BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

(Appointed by the Maharashtra Electricity Regulatory Commission
under Section 42(6) of the Electricity Act, 2003)

REPRESENTATION NO. 13 OF 2021

In the matter of change in tariff Category and retrospective recovery

Gurudev Siddha Peeth … …… …… ..... … ....……..... Appellant

V/s.

Maharashtra State Electricity Distribution Co. Ltd., Vasai (MSEDCL)…….. Respondent

Appearances

Appellant : Shirish Thakkar, Representative

Respondent : 1. A. H. Holmukhe, Executive Engineer (Adm), Vasai
2. Rajiv Vaman, Asst. Law Officer

Coram: Mr. Deepak Lad

Date of Hearing: 27th April 2021

Date of Order : 6th May 2021

ORDER

The Representation is received on 2nd March 2021 under Regulation 17.2 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2006 (CGRF Regulations 2006) against the Order dated 29th December 2020 passed by the Consumer Grievance Redressal Forum, MSEDCL, Kalyan Zone (the Forum).

2. The Forum, by its Order dated 29.12.2020 has rejected the Grievance Application No. 2018 of 2019 -20.

(Dilip Dumbre)
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Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

3. Aggrieved by the order of the Forum, the Appellant filed this representation stating in brief as below: -

(i) The Appellant is HT Consumer (No. 013069016868) from 09.04.1990 having Contract Demand (CD) of 90 KVA and Sanctioned Load (SL) of 80 KW at Ganeshpuri, District Thane.

(ii) The Respondent inspected the Appellant's premises on 14.05.2019. The inspection was carried out unilaterally without taking the Appellant into confidence.

(iii) The Respondent issued a provisional assessment bill of Rs.19,40,508.57 vide its letter dated 04.10.2019 towards tariff difference for the past 15 months from February 2018 to April 2019 which was paid under protest subject to the right of refund.

(iv) The Appellant filed the grievance application in Internal Grievance Redressal Cell (IGRC) for restoring original tariff category i.e. Public Water Works with other prayers. The IGRC by its order dated 09.01.2020 has rejected the grievance of the Appellant. The IGRC in its order observed that the use of power supply of Consumer (No. 013069016868) has been wrongly charged Tariff of HT IV: Public Water Works instead of HT IX - (B): Public Services – Others. The action of MSEDCL changing the tariff of consumer from HT IV to HT IX - (B) and recovery of tariff difference of Rs. 19,40,508.57 for the period from February 2018 to April 2019 is found justified, proper and legal.

(v) Against the above observation, the Appellant cited the interim Judgement dated 17.07.2015 in Case of Writ Petition (WP) No.6552 of 2015 in Case of MSEDCL V/s Ram Kanojiya and WP No. 6545/2015, and WP No. 6553/ 2015 regarding the change in the tariff category and retrospective recovery thereof. The High Court has passed Judgement to maintain status quo in the matters.

(vi) The Appellant also referred the Judgement dated 07.08.2014 of Hon'ble Appellate Tribunal for Electricity (ATE) in Case No. 131 of 2013, wherein it is stated that tariff change is permissible from date of detection of error in tariff classification. As per the Judgement of the ATE, no past recovery is permissible. The change of tariff category needs to be applied prospectively from the date of detection of the error.

(Dilip Dumbre)
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Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

(vii) The Appellant referred some of the orders of Hon'ble Electricity Ombudsman Mumbai in which it has clearly mentioned that no retrospective recovery is allowed.

(viii) It is submitted that the Respondent is bound by the Judgement of the ATE and the order of the Hon'ble Ombudsman. The Respondent cannot claim recovery retrospectively. It is submitted that the Respondent while changing the category has also grouped the consumer under Industry and has charged Maharashtra Tax on Sale of Electricity even though the consumer is neither commercial nor industrial.

(ix) The Appellant approached the Forum on 28.02.2020. Without prejudice to the above submission, it is brought to the notice of the Forum that the change of category that the Respondent is claiming to be applicable was known to them on the date of change by Tariff Order dated 16.08.2012 of Maharashtra Electricity Regulatory Commission (the Commission) in Case No. 19 of 2012 and a Commercial circular No.203 of the Respondent dated 16.07.2013 to be followed by their field officers. However, the same was never intimated or given effect and the same has been only done after the surprise visit of the representative of MSEDCL on 14.05.2019.

(x) The Forum, by its Order dated 29.12.2020 has rejected the grievance application.

(xi) That there is no denying the fact that the Consumer has been regularly paying the bills as raised by the Respondent from time to time and that no payment of any of the bills issued was in arrears.

(xii) That, the Appellant had also questioned purported tax levied on the sale of electricity by the Distribution Company, raising the contention as per Notification No SRP-20015/CR-48/NRG-1 and Notification No VVK-2018/CR-161/Energy-1 dated 21.04.2015 and 26.12.2018 respectively rate of tax in respect of sale of electricity in any other area was nil and as such amount realized as tax was in violation of Article 265 of the Constitution of India, which says no tax shall be levied or collected except by authority of law. However, the IGRC and the Forum have failed to consider this point which resulted in miscarriage of justice.

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

(xiii) It is in this context that the Appellant raises his grievance by filing this Representation before the Hon'ble Electricity Ombudsman submitting that impugned part of decision dated 29.12.2020 upholding the Respondent's right to change tariff category and recovery of the demand for 24 months prior to date of inspection is liable to be invalidated, inter alia, on the grounds set forth below:

(xiv) Grounds of Challenge:

a) Impugned provisional demand of Rs19,40,508.57 as purported tariff difference does not have the backing of the statutory provisions and as such is liable to be struck down.

b) That the provisions of Section 56(2) of the Electricity Act, 2003 (the Act) say in unequivocal terms that no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of the charges for electricity supplied. The Appellant submits respectfully that the condition precedent for effecting recovery of the amount was not satisfied in the present case.

(xv) Principles of Law:

a) Interpreting said provisions, their Lordships of the Supreme Court in Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Limited & Another V/s. Rahamatullah Khan alias Rahamjulla held,

"*sub-section (2) of Section 56 by a non obstante clause provides, notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, shall be recoverable under Section 56, after the expiry of two years from the date when the sum became first due, unless such sum was shown continuously recoverable as arrears of charges for the electricity supplied, nor would the Respondent company disconnect the electricity supply of the consumer."*

b) A Full Bench Judgment dated 12.03.2019 of the Hon'ble Bombay High Court in Writ Petition (WP) No 10764 of 2011 & Others observed that "Unless and until the preconditions set out in sub-section (2) of Section 56

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

are satisfied, there is no question of the electricity supply being cut off. Further, the recovery proceedings may be initiated seeking to recover amounts beyond a period of two years, but the section itself imposing a condition that the amount sought to be recovered as arrears must, in fact, be reflected and shown in the bill continuously as recoverable as arrears, the claim cannot succeed. Even if supplementary bills are raised to correct the amounts by applying accurate multiplying factor, still no recovery beyond two years is permissible unless that sum has been shown continuously as recoverable as arrears of charges for the electricity supplied from the date when such sum became first due and payable.

c) That, the Forum did not appreciate the legal principles laid down in the said cases which has resulted in miscarriage of justice.

d) In the Judgment dated 09.06.2020 in WP No.10536 of 2019 of Hon'ble Bombay High Court in case of Maharashtra Electricity Distribution Company Ltd. V/s. Principal, College of Engineering, Pune, dismissed the Writ Petition filed by the Respondent demanding differential amount worked out on the basis of retrospective re-classification of tariff category and held that there was no error or infirmity in the decision of Ombudsman, which had taken the view that revised tariff category would be applicable prospectively. Setting aside the entire bill of arrears issued by the Respondent on account of re-categorization of tariff, Ombudsman had followed the order of the Commission in Case No.24 of 2001 dated 11.02.2003 wherein it was held:

> *"23. No retrospective recovery of arrear can be allowed on the basis of any abrupt reclassification of a consumer even though the same might have been pointed out by the Auditor. Any reclassification must follow a definite process of natural justice and the recovery, if any, would be prospective only as the earlier classification was done with a distinct application of mind by the competent people. The same cannot be categorized as an escaped billing in the strict sense of the term to be recovered retrospectively. With the setting up of the MERC, order of the Commission will have to be sought as any reclassification of consumers directly affects the Revenue collection etc. as projected in its Tariff Order. The same could be done either at the time of the tariff revision or through a special petition by the utility or through a petition*

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

filed by the affected consumer. In all these cases, recovery, if any, would be prospective from the date of order or when the matter was raised either by the utility or consumer and not retrospective."

(xvi) That, seeking review of said Judgment and Order in Writ Petition No 10536 of 2019 decided on 09.06.2020, MSEDCL filed a Petition which came to be dismissed vide order dated 23.07.2020 by Hon'ble Bombay High Court.

(xvii) That the Respondent has started issuing the bills with rate under new Tariff Category HT-IX (B). Since reclassification of category itself is illegal, the amount realized under the new category is liable to be refunded and that the Appellant prays for direction to the Respondent from applying the new rate which is more than even what is charged to the consumers of industrial category.

(xviii) That, the Respondent continues to classify on its billing portal the Consumer in the category of, 'Industrial consumer' as is apparent from the bills issued, which is against the law and as such illegal. It is by reason of this that illegal charges are being levied on the Consumer. The amount paid under protest is liable to be refunded and a direction needs to be issued to the Respondent to correct it.

(xix) Purported 'Tax' on Sale of Electricity charged is wholly illegal and unconstitutional:

That the Respondent illegally charges amount as purported Tax on sale under its Notifications dated 21.04.2015 and 26.12.2018. On similar facts, the Forum was pleased to grant the relief in a Complaint filed by Godavari Foundation, Jalgaon V/s Executive Engineer and Nodal Officer, Jalgaon decided on 10.03.2017 directing that Distribution Company should not charge tax on sale of electricity to the Complainant from the ensuing Bills to be issued and that amount recovered toward tax on sale should be refunded with interest.

(xx) That, in any event, Consumer being a Charitable Institution ought to be considered at par with similarly situated institutions operated by the Government as it is not a profit-making organisation. Consumer's case cannot be considered as that of a private institution engaged in the profit earning activity. Consumer's activities are no different from public services provided by Institutions owned by Government to which concessional tariff applies. The concession provided to the Institutions is

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

activity specific and that the Consumer cannot be deprived of its right to claim to that category merely because it is not run by the Government as the objective of both being similar. This is contrary to Section 62(3) of the Electricity Act, 2003 besides being hit by Article 14 of the Constitution of India. In support of this submission, we rely on order passed in Case No 19 of 2012 by Maharashtra Electricity Regulatory Commission, Mumbai on 22.05.2013 as also a Commercial Circular No 203 dated 16.07.2013 issued by Maharashtra State Electricity Distribution Co. Ltd, Mumbai.

(xxi) The Appellant therefore prays: -

(a) Re-categorization (to Public Services– Others) be set aside and the original tariff category (Public Water Works) be restored.

(b) Refund the extra amount charged from May 2019 onwards.

(c) Cancel the provisional demand of Rs.19,40,508.57 fully.

(d) Pass appropriate orders in terms of Section 62 (3) of the Act and rulings thereon.

(e) Direct the Respondent to withdraw the Maharashtra tax on sale of electricity wrongly charged at the rate applicable to Industries and Commercial consumers till date.

4. The Respondent filed its reply by letter dated 30.03.2021 stating in brief as under: -

(i) The Appellant is HT Consumer (No. 013069016868) from 09.04.1990 having CD of 90 KVA and SL of 80 KW at Ganeshpuri, District Thane. The meter is installed at bank of the river and used for pumping of water from river to the Appellant`s premises for the gardening, drinking water etc.

(ii) The Respondent submits that all statements, averments, and contentions raised in the present complaint are totally denied by Respondent unless it is specifically admitted.

(iii) There are two HT consumers at Gurudev Siddha Peeth, Ganeshpuri. The Respondent inspected the premises of both the consumers on 14.05.2019 and observed that:

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

(a) Consumer No. 013069016868 used for pumping of water from river for use in the premises being Representation No. 13 of 2021.

(b) Consumer No. 013069009721 used for Spiritual activities being Representation No. 14 of 2021.

(iv) The Appellant is a spiritual organization where various spiritual activities are being performed. It functions as a full-time spiritual retreat for people who want to pursue their Siddha Yoga practices. The activities of the Appellant are service oriented to the Society. The power from these two electric installations is for spiritual activities on the premises. Hence, the Appellant in both the cases i.e. 13 of 2021and 14 of 2021 is categorised under Public Services Tariff Category as per Tariff Order in Case No. 19 of 2012, and further Public Services-Others as per Tariff Order in Case of 121 of 2014, and subsequent Tariff Orders of the Commission.

(v) That, it was further revealed that, since February 2018, Consumer No. 013069016868 has been inadvertently charged under tariff category of HT IV: HT - Public Water Works and Sewage Treatment Plants instead of HT IX - (B) : Public Service – Others as per Tariff Orders of the Commission.

(vi) The Tariff of the Appellant is accordingly changed to HT IX - (B) in the month of May 2019 onwards as per inspection dated 14.05.2019. Therefore, the supplementary bill of Rs. 19,40,508.57 was issued to the Appellant vide letter dated 01.10.2019 towards tariff difference for the period from February 2018 to April 2019.

(vii) That, Hon'ble Bombay High Court in its Judgment dated 13.03.2013 in WP No. 11764/2012 & 11765/2012 (filed by Spiritual Organizations such as Osho International Foundation and Neo Sanyas Foundation) has directed the Commission to include Spiritual Organisations which are service oriented and falling within the definition of the newly created tariff category "HT IX-Public Services". Accordingly, the Commission issued Supplementary Order dated 22.05.2013 in Case No. 19 of 2012. The Respondent has accordingly issued the Commercial Circular No.203 dated 16.07.2013.

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

(viii) The tariff category of HT IX: Public Services is further divided into HT IX (A): HT - Public Services - Government Educational Institutes and Hospitals and HT IX - (B): Public Service-Others as per Tariff Order in Case No. 121 of 2014 and subsequent tariff orders of the Commission. The activity of the Appellant covers under HT IX - (B): Public Service-Others Tariff Category. Recovery of tariff difference of Rs.19,40,508.57 for the period from February 2018 to April 2019 is justified, proper and as per mandate of supplementary order and further tariff orders of the Commission.

(ix) That, the Hon'ble Supreme Court of India in its Judgment dated 18.02.2020 in Civil Appeal No.1672 of 2020 in Case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla, has held that the Section 56(2) of the Act did not preclude the Respondent from raising an additional or supplementary demand after the expiry of the limitation period of 24 months under Section 56 (2) of the Act in case of error.

(x) The Appellant filed the grievance application with IGRC. The IGRC, by its order dated 09.01.2020 has rejected the grievance. The Appellant approached the Forum on 28.02.2020. The Forum, by its Order dated 29.12.2020 has rightly rejected the grievance application.

(xi) In view of the above submissions, the Respondent prays that the representation of the Appellant be rejected.

5. The Appellant vide email dated 15.04.2021 has submitted common rejoinder for Representation No. 13 of 2021 and 14 of 2021 which is more or less repetition of its issues in the Representations. Some important issues, in brief, are taken below.

(i) That, Respondent's stand regarding categorisation of Tariff is contrary to law in view of observations made by Hon'ble Bombay High Court in Osho International Foundation V/s Maharashtra Electricity Regulatory Commission in Civil Writ Petition No 11764 of 2012. It was in this context that Hon'ble Bombay High Court held:

"In view of the order of the Appellate Tribunal requiring the State Commission to classify Spiritual Organizations which are service oriented also in a special

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

category along with Hospitals and Educational Institutions as "Public Services", these Writ Petitions are allowed and Respondent No.1 is directed to include Spiritual Organisations which are service oriented as falling within the definition of the newly created category "HT IX-Public Services."

(ii) That, the impugned order of the Forum discloses non-application of mind as the Forum failed to appreciate submissions advanced before it.

(iii) It is submitted that relying upon the Full Bench Judgment in Writ Petition No. 10764 of 2011 & others in the case of MSEDCL V/s the Electricity Ombudsman & Others, the review of MSEDCL was dismissed in Writ Petition No. 10536 of 2019 in the case of MSEDCL V/s Principal, College of Engineering, Pune.

(iv) That, the Special Leave Petition filed by Respondent challenging the validity of the Full Bench Judgment of Hon'ble Bombay High Court in Writ Petition No 10764 of 2011 in the case of MSEDCL V/s. the Electricity Ombudsman & Others, stands dismissed by Hon'ble Supreme Court of India on 14.02.2020 in Diary No. 25 of 2020. The challenge made by the Respondent to Single Bench Judgment in Review Petition in MSEDCL V/s Principal, College of Engineering, Pune, Writ Petition No 10536 of 2019 and Review Petition of 2020 though is pending adjudication before Hon'ble Supreme Court in SLP (C) No 001952-001953 of 2021 but its operation has not been stayed. This decision continues to hold the field and being a binding precedent applies in the present case as the facts are similar.

(v) That, challenging validity of the demand, consumers raised many points, and that the Respondent chose not to controvert the same. In the Judgment dated 12.03.2019 of the Full Bench of the Hon'ble Bombay High Court in Writ Petition No 10764 of 2011 & Others in the case of Maharashtra State Electricity Distribution Company Limited V/s Electricity Ombudsman & Others observed,

"Unless and until the preconditions set out in sub-section (2) of Section 56 are satisfied, there is no question of the electricity supply being cut off. Further, the recovery proceedings may be initiated seeking to recover amounts beyond a period of two years, but the section itself imposing a condition that the amount sought to be recovered as arrears must, in fact, be reflected and shown in the bill continuously as recoverable as arrears, the claim cannot succeed. Even if supplementary bills are raised to correct the amounts by applying accurate multiplying factor, still no recovery beyond two years is permissible unless that sum has been shown continuously as recoverable as arrears of charges for the electricity supplied from the date when such sum became first due and payable."

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

The Distribution Licensee will have to raise a demand by issuing a bill and the bill may include the amount for the period preceding more than two years provided the condition set out in sub-section (2) of Section 56 is satisfied. In the sense, the amount is carried and shown as arrears in terms of that provision.

(vi) Principles of Law in Support:

When moneys are paid to the State which the State has no legal right to receive, it is ordinarily the duty of the State subject to any special provisions of any particular statute or special facts and circumstances of the case, to refund the tax of the amount paid. Article 265 mandates that no tax shall be levied or collected except by authority of law. In other words, no tax in terms of Article 265 of the Constitution of India can be imposed, levied or collected except by the authority of law. There is no such thing as taxation by implication and that the burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of tax claimed. A taxing statute is to be strictly construed. The well-established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means

"The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be."

In other words, if there is admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

(vii) Prayer:

In the premises aforesaid, Hon'ble Ombudsman may be graciously pleased to allow this Representation quashing the impugned order dated 29.12.2020 declaring that change in the tariff category as also the demand raised by the Respondent is wholly

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

illegal and unenforceable in law and that Complainant was not liable to pay the same and that the amount paid under protest is liable to be refunded with interest. The Appellant further prays that the Hon'ble Ombudsman may be pleased to direct the Respondent to refrain from charging purported 'tax' on the sale of electricity, charges based on classification, which is illegal and unreasonable, as also to apply necessary corrective on the billing portal and direct refund of the amount charged in excess of what is actually payable as per law.

6. The Appellant vide its e-mail dated 27.04.2021 has made additional submissions wherein it has cited the Judgement of ATE dated 01.12.2020 in Case No. DFR No 421 of 2020 in Case of Winindia Ventures Pvt Ltd. V/s Maharashtra State Electricity Distribution Company Ltd., and Another, in support of its argument. The Judgement held that:

> *"It has to be borne in mind by all concerned that an order passed by a statutory authority remains binding and continues to be operative and enforceable so long as it is not set aside, vacated, modified or stayed by superior authority in the hierarchy of the institutions established by the law. The Commission has failed to bear in mind that there is no stay against the operation of the impugned order. Mere challenge by appeal could not be construed as an automatic stay of operation of the order. If that were to be accepted as a practice it would result in chaos.*"

7. Hearing was conducted on 27.04.2021 on e-platform through video conferencing due to the Covid-19 epidemic and the situations arising out of it.

8. The Appellant argued in line with its written submissions. The Appellant stated that it has two connections, one Consumer No. 013069016868 which is used for pumping of water from river for use in the Ashram premises being adjudicated in the instant Representation and the other Consumer No. 013069009721 is used mainly for residential houses of the Ashram which is in Representation No.14 of 2021. The Respondent has correctly applied the tariff category of Public Water Works (PWW) from February 2018, the same needs to be continued. Hence, the retrospective recovery towards the tariff difference from PWW to Public Services – Others is illegal, and the amount collected towards it needs to be refunded. The Appellant has referred the ATE Judgment dated 07.08.2014 in Appeal No.131 of 2013, and the Commission's order dated 11.02.2003 in Case No. 24 of 2001 which does not allow retrospective recovery. In the same vein, the Appellant cited Judgement of Writ Petition No.

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

10536 of 2019 dated 09.06.2020 in Case of MSEDCL V/s Principal, College of Engineering, Pune and subsequent review petition filed by the Respondent. This has been appropriately captured at para 5 (iv) above. The Appellant argued that since there is no stay on the Judgment of Hon'ble Bombay High Court in case of Principal Engineering College, Pune, and the present representation being similar, it continues to apply. Therefore, the supplementary bill issued by the Respondent needs to be quashed.

9. The Appellant had also questioned the purported tax levied on the Sale of electricity by the Respondent particularly when it does not apply to it. It further argued that no tax shall be levied or collected except by the authority of law. It, therefore, needs to be withdrawn through direction to the Respondent.

10. The Respondent on the other hand argued that the Appellant is a spiritual organization. The entire Ashram premises is used full time for spiritual retreat by people who want to pursue their Siddha Yoga practices. The electricity connection (Consumer No.013069016868) is used for pumping of water from river to the Appellant`s premises for gardening, drinking water etc. It further stated that water supply from this pumping station, for which electricity connection (Consumer No.013069016868) is provided, is used for the entire premises where spiritual activities are being conducted and is also provided with a separate electricity connection (Consumer No. 013069009721). Incidentally, the Appellant has filed Representation No. 14 of 2021 wherein it has also disclosed this fact.

11. Hence, the purpose of the use of power from this connection No.013069016868 is classified under Public Services-Others as per Tariff Order in Case of 121 of 2014 and subsequent Tariff Orders onwards issued by the Commission. However, the Appellant was wrongly being billed under HT IV: Public Water Works tariff category from February 2018. This mistake was intimated to the Appellant during inspection on 14.05.2019. Afterwards the correct tariff code of HT IX - (B): Public Service-Others Tariff Category was applied from May 2019 and communicated verbally that the legal retrospective recovery of tariff difference will be shortly issued. Therefore, the supplementary bill of Rs. 19,40,508.57 was issued to the Appellant vide letter dated 01.10.2019 towards amount of tariff difference for change in

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

tariff category for the period from February 2018 to April 2019 (15 months). This is as per the provision of Section 56 (2) of the Act and the Judgment dated 18.02.2020 of Hon'ble Supreme Court of India in its Civil Appeal No.1672 of 2020 in Case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan Alias Rahamjulla. The Appellant did not make prayer with respect to Tax on sale of electricity in IGRC. Hence, it cannot agitate on this at the Appellate level. Considering all these facts, the Respondent prays for rejection of the representation.

Analysis and Ruling

12. Heard the parties and perused the documents on record. The Appellant is HT consumer (No. .013069016868) from 09.04.1990. The factual position in pursuance of the submission of the Appellant and the Respondent in this case is as below:

The Respondent inspected the premises on 14.05.2019 and discovered that the purpose of power being used by the Appellant and the tariff applied does not match with the actual tariff that should have been applied as per the tariff order of the Commission. In sum and substance, the Appellant was being billed under the HT IV: HT - Public Water Works and Sewage Treatment Plants instead of HT IX: Public Services which came into being through the Commission's order dated 16.08.2012 in Case No.19 of 2012. The Commission issued supplementary order dated 22.05.2013 in Case No. 19 of 2012 whereby it added ***Spiritual Organisation which are service oriented*** in HT IX Public Services. The Commission then issued tariff order dated **26.06.2015 in Case No. 121 of 2014** (effective from 01.06.2015) vide which new tariff Categories in **HT IX: HT Public Services** are created which are as below.

(a) HT IX (A): HT - Public Services - Government Educational Institutes and Hospitals

(b) HT IX (B): Public Services – Others.

The relevant portions of Supplementary Order of the Commission dated 22.05.2013 in Case of 19 of 2012, and the tariff order dated 26.06.2015 in Case No. 121 of 2014 are reproduced below: The relevant portion of the order is quoted as below: -

Supplementary Order of the Commission dated 22.05.2013 in Case No. 19 of 2012,

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

"5. Accordingly, incompliance with the above said Judgment of the Hon'ble High Court, the Commission hereby amends the applicability of 'HT Public Service category' in Tariff Schedule of Order issued on 16 August 2012 in Case No. 19 of 2012 with effect from 1 August, 2012.

6. The revised Tariff Schedule for applicability of "HT X: HT- Public Services" is as under:

HT IX - Public Services

Applicability

This Tariff shall be applicable to education institutes, hospitals, dispensaries, primary health care centres, pathology laboratories, ***Spiritual Organisation which are service oriented,*** *Police Stations, Post Offices, Defence establishments (army, navy and air force), Public libraries and Reading rooms, Railway except traction (shops on the platforms/railway station/bus stands will be billed under Commercial category as per the respective slab), State transport establishments; Railway and State Transport Workshops, Fire Service Stations, Jails, Prisons, Courts; Airports (only activities related to aeronautical operations)*

Sports Club / Health Club / Gymnasium / Swimming Pool attached to the Educational Institution / Hospital provided said Sports Club / Health Club / Gymnasium / Swimming Pool is situated in MERC Final Order Case No.19 of 2012 _ Supplemental Order Page 6 of 6 the same premises and is exclusively meant for the students / patients of such Educational Institutions & Hospitals."

Order of the Commission dated 26.06.2015 in Case No. 121 of 2014

HT IX: HT Public Services

HT IX (A): HT - Public Services - Government Educational Institutes and Hospitals

Applicability:

This Tariff shall be applicable to all Educational Institutions such as Schools and Colleges, and Hospitals, Dispensaries, Primary Health Care Centres and Diagnostic Centres/ Pathology Laboratories and Libraries and Public reading rooms of State or Central Government, Local Self Government bodies such as Municipal Bodies, Zilla Parishads, Panchayat Samities or Gram Panchayat. Sports Club / Health Club / Gymnasium / Swimming Pool attached to the Educational Institution / Hospital provided said Sports Club / Health Club / Gymnasium / Swimming Pool is situated in the same premises and is primarily meant for the students / faculty/ employees/ patients of such Educational Institutions & Hospitals.

HT IX (B): Public Services – Others

Applicability

This Tariff shall be applicable to education institutions, hospitals, dispensaries, primary health care centres, pathology laboratories etc which are not covered in HT IX (A), ***Spiritual Organizations,*** *Police Stations, Post Offices, Defence establishments (army, navy and air MYT Order of MSEDCL for the period from FY 2013-14 to FY 2015-16 Page 348 of 381 Case No. 121*

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

*of 2014 force), Public libraries and Reading rooms, Railway / Metro / Monorail except traction, State transport establishments; Railway and State Transport Workshops, Fire Service Stations, Jails, Prisons, Courts, Airports (only activities related to aeronautical operations), Pumping of Water for Tankers, Public Gardens owned by Local Self Government Bodies such as Gram Panchayat, Municipal Council/Corporation. Sports Club / Health Club / Gymnasium / Swimming Pool attached to the Educational Institution / Hospital provided said Sports Club / Health Club / Gymnasium / Swimming Pool is situated in the same premises and is primarily meant for the students / faculty/ employees/ patients of such Educational Institutions & Hospitals. ……..(**Emphasis added**)*

The said categories are continued in all subsequent Tariff Orders of the Commission.

13. Pursuant to these two tariff orders of the Commission, the Respondent issued separate supplementary bill of Rs. 19,40,508.57 vide its letter dated 01.10.2019 towards tariff difference from February 2018 to April 2019.

14. It is an admitted proposition that the water pumped from this connection (No. .013069016868) is used for the premises where spiritual activities are held in pursuit of Siddha Yoga practices. This entire premises for which pumped water supply is being used has various structures like bungalows, flats, meditation hall, kitchen, yadnya mandap, temple, garden, street lighting and air conditioning whose total load is to the tune of almost 854 KW for which a separate HT connection exists. The use to which this premises is being put to is akin to OSHO International Foundation Pune. It is the same Foundation which has filed a WP in Hon'ble Bombay High Court as a result of which the Commission has categorised such premises under Public Services in its Supplementary Order dated 22.05.2013 in its original order dated 16.08.2012 in Case No. 19 of 2012. Therefore, application of Public Water Works tariff by the Respondent was its mistake which is corrected by applying HT IX (B): Public Services – Others tariff category.

15. Therefore, I am convinced that the purpose for which power is being used by the Appellant clearly falls under HT IX (B) – Public Services – Others as per the Tariff Order dated 26.06.2015 in Case No. 121 of 2014 and continued to remain so in the subsequent tariff orders. However, the Respondent failed to apply the appropriate tariff category to the Appellant which appears to be a mistake.

16. Now, let us discuss the various citations by both the parties: -

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

(a) The Appellant has cited the Commission's order dated 11.02.2003 in Case No. 24 of 2001 and ATE Judgment dated 07.08.2014 in Appeal No. 131 of 2013 which stipulates that recovery due to abrupt change of tariff category cannot be made retrospectively. This order of the Commission and the Judgment of the ATE are no more relevant in view of the Larger Bench Judgment dated 12.03.2019 of the Hon'ble Bombay High Court in W.P. No.10764 of 2011 with other Writ Petitions interpreting Section 56 (2) of the Act.

(b) However, the Appellant has stated that the Larger Bench Judgment in WP No. 10764 of 2011 has been discussed by the Hon'ble Bombay High Court in its Judgment dated 23.07.2020 in WP No.10530 of 2020 in case of MSEDCL V/s Principal, College of Engineering, Pune and upheld the order of the Electricity Ombudsman, Mumbai which allowed prospective recovery. The Respondent appealed against this Judgment in the Hon'ble Supreme Court in Diary No. 21058 of 2020, however, no interim or otherwise Judgment has been passed. Therefore, the Judgment of the Hon'ble Bombay High Court sustains until such time.

(c) The Appellant further stated that the Special Leave Petition filed by Respondent challenging the validity of the Larger Bench Judgment of Hon'ble Bombay High Court in Writ Petition No 10764 of 2011 in the case of MSEDCL V/s the Electricity Ombudsman & Others stands dismissed by Hon'ble Supreme Court of India on 14.02.2020 in Special Leave Petition (Civil) Diary No. 25 of 2020. This is a misleading submission as the SLP is dismissed by the Hon'ble Supreme Court on the ground of delay and not on merit. Therefore, the submission of the Appellant to the extent of effect of Larger Bench Judgment not to be considered has no meaning.

The relevant portion of Section 56 (2) of the Act and the Larger Bench Judgment dated 12.03.2019 of the Hon'ble Bombay High Court is quoted below:-

Section 56 (2) of the Electricity Act, 2003

"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

Relevant portion of the Larger Bench Judgment

"76. In our opinion, in the latter Division Bench Judgment the issue was somewhat different. There the question arose as to what meaning has to be given to the expression "when such sum became first due" appearing in subsection (2) of Section 56.

77. There, the Division Bench held and agreed with the Learned Single Judge of this Court that the sum became due and payable after a valid bill has been sent to the consumer. It does not become due otherwise. Once again and with great respect, the understanding of the Division Bench and the Learned Single Judge with whose Judgment the Division Bench concurred in Rototex Polyester (supra) is that the electricity supply is continued. The recording of the supply is on an apparatus or a machine known in other words as an electricity meter. After that recording is noted that the electricity supply company/distribution company raises a bill. That bill seeks to recover the charges for the month to month supply based on the meter reading. For example, for the month of December, 2018, on the basis of the meter reading, a bill would be raised in the month of January, 2019. That bill would be served on the consumer giving him some time to pay the sum claimed as charges for electricity supplied for the month of December, 2018. Thus, when the bill is raised and it is served, it is from the date of the service that the period for payment stipulated in the bill would commence. Thus, within the outer limit the amount under the bill has to be paid else this amount can be carried forward in the bill for the subsequent month as arrears and included in the sum due or recoverable under the bill for the subsequent month. Naturally, the bill would also include the amount for that particular month and payable towards the charges for the electricity supplied or continued to be supplied in that month. It is when the bill is received that the amount becomes first due. We do not see how, therefore, there was any conflict for Awadesh Pandey's case (supra) was a simple case of threat of disconnection of electricity supply for default in payment of the electricity charges. That was a notice of disconnection under which the payment of arrears was raised. It was that notice of disconnection setting out the demand which was under challenge in Awadesh Pandey's case. That demand was raised on the basis of the order of the Electricity Ombudsman. Once the Division Bench found that the challenge to the Electricity Ombudsman's order is not raised, by taking into account the subsequent relief granted by it to Awadesh Pandey, there was no other course left before the Division Bench but to dismiss Awadesh Pandey's writ petition. The reason for that was obvious because the demand was reworked on the basis of the order of the Electricity Ombudsman. That partially allowed the appeal of Awadesh Pandey. Once the facts in Awadesh Pandey's case were clear and there the demand was within the period of two years, that the writ petition came to be dismissed. In fact, when such amount became first due, was never the controversy. In Awadesh Pandey's case, on facts, it was found that after re-working of the demand and curtailing it to the period of two years preceding the supplementary bill raised in 2006, that the bar carved out by subsection (2) of Section 56 was held to be inapplicable.

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

Hence there, with greatest respect, there is no conflict found between the two Division Bench Judgments.

78. Assuming that it was and as noted by the Learned Single Judge in the referring order, still, as we have clarified above, eventually this is an issue which has to be determined on the facts and circumstances of each case. The legal provision is clear and its applicability would depend upon the facts and circumstances of a given case. With respect, therefore, there was no need for a reference. The para 7 of the Division Bench's order in Awadesh Pandey's case and paras 14 and 17 of the latter Judgment in Rototex Polyester's case should not be read in isolation. Both the Judgments would have to be read as a whole. Ultimately, Judgments are not be read like statutes. The Judgments only interpret statutes, for statutes are already in place. Judges do not make law but interpret the law as it stands and enacted by the Parliament. Hence, if the Judgments of the two Division Benches are read in their entirety as a whole and in the backdrop of the factual position, then, there is no difficulty in the sense that the legal provision would be applied and the action justified or struck down only with reference to the facts unfolded before the Court of law. In the circumstances, what we have clarified in the foregoing paragraphs would apply and assuming that from the Judgment in Rototex Polyester's case an inference is possible that a supplementary bill can be raised after any number of years, without specifying the period of arrears and the details of the amount claimed and no bar or period of limitation can be read, though provided by subsection (2) of Section 56, our view as unfolded in the foregoing paragraphs would be the applicable interpretation of the legal provision in question. Unless and until the preconditions set out in subsection (2) of Section 56 are satisfied, there is no question of the electricity supply being cutoff. Further, the recovery proceedings may be initiated seeking to recover amounts beyond a period of two years, but the section itself imposing a condition that the amount sought to be recovered as arrears must, in fact, be reflected and shown in the bill continuously as recoverable as arrears, the claim cannot succeed. Even if supplementary bills are raised to correct the amounts by applying accurate multiplying factor, still no recovery beyond two years is permissible unless that sum has been shown continuously as recoverable as arrears of charges for the electricity supplied from the date when such sum became first due and payable."

As a result of the above discussion, the issues referred for our opinion are answered as under:

(A) ***The issue No. (i) Is answered in the negative. The Distribution Licensee cannot demand charges for consumption of electricity for a period of more than two years preceding the date of the first demand of such charges.***

(Emphasis added)

(B) As regards issue No. (ii), in the light of the answer to issue No. (i) above, this issue will also have to be answered accordingly. In other words, the Distribution Licensee will have to raise a demand by issuing a bill and the bill may include the amount for

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

the period preceding more than two years provided the condition set out in sub-section (2) of Section 56 is satisfied. In the sense, the amount is carried and shown as arrears in terms of that provision.

(C) The issue No.(iii) is answered in terms of our discussion in paras 77 & 78 of this Judgment."

(d) The Appellant's submission that the challenge made by the Respondent to Single Bench Judgment in Review Petition in Maharashtra State Electricity Distribution Co. Ltd. V/s Principal, College of Engineering, Pune, Writ Petition No 10536 of 2019 and Review Petition of 2020 though is pending adjudication before Hon'ble Supreme Court in SLP (C) No 001952-001953 of 2021 but its operation has not been stayed. This decision continues to hold the field and being a binding precedent applies in the present case as the facts are similar. However, it is not so for the simple reason that the context and sequence of events in Principal, College of Engineering case is totally different compared to that of the instant Representation. Therefore, the stipulation of the Appellant to the extent of applicability of this Judgment cannot be considered and blindly applied to in this case.

(e) The Appellant also cited the Larger Bench Judgment in WP No. 10764 of 2011 and quoted certain part of it which is captured at 3 (xv)(b) above in its submission in this order. However, the Appellant has conveniently forgot to quote the most important finding of the Larger Bench which is after paragraph 78 and is at (A) in the Judgment which is already quoted above.

(f) The Respondent also cited the Judgment dated 18.02.2020 of Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla which upheld the right of the Respondent to recover the amount retrospectively in light of Section 56 (2) of the Electricity Act, 2003. The relevant portion of the said Judgment is quoted below:

"9. Applying the aforesaid ratio to the facts of the present case, the licensee company raised an additional demand on 18.03.2014 for the period July, 2009 to September, 2011.

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

The licensee company discovered the mistake of billing under the wrong Tariff Code on 18.03.2014. The limitation period of two years under Section 56(2) had by then already expired.

Section 56(2) did not preclude the licensee company from raising an additional or supplementary demand after the expiry of the limitation period under Section 56(2) in the case of a mistake or bona fide error. It did not however, empower the licensee company to take recourse to the coercive measure of disconnection of electricity supply, for recovery of the additional demand. (Emphasis added)

…… ……"

The ratio of the Judgment is that the licensee company can recover energy bill by way of additional supplementary demand for a period of two years for an error. In the instant case, the error on the part of the Respondent appears to be correct and hence it is entitled to recover tariff difference for the period of 24 months prior to issue of supplementary bill vide the letter dated 01.10.2019 under Section 56 (2) of the Act.

The undersigned has also decided many cases relying on the Judgment of the Larger Bench of the Hon'ble Bombay High Court. The other citations of the Appellant are not considered in view of the Supreme Court Judgment.

17. In the instant case, the Respondent has demanded tariff difference bill for 15 months from February 2018 to April 2019 subsequent to its inspection on 14.05.2019. The Respondent issued supplementary bill through its letter dated 01.10.2019 which was challenged by the Appellant in IGRC in November 2019. The Appellant has been regularly being billed with the correct tariff from May 2019 onwards. The Respondent is entitled to recover tariff difference between HT IV: HT - Public Water Works and Sewage Treatment Plants and HT IX-(B): Public Services – Others for 15 months for the period from February 2018 to April 2019 which is within the period of 24 months prior to issue of supplementary bill in October 2019 as per Section 56 (2) of the Act.

18. The Appellant has also raised the issue of tax on sale of electricity charged to it by the Respondent. It is the case of the Appellant that it cannot be levied to its connection. However, the Respondent argued that the Appellant did not take up this issue at the initial stage of IGRC. I also noticed that the Appellant in its grievance before the Forum in prescribed Schedule A

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.

form has not taken up issue of this Tax as such, it is not appropriate on the part of the Appellant to agitate this issue before the Appellate Authority. This being the case, I have not adjudicated on the matter. However, the Respondent may examine the issue if there is some substance in the submission of the Appellant in this regard.

19. The Appellant has also stated that the billing portal of the Respondent (as is known to the Appellant) shows the consumer under 'Industrial' category which though did not affect the Appellant financially, it needs to be corrected by the Respondent.

20. In view of the above discussions, I do not find it necessary to interfere in the order of the Forum. The representation is disposed of accordingly.

21. The Respondent may take suitable action against the erring officials for improper categorisation of the Appellant.

Sd/
(Deepak Lad)
Electricity Ombudsman (Mumbai)

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

Electricity Ombudsman Mumbai M.E.R.C.