

(2009) 10 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No. 6414 of 2000 and Civil Writ Petition No. 495 of 2001

Ravalgaon Sugar Farm Ltd.

APPELLANT

Vs

The State of Maharashtra and The Electrical Duty Inspector

 The Saswad Mali Sugar Factory Ltd., Shri Vijaykant
Shankarrao Kudale Managing Director, The Saswad Mali
Sugar Factory Ltd. and Shri Arvind Eknath Jadhav, Whole
time Director, The Saswad mali Sugar Factory Limited Vs The
State of Maharashtra, The Secretary to the Government of
Maharashtra, Industries, Energy and Labour Department, The
Deputy Secretary to the Government of Maharashtra, Energy
Industries, Energy and Labour Department and Shri P.L.
Kulkarni, Electricity Inspector, Electricity Inspection Dept.

RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:

Bombay Electricity Duty Act, 1958 — Section 22, 22(2), 3, 3(1), 4
Constitution of India, 1950 — Article 14

Citation : (2009) 6 BomCR 316 : (2009) 111 BOMLR 4332

Hon'ble Judges : Roshan S. Dalvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Pashant Naik and Y.R. Naik, in W.P. No. 495/2001 and 5207/2001,
for the Appellant; V.A. Sonpal, 'A' Panel Counsel, for the Respondent

Judgement

B.H. Marlapalle, J.—All these three petitions have raised the common challenge and, therefore, they are being decided by this common judgment. All the petitions challenge the Government Notification dated 25/4/2000 as well as the subsequent Notification dated 4/4/2001 issued through the Department of Labour, Energy and Industries of the State Government u/s 5A of the Bombay Electricity Act, 1958 ("the Act" for short). By the first Government Resolution dated 25/4/2000 the exemption of payment of electricity duty for captive generation of power, by non conventional or conventional sources, as available prior to the said date came to be withdrawn except the industries in the co-operative sector and electricity duty at 30 paise per unit on generation of power

for captive consumption was levied with effect from 1/4/2000. Whereas by the second Notification dated 4th April 2001 the State Government exempted with retrospective effect from 1st April 2000, the consumption of energy generated in a generating station by a person carrying on an industry and consumed by himself for such industry, in the whole of the State of Maharashtra, on payment of such part of electricity duty payable under Clause (b) of Part G of the Schedule to the Bombay Electricity Duty Act, 1958, as in excess of 15 paise per unit of energy was consumed, subject to the condition that the generating set was installed in pursuance of the Government of Maharashtra policy prior to the revised policy regarding captive generation declared vide the Government Resolution dated 25th April 2000. Thus by the Notification dated 4th April 2001 the petitioners were levied electricity duty at the rate of 15 paise per unit instead of 30 paise per unit from 1st April 2000. It is the case of the petitioners that they cannot be differentiated from the Cooperative Sugar Mills and they must continue to have full exemption in payment of electricity duty as was prevailing upto 31st March 2000, on par with the sugar factories / mills in the cooperative sector.

2. All the petitioners are the companies registered under the Companies Act and are running sugar mills in different parts of Maharashtra. As per them, the sugar mills run by companies are less than ten and all those who had installed Bagasse based co-generation captive power plants prior to 1st April 2000 were getting the benefit of full exemption in electricity duty on such co-generation and to the extent it was used for captive purposes i.e. to run their own sugar factories. However, the State Government arbitrarily, capriciously and without any justifiable reasons withdrew the said benefit vide Notification dated 1st April 2000 but continued it to the sugar factories / mills in the Co-operative Sector. It has been pointed out that the Government of Maharashtra by the G.R. dated 1st September 1994 had granted such exemption which was continued by the revised Industrial policy as per the Notification dated 30th October 1996. The Government of Maharashtra issued the said notification in exercise of the powers conferred u/s 5A of the Act and in supercession of the Government Notification dated 1st September 1994, with effect from the billing month of October 1996 the consumption of energy generated in a generating station by a person carrying on an industry and consumed by himself for such industry in the whole of the State of Maharashtra for payment of the whole of the electricity duty payable under Clause (b) of Part G of the Schedule appended to the said Act. Thus exemption was available to all the industries in the whole of the State of Maharashtra and those who were generating electricity from a generating station for their captive use.

3. It would be appropriate to reproduce the impugned GRs, as under,

NOTIFICATION dated 1st April, 2000: Under the provisions of Section 5-A The Bombay Electricity Duty Act 1958 (BOM ACT XL OF 1958) and in exercise of the powers conferred there under and in supercession of notification No. ELD 1096/CR 2864[1]/NRG-2 dated 30th October 1996, the Government of Maharashtra

hereby exempts, with effect from the billing month April, 2000 the generation of electricity by unconventional method by a person / consumer carrying on an industry in the co-operative sector and consumed by them for such industry, in the whole of Maharashtra from the payment of the whole electricity duty payable under Clause (b) of Part G of the schedule appended to the said Act.

NOTIFICATION dated 4th April 2001:No. ELD.2001/CR-1069/NRG-1. In exercise of the powers conferred by Section 5A of the Bombay Electricity Duty Act, 1958 (Bom. XL of 1958) and of all other powers enabling in this behalf, the Government of Maharashtra, having considered it necessary in the public interest, so to do, hereby exempts, with effect from 1st April 2000, the consumption of energy generated in a generating station by a person carrying on an industry and consumed by himself for such industry, in whole of the State of Maharashtra, from payment of such part of electricity duty payable under Clause (b) of Part `G" of the schedule to the said Act, as in excess of fifteen paise per unit, of energy so consumed, subject to the condition that generating set is installed in pursuance of the Government of Maharashtra policy prior to the revised policy regarding captive generation declared vide Government Resolution Industries, Energy and Labour Department, No. Sankirana - 1099/CR-455/ NRG-7, dated 25th April, 2000.

By the notification dated 1st April 2000 the exemption from the payment of electricity duty was continued only in respect of generation of electricity by non conventional method by a person / consumer carrying on an industry in the co operative sector and consumed by them for such industry in the whole of the State of Maharashtra, whereas all other persons having engaged in generation of power for their captive purposes, the State Government decided to levy electricity duty at the rate of 30 paise per unit. This policy announced on 1st April 2000 was again modified by the G.R. dated 4th April 2001 and the levy of electricity duty at 30 paise per unit was brought down to 15 paise per unit provided such industry / person generating energy for captive purposes had installed the generating station in pursuance of the Government of Maharashtra policy prior to the revised policy regarding captive generation declared by the Government of Maharashtra vide GR dated 25th April 2000. This implied that all those captive power plants installed after 25th April 2000 were not entitled for the concession or reduced rate of electricity duty at 15 paise per unit from 30 paise per unit.

4. It is also an admitted position that while these petitions were pending, the State Government vide its Notification dated 16th June 2005 in supercession of the impugned notifications i.e. Notification dated 1st April 2000 and GR dated 4th April 2001, restored the exemptions on the payment of electricity duty as was introduced by the notification dated 30th October 1996, with effect from 1st May 2005 to all the industries. Though the petitioners were required to pay electricity duty at the rate of 15 paise per unit from 1st April 2000 till 30th April, 2005, the said payment was not made or made under protest in view of the interim order

passed by this Court directing the State Government not to resort to any coercive action for recovery of the electricity duty so levied. Thus the only issue which remains for our consideration as of now is as to whether the denial of exemption in the payment of electricity duty to the petitioner sugar mills from 1st April 2000 till 31st March 2005 is illegal, unjustified, unreasonable, arbitrary, discriminatory and / or in violation of the guarantee under Article 14 of the Constitution. It is pertinent to note here itself that none of the petitioners have indicated as to when they have installed the bagasse based power generating captive plants i.e. any date prior to 1st September 1994 or 30th October 1996, but it appears that installation appears to be after the notification dated 22nd June 1993.

5. The petitioners state that there is no distinction in any manner between the co-operative sugar factories and the private sugar factories, in respect of licensing policy, financial policy, taxation, levy, control and sale of sugar, payment of salaries to the employees, machinery requirements, procurement of the sugarcane from the farmers and the pricing policy of the sugarcane as well as sugar. When the sugar industry as such is treated as one by the Government of India or by the State Government for all purposes, the State Government has discriminated and acted arbitrarily in denying the exemption in payment of electricity duty to the private sugar mills and continuing the said benefit only to the cooperative sugar mills. It has been pointed out that the Government of Maharashtra issued a notification dated 30th September 1995 and levied the sugarcane purchase tax at the rate of 3 per cent from all the sugar factories i.e. co-operative sugar factories as well as private sugar factories. The Central Government levies and collects excise duty at the same rate for all the sugar factories and there is no distinction made between the cooperative sugar factories and the private sugar factories. Same thing applies to other taxes like sales tax, professional tax and excise duty etc. The payment of salaries to the employees were also uniform in all the sugar factories and there is no distinction between the private sugar factories and the co-operative sugar factories. Procurement of sugarcane is from the sugarcane growers and the minimum procurement price is determined by the State Government. The price for sale of sugar is also determined by the Government of India. The distribution of sugar is also as per the directions of the Government India from time to time and in all this, there is no distinction made between the co-operative sugar factory and the private sugar factory. The State Government and the Central Government have been treating all the sugar factories equally and uniformly under the Income Tax Act, Customs Act, Central Excise Act and the Central Sales Tax Act etc. Thus the action of the State Government in issuing the impugned notifications is discriminatory, arbitrary and unreasonable. There is no rational nexus to the object sought to be achieved by these notifications. The exemption for payment of electricity duty was introduced to achieve the aim of generation of electricity and more particularly for captive purposes so that the industries would become self sufficient for the need of power consumption. The impugned notifications

make an irrational, unconstitutional and illegal differentiation between the co-operative sugar factories and private sugar factories. The equals are made unequals. Equals are treated unequally and the impugned notifications are ultra vires of Article 14 of the Constitution. When the State Government in its wisdom reconsidered the impugned notifications and superseded it as per the notification dated 16th June 2005, the State Government is deemed to have accepted its own illegal, unreasonable and unjustified act by levying electricity duty on the private sugar factories and exempting the co-operative sugar factories for the intervening period from 1st April 2000. This is a blatant exercise of discrimination by the State Government and the impugned notifications do not set out any rationale as to why the State Government thought it fit to continue the exemption in payment of electricity duty only to the co-operative sector. On the point of law it has been pointed out that the exemption permissible u/s 5A of the Act are permissible and restricted to (i) any class of premises, or (ii) purposes, or (iii) in respect of energy consumed upto a specified limit. These three restrictions alone can form basis for reasonable restrictions that may be imposed by the State Government on the power to grant exemptions. The Legislature having spelt out its intent with reference to Section 5A, there is no power in the State Government to alter, add or otherwise amplify indicated legislative restrictions as have been attempted by the said impugned notifications. Amongst the sugar factories there cannot be a further distinction as private sugar factories, joint stock sugar factories or the co-operative sugar factories. All of them are set up for the purpose of manufacturing sugar and when they have captive power generation units, they cannot be differentiated and treated unequally when for all the purposes they are treated as equals by the State Government as well as the Central Government.

6. The State Government has filed affidavit-in-reply and has denied that the impugned notifications are ultra vires the Constitution. It has been emphasized that u/s 5A of the Act the Government can restrict the exemptions to any sector and, therefore, it decided to restrict the benefit only to the co-operative sector. The impugned notifications have been issued in pursuance of the powers conferred on the State Government u/s 5A of the Act and the State Government has treated persons carrying on industry in the cooperative sector as a separate class of premises and as such has granted exemption in payment of electricity duty. It is further stated that the persons carrying on industry in the cooperative sector and in the private sector form a separate class by themselves, distinct and different from others and as such the persons carrying on industry in the co-operative sector cannot be compared with the persons carrying on industry in any other sector. In order to enhance the Government revenue, it was thought fit that such captive consumers like the petitioners be also liable for payment of electricity duty while exempting the co-operative sector.

The affidavits in reply have been filed prior to the notification dated 16th June 2005 and thereafter there is no affidavit-in-reply justifying the denial of exemption in payment of electricity duty for the period from 1st April 2000 till

that date i.e. for about five years. No reasons have been set out by the State Government as to why it thought it fit to deny such exemption only for the intervening period and at the same time why it thought it fit to reintroduce the exemption to all the industrial sector so long as the power generation was for captive purposes and it did away the differentiation between the cooperative sector and private sector. In the absence of any such explanation, we will have to presume that either the State Government has no explanation or it does not deem it appropriate to place such explanation before us justifying the denial of exemption for the limited period of five years from 1st April 2000 to 1st May 2005.

7. The Government of India issued a circular dated 31/10/1996 modifying the national programme of bagasse based co-generation of power particularly in sugar mills. The circular did not make any distinction between the private sector sugar mills on one hand and the co-operative sector sugar mills on the other hand. The duration of the national programme of bagasse based co-generation came to be extended upto 31st March 2000 or until further orders whichever was earlier. M/s. Maharashtra Industrial & Technical Consultancy Organization (MITCON), an undertaking of the State Government, organized a national workshop on co-generation and the Ministry of Non- Conventional Energy Sources, Government of India was a co organizer .It published the Investor Guide Book on Bagasse Based Co-generation Power Projects in India. MITCON is a premier concept to commissioning consultancy organization for sugar mill co-generation projects and the Lead Programme Partner (LPP) of the Ministry for Non-Conventional Energy Sources for promoting projects of captive power generation in sugar mills. The seminar dealt with almost all the issues right from installation to the functioning of captive power plants and did not make any distinction whatsoever between the private and co-operative sugar factories. In terms of investments and other financial liabilities admittedly there is no distinction that can be made between the co-operative and private sugar factories. In terms of procurement of sugarcane, the minimum base price of sugarcane, the sale and distribution of sugar, pricing of sugar, levy / taxes by the State Government of the Central Government, there is no distinction between the cooperative and private sugar factories. The liabilities in terms of the employees are also not in any way different between the two. The basic aim of the State Government in granting exemption in payment of electricity duty by invoking the powers u/s 5A of the Act is to encourage the sugar industry to be on its own, to the extent possible, in its requirement of power generation and when such is the "purpose" which words find place in Section 5A, it is not permissible for the State Government to make a further distinction between the cooperative sugar factory and private sugar factory while granting exemption in payment of electricity duty. It would be appropriate to reproduce the scheme of Sections 3, 4 and 5 of the Act as under

3. Duty on units of energy consumed

(1) Subject to the provisions of Sub-section

(2) there shall be levied and paid to the State Government on the consumption charges or the units of energy consumed (excluding losses of energy sustained in transmission and transformation by a licensee before supply to a consumer) a duty (hereinafter referred to as "electricity duty") at the rates specified in the Schedule to this Act.

(2) (a) Electricity duty shall not be leviable on the consumption charges or the units of energy consumed

(i) by the Government of Maharashtra (save in respect of premises used for residential purposes);

(ia) by or in respect of any municipal corporation, municipality, municipal committee, town committee, notified area committee, Cantonment Board, Zilla parishad or Village Panchayat constituted under any law for the time being in force in the State, for the purpose of, or in respect of a school or college imparting education or training in academic or technical subjects, a hospital, nursing home, dispensary, clinic, public street lighting, public water works and system of public sewers or drains (save in respect of premises used for residential purposes).

(ib) by any licensee for purposes directly connected with the construction, maintenance or operation of any generating, transmitting and distributing system of the licensee;

(ii) by a tramway company, save in respect of premises used for residential and office purposes.

(iii) by or in respect of any statutory University and institution run by the statutory University for the purpose of or in respect of education, research and training (save in respect of premises used for residential purposes).

(iia) by or in respect of charitable institution registered under the Bombay Public Trusts Act, 1950, for the purpose of, or in respect of, a school or college imparting education or training in academic or technical subjects (save in respect of premises used for residential purposes).

(iv) where the energy is generated by any person for the purpose of supplying it for the use of vehicles or vessels;

(v) where the energy is generated at a voltage not exceeding 100 volts;

(vi) in respect of such industrial or agricultural purposes (other than residential or office purposes) in such areas and subject to such terms and conditions and for such period as the State Government may, having regard to the need and conditions of industrial and agricultural development in the areas by general or special order specify in that behalf.

(vii) for any industrial purpose or process, in the Vidarbha region, Marathwada

region, in the Raigad, Sindhudurg and Ratnagiri Districts and in the Thane District (but excluding there from the part adjoining Greater Bombay, which is encircled by the Thane - Basse in creek) in respect of any new industrial undertaking during a period of five years from the date on which such undertaking has begun to manufacture or produce articles for the first time before the commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 1988; Provided that, a new industrial undertaking which begins to manufacture or produce articles for the first time on any date after the commencement of the Bombay Electricity Duty (Amendment) Act, 1986 (hereinafter referred to in this sub-clause as "the said date"), shall make an application in the prescribed manner and form within two years from the said date, and thereupon the provisions of this sub-clause shall apply to such undertaking from the said date;

Provided further that, the State Government may, either prospectively or retrospectively by notification in the Official Gazette, exclude,

(a) any area aforesaid or any part thereof (regard being had to the price of energy prevailing therein and to the state of industrial development thereof) or

(b) any new industrial undertaking or class of new industrial undertaking subject to such conditions and restrictions as may be specified in this behalf by the State Government in such notification. and thereupon the provisions of this sub-clause shall not apply in those areas as part thereof or in relation to such new industrial undertaking or class of new industrial undertaking.

(b) In those parts of the State not mentioned in Sub-clause (vii) of Clause (a) (but excluding Greater Bombay) electricity duty on the units of energy consumed by any new industrial undertaking for any industrial purpose or process shall during a period of five years commencing from the date from which such undertaking has begun to manufacture or produce articles for the first time before the commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 1988 be leviable at half the rates specified in the Schedule to this Act.

Provided that, a new industrial undertaking which begins to manufacture or produce articles for the first time on any date after the commencement of the Bombay Electricity Duty (Amendment) Act, 1986 (hereinafter referred to in this sub-clause as "the said date"), shall make an application into he prescribed manner and form within two years from the said date; and thereupon the provisions of this sub-clause shall apply to such undertaking from the said date;

Provided further that the State Government may, either prospectively or retrospectively, by notification in the Official Gazette, exclude

(a) any area aforesaid or any part thereof (regard being had to the price of energy prevailing therein and to the State of industrial development thereof) or

(b) any new industrial undertaking or class of new industrial undertaking subject to such conditions and restrictions, as may be specified in this behalf by the

State Government in such notification, and thereupon the provisions of this clause shall not apply in those areas or part thereof or in relation to such new industrial undertaking or class of new industrial undertaking.

4. Payment of electricity duty :-(4) Every person other than the licensee who generates energy for his own use shall pay to the State Government at the time and in the manner prescribed the proper electricity duty payable under this Act on the units of energy consumed by him.

5A. Power to exempt:-Subject to such conditions as it may impose, the State Government may, if it considers it necessary in the public interest so to do, by notification in the Official Gazette, exempt whether prospectively or retrospectively, the consumption of energy in the whole or any part of the State in respect of any class of premises or purposes or in respect of energy consumed upto a specified limit, from payment of the whole or any part of the electricity duty payable under Part A, Part B, (Part F or Part G) of the Schedule to this Act.

SCHEDULE (See Section 3) Part G

In respect of

8. While Sub-section (1) of Section 3 of the Act is the charging section which provides for levy of payment of electricity duty at the rates specified in the Schedule to the Act Sub-section (2) provides for exemption from payment of the electricity duty, inter alia, to various persons like the industries, municipal corporation, municipality, municipal committee, town committee, Cantonment Board, Zilla Parishad, statutory universities, charitable institutions etc. Section 5A empowers the State Government, if it considers it necessary in the public interest so, to exempt by notification in the official gazette, the consumption of energy in the whole or any part of the State, in respect of (i) any class of premises, or (ii) purposes, or (iii) in respect of energy consumed upto a specified limit, from payment of whole or any part of the electricity duty payable under Parts A, B, F or G of Schedule to the Act. It is pertinent to note that Section 5A does not use the words "exemption to any person or class of persons" and it only speaks of (i) any class of premises, (ii) purposes, and (iii) in respect of energy consumed upto a specified limit, for exemption in payment of electricity duty. Even if we consider "any class of premises" or "purposes", it is clear that sugar industry as such is set up for the purpose of manufacture of sugar or the factory as such has the premises used for manufacture of sugar. Whether such premises for the purpose of manufacturing sugar is belonging to the private sector or the public sector, Section 5A does not make any distinction. The Legislature while enacting Section 5A has not considered a further differentiation in terms of sectors, viz. private sector, public sector and co-operative sector and the Legislature has in its wisdom used only the words any class of premises or purposes or in respect of energy consumed upto a specified limit which the State Government could grant exemption from payment of the whole or any party of the electricity duty payable under the Act. It is obvious that the State

Government realized this when it issued a fresh notification dated 16th June 2005 and reintroduced the exemption from payment of electricity duty to all the industries who have set up power generation plants for captive consumption.

It is pertinent to note that for the first time the Government of Maharashtra vide its notification dated 22nd June 1993, in exercise of its powers u/s 5-A of the Act granted exemption in payment of electricity duty for captive consumption in respect of any industrial purpose in the whole of the State of Maharashtra subject to the following conditions viz., (a) the exemption shall be available only in respect of energy generated in a generating station installed on or after 1st day of July 1993 by the person carrying on industry and consumed by himself for such industry, (b) the exemption shall not be available in respect of any energy consumed for residential or office purposes in any industry. However, by the subsequent notification dated 1st September 1995 the State Government made the exemption of electricity available to all the industries irrespective of the date of installation of the captive generating station and the purpose of consumption and it was made open as distinct from the earlier policy of denying such exemption in respect of any energy consumed for residential or official purpose in any industry. The notification dated 22nd June 1993, therefore, clearly indicated that the Government of Maharashtra wanted to encourage / motivate or invite the industries to install the captive power generation plants so that the requirement of power by the industries from the State Electricity Board is reduced. The gap between the generation and distribution of electricity in the State of Maharashtra has been widening every year and, therefore, it was obviously the State Government's intention to encourage the industries to be self sufficient, to the extent possible, in requirement of power supply. The power position in the State of Maharashtra as per the Western Region Power Sector Profile - January 2007 published by Government of India, Ministry of Power is as under:

The intention of the State Government is not disputed before us either in the affidavit-in-reply or in the oral arguments advanced by the learned AGP. Thus the purpose for which the powers u/s 5-A of the Act were invoked by the State Government was to ensure that the industries become self reliant as far as possible or to the extent possible, in the requirement of power to run the industry and the said purpose continues to be relevant even as of now and it remains so for the period from 1st April 2000 to 30th April 2005. On the face of this factual position, no reasonable ground has been explained or set out before us by the State Government in continuing the exemption only to the co-operative sector sugar mills and denying the same to all other sugar mills and consequently the impugned notifications are vitiated as being discriminatory, arbitrary and lack of application of mind.

9. Mr. Sonpal, the learned AGP submitted in his oral arguments that at no point of time the State Government had committed that the exemption will be continued for an indefinite period. At the same time the exemption was

continued for more than five years and was withdrawn because of the financial crunch and the Government had to resort to augmentation of revenue so as to face the revenue deficit. In this regard he referred to the speech of the Finance Minister on the floor of the House where he presented the Budget for the year 2000-2001 and more particularly the following statement:

Duty on the electricity produced for captive use is exempt. However, if electricity from captive power plants is supplied to other consumers, it attracts duty of 30 paise per unit. I propose to remove this differentiation by withdrawing the exemption for captive use with effect from 1st April, 2000.

10. It is not known whether the final budget was approved by the Assembly in terms of the above speech or there were any amendments. The proposal made by the Finance Minister was to withdraw the exemption of electricity duty applicable for captive use to all the industries but by the impugned notifications it has been continued in the cooperative sector captive power plants being run on non conventional resources. If the State had withdrawn the exemption for all the industries, it could be a different matter but it is evident that the State Government continued the exemption for payment of electricity duty selectively and only to the co-operative sector. No reasons have been furnished in the impugned notifications so as to justify the benefit being continued to the co-operative sector which predominantly implies, in the State of Maharashtra, the co-operative sugar mills, co-operative textile mills and the co-operative milk dairies which are commonly known to be the political power centers in rural Maharashtra. In fact the revenue deficit of the State Government has been increasing every year and the Government on its own or may be on account of the advice it received from the Maharashtra Electricity Regulatory Commission, decided to withdraw the impugned notification dated 4th April 2001 and restored the full exemption of electricity duty to all the industries. Thus the reason of budgetary deficit to withdraw the exemption in the payment of electricity duty does not justify / support the impugned notifications.

The Electricity Regulatory Commissions Act, 1998 received the assent of the President of India on 2/7/1998 and it was published in the Gazette on the same day. Maharashtra State Electricity Commission was established on 5th August 1999. u/s 22 of the said Act the State Commission is to discharge the functions stated there under. Clauses (b), (e), (h), (j) and (p) of Sub-section (2) of Section 22 read as under:

(2) Subject to the provisions of Chapter III and without prejudice to the provisions of Sub-section (1), the State Government may, by notification in the Official Gazette, confer any of the following functions upon the State Commission, namely:

(a) ...

(b) to aid and advise the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State;

(c) ...

(d) ...

(e) to regulate the working of the licensees and other persons authorised or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner;

(f) ...

(g) ...

(h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the customers;

(i) ...

(j) to aid and advise the State Government in the formulation of the State power policy;

(k) ...

(l) ...

(m) ...

(n) ...

(o) ...

(p) to aid and advise the State Government on any other matter referred to the State Commission by such Government.

Sub-section (3) of Section 22 states that the State Commission shall exercise its functions in conformity with the national power plan.

11. Though it appears that the State Government decided to review its decision in the impugned notification dated 4th April 2001 on the advice received from the MERC on 8th September 2004, it is not known as to why the State Government did not deem it appropriate to seek the advice of the State Commission before issuing the impugned notifications. It was submitted by Mr. Sonpal that it is not mandatory for the State Government to seek the advice of the MERC. It is important to note that when such a statutory body has been created by an Act of Parliament and one of its functions is to advise the State Government on the matters listed u/s 22 of that Act, the State Government could have been better advised if it had sought the opinion of such an expert body like the MERC.

Mr. Sonpal also relied upon the Budget Speech made by the Finance Minister on the floor of the House and pointed out that there was Revenue Surplus in the budget estimate 2005-06. The Hon''ble Minister had announced on the floor of

the House that a revenue surplus of Rs. 265 Crores was estimated for the year 2005-06. The learned AGP tried to make out a case that because of the revenue surplus in the budget the Government issued the notification dated 16th June 2005 restoring the exemption in payment of electricity duty with effect from 1st May 2005. It is not possible to draw such an inference, more so when while rejecting the representations made by the similarly placed / connected writ petitions, no such reasons have been set out. In fact the rejection order admittedly is without assigning any reasons. Even the announcement made by the Minister in his speech, does not state the State Government's proposal to restore the exemption on electricity duty payment.

The State Government vide its notification dated 22nd June 1993 issued in exercise of powers conferred u/s 5-A of the Act for the first time introduced exemption in payment of electricity duty with effect from 1st July 1993 on the consumption of energy in respect of any industrial purpose in the whole of the State of Maharashtra subject to the following two conditions viz. (i) the exemptions shall be available only in respect of energy generated in a generating station installed on or after 1st day of July 1993 by the person carrying on industry and consumed by himself for such industry and (ii) the exemption shall not be available in respect of any energy consumed for residential or office purposes in any industry. It was thus an exemption available to any person carrying on the industry and in respect of energy generated from a captive power plant but at the same time the exemption was not available in respect of any energy consumed for residential or office purposes in any such industry. No time period was set out indicating that the exemption would be available for a particular period or until further orders and this is so in respect of the subsequent notifications dated 1/9/1994 and 30/10/1996. Power of granting concession is coupled with the power of withdrawal but such withdrawal cannot be selective and arbitrary. There can be no doubt that the power of the Government to withdraw such concession after a specific period cannot be doubted but at the same time such withdrawal must be in case of overwhelming public interest and if there was overwhelming public interest in issuing the notifications withdrawing the exemption, the action of the State Government to restore the exemption in its entirety on 1st May 2005 itself goes to show that the impugned notification was not issued on the State Government's satisfaction of overwhelming public interest. As per the learned AGP augmentation of public revenue is public interest. However, it is well settled that imposition of levies or additional levies to augment revenue collection is not public interest. It was also submitted by the learned AGP that amongst the industries also, the Government while exercising the powers u/s 5-A of the Act can resort to further sub classification. We are afraid, this argument is not tenable in law though under Article 14 of the Constitution a reasonable classification is permissible. However, Section 5-A of the Act specifically uses the terms "purpose" and "premises" and these words cannot be further stretched to include "sector". When electricity is generated it could be for the grid power supply, board power supply, commercial

power supply or captive power supply. When the Government granted exemption and in its wisdom decided to restore it after a gap of about five years in respect of captive power supply generated, the purpose for exemption was clear and unambiguous in as much as it exhibited its commitment to encourage captive power plants so that the industries could be self reliant to the extent possible. It is well settled that classification must be based on legal and relevant considerations. In the instant case, there cannot be any further classification beyond the scope of Section 5-A of the Act. The power to withdraw the concession granted does not mean the power to withdraw intermittently and even while exercising such a power of withdrawal in public interest, it is imperative that the State Government sets out just and proper reasons. In the instant case no reasons have been put forward except to say that the withdrawal was done in public interest and at the same time no reason has been set out as to why the Government thought it necessary to restore the exemption with effect from 1st May 2005. We called upon the learned AGP to place before us the concerned files so as to see at least from the record whether the Government had before it any justifiable reasons before the impugned notifications were issued. However, we are informed that the files concerned are not traceable. In the absence of reasons in support of the withdrawal of exemption or refusal to restore the exemption from payment of electricity duty for the intervening period from 1/4/2000 to 30/4/2005, the impugned notifications would suffer from arbitrariness. At the same time, the exercise of power by the State Government must be in conformity with the scheme of Section 5A of the Act. If the exemption granted was withdrawn for all the industries, it could be a different matter. But by the impugned notifications, it created a sub classification of cooperative sector to continue the exemption and after a gap of about five years, it decided to bring in uniformity amongst all the industries, on receipt of the advice of the MERC. The exercise of power u/s 5-A of the Act, in such manner does violence to the scheme of the said section and it smacks of arbitrariness. Captive use of the power generated by a generating station, in respect of all the industries must be treated on par while granting exemption in payment of electricity duty u/s 5-A of the Act. We are, therefore, satisfied that the impugned notifications on the face of the Government's own decision to restore the exemption from payment of electricity duty by invoking powers u/s 5A of the Act are unsustainable.

12. Hence the petitions are partly allowed and the impugned notifications dated 1/4/2000 and 4/4/2001 are hereby quashed and set aside and it is held that the petitioners are entitled for exemption in payment of electricity duty in terms of notification dated 30/10/1996 for the period from 1/4/2000 to 30/4/2005. Consequently the demand notices are quashed and set side. In Writ Petition No. 5207 of 2001 the amount of electricity duty, if paid under protest, be refunded for the above stated period within two months.

13. Rule is made absolute accordingly with no order as to costs.