

(2010) 09 BOM CK 0143

In the Bombay High Court

Case No : Writ Petition No. 1557 of 2008

Maharashtra State Electricity Distribution Co. Ltd.

APPELLANT

Vs

The Lloyd Steel Industries Ltd., Electricity Ombudsman and
The Consumer Grievance Redressal Forum, Maharashtra
Electricity Distribution Co. Ltd.

RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Electricity Act, 2003 — Section 1, 42, 42(5)

Citation : (2011) 1 MhLj 125

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : K.H. Deshpande and R.E. Moharir, for the Appellant; M.G. Bhangde and R.M. Bhangde, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—On 13.07.2010 it was stated by parties that Writ Petition is to be disposed of finally at admission stage as per earlier arrangement. Accordingly, the matter was adjourned to 27.07.2010 and then to 11.08.2010. As jointly requested by both the learned Senior Advocates, the matter has been finally heard.

2. Petitioner before this Court is a Distribution Company and in petition under Article 226 read with Article 227 of the Constitution of India, it has assailed the orders dated 29.02.2008 passed by respondent No. 2 Electricity Ombudsman. The respondent No. 2 has decided the representation No. 5/2008 in the matter of refund of Service Line Charges (SLC) and Service Connection Charges (SCC) recovered from respondent No. 1 consumer, while restoring supply as per contract demand.

3. Facts in the matter are not much in dispute. The petitioner initially supplied to respondent Nos. 1, 9 MVA electricity, which was gradually increased to 100 MVA.

The initial agreement in relation to 9 MVA supply is dated 07.01.1994, while in relation to 90 MVA supply it is dated 07.12.1994. On 18.04.1996 this 90 MVA was further hiked to 100 MVA. Respondent No. 1 Consumer has deposited the requisite amount for this increase in various installments, and those details are not in dispute. Total amount of Rs. 65 lakhs has been paid towards the SLC and SCC between 24.04.1996 to 07.05.1998 in 10 equal installments of Rs. 6.50 lakhs each. Respondent No. 1 thereafter sought reduction in contract demand gradually. Upto 03.03.1999 it was receiving supply at 100 MVA, from 03.03.1999 till 24.08.2000 it has received supply at 90 MVA, from 25.08.2000 to 23.07.2001 it has drawn supply at 88 MVA and from 24.07.2001 till 10.11.2002 it has drawn supply at 56 MVA. It is also not in dispute that when it was receiving supply at 100 MVA it's connected load was 128.628 and the same remained unchanged all through. On 13.06.2002 the respondent No. 1 requested to restore its contract demand to 90 MVA and in that request letter it specifically stated that the same should be without any SLC or SCC. This was replied by the petitioner on 26.08.2002 and the disputed part of the said communication shows that the petitioners demanded amount of Rs. 6.9 lakhs towards SCC and Rs. 221 lakhs towards SLC.

4. A Public Interest Litigation about the huge amounts of electricity charges due and un-recovered, came to be filed and because of that litigation and resulting position, according to respondent No. 1 it was constrained to file an affidavit/undertaking to pay said amounts. At this stage, it is not necessary to go into the details of the same, because according to the petitioner in view of the said affidavit and undertaking, principles of estoppel stands attracted, while according to respondent No. 1 as there was/is no legal basis for said demand the principles of estoppel are not attracted. This aspect can be considered little later.

5. In the matter of this demand, respondent No. 1 raised dispute before the Maharashtra State Regulatory Commission (MERC) vide Case No. 23/2004. Learned Members of the Commission vide orders dated 18.10.2005 allowed the claim of respondent No. 1 holding that recovery of SLC and SCC was not in accordance with the conditions of supply and the relevant commercial circulars. The petitioner then approached the Appellate Tribunal in Appeal No. 191/2005 and the said Tribunal vide its judgment dated 05.04.2006 answered the points in favour of present respondent Nos. 1. Petitioner's then approached the Hon'ble Apex Court in Civil Appeal No. 3551/2006. The Hon'ble Apex Court noticed that the MERC had no jurisdiction and respondent Nos. 1 ought to have raised the issue before present respondent No. 3 Consumer Grievance Redressal Forum. It accordingly set aside the order dated 18.10.2005 and judgment dated 05.04.2006 and remitted the matter to respondent No. 3, an appropriate forum created u/s 42[5] of the Electricity Act, 2003. The Hon'ble Apex Court also clarified that payment, if any, made by respondent No. 1 Company shall not operate as estoppel against it.

6. Thereafter, respondent Nos. 1 approached respondent Nos. 3 Forum in

Application/Case No. 48/2007. Members of the Forum vide order dated 26.11.2007 rejected that application. Respondent Nos. 1 then filed a representation before respondent No. 2 Ombudsman and on 29.02.2008 respondent No. 2 Ombudsman has accepted that representation. The respondent No. 2 has directed petitioners to refund charges of Rs. 227.9 lakhs along with interest at Bank rate. Thus the SLC of Rs. 221 lakhs and SCC of Rs. 6.9 lakhs has been directed to be refunded.

7. Shri K.H. Deshpande, learned Senior Advocate with Shri R.E. Moharir, learned Advocate has in this background contended that the demand was under condition No. 7 [5] of the Conditions of Supply and the said condition has not been properly evaluated by respondent No. 2. He has invited attention to the provisions of condition No. 7, particularly 7[i] [a] and has read out in contra-distinction with its Clause 5. He has also invited attention to Clause 1[h] of the Conditions of Supply which defines phrase "Connected Load" and Clause 1 [i] which defines what is "Maximum Demand". In the light of this legal provision, he has invited attention to the requirement of entering into a fresh agreement on each occasion when the contract demand is either increased or reduced. The agreement dated 07.01.1994 and 11.11.2002 are pressed into service for said purpose. He has urged that the electricity required by the consumer either at maximum of 9 MVA or 90 MVA is contract demand and agreement postulates additional supply in case of contract demand in its Clause 7[a], [b] and [c]. He has also stated that these clauses in all the agreements are identical. By reading Clause 7 with its sub-clauses [a] [b] and [c] the learned Senior Advocate has attempted to show that the additional supply envisage therein, is supply over and above the contract demand and for which additional supply, Clause 7[i] and 7[v] of the Conditions of Supply become applicable because of the agreement. He points out that the moment additional supply is made applicable by petitioner, the contract demand specified in Clause 3 of the agreement is automatically increased in same proportion.

8. In this background the provisions of condition of supply of electrical energy as effective from 01.01.1976 are pressed into service. He points out that as per Clause 7[1][a], SLC is payable in relation to expenditure required to be undertaken on infrastructural alterations. According to him, the respondent No. 2 or then this Court is not concerned with Clause 7[i][a] of COS and the relevant clause to be looked into is 7[v]. The payment of fixed service connection charges as contemplated in said Clause [v], is over and above the amount to be paid as per condition No. 7[i] for new load or then additional load. He points out that such additional load is taken care of by prescribing rate of Rs. 20/ - per KVA or Rs. 20,000/ - per MVA for each additional KVA demand over 1000 KVA. In the light of the provisions in the agreement, he states that when contract demand was reduced gradually to from 100 MVA to 56 MVA, the later increase in it, is of additional load in this matter may have remained same, but, it is totally irrelevant and the respondent No. 2 Ombudsman ought to have considered the load connected. According to the learned Senior Advocate, concept of "Connected

Load" or "Load Connected" are entirely different and as this difference has not been noticed by the Ombudsman, there is erroneous exercise of jurisdiction.

9. He has also relied upon the provisions of Clause 28 of conditions of supply. He has pointed out that it speaks of issue of supply and vide its Clause [ii] it makes it mandatory for a consumer to pay normative service line charges for additional load over and above the existing load, as per prevailing rules from time to time. Attention is also invited to Clause F[i] and [ii] of the Conditions of Supply to throw more light on his contentions. Learned Senior Advocate, has repeated that the provisions of condition 7[v] is only relevant for adjudication in the matter, and that condition in the light of various legal provisions pointed out by him clearly require the respondent No. 1 to pay service connection charges as demanded. Direction to refund Rs. 227.9 lakhs to respondent No. 1 is therefore stated to be erroneous and without jurisdiction.

10. Learned Senior Advocate has also urged that the demand as raised by respondent No. 1 before various authorities including respondent No. 3 and respondent No. 2 is not maintainable. According to him, respondent No. 1 is estopped from raising such contentions. He has urged that, when respondent No. 1 applied for reduction of loan from 88 MVA to 56 MVA vide its application dated 21.07.2001 and 25.07.2001, petitioners informed respondent No. 1 on 02.08.2001 that the same was approved without any change in connected load w.e.f. 24.07.2001. Respondent No. 1 was cautioned because, if any enhancement in contract demand was required in future, the same would attract payment of SLC and other charges in accordance with prevailing conditions of supply. In this background, the application filed by respondent No. 1 on 02.09.2002 is shown to this Court to show that respondent No. 1 had notice of this requirement and agreed to pay SLC of Rs. 221 lakhs and sought leave to pay it in 20 installments. This connection was considered by the recovery committee in its meeting dated 27.09.2002 and subject to certain conditions, the installments was granted. Amount of SLC of Rs. 221 lakhs was permitted to be paid in 10 equal installments, while SCC of Rs. 6.9 lakhs was directed to be paid in one stroke. These conditions were accepted by respondent No. 1 and therefore, only the petitioner's agreed to release and released additional load. As per the agreement of the conditions of supply there is no obligation upon the petitioner to supply such additional load and had respondent No. 1 then communicated its refusal or disagreement, the additional load/supply would not have been released. Learned Senior Advocate states that having been agreed to the terms and conditions and thereby having induced petitioner to release such additional load, the challenge by respondent No. 1 before respondent No. 3 and respondent No. 2 deserves to be rejected.

11. Shri M.G. Bhangde, learned Senior Advocate with Shri R.M. Bhangde, learned Advocate for respondent No. 1 has at the outset stated that there has been material deviation by petitioners before this Court. According to it, the entire levy of 227.9 lakhs is for the first time sought to be justified by applying condition No.

7[v] of the Conditions of Supply as its source. He has urged that, before respondent No. 3 and respondent No. 2 the levy was sought to be justified by pointing out condition No. 7[i][a] as source for SLC and Rs. 221 lakhs and condition No. 7[v] as source for demand of Rs. 6.9 lakhs. This contention according to him needs to be noted and learned Senior Advocate has in the alternative also urged that in any case, the demand of Rs. 221 lakhs could not have been attributed to condition 7[i] [a]. He has urged that it's wording clearly shows that when for additional supply any infrastructural changes are insisted, costs on account of such changes are leviable in condition No. 7[i][a]. He has further stated that Condition No. 7[v] speaks of fixed SCC and even that condition and clause is not attracted in the present matter. However, without prejudice to this condition and in the alternative, the learned Senior Advocate has proceeded to demonstrate that even the said condition No. 7[v] is presumed to be applicable, at the most demand of Rs. 6.9 lakhs constitute part of impugned demand can be said to be justified. The remaining demand of Rs. 221 lakhs cannot be attributed to said condition.

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12. He has pointed out that the Demand Note dated 25.08.2002, communication dated 08.10.2002 clearly show that the petitioner is in possession to justify demand for Rs. 6.90 lakh only before this Court.

13. He has invited attention to very same agreement to which learned Senior Advocate for the petitioner also made reference. According to him, as per Clause 7(b), only source of power to the petitioner to SLC and SCC is conditions of supply and its term No. 7(v) is relevant. The conditions of supply are statutory in nature and in order to justify the demand of Rs. 6.90 lakh under condition 7(v), it must be shown that the same is an additional load. He points out that earlier M.E.R.C. had found that there was no additional load and no new infrastructure. The same finding is reached by Ombudsman also. He has pointed out that there is no specific challenge raised in this respect in writ petition and hence the application of mind in this respect by Respondent No. 2 cannot be interfered with.

14. About estoppel, the learned Senior Advocate has contended that the demand for reduction in contract demand was accepted vide communication dated 02.03.2001 which stipulated that for any further enhancement in contract demand, SLC and SCC as per relevant conditions of supply would be charged. Respondent No. 1 agreed to sell and also pointed out in that communication that they would pay the amount in installments. But then payment of necessary SLC and SCC already made was also highlighted with fact that a developed plot was given to the petitioner with necessary facilities for establishing a 220 KV sub-station. In communication dated 23.10.2002, the demands were objected to as unnecessary charges. Attention is also invited to communication dated 13.06.2002 requesting the petitioner to restore contract demand of 90 MVA without asking for SLC or SCC. Lastly, the orders of the Hon''ble Apex Court are also pressed into service to urge that there the Hon''ble Apex Court has

expressly ruled out estoppel. Reliance has been placed upon the judgments of the Hon''ble Apex Court in the case of Bhagwant Rai and others Vs. State of Punjab and others, and Godrej and Godrej and Boyce Manufacturing Co. Ltd. Vs. State of Maharashtra and Others, to urge that there cannot be estoppel against the statute.

15. It is contended that here the connected load has always remained the same for all relevant purposes and hence there is no question of any additional load as such. The provisions of condition No. 7(v) are, therefore, stated to be not relevant. Attention is also invited to Clause (f) which appears in procedure of assessment in its part II meant for LT consumers. It is urged that it is applicable only to LT consumers and that too for additional infrastructure. It is urged that in present matter, there is no such additional infrastructure required. The condition No. 28 dealing with system of supply is pointed out to meet the arguments of learned Senior Advocate and it is contended that its Clause (ii) again deals with LT consumers and is not applicable in present matter. Attention is invited to findings reached by Respondent No. 2 to show that sanctioned demand never exceeded 90 MVA.

16. In brief reply, Shri Deshpande, learned Senior Advocate has stated that load connected does not mean connected load and it only implies contract demand. Any addition to contract demand is recognized statutorily as additional load and provisions of condition No. 7(i)(a) and 7(v) are accordingly applied.

17. Today, before the dictation of the judgment was undertaken, Shri Agrawal, Advocate holding for Shri Bhangde, learned Senior Advocate pointed out that in PIL No. 53 of 2001, Respondent No. 1 filed Civil Application No. 2958 of 2003 and sought review of the order dated 30.04.2003. That review was granted and Respondent No. 1 was permitted to take recourse to statutory remedies. Shri Moharir, Advocate on behalf of the petition states that he does not dispute the order but he is not aware of further developments in the matter.

18. In this situation, I find it appropriate to consider the issue of estoppel as raised, as objection by the petitioner. The judgment of the Hon''ble Apex Court setting aside the earlier two orders operating in favour of Respondent No. 1 found that forum constituted u/s 42(5) of Electricity Act, 2003, alone had jurisdiction. In view of this, Respondent No. 1 approached Respondent No. 3 - Consumers Grievance Redressal Forum (CGRF). The Hon''ble Apex Court has in such order observed, "the payment, if any, made by the company will not operate as estoppel against the respondent company". It is, therefore, clear that after this declaration by the Hon''ble Apex Court, the petitioner should not have raised such objection before this Court. In any case, the communication dated 02.08.2001 forwarded by the petitioner to Respondent No. 1 reveals that it has approved reduction in contract demand from 88 MVA to 56 MVA without change in connected load. Thereafter it has been stated that further enhancement in contract demand would attract payment of service line and other charges as per prevailing conditions of supply, It is, therefore, apparent that the petitioner has

stated that SLC and SCC would be demanded on the basis of conditions of supply. The communication dated 26.08.2002 sent by the petitioner to Respondent No. 1 reveals a demand of Rs. 6.9 lakh towards SCC and of Rs. 2.21 lakh towards SLC. Respondent No. 1 agreed to pay that payment on 02.09.2002 but then pointed out that it already had maximum contract demand of 90 MVA and had paid necessary SLC and other charges for the same. On 08.10.2002, the petitioner reiterated their demand and that communication is replied on 23.10.2002 by Respondent No. 1. In that reply, Respondent No. 1 has specifically stated that the same were unnecessary charges.

19. The perusal of order dated 07.04.2004 passed by the Division Bench of this Court on Civil Application No. 2958 of 2003 in Writ Petition No. 3399 of 2000 (PIL NO. 53 of 2001) reveals that there present Respondent No. 1 had sought a leave to prosecute their application dated 28.11.2002 filed before MERC in order to challenge the demand of service connection charges and service line charges. That application was rejected by the Division Bench on 30.04.2003 and in review, on 07.04.2004, the application was allowed with the result that Respondent No. 1 was permitted to prosecute statutory remedies available to it before Respondent No. 3 - CGRF. This order coupled with the order of the Hon"ble Apex Court reveals that the contention about estoppel in the matter is misconceived.

20. The perusal of judgment of the Hon"ble Apex Court in the case of Bhagwant Rai v. State of Punjab (supra) reveals that there the Hon"ble Apex Court found that actual rent received from the tenant who was not major, for determination of annual ratable value, therefore, admission by the landlord in their letter that they were prepared to pay municipal taxes on the basis of actual rent received from tenant, was held not to constitute estoppel. It was found that such admission was wrongly made.

21. In Godrej and Boyce Manufacturing Company Ltd. v. State of Maharashtra (supra), the Hon"ble Apex Court has found that conditions subject to which land owner made offer to surrender the designated plot of land to the Municipal authority and for its acceptance by the municipal authority were enumerated in statutory provisions and beyond those conditions, there could be no negotiations. In para 64, the Hon"ble Apex Court has also noticed that surrender of land in terms of said statutory provision cannot be subjected to any further conditions apart from those already contained therein. It is further found that the representative of the appellant before the Hon"ble Apex Court though present and might or might not have voted for the graded scheme for grant of additional TDR but that did not authorize the municipal authorities to override or supersede the statutory provisions by issuing circulars in the nature of executive instructions.

22. It is, therefore, apparent that in present facts, there was no express promise by Respondent No. 1 to agree to pay SLC or SCC de hors the provisions of conditions of supply. It also cannot be presumed that the petitioner wanted to claim anything de hors such terms and conditions. The argument of estoppel,

therefore, is without any merit and liable to be rejected.

23. It is not in dispute that condition No. 7 in conditions of supply is the only relevant source of power under which the petitioner can justify their demand. The documents show that demand was split into two and amount of Rs. 6.90 lakh was claimed as SCC under condition 7(v). The amount of Rs. 2.21 lakh was also attempted to be justified under very same provision. The effort has been undertaken only after realising that the demand was not covered under condition 7(i)(a). That clause expressly stipulates that consumer has to pay non refundable service line charges in order to meet the total cost (with 15% overhead charges) of works involved in effecting the supply facility and in extending the supply line up to its establishment. Though said Sub-clause (a) uses the word "service connection charges", it is not in dispute that later on those words have been amended to read "service line charges". The MERC in its order dated 18.10.2005 in paras 10 and 11 specifically found that there was no additional infrastructure created and existing infrastructure was utilized. The predecessor of present petitioner (Maharashtra State Electricity Board) is held to have not established any additional capital expenditure or infrastructure cost for restoration of contract demand of Respondent No. 1 to its earlier levels. It is no doubt true that this order has been later on set aside by the Hon'ble Apex Court but then similar observations are again made by Respondent No. 2 - Ombudsman in para 43 of its order dated 29.02.2008. These findings of MERC were within the knowledge of the petitioner and even the findings of Respondent No. 2 in the impugned order are sought to be challenged in present writ petition. But then no supporting material to show nature of expenditure incurred or then nature of exercise undertaken is produced before any of the authorities by the petitioner. It is, therefore, obvious that these findings on facts need to be accepted.

24. Respondent No. 2 - Ombudsman has found that the sanctioned demand remained at 90 MVA at all times while contract demand only was brought down. This finding is also not in challenge before this Court. The 9A load Summary submitted by Respondent No. 1 and produced by the petitioner also reveal same position. The connected load has always remained 128.628 MW after 03.03.1999 and it was never reduced or increased.

25. Phrase "connected load" has been defined in conditions of supply in Section 1(h) to mean the sum of the rated capacities of all the energy consuming devices duly wired up and connected to the power supply system on the consumer's premises, including stand-by devices, if any. The term "maximum demand" is also defined as the average KW/KVA delivered at the point of supply to the consumer during the 30 minutes period of the maximum use during month. The phrase "contract demand" has been defined in High Tension Tariff Booklet of the petitioner as maximum KW/ KVA for the supply of which the petitioner undertakes to provide facilities from time to time. These tariff regulations also defined maximum demand and connected load and those definitions are same

and identical as one in conditions of supply. Nowhere the phrase "load connected" has been implied either in conditions of supply or tariff regulations.

26. The perusal of condition 7(v) reveals that fixed service connection charges contemplated therein are payable over and above the amount to be paid as per condition 7(i). This fixed service connection charge is payable for new load and also for additional load. Here, this Court is concerned with additional load and the meaning of additional load can be covered from this condition only which stipulates that such SCC is payable in case of additional load, only to the extent of new demand i.e. excluding load already connected. Thus, connected load or load already connected is required to be excluded while finding out additional load. Here, as already observed above, sanctioned demand has always remained 90 MVA. Similarly, connected load has also not undertaken any change therefore even if any difference is presumed between connected load and load connected, the sanctioned demand has not undergone any change.

27. The provisions of condition 7(v) show that for each additional KVA demand over 1000 KVA, the fixed SCC payable is Rs. 20/ - per KVA. In case of Respondent No. 1, he sought restoration of his contract demand to 90 MVA from 56 KVA. If this rate of Rs. 20/ - per KVA is applied, the part of demand i.e. amount of Rs. 6.9 lakh at the most can be held to be substantiated. The remaining part or remaining demand of Rs. 2.21 lakh is not covered even under condition 7(v). Fixed SCC is payable for additional load. Respondent No. 2 has found that there was and there is no additional load. It was only restoration to already sanctioned contract demand by using same infrastructure and facility. The petitioner has failed to point out that while restoring such earlier sanctioned contract demand, any other expenditure was required to be incurred, necessitating payment of fixed SCC.

28. The effort has also been made to justify the demand by pointing out Clause 28 which speaks of system of supply. Relevant Clause (ii) appearing therein obliges consumer to pay normative service line charges for additional load over and above their existing load as per prevailing rules from time to time. Again this clause requires additional load. If there is no additional load, this clause cannot have any application. Hence, in present facts, this clause is not relevant. Not only this, the substantive portion of condition of service appearing above it deals with LT owner consumers and states that they are allowed to avail LT supply up to 100 HP subject to consumer installing LT maximum demand meter having the facility to record KVA demand also, at its own cost and billing would be as per the provisions of tariff prevailing from time to time. Clause (i) appearing below it states that this is an option to the LT consumers. Clause (iii) further stipulates that consumer has to install LT maximum demand meter. It is, therefore, obvious that entire arrangement contemplated therein is in relation to LT consumers and hence its Clause (ii) cannot be read as angle free within itself even to HT consumers. Reliance upon said provision, therefore, in present facts is misconceived.

29. Clause (f))(i) pointed out above requires consumer at all times to restrict their actual maximum demand within sanctioned contract demand. If the actual maximum demand exceeds contract demand, such demand in excess of contract demand is charged at twice the prevailing rate for demand charges. It also gives procedure for billing in that event. It also requires consumer to pay additional service line charges, additional security deposit etc. The petitioner has never invoked this provision as source of power before any of the authorities below. Moreover, this provision also falls in part (ii) which deals with LT consumers. As the petitioner has not taken recourse under this provision and there is no demand gained accordingly at twice the prevailing rate or then additional security deposit etc. in present matter, it is not necessary to delve more in this controversy.

30. The perusal of order passed by Respondent No. 2 -Ombudsman shows that the petitioner has failed to demonstrate any sanction of additional load within the meaning of condition 7(v) of Conditions of Supply. Even before this Court, the petitioner could not point out that Respondent No. 1 has sought any additional load and hence the petitioner was justified in raising demand.

31. I, therefore, do not find anything wrong with the finding of Respondent No. 2 that there was no additional load involved in this case and hence the demands as made were unjustifiable. No case is made out warranting any interference. Writ Petition is, therefore, dismissed. Rule discharged. However, in the facts and circumstances of the case, there shall be no order as to costs.