# IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

## (APPELLATE JURISDICTION)

## APPEAL NO. 164 OF 2018 & IA NO. 788 OF 2018

**Dated: 20th February, 2020**

**Present: HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

**HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER**

**IN THE MATTER OF**

**M/s Century Rayon (A division of Century Textile**
& Industries Ltd.), Shahad,
District – Thane, State-Maharashtra,
Pin Code – 421 103 ..... Appellant

***VERSUS***

1. **Maharashtra State Electricity Distribution Company Ltd;**
Through its, Chief Engineer (Commercial),
Plot No. G – 9, Prakashgad, Anant Kanekar Marg,
Bandra (East), Mumbai, Maharashtra - 400051 ..... Respondent No.1

2. **The Maharashtra Electricity Regulatory Commission**
Through its Chairman
Having its Office at World Trade Centre
Centre No. 1, 13th Floor, Cuffe Parade
Mumbai – 400005, Maharashtra ..... Respondent No.2

Counsel for the Appellant … Mr. M.G. Ramachandran, Sr. Adv.
Mr. Vijay Kumar Aggarwal
Mr. Ajit M. Patil

Counsel for the Respondent(s)… Ms. Deepa Chawan
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Mr. Nitish Gupta

Ms. Nikita Choukse
Ms. Shruti Awasthi
Mr. Varun Agarwal
Ms. Krishna Dayama
Ms. Saroj Bala For R-1

# J U D G M E N T

**PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER**

1. The Electricity Act, 2003 was enacted not only to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity but also, and more importantly, to take measures conducive to development of electricity industry wherein, besides the promotion of competition and adoption of efficient and environmentally benign policies, interests of the consumers were duly protected. The promise held out by various provisions of the statute is to develop a power system wherein *"quality, continuity and reliability of service"* is ensured to the consumer, there being a statutory duty (Section 43) on part of the Distribution Licensee to give supply of electricity on request, the exception from such duty (Section 44) being jointly if the Distribution Licensee is *"prevented"* from so doing on account of Acts of God (*"cyclones, floods, storms"*) or *"other occurrences beyond his control"*.

2. From the above perspective, it would not be incorrect to say that the general legitimate expectation of each consumer is that he would receive supply of electricity which subscribes to the prescribed standards of "*quality, continuity and reliability*". But, in practical terms, it is at times

difficult to maintain uninterrupted power supply for various reasons that include the necessity for shut down for regular maintenance of systems of generation, transmission etc. or outages, load shedding, tripping etc. The assurance of continuous uninterrupted supply, thus, is subject to, generally speaking, just exceptions. Yet, the Distribution Companies do enter into arrangements with certain classes of consumers holding out the promise of uninterrupted continuous supply. The matter at hand involves alleged breach of contractual obligations vis-à-vis such arrangements, and consequences flowing there from, against the backdrop of regulatory control of the Maharashtra Electricity Regulatory Commission (hereinafter variously referred to as *"MERC"* or *"State Commission"*).

3. The Appellant is one of the several entities which are acknowledged as "*continuous industries*", the manufacturing process in which they are engaged being "*continuous*", one that needs "*uninterrupted continuous 24x7 supply of power*". For their purposes, the MERC had formed a separate category of HT-1 industries on "*express feeders*" assuring to such category continuous uninterrupted power supply though levying tariff which was kept 7% higher than HT-1 consumers connected on "*non-express feeders*" or for "*HT-1 non-continuous industries*". In an earlier round of adjudicatory process (referred to herein as "*Kalika Case*"), the MERC had ruled that "*continuous category*" meant obligation to provide the consumer with a "*continuous supply*" in the "*literal meaning*" of the expression. The claim in *Kalika case* for refund of the excess tariff

charged for continuous category for the billing periods where there had been interruptions was upheld, the order having been complied with by the Respondent Maharashtra State Electricity Distribution Company Limited (hereinafter referred to variously as "*MSEDCL*" or "*DISCOM"*).

4. The view formed in *Kalika case* was reiterated by MERC in proceedings for similar relief taken out by the Appellant (case No. 86 of 2015), though relegating the Appellant to approach the grievance forum as a consumer, the review sought by MSEDCL (case No. 122 of 2017) to reiterate of such principle having been repelled by order dated 04.05.2018. The MERC in the review order, however, has qualified the dispensation vis-à-vis uninterrupted power supply to continuous category of express feeder by introducing the test of "*60 hours/month interruptions/no-supply*".

5. The Appellant is aggrieved by the aforesaid change of the principle – terming at as arbitrary, unfair and unjust – and is seeking intervention by this Tribunal through the appeal at hand, assailing the order dated 04.05.2018.

6. As observed at the outset, the assurance to consumer at large of continuous and reliable quality power is subject to just exceptions. The Maharashtra Electricity Regulatory Commission (Standards of Performance of Distribution Licensee, Period of giving Supply and Determination of Compensation) Regulations, 2005 provided, *inter-alia*, as under:

*"6.5 The period of interruption as a result of any scheduled outage shall be specified in a public notice of such scheduled outage:*

*Provided that such scheduled outage shall not normally exceed twelve hours on any day."*

7. The Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 dealt, *inter-alia*, with the subject of "*failure of supply*". The relevant clause reads thus:-

*"**17. Failure of supply***

*17.1 The Distribution Licensee shall take all reasonable measures to ensure continuity, quality and reliability of supply of power to the consumer, except where he is prevented from doing so by cyclone, floods, storms or other occurrences beyond his control.*

*17.2 The Distribution Licensee shall be entitled, for reasons of testing or maintenance or any other sufficient cause for its efficient working, to temporarily discontinue the supply for such periods, as may be necessary, subject to providing advance public notice in this behalf.*

*17.3 The Distribution Licensee shall not be liable for any claims attributable to indirect, consequential, incidental, punitive, or exemplary damages, loss of profits or opportunity, whether arising in contract, tort, warranty, strict liability or any legal principle which may become available, as a result of any curtailment of supply under the circumstances or conditions mentioned in this Regulation 17."*

8. The responsibility "*for development of power system based on optimal utilization of resources*" is conferred by the legislature, enacting the Electricity Act, 2003, on the Central Government which is expected, by Section 3, to prepare and publish National Electricity Policy, Tariff Policy and National Electricity Plan, from time to time. The scheme and various provisions of the legislation show that the National Electricity Policy and Plan guide various statutory authorities in discharging their role and responsibilities. The Central Government, in exercise of the said power,

had notified the Tariff Policy on 06.01.2006, in continuation of the National Electricity Policy notified on 12.02.2005. The Clause 8.2.1 of the Tariff Policy (2006) is of the some interest here, and, therefore, may be quoted thus:

> "*8.2.1 The following aspects would need to be considered in determining tariffs:-*
>
> *(1) All Power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates. The reduction of Aggregate Technical & Commercial (ATC) losses needs to be brought about but not by denying revenues required for power purchase for 24 hours supply and necessary and reasonable O&M and investment for system upgradation. Consumers, particularly those who are ready to pay a tariff which reflects efficient costs have the right to get uninterrupted 24 hours supply of quality power. Actual level of retail sales should be grossed up by normative level of T&D losses as indicated in MYT trajectory for allowing power purchase cost subject to justifiable power purchase mix variation (for example, more energy may be purchased from thermal generation in the event of poor rainfall) and fuel surcharge adjustment as per regulations of SERC."*
>
> *[emphasis supplied]*

9. The category of consumers expecting uninterrupted 24 hours supply of quality power, as conceived in the above quoted portion of the Tariff Policy, is same as those depending on continuous "*express feeder*", the category to which the matter at hand relates.

10. The provision for express feeder for such consumers as require continuous uninterrupted supply of electricity has been in existence from times prior to the enactment of the current law i.e. Electricity Act, 2003. Following the practices which have been prevalent in such regard, Maharashtra State Electricity Board (*"MSEB"*), the predecessor-in-interest

of the first Respondent (*"DISCOM"*) had issued a Departmental Circular (Commercial) No. 563 dated 11.01.1996 shifting the power to grant sanction for continuous category from the Government to the Head Office of MSEB. By the said circular, certain guidelines relevant to subject were also issued. The preamble to the guidelines would state thus:

> *"Some industrial loads and processes require continuous uninterrupted supply of power. Even a momentary interruption in supply can lead to damage of equipment and loss of work in process. Such processes often taken a long time to restart and require consumption of additional fuel/power."*

11. It is not in dispute that the industries that depend on "continuous load", as set out by way of illustration in the guidelines, include those engaged in:

> *"Manufacture of synthetic fiber such and rayon, nylon, polyester and yarn."*

12. Concededly, the appellant falls in the above-said category on account of the manufacturing process adopted by it.

13. The scope and width of the norms through guidelines promulgated as above came up for consideration by the State Commission in various cases over the period thereafter. By its order dated 18.05.2007, in case No. 65 of 2006, the State Commission made an attempt to define the basis of bifurcating industrial category into express feeder continuous and non-continuous supply and held thus:

> *"The tariff categories have been simplified in the case of industries and only HT industries connected on express feeders and demanding continuous supply will be deemed as HT continuous industry and given*

*continuous supply, while all other HT industrial consumers will be deemed as HT non-continuous industry."*

*[emphasis supplied]*

14. By Order dated 20.06.2008, in case No. 72 of 2007, the State Commission sought to clarify the criteria for the continuous and non supply of industries with respect to load shedding, holding thus:

*"Since the continuous process industries are getting supply on a continuous basis, and are not subjected to load shedding, including staggering the tariff for HT continuous industry has been specified slightly higher than that applicable for HT non-continuous industry."*

*[emphasis supplied]*

15. On 17.08.2009, in case No. 116 of 2008, the State Commission expounded on the concept of interruptible and uninterruptible tariff holding thus:-

"

- *Internationally, there is a concept of 'interruptible tariff' and 'non-interruptible tariff', wherein, consumers opting for 'interruptible tariff' are entitled to a flat discount on their entire consumption, in exchange for offering their load for load shedding for a certain ceiling hours every month (with advance notice), in case the grid security situation requires the Utility to shed load. However, the situation in Maharashtra is different in that, load shedding has become a common phenomenon, and it is not that the load will be shed only on call.*

- *Keeping all these factors in mind, the Commission has determined the tariffs of HT industrial category in such a manner that HT I consumers connected on express feeders will be required to pay around 7% higher than HT I consumers connected on non-express feeders.*

- *Only HT industries connected on express feeders and demanding continuous supply will be deemed as HT continuous industry and given continuous supply, while all other HT industrial consumers will be deemed as HT non-continuous industry."*

*[emphasis supplied]*

16. M/s Kalika Steel & Alloys Private Limited (for short *"Kalika"*) and sixteen other similarly placed consumers had instituted a petition (case No. 88 of 2012) under Section 62 of the Electricity Act, 2003 before MERC. All the said petitioners were engaged in manufacturing processes using machinery that required continuous supply of electricity, interruptions causing huge losses and, therefore, had opted for HT-1 continuous supply connections from the Respondent DISCOM. On account of this, the Respondent DISCOM was levying additional charges applicable for express feeder-continuous supply category. Disruptions in supply of electricity over a prolonged period of 43 months had led to the said petitioners feeling aggrieved, they seeking clarificatory Order from the Commission as to the applicability of the appropriate tariff to them during the period/month when there had been interruption/outages/load shedding in power supply.

17. It may be mentioned here itself that the data which was produced before the State Commission showed, *inter-alia*, disruption of supply for various reasons that included outages, load shedding or tripping. The said petition in *Kalika Case* was decided by the State Commission by Order dated 16.07.2013. The appellant has gathered detailed information about the said interruptions as were submitted in tabular form (annexure-II) before the State Commission, copy of which material collected under Right to Information has been submitted with the Rejoinder dated 18.09.2018. It was pointed out from the said data (of 40 months for the

period June, 2008 to September, 2011) that the disruption of supply ranged from 27 hours (in case of M/s. Omsairam Steel & Alloy) to 702 hours (in case of Jailaxmi Steels Limited) over the period of 40 months.

18. The Petitioners in *Kalika* Case before the State Commission argued that even though they had been assured that being express feeder consumers, paying additional charges on such account they would not be subjected to interruption in power supply or load shedding, they had faced interruptions leading to huge losses, this disentitling the respondent DISCOM from levying the tariff of HT continuous (express feeders) category, giving rise to a legitimate claim of refund, their liability having been reduced in terms of tariff leviable to non-continuous category.

19. The Respondent DISCOM contested the said proceedings before the State Commission submitting, *inter-alia*, that when the consumers in question had changed from non-continuous to continuous category, they had agreed that in case the load shedding was due to unavoidable conditions, the energy charges of HT-1 continuous category would continue to apply. The DISCOM sought to explain away the interruptions for various reasons including opening of jumpers; bursting of cable joints; blowing of fuses; there being multiple consumers on same feeder; failure of supply to certain territory; snapping of conductors due to reasons such as bird fault, heavy rains, lightening etc.; the last being reasons beyond the control – some outages being attributable to load release/load enhancement/ maintenance etc.

20. It is noted from the Order passed by the Commission on 16.07.2013 in *Kalika Case* that the Commission was of the following view:

> "*31. The Commission observed that there is no specific provision in regard to the frequency of occurrences, either in the SOP Regulations or in the definition of applicability of Tariff, which will qualify as unacceptable for a continuous category of consumer. Obviously, the intent and purport of the SOP Regulations and design of the Tariff under the "continuous category" of supply was to provide the consumer with a "continuous supply" in the literal meaning of the expression. Therefore, it cannot be ruled out that MSEDCL failed to provide the required quality of supply for which it has charged the Petitioners."*
>
> [*emphasis supplied*]

21. After analyzing the data concerning frequency of interruptions in the case of Petitioners in *Kalika Case*, the State Commission ruled thus:

> *"34. Therefore, it can be easily seen that under each of the scenarios, the Petitioners have suffered high level of interruptions in the supply of electricity by MSEDCL. The filters applied in Scenario 3 are much liberal compared to Scenario 1. Even under such scenario it is obvious that the Petitioners actually suffered from frequent unplanned interruptions, which surely have led to difficulty in operations leading to losses as their production is under continuous process industry. As all the Petitioners are steel and alloy companies, it is very important to have continuous power supply for manufacturing in their factories.*
>
> *35. In view of the analysis made above and also considering the observation made in Paragraph 31 above, the Commission is of the opinion that the Petitioners have actually suffered frequent interruptions in the electricity supply provided by MSEDCL. Even if it can be argued that all the interruptions classified by MSEDCL as planned outages and due notices were provided under the provisions of the SOP Regulations, the balance of the interruptions occurred during the reported period were unplanned and should not have occurred under a continuous supply condition. As observed in paragraph 30, there were instances of load shedding carried out as applicable to non-continuous category of industrial consumers, which is completely unacceptable. Further, if the number of interruptions reported under "outages", which are essentially tripping are added to the number of "tripping" classified by MSEDCL, then the total occurrence of tripping will increase substantially."*
>
> [emphasis supplied]

22. On the basis of the above noted conclusions arrived at by the State Commission, it observed that the supply provided by the DISCOM to the Petitioners in that case did not confirm to the "*expected norm and quality of continuous supply*". Holding that the DISCOM should not have charged tariff applicable to continuous industry on express feeder consumers in the month in which they had not been supplied continuous supply, directions were given to the DISCOM to refund the amounts equivalent to the difference between the tariff charged (continuous category) and the tariff as applicable (non-continuous category) with interest at the bank rate then applicable.

23. The distribution company sought a review of the above mentioned order on 16.07.2013 (in case 88 of 2012) in the *Kalika Case* before MERC by filing a petition (in case No.105 of 2013), *inter-alia*, pleading financial burden on account of refund as had been directed, referring to the undertaking given by some of the consumers which had the effect of acceptance of supply below par in relation to the Standards of Performance (SoP). The distribution company also expressed apprehension that the order may not remain restricted to the Petitioners in *Kalika Case* since other similar consumers might also come forward to make similar demands.

24. The review petition of the Respondent DISCOM vis-à-vis the Order dated 16.07.2013 in *Kalika Case* was disposed of by the State Commission by Order dated 17.07.2014 reiterating the earlier view

observing that regardless of undertaking or agreement on supply at sub-SoP level, the DISCOM was *"bound to supply continuous power as envisaged for continuous process industry"*. The argument of financial burden was rejected though the direction about payment of "interest" with refund was vacated. At the same time, while reiterating the principle in the main decision in *Kalika* case, the State Commission directed that the claims of such nature would be granted subject to certification by District Industrial Centre (DIC) for the relevant billing months.

25. The Appellant approached the State Commission for similar relief as granted in *Kalika* Case by filing a petition (case No. 86 of 2015) seeking refund of HT continuous tariff charges for the period during which it had not received the continuous supply as HT-1 continuous category consumer on express feeder. It appears that the petition of the appellant was resisted, *inter-alia*, on the ground the State Commission did not have jurisdiction to adjudicate upon disputes involving individual consumers, reference being made in such regard to judgment dated 14.08.2007 of Supreme Court in Civil Appeal No. 2846 of 2006 titled *MERC vs Reliance Energy Limited and Others*. The petition of the appellant was decided by the Commission by its order dated 15.02.2017, noticeably reiterating the dispensation in *Kalika* (supra) including by reference to order passed on review of MERC. Though the appellant's claim for refund was not examined by the State Commission, it being referred instead to the Consumer Grievance Redressal Forum (CGRF) under Section 42 of the

Electricity Act, 2003, the Commission re-asserted the principle observing, *inter-alia*, that the decision in *Kalika* case was "*of general application*".

26. It appears that before the appellant could approach the Consumer Grievance Redressal Forum to which it had been directed, the distribution company approached the State Commission by a review petition (case No. 122 of 2017). The review petition was disposed by the Order dated 04.05.2018 with which the appellant is aggrieved, it having assailed it by appeal at hand.

27. It is clear from a bare perusal of the impugned order dated 04.05.2018 that the State Commission was not impressed with the grounds on which the review had been sought. While reiterating the principle laid down in the previous decision in *Kalika* Case, holding once again that the said ruling was "*applicable to similarly placed consumers*", the Commission ruled that the review could not be granted. Yet, having decided to repel the challenge by review (by observations in para No. 12), the Commission proceeded further to examine the matter so as to bring about "*further clarity on the circumstances under which continuous category consumers can be treated as non-continuous consumers for purposes of tariff*". It recalled the detailed analysis to which the claim in *Kalika* Case had been subjected and the earlier decision mandating "*detailed scrutiny"* of each and every case, observing in this context that such relief could not be passed on "*simply because there were*

*insignificant random interruptions, perhaps on account of transient faults or otherwise*".

28. On such further basis as above, the review petition of the respondent DISCOM *vis-à-vis* the claim of the appellant was disposed of by the impugned order dated 04.05.2018 holding thus:

> *"In this regard, the Commission observes that the formula for Load Factor Incentive specified in the Tariff Order factored in 60 hours of interruption/no-supply in a month. Load Factor Incentive was applicable to continuous category consumers also. Thus, in the Tariff Order, 60 hours/month interruptions/no-supply was considered as permissible for continuous category consumers. Further, such continuous category consumer was entitled to seek compensation as per the provisions of the SoP Regulations for delay in restoration of supply. Hence, before granting relief of change of tariff category from continuous to non-continuous on account of interruptions in supply. It is important to verify that such consumer suffered more than 60 hours of interruptions/no-supply in a month. Further, as mentioned in the Order dated 16 July, 2013, continuous category consumers were not supposed to undergo any planned Load Shedding. Hence, if a continuous category consumer was subjected to planned Load Shedding, such consumer should pay the non-continuous tariff for that month and not the continuous category tariff. All these details need to be verified before granting the benefit of non-continuous tariff to continuous category consumers. MSEDCL should verify these details before granting any relief in future."*
>
> *[emphasis supplied]*

29. As mentioned earlier, the grievance of the appellant concerns the introduction of new test of "*60 hours/month interruptions/no-supply*". It is its submission that the rule could not have been changed in the manner done, particularly after it had been found that the review petition did not deserve to be allowed. It is the argument of the appellant that 60 hours test had been suggested by the State DISCOM previously but no merit was found and that its introduction in the Review Order amounts to re-

writing the principle to unfairly take away the vested right of the appellant for refund. It is also the argument of the appellant that the condition of 60 hours per month interruption or no-supply has been taken from the norm of "*Load Factor Incentive*" which is applicable across the board and, therefore, of no consequence *vis-à-vis* a right of continuous category consumer who is paying higher tariff.

30. The Respondent DISCOM has argued that the grievance raised by the appellant is essentially that of a consumer's claim against Distribution Licensee on which the petition could not have been entertained by the State Commission, as had also been the decision rendered there upon on 15.02.2017. It is the argument that by the same logic, this court ought not entertain the appeal, the dispute raised concerning claim for refund on account of interruptions being a matter within the domain and jurisdiction of Grievance Redressal Forum to which the Commission had referred in it its previous order.

31. We are not inclined to accept the above objection. The claim of the appellant for refund has not been subjected to scrutiny at any forum till date. No doubt, the appellant had approached the State Commission for such relief of refund. But then, it had been encouraged to do so because the State Commission had earlier entertained such claims in *Kalika* Case. As was submitted by its Counsel, the Appellant was not aggrieved by the Order dated 15.02.2017 whereby it had been asked to approach the Consumer Grievance Redressal Forum. Its grievance emanates from the

change of the rule by the Review Order dated 04.05.2018. Without the changed rule being assailed, no purpose would be served by approaching the Grievance Redressal Forum which would necessarily feel bound by the decision introducing the 60 hours test in the principle enunciated in *Kalika* Case.

32. The Respondent DISCOM has argued that the claim of the Appellant for refund is without merit. Noticeably, its submissions in this regard refer to the 60 hours test. Since the validity of the said additional test is under challenge and since the extent of interruptions, or the reasons for non-supply, have not been subjected to scrutiny, it is neither fair nor proper to seek a decision on merits of the claim from this Tribunal.

33. For the forgoing reasons, we have restricted our scrutiny of the case only from the perspective of validity of the introduction of 60 hour test to the rule laid down in *Kalika* Case.

34. Load Factor Incentive was explained by MERC in its order dated 03.11.2016 in case No. 48 of 2016 in the matter of *Maharashtra State Electricity Distribution Company Limited for Truing-up for FY 2014-15, Provisional Truing-up for FY 2015-16 and Multi-Year-Tariff for 3rd Control Period FY 2016-17 to FY 2019-20* as under:

> *"**8.32 Load Factor Incentive***
>
> *Consumers having a Load Factor over 75% and upto 85% will be entitled to a rebate of 0.75% on the Energy Charges for every percentage point increase in Load Factor from 75% to 85%. Consumers having a Load Factor over 85% will be entitled to a rebate of 1% on the Energy Charges for every percentage point increase in Load Factor from*

*85%. The total rebate will be subject to a ceiling of 15% of the Energy Charges for that consumer.*

*This incentive is applicable only to the HT I, HT II and HT IX tariff categories. Further, the Load Factor rebate will be available only if the consumer has no arrears with MSEDCL, and payment is made within seven days from the date of the bill. However, it will be applicable to consumers where payment of arrears in installments has been granted by MSEDCL, and such payment is being made as scheduled.*

*The Load Factor has been defined as below:*

$$\text{Load Factor} = \frac{\text{Consumption during the Month in MU}}{\text{Maximum Consumption Possible during the Month in MU}}$$

*Maximum consumption possible = Contract Demand (kVA) x Actual Power Factor x (Total no. of hrs during the month less planned load shedding hours*)*

**- Interruption/non-supply to the extent of 60 hours in a 30 day month has been built in the scheme.*

*In case the Billing Demand exceeds the Contract Demand in any particular month, the Load Factor Incentive will not be payable in that month. (The Billing Demand definition excludes the demand recorded during the non-peak hours, i.e. 22:00 hrs to 06:00 hrs. Even if the Maximum Demand exceeds the Contract Demand in that duration, the Load Factor Incentive would be applicable. However, the consumer would have to pay the penal charges for exceeding the Contract Demand.)".*

*[emphasis supplied]*

35. The learned Counsel for the Respondents fairly conceded that Load Factor Incentive is available across the board for all HT tariff categories. This is to say that such incentive is available not only to continuous HT category consumers, but also to non-continuous HT category consumers. There is no additional advantage given by such incentive to continuous category consumers. Such incentive is made available on account of acts attributable to the consumer. The grievance of the continuous category, in contrast, relates to in-action on the part of the distribution company – a

matter which has nothing to do with any obligation on the part of consumer.

36. As was pointed out by the learned counsel for the appellant a suggestion for such principle to be adopted and the ruling in *Kalika* Case to be not made generally applicable had been made by the Respondent DISCOM at the hearing on the main petition (Case No. 86 of 2015) of the appellant culminating in order dated 15.08.2017. Though not granting relief and calling upon the appellant to instead approach the Consumer Grievance Redressal Forum, the suggestion was specifically noted (at internal page No. 12 of the said order) and yet not accepted because the ruling of *Kalika* Case (which did not include the test of Load Incentive Factor) was reiterated. The reference to possible claim for compensation under SoP Regulations "*for delay in restoration of supply*" is incorrect it being in teeth of the conclusion that no interruption can be brooked for continuous category, a principle again voiced at the end of impugned order stating that even "*planned Load Shedding*" means the continuous category consumer would pay non-continuous tariff.

37. Having laid down a principle for continuous HT category consumers on express feeder in *Kalika* Case, it was not correct on the part of the State Commission to change the rule by introduction of 60 hour per month interruption test. If this were the correct dispensation, several petitioners in *Kalika* Case should also not have been granted the relief of refund, the period of interruption in their case being much lower. The decision in

*Kalika* Case was based on sound reasoning. If the continuous category consumer was willing to pay higher tariff, and if the DISCOM had accepted him in such category, it was the obligation of the DISCOM to provide quality supply of electricity which was uninterrupted. The only exceptions to this general rule for continuous category would be those envisaged in Section 44 of the Electricity Act, wherein the Distribution Licensee is "prevented" from discharging its obligations for reasons of *force majeure* or other such occurrences "*beyond his control*". We may add that outages, load shedding or tripping which have been generally set out as the primarily reasons for interruptions do not fall in the exempt categories. There can arguably be a case made out for the outages to be scheduled for routine maintenance purposes. But then even such outages in the case of continuous category, dependent on supply by dedicated supply lines, have to be minimal, not of the extent included in the new rule introduced with reference to Load Factor Incentive.

38. We note that the directions for scrutiny by applying the test of 60 hours per month interruption as given in the concluding sentence of the impugned para (No. 16) of Order dated 04.05.2018 are followed by the observations of the Commission that such verification was necessary *"before granting relief of change of tariff category from continuous to non-continuous on account of interruptions in supply".* The said observations of the Commission give the impression of some confusion prevailing in the mind of those rendering the decision. The appellant whose case had led to

the Review Petition being filed was not seeking "*change of tariff category*". It was already in the tariff category of continuous consumers. It appears that the Commission intended to introduce the new Load Factor Incentive formula for the future – that is to say, in cases where consumers were seeking change of tariff category from continuous to non-continuous. But while deciding the matter arising out of the review, the formulation of the directions ended up introducing the said test retrospectively to the existing continuous category consumers there by taking away the benefit, the claim in which regard based on the rule in *Kalika* Case, had already crystalised. This was not only unfair but wholly unjust, being arbitrary.

40. For the forgoing reasons, we vacate the directions of the State Commission introducing the test of 60 hours per month interruption to the rule in *Kalika* Case as introduced by directions in the concluding para of impugned Order dated 04.05.2018, for the continuous HT category consumers on express feeders. The claim for refund will have to be subjected to scrutiny on the principle laid down in the earlier decision in *Kalika* Case ignoring the modification introduced by the impugned order dated 04.05.2018. For removal of doubts, if any, we must add that neither the State Commission nor this Tribunal has examined the claim of refund on account of interruptions (staked by the appellant) on its merits. The verification of the facts will have to be undertaken by the appropriate forum which, in this case, is the Consumer Grievance Redressal Forum.

41. Before parting, we may add that evolution of the rules or principles governing such claims as breach of obligation in providing uninterrupted supply to continuous category consumers on express feeder should be undertaken by the State Commission not by way of rulings in disputes brought for adjudication, but by exercise of its powers to from regulations under Section 181 of the Electricity Act, 2003. Need we remind the State Commission that a very wide power is conferred upon it in this behalf by sub-section (1) of Section 181, it not being restricted by the illustrations of specific subjects set out in sub-section (2). If regulations are in place, they bring about consistency in application removing the possibility of whims or caprice vitiating the decision.

42. The appeal is disposed of in above terms. Applications, if any pending, are rendered infructuous and stand disposed of accordingly.

**PRONOUNCED IN THE OPEN COURT ON THIS 20TH DAY OF FEBRUARY, 2020.**

**(Justice R.K. Gauba)** Judicial Member

**(Ravindra Kumar Verma)** Technical Member