

(2010) 04 BOM CK 0088
In the Bombay High Court
Case No : Writ Petition No. 798 of 2010

Seth Bankatlal Maloo (S.B.M.) Industries Pvt. Ltd.	APPELLANT
Vs	
Superintendent Engineer (NRC) M.S.E.D.C.L. and The Executive Engineer, C.C.O. and M., Division II	RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2010) 4 BomCR 716 : (2010) 112 BOMLR 2127

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

Bench : Single Bench

Advocate : P.N. Mehta, for the Appellant; A.S. Chandurkar, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—Considering the nature of controversy, writ petition is heard finally at the stage of admission itself with the consent of Shri Mehta, learned Counsel for the petitioner and Shri Chandurkar, learned Counsel for the respondents.

2. By this writ petition filed under Articles 226 and 227 of Constitution of India, the petitioner - industry seeks to challenge the order dated 13.01.2010 passed by Electricity Ombudsman in Representation No. 132 of 2009 holding that as the petitioner - industry is not on a express feeder, it is not entitled to continuous electric supply and is entitled to refund of excess charges recovered from it by respondents wrongly treating it as on express feeder. The contention in short, of the petitioner is that it has been sanctioned electric supply as continuous supply industry and subsequent introduction of concept of express feeder cannot change its that status.

3. The facts are not in dispute. The respondents sanctioned supply to the petitioner on 22.08.1995. This order of sanction titled as Load Sanction Order mentions that it is fresh/ continuous industry for manufacturer of paper with

maximum demand of 800 KVA. Accordingly, the industry continued to enjoy uninterrupted supply till 30.06.2009 and on 01.07.2009, there was interruption. The petitioner upon enquiry gathered that it was due to load shedding. The petitioner made representation on 01.07.2009 and 06.07.2009 pointing out that their industry has been accepted and recognized as continuous process industry and was entitled to continuous power supply. They pointed out that it is being assessed and charged accordingly. They also made some allegations of malafides and ultimately as their grievance was not redressed, they filed Case No. CGRF (NUZ)/042/2009 before Consumer Grievance Redressal Forum of Maharashtra Electricity Distribution Company Limited at Nagpur. The forum rejected that grievance after observing that the petitioner has to pay cost of estimate for express feeder and thereafter only the facility of continuous supply can be dedicated to it. This order of Consumer Forum dated 05.09.2009 & entire exercise was then assailed by the petitioner in Representation No. 132 of 2009 before Electricity Ombudsman and that representation was found without any merit. Thereafter this petition has been filed.

4. Shri Mehta, learned Counsel has pointed out that supply has been started to the petitioner industry on 19.05.1995 and since then the industry has been recognized as continuous processing industry as per letter dated 24.07.1995. He states that this was as per the conditions and miscellaneous charges for supply of electrical energy effective from 01.01.1976 issued by predecessor of petitioner by name Maharashtra State Electricity Board. He points out that Maharashtra Electricity Regulatory Commission (Electricity Supply Code and other Conditions of Supply) Regulations, 2005, cannot apply retrospectively and therefore, cannot affect the status of petitioner industry. He invites attention to Commercial Circular No. 45 dated 09.10.2006 to show that it has come into force from 01.10.2006 and the petitioner has been charged additional supply charge (ASC) accordingly. He also invites the categories of customers as contained therein to show that the petitioner falls in "O" (zero) load shedding pattern. The continuous status of the petitioner industry is also recognized therein. Attention is invited to Commercial Circular No. 47 issued on 04.11.2006 which deals with implementation of Revision in Tariff which came in to force from 01.10.2006. He points out that there again the petitioner industry is recognized as zero load shedding and because of deeming provision contained in Clause (4), it is a continuous supply industry treated as on express feeder. Attention is invited to order of Consumer Forum to show that it only reproduced rival contentions and without evaluating them comparatively, suddenly records conclusion. The decision of Ombudsman is also challenged by contending that relevant questions of change of status of the petitioner because of issuance of Commercial Circular Nos. 45 or 47, have not been gone into and the application of mind therein shows apparent confusion. The learned Counsel has contended that because of earlier sanction and recognition of the petitioner industry and the assessment to various charges accordingly by the respondents, plea of mistake in this respect is unsustainable. He points out that non availability of electricity or any other

similar factor not within control of the respondents is not the reason given for unilaterally imposing load shedding upon the petitioner. The attention is invited to law on the point to urge that the respondents are estopped from discontinuing continuous supply to the petitioners and further the malafides pleaded are also sought to be substantiated. The contention is, establishment of one Musle situated near the establishment of the petitioner is sought to be accommodated at Patansavangi sub-station from where the petitioner is receiving power supply and to so accommodate, load shedding is being imposed on the petitioner also as said establishment of Musle is not enjoying continuous power supply. A sketch filed along with writ petition is also pressed into service for said purpose.

5. Shri Chandurkar, learned counsel, on the other hand, has stated that the law does not prohibit respondents from supplying power to any other establishment from Patansavangi sub-station and hence the objection of the petitioner in relation to supply to Shri Musle is misconceived. He further states that establishment of Musle is very old. He invites attention to various clauses to urge that if the petitioner wants uninterrupted power supply then the rules require him to incur necessary expenditure and as that expenditure is not made by the petitioner, the Forum as also Ombudsman have rightly treated the industry of the petitioner as not on express feeder. He argues that the annexures of the respondents wrongly treated the establishment of the petitioner as on express feeder and hence power supply was accordingly maintained uninterrupted. After the mistake was realized, communication was given to the petitioner and attention is invited to the fact that Ombudsman has directed refund of excess duty collected by the respondents from the petitioner as they wrongly treated it as on express feeder. He further states that if necessary conditions for coming on express feeder are satisfied by the petitioner, the respondents can release uninterrupted power supply after obtaining appropriate orders in this respect. He, therefore, argues that no case is made out warranting any interference in the matter.

6. Shri Mehta, learned Counsel, in reply has urged that unit of Shri Musle was earlier drawing supply from Khapa substation but later on Musle wanted to shift his establishment at Patansavangi sub-station and because of his influence, the exercise in dispute has been undertaken and he invites attention to necessary grounds taken in this respect as ground No. X and XIII in the details of grievance made before Ombudsman.

7. After hearing parties, I find that it is not necessary for this Court to go into the grievance against Shri Musle as Shri Musle is not party. Similarly, Ombudsman has not recorded any finding in relation to said unit of Shri Musle and there is nothing to show that Ombudsman has recorded a finding that earlier the said establishment was receiving power supply from Khapa substation and later on Musale wanted to draw it to Patansavangi sub-station.

8. The fact that the petitioner establishment has been recognized as continuous processing industry and has been released continuous power supply is not in

dispute. The load sanction order dated 22.08.1995 itself recognizes this position. Even the communication dated 17.09.2008 sent by Superintending Engineer of the respondents to its Executive Engineer on the subject of express feeder shows that the petitioner unit could not have been subjected to interruptions other than planned outages. This communication is in response of application dated 25.08.2008 by the petitioner protesting against unexplained load shedding. It mentions that consumer has been paying ASC and other charges applicable to consumers on express feeder as per tariff order of MERC. As the respondents have not disputed this communication, it is not necessary to go into further details thereof. This communication also mentions that for such unplanned outages, NOC of consumer-here petitioners is essential. This position is also apparent from other correspondence between the parties. On 25.06.2009, however, Superintending Engineer has communicated to the petitioners that it would be subjected to staggering holidays from 02.07.2009 as it is not shifted on express feeder. On 09.07.2009, it reiterated that continuous supply cannot be maintained as unit of the petitioner had no connection through express feeder. The perusal of communication dated 02.06.2009 shows that it is on subject of providing connection to unit of Shri Musle from Patansavangi sub-station and it is mentioned that it is a normal feeder. In other words, Patansavangi feeder has not been treated as express feeder.

9. The order of Consumer Forum dated 05.09.2009 need not be referred to because apart from reproducing rival contentions, it does not reveal any application of mind to the same. This position that the petitioner unit was receiving continuous power supply as continuous processing industry till July 2009 is even accepted by the respondents and their case is it was under mistaken notion. The perusal of order of Ombudsman shows that at one stage in the order, it holds that 2005 Regulations are not applicable to the matter as it came in to force subsequently, while at other stage while considering the question whether the connection to the petitioner industry is on express feeder or not, this finding recorded by it has been ignored. In fact, the consideration of issue by it shows that it has not attempted to find out whether status of the petitioner as continuous supply industry has been changed or undergone a change in accordance with law by the respondents at any point of time.

10. As per supply conditions in force from 01.01.1976, the petitioner has been required to pay service line charges as per Clause 7(i) (a). The provisions of sub-clause (v) (a) are also satisfied by the petitioner in this respect. Clause 11 deals with Board's Supply Mains and Apparatus. As per said provision, Board has to provide its own meter boards, cut outs and all circuit breakers or high tension fuses and it is not the case of the board that the petitioner did not fulfill any of the terms and conditions of these regulations in force till they were replaced by 2005 regulations. Clause 11(d) states that the board has right to use meters and apparatus provided under earlier sub clause for supply to other premises in the neighborhood, provided the supply to the consumer is not thereby affected. This, therefore, shows that if supply to establishment of petitioner is not getting

affected, then only the respondents can supply to premises of Shri Musle.

11. The provision of Supply Regulations 2005 are also not much different. The Regulation 3 thereof deals with recovery of charges and it permits distribution licensee to recover such expenses as may be reasonably incurred by it in providing electric line or electrical plant used for the purpose of supply. Clause 3.3 deals with recovery of expenses for supply and Clause 3.3.2 deals with works of laying of service-line from distributing main to the applicant's premises and recovery of expenses for it. Proviso thereto enables distribution licensee to use such service-line to supply electricity to any other premises if such supply is not detrimental to the supply of consumer already connected therewith. Clause 3.3.3 deals with recovery of expenses for installation of dedicated distribution facility.

12. It is to be noted here that it is not the case of the respondents that the petitioner was informed of any work of service-line or any other installations/apparatus to be erected/ fitted and the demand of any charges therefore in accordance with law. It is not their case that after such demand, as the petitioner refused to pay those charges, the continuous power supply has been discontinued. Their case is of mistake only. The mistake alleged is in treating the unit of the petitioner as on express feeder and of recovering supply charges from it on that basis.

13. The commercial circular No. 45 dated 09.10.2006 has come into force with effect from 01.10.2006 and as per its Clause 2.2, Additional Supply charge is applicable to all consumers. Clause 2.5 states that such consumers are classified in to various categories and at Sr. No. 1 are zero load shedding consumers. Consumers falling in this category are stated to be consumers connected on express/ dedicated feeder and exempted from any action of load shedding including staggering holiday. Clause 4.2 states that earlier two categories i.e. H.T.P. I and H.T.P. II are clubbed into one consumer category viz., H.T.P. I and it has been further reclassified into two sub categories viz., continuous and non continuous industries. Clause 4.3 clearly states that the erstwhile HTP I and HTP II high tension industry consumers exempt from load shedding for the purpose, shall thereafter be classified as "continuous" industries and shall be billed accordingly. The status of the petitioner industry as continuous industry or continuous processing industry is not in dispute and this status prevailing from 1995 is, therefore, converted into H.T.P. I in terms of commercial circular No. 45 and has been classified there as continuous industry. The Commercial Circular No. 47 that was issued on 04.11.2006, has also come into force from 01.10.2006 and its Clause 2 speaks of additional supply charges. These additional supply charges are applicable to all consumers except agricultural consumers and domestic consumers. Its Clause 2.6 speaks of classification of consumers for applicability of additional supply charge depending upon load shedding pattern. At Sr. No. 1 is Zero load shedding pattern and consumers connected on express/ dedicated feeder and exempted from any action of load shedding including staggering day fall in his load shedding pattern. Clause 4 of this requirement

deals with H.T.P. I industries and relevant clause is 4.3. The said clause reads as under:

4.3 In the absence of any authenticate data regarding processing type of industry all the erstwhile HTP - I & HTP - II High Tension Industrial consumers, who are at present exempted from Load shedding, will be treated as being on an Express feeder, shall henceforth be classified as "Continuous" industries and shall be billed accordingly.

14. This clause, therefore, specifically states that if there exempt from load shedding are to be treated as on express feed and are to be classified as continuous industries. It also provides that these industries are to be billed accordingly. Again it follows that it is not the case before me & there is no material with the respondents to show that they had any authenticate data and based on that data, they have changed the classification of the petitioner industry. On the contrary, this clause itself reveals that existing industries receiving continuous supply as on 1.10.2006 and exempt from load shedding stand automatically recognized as on express feeder and are also automatically classified as continuous industries under Commercial Circular No. 47. It is again important to note that the defence of respondents is of mistake in treating the industry of the petitioner as on express feeder. They have not denied that industry of the petitioner has been receiving continuous power supply since 1995 and it is continuous processing industry. In other words, they have not changed the classification of the petitioner industry but have tried to urge that it is not on express feeder. These respondents have obviously overlooked the clear provisions of this Clause 4.3 which obliged them to treat the petitioner industry "as being on an express feeder".

15. In this connection, the provisions of Clause 4.4 of said circular also assume importance because the other HTP I and HTP II consumers subjected to load shedding have been classified as non-continuous industries. The petitioners have not stated that they have classified the petitioner industry as non continuous industry under Clause 4.4. To rebut attack of petitioners, their case is as the petitioner is not on express feeder, it is a noncontinuous industry. When Clause 4.3 and 4.4 are read together, it is apparent that there is no requirement of actually being on express feeder in Clause 4.3. This reveals falsity of defence raised by the respondents. The authority issuing circulars appears not to be oblivious to the fate of continuous processing industries like present petitioners and of limitations flowing therefrom if some new arrangement is to be imposed with monetary liabilities on them all of a sudden.

16. The attention of this Court is also invited to the order dated 24.07.2008 passed by M.E.R.C. in Case No. 19 of 2008. In this order the Commission has referred to its earlier order dated 07.02.2007 in Case No. 49 of 2006 wherein the commission has clarified that continuous and non continuous categories are differentiated based on the continuous and non continuous nature of the process adopted in the industries and not because industries are connected to express

feeder or non express feeder. This is the correct norm for old or existing industries already operating and their existence itself can not be jeopardized by such a change.

17. Shri Chandurkar, learned Counsel has invited attention to order dated 16.02.2008 passed by the Commission in Case No. 56 of 2007, particularly para 12 therein. In said appeal, Commission has considered the concept of Dedicated Distribution Facility. The commission has observed that mere extension or tapping of the existing line cannot be treated as Dedicated Distribution facility. However, the commission there was not called upon to consider Clause 4.3 and 4.4 of the Commercial Circular No. 47 dated 04.11.2006. The deeming provision made in Clause 4.3 above needs to be honoured and in present facts when the defence is of mistake, it is clear that the order of Commission relied upon by Shri Chandurkar, learned Counsel has not much of relevance.

18. The communication dated 02.06.2009 sent by the Executive Engineer to Superintending Engineer directs that HT consumers i.e. petitioner should be informed about the change of tariff from continuous to non continuous one so as to enable it to implement staggering holiday at Patansavangi sub-station. It appears that said feeder is also known as S.B.M. Feeder i.e. in the name of establishment of the petitioner. However, that is hardly relevant in so far as legal provisions are concerned. This communication only shows that a High Tension consumer i.e. petitioner has been till 02.06.2009 recognized as continuous user and no load shedding was implemented in that establishment. This communication also refers to estimate for new connection to 45 H.P. Industrial connection in respect of Ramchandra Musle from 11 KV S.B.M. Feeder. It is obvious that industry of Shri Musle is non continuous type and hence it cannot be connected on express feeder. The respondents, therefore, wanted to implement staggering holiday or load shedding on the feeder of the petitioner. No provision of law, which permitted the petitioners to do so unilaterally, without previous notice and opportunity to the petitioner, has been pointed out. As already discussed above, the issue cannot be concluded in present matter as Shri Musle is not before this Court. If the respondents have got any such power, they are free to take recourse to it in accordance with law and ask the petitioner either to shift over to express feeder facility or dedicated distribution facility and thereafter further appropriate steps in the matter can be taken. Shri Chandurkar, learned Counsel is right when he states that the respondents are free to use installations at Patansavangi substation for supplying the electricity to any other establishment but then the same cannot be done to the prejudice of the petitioner. The recognition of that feeder as express feeder under the circular mentioned above could not have been ignored/defeated by the respondents on 2.6.2009.

19. The consideration of these issues by Ombudsman reveals that after mentioning the facts and arguments in para 12, the Ombudsman framed various questions. The first question framed by it is about 11 KV Feeder supplying

electricity to the petitioner and it has held that it is not an express feeder. This aspect is considered by it in paras 17 & 18 of its order. Consideration in paras 13, 14 & 15 shows the appreciation of facts by Ombudsman and also a finding that there was no dispute about manufacturing process of the petitioner being of continuous nature requiring continuous supply. In para 16, it has then attempted to find out whether feeder on which supply was given to the petitioner was separate express feeder or not. For that purpose, it has referred to the provisions of supply regulations effective from 01.01.1976 and in para 17, stated that these regulations nowhere impart any exclusive right to consumer on such feeder merely because it has contributed by way of service charges or towards the cost. It held that without disturbing supply of such consumer, the distribution licensee is free to provide supply to other establishment also and hence feeder cannot be treated as reserved or exclusive one. In para 18, it has then considered the provisions of 2005 Regulations and noted that the contribution by the petitioner towards service line connection and erection etc. was in 1995 i.e. much prior to coming into force of 2005 Regulations and hence reference to them was not relevant. It has then also noted that the petitioner has not demonstrated that supply to other consumer from feeder is detrimental to its supply. This line of reasoning clearly shows that it accepted right of the respondents to implement load shedding in case of the petitioner industry and, therefore, found that the supply to other consumers "Mr. Musle here" is not detrimental to the petitioner industry. It is obvious that the provisions of Commercial Circular No. 47 dated 04.11.2006 particularly 4.3 mentioned above has not been properly understood and appreciated by it. It on one hand keeps circular No. 47 away but then uses concept of express feeder emanating from it.

20. The other question framed by Ombudsman is about entitlement of the respondents to provide supply to other consumer from that feeder and it has been answered along with above question in favour of respondents in paras 17 & 18 only. Thus use of Circular 47 in the interest of respondents is again clear.

21. In para 19, it has considered whether contribution can be issued to the respondents to maintain continuous power supply without load shedding to the petitioner industry. It has found that the petitioner was getting continuous power supply till 01.07.2009 but it was under presumption that Patansavangi feeder was an express feeder and hence under mistake, the respondents did not implement load shedding protocol. It noticed that load shedding protocol was applicable to all consumers except one on express feeder. Thus as it found that establishment of the petitioner was not on express feeder but on normal feeder, load shedding protocol needed to be implemented and hence direction as prayed for could not be given. The application of mind here, therefore, shows that the provisions of Commercial Circular No. 45 or 47 issued in 2006 enabling the respondents to prescribe load shedding for non continuous industries only has been made applicable to the petitioner industry ignoring its own reasoning in earlier part that the petitioner unit was established in 1995. The approach is unsustainable not only on this count but also because of overlooking of Clause

4.3 of Commercial Circular No. 47 dated 04.11.2006. Circular Nos. 45 & 47 both recognize establishment of the petitioner receiving continuous power supply as continuous industry are, therefore, not appropriately evaluated. The Circulars nowhere contemplated that establishment of the petitioner must be connected on express or dedicated feeder. It only contemplates exemption from load shedding as on date of coming into force of those requirements i.e. 01.10.2006. Till 01.10.2006, there was no concept like express feeder. The respondents nowhere stated that from 1995 till 2006 they have not treated industry of the petitioner as continuous industry. The reason of "mistake" put forth by the respondents is not available till 01.10.2006. In view of the provisions of Clauses 2.5, 4.2 and 4.3 of Commercial Circular No. 45 and provisions of Clauses 2.2., 2.6, 4.2, 4.3 and 4.4 of Commercial Circular No. 47, it is clear that the theory of mistake after 01.10.2006 is not at all open to the respondents. It has to be, therefore, concluded that the respondents gave incorrect excuses before Ombudsman to justify their illegal and wrong action. The answer to question No. (d) given in para 19 is, therefore, incorrect.

22. In subsequent paras, the Ombudsman has considered whether recovery of additional supply charges from the petitioner is incorrect and a direction to refund excess charges, therefore, needed to be issued. In para 22, it has noticed that the tariff for continuous industry is applicable only to those industries which are on continuous or express feeder and earlier criterion for continuous process industry based on Industries department's Certification was not available after 01.05.2007. It also found that nature of manufacturing process of petitioner industry was immaterial. This application of mind again is unsustainable. The availability of authenticate data with respondents in terms of Clause 4.3 of Commercial Circular No. 47 can only enable the respondents to change the classification of the petitioner industry. The recovery of charges as mentioned in paras 21 and 23 by the Ombudsman show that all the while the respondents have treated the industry of the petitioner as continuous processing industry. As already observed above, these facts are not in dispute between the parties.

23. In this situation, it is apparent that the order of Ombudsman in the matter is unsustainable. The said order dated 13.01.2010 passed on Representation No. 132 of 2009 is accordingly quashed and set aside. The respondents are directed to restore supply to the petitioner industry as continuous supply industry. It is also made clear that the respondents are free to effect change in that status of petitioner in accordance with law, if it is open to it.

24. Writ Petition is accordingly allowed. Rule is made absolute in above terms. However, in the facts and circumstances of the case, there shall be no order as to costs.