COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

APPEAL NO. 380 OF 2019

Dated: 19th May 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of :

Century Rayon
P.B. No. 22, Kalyan Murbad Road
Shahad – 421103
District Thane
Maharashtra
Through its authorized signatory
Mr. Ajit Marutirao Patil **… Appellant(s)**

Versus

1. **Maharashtra Electricity Regulatory Commission**
   Through its Secretary
   World Trade Centre, Centre No. 1
   13th Floor, Cuffe Parade
   Colaba, Mumbai - 400005

2. **Maharashtra State Electricity Distribution Company Limited**
   Through its Chief Engineer (Commercial)
   Prakashgad, Plot No. G-9,
   Anant Kanekar Marg Bandra (E),
   Mumbai – 400 051. **… Respondent(s)**

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Sakya Singha Chaudhuri
Mr. Avijeet Lala
Mr. Anand Kumar Shrivastava
Ms. Shreya Mukerjee
Ms. Shikha Pandey
Mr. Shivam Sinha

Counsel for the Respondent(s) : Ms. Pratiti Rungta**for R-1**

Mr. Ganesan Umapathy**for R-2**

JUDGMENT

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This appeal is directed against the impugned order dated 25.04.2018passed by the 1st Respondent-Maharashtra Electricity Regulatory Commission (for short hereinafter referred to as "**MERC/Commission**") in Case No. 99 of 2017, Order dated 12.09.2018 in Case No. 195 of 2017 and Order dated 24.12.2018 in Review Petition No. 246 of 2018 on the file of the 1st Respondent-Commission.

2. In brief, the facts that led to filing of the present Appeal are as under:

(i) The Appellant is a division of a Public Limited Company which was registered under the Companies Act, 1956. Admittedly, it is a HT consumer under 2nd Respondent-Maharashtra State Electricity Distribution Company Limited (for short hereinafter referred to as "**MSEDCL**"). Admittedly, the Contract Demand and Sanctioned Load were 27,750 kVA and 60,627 kW which was made over a period of time. At the relevant point of time, it was 19,200 kVA and 52,447 kW respectively. It is not in dispute that since the beginning, the Appellant is receiving power supply on express feeder at a voltage level of 22 kV. This arrangement was on account of lack of 33 kV infrastructure in the area.

(ii) According to Appellant, in terms of provisions of Maharashtra Electricity Regulatory Commission (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2005, and especially Regulation 5.3, the classification of installations is done by the 1st Respondent-Commission. This came to be amended in the year 2014 (for short referred to as "**SOP Regulations**"). This also classifies/categorises installations by the 1st Respondent. It is the contention of the Appellant that voltage levels in terms of Regulation 5.3 prior to and after amendment also are primarily to

ensure good quality of supply and also to ensure minimum losses. Higher voltage levels are essential for higher loads from the system from the point of stability. This also ensures overall system stability apart from quality of supply.

(iii) According to Appellant, since the Contract Demand of the Appellant was mostly above 10 MVA, the Appellant is eligible for being supplied power on 33 kV in terms of Regulations. The supply of power on 33 kV level or for that matter different voltage levels depending upon the load factor is the responsibility of the 2nd Respondent as a distribution company who is to develop and maintain an efficient and economic system in terms of Section 42 (1) of the Electricity Act, 2003 (for short hereinafter referred to as "**the Act**").

(iv) Admittedly, the 2nd Respondent could not develop the infrastructure for supply of power at 33 kV level to the Appellant on account of deficit/lack of infrastructure.

(v) Appellant further contends that in terms of the Contract Demand actually recorded for which amounts were paid by the Appellant under monthly invoices clearly indicate that the Appellant is eligible to receive power supply at 33 kV voltage level. But for

lack of infrastructure due to fault of the 2nd Respondent, the Appellant is forced to receive power at lower voltage level i.e., 22 kV.

(vi) In discharging statutory powers by 1st Respondent-MERC, Multi Year Tariff for the 2nd Respondent came to be determined by Order dated 03.11.2016 (for short **"MYT Order**") in Case No. 48 of 2016 wherein supply of electricity to various classes of consumers as applicable from 01.11.2016 was indicated. For the first time in this Order, the Commission determined energy component and wheeling component separately and accordingly determined what wheeling charges are payable by the consumers depending upon the voltage level to which consumers are connected.

(vii) In spite of the above MYT Order, due to inadequate infrastructure and the failure of the 2nd Respondent to upgrade infrastructure in the said area where the Appellant is situated, the Appellant is compelled to continue receiving power at much below the voltage level prescribed by the 1st Respondent in terms of SOP Regulations. Therefore, on account of failure of the 2nd Respondent, According to Appellant, it is forced to pay wheeling charges applicable to consumers receiving power supply at the voltage level of 22/11 kV, which is substantially higher than the

wheeling charges applicable to consumers connected to 33 kV voltage level.

(viii) Under these circumstances, Guardian Castings along with 11 others approached 1st Respondent-Commission in Petition No. 99 of 2017. In this Petition, the Appellant filed M.A. No. 18 of 2017 seeking direction to treat the applicant as connected to the power supply at 33 kV voltage level, since the 2nd Respondent is at fault and sought for direction against the 2nd Respondent-MSEDCL to recover the wheeling charges under Tariff Order dated 03.11.2016 applicable to 33 kV voltage level consumers. They also sought for refund of excess wheeling charges which were already recovered from the Appellant vide the impugned order dated 25.04.2018 by the 1st Respondent.

(ix) By virtue of this Order, it was clear that the Appellant being entitled to supply of power at 33 kV level voltage, has been supplied at 22 kV level voltage at all relevant times due to infrastructural deficiencies of the 2nd Respondent, which affects the consumers at large. Since this Order was vague, the Appellant filed a clarification Petition and also for implementation of the first order i.e., dated 25.04.2018 with retrospective effect i.e., from 16.06.2017 or from the date from which MYT Order was passed

i.e., on 03.11.2016. It also sought review of the first order by filing Review Petition. The 1st Respondent-Commission dismissed the Review Petition.

(x) Meanwhile, Case No. 195 of 2017 came to be filed by 2nd Respondent for Mid-Term Review for truing-up of Aggregate Revenue Requirement (for short "ARR") of Financial Year 2015-16 so also Financial Year 2016-17 and provisional truing-up of ARR of Financial Year 2017-18 and revised projections of ARR for Financial Years 2018-19 and 2019-20. In the Order dated 12.09.2018, the 1st Respondent-Commission for the first time provided dispensation for levy of wheeling charges. According to Appellant, 1st Respondent-Commission was not justified in passing this Order by placing reliance on its own Order dated 25.03.2010 which is erroneous. The issue did not involve retrospective application of any rule or regulation. The controversy involved was for correct categorization of the Appellant for the purpose of wheeling charges from date of MYT Order of 2016.

3. Aggrieved by the said Order, the Appellant contends that the Appellant is entitled to be charged at the wheeling charges applicable to 33 kV from 03.11.2016 or from the date of filing of the Case No. 99 of

2017. But 1st Respondent has failed to appreciate that in accordance with SOP Regulations, 2nd Respondent has not created infrastructure required and rather 2nd Respondent failed to comply with the mandate of the SOP Regulations. Hence, the Appellant cannot be put to losses for inaction of the 2nd Respondent. The Appellant contends that it cannot be subjected to pay higher wheeling charges on account of failure of the 2nd Respondent to develop proper network and infrastructure required for 33 kV consumers.

4. Appellant also contends that 1st Respondent-Commission was erroneous not to grant any relief to the Appellant though it took note of the failure of the 2nd Respondent to create/develop proper network and infrastructure. The Respondent-Commission ought to have re-categorised the Appellant at par with 33 kV consumers with effect from the date of MYT Order.1st Respondent-Commission failed to take into consideration the failure of the 2nd Respondent is the cause of the Appellant being compelled to accept supply of power at 22 kV voltage level, thereby denied benefits to the Appellant. Otherwise, the Appellant was entitled to 33 kV consumer benefit. Further, though it is connected to a lower voltage level of 22 kV for the fault of 2nd Respondent, it was

made to pay at the rates applicable to 22 kV consumers erroneously is the stand of the Appellant.

5. Appellant further contends that for the first time, different levels of wheeling charges as per voltage level came to be introduced by MYT Order dated 03.11.2016. Therefore, the Appellant could not approach the Respondent-Commission on the issue of supply of power at 22 kV level on earlier occasions. Further, having a Contract Demand above 10 MVA consistently also entitles supply of power at 33 kV, therefore, wheeling charges in terms of SOP Regulations has to be for 33 kV level consumers. Therefore, the 1st Respondent ought to have opined that till the 2nd Respondent provides infrastructure required to supply power to the Appellant at 33 kV voltage level, and the Appellant is required to pay only 33 kV voltage level consumer so far as the wheeling charges. The 1st Respondent also failed to notice that such benefit is enjoyed by other consumers in other regions or circles who are getting the benefit of better quality supply at 33 kV. It is nothing but violation of principles of equity and fair play is the stand of the Appellant.

6. According to Appellant, 1st Respondent failed to take into consideration the admission of the 2nd respondent that it was not in a

position to provide 33 kV network and requested 1st Respondent to determine the wheeling charges as may be applicable based on SOP Regulations in the areas where 33 kV voltage level is available. But according to 2nd Respondent, it is not feasible to provide infrastructure of 33 kV power though it admits that the Appellant is also covered by the areas where SOP Regulations apply.

7. Further, the Appellant contends that though the 1st Respondent appreciated that bona fide consumers including the Appellant were entitled to supply of power at 33 kV level voltage, but failed to appreciate the said fact by making the scope only prospectively applicable instead of 03.11.2016 when the 1st Respondent unbundled the tariff.

8. With these submissions, the Appellant sought for the following reliefs:

(a) Allow the present Appeal and modify the First Impugned Order dated 25.04.2018 in Case No. 99 of 2017 & M.A. No. 18 of 2017 and the MTR Order dated 12.09.2018 in Case No. 195 of 2017 to the limited extent to allow levy of lower Wheeling Charges at 33 kV to the Appellant from the date of the MYT Order dated 03.11.2016; and set aside the Second Impugned Order dated

24.12.2018 in Case No. 246 of 2018 to the limited extent that it has not allowed lower Wheeling Charges at 33 kV to the Appellant from the date of the MYT Order dated 03.11.2016.

(b) Declare and hold that the Appellant would be entitled to levy of Wheeling Charges on the Appellant as per 33 kV level from the date of MYT Order dated 03.11.2016 in Case No. 48 of 2016 or at least, the date of filing of M.A. No. 18 of 2017 in Case No. 99 of 2017.

(c) Pass such further or other order(s) as this Tribunal may deem fit in the facts and circumstances of the case.

9. Per Contra, **1st Respondent-MERC filed its reply, in brief, as under:**

i) According to 1st Respondent-MERC, the present Appeal is devoid of merits, as the Appellant cannot challenge that the relief granted ought to have been retrospective but not with prospective effect since no case is made out by the Appellant warranting any interference. The Respondent-Commission allowed levy of lower wheeling charges from the date of the impugned order dated 25.04.2018 and not from the date of MYT Order or from the filing of M.A. 18 of 2017 i.e., 16.06.2017. It

admits passing of MYT Order dated 03.11.2016 in Case No. 48 of 2016 wherein for the first time, it unbundled the variable charges component of the tariff into wheeling charge component and energy charge component. When the Appellant and others approached the Respondent-Commission, it passed Orders on 25.04.2018 granting the relief from prospective date and also rightly rejected the review and continued prospective implementation of relief granted in Order dated 25.04.2018.

ii) 1st Respondent-Commission also contends that proper reasons were given for providing prospective application or benefit of lower wheeling charges and it is a comprehensive order. It has clearly explained the methodology of determining voltage-wise wheeling charges and hence rejected the proposal of levying 33 kV wheeling charges to the consumers who are eligible by its Contract Demand to connect to 33 kV, but on account of non-availability of network is connected to 22 kV voltage level. The Commission also made it clear that a separate determination for wheeling charges for 22 kV or clubbing it with 33 kV or otherwise would be made during subsequent tariff proceedings. However, as an interim measure it had stated that if the consumer is connected to 22 kV but records billing demand which is eligible for connected at 33 kV level, then in that month such consumer

will get benefit of lower wheeling charges applicable to 33 kV level voltage. It was done only to remove difficulties under SOP Regulations and without amending the tariff order, it has made it applicable prospectively. Therefore, it rightly rejected the review, since retrospective applicability was clearly explained as provided in the impugned order. 1st Respondent-Commission also contends that, unless MYT Tariff Order was reviewed, it would not be possible to give effect to the relief claimed by the Appellant with retrospective effect.

iii) 1stRespondent-Commission further contends that the Appellant has misrepresented the reasoning given and the rationale adopted by the Respondent-Commission while deciding the issues in its impugned order. They also contend that the Commission has passed logical order explaining rationale behind it.

With these contentions, the 1st Respondent has sought for dismissal of the Appeal.

10. 2nd Respondent-MSEDCL also filed its reply, in brief, as under:

i) Contending that the 1st Respondent in exercise of its power to remove difficulties under Regulation 15 of SOP Regulations of 2014, has dealt with the issue of implementation of orders prospectively in the

impugned order. As a matter of fact, MERC in its impugned MTR Order dated 12.09.2018 in Case No. 195 of 2017 has given dispensation for levy of wheeling charges applicable to various voltage levels. Therefore, According to 2nd Respondent-MSEDCL, the first impugned order dated 25.04.2018 in case No. 99 of 2017 was disposed of in correct manner giving interim relief prospectively to the Appellant and it was also justified in rejecting the Review Petition by impugned order dated 24.12.2018.

ii) The 2nd Respondent further contends that the Appellant sought clarification of the first impugned order asking retrospective implementation of the order from the date of filing of Petition i.e., 16.06.2017; however, MERC vide order dated 24.12.2018 rightly held that there was no error in the first impugned order that warrants review.

iii) The entire grounds of Appeal, according to 2nd Respondent, would point that the scope of the present Appeal is confined to the retrospective application of the first impugned order i.e., MTR Order. MERC gave reasons for prospective grant of the relief and also referred to 12.09.2018 MTR Order wherein dispensation was granted to levy of wheeling charges applicable to various voltage levels. Therefore,

interim dispensation was given prospectively in the first impugned order which attained finality in the MTR Order dated 12.09.2018.

iv) They further contend that MERC was justified in placing reliance on its earlier Order dated 25.03.2010 in the case of ***Kendriya Vihar Co-operative Housing Federation Ltd. v MERC***. Further, in the absence of express statutory provisions of granting retrospective benefit, there cannot be retrospective application of the impugned order as sought by the Appellant, since it would have adverse revenue impact on MSEDCL.

With these submissions, 2nd Respondent-MSEDCL sought for dismissal of the Appeals

11. Rejoinders also came to be filed with more or less the same grounds as agitated in the grounds of the Appeal.

12. Based on the above pleadings, the points that would arise for our consideration are –

"Whether the impugned orders warrant interference as sought for by the Appellant?" and "if so, what order?"

13. The Appellant, reiterating the issues and contentions raised in the Appeal Memo submitted its arguments as well as written submissions, in brief, as under:

i) The Appellant's main contention is that the Respondent-Discom is not entitled to charge higher wheeling charges at 0.83 paise per unit which is leviable for 22 kV instead of 0.9 paise per unit which is fixed for 33 kV level consumers must be charged for the Appellant's unit. This contention is on the ground that for want of infrastructure, which is the responsibility of the Discom, is not in place; therefore, the Appellant is not only entitled to be connected to 33 kV level based on its power demand and consumption but also must be charged what is leviable for 33 kV level consumers.

ii) The Appellant further contends that since Regulations 2005 came to be amended with effect from 20.05.2014, the Appellant is entitled for such benefit available under Regulation 5.3 of the SOP Regulations and consequently charges have to be inconformity with the charges applicable to such consumers. In terms of Regulations, it was mandatory for the 2nd Respondent-Discom to provide higher voltage i.e., 33 kV network within one year from the date of the amended Regulations 2014 came into force i.e., on or before 20.05.2015. This was recognised and in its Order dated 03.11.2016, the 1st Respondent-

Commission in Case No. 48 of 2016 (MYT Order), while determining the Multi-Year Tariff for 2nd Respondent-Discom to various classes of consumers, for the first time, unbundled the tariff by determining the energy component and wheeling component separately.

iii) According to Appellant, since the Appellant did not connect to 33 kV infrastructure in the area on account of want of such infrastructure to be provided by the 2nd Respondent, for no fault of Appellant, they should be put to additional financial burden and the same deserves to be set right. It is further contended that even if various technical and commercial reasons given by 2nd Respondent for not providing required infrastructure to give connection at 33 kV to various consumers, it does not mean that consumers who are not at fault for any nature should face the brunt of its consequences of such deficits on the part of the Discom.

iv) The Appellant further contends that since Case No. 99 of 2017 filed by Guardian Castings and 11 others before the 1st Respondent-Commission was also involved similar to the request of the Appellant, the Appellant filed an Intervening Application i.e., M.A. 18 of 2017 seeking implementation of applicable wheeling charges with effect from the MYT Order dated 03.11.2016. Then 1st Respondent-Commission passed Orders on 25.04.2018 in Case No. 99 of 2017. Since it appreciated the problems i.e., substantial investment to be spent by the

2nd Respondent to create infrastructure of 33 kV network, while granting exemption to 2nd Respondent to put up such required network, 1st Respondent-Commission directed that the consumers including the Appellant who are eligible to be connected to 33 kV but factually connected to 22 kV level, be charged wheeling charges for 33 kV level in the months when their billing demand is within the load level eligible for connecting at 33 kV level. But this direction had to be applied prospectively i.e., from 25.04.2018. Aggrieved by this, a Review Petition came to be filed contending that from the date of MYT Order i.e., 03.11.2016 or from the date of filing of Case No. 99 of 2017, the charging as directed in its Order dated 25.04.2018 must be implemented.

v) Meanwhile, according to Appellant, by MTR Order dated 12.09.2018 in Case No. 195 of 2017, the Commission had clearly indicated that in those areas where 33 kV networks are absent, the consumers, if connected to 22 kV who were required to be connected to 33 kV network, are required to pay wheeling charges of 33 kV level, if the billing demand was equal to or more than the eligible payment specified as per the SOP Regulations. Observing these facts, the Review Petition came to be dismissed erroneously is the contention of the Appellant. Since 2nd Respondent failed to comply with the

mandatory requirement of network or infrastructure in terms of SOP Regulations, the Appellant and other such consumers who fulfil the criteria of 33 kV consumers must be treated at par with 33 kV consumers from the period as prescribed under SOP Regulations i.e., 20.05.2015. But the Respondent-Commission erred in interpreting said Regulations, though status of the Appellant was recognised. Therefore, according to Appellant, from the date of MYT Order dated 03.11.2016, such benefit must be made applicable and not prospectively. For this preposition, as stated above, they rely upon ***Lily Thomas*** *vs.* ***Union of India, [(2000) 6 SCC 224 at Para 59]***.

vi) The Appellant also refers to ***Kusheshwar Prasad Singh*** *vs.* ***State of Bihar, [(2007) 11 SCC 447)*** to contend that a person who is at fault cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable orders i.e., 2nd Respondent herein who failed to create infrastructure of 33 kV level.

vii) According to Appellant, the Appellant cannot be made to pay wheeling charges at 22 kV, since it is in excess of tariff legally payable. Therefore, once 1st Respondent accepts the Appellant as a consumer entitled to wheeling charges at 33 kV, only at such levels tariff has to be levied and not any other tariff. Therefore, the 2nd Respondent cannot be allowed to enrich itself by retaining higher wheeling charges from the

Appellant over and above the charges specified for 33 kV consumers. If it is allowed, it is contrary to the provisions of Section 62 (6) of the Act. Therefore, the excess amount collected from the Appellant towards wheeling charges has to be refunded along with interest is the stand of the Appellant.

viii) They further contend that the Respondents cannot rely upon Regulation 15 of SOP Regulations, since it is misplaced. Granting exemption to the 2nd Respondent from 33 kV network in the concerned area in exercise of powers of removal of difficulty, cannot come in the way of interim dispensation of wheeling charges as opined by the 1st Respondent by further opining that it was done in exercise of its powers to remove difficulties. Such exercise of the Respondent-Commission by granting exemption should not affect the Appellant's entitlement under the SOP Regulations.

ix) The Appellant again contends that the present matter does not involve retrospective application of any rule, regulations etc., since rule was in effect right from 2014 i.e., 20.05.2014. Therefore, placing reliance on its own order dated 25.03.2010 pertaining to ***Kendriya Vihar Co-operative Housing Federation Ltd. v MERC***'s case is erroneous and totally misplaced, since the Appellant is asking entitlement of the benefit from the period of SOP Regulations amended and not earlier.

With these submissions, the Appellant sought for granting the relief as prayed in the Appeal.

14. As against this, 1st Respondent-Commission filed its written submissions, more or less adopting the contentions raised in the reply.

i) After reiterating the same, 1st Respondent-Commission further contends that since 2nd Respondent has no network to supply power at 33 kV voltage level in 9 circles including the circle where the Appellant is situated and to create such infrastructure by changing the entire existing network to LT level from EHV requires substantial investment. Keeping in mind the SOP Regulations of 2014 wherein the Commission had specifically instructed to provide specified voltage level with reference to the Contract Demand and also instructed distribution licensee to ensure that the supply is provided at the specified voltage level within one year. Installations are classified as per Regulation 5.3 of SOP Regulations. According to provisions of SOP Regulations, the Appellant is eligible for power supply at 33 kV from the date of release of supply till date, since the Contract Demand has never gone below the required 5 MVA limit (now it is 10 MVA).

ii) 1st Respondent further contends that for the first time, two unbundling of tariff components were made by MYT Order dated 03.11.2016 in Case No. 48 of 2016. This led to determination of wheeling charges for different voltage levels based on the principle that consumer tariff also reflects the underlying differences in cost of supply at different voltage levels. Therefore, HT consumers have been distinguished based on voltage levels i.e., EHV, 33 kV, 22 kV and 11 kV. This was in consonance with APTEL's observation that separate consumer category created for EHV consumers.

iii) Further, they contend that the Appellant filed Intervention Application in Case No. 99 of 2017. This application and Case No. 99 of 2017 came to be disposed of by a common order dated 25.04.2018. The observations in the said Order clearly indicate why the benefit cannot be granted with retrospective effect and why it should be prospective. The Appellant had challenged the said order only to the extent that the Appellant is entitled to be charged wheeling charges from 03.11.2016. But the same is not tenable, since the Appellant never sought such claim by filing any substantive MTR Petitions. The Appellant approached the Commission only by filing an Intervention Application and the said route is not permissible. To balance equities between the Appellant and MSEDCL, so also other similarly constituted

persons, MERC allowed computation of wheeling charges for all those who are connected to 22 kV but eligible for 33 kV must be charged at the rate applicable to 33 kV as an interim measure only in the months in which their billing demand is within the load limit eligible for connection at 33 kV level. However, this was to be prospectively applicable. This approach was adopted by the Commission in the light of the fact that during public consultation, a suggestion was made to merge 22 kV and 33 kV levels for computing wheeling charges and losses.

iv) The Respondent-Commission further contends that in MTR Petition, the Commission took note of voltage-wise break-up of GFA and voltage-wise loss levels pertaining to all major voltage levels and finally determined that the wheeling charges for all these voltage levels must be separate. It is still in the process of finally determining the wheeling charges based on the information. Therefore, the present Appeal being against an interim dispensation is devoid of merits. This interim arrangement was to balance equities between the parties.

v) According to 1st Respondent-Commission, since laying of infrastructure would adversely impact other HT consumers, which again has to be recovered from consumers including expenses in the ARR of 2nd Respondent, as it was an interim arrangement, it cannot be with

retrospective effect. Therefore, the Appellant cannot be granted the relief sought by it.

15. 2nd Respondent-MSEDCL also filed written submissions, in brief, as under:

i) 2nd Respondent contends that the impugned orders cannot be altered or modified or quashed, since they are supported with cogent reasons to arrive at the conclusions. The infrastructure required for 33 kV network cannot be provided for want of space, cost and burden on consumers as well as MSEDCL at the end of the process. They almost raised similar contentions as put forth by 1st Respondent-Commission and reiterate that the interim relief was granted prospectively, since MTR Order was pending. When clarification was sought to implement retrospectively from the date of filing of Petition i.e., 16.06.2017 or from MYT Order dated 03.11.2016 by filing Review Petition, the second impugned order was passed rejecting the application by opining that rules, stipulation and regulations cannot be applied with retrospective effect and dismissed the Review Petition properly.

ii) 2nd Respondent-MSEDCL further contends that the Appeal is not maintainable since the Appeal is challenging both the first impugned order as well as the review order. In the light of provisions of Order 47

Rule 7 of CPC, if Review is rejected, the Appeal is not maintainable against such order and it lies against the impugned order.

iii) They further contend that the 1st Respondent by its first Order dated 25.04.2018 has rejected or denied levy of lower wheeling charges from the date of MYT Order or from the date of filing Intervention Application and instead it is made applicable from the date of the impugned order i.e., 25.04.2018 and there is no infirmity. The MTR Order dated 12.09.2018 has given dispensation for levy of wheeling charges applicable to various voltage levels and the same Order clearly indicates the reasons. Since Order dated 03.11.2016 has not determined any rights of a particular consumer or the Appellant, it has introduced wheeling charges based on voltage level on which the consumer is connected for different categories, and benefit cannot be extended to the Appellant with effect from 03.11.2016. The rights of the Appellant and other similarly placed consumers came to be crystallised for the first time only on 25.04.2018. The 1st Respondent was justified in saying that the benefit must be extended prospectively. Therefore, it cannot be that the word 'prospectively' would mean from the date of filing of the Petition i.e., 16.06.2017 or the date of passing of the Order in Case No. 48 of 2016 i.e., 03.11.2016. While rejecting the Review Petition, MERC has rightly observed that rules and regulations cannot

be applied prospectively. Therefore, the impugned orders have to be applied prospectively and not with retrospective effect as contended by the Appellant unless there is any express statutory provisions. Otherwise, this would cause adverse revenue impact on MSEDCL.

With these submissions, the 2nd Respondent sought for dismissal of the Appeal.

16. We have heard oral submissions too by all the parties.

17. It is not in dispute that for the first time, by virtue of amendment to SOP Regulations in 2014, the 1st Respondent-Commission unbundled variable tariff components which were earlier referred to as energy charge of the tariff into the wheeling charge component and energy (supply charge) component. This unbundling of tariff component and determination of charges for different voltage levels was made for the first time in MYT Order dated 03.11.2016 in Case No. 48 of 2016. The intention of the 1st Respondent for unbundling the tariff components was to determine wheeling charges for different voltage levels based on the principle that the consumer tariff should also reflect the underlying differences in cost of supply at different voltage levels. They also made it clear by distinguishing HT consumers based on voltage levels i.e.,

EHV, 33 kV, 22 kV and 11 kV, keeping in view the observation of APTEL that EHV consumers must have a separate consumer category. This MYT Order provides wheeling charges for different voltage level as under:

Particulars	**Wheeling Charges (Rs./kWh)**
33 kV	0.09
22 kV / 11 kV	0.83
LT Level	1.43

18. Thereafter, Petition No. 99 of 2017 came to be filed against MSEDCL by Guardian Castings and several other consumers claiming levy of wheeling charges as applicable to consumers connected at 33 kV line by MSEDCL instead of charging at the rate applicable to 22 kV line. In this Petition Appellant filed an Intervening Application which was numbered as M.A. 18 of 2017 wherein the Appellant sought the following reliefs:

> *"a. Delay, if any, in filing the present Application may please be condoned;*
>
> *b. To admit this Application and may be further pleased to allow the Applicant to intervene in Case No. 99 of 2017;*
>
> *c. To direct the Respondent MSEDCL to treat the Applicant / Intervener connected on 33 kV Voltage level as per the MERC*

(Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2014 of this Commission and further to direct the Respondent MSEDCL to recover "Wheeling Charges" under Tariff Order dated 3rd November 2016 as applicable to consumers receiving power supply on 33 kV Voltage level; and to refund the excess wheeling charges recovered from the Applicant/ Intervener from 1st November 2016 and onwards."

19. The first impugned order dated 25.04.2018 came to be passed as common order which reads as under:

"The Commission notes that, significantly, the Petitioners have approached MSEDCL (and now the Commission) only after the MYT Order dated 3 November, 2016 although they were being supplied at lower voltage levels for long before that, and the SoP Regulations, 2014 which increased the limits of loads which can be released on specified voltage levels were notified in May, 2014.

36. The GFA, energy sales and distribution loss at each voltage level are the factors considering which the ARR concerned with Wheeling is allocated to different voltage levels and the voltage-wise Wheeling Charges are determined. The proposed alternative of levying Wheeling Charges to consumers in such areas who are connected on 22 kV but eligible for 33 kV voltage supply at the rate applicable to the 33 kV level is not in consonance with the basic principle of voltage-wise Wheeling Charges. Hence, it cannot be accepted.

37. The 2nd proviso to Regulation 5.3 (quoted at para. 3(a) earlier in this Order) provides that, pending supply within one year at the specified voltage, a Voltage Surcharge may be levied as may be determined by the Commission. In the context of MSEDCL's claim to a 2% Voltage Surcharge in the event that its proposal above is accepted, the Commission notes that the determination of a Voltage Surcharge has been discontinued from its previous MYT Order dated 26 June, 2015 in Case No. 121 of 2014.

38. MSEDCL has stated that it has no network to supply power at the 33 kV voltage level in 9 Circles (viz. Pen, Satara, Pune, Vasai, Kalyan-1, Kalyan-2, Palghar, Thane and Baramati). Unlike other areas, where voltages are stepped down from EHV to 33 kV, 33 kV to 11 kV and 11 kV to LT voltage, in these areas the network is designed to step down from EHV to 22 kV and from 22 kV directly to the LT level. For laying a 33 kV infrastructure in these areas, the entire network design, from the EHV to the LT level, would require to be changed at a very substantial cost.

39. Establishing such a network would enable MSEDCL to cater to higher loads in these areas at the applicable 33 kV voltage level instead of the present 22 kV level in accordance with Regulation 5.3 of the SoP Regulations. However, at the same time, the Commission cannot be oblivious of the interests of the consumers at large who would have to bear, through future tariffs, the large additional cost that this would entail. Moreover, all other HT consumers in these areas would have to change their existing Distribution Transformers of 22/0.4 kV to

33/0.4kV Transformers, also at a substantial cost. Thus, directing MSEDCL to lay a 33 kV network in these areas considering the provisions of the SoP Regulations may benefit the Petitioners, but adversely impact other HT consumers there as well as the consumers at large.

40. During the public consultation process in Case No. 48 of 2016, as recorded at para. 2.22 of the MYT Order, suggestions were made to merge the 22 kV and 33 kV levels for computing Wheeling Charges and losses. However, in the absence of separate details such as GFA and distribution loss for the 22 kV level, in its MYT Order the Commission continued the practice of clubbing the 22 kV and 11 kV levels for computing Wheeling Charges and losses. The Commission directed MSEDCL to submit the relevant details in the subsequent MTR proceedings:

"However, the Commission directs MSEDCL to submit the voltage-wise break-up of GFA and voltage-wise loss levels separately for all major voltage levels, i.e. EHV (above 33 kV), 33 kV, 22 kV, 11 kV and LT, in its MTR Petition to enable the Commission to determine the Wheeling Charges for all these voltage levels separately."

Thus, in the forthcoming MTR proceedings, taking into account the details submitted by MSEDCL and the public and stake-holder comments, the Commission may consider determining separate Wheeling Charges for each voltage level, or club the 22 kV and 33 kV levels for these charges, or some other dispensation.

41. In the meantime, some relief needs to be given to those consumers who are eligible for the 33 kV voltage level but are connected at the 22 kV level in the absence of a 33 kV network, while at the same time safeguarding the interests of other consumers. Hence, while consumers connected at the 22 kV level in these 9 MSEDCL Circles are entitled to apply for shifting to the 33 kV voltage level considering the load limits in the SoP Regulations, 2014, they shall be levied Wheeling Charges applicable to the 33 kV level only in the months in which their Billing Demand is within the load limit eligible for connecting at the 33 kV level. In all other months, they shall be levied the Wheeling Charges applicable to the 22 kV level. This would also limit the scope for gaming.

42. MSEDCL has many other consumers who are availing power at higher or lower voltage level than specified in SoP Regulations. This could be because of non availability of requisite network. The possibility of gaming by consumers to pay lower Wheeling Charge also cannot be ruled out due to which MSEDCL is possibly losing their legitimate Wheeling Charge revenue. The Commission would look into this aspect and give necessary direction in the MTR Order.

43. The Commission is providing this interim dispensation prospectively, pending its MTR Order, in exercise of its power to remove difficulties under Regulation 15 of the SoP Regulations, 2014 in the light of the circumstances and on the considerations elaborated earlier in this Order."

20. By virtue of the amended provisions of SOP Regulations which came into effect from 20.05.2014, Regulation 5.3 of the amended Regulations providing classification of various installations by voltage levels reads as under:

> *"5.3 Except where otherwise previously approved by the Authority, the classification of installations shall be as follows :—*
>
> *(a)* ***AC system***
>
> *(i) Two wires, single phase, 230 / 240 volts- General supply not exceeding 40 amperes.*
>
> *(ii) Four / Three wires, three phase, 230 / 240 volts between phase wire and neutral or 400 / 415 volts between the phases / lines and contract demand not exceeding 80 kW/ 100 kVA in all areas, except in Municipal Corporation areas where such limit would be 150 kW/ 187kVA : Provided that in case of multiple consumers with contract demand more than 150 kW / 187 kVA, in the same building / premises as a single point supply in the Municipal Corporation areas where such limit would be 480 kW / 600 kVA :*
>
> *(iii) Three phase, 50 cycles, 11 kV – all installations with contract demand above the limit specified in the clause (ii) and up to 3000kVA :*
>
> *Provided that in Mumbai Metropolitan Region or in case of supply to an installation through an express feeder in other area, the contract demand limit would be 5000 kVA.*

(iv) Three phase, 50 cycles, 22 kV – all installations with contract demand above the limit specified in the clause (ii) or clause (iii) and up to 7500 kVA :
Provided that in Mumbai Metropolitan Region or in case of supply to an installation through an express feeder in other area, the contract demand limit would be 10,000 kVA.

(v) Three phase, 50 cycles, 33 kV – all installations with contract demand above the limit specified in the clause (ii) or clause (iii) or (iv) above and up to 10,000 kVA :
Provided that in Mumbai Metropolitan Region or in case of supply to an installation through an express feeder in other area, the contract demand limit would be 20,000 kVA

(vi) Three phase, 50 cycles, Extra High Voltage – all installations with contract demand above the limit specified in the clause (iv) or clause (v)."

21. This was done with a view to ensure primarily good quality of supply of power and also to ensure that losses are minimised. System stability depends upon voltage levels, therefore, this amendment was introduced to reduce T&D losses and to have reliable supply of power. It is not in dispute that by virtue of the SOP Regulations, the 2nd Respondent was required, rather mandated to provide 33 kV infrastructure to the Appellant, since its Contract Demand limit was more

than 10,000 kVA. However, in the area of the Appellant, such infrastructure could not be provided for various reasons including substantial investment on the part of the 2nd Respondent which again would burden other consumers. Therefore, the 1st Respondent did not compel the 2nd Respondent to create this infrastructure and therefore, installation of the Appellant was due to be connected to 22 kV voltage level though mandatorily it was to be connected to 33 kV voltage level.

22. At this point of time, when amendment to Regulation 5.3 of SOP Regulations came into effect, the tariff was not unbundled and it was just component of energy which included all other aspects. For the first time, the tariff came to be unbundled creating wheeling charges component etc. This wheeling charges component apparently, as noted in the table referred above, is much lesser for installation connected to 33 kV voltage level than the installation connected to 22 kV voltage level or others.

23. It is very clear that the Appellant is in no way responsible for connecting its installation to 22 kV level voltage. It is entirely on account of the 2nd Respondent's inability to provide 33 kV voltage level infrastructure, the Appellant's installations had to be connected to 22 kV voltage level. That being the situation, can contention of the 1st and 2nd

Respondents that the 2nd Respondent would face financial burden, if Appellant's installation is given benefit of paying lesser wheeling charges as indicated in the first impugned order with retrospective effect stand?

24. The Appellant has challenged three orders dated 25.04.2018 in Case No. 99 of 2017, dated 12.09.2018 in Case No. 197 of 2017, and dated 24.12.2018 in Case No. 246 of 2018 (Review). Since review was not allowed, question of maintaining an Appeal against the Review Order would not arise and the Appeal has to be against the impugned order dated 25.04.2018. In that view of the matter, this has to be only against the Order dated 25.04.2018 and the relevant paragraphs are already mentioned above.

25. It is well settled principle that a party who is the wrong doer or who is at fault cannot take advantage of his own default or wrong doing. Though there is no intentional exercise on the part of the 2nd Respondent in not providing required infrastructure for installation of 33 kV voltage levels like the Appellant and others, but the fact remains, it is on account of deficit, whatever be the reasons for such deficit is attributable to the 2nd Respondent.

26. When MYT Order came to be passed on 03.11.2016 wherein for the first time unbundling of tariff dividing the components of the tariff came to be made, no one including the Appellant had approached 1st Respondent-Commission seeking extension of such benefit after unbundling of the tariff by the Commission in the MYT order. Therefore, one cannot entertain the relief/prayer sought by the Appellant that he is entitled to such benefit with effect from 03.11.2016.

27. Then coming to the alternative prayer that at least the Appellant must get benefit from the date of filing of Case No.99 of 2017 or from the date of filing Intervention Application i.e., M.A. No. 18 of 2017 as already stated above during the contentions raised by Respondents that the rule, regulations or stipulations cannot be implemented with retrospective effect. For this, the Respondent-Commission relied upon the case of ***Kendriya Vihar Co-operative Housing Federation Ltd. v MERC*****.**

28. What we note in the present appeal is that the Appellant is not seeking extension of benefit of paying lesser wheeling charges (as per 33 kV voltage level consumer must be extended to him when the Regulation was not in existence). Apparently, by virtue of SOP Regulations, 2014 within one year, responsibility of the 2nd Respondent

was to create infrastructure in terms of the set Regulations depending upon the category or classification of installations vis-à-vis voltage levels which again depends on the Contract Demand. At the most by 20.05.2015 such infrastructure ought to have been provided which admittedly is not provided so far as the Appellant is concerned, till date.

29. As stated above, the Appellant or any other consumer of similar category did not approach the Commission till filing of Case No. 99 of 2017 seeking benefit arising out of unbundling of tariff components by virtue of MYT Order dated 03.11.2016. If benefits were to be extended to the Appellant or such consumers with effect from filing of the Petition i.e. 16.06.2017**,** it does not mean that there was no regulation/stipulation or order which clearly gave different components of tariff for HT installations i.e., based on Contract Demand vis-à-vis category. This was known to all by virtue of the MYT Order dated 03.11.2016. Therefore, contention of the Respondents that it is nothing but application of Stipulation/Regulation with retrospective effect would mean that there was no such Regulation. It is made clear that the Regulation was very much in existence, MYT Order dated 03.11.2016 was very much in existence and it was only interpretation of the existing Stipulation, Regulation and Orders of MERC that was required to be

done and it is not applying a Regulation/Stipulation when it was not born or not in existence.

30. In that view of the matter, we are of the opinion that the Appellant is entitled to the benefit of having the benefit granted to him in the impugned order with effect from the date of filing of the application by him before MERC i.e., 18.09.2017.The wheeling charges which were paid by the Appellant from the date of application dated 18.09.2017 has to be adjusted from the future wheeling charges which has to be paid by the Appellant to the 2nd Respondent-Discom. With these observations, the Appeal is allowed in part.

31. No order as to costs.

32. Pronounced in the Virtual Court on this the 19th May, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd