

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO.172/2010 IN
WRIT PETITION 5206/2006(D)

M/s. Suryalaxmi Cotton Mills Ltd.
40, 'Visav' Tilak Nagar,
West High Court Road, Nagpur.

..... **APPELLANT**

...V E R S U S...

- 1] Maharashtra State Electricity Distribution Ltd.(MSEDCL)
through its Executive Engineer (Administration)
Rural Circle, Nagpur.
- 2] The Consumer Grievance Redressal Forum,
through its Member Secretary,
Nagpur Urban Zone,
Maharashtra State Electricity Distribution Company
Ltd., Nagpur.

..... **RESPONDENTS**

Shri N.A.Padhya, Advocate for appellant.
Shri S.V.Purohit, Advocate for respondent no. 1.

CORAM : A.S.CHANDURKAR and G. A. SANAP, JJ.

DATE ON WHICH THE ARGUMENTS WERE HEARD : 15/07/2021

DATE ON WHICH THE JUDGMENT IS PRONOUNCED :29/07/2021

JUDGMENT (Per A.S.Chandurkar, J.)

The challenge raised in this Letters Patent Appeal is to the judgment of the learned Single Judge in Writ Petition No. 5206/2008 decided on 30.11.2009 and 1.12.2009. By the said judgment the challenge raised by the respondent no.1 herein to the order passed by the Consumer Grievance Redressal Forum, Nagpur dated

25.09.2008 was upheld and the writ petition was allowed. The appellant being aggrieved by that adjudication has challenged the same in the present Letters Patent Appeal.

2. The facts giving rise to the present proceedings are that the appellant-Consumer is an industrial establishment which was being supplied electricity by the respondent no.1-MSEDCL. The existing contract demand of the Consumer was 4000 KVA on 33 KV level. The Consumer sought enhancement of that load by 3000 KVA at the same level and hence moved an application in that regard before the MSEDCL. Initial request made by the Consumer was not accepted by the MSEDCL. A fresh application was thereafter moved by the Consumer on 02.03.2006. On 31.08.2006 the MSEDCL in exercise of powers delegated by the State Government as per the order dated 02.01.1995 sanctioned additional power supply to the extent of 3000 KVA contract demand. The same was subject to certain conditions which included furnishing of an undertaking by the Consumer. It was stipulated that the MSEDCL would levy additional 2% extra units on the monthly units consumed by the Consumer which demand was in the nature of surcharge for the power supply on lower voltage than the prescribed voltage. It was stated that on completion of the necessary formalities the additional load would be released. The Consumer accepted the offer as made by the MSEDCL and on completion of the necessary formalities such additional load was released. It appears that on 24.05.2008 the Consumer approached the Internal Grievance Redressal Cell (IGRC) of the MSEDCL raising a grievance that the recovery of 2% excess energy charges was contrary to the provisions of Section 45 of the Electricity Act, 2003 (for short, the Act of 2003). On

01.07.2008 the IGRC held that since the MSEDCL had not been prohibited from recovering surcharge if the Consumer was given supply on lower voltage, there was nothing illegal in 2% surcharge that was being charged towards consumption of electricity.

3. The Consumer not being satisfied with the aforesaid order approached the respondent no.2-Consumer Grievance Redressal Forum (CGRF). The CGRF after hearing both the sides and considering the material on record passed an order on 25.09.2008 by majority of 2:1 and held that the levy of 2% surcharge was without the approval of the Maharashtra Electricity Regulatory Commission (MERC). In view of the provisions of Section 45(4) of the Act of 2003 such levy was not permissible and it was therefore *ab initio* illegal. The MSEDCL was held liable to refund the excess amount recovered in terms of the provisions of Section 62(6) of the Act of 2003. Accordingly the order passed by the IGRC came to be set aside and the grievance as made was allowed. After the decision of the CGRF the MSEDCL discontinued the levy of surcharge. The MSEDCL being aggrieved by the aforesaid adjudication challenged the same in Writ Petition No.5206/2008. The learned Single Judge on hearing both the sides found that the Consumer had voluntarily agreed to the condition of imposition of 2% surcharge by MSEDCL. The Consumer obtained a special favour which it was otherwise not entitled to and thereby enhanced its business and profit. If additional load was being released for which additional payment was provisionally charged, the same could not be termed to be illegal. On the aforesaid premise the order passed by the CGRF was set aside and the writ petition came to be allowed. The parties were also directed to move the

MERC to have an expeditious decision on the question of surcharge before such levy could again be started by the MSEDCL. As state above, the Consumer being aggrieved by the aforesaid judgment has preferred the present Letters Patent Appeal.

4. Shri N. A. Padhye, learned counsel for the appellant-Consumer submitted that MSEDCL had no legal right to levy 2% surcharge as was done by the communication dated 31.08.2006 while sanctioning the additional supply to the extent of 3000 KVA. Referring to the provisions of Section 45(1) and (4) of the Act of 2003, it was submitted that the price to be charged by the MSEDCL for the supply of electricity had to be in accordance with the tariff fixed by the MERC from time to time. It was not open for the MSEDCL to show undue preference to any person or discrimination against any person in this matter. The levy of 2% surcharge was not supported by any tariff order passed by the MERC and hence the acceptance of the terms and conditions imposed by MSEDCL were of no avail. The MSEDCL at the outset was not justified in levying such surcharge and therefore furnishing of undertaking by the Consumer was of no consequence. Such undertaking was given on account of the need of the Consumer and it was not aware of the requirement of a tariff order in that regard. It was urged that even according to the MSEDCL the levy of 2% surcharge had not been approved by the MERC in any of its tariff order but despite that such levy was imposed on the Consumer. He further submitted that in breach of the provisions of Section 45(4) of the Act of 2003, additional surcharge was not demanded from two other consumers who were similarly situated as the present appellant. The CGRF was therefore justified in setting aside the illegal levy but the learned Single Judge erred in setting aside that order passed by the CGRF.

The learned counsel then referred to documents filed on filed along with Civil Application No. 227/2010 as well as additional affidavits placed on record. Attention was invited to the developments during pendency of the appeal and especially the order dated 05.03.2010 passed by the MERC in which it was stipulated that MSEDCL could levy 2% surcharge only from 05.03.2010 and not from any prior date. Reference was also made to the clarificatory order passed by the MERC on 09.11.2010 wherein it was observed that the levy of 2% additional surcharge on a consumer of non-express feeder had not been permitted for any period prior to 05.03.2010. In the light of this adjudication by the MERC, it was submitted that such recovery of 2% surcharge from 31.08.2006 till the passing of the order by the CGRF on 25.09.2008 was illegal. In terms of the provisions of Section 62(6) of the Act of 2003 the MSEDCL was liable to refund the amount recovered from the Consumer with interest. The learned counsel therefore submitted that since the recovery of additional surcharge to the extent of 2% was wholly unjustified and without any statutory support, the learned Single Judge erred in setting aside the order passed by the CGRF. He thus submitted that the judgment of the learned Single Judge ought to be set aside and the order passed by the CGRF was liable to be restored.

5. Per contra, Shri S.V.Purohit, learned counsel for the respondent no.1-MSEDCL supported the judgment of the learned Single Judge. According to the learned counsel it was the Consumer who was in need of additional power supply and had therefore voluntarily made a request in that regard. He referred to the communications issued by the Consumer on 02.03.2006 and 04.09.2006 to indicate

that as the Consumer was not in a position to spend huge amount for upgrading the line, he had voluntarily approached the MSEDCL for sanction of additional load at 33 KV level itself. Referring to the orders passed by the State Government on 07.04.1994, 09.05.1994 and 02.01.1995 it was submitted that after being so authorised by the State Government the MSEDCL had sanctioned additional load to the extent of 3000 KVA as a special case. This was subject to the condition of levy of 2% on monthly units and it was made clear that only if the terms as stipulated by the MSEDCL on 31.08.2006 were acceptable to the Consumer such additional load could be sanctioned. The Consumer having accepted these terms and having given an undertaking in that regard, it was not open for the Consumer to subsequently turn around and make a grievance as raised initially before the IGRC and thereafter the CGRF. Referring to the Maharashtra Electricity Regulatory Commission (Standards of Performance of Distribution Licencees, Period for Giving Supply and Determination of Compensation) Regulations 2014 and especially Clause 5 thereof, it was submitted that consent of the Consumer was rightly obtained in that regard. From September 2006 to March 2008 this facility was availed by the Consumer with open eyes and without making any grievance. It was only for the first time on 24.05.2008 that the Consumer sought to raise a grievance in that regard. For the entire period the Consumer conducted its business and earned profits on the basis of supply of 7000 KVA. It was therefore not permissible for the Consumer to thereafter retract from its consent and raise a grievance. It was then submitted that the MSEDCL had moved the MERC as early as on 14.10.2005 in various tariff petitions and had sought issuance of appropriate tariff orders. It was only for the first time on 05.03.2010 that the MERC undertook such adjudication. The fact that by an interim

measure 2% surcharge was permitted to be levied justified the conditions imposed by the MSEDCL while sanctioning the additional load to the Consumer. It was denied that any discrimination as contemplated by Section 45(4) of the Act of 2003 was practiced on the Consumer and in fact there was no material on record to substantiate this allegation of the Consumer. The learned counsel urged that on the principle of promissory estoppel it was not open for the Consumer to raise a grievance and the stand taken by it was unjustified. Reference was made to the decision in *LML Limited Vs. State of Uttar Pradesh and others, (2008) 3 SCC 128* and it was urged that the judgment of the learned Single Judge did not call for any interference. Without prejudice to the aforesaid submission, it was submitted that since the Consumer had consumed the additional load and had also earned profits, interest may not be directed to be paid to the Consumer.

In reply it was submitted by the learned counsel for the appellant that the order dated 02.01.1995 did not give any authority to the MSEDCL to levy surcharge. The entire action of the MSEDCL was against the provisions of the Act of 2003. He sought to distinguish the decision relied upon by the learned counsel for the respondent no.1 and also urged that in the light of provisions of Section 62(6) of the Act of 2003, the direction to refund the excess amount recovered with interest ought to be issued.

6. We have heard the learned counsel for the parties at length and we have given our thoughtful consideration to the respective submissions. The undisputed facts are that initially the Consumer was availing 4000 KVA on 33KV arrangement. As per the prevailing norms stipulated on 07.04.1994 and 09.05.1994 the State Government had directed that no licensee supplying electrical energy could, without

the previous sanction of the State Government, supply electrical energy for industrial purposes to any existing or new consumer in excess of 5000 KVA contract demand. Subsequently on 02.01.1995 the State Government delegated its powers to all the licencees for sanction of any quantity of connected load and contract demand exceeding 5000 KVA. It is also not in dispute that the Consumer was in need of additional 3000 KVA contract demand and it wished to avail the same on the existing 33 KV level network. It therefore made an application to the MSEDCL on 02.03.2006 and on 31.08.2006 the MSEDCL sanctioned additional power supply to the extent of 3000 KVA contract demand. This was done as a special case at the request of the Consumer and it was made subject to certain terms and conditions. The Consumer was to be charged additional 2% extra units on the energy units consumed by it every month. This was till the time the MERC determined the surcharge for power supply on lower voltage than the prescribed voltage as per the Standard of Performance Regulations. The Consumer was called upon to give an undertaking and it was clarified that if the MERC determined any additional surcharge, the Consumer would be liable to pay the same. The Consumer accepted all the terms and conditions as imposed and also furnished an undertaking in that regard. This acceptance was unqualified by the Consumer as is clear from its letter dated 04.09.2006. In this communication the Consumer stated that it was ready to pay all necessary charges in that regard. Pursuant to necessary compliance being made the additional load of 3000 KVA was accordingly availed by the Consumer and for the period from September 2006 to March 2008 it was charged additional 2% units of energy consumed.

From the documents on record it becomes clear that it was the Consumer who was in need of additional power supply to the extent of 3000 KVA contract demand and at its request as a special case the MSEDCL was pleased to sanction the same. The Consumer was made aware of all the necessary terms and conditions on the basis of which such additional load would be released and the Consumer accepted the same willingly and thereafter complied with the same. In other words the offer made by the MSEDCL indicating the terms and conditions on which the additional load would be supplied was accepted by the Consumer which acceptance was unequivocal. It is not the case of the Consumer that its consent was obtained under any misrepresentation or coercion.

7. It is seen from the record that at the relevant time there was no tariff order in force issued by the MERC prescribing the rate at which the higher load could be released by the MSEDCL in favour of the Consumer. It is in that backdrop that the sanction order dated 31.08.2006 indicates that though additional surcharge of 2% would be charged provisionally, the same was subject to payment of additional charge as and when determined by the MERC. It was on 14.10.2005 that the MSEDCL submitted a proposal to the MERC for levy of voltage surcharge to the consumers who were being supplied power at voltage lower than that prescribed in the Standard of Performance Regulations. Noting this aspect and in view of the further fact the MERC had not passed any order on that proposal, the learned Single Judge was pleased to direct the MERC to take a decision on such fresh proposal by 31.03.2010. After the learned Single Judge decided the writ petition, the MERC on 05.03.2010 passed an order and directed that till such time a detailed technical

study was undertaken, it approved by way of an interim measure levy of voltage surcharge of 2% additional units to be billed for supply to the consumer on voltage lower than that specified in the Standard of Performance Regulations. It was clarified that such voltage surcharge would be applicable from the date of its order which was 05.03.2010. Thereafter on 09.11.2010 a clarificatory order was issued by the MERC stating therein that the levy of additional 2% voltage surcharge had not been permitted for any period prior to 05.03.2010 and levy with retrospective effect was not permissible. It is on the basis of these orders that it was sought to be urged that the levy of 2% surcharge by the MSEDCL was illegal and beyond the provisions of the Act of 2003.

8. We are not in a position to accept the aforesaid submission in the facts of the present case. It was the Consumer who was in need of additional 3000 KVA but who desired such supply on the existing 33 KV arrangement. Considering the need of the Consumer and at its request the load was enhanced for additional contract demand of 3000 KVA when such sanction was made there was no prohibitory tariff order issued by the MERC that was operating. Since it was the Consumer who wanted the additional facility, the same was provided by the MSEDCL subject to surcharge being determined by the MERC. Having availed this facility after giving its consent it was not open for the Consumer to subsequently turn around and contend that the MSEDCL was not justified in levying 2% extra surcharge. It has been rightly found by the learned Single Judge that the benefit which was otherwise not available to the Consumer had been obtained by it and in the process the Consumer had utilized the same for making profits. The amount was accepted provisionally and the

fact that on 05.03.2010 the MERC also permitted levy of voltage surcharge at 2% as an interim measure which was the same rate as prescribed by the MSEDCL while sanctioning additional 3000 KVA on 31.08.2006 is also a factor which cannot be ignored. It is not the case that levy of surcharge at a higher rate was demanded from the Consumer than what was subsequently permitted by the MERC as an interim measure. It was rightly found that the claim as made by the Consumer seeking refund of the surcharge paid was unjustified in these facts.

9. We also do not find that there has been any breach of the provisions of Section 45(1) of the Act of 2003 as urged by the Consumer. There was no tariff fixed by the MERC when as a special case and at the request of the Consumer it was supplied additional 3000 KVA on the existing facility which was otherwise not permitted to exceed 5000 KVA. At the relevant time the field was not occupied by any tariff order. Further in absence of any sufficient material on record to demonstrate that other persons had been shown undue preference by the MSEDCL there is no material to hold that the provisions of Section 45(4) of the Act of 2003 have been violated. Even the orders passed by the MERC on 05.03.2010 and 09.11.2010 cannot have the effect of directing refund of 2% surcharge as levied by the MSEDCL. There was no levy of such additional surcharge with retrospective effect. On the contrary what was recovered from the Consumer for the period from September 2006 to March 2008 was the surcharge at the rate of 2% which was also the rate fixed by the MERC on 05.03.2010 as an interim measure on the additional load as supplied to the Consumer. We therefore do not find anything unjust on the part of the MSEDCL in levying 2% voltage surcharge from the Consumer in the

backdrop of the unequivocal consent given by the Consumer. The decision in the case of ***LML Limited*** (supra) has been referred to by the learned Single Judge and has been distinguished. We are in agreement with the observations made in that regard by the learned Single Judge and it is not necessary to say anything further in the matter.

We may in this regard note the observations of the Hon'ble Supreme Court in ***Kasinka Trading and another Vs. Union of India and another (1995) 1 SCC 274*** wherein it was observed that the doctrine of equitable estoppel represents a principle evolved by equity to avoid injustice. While considering the applicability of the doctrine of promissory estoppel or equitable estoppel the Courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the Court while considering the applicability of the doctrine. This view has been reiterated in ***Monnet Ispat and Energy Limited Vs. Union of India and others (2012) 11 SCC 1***. The aforesaid observations are clearly applicable to the case in hand.

10. Thus for the aforesaid reasons, we do not find any case made out to interfere with the impugned judgment passed by the learned Single Judge. The letters patent appeal accordingly fails. It is dismissed leaving the parties to bear their own costs.

JUDGE

JUDGE