IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 403 OF 2022

Dated: 20th February, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

BHARAT FEEDS AND EXTRACTIONS LIMITED
(Through Authorized Signatory (office Clerk)
Mr. Anil Virang S/o Shri Kastur Chand)
Regd. Address – Gimar Chamber
3rd Floor, 10, Sneh Nagar Indore
M.P.-452001
Email ID: haratfeed@yahoo.co.in … Appellant

Versus

1. **MADHYA PRADESH PASCHIM KSHETRA VIDYUT VITARAN COMPANY LIMITED**
(Successor of MPEB)
(*Through its Managing Director)*
G.P.H. Compound, Pologround,
Indore (M.P.)-452015
Email ID: htcellmppkvvcl@gmail.com

2. **MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**
(*Through its Secretary)*
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal 462016 … Respondent(s)

Counsel for the Appellant(s)	:	Buddy Ranganadhan Pankhuri Bhardwaj Pai Amit Rohit R. Saboo
Counsel for the Respondent(s)	:	M G Ramachandran, Sr. Adv. Poorva Saigal Shubham Arya Ravi Nair Shikha Sood Reeha Singh for Res. 1 Preeti Goel for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant is aggrieved by the order dated 19.09.2022 passed by the 2nd respondent Madhya Pradesh Electricity Regulatory Commission (in short MPERC) whereby its petition bearing no.49/2022 under Sections 82 and 86 of Electricity Act, 2003, has been dismissed. The reliefs sought by the appellant in the petition were as under:

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> a. *Declare that the petitioner would fall under tariff category HV-5/5.2 under the retail supply tariff orders for various years.*
> b. *Quash impugned demand notice dated 25.03.2022 issued by respondent authorities and all consequential proceedings.*
> c. *Revise the electricity bills raised since November 2021 under tariff schedule HV-3.1 and remaining amount would be adjusted after verification under the tariff schedule HV-5.2"*

2. The facts of the case, set out in brief, are that the appellant company is engaged in the business of manufacturing cattle feed and poultry feed. Upon its application to the 1st respondent for a HT connection, an agreement dated 06.05.2002 was executed in this regard between the two, whereunder a HT electricity connection under the tariff category HV-3.1 (industrial) was given to it. It appears that subsequently the appellant came to know that other concerns/manufacturing units also engaged in the manufacture of cattle feed and poultry feed had been given HT connections under a different tariff category i.e. HV-5.2 (other than agricultural use). Hence, the appellant submitted an application dated 03.12.2008 to the office of Superintending Engineer, seeking change of tariff category of the HT connection from HV-3.1 to HV-5.2. The appellant's application was considered by the concerned officials of the 1st respondent and the request for change in tariff category was allowed. Accordingly, a supplementary agreement dated 27.03.2009 was executed in this regard between the appellant and the 1st respondent, wherein it was stated that the tariff applicable to the appellant would be under the tariff category HV-5.2 of MPERC order dated 29.03.2008. Thereafter, two more supplementary agreements dated 10.04.2015 and 22.06.2017 were executed between the appellant and the 1st respondent with regards to the additional electricity requirements of the appellant. In these two supplementary agreements also, the tariff category applicable to the appellant has been mentioned as HV-5.2. The arrangement continued between the parties till the year 2021 when the 1st respondent discom, without issuing any notice to the appellant, raised bill in the name of appellant for the months of November and December, 2021 dated 29.11.2021 and

28.12.2021 wherein the electricity charges were levied under HV-3.1 category, thereby having changed the tariff category of the appellant from HV-5.2 to HV 3.1. The appellant preferred a representation dated 12.01.2022 to the discom with the request to issue correct bills under HV-5.2 category. Instead of considering the representation of the appellant, the 1st respondent discom issued a demand notice in the sum of Rs.1.18 crores on account of arears due to underbilling from April, 2016 to October, 2021 as calculated by the HT Audit Cell on the contention that as per the report dated 22.01.2021 of the HT Audit Cell, Indore, the tariff category applicable to the appellant was HV-3.1 i.e. industrial and not HV-5.2. The appellant approached the Hon'ble High Court, Indore Bench, by way of writ petition no.8616/2022 challenging the said demand notice dated 25.03.2022. The writ petition was disposed of by the Hon'ble High Court with the direction to the appellant to approach the 2nd respondent Commission with its representation in this regard. Accordingly, the appellant had filed the petition no.49/2022 before the Commission which has been dismissed vide the impugned order dated 19.09.2022.

3. While dismissing the petition, the Commission has held that the manufacture of cattle feed and poultry feed tantamount to industrial activity which fall under the tariff category HV-3.1 of the retail supply tariff orders, and therefore, the appellants have been rightly billed under the said category. The Commission also rejected the appellant's contention that the respondent discom cannot recover the excess amount on account of change in tariff category retrospectively.

4. It was vehemently argued by the learned counsel for the appellant that once the 1st respondent discom had itself permitted the change of tariff

category from HV-3.1 to HV-5.2, it was not permissible for it to bill the appellant again in terms of the former tariff category subsequently, when there was absolutely no change in the business being carried out by the appellant company. He submitted that by way of supplementary agreement dated 27.03.2009, the parties mutually accepted the terms stated therein and the tariff category applicable to the appellant was consciously changed by the respondent discom from HV-3.1 to HV-5.2, and therefore, it was not open for the discom to raise demand upon the appellant on account of alleged underbilling, which is contrary to the express terms of the said agreement. It is submitted that the benefit of lower tariff category given to the appellant by virtue of the said agreement dated 27.03.2009 could not be snatched / withdrawn by the respondent discom unilaterally without putting the appellant to notice and without providing any hearing to it. He would, further argue that the finding of the Commission to the effect that manufacture of cattle feed and poultry feed tantamount to industrial activity attracting the tariff category HV-3.1 is totally erroneous for the reason that the tariff category HV-5.2 applies to the industries such as cattle breed farms, poultry farms, green lands, vegetable / mushroom growing units etc. It is, further, submitted that the impugned order of the Commission is immensely harsh to the appellant as it would cause grave financial prejudice to it for the reason that the appellant has been selling its products in the market at a price which is calculated upon taking into account the electricity charges levied on it under the lower tariff category of HV-5.2, and in case, the tariff category HV-3.1 is permitted to be applied to the appellant's manufacturing unit retrospectively, it would be impossible for the appellant to get back any amount from its customers.

5. On behalf of the respondent no.1 discom it is argued that the activities of the appellant involve manufacturing / process of cattle feed and poultry feed which tantamount to industrial activity and thus, falling under the tariff category HV-3.1. It is submitted that the tariff category HV-5.1, if read in *ejusdem generis* manner is applicable to agriculture related / akin activities such as farming, breeding etc. According to the learned counsel, the word "processing" indicates a process whereby the original commodity experiences a change and the word "manufacturing" entails transformation of a matter into something commercially different. In this regard, he referred to the definition of "manufacturing" in terms of the Factories Act, 1948, which provides that the process of manufacturing entails, *inter alia,* making and/or finishing any article in order to use and/or sell it. He would argue that the "manufacturing process" details provided on the website of the appellant itself clearly show that the poultry / cattle feed is processed / manufactured through grinding, mixing, blinding techniques etc., and therefore, such activity clearly tantamount to industrial activity. He would further argue that the tariff categorization is done by the State Electricity Regulatory Commission in the tariff order and the same is binding on both the licensee as well as consumers and any agreement between the two regarding the categorization which is contrary to the terms / conditions of the tariff order is not legal as well as enforceable. The learned counsel also referred to Section 56(2) of the Electricity Act to contend that a discom is empowered to recover applicable charges from a consumer retrospectively by raising invoices, if there has been any mistake leading to under recovery of the power tariff for the relevant period.

6. We have considered the rival submissions may by the learned counsels on behalf of the parties and have perused the impugned order as well as the entire report.

7. It is not in dispute that the appellant was initially being billed under the tariff category HV-3.1 i.e. industrial and later on, upon representation made in this behalf by the appellant, the tariff category was changed from HV-3.1 to HV-5.2 (other than agricultural use) vide supplementary agreement dated 27.03.2009. Thereafter, the appellant continued to be billed under tariff category HV-5.2 continuously till the month of November, 2021. The two supplementary agreements dated 10.04.2015 and 22.06.2017 executed between the appellant and the 1st respondent discom with regards to the additional electricity requirement of the appellant also mentioned the tariff category as HV-5.2. It appears that the respondent discom all of a sudden awoke from slumber and raised bills dated 39.11.2021 and 28.12.2021 to the appellant for the months of November and December, 2021 respectively charging it for the electricity under HV-3.1 (industrial category). When the appellant submitted representation dated 12.01.2022 to the discom seeking correction of these bills, the discom sent a demand notice dated 25.03.2022 in the amount of Rs.1,18,79,311/- as the amount stated to be billed less from the month of April, 2016 till October, 2021.

8. We are unable to persuade ourselves to uphold the legality of the bills dated 29.11.2021 and 28.12.2021 as well as demand notice dated 25.03.2022 raised by the respondent discom in the name of appellant thereby seeking to apply tariff category of HV-3.1. There has been a legal and valid agreement dated 27.03.2009 between the parties whereby the tariff

category applicable to the appellant's manufacturing unit was changed from HV-3.1 to HV-5.2. It is nowhere the case of the respondent discom that this agreement was entered into on account of any misrepresentation on the part of the appellant or on account of any mistake. In fact, nothing was submitted on this aspect by the Learned Counsel for the respondent discom. That being the case, it was not open to the respondent discom to start billing the appellant under tariff category HV-3.1 from the month of November, 2021 unilaterally merely on the basis of some internal audit reports, to which the appellant was not a party at all. In case, as per the said audit report, there had been an error in the applicability of the tariff category to the appellant, the appropriate course of action for the respondent discom was to issue a notice to the appellant and provide him hearing before applying the higher tariff category HV-3.1 and that too retrospectively. By changing the tariff category applicable to the appellant from HV-5.2, which is lower, to HV-3.1 which is higher, a serious financial burden would be caused to the appellant, and therefore, it could not have been done without adhering to the principles of natural justice i.e. without affording an opportunity of being heard to the appellant. Ironically, the tariff category continued to be stated as HV-5.2 even in the bills in question dated 29.11.2021 and 28.12.2021 which indicates that the bills/demand have been raised without there being any change in tariff category applicable to the appellant. This fact also renders the bills/demand arbitrary, baseless and unjustified.

9. Further, we are also of the considered opinion that the change of tariff category was not permissible without amending the terms of the valid and subsisting agreement dated 22.03.2009 between the parties. Once there is a binding and subsisting agreement between the parties specifying the tariff

category applicable to the appellant, the action of the respondent discom in raising bills/demand as per the higher tariff category without seeking the termination of agreement cannot be legally justified. The argument that a tariff order issued by the State Electricity Regulatory Commission is binding on all the consumers, even if it is contrary to the terms / conditions of an agreement between the consumer and the discom with regards to the tariff category applicable to the consumer, is not tenable and is devoid of any force. It is for the reason that a tariff order issued by a State Commission does not have the force of law as it does not qualify as a delegated legislation like the tariff regulations issued by the Commission under Section 178/179 of the Electricity Act. Therefore, the tariff order issued by a Commission cannot be applied automatically to a consumer, if the terms and conditions of an agreement entered beforehand between the consumer and the discom state otherwise.

10. Hence, we hold that when there is a legally binding agreement between the consumer and a discom regarding applicability of a particular tariff category to the consumer, the tariff category cannot be changed unilaterally by the discom without notifying the consumer about proposed change of tariff category and providing him an opportunity of being heard on this aspect.

11. Having regard to the above discussion, we find the impugned order of the Commission unsustainable in the eyes of the law. The same is hereby set aside. The appeal stands allowed.

12. As a consequence, we hereby quash the two bills dated 29.11.2021 and 28.12.2021 as well as the demand notice dated 25.03.2022 raised by

the respondent discom in the name of the appellant. The respondent discom, however, shall be at liberty to initiate fresh action in this regard against the appellant after adhering to the principles of natural justice, as noted hereinabove.

Pronounced in the open court on this 20th day of February, 2024.

(Virender Bhat)	(Sandesh Kumar Sharma)
Judicial Member	Technical Member (Electricity)

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