APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 169 OF 2020 &
IA NO. 1237 OF 2020

Dated : 22nd December, 2022

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

IN THE MATTER OF :

Whirlpool of India Limited,
Plot No. A-4, MIDC, Ranjangaon,
Tal. Shirur, Dist. Pune,
Maharashtra – 412220. .... **APPELLANT**

Versus

The Director General, Bureau of Energy Efficiency,
Ministry of power, Government of India,
4th Floor, Sewa Bhawan,
R. K. Puram, New Delhi – 110 066. .... **RESPONDENT**

Counsel for the Appellant(s) : Ms. Anannya Ghosh
Ms. Brianhenry Moses
Mr. Dushyant Manocha

Counsel for the Respondent(s) : Mr. Aamir Zafar Khan
Mr. Sadiqua Fatma
Ms. Gagan Anand
Mr. Ishan Khanna
Mr. Ankit Konwar
Mr. Jitendra Kumar
Ms. Grusha Mehta

J U D G E M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. This appeal is filed by Whirlpool of India Ltd. ("Appellant" for short), under Section 31(1) of the Energy Conservation Act, 2001 ("the Act" for short) against the Order passed by the Secretary, Bureau of Energy Efficiency on 04.08.2020.

2. Facts, to the extent necessary, are that the Appellant, a company incorporated under the Companies Act, 1956, is the Indian subsidiary of Whirlpool Corporation and, among others, manufactures refrigerators. The Respondent is the authority entrusted with the functions of developing standards for determining energy consumption ratings, granting permissions for application of energy consumption rating labels on appliances, and to ensure that the same meet the standards set by it.The Appellant filed an application on 17.12.2015/18.12.2015 seeking permission to affix the energy consumption rating label on its product. The Respondent granted permissions by its proceedings dated 12.02.2016 and, consequent thereto, the Appellant has been using the label containing a five-star rating on its refrigerators.

3. By its letter dated 19.06.2020, the Respondent informed the Appellant that it had conducted a suo-motu verification test on a sample refrigerator and found it to be non-compliant, and that a second test was proposed to be conducted on 06.07.2020. Attached to this letter dated 19.06.2020 was a copy of the suo-motu verification test report dated 30.09.2019. The

Appellant claims to have received a physical copy of this letter dated 19.06.2020 only on 08.07.2020, after the second testing process had commenced on 06.07.2020; and not to have received a copy of the letter dated 19.06.2020, which the Respondent claims to have sent to them by e-mail. These, and other, contentions shall be examined later in this order.

4. Be that as it may, pursuant to the second test report dated 11.07.2020, the Appellant was informed by the Respondent, by letter dated 04.08.2020, that they were permitted to affix a label on the direct cool refrigerator by their letter dated 11.11.2019, subject to compliance of the terms and conditions specified therein; in terms of Regulation 11, the Bureau had purchased two samples of BEE star labelled DCR Model No. DC (P) 205 5S from the Appellant's authorised distributor by invoice dated 27.02.2020, and had lifted the samples through M/s Conformity India International Pvt Ltd, for its delivery to an agency appointed by the Bureau, for testing and verification of the particulars displayed on the label of the said product; details of the procurement, the test, and the samples picked up, were communicated to the Appellant on 19.06.2020, and they were asked to attend and witness the second check verification test at the National Accreditation Board for Testing and Calibration Laboratories Accredited Laboratory M/s ERDA; the test result of the second check testing was duly checked and counter signed by the authorised personnel of M/s ERDA; the results of the test confirmed that the samples had failed to meet the requisite parameters and standards stipulated in S.O. 6243 (E) dated 21.12.2018, as also the terms and conditions of the permission given to the Appellant for display of particulars on the label.

5. In exercise of the powers, conferred under Regulation 11 (5) (a) of the Bureau of Energy Efficiency (Particular and Manner of their Display on Labels of household Direct Cool Refrigerator) Regulations, 2016 ("Regulations" for short), the Appellant was directed by the Respondent to (i) correct the star label displayed on the label of the direct cool refrigerator or remove the defects and deficiencies found during the testing; (ii) withdraw all stocks from the market to comply with the directions of the Bureau; and (iii) change the particulars displaced on advertising material.

6. The Appellant was also directed to complete the afore-said directions within 10 days after expiry of two months i.e., 04.10.2020, and was informed that, in case the compliance report was not received by them, the Bureau would proceed to take action in terms of Regulation 11 (6) (b) of the Regulations, and take further follow up action in terms of sub-regulation (5), (6), (7) and (8) of Regulation 11 of the Regulations. Aggrieved thereby, the present appeal.

I. RIVAL SUBMISSIONS:

7. Ms. Anannya Ghosh, learned counsel for the appellant, would question the validity of the impugned order on the following grounds: (i) the e-mail allegedly sent by the Respondent regarding the first test report, and intimating them that a second test would be conducted, was not received by the Appellant; (ii) a physical copy of such intimation was received by the Appellant only on 08.07.2020, after the second test had commenced on 06.07.2020; (iii) in terms of the guidelines, for promoting standards and labels program of BEE (issued in January 2016), the second test is required to be conducted by the very same laboratory which conducted the first test, that too within two weeks; (iv) while the first test was conducted during the

period 26.08.2019 to 25.09.2019, the second test was conducted during the period 06.07.2020 to 11.07.2020, and the time lag between the first and second test was more than nine months, and falls foul of the guidelines which require the second test to be conducted within two weeks of the first; (v) while the first test was conducted by the Central Power Research Institute, Bangalore, the second test was conducted by the Electrical Research and Development Association, Vadodara; consequently, the stipulation in the guidelines that the second test should be conducted by the very samelaboratory, which conducted the first test, is also not satisfied; (vi) even otherwise, the Respondent has failed to assign any reasons why they chose to conduct the second test in a different laboratory, which is also in violation of the guidelines; (vii) the guidelines prescribed by the Bureau is binding on it, notwithstanding the fact that statutory regulations were framed thereafter on 26.05.2016; (viii) while the respondent claims that the first test had been conducted for a month from 26.08.2019 to 25.09.2019, the test report dated 30.09.2019 shows that the pull down test was conducted merely for one and half hours; (ix) the test report dated 30.09.2019, regarding determination of energy consumption, records that the target temperatures of fresh food compartment (3 degrees C) and freezer compartment (-6 degrees C) were not achieved during the test period; this is at variance with the volume measurement report which records that the sample satisfied the requirements in the pull down test: (x) the first test report is incomplete and defective, and does not even indicate whether the prescribed parameters have been fulfilled or not; (xi) the Appellant has pleaded in Para 9.6 of its Appeal that the report of the first verification merits to be disregarded since it is silent as to the test parameters, and have then specifically referred to its silence regarding compliance with the manufacturer's instructions; (xii) failure to give the Appellant an opportunity

to be present during the second test is fatal; (xiii) while the second test report records that the test specifications are as per IS: 1476, and clause 12.3.2.2 of the testing standards thereof require the distance between the condenser and the wall to be 150mm, it is clear from the e-mail dated 18.10.2020 that this requirement was not complied during the second test;and,consequently, the impugned order dated 04.08.2020 is liable to be set aside. Learned Counsel would submit that, to avoid any cloud on their reputation and as they are confident that their Product satisfies the BEE specifications, the Appellant is willing to have its product to be subjected to another test, and to bear the entire cost thereof.

8. On the other hand, Mr. Aamir Zafar Khan, Learned Counsel for the Respondent, would submit that it is evident from a reading of the e-mails placed on record, that the Appellant had received intimation regarding the first test, and were made aware, well in advance, of a second test to be conducted; the first test report is clear and unambiguous; the blank in the measurement column is only because the sample product did not achieve the bench mark temperature standards; as the test was conducted by an independent agency, the Bureau was bound to accept the first test report, and conduct a second test as per the Regulations; minor flaws in the first test report, showing the BEE star value label value as 289 units per year, is of no consequence; and, even from the second test report, it is clear that the sample's measured value of energy consumption ie 226 units is far more than both the label value and the specification value.

II. STATUTORY FRAMEWORK:

9. Before examining the rival submissions, it is useful to note the relevant provisions of the Energy Conservation Act, and the Regulations made thereunder.

10. Section 3 of the Energy Conservation Act, 2001 (the "Act" *for short*) relates to the establishment and incorporation of the Bureau of Energy Efficiency which, in terms of sub clause (2) thereof, is established as a body corporate with perpetual succession and a common seal. Chapter IV of the Act relates to the powers and functions of the Bureau and Section 13(1), thereunder, requires the Bureau to effectively co-ordinate with designated consumers, designated agencies and other agencies; and to recognise and utilise the existing resources and infrastructure in performing the functions assigned to it by or under this Act. Section 13(2) enables the Bureau to perform such functions and exercise such powers as may be assigned to it by or under this Act and, in particular, such functions and powers include, among others, — (i) to develop testing and certification procedure and promote testing facilities for certification and testing for energy consumption of equipment and appliances; and (n) to levy fees, as may be determined by the Regulations, for services provided for promoting efficient use of energy and its conservation. Section 14 of the Act relates to the power of the Central Government to enforce efficient use of energy and its conservation, and, in terms of Clause (d) thereof, the Central Government may, by notification and in consultation with the Bureau, direct display of such particulars on label on equipment or on appliance specified under clause (b), and in such manner as may be specified by Regulations. Section 58 relates to the power of the Bureau to make Regulations, and under clause (i) of sub-section (2) thereof, such Regulations may provide, among others,

for the particulars required to be displayed on the label and the manner of their display under clause (d) of Section 14.

11. Regulation 5 of the Regulations provides for the manner of display of the label, and Regulation 6 relates to the permission for display of label. Under Regulation 7(1), on receipt of an application under Regulation 6, and after being satisfied that all requirements therein are complied with, the Bureau may grant, subject to such terms and conditions as are specified in Regulation 8, permission for affixing the label on the direct cool refrigerator. Rule 8 relates to the terms and conditions for display of particulars of a label and, thereunder, every permittee, trader and seller shall comply with the terms and conditions in displaying the particulars on the label, among others, that (a) the star level displayed on the label of direct cool refrigerator shall conform to energy consumption standards for direct cool refrigerator notified by the Central Government under Section 14 (a) of the Act; (g) the permittee shall furnish to the Bureau an updated list of authorized distributors, dealers, retailers, sellers appointed to sell their labelled products by 30th of April each year; and (h) the permittee, trader and seller shall comply with such other terms and conditions which the Bureau may specify including those contained in the Bureau's Manual on Standard and Labelling.

12. The dispute, in the present appeal, is regarding the manner in which the sample refrigerator was tested and, since the procedure applicable thereto is in terms of Regulation 11, it is useful to refer to Regulation 11 which relates to verification by the Bureau. Regulation 11(1) provides that the Bureau or its designated agency may either suo motu, or on a complaint received by it, carry out verification to ensure that the direct cool refrigerator

conforms to the star level and other particulars displayed on its label, and that it complies with the other terms and conditions of permission. Regulation 11 (2) provides that, for the purpose of verification, samples shall be picked up at random by the Bureau or its designated agency from the manufacturing facility, warehouse or the retail outlet as it deems fit. Under Regulation 11(3), where, upon a complaint received under sub-regulation(1), the Bureau is required to carry out verification by challenge testing the direct cool refrigerator in an independent laboratory duly accredited by the National Accreditation Board for Testing and Calibration Laboratories, a notice shall be issued to the permittee for carrying out such testing, and the complainant shall be called upon to depositsuch expenses relating to testing, transportation and other incidental expenses with the Bureau, within such time, as may be determined by the Bureau, and, if the sample drawn under challenge testing fails, all expenses towards the cost of sample, transportation of sample and the testing charges, shall be reimbursed by the permittee to the Bureau, and the Bureau shall refund the aforesaid expenses to the complainant; and where the equipment passes the challenge test, then the expenses deposited by the complainant shall stand forfeited.

13. Regulation 11(4) provides that, where samples of direct cool refrigerator used for testing fails the test during suo motu testing or challenge testing, the permittee shall be afforded another opportunity, and the Bureau shall conduct a second test with twice the quantity of the direct cool refrigerator used in the first test in an independent test laboratory duly accredited by the National Accreditation Board for Testing and Calibration Laboratories at the cost of the permittee. Regulation 11(5) provides that, where the second test fails, the Bureau shall,-(a) direct the permittee in

Form V, under intimation to all the State Designated Agencies, that the permittee shall, within a period of two months,- (i) correct the star level displayed on the label of the direct cool refrigerator or remove the defects and deficiencies found during testing; (ii) withdraw all the stocks from the market to comply with the directions of the Bureau; and (iii) change the particulars displayed on advertising material; (a) publish, for the benefit of the consumers, the name of any permittee, brand name, model name or model number, logo and other specifications in any national or regional daily newspaper and in any electronic means or in any other manner as it deems fit, within two months; and (b) Intimate to the concerned State Designated Agency to initiate adjudication proceedings against the permittee and the trader under Section 27 of the Act.

14. Regulation 11(6) stipulates that the permittee shall, within ten days of the conclusion of the period of two months referred to in sub-regulation (5), (a) send the compliance report in Form VI to Bureau with respect to action taken in compliance with the direction; and (b) in case the compliance report referred to in clause (a) is not received or received without complying with any of the direction within the specified period, it shall be deemed as non-compliance of the direction issued and orders to that effect shall be passed by the Bureau. Regulation 11(7) requires the Bureau to send a copy of the compliance report referred to in clause (a), and orders passed in clause (b) of sub-regulation (6), along with the necessary documents, to all the State Designated Agencies for the purpose of taking action under Section 17 of the Act, and enforcement of the orders passed under clause (b) of the said sub-regulation.

15. Regulation 11(8) provides that, where the permittee fails to comply with the directions issued by the Bureau under sub-regulation (5), the Bureau, under intimation to all State Designated Agencies, shall (a) withdraw the permission granted to the permittee under sub-regulation (1) of Regulation 7; (b) send a report to the Central Government accompanied by the test report in support of the failure by the permittee to conform to the energy consumption standards notified by the Central Government under clause (a) of Section 14 of the Act, the directions of the Bureau referred to in clause (a) of sub-regulation (6) for consideration and taking action under clause (c) of Section 14 of the Act by the Central Government; (c) publish for the benefit of the consumers, the name of any permittee, brand name, model name or model number, logo and other specification in any national or regional daily newspaper and in any electronic or in any other manner as it deems fit within two months; (d) intimate to the concerned State Designated Agencies to initiate further adjudication proceedings against the permittee and the trader under Section 27 of the Act. Regulation 12 relates to cancellation of permission and, in terms of Regulation12(c), the Bureau may cancel the permission granted under Regulation 7, if the permittee does not comply with the directions issued under Regulation 11.

III. GUIDELINES FOR PERMITTING STANDARD AND LABELLING PROGRAMME OF BEE:

16. Since reliance is placed by Ms. Anannya Ghosh, learned counsel for the Appellant, on the Guidelines for permitting Standard and Labelling Programme of BEE (published in January, 2016), it is useful to refer to the provisions therein which have been relied upon by her. Clause 6.1 of the guidelines relate to check testing and states that check testing asseses whether the claims made for the energy performance of individual products

by the permittee are accurate under the conditions stipulated in the relevant product regulation/schedule. The Bureau or its designated agency (IAME or SDA or any other agency), shall suo-motu carry out check testing of products as per the product schedule or regulation to ensure that product models meet the performance claims. In case the sample drawn for the check testing fails, the Bureau or its designated agency shall conduct a second check testing. Bureau or its designated agency shall use a sampling based approach to the selection of products for check testing. Once the samples are selected, they shall be procured by the Bureau or its designated agency from the market. Once the samples are procured, the check testing of labelled products shall be conducted in a third party NABL accredited laboratories. The test lab shall submit the test report to the Bureau on completion of testing, which will be evaluated by the Bureau or its designated agency to evaluate whether the test result conforms to the relevant schedule/standard/regulation and also the information given on the label.

17. Regarding the second check testing, these guidelines provide that (i) In case the sample drawn for the first check testing fails, the Bureau or its designated agency shall conduct a second check testing for which it shall buy two additional samples of the same model within two weeks. (ii) The permittee/user of the label would be accordingly informed about the failure of the first check testing and shall be advised to deposit the cost of the samples and also the cost of check testing in advance. If permittee does not deposit/pay the cost, then also Bureau shall proceed with the testing but will not process any further applications for new products of the respective permittee, and shall block the S&L web portal of the permittee. (iii) In case samples are not available in the market, and all efforts to trace the samples

fail, designated agency shall submit a report to BEE with all facts including locations where appliance was searched. The Bureau shall then write to the permittee to provide that sample, within 3-4 weeks of the date of issuance of such letter. In case permittee is not able to provide sample for the second check testing, then check testing of the first sample shall be treated as final and shall be binding on the permittee. (iv) BEE or its designated agency shall inform the date of the second check testing to the permittee to witness, and advise them to depute their official to witness the testing. The permittee shall, accordingly, inform the name of the nominee to the BEE. If the permittee is unable to witness the testing, the Bureau shall proceed with testing in the presence of BEE/ designated agency personnel and the test result shall be binding on the permittee. (v) The second check testing shall be done in the laboratory where the first check testing was conducted. In case it is not possible to test the second sample in the same laboratory, the sample may be tested in another empanelled laboratory under intimation to the Bureau.

18. As noted hereinabove, Regulation 8(h) of the Regulations require the permittee, trader and seller to comply with such terms and conditions which the Bureau may specify including those contained in the Bureau's Manual on Standard and Labelling. While the Guidelines were no doubt made in January 2016, prior to notification of the Regulations on 26.05.2016, the Guidelines necessitate adherence, save anything to the contrary in the Regulations, for it is well settled that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe the standards stipulated in the Guidelines on pain of invalidation of an act in violation of them.

(**Vitarelli v. Seaton [359 US 535 : 3 LEd 2d 1012 (1959)]; Amarjit Singh Ahluwalia v. State of Punjab [(1975) 3 SCC 503; Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489: B.S. Minhas v. Indian Statistical Institte, (1983) 4 SCC 582)**.

19. The fact, however, remains that these Guidelines have no statutory force, and, unlike Statutory Regulations which are in the nature of subordinate legislation, are not enforceable in a court of law. (**J.R. Raghupathy v. State of A.P., (1988) 4 SCC 364).** Non-observance of administrative guidelines does not give any right to a person for any relief on the alleged breach of such guidelines, (**G.J. Fernandez: AIR 1967 SC 1753;J.R. Raghupathy v. State of A.P., (1988) 4 SCC 364)**, more so when the subsequent statutory Regulations prescribe a procedure different from those stipulated in the Guidelines made earlier. Consequently, while both the Appellant and the Bureau would, ordinarily, be bound by the guidelines, these guidelines prescribed in January, 2016 must yield to the statutory regulations notified later on 26.05.2016.

20. The contention urged on behalf of the Appellant, relying on Clause 6.1 (v) of the guidelines, that the second check test must invariably be conducted by the very same laboratory where the first check was conducted, does not merit acceptance firstly because the said clause itself permits the second test to be conducted in another empanelled laboratory under intimation to the Bureau if it is not possible to conduct the second test in the same laboratory, and, secondly since the statutory regulations, which came into force later, do not place any such restriction. The words in Clause

6.1(v),"*in case it is not possible to test the second sample in the same laboratory"* suggest that the Bureau ought to have furnished reasons, or at least placed material before this Tribunal, to show why it was not possible for them to test the second sample in the same laboratory. The fact, however, remains that no such condition is stipulated in the statutory regulations. Similarly the obligation placed by clause 6.1(i) of the guidelines, for the second test to be conducted within two weeks of the first, does not also find mention in the statutory regulations. As such, the Bureau cannot be faulted for having conducted the second test in another independent laboratory.

IV. CONTENTS OF BOTH THE TEST REPORTS REGARDING VOLUME MEASUREMENT:

21. In terms of Regulation 11(4), it is only if the sample fails the first test, is the Bureau entitled to conduct the second test with twice the number of samples as the first. It is in this context that the contention urged by the learned counsel for the Appellant, that the first test report is deficient and cannot be relied upon, necessitates examination. It is useful to extract the contents of both the first and the second test report regarding volume measurements. They read as under:

"CENTRAL POWER RESEARCH INSTITUTE

TEST REPORT

Test Report Number: CPRIBLREATD19T0456 *Dated: 30.09.2019*

Test Results:

VOLUME MEASUREMENT

Sl. No.	*Volume*		*Measured Volume (Liters)*
1	*Gross volume*	*Freezer:*	*21.14*
		Fresh Food:	*166.86*
		Total storage Volume:	*188*
2	*Storage Volume*	*Freezer:*	*16.60*
		Fresh Food:	*156.26*

		Total storage Volume:	*172.86*

Test Parameters	*BEE star Label value*	*BEE Specifications*		*Measured Values*	*Comply Yes/No*
		%	*Value*		
Energy Consumption	*289 units per year*	*≤115%*	*223.3*	*..*	*No*
Pull Down test	*The average air temperature in all the compartments shall be at or below the required values to be attained within 6 hrs.*	*-*	*Freezer -8°C*	*-8°C*	*Yes*
		-	*Fresh Food 7°C*	*7.0°C*	
Volume Measurement in liters	*Gross volume: 190 liters*	*≥97%*	*184.30*	*188*	*Yes*
	Storage volume: 174 liters	*≥97%*	*168.78*	*172.86*	*Yes*

(D. VENKATESH)
Test Engineer"

"ELECTRICAL RESEARCH AND DEVELOPMENT ASSOCIATION

… …
… …

ULR; TC538920000013777F
TEST REPORT NO.: RP-2021-005551 *DATE: 11.07.2020* *SHEET 1 OF 1*

Equipment	*Household Refrigerator-Direct Cool*
Name of the Manufacturer	*Whirlpool of India Limited*
Make/Brand	*Whirlpool*
Gross Capacity (Litres)	*190*
Net Capacity (Litres)	*174*
Model Name/No.	*DC (P) 205 5S/2019*
Sample Sr. No.	*INE 192501032*
Star Rating (on Label)	*3 Star*
Sample Receiving date in Lab	*09.03.2020*
Date of testing	*06.07.2020 to 11.07.2020*
Overall Result	*Fail*

Sl. No.	*Volume*	*Label Values*	*Specifications*	*Measured Values*	*Remark*
1	*Gross Volume (litres)*	*190*	*Rated Values ≤1.03 x measured value*	*192.79*	*Conforms*
	Storage Volume (litres)	*174*		*177.92*	
2	*Energy Consumption*				*Does not Conform*
	Fresh food storage volume (litres)		*163.38*		
	Freezer storage volume (litres)		*14.54*		
	Total storage volume (litres)		*177.92*		
	Total Adjusted volume: … …(litres)		*Fresh food storage volume + 1.31 x Freezer storage volume = 182.43*		

Star Rating Band (SRB0		*Kdc x Vadj_tot_dc + cdc*			
As per Table 2.2 of BEE Schedule-5 (Direct cool Refrigerator) & Gazette notification : S.O. 6244 (E) dated 21st December, 2018					
Star Rating Band		*Kdc (Constant Multiplier)*	*Cdc (Constant Fixed Allowance)*	*Values (Units/year)*	
1		*0.330*	*277*	*337*	
2		*0.264*	*221*	*269*	
3		*0.211*	*177*	*215*	
4		*0.169*	*141*	*172*	
5		*0.135*	*113*	*138*	
Energy Consumption (Units/year)		*Label Values (Units/year)*	*Specification*	*Measured Values/year)*	
		203	*PAEC ≤ 1.1xCEC &< 215*	*226*	
3	*Pull down test*	*Temp.*	*Specification*	*Time*	*Conforms*
		Freezer: -8^{0}C	*The average air temperature in all the compartments shall be at or below the required values to be attained within 6 hours*	*91.5 minutes*	
		Chiller: 5^{0}C		*38.8 minutes*	
		Fresh food: 7^{0}C		*102.8 minutes*	
		Cellar: 16^{0}C		*111.8 minutes*	

PREPARED BY *CHECKED BY"*

22. From the table extracted herein above, it is evident that, in so far as energy consumption parameters are concerned, the figures "289 units per year" under BEE star label value, and "223.3" as the BEE specification value, are both incorrect, in as much as the star label value (as has been rightly noted in the second test report) standard is 203 units per year and, similarly, the specification value standard, (as has been rightly noted in the second test report), is less than 215 units.

23. Curiously the column relating to measurement value, in the first test report, is left blank and, thereafter, in the remarks column, under the head complied, it is stated "No". The submission made on behalf of the Bureau is that, since the sample did not satisfy the prescribed parameters, the measurement column could not be filled, and had perforce to be left blank.

This submission does not merit acceptance since the second test report records the measurement value as 230 units per year. While this measurement value, as recorded in the second test report, no doubt shows that the second sample did not measure up either to the label value or to the specification value, what we are concerned, at present, is regarding the action of the testing laboratory, which conducted the first test, in leaving the measurement column blank.

24. Mr. Aamir Zafar Khan, learned counsel for the Respondent, submits that the first test report dated 30.09.2019 records that the target temperature of the fresh food compartment (3^0C) and freezer compartment of (-6^0C) were not achieved during the first test. What the learned Counsel has glossed over is the table annexed to the very same report (extracted herein above) whichrecords,(albeit erroneously),the specification value for the freezer compartment as (-8^0C) and for the fresh food compartment as (-7^0C). Contrary to what is stated in the main report, the table annexed thereto also erroneously records the measured valuefor the freezeras (-8^0C), and for the fresh food compartment as (-7^0C). Another glaring inconsistency is that, contrary to the conclusions in main part of the report, the remarks column in the table annexed thereto states that both these parameters have been complied with. It is evident, therefore, that the first test report suffers from several errors and inconsistencies and the Respondent could not have, on the basis of such a deficient report, conducted the second test. No explanation is forthcoming from the Respondent as to why they chose not to obtain clarifications from the Central Power Research Institute, Bengaluru which conducted the first test, regarding the errors therein, as also for leaving the relevant column, in the table therein, blank.

25. The submissions urged by Mr. Aamir Zafar Khan, learned counsel for the Respondent, that the respondent had no option but to accept the independent agency's report, needs only to be noted to be rejected since, firstly, seeking clarifications, regarding the incomplete first test report, would not amount to the Bureau interfering with the findings which an independent laboratory has arrived at; and, secondly, since the Respondent has itself, subsequently by its e-mail dated 08.12.2022 (when the present appeal was being heard), sought clarifications from the said laboratory.

26. It is only if the first test report had recorded what the actual measurement value was, in relation to energy consumption, would it be known whether or not the measurement value was in excess of both the specification value and the star label value, attracting the relevant provisions of the statutory regulations which require a second test to be conducted on the sample being found, in the first test, not to meet the specified standards.

27. The casual manner in which the first test report was prepared, and failure on the part of the Respondent to even fault the said report and call for the required information regarding the actual measurement value of energy consumption of the sample product, is, to say the least, disconcerting. While the failure of the Test Laboratory to discharge its statutory functions may justify action being directed to be initiated against them in accordance with law, we have exercised restraint in the belief that the Respondent Bureau would ensure that repetition of such acts are avoided in future.

28. The contention, urged on behalf of the Respondent, that no plea has been taken by the Appellant, in the appeal filed before this Tribunal, regarding the first test report being deficient also necessitates rejection, for

such a plea has been taken in para 9.6 of the Appeal. While the said plea could, no doubt, have been more detailed/ elaborate, that, by itself, would not justify upholding the action taken, against the Appellant by the Respondent Bureau, on the basis of an ex-facie deficient first test report.

29. Since the first test report cannot be considered a valid report in the eye of law, as it bereft of the particulars required to establish that the Appellant's sample product had failed to satisfy the test parameters of energy consumption, the second test report (even if it is presumed to be valid) cannot form the basis for action being taken against the appellant, since it is only if the sample product is found deficient in the first test, do the statutory regulations require/permit a second test to be conducted.

V. WAS THE APPELLANT INTIMATED OF THE SECOND TEST PRIOR TO ITS COMMENCEMENT?

30. Ms. Ananya Ghosh, Learned Counsel, is justified in her submission that the Appellant was neither furnished a copy of the first test report nor intimated, well in advance, regarding the respondent's intention to conduct the second test. The Respondent claims that a physical copy of the first test report, and intimation regarding the second test intended to be conducted from 6th July,2020, was sent by speed post No. ED2811941541N dated 26.06.2020. The tracking report, filed along with the appeal, shows that, while the said letter was despatched by speed post only on 01.07.2020, it was received by the Appellant at Pune on 08.07.2020, two days after the second test had commenced at Vadodara on 06.07.2020.

31. The contention urged on behalf of the Respondent, however, is that a copy of the notice was sent to the Appellant also by e-mail on 22.06.2020,

long before the second test commenced on 06.07.2020. While it is doubtful whether sending a notice by e-mail would justify failure to effect service of notice through the accepted mode of service of notice by registered post/speed post, the contention urged on behalf of the Appellant is that this e-mail dated 22.06.2020 was also not received by them.

32. The Respondent claims to have sent the e-mail on 22.06.2020 to Sri B.N.Tripati at his email address : 'b_n_tripathi@whirlpool.com'. It does appear, from the documents placed on record, that the e-mails sent by the Respondent on 22.06.2020, 30.06.2020, 02.07.2020 and 04.08.2020 were to the following e-mail address 'b_n_tripathi@whirlpool.com' whereas the e-mail sent by the Respondent on 05.08.2022 (which the Appellant admits having received) is to the following email ID: b_n_tripathi@whirlpool.com.

33. The submission of Ms. Anannya Ghosh, learned counsel for the Appellant, that use of the apostrophe ('), both before and after the e-mail id of Sri B.N.Tripathi, may have resulted in the Appellant not receiving a copy of the e-mails sent on 22.06.2020, 30.06.2020 and 02.07.2020, cannot be readily brushed aside. While it is evident that a physical copy of the notice was not served on the Appellant before commencement of the second test on 06.07.2020, the Appellant's contention, not even to have received the e-mails sent to them by the Respondent, before commencement of the second test on 06.07.2020, seems highly probable.

34. While it is contended, on behalf of the Respondent, that the Appellant has acknowledged, in their e-mail dated 16.07.2016, to have received the e-mail dated 22.06.2020, what is merely stated in the said e-mail is that the original e-mail was never delivered to Mr. B.N. Tripathi, which was now

received by him from his colleague's e-mail. The e-mail appears to have been shared with the person, who forwarded it to Sri B.N.Tripathi, by the respondent after the second test had commenced on 06.07.2020.

35. Even otherwise, judicial notice can be taken of the fact that there was a lockdown on account of COVID-19 till 31.05.2020 and travel in the following couple of months, more so from Pune where the Appellant is situated to Vadodara where the second test was conducted, was extremely risky. We are satisfied that the Appellant did not have advance intimation of the second test being conducted, and could not have travelled from Pune to Vadodara to be present during the second test which commenced on 06.07.2020.

36. The Appellants have been denied their right, under Regulation 11, both on the grounds of the first test report being deficient, and for not receiving advance intimation of the second test conducted from 06.7.2020 onwards. The impugned order dated 04.08.2022 is therefore liable to be, and is accordingly, set aside.

VI. CONCLUSION:

37. We cannot, however, ignore the fact that the second test report dated 06.07.2020 also records that the sample of the Appellant did not measure up to the energy consumption specifications stipulated by the Respondent Bureau which has been established, under the Energy Conservation Act, 2001, with the object of promoting energy efficiency and reducing energy consumption. The object of granting a star label, and permitting a manufacturer to affix the star label on its products, among others, is to inform consumers of the energy efficiency of the product. In case the

product does not satisfy the standard specifications, regarding energy consumption, the star label affixed on the product may mislead consumersinto purchasing a product which, contrary to the manufacturer's claim, does not fulfil the prescribed parameters.

38. Ms. Anannya Ghosh, learned counsel for the Appellant, had, even before commencement of her submissions in this Appeal, fairly stated that, since the Appellant's reputation in the refrigerators market is at stake, they are not fighting shy of having another test being conducted in their presence in accordance with ISO1496 specifications. When we asked her whether the Appellant was willing to deposit the cost, of two sample refrigerators, in advance with the Bureau, to enable them to procure two sample refrigerators on payment of its market price, learned counsel readily agreed to do so.

39. Since the first test report is deficient and does not stand legal scrutiny, we considered it appropriate to treat the second test report as the first test report, and to issue the following directions-

(1) The Appellant shall, within three weeks from today, deposit with the respondent Bureau a sum equivalent to the market price of two refrigerator models similar to those which were subjected to test verification earlier. In addition, they shall also deposit Rs. 25000/- to cover the charges which the Respondent may have to incur to transport the samples from the place where they are procured to the laboratory where they are to be tested.

(2) Within three weeks, of receipt of the amounts mentioned in direction (i) above, the Respondent shall procure two sample

refrigerators from the market, and issue a notice to the Appellant, including by registered post/speed post, intimating them, well in advance, of the date and place at which the second test is proposed to be conducted, and give them an opportunity of being present during such a test.

(3) After the second test is conducted, and depending on its result, it is open to the Respondent Bureau to take action, if need be, against the Appellant in accordance with law.

40. The Appeal is disposed of accordingly. Interlocutory Applications, if any pending in the Appeal, shall also stand disposed of.

41. Pronounced in the open court on this the **22nd day of December, 2022**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd