

ETERNITY:LAW APPRISE

Case Summary: Bharat Sanchar Nigam Limited vs. Maharashtra State Electricity Distribution Company Limited and Anr. 1.

Critical Analysis of the Ministry of Power Clarification 2.

* Private Circulation Only

APRIL 2024

CASE SUMMARY

Case Name: Bharat Sanchar Nigam Limited vs. Maharashtra State Electricity Distribution Company Limited and Anr.

Case No.: Writ Petition No. 7884 of 2010

Court: Hon'ble Bombay High Court

Judges: Hon'ble Justices Jitendra Jain and A. S. Chandurkar

Order Date: April 16, 2024

Citation: 2024 SCC OnLine Bom 1105

FACTS

The Petitioner, Bharat Sanchar Nigam Limited, a Telecom Services Provider Company by way of the present Petition has invoked writ jurisdiction under Article 226 of the Constitution of India to seek directions against Respondent No. 1 i.e. Maharashtra State Electricity Distribution Co. Ltd ("**MSEDCL**") for wrongfully classifying the Petitioner as HT-II Commercial and not HT-I Industrial.

On 20th June 2008, MERC passed an Order in Case No. 72 of 2007 for determination of tariff for the financial year 2008-2009 under which the commission created a new category, namely, HT-II commercial to cater to the commercial category consumers availing supply at HT voltages and which were classified under the existing HT-I industrial or LT-IX (multiplexes and shopping mall). Later, on August 17, 2009, MERC passed an Order in Case No. 116 of 2008, for tariff determination for the financial year 2009-2010.

The Petitioner relied on the Order of MERC dated August 17, 2009 in Case No. 116 of 2008 and prayed that they be classified under IT/IT-enabled services (“IT/ITES”). It is on the above backdrop that the present petition is filed for the reliefs sought therein.

KEY DETAILS:

- i. The Petitioner sought to be charged under HT-I Industrial tariffs, cancel HT-II Commercial bills, and refund approximately ₹62.13 crore for excess charges from June 2008 to July 2010.
- ii. The Petitioner admitted it lacked a certificate from the Directorate of Industries to claim IT/ITES status under the Maharashtra IT/ITES Policy, 2003.

ISSUE

- i. Whether the Petitioner should be classified under the HT-II Commercial tariff category or the HT-I Industrial tariff category, including as an IT/ITES entity, for the period 2008-2010.
- ii. Whether the Petitioner was justified in invoking writ jurisdiction of the Hon’ble Bombay High Court under Article 226, given the availability of alternate remedies under the Electricity Act, 2003.
- iii. Whether definitions of “industry” from other statutes (e.g., Industrial Disputes Act, 1947, or Income Tax Act, 1961) can be applied to determine tariff classification under the Electricity Act, 2003.

RULE

1. Section 42(5) of the Electricity Act, 2003: Mandates that every distribution licensee establish a consumer grievance redressal forum per State Commission guidelines.
2. Section 42(6) of the Electricity Act, 2003: Allows consumers aggrieved by non-redressal of grievances under Section 42(5) to approach an Ombudsman appointed by the State Commission.

1. **Section 72(7A)(aa) of the Income Tax Act, 1961:** Defines “industrial undertaking” to include telecommunication services for tax purposes.
2. **Section 2(j) of Industrial Disputes Act, 1947:** Defines “industry” broadly to include services like telecom for labor disputes.
3. Regulation 13 of Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005: Allows Distribution Licensees to categorize consumers based on usage patterns and other criteria.
4. Sections 61 and 62 of the Electricity Act, 2003: Empower MERC to determine tariffs and classify consumers based on electricity usage.
5. Maharashtra IT/ITES Policy, 2003: Allows IT/ITES entities to be classified under industrial tariffs, subject to certification from the Directorate of Industries.

Judicial Precedents:

1. Maharashtra State Electricity Board v. Arvind P. Joshi (1997) 2 Mah LJ 59: Tariff classification depends on electricity usage, not definitions from other statutes.
2. P.C. Cheriyan v. Barfi Devi (1980) 2 SCC 461: Definitions from one statute cannot be applied to another unless objectives align.
3. Durga Enterprises (P) Ltd. v. Principal Secretary, Government of Uttar Pradesh (2004) 13 SCC 665: Courts may not dismiss writ petitions for alternative remedies if long-pending.

APPLICATION

Issue 1: Whether the Petitioner should be classified under the HT-II Commercial tariff category or the HT-I Industrial tariff category, including as an IT/ITES entity

The Court ruled that from 2008 a new HT-II commercial category has been introduced by Respondent No. 1 and which is approved by MERC in its order dated June 20, 2008 in Case No. 72 of 2007 and cater to all commercial category consumers availing supply at HT voltages and classified prior to the said order under HT-I industrial or LT-IX. This order, therefore, clarifies that certain category of users which were earlier charged tariffs under HT-I industrial are now sought to be removed from the said category and put under HT-II commercial based on the usage. The Court also observed that while determining the tariff category the only material aspect is nature of the usage of the entity receiving the electricity.

Further the Petitioner had relied upon the order passed by MERC determining the tariffs of Respondent No. 1 for the financial year 2012-2013 in support of its submission that they should be categorised as HT-I industrial and not HT-II commercial, however, it was ruled by the Court that since the disputed period before the Court is June 2008 to July 2010, the reliance placed on the order passed in Appeal for the financial year 2012-2013 by Appellate Tribunal for Electricity cannot come to the rescue of the Petitioner as the determination of tariff by MERC is year wise and also the factors considered vary year wise and hence the Petitioner cannot rely upon the order passed for another year's tariff determination.

Analysis:

- MERC's June 20, 2008, order created the HT-II Commercial category for HT voltage consumers (e.g., hotels, hospitals). BSNL's telecom services, using HT voltage for profit-driven operations, aligned with this category.
- BSNL's lack of IT/ITES certification disqualified it from claiming HT-I Industrial tariffs, despite MERC's August 17, 2009, order recognizing IT/ITES as industrial.
- Regulation 13 authorized MSEDCL to reclassify BSNL based on usage, and MERC's approval of HT-II Commercial in 2008 justified this.

Issue 2: Whether the Petitioner was justified in invoking writ jurisdiction of the Hon'ble Bombay High Court under Article 226, given the availability of alternate remedies under the Electricity Act, 2003.

Upon the objection of the Respondent No. 1 that the Petition is required to be dismissed on the grounds that the Petitioner has alternate remedy under Section 42(5) and 42(6) of the Electricity Act, 2003, the Court assessed that the present Petition is not for determination whether the issue raised in the present Petition is covered under the term “grievance”. The Court further observed that the Petition was admitted on November 23, 2010 and no such objection was raised by the Respondent No. 1 at the relevant time of the admission and accordingly it has been admitted in the Court and was pending for 14 years before the Court. On the aforesaid observations the Court rejected the plea of the Respondent No. 1.

Analysis:

- Citing *Durga Enterprises (P) Ltd. v. Principal Secretary, Government of Uttar Pradesh* (2004) 13 SCC 665, the court held that dismissing a petition after 14 years of pendency was inappropriate, prioritizing judicial autonomy over alternative remedies.

Issue 3: Whether definitions of “industry” from other statutes (e.g., Industrial Disputes Act, 1947, or Income Tax Act, 1961) can be applied to determine tariff classification under the Electricity Act, 2003.

The Court expressed its view that it is settled position that the definition of the words in other enactments cannot be applied blindly to interpret same phrase in another enactment. One has to understand the meaning of a word in the context in which it is used in a particular enactment. The contextual meaning of the same word may defer from enactment to enactment. The object of the Industrial Disputes Act is different from the fixation of tariff under the Electricity Act, 2003. Similarly, the definition of “industrial undertaking” under Section 72(A) of the Income Tax Act is in the context of that very Section of the Income Tax Act and same cannot be applied to interpret the phrase “industry” for the purpose of Electricity Act, 2003.

The Court further stated that the phrase “industry” and “commercial” is not defined under the Electricity Act, 2003. The phrase “industry” should be given a common parlance meaning which would mean an entity engaged in manufacture, production or processing of goods and the phrase “commercial” would encompass buying and selling of goods, rendering of services, etc. The said term concerns itself with profit motive. The classification under “commercial” category is based on supply of HT voltages. In HT-II commercial category what is included is hotel, shopping mall, film studio, etc. who avail high voltage for commercial purpose.

While determining whether the Petitioner falls under HT-II commercial or HT-I industrial or IT enable the Court ruled that “Admittedly, there is no dispute that the Petitioner has availed high voltage for commercial purpose. If the contention of the Petitioner that because of Industrial Disputes Act they should be treated as “industry” then MERC order approving classification for hotels, etc. as “commercial” would become meaningless although hotels, hospitals, etc. fall under industry for the purpose of Industrial Disputes Act. In our view, HT-I industry post 2008 would be applicable only to those entities which are in the manufacturing sector since with respect to other entities a new category is created which is HT-II commercial. Therefore, in our view, the Petitioner is not justified in contending that they are covered HT-I industrial and not HT-II commercial”.

Analysis:

- Citing P.C. Cheriyan v. Barfi Devi (1980) 2 SCC 461 and Maharashtra State Electricity Board v. Arvind P. Joshi (1997) 2 Mah LJ 59, the court rejected BSNL’s reliance on the Industrial Disputes Act and Income Tax Act, holding that tariff classification under the Electricity Act depends on usage, not unrelated statutory definitions.
- The court defined “industry” as manufacturing and “commercial” as service-oriented, classifying BSNL’s HT voltage telecom operations as commercial.

CONCLUSION

The judgement passed by the Hon’ble Bombay High Court demonstrates its principled approach to statutory interpretation, emphasizing context-specific application under the Electricity Act, 2003, and rejecting definitions from unrelated statutes. Further, while upholding the respective powers of MSEDCL and MERC under Electricity Act and Rules and Regulations thereunder, the Court ruled that for the period of 2008-2010, the Respondent No. 1 is justified in charging tariffs to the Petitioner under HT-II commercial.

While passing the order the Court drew limited interference with regards to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 for issues involved under the Electricity Act in the light of alternate remedy being available to the Petitioner but also made profound observation that such objection of jurisdiction is to be raised at the time admission and not after substantive time is lapsed and the petition is admitted by the Court.

"Clarifying Surplus Power Use: A Step Toward Market-Driven Energy Efficiency"

On April 22, 2024, the Ministry of Power ("MoP") issued a clarification (No. FU-22/2023-FSC) to address the underutilization of power generation capacity due to un-requisitioned surplus power. Below is a critical analysis of the clarification, evaluating its intent, implications, and potential challenges:

Intent and Context:

- **Objective:** The clarification aims to promote the optimal use of power generation capacity by allowing generating companies to sell surplus power in the power market, addressing the issue of idle capacity at the national level.
- **Policy Alignment:** It reinforces the Tariff Policy, 2016, and the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022, which emphasize that power stations must remain available for dispatch and that surplus power can be sold in the market.
- **Relevance:** The clarification responds to concerns raised by power utilities regarding restrictions in Fuel Supply Agreements ("FSAs"), particularly under the Letter of Assurance ("LoA") route and SHAKTI B(ii) policy, which limited the use of linkage coal to long-term Power Purchase Agreements ("PPAs") with distribution companies ("DISCOMs").

Strengths:

- **Promotes Efficiency:** By allowing generating companies to sell un-requisitioned surplus power, the clarification ensures better utilization of existing infrastructure, reducing wastage of resources like coal and generation capacity.
- **Market-Oriented Approach:** Encouraging market participation aligns with India's push toward competitive power markets, potentially stabilizing prices and improving grid reliability.
- **Clarity on Fuel Usage:** The clarification explicitly permits the use of linkage coal for selling surplus power, resolving ambiguities in FSAs and enabling Independent Power Producers ("IPPs") to operate more flexibly.
- **Regulatory Consistency:** It ties together existing policies (Tariff Policy, 2016; Electricity Rules, 2022; and guidelines from 2021), creating a cohesive framework for surplus power management.

Potential Challenges and Gaps:

- **Implementation Hurdles:** While the clarification permits the use of linkage coal for surplus power sales, it does not detail how existing FSAs will be amended or enforced. DISCOMs or coal suppliers may resist changes, leading to disputes or delays.
- **Market Dynamics:** The power market's ability to absorb surplus power depends on demand, pricing, and transmission infrastructure. Without adequate demand or competitive pricing, generators may still face losses.
- **Financial Implications for Generators:** Selling surplus power in the market may not always be profitable, especially if market prices are lower than the cost of generation. The clarification does not address cost recovery mechanisms for generators.
- **DISCOM Behavior:** DISCOMs' reluctance to requisition full capacity (due to financial constraints or over-contracting) is a root cause of surplus power. The clarification does not address this underlying issue, which could limit its effectiveness.
- **Monitoring and Compliance:** The clarification lacks details on mechanisms to monitor compliance or penalize generators who fail to offer surplus power, potentially undermining its enforcement.

Broader Implications:

- **Energy Security:** By maximizing the use of available generation capacity, the clarification supports India's energy security goals, especially during peak demand periods.
- **Transition to Renewables:** While the clarification focuses on coal-based generation, it may indirectly support grid stability as India scales up renewable energy, which is intermittent and requires backup from conventional sources.
- **Stakeholder Impact:** Generators gain flexibility, but DISCOMs may face increased pressure to optimize their power procurement strategies. Coal suppliers may need to adjust logistics to accommodate market-based sales.

Critical Gaps:

- **Lack of Specificity:** The clarification is broad and does not provide granular guidance on operationalizing surplus power sales, such as timelines for FSA amendments or market integration processes.

- **Environmental Concerns:** Encouraging coal-based power generation, even for surplus capacity, may conflict with India's climate commitments, as coal is a high-emission fuel.
- **Stakeholder Consultation:** The clarification mentions representations from power utilities but does not indicate broader consultation with DISCOMs, regulators, or market operators, which could affect buy-in.

In summary, the clarification is a step toward optimizing India's power generation capacity and aligning with market-oriented reforms. However, its success depends on addressing implementation challenges, ensuring economic viability for generators, and integrating with broader energy transition goals.

Dear Readers,

In case you do not wish to receive our monthly update, please send us email on legalupdates@eternitylegal.com with the subject as "Unsubscribe".

Warm Regards,

Dipali Sarvaiya Sheth

Founder



D-226, Neelkanth Business Park,

Vidyavihar (West), Mumbai– 400086

Email: contact@eternitylegal.com Tel no.: +91 22 2515-9001

Website: www.eternitylegal.com