

ORDER (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The petition at hand was presented (as DFR No.211/2020) on 29.06.2020 seeking review of the judgment passed by this Tribunal on 28.05.2020 in appeal no. 35 of 2020, the petitioner herein being also the appellant in the said matter.

2. The dispute which had been brought for adjudication by the said appeal related to parallel distribution license in Mumbai, the appellant (*distribution company*) claiming for itself a right to bid to serve the interest of new consumer(s) as against the claim of the second respondent (*another distribution licensee*) asserting itself to be in a superior position to do so. The challenge was to the legality, validity and propriety of the order dated 03.12.2019 passed by the first respondent (*the State Commission*) in Case No.283 of 2019 upholding and adopting the view taken by the *Mumbai Distribution Network Assessment Committee ("M-DNAC")* vis-à-vis the status of the new consumer (*the third respondent*).

3. The appeal was dismissed by a detailed reasoned judgment on 28.05.2020, no merit having been found therein, the decision being rendered by a bench of this tribunal which then comprised of one of us (*Justice R.K. Gauba*), the bench being presided over by Mr. Ravindra Kumar Verma, Technical Member. Mr. Ravindra Kumar Verma, the Technical Member who presided over the Bench had rendered the decision sought to be reviewed has since demitted office on completion of his tenure of appointment. Hence, the matter has been heard by this bench.

4. The detailed facts in the background of the controversy brought before this Tribunal by Appeal No.35 of 2020 as indeed the contentions urged, were noted at length in the judgment dated 28.05.2020. For such purposes, the said judgment will be referred to. For the present, we only need to note that it is the contention of the petitioner that certain issues have been adjudicated upon improperly in the said appeal because they had not been raised by the appellant, reference being made in this context to observations that *M-DNAC* is validly constituted, the conclusions reached by it having been treated as recommendatory or advisory, not being conclusive or binding on the State Commission and that an earlier order dated 12.06.2017 whereby *M-DNAC* had been constituted as the *institutional mechanism* to evaluate the process of resolving the disputes arising from competing claims had followed the broad theme commended by this Tribunal by judgment dated 28.11.2014 in Appeal No.246 of 2012. It is submitted that the observations which have been recorded on these issues by the judgment sought to be reviewed impinge upon the appellant's submissions in pending proceedings (Appeal No.195 of 2017 & batch and Appeal No.142 of 2019). It is also submitted that the findings returned by the judgment dated 28.05.2020 vis-à-vis the validity of the constitution of *M-DNAC* and that of its recommendations based on the criteria of "network spread" are incorrect.

5. We only quote some passages from the judgment dated 28.05.2020 to bring out that decision was rendered on the contentions which had been raised during the course of oral arguments, it being necessary to do so for complete adjudication of the dispute agitated by the said appeal. On the subject of matter of position of *M-DNAC* and its role, as indeed the objections thereto, this tribunal observed as under:

“36. Notwithstanding the concession made with regard to the issues that are subject matter of the earlier set of appeals (Appeal no. 195 of 2017 & batch and Appeal no. 142 of 2019), a slightly nuanced argument was raised by the learned counsel for the appellant that the procedure followed by the State Commission is illegal in the sense it has delegated its power of adjudication to another entity which is not permissible even in terms of Section 97 of Electricity Act, 2003, the provision reading thus:

“97. Delegation. – The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under section 79 and section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary.”

37. We have examined the plea to above effect but find no merit in it. In the present case, the conclusion reached by M-DNAC has been treated more as recommendatory or advisory in nature than as a “decision” of an adjudicatory body. What is under challenge before us is the decision of the State Commission in which the advice tendered by M-DNAC stands subsumed. Pertinent to add here that even MERC has not been taking Appeal No. 35 of 2020 Page 35 of 54 the reports of M-DNAC as conclusive or binding. If an illustration in this regard were required, reference could be made to the case of Medinee (supra) wherein, by its order dated 04.02.2019, the State Commission had ignored the view formulated by M-DNAC and ruled contrarily. The practice followed shows that MERC has been entertaining objections against the dispensation by M-DNAC and, therefore, has asserted its position as the statutory authority to adjudicate on the dispute rather than abdicating its responsibility. In this view of the matter, reliance on decisions of Supreme Court reported as Naraindas Indurkhya v The State of Madhya Pradesh and Others [(1974) 4 SCC 788], A.L. Kalra v Project and Equipment Corporation of India Ltd [(1984) 3 SCC 316], District Collector, Chittoor and Others v Chittoor District Groundnut Traders’ Association, Chittoor and Others [(1989) SCC 58] and Babu Verghese and Others v Bar Council of Kerala and Others [(1999) 3 SCC 422 as also a decision of House of Lords reported as Anisminic Ltd v Foreign Compensation Commission and Another [(1968) UKHL 6], is misplaced.”

6. With reference to the order dated 12.06.2017, the tribunal held thus:

“44. We cannot but agree that the broad principles laid down by the State commission in its order dated 12.06.2017 followed the broad theme that had been commended by this tribunal by judgment dated 28.11.2014 viz. the best interests of the consumers have to be protected even while competition is to be encouraged and, from this perspective, the scenario being evolving and dynamic, duplication of the network development is to be avoided. Though we must observe that the principles could have been Appeal No. 35 of 2020 Page 40 of 54 formulated by the Commission with a little more clarity, it cannot at the same time be denied that laying down unexceptional or rigid regime would also have created room for some confusion, it coming in the way of the consumer being served.

45. The State Commission, in its order dated 12.06.2017, observed thus:

“The Committee is of the view that it would not be practical to consider only a Municipal Ward or other such area for assessing and categorizing an area in one or the other of the Scenarios at Para 53 of the Interim Order. It would be difficult to map the entire area on such criteria. Moreover, the distribution systems have evolved over time and electrical network boundaries do not correspond to geographical area limits such as Municipal Wards.”

[Emphasis supplied]

46. Given the fact that it is not possible to lay down the contours of the specific area or location with reference to which parallel distribution licensee must operate, some amount of overlap in the different scenarios that could be conceived is always unavoidable. When the State commission set about to put on paper the fundamentals through its interim order dated 09.11.2015, the description of the four possible scenarios was articulated, through para no. 53 (quoted earlier), only to build a skeleton structure. Given the fact that the endeavour was to create a foundation on basis of which the rules were to eventually evolve, the language employed at that stage could not be anything but tentative. The structure thus Appeal No. 35 of 2020 Page 41 of 54 created had to be fleshed out and this was done by the order dated 12.06.2017 whereby detailed rules were framed. Naturally, the initial or nascent thoughts (of interim order) found expansive expression in the regime thereby put in position, the overlap occurring obviously because the room for competitive play had to take into account not only the environment of the four scenarios originally visualized but also the different levels of development of network or support systems. Thus, any enforcement or application of these principles must factor in

the presence of the competing distribution licensees and, in equal measure, the extent of their presence, the possibility of increased demand of supply (inclusive of the additional load requested by existing consumers or the additional demand of new consumers) being responded to, the readiness and capacity of the distribution licensee(s) to cater to such increased demand which, in turn, depends on reach of the existing distribution mains (LT or HT), associated switchgear, distribution substations, age of such equipment or network (that also bringing in the check of obsolescence), need or feasibility of augmentation, et al. In this view of the matter, it will not be just or fair to apply the description of the four scenarios as given in para no. 53 of the interim order dated 09.11.2015 as rigid rules”.

7. Given the fact that arguments as noticed in the above quoted passages were raised, the grievance agitated through the Review Petition at hand are wholly incorrect and improper. The averments made indicate that the endeavour is to re-argue the appeal which is not permissible.

8. We do not find any such error apparent on the face of record as calls for any review.

9. For above reasons, the Review Petition is dismissed.

10. Before parting, we must note here that the petition was filed on 29.06.2020. It was listed for the first time on 22.04.2022 before this bench. Since the time gap is too long, we asked for a formal report from the registry for such delayed listing. Ms. Kalpana Singh, Private Secretary deputed by the Registrar for overseeing the related work in the registry has submitted a reported dated 17.10.2022 which indicates that the defect letter was issued by the registry on 06.07.2021, the defects having being cured on 29.07.2021, soft copies being made available by the counsel only on 19.04.2022 followed by the listing of the matter on 22.04.2022. We find that the non-listing of the matter during 29.06.2020 and 06.07.2021 has not been explained. We also do not understand as to why the matter was not listed immediately after defects had been cured on 29.07.2021. We direct

the Registrar to ascertain the reasons and submit a report within a week, for consideration on the administrative side.

Pronounced in open court on this 18th Day of October, 2022.

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R.K. Gauba)
Officiating Chairperson