maha Discom, as it will have to borrow higher working capital to tide over the under recovery. Continuity of such a situation may result into serious ramifications on the financial health of Maha Discom. It will also lead to abrupt and very high increase in retail tariff in future and will create undesirable tariff shock to the consumers of the Maha Discom which consumers may not be able to absorb.*
- (iii) *The situation requires it to suo-motu intervene so that the Maha Discom is able to recover these amounts till the time next tariff Order is issued by it upon receipt of a petition from the Maha Discom.*
- (iv) *Under Section 61 (d) of the Electricity Act not only the interest of the consumers has to be safeguarded but also at the same time tariff must be determined in such a manner that the cost of electricity is also recovered in the reasonable manner.*

59. A whole reading of the impugned Order would not show as to why the State Commission has decided to take up the matter *Suo-motu* without any Applications by the Distribution Company and as to what was the urgency to pass such an

Order. Even assuming that *suo-motu* powers can be exercised in the absence of any Application on behalf of the Distribution Company, the State Commission while considering the aspect of increasing the tariff by exercising *suo-motu* powers, has to necessarily hear the consumers, in view of the fact that as per Sec. 61 (d) of the Electricity Act, the State Commission ought to safeguard the interest of the consumers in such a way that the tariff shall be determined and that the cost of the electricity is recovered by the Distribution Company in a reasonable manner. When Section 61 (d) has been specifically quoted in the impugned Order, there is no reason as to why the interest of the consumers has not been taken into consideration by the State Commission by issuing notice to the public for giving opportunity to them and by not applying its mind to their suggestions and objections and as to why the State Commission has to pass this impugned Order hurriedly.

60. A perusal of the impugned Order would clearly indicate that the State Commission was anxious to safeguard the interest of the Distribution Company rather than the interest of the consumers, who are likely to be affected due to the revised tariff Order. In view of the above, it cannot be contended that there is no prejudice caused to the consumers by not providing the opportunity of public hearing.

61. Thus, the Appellant and the Interveners have not only pointed out the violation of principles of natural justice but also summed up the following infirmities in the impugned Order. They are:

- (a) The impugned Order is contrary to the earlier Order passed by the State Commission on 30.04.2013. This Order had been passed on the Petition filed by the Distribution Company on 01.03.2013 seeking for a recovery mechanism from the Consumers for the additional amount payable by the Distribution Company to the Generating Company. The State Commission refused to entertain this Petition filed by the Distribution Company on the ground that proposed pass through was not on account of fuel related expenses and since the present Petition would amount to an amendment to the existing tariff, this requires the mandatory procedure for determination such as public notice, public hearing, consideration of suggestions/objections etc., under Section 62 (4) of the Act. In this Order, the State Commission specifically directed the Distribution Company-MSEDCL to include the financial impact of additional payment in the determination of tariff for the second control period. After having held in the Order dated 30.04.2013 that the prayer of the

Distribution Company-MSEDCL would amount to amendment of the existing tariffs, which requires the observance of the mandatory procedure under Section 62 (4) of the Act, the State Commission has now by the impugned Order permitted the Distribution Company-MSEDCL to recover the additional charges from the Consumers. This is completely a contrary stand. This approach is entirely wrong.

(b) When the Business Plan Petition was filed by the Distribution Company seeking for the similar prayer in Case No. 134 of 2012, the State Commission had passed an Order on 26.08.2013 directing the Distribution Company to submit its MYT Petition within 60 days and the said prayer could be considered while disposing of the said MYT Petition. This time period of 60 days would expire only on 25.10.2013. But the impugned Order had been passed in a *suo-motu* proceedings on 05.09.2013 itself. As such, this Order is not in consonance with the earlier Order passed by the State Commission on 26.08.2013.

(c) The impugned Order is contrary to the provisions of the Electricity Act and the tariff policy. Section 61 (g) of the Act provides that one of the factors guiding the determination of tariff is that the tariff should

progressively reflect the cost of supply. A National Electricity Policy and Tariff Policy envisage that the tariff should progressively reflect the prudent cost of supply of electricity and by 2010-2011, and the tariff for all categories of consumers should be such that it must be within  $\pm 20\%$  of the average cost of supply. This must be achieved without giving any tariff shock to the subsidised category for which a road map must be given by the State Commission. But in the impugned Order, this has not been followed. On the other hand, the State Commission directed the MSEDCL to recover the two additional charges from its Consumers. In fact, the average billing rate of the Consumers had increased as a result of the impugned Order.

- (d) While calculating the average cost of supply, the State Commission has failed to appreciate that the amount of Rs.3450.19 Crores, namely, the additional energy charges to be recovered by the Distribution Company ought to have been considered in the additional revenue requirement for calculating the average cost of supply. However, the State Commission has revised the tariff and made applicable to all categories of consumers, which is not

reflective of the cost of supply and not within  $\pm 20\%$  of the average cost of supply.

(e) There has been a double recovery of Rs.235.39 under the head AEC –II in the Commercial Circular No. 209 issued on the basis of the impugned Order

(f) In terms of Section 62 of the Electricity Act the State Commission is required to determine the tariff in accordance with the provisions of the Act. In terms of Sec. 45 of the Act, the State Commission is required to determine the charges to be paid for supply of electricity by the distribution licensees to the consumers. Therefore, it is not open to the State Commission to merely approve the aggregate amount to be recovered from the consumers and leave the methodology of determining the tariff for each category of consumers to MSEDCL – R.2. This would amount to leaving the tariff design to MSEDCL – R.2. This means the delegation of regulatory functions by the State Commission to the Distribution Company. Such an action on the part of the State Commission is in violation of the provisions of Sec. 61, 62, 64 & 86 read with Section 45 of the Electricity Act, 2003.

(g) The perusal of the Commercial Circular dated 07.09.2013 issued in pursuance of the impugned Order by the Distribution Company would show that the determined rates fixed are not in accordance with the requirement of determining the charges proportionate to the approved average billing rate of consumer category. The proportionate basis to be applied has been clearly set out in the earlier Order passed by the State Commission in Case No. 43 of 2012. In terms of the above, the State Commission instead of leaving the tariff design and tariff rate to the Distribution Company, ought to have decided itself on the pre unit tariff to be recovered from each category of consumers.

(h) The impugned Order of the State Commission has resulted in significant tariff shock to the consumers i.e., upwards of 20% hike. The contention of the State Commission that the impugned Order was passed to prevent the serious ramifications on the financial health of MSEDCL is without any merit. In fact, the huge amount under recovery was on account of the deficiencies on the part of the Distribution Company in not properly placing the material at the relevant time for passing appropriate tariff Order. The consumers in the State ought not to have been

directed to pay the significant increase in the tariff for the deficiencies on the part of the Distribution Company.

62. The above infirmities pointed out by the Appellant and the Interveners would make it evident that this Appeal has been filed not only on the ground of violation on the part of the State Commission by not giving the opportunity to the Consumers to make their suggestions before passing the impugned Order, but also on the ground that there were several infirmities in the impugned Order.
63. As we have already indicated, the revision or re-determination of the tariff already determined would amount to determination, which has to be done as per the provisions of Sec. 62 under the procedure contemplated under Section 64. Admittedly, this has not been done.
64. There was no transparency in the matter of taking up the *suo-motu* proceedings and passing an Order in favour of the Distribution Company on the same day without informing the consumers. As such, there is violation of Sec. 86 (3) of the Act also. Hence, the contention urged by the learned Counsel for the Respondents that the impugned Order has been passed only on the basis of the earlier Orders, and as such, the same is only a consequential Order to formalise

the recovery of amounts already considered would not merit consideration.

65. From the discussion made above, three aspects would emerge.

**(a)** The State Commission decided on 30.04.2013 in the Application filed by the Distribution Company-MSEDCL in Case No. 32 of 2013 for recovery of the additional charges not to allow the claim of the Distribution Company-MSEDCL on the ground that the provision of Sec. 64 of the Act in regard to the process to be adopted need to be satisfied before the revision in the tariff claimed by the Distribution Company-MSEDCL. **Then why the very same State Commission has changed its view in the present proceedings with regard to the observance of the procedure under Sec. 64 of the Act and hurriedly passed the impugned Order on 05.09.2013 giving the relief to the Distribution Company-MSEDCL, in spite of the fact that there was no such Application filed by the Distribution Company praying for the same? There is no answer.**

(b) The Distribution Company, MSEDCL, filed a business plan for the period in question in Case No. 134 of 2012. In this Petition, the State Commission

directed the Distribution Company to claim such a prayer by submitting its MYT Petition within 60 days from its Order dated 26.08.2013. This Period granted to the Distribution Company-MSEDCL was supposed to expire on 25.10.2013. When the specified time was granted up to 25.10.2013 by the State Commission by the Order dated 26.08.2013 to file the MYT Petition, then, **why the State Commission had hurriedly initiated suo-motu proceedings on 05.09.2013 itself and pass the impugned Order? There is no answer.**

(c) The State Commission, in the impugned Order has mentioned that on the basis of the earlier Order dated 13.05.2013 relating to the Transmission tariff, the Order dated 03.09.2013 relating to the Generating Company for the payment of the amounts by the Distribution Company-MSEDCL, and the Order dated 04.09.2013 relating to the final tariff of another Generating Company, the impugned Order in the *Suo-Motu* Petition was passed on 05.09.2013. As indicated earlier, relating to the Transmission Company and Generating Company, Orders had been passed on 13.05.2013 as well as on 03.09.2013 and 04.09.2013. The impugned Order had been passed immediately the next day. In fact the initiations of *Suo-Motu*

proceedings in Petition No. 95 of 2013 as well as disposal of the said Petition granting permission to the Distribution Company to recover the additional charges from the consumers were also done on the same day. ***What was the urgency or immediate cause for the State Commission to take up the matter as Suo-Motu proceedings and pass the impugned Order on the same day, without even hearing the consumers, who are likely to be affected by this Order, that too without an Application by the Distribution Company-MSEDCL? There is no answer.***

66. The learned Counsel for the Respondent cannot improve now by adding their own reasons for the same. Thus, these aspects would make us to feel that the State Commission hurriedly passed the impugned Order in favour of the Distribution Company without issuing public notice seeking for the suggestions of the consumers and even without any reference to the urgency to pass such an Order. This is not a judicial approach.

67. It is well settled law that it is of fundamental importance that justice should not only be done, but should also manifestly and undoubtedly be appear to be done. The appearance of justice is important to the substance of the justice. In the absence of the explanation for the above three questions,

we are constrained to hold that the State Commission without valid reason whatsoever has rushed to pass the impugned Order by granting relief to the Distribution Company without adopting the judicial approach.

68. According to the Appellant, if the opportunity had been given to them before passing the impugned Order, they would have given all assistance to the State Commission to pass the appropriate Order by taking into consideration of all these points which have been raised before this Tribunal. In view of the above submission of the Appellant, it cannot be contended by the Respondents that the Impugned Order, which was passed without hearing the public would not prejudice in any manner.
69. As mentioned above, though some attempt has been made by the Respondents to give some explanation for the justification of the Order, in the absence of the said explanation in the impugned Order, we are not able to accept the same.
70. As indicated earlier, the Distribution Company earlier filed a Petition on 01.03.2013 in case No. 32 of 2013 seeking for the same relief through recovery mechanism from the consumers for the additional amount payable by the Distribution Company to the other utilities including Generating Companies. The very same State Commission

did not entertain the said Petition and passed the Order on 30.04.2013 specifically holding that “since the present petition would amount to amendment to the existing tariff, it cannot be entertained unless the procedure under Sec. 62 (4) is followed”. The relevant observation is reiterated hereunder:

***“The proposed pass through is not on account of fuel related expenses. Hence, keeping in view the provisions of Section 62 (4) as well as the need to go through the mandatory procedure of tariff determination; public notices; public hearings; consideration of suggestions and objections etc., MSEDCL may include the financial impact of additional payment to be made to the MSPGCL in the determination of tariff for the second control period. In this manner, the requirements of law can be fulfilled...”***

71. This would clearly indicate that the State Commission was conscious about the legal provisions and the mandatory procedures to be followed for passing an Order with reference to the recovery mechanism from the consumers for the additional amount payable by the Distribution Company-MSEDCL to the other utilities.
72. Having known about the legal position by referring to the mandatory provisions, is it not proper for the State Commission to take a complete contrary view while passing the impugned Order granting the very same relief to the Distribution Company-MSEDCL without following those

procedures by ignoring the earlier Order passed by the same State Commission on 30.04.2013 ?

73. Thus, it is clear that the State Commission even though had the knowledge of Law to observe the legal procedure to pass the impugned Order of this nature, has all of a sudden decided to take a different view in the impugned Order in respect of the very same relief claimed by the Distribution Company. At least the State Commission should have mentioned in the impugned Order as to why they had to take a different view from that of the view taken earlier by the State Commission through Order dated 30.04.2013.

74. Admittedly, the said reference has not been made in the impugned Order. On the other hand, the Respondents made a novel submission stating that the impugned Order is only an interim Order passed under Section 94 (2) of the Act, which can be corrected at a later stage at the time of final tariff Order. As mentioned above, this strange and belated explanation has not been referred to in the impugned Order.

75. The judicial propriety and discipline demands that there is certainty in the decision making process; the consistency and the earlier Orders passed by the State Commission must be respected by the very same State Commission.

76. Even though the learned Counsel for the Appellant and the Impleaders have elaborately argued about the infirmities as referred to above and sought for quashing of the Impugned Order on the basis of those infirmities, we do not propose to do so since we are mainly concerned with the question as to whether the mandatory procedures contemplated under Sections 62, 64 and 86 (3) have been complied with or not.
77. In the present case, on the basis of the above discussion, we come to the conclusion that the State Commission having known about the legal position as mentioned in the earlier Order dated 30.04.2013 has not followed mandatory procedure while the impugned Order dated 05.09.20143 has been passed.
78. So, on that count, we would like to set aside the impugned Order and remand the matter to the State Commission for fresh consideration of the relevant issues after observing the procedures contemplated under Sections 64 and 86 (3) of the Act by issuing public notice and giving opportunity to the Consumers and considering those suggestions and objections to be filed by the Consumers and for passing the final Order after application of judicial mind in accordance with law.
79. It is made clear that we are not giving any opinion on the issues. It is for the State Commission to consider the

submissions of the parties on these infirmities as well as other legal points and decide the issues and pass an Order.

80. Accordingly, we set aside the impugned Order and remand the matter to the State Commission to give opportunity to all the parties concerned as per the provisions of Sections 64 of the Act and hear the matter in a transparent manner and pass the final Order on all the issues in accordance with law uninfluenced by any of the finding earlier rendered, as expeditiously as possible.

#### 81. **SUMMARY OF OUR FINDINGS**

**(a) The Impugned Order has been passed in violation of Section 62, 64 and 86 (3) of the Electricity Act, 2003. The State Commission should have followed the mandatory procedures contemplated u/s 64 and 86(3) of the Electricity Act, 2003 by issuing public notice and giving opportunity to the consumers to raise objections/suggestions on the retail supply of tariff proposed and only after considering these objections/suggestion, should have determined the tariff.**

**(b) As per Section 62(4) of the Act, the tariff may not ordinarily be amended more frequently than once. However, the tariff can be amended more**

than once in a financial year in respect of any changes in terms of fuel surcharge formula as may be specified by the State Commission. This Tribunal has held earlier that the tariff can be revised without following the procedure u/s 64 provided the revision in tariff is in terms of the Fuel Surcharge Formula as specified by the State Commission through Regulations or by the Tariff Order. The Impugned Order was not an amendment in tariff as per the specified Fuel Surcharge Formula.

(c) We, therefore, set aside the Impugned Order and remand the matter to the State Commission to give opportunity to the parties concerned as per the provisions of Section 64 of the Electricity Act and hear the matter in a transparent manner and pass the final order uninfluenced by its earlier findings, as expeditiously as possible. We want to make it clear that we are not giving any opinion on the merits.

82. In view of the above, the Impugned Order is set aside and the matter is remanded to the State Commission to pass consequential order as per the directions given in this judgment.

83. No order as to cost.

84. Pronounced in the Open Court on this 22<sup>nd</sup> day of August, 2014.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated:22<sup>nd</sup> Aug , 2014

√REPORTABLE/~~NON-REPORTABLE~~