BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 220 OF 2019

In the matter of appropriate tariff categorisation

Jain Irrigation Systems Ltd……………………….……………………. Appellant

V/s

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

Appearances

For Appellant : 1. Satish Shah, Representative
2. T.N. Agrawal, Representative
3. Tarun Agrawal, Representative

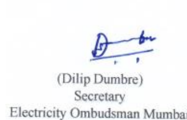
For Respondent : 1. Ravindra F. Pawar, Dy. Ex. Engineer
2. Nilesh Y. Mulay, Asst. Accountant

Coram: Deepak Lad

Date of Order: 13th February 2020

ORDER

This Representation is filed on 16th December 2019 under Regulation 17.2 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2006 (CGRF Regulations) against the Order dated 27th November 2019 passed by the Consumer Grievance Redressal Forum, MSEDCL, Jalgaon Zone (the Forum).



2. The Forum, by its Order dated 27.11.2019 has dismissed the grievance application No. 8 of 2019-20.

3. Aggrieved by the order of the Forum, the Appellant in its representation has stated in brief as below: -

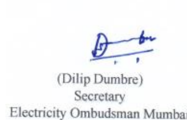
(i) The Appellant is a HT Consumer (No. 110019001550) from 21.08.2002 having Contract Demand of 250 KVA and Connected Load of 370 KW at Jain Agri Park, Gut No. 63/3, Mohadi, Sirsoli Road, Jalgaon.

(ii) Initially, this load was sanctioned for industrial purpose with installation of sub-meter to measure residential consumption. The industrial project was postponed due to unavoidable circumstances. It was confirmed by Ex. Engineer, Jalgaon vide letter dated 16.11.2004 that usage of power was only for residential and no industrial load existed.

(iii) Again, in the year 2009, the Ex. Engineer vide letter dated 27.05.2009 confirmed that the load connected is for residential purpose. Therefore, the Appellant was billed as per HT-IA/HT-VI Group Housing Residential tariff category correctly up to December 2017. In the month of January 2018, the Appellant had received the bill of Rs.2297410/- under LT-I Residential tariff category when its usage was not changed at all. This tariff category was changed abruptly from HT VI to LT-I category without any prior intimation/notice. The said bill of Rs.2297410/- was paid under protest by letter dated 01.03.2018. Thereafter, the Appellant is billed at LT-I residential tariff category from January 2018 onwards instead of HT-IA/HT-VI tariff category.

(iv) In the month of April 2019, the Appellant received a supplementary bill of Rs.181.92 lakhs vide letter No.2215 dated 18.04.2019 for tariff difference between HT-IA/HT-VI and LT-1 for the retrospective recovery for the period from December 2015 to December 2017 (25 months). This is against the tariff philosophy and various judgments issued by Ombudsman, Maharashtra Electricity Regulatory Commission (the Commission) and the Appellate Tribunal of Electricity (ATE).

(v) The Appellant filed the grievance application with Internal Grievance Redressal Cell (IGRC) on 13.06.2019. The IGRC by its order dated 09.08.2019 has rejected the grievance. Subsequently, the Appellant approached the Forum on 09.09.2019. The Forum, by its Order dated 27.11.2019 also dismissed the grievance application.



(vi) The supplementary bill of Rs.181.92 lakh raised by the Respondent is totally incorrect, illegal without any base and justification. As there was a disconnection threat from the Respondent, the Appellant had approached the Forum for interim relief and accordingly, the Forum by its interim order dated 02.07.2019 granted interim injunction.

(vii) Further to avoid unpleasant situation due to disconnection of power, the Appellant had been forced to pay part amount of Rs.123.6 lakh (Past 6 months bill) on 10.07.2019. The Appellant is paying regular monthly bills at tariff category of LT-I from January 2018 onwards.

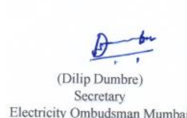
(viii) As per Regulation 13 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code & Other Conditions of Supply) Regulations, 2005 (Supply Code Regulations) for classification & reclassification of tariff category, the Distribution licensee is to decide tariff category based upon usage by the consumer. Tariff category charged till December 2017 was of HT-VI - Group Housing society. Suddenly / abruptly, the MSEDCL shifted tariff to LT-I without any prior intimation/ notice.

(ix) The Appellant has framed the following issues for its grievance as below:-

a. Whether retrospective recovery is permissible under the various judgments/orders/directives passed by the Commission and ATE?
b. What is the period as per Section 56(2) of the Electricity Act, 2003 (the Act) for retrospective recovery and from which date?
c. What should be the rate of wheeling charges to be billed when availing supply at 11 KV/HT level?

The above points are answered in the following manner.

Issue a. The MSEDCL has got no legal right to raise supplementary bill arising out of the escaped billing due to error in reclassification of tariff and to disconnect the power supply as a legal means to exert pressure on the consumer for clearing its dues. As per Regulation 13 of the Supply Code Regulations, classification & reclassification of tariff category, distribution licensee to decide tariff category based upon usage by its consumer. The consumer has



no role to decide the tariff category on its own. The Respondent officials used to visit the premises monthly for taking reading of the meter and inspection of the installation. However, no irregularity was pointed out.

The Appellant on the issue of reclassification of tariff or abrupt change of tariff category relies on the following decision/orders passed by the Commission and the ATE. Accordingly, no retrospective recovery is permissible under the present Act, rules & regulations.

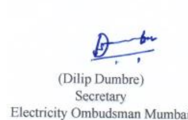
The Appellant refers the Commission's order dated 11.02.2003 in Case No. 24 of 2001. The relevant portion is quoted below:

"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 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". (Emphasis added)

The Appellant also referred the decision / order dated 07.08.2014 of 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.

"*According to the tariff schedule decided by the State Commission in the 2007 tariff order, the Appellant's unit engaged in the activities of filling and packing of oil falls under LT VII (A) – Commercial category. The Electricity Board had wrongly been billing the Appellant under LT IV – Industrial category. The State Commission has correctly decided that the Appellant would be charged under the LT VII (A) – Commercial category from the date of detection of the error i.e. 10.03.2008.*"

As per the above decision of the ATE, no past recovery is permissible, hence in this case also this directive should be made applicable. Effect of change of tariff category needs to be applied prospectively from the date of detection of the so-called error which is November 2017.



Issue b. As per Section 56(2) of the Act, the Respondent issued supplementary bill for retrospective recovery vide letter No.2215 dated18.04.2019 for the period from December 2015 to December 2017. Therefore, the billed amount becomes first due on the date of tendering bill to the consumer i.e. 18.04.2019. As per Section 56(2), the MSEDCL was empowered to recover arrears for 24 months prior to the date of issue of bill i.e. 24 months prior to 18.04.2019. Therefore, the Respondent should not have claimed bill for the period prior to May 2017 as the bill was first raised on 18.04.2019. Hence, the arrears claimed for the period from December 2015 to April 2017 (16 months) is against the provision of Section 56(2) of the Act which is liable to be set aside.

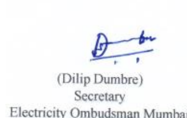
Issue c. As per para 2.4.24 of the tariff order of the Commission in Case No. 195 of 2017, philosophy for billing of wheeling charges is mentioned as: *"The Wheeling Charges shall be levied as per the voltage level on which the consumer is connected irrespective of the Voltage level specified in the SoP."*

The Appellant is supplied at 11 KV voltage level (?). As per tariff order, wheeling charge for the same is Rs.0.78 per unit. However, the Respondent is treating the Appellant as a LT consumer and levying LT wheeling charge which is Rs.1.30 per unit. Hence, wheeling charges billed for past recovery at LT level should be corrected as that of HT 11 KV level.

4. The Appellant has stated following points of the Forum which he is not satisfied as below: -

(a) The Forum issued final order which is very brief and did not consider the submissions of the Appellant.

(b) The Forum referred to W.P. No. 6869, 6860, 6861 & 6862 of 2017 in case of Jawahar Shetkari Soot Girni Ltd., issued by Aurangabad Bench, Bombay High Court which pertains to FAC & 2% Voltage surcharge refund. These cases are not related to abrupt change of tariff category. The Forum failed to consider the provision under Section 56(2) of the Act regarding recovery of the arrears.



(c) LT-1 category is not applicable as supply is availed at HT. The Respondent had the tariff category to LT-1 Residential

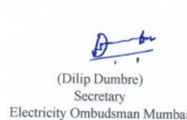
5. In view of the above, the Appellant prays for direction to the Respondent as below:-
   1. to withdraw the supplementary bill of Rs.181.92 lakh for retrospective recovery from Dec-2015 to Dec-2017 (25 months) due to abrupt change of tariff category.
   2. to refund Rs.123.62 lakh (68%) paid part amount under protest against the demand of Rs.181.92 lakh raised by MSEDCL along with accrued interest at bank rate as per the Section 62(6) of the Act.
   3. to waive DPC and interest levied in monthly bills due to arrears shown by MSEDCL for the past recovery amount.
   4. to compensate up to Rs.100000/- as per Regulation 8.2 (c) of the CGRF Regulations for loss suffered by the consumer, for mental agony, defamation, man hours lost, travelling expenses, etc.

6. The Respondent filed its reply by letter dated 31.12.2019 stating in brief as under: -

   (i) Appellant has applied for HT Connection for industrial purpose for production activities of papain, liquid fertilizer and Neem products and sub-meter for residential purpose and VIPs Guest House at Jain Agri Park, Gut No. 63/3, Mohadi, Sirsoli Road, Jalgaon. The load is sanctioned and subsequently released on 21.08.2002 having Consumer No.110019001550) with Contract Demand 250 KVA & Connected Load 370 KW.

   (ii) As per physical verification report dated 28.11.2002, said connection was used for residential purpose (training centre, hostel, residential bungalow, guest house).

   (iii) As per physical verification report dated 16.11.2004, load was utilized for 5 buildings for residential purpose. Names of the buildings are Gauri, Hira, Raja, Rani & Hasti but production activities of papain, liquid fertilizer and Neem products were not started and hence the said connection was used for residential purpose only.



(iv) The Respondent's flying squad has inspected the electrical installation on 22.11.2017 in presence of the Appellant wherein it was noticed that the Appellant is billed on HT-VI Group Housing tariff category.

(v) Hence, the Flying Squad vide its letter dated 11.01.2018 asked the billing authority to change the tariff to LT-1 Residential tariff. Accordingly, the tariff category is changed to LT-I in the bill of January 2018. As LT-I residential tariff category is also applicable to consumers who are supplied power at high voltage level for various purposes for residential purpose. The Appellant has paid energy bill under new tariff i.e.LT-I.

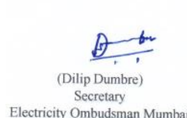
(vi) After the Appellant's complaints dated 14.02.2018 and 17.04.2018, a Committee was formed for confirming the activity of the Appellant. As per Committee Report, there are 5 bungalows, 1 training hostel, 1 guest house, 1 building for information centre for the activities of Jain Group Industries. Hence, Committee recommended residential tariff i.e. LT-I for the Appellant.

(vii) A supplementary bill of Rs.181.92 lakh for tariff difference recovery from HT VI – Group Housing to LT-1 Residential for the period December 2015 to December 2017 was sent to the Appellant on 18.04.2019.

(viii) As per Section 56(2) of the Act "*the distribution licensee can demand charges for the consumption of electricity for a period of two years preceding the date of first demand of such charges*". As per this provision of the Act and as well as the Judgment dated 12.03.2019 given by Hon. Bombay High Court in Writ Petition No. 10764 /2011 & Others, the tariff is changed and the supplementary bill of Rs.181.92 lakhs is issued for tariff difference recovery for the period from December 2015 to December 2017.

(ix) The Forum has also rejected the case of the Appellant on the basis of decision of ratio laid down by the Aurangabad Bench of Bombay High Court in Jawahar Shetkari Soot Girni Ltd. post facto 24 months.

(x) Meanwhile, the Respondent has issued disconnection notice to the Appellant on 18.06.2019 after due date for non-payment of full bill amount with prior period recovery. Hence, the Appellant approached the Forum for interim relief against disconnection notice. As per the interim order passed by the Forum, the Appellant has paid Rs.12362970/- on 10.07.2019. However, the Forum, by its Order dated 27.11.2019 has dismissed its grievance.



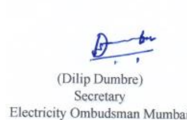
(xi) Hence, the Respondent prays for rejection of the representation of the Appellant as the order of the Forum is correct.

7. During the hearing on 23.01.2020, both the parties argued in line with their written submissions. The Appellant argued that the Respondent issued the supplementary bill for retrospective recovery vide letter dated 18.04.2019 for the period from December 2015 to December 2017. Therefore, the billed amount becomes first due on 18.04.2019. As per Section 56(2), the Respondent is empowered to recover supplementary bill for 24 months prior to the date of issue of bill i.e. accordingly, the period will come to May 2017 to April 2019. Hence, the arrears claimed for the period from December 2015 to April 2017 (16 months) is liable to be set aside. The Appellant also argued that as per ATE Judgement, the Respondent can only prospectively bill the Appellant in case of escaped billing. The Appellant prayed that the Respondent be directed to revise the supplementary bill for the period of May 2017 to December 2017 without interest and DPC.

8. The Respondent stated during the hearing that the supply is used for 5 bungalows, 1 training hostel, 1 guest house and 1 building for its information centre. Hence, the Respondent correctly applied residential tariff i.e. LT-I for the Appellant from January 2018. The period of supplementary bill was taken 24 months prior to change of tariff category i.e. December 2015 to December 2017. The Appellant is a big consumer and hence the Respondent appointed a Committee to verify the use under intimation to the Appellant. There is slight delay for issuing the supplementary bill, however it was under coordination with the Appellant. The Forum, by its order dated 27.11.2019 has rightly decided the grievance. Considering all these facts, the Respondent prays for rejection of the representation.

Analysis and Ruling

9. Heard the parties and perused the documents on record. I noted that the Appellant is connected on 33 KV and not on 11 KV. It is an admitted position that the Appellant was billed at HT VI: HT-Group Housing Society (Residential) tariff category till December 2017. This tariff was changed to LT-1 (B) Residential from January 2018 post inspection on 22.11.2017 by the Flying Squad of the Respondent. Pursuant to this change of tariff category, the Respondent issued



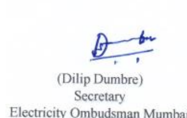
supplementary bill of Rs.181.92 lakh vide its letter dated 18.04.2019 towards tariff difference for the period December 2015 to December 2017. It is also noted that the bill of Rs.181.92 is debited in the bill of May 2019.

10. During the argument, the Appellant claimed relief under 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 on one hand while on the other, argued its case for relief under Section 56 (2) of the Act. When this particular fact was brought to its notice, the Appellant finally pressed for relief under Section 56 (2) only. Further, notwithstanding this, the order of the Commission and the Judgment of the ATE are no more relevant in view of the Larger Bench Judgment of the Bombay High Court interpreting Section 56 (2) of the Act.

11. The Respondent also claimed to have followed the provision of Section 56 (2) of the Act and issued the supplementary bill for the period December 2015 to December 2017 while the recovery on account of tariff differential is actually debited in the bill of May 2019.

12. The Section 56 (2) of the Act has been interpreted by the Larger Bench Judgment dated 12.03.2019 of the Bombay High Court in W.P. No. 10764 of 2011 with Other Writ Petitions. In accordance with this Judgment, 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. In this case, the Respondent has debited the bill in the month of May 2019, therefore, 24 months prior to it will start from May 2017. Thus, the retrospective recovery period will be limited to May 2017 to April 2019. However, the tariff is already changed to LT-I(B) from January 2018 onwards.

13. Secondly, as regards applicability of tariff, it is an admitted position that industrial activity never came up as thought of at the time of application for grant of electricity connection. The electricity was used for 5 bungalows, 1 training hostel, 1 guest house and 1 building for its information centre. The Appellant has not disputed this submission of the Respondent. Therefore, this is a case of mixed load.



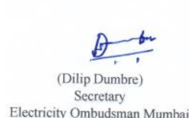
14. The Appellant has neither raised any dispute nor contested applicability of LT-I (B) Residential tariff category. The only issue the Appellant pressed during the argument and in its written submission is that the retrospective recovery towards tariff differential needs to be calculated by the Respondent for 24 months prior to the month in which the debit bill has been raised for it in accordance with Section 56 (2) of the Act which has been interpreted by the Larger Bench of Bombay High Court in W.P. No. 10764 of 2011 with other Writ Petitions. I, therefore, do not find it necessary to delve into the issue of appropriate applicability of tariff category. The relevant portion of the Section 56 (2) of the Act and the Larger Bench Judgment is quoted below.

Section 56 (2) of the Act

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

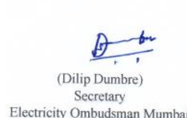
The Larger Bench Judgment dated 12.03.2019 of the Bombay High Court.

> *"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. 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



(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

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.

(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 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.

15. In view of the above discussions and Larger Bench Judgment, the Respondent can recover retrospective recovery from May 2017 to April 2019 and not December 2015 to December 2017 as the debit bill has been raised in the month of May 2019.

16. The prayer of the Appellant with respect to applicability of appropriate wheeling charge as it is connected on HT cannot be granted as the tariff order in Case No. 48 of 2016 and 195 of 2017 does not specifically provide this sort of dispensation for residential consumers connected on HT.

17. In view of the above discussions, I pass the following order:-

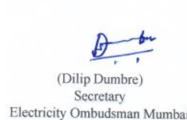
(a) The retrospective recovery period shall be from May 2017 to April 2019 only as against December 2015 to December 2017.

(b) The amount already deposited by the Appellant pursuant to the Forum's order needs to be adjusted in total recovery.

(c) DPC and interest, levied if any, is waived of. On the same line, no interest shall be paid to the Appellant if refund becomes due.

(d) Other prayers of the Appellant are rejected.

(e) Compliance to be submitted within two months from the date of issue of this order.



18. The Forum's order is therefore revised to the above extent.

19. While departing with the order, I am of the view that there could be many cases like this in the licensed area of the Respondent, therefore, the Respondent Head Office may look into all aspects of such cases of mixed load for appropriate applicability of tariff. The secretariat of this office is therefore directed to send one copy of this order to the Chairman and Managing Director of the Respondent.

20. The secretariat of this office is further directed to refund the amount of Rs.25000/- to the Appellant immediately.

Sd/-
(Deepak Lad)
Electricity Ombudsman (Mumbai)