BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 34 OF 2022

In the matter of waiver / refund of demand charges for the closure / gestation period.

Akay Organics Ltd…….. …….. …….. ……. ….. Appellant

V/s.

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

Appearances:

Appellant : L.S. Pardasaney, Chairman& Managing Director

Respondent : 1. Rajiv Waman, Asst. Law Officer, Vasai
2. Sanjay Raut, Assistant Engineer

Coram: Vandana Krishna (Retd I.A.S.)

Date of hearing: 26th May 2022

Date of Order : 28th June 2022

ORDER

The Representation is filed on 4th March 2022 under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the Review Order dated 24th February 2022 in Case No. 007 of 2022 and original Order dated 20th January 2022 in Case No. 106 of 2021 passed by the Consumer Grievance Redressal Forum, MSEDCL Vasai (the Forum). The Appellant paid deposit amount of Rs. 25000/- on 16.03.2022. The Representation was registered on 16.03.2022.

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2. The Forum, by its order dated 20.01.2022 has dismissed the grievance application of the Applicant in Case No. 106 of 2021 as the grievance was time barred as per Regulation 7.9(c). The Appellant filed the Review Application as per Regulation 10 of CGRF & EO Regulations 2020. The Forum by its Review Order dated 24.02.2022 has also dismissed the Review Application in Case No. 007 of 2022.

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

(i) The Appellant is an Industrial consumer (No. 003019014532) from 04.12.1987 with Sanctioned Load (SL) of 270 KW and Contract Demand (CD) of 120 kVA at present, at Plot No. G 8/3, Cross Road No.3, MIDC Industrial Area Tarapur, Boisar, Dist. Palghar.

(ii) The Appellant initially was a small-scale company promoted by technocrats with a peak turnover per year of under Rs. 3 crores, currently reduced to Rs. 56 lakhs. It was registered with the Board for Industrial and Financial Reconstruction (BIFR) as a Sick Company (Registered No 69/94) in 1994. The BIFR vide its order dated 24.05.2013 has sanctioned Scheme for Reliefs and Concessions as Sick Unit after lapse of about 17 years. The relevant portion of the Sanctioned Scheme of BIFR dated 24.05.2013 under Reliefs and Concessions from Govt of Maharashtra reads as under:

12 RELIEFS & CONCESSIONS

12.1 The rehabilitation scheme envisages the following relief and concessions from the parties concerned:

…. …….. ……..

"IV <u>STATE GOVERNMENT OF MAHARASHTRA</u>

a) To extend reliefs and concessions as applicable to the rehabilitation of sick units as per the government notification / policy in force, up to a period of 5 years from the cut-off date;

***b)** To accept payments towards dues of sales tax /electricity dues, if any, period of 5 years commencing from 2010-11.*

c) To consider to waive minimum demand charges, if any, for the closure / gestation period." …….. Emphasis added

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The BIFR Order was circulated to all concerned, including Directorate of Industries Maharashtra and the Chairman Maharashtra State Electricity Board. As per the Order of BIFR all parties concerned are directed as under:

"Accordingly the scheme is sanctioned for implementation by all concerned."

(iii) The Appellant made a representation to the Respondent for waiver and consequent refund of Minimum Demand Charges in compliance with the said Order of the BIFR, vide letter dated 08.12.2018 supplemented with application dated 09.09.2020. After considerable delay of 31 months, the Respondent rejected the application vide their letter dated 15.07.2021.

(iv) This decision of the Respondent appears mainly due to non-familiarity with Sick Industries Company Act 1985 (SICA) and resulting misinterpretation of the order of the BIFR dated 24.05.2013. This is evident from the opinion of the Law Department of the Respondent. The relevant portion of the same is reproduced below:

"Perused your letter the order of the Hon'ble BIFR and other documents. In the order of the Hon'ble BIFR there is no specific direction for refund of Demand Charges, but the wordings are to 'consider'. Therefore, its an administrative decision to be taken and there is no legal point involved. Had there been a specific direction there would not have been a second thought."

(v) Aggrieved with the rejection, the Appellant came across Respondent`s Portal giving an option of redressal of grievance through the "Internal Complaint Redressal System (ICRS)". Accordingly, the Appellant made the complaint under ICRS on.21.07.2021 with the expectation that the complaint shall be independently gone into by the relevant members of the ICRS Committee.

(vi) The Appellant diligently paid all the bills raised by the Respondent during the implementation of Rehabilitation Scheme in the gestation period, pending recommissioning of the plant and reasonable capacity utilization. However, the Appellant was constrained to stop paying electricity bills after initial period of Lockdown due to pandemic, as the amount due for refund (against Minimum Demand Charges continuously paid by the Appellant), pending compliance of BIFR order, amounted to more than Rs.26 lakhs, expecting Respondent to adjust the current bills against the refund due.

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(vii) During last 5 to 6 months Respondent`s Representative at Boisar was ordered to disconnect the power supply and every month the Appellant had to undergo an agony of trying to convince the Respondent officers at Vasai not to disconnect the power supply, pending the decision on its application for refund of dues, which was more than double the amount of unpaid bills (which included Minimum Demand Charges).

(viii) On rejection of its complaint with ICRS on 08.09.2021 the Appellant raised the grievance with the Forum vide Case No.106 of 2021 dated 14.10.2021. The same was dismissed by its order dated 20.01.2022. This unexpected rejection led the Appellant to explore the justification and correctness of the observations of the Forum supporting the rejection. It was given to understand that the issues and reasoning for rejection have been clearly dealt with by the Hon'ble Delhi High Court related to the BIFR Sanctioned Schemes. One such Judgement of Delhi High Court was discovered viz W.P. (C) 626/2014, C.M. Appl. 1246/2014 Union of India V/S Cimmco Ltd. and Ors. The Judgement contradicts each observation and reasoning cited by the Forum in their final order dated 20.01.2022 dismissing the application.

(ix) The Appellant thereafter filed Review Application in Case No. 007 of 2022 on 29.01.2022 in accordance with Regulation No 10.1(a), (b), (c). The said Review Application has been dismissed as non-maintainable vide the final order dated 24.02.2022.

(x) The sum and substance of the arguments against Forum's Review order is as follows:

- **Forum's observation in Review order:**

"b) ……..
On plain reading of Reg.10 of MERC (CGRF and EO) Regulations, 2020 and appreciation of ratio laid down in aforesaid judicial pronouncement it is clear ***that power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court.*** *It is not rehearing of an original matter. A repetition of all and overruled argument is not enough to reopen concluded adjudications."*

Appellant's Submission:

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Regulation 10.1(c) of the CGRF & EO Regulations 2020 clearly stipulates that the Appellant may file Review Application upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was passed.

On coming across the said Hon'ble Delhi High Court's Order, the Appellant felt that this newly available evidence should be brought before the Forum utilising the provision of Review Application instead of bypassing the Forum and directly going in Appeal with this Hon'ble Authority. Also, Appellant found error apparent on the face of the observations and reasoning made by the Forum which are described in the Review Application adequately.

- **Forum's observation in Review order:**

"C) *It is the case of review applicant that after the order dtd.20.01.2022 of this forum, the review applicant come across the judgment dtd. 28.02.2014 of Hon'ble Delhi High Court in the matter of W.P.No. (C) 626/2014, C.M.APPL.1246/2014, Union of India Vs. Cimmco Ltd and Ors which thrown the light upon the interpretation of the Words "to consider to waive" in Reliefs and Concessions under para 12 IV c of the Sanctioned Scheme Order dt. 24th May 2013 of BIFR. This is new and important matter and evidence which even after due diligence could not be produce when order by this forum was passed. In this respect it is pertinent to note that the MSEDCL vide Communication dtd. 15.06.2021 and thereafter IGRC by its order dtd. 08.09.2021 rejected the claim of refund on this ground also among all other grounds therefore this it cannot be said that this fact was not within the knowledge of review applicant till this forum decision dtd.20.01.2022. This forum has not rejected the grievance only on this sole ground. The Citation referred and relied is of year 2014 much prior to the order of this forum. This forum is of view that,* ***the discovery of any Citation or Case law could not be interpreted the discovery of new and important matter or evidence which could be produced even after due diligence at the time when order was passed for satisfaction of requirement to exercise the review power by this forum."***

Appellant's Submission:

From the submissions made in Observation No.1 it is clear that the ratio of Judgement cited by the Forum at Para No. 5 (c) which are based on General Law cannot be used to negate the Specific Law in the form of CGRF & EO Regulations 2020. Specially so when the requirements of regulation of 10.1 (c)

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and (b) are specifically met to enable validate Review Application. The Forum has referred to the part of the sentence, "not within his knowledge or could not be produced by him at the time when order was passed" in para10.1(c) of the regulations, as the knowledge of grounds of rejection by Respondent dated 15th June and ICRS by its order dated 08.09.2021 rejecting the claim of refund.

Appellant further stated that the Appellant Company is now a Micro scale industry with negligible resources, and as per the Regulations is not allowed to be represented by any advocate. Under such circumstances it is difficult for a technocrat promoted company to have knowledge and access to the relevant Court Judgements.

- **Forum's observation in Review order:**

"d) The review application of applicant is based on arguments that, the Words "to consider to waive" in Reliefs and Concessions under para 12 IV c of the Sanctioned Scheme Order dt. 24th May 2013 of BIFR have been interpreted by this forum to be advisory in nature and not mandatory direction but it was mandatory and binding on MSEDCL and Govt. of Maharashtra in support of this arguments the applicant referred and relied upon the Judgment dtd. 28.02.2014 of Hon'ble Delhi High Court in the matter of W.P.No.(C) 626/2014, C.M.APPL.1246/2014, Union of India Vs. Cimmco Ltd and Ors. With due respect to ***the ration laid down by Hon'ble Delhi High Court this forum is of view that the fact of present case is slightly different. In present case the question before the forum was whether the Words "to consider to waive" will also include "to refund" which was paid voluntarily without any protest or demure therefore this forum is of opinion that this case law will not applicable in present case."***

Appellant's Submission:

The Appellant did not misconstrue the words "to consider to waive". As per the said Judgement of Delhi High Court, the words "to Consider" and Consent obtained in terms of Sec 19 of SICA (Special Provisions Act), will not be treated as "recommendatory" but becomes a mandatory requirement of the parties concerned. The refund as per Appellant is a consequence of Waiver of Minimum Demand charges by Respondent during the gestation/ closure period, once BIFR order is complied with and implemented. As detailed in the Review Application, pending compliance and implementation of the BIFR Order by

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Respondent, the Appellant continued to pay the bills raised including the Minimum Demand Charges, from the fear of disconnection, and with the backing and assurance of the order of Hon'ble BIFR, which is required to be complied by all concerned parties.

When the Respondent bills are corrected and credit given in compliance with orders of Hon'ble BIFR, the account becomes surplus in favour of the Company resulting in impending refund. The Forum has evidently misconstrued the word "to refund" in its application to justify noncompliance of waiver of Minimum Demand Charges by Respondent.

- **Forum's observation in Review order:**

"e) It is further argument of review applicant that, Reliefs and Concessions granted to him under para 12 IV c of the Sanctioned Scheme Order dt. 24th May 2013 of BIFR is for closure/gestation period and gestation period is still continued therefore there is continuous cause of action. However, ***review applicant has not provided any concrete document to show that gestation period is still in force but on contrary during argument in answer to question asked by the Member (CPO) he fairly submitted that this concession was initially granted for period of 5 years.*** *Assuming without admitting this statement as true even then also 5 years expire in Year 2018. Therefore, the arguments of review applicant on points of limitation did not hold any water."*

Appellant's Submission:

As regards the observation on Limitation Clause, it may be noted from the direction of Hon'ble BIFR under para 12 (IV) (c) that the waiver of Minimum Demand charges is based on closure /gestation period and not limited to 5 yrs. The member of the Forum did ask the undersigned whether Sanctioned Schemes have any validity period to which the undersigned replied that generally they are valid for a period of 5 yrs. This statement of the undersigned has been misconstrued to interpret that the Relief and Concession under clause 12(IV)(c) where no time limit has been given and is based only on closure /gestation period, is valid for only 5 yrs.

(xi) The Appellant stated that one of the errors apparent in the order of Forum is that the power consumption is progressive (increasing). The application provides a

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Graphical View of the Maximum Demand during the month w.r.t the Time in months. One glance at the Graph makes it evident that the Maximum Demand readings are regressive (decreasing), and the Maximum Demand has reduced over a period from April 2013 to July 2020. Hon'ble Authority will appreciate that the operation of the Plant and capacity utilisation is dependent upon the utilisation of various equipment in the plant which is denoted by the Maximum Demand reading in each month's bill w.r.t the total connected load (270 KW). The graph clearly indicates that only 10 to 15% of the connected load has been utilised. This is due to the fact that Main Reactor which is heart of the Process Plant having connected power of 190 HP has not yet been recommissioned after Renovation. The latest Respondent bill for the month of January 2022 showing Maximum Demand of meagre 10.2KW as against connected load of 270 KW is kept on record.

(xii) As pointed out in submissions against observation No.1and 2 the knowledge as well as availability of the Judgement of Hon'ble Delhi High Court on various issues related to Appellant's grievances and the Reasoning and Observations of the Forum while rejecting the Application No. 106 of 2021, came to light and the copy was accessed only after the Forum's order dated 20.01.2022.The submissions made in the Review applications have been corroborated with the citations in the said Delhi High Court Judgement obtained subsequently. The arguments in Review Application are based on the observations made in the said Hon'ble Delhi High Court Judgement. Hence, the contention of the Forum is contrary to the facts.

(xiii) The Appellant therefore prays that the Hon'ble Authority to consider merits of the Appeal and grant reliefs as per the prayers contained in Review Application against Case No. 106 of 2021 and Ref No. 007 of 2022 dated 29.01.2022 which was as below:

Nature of Relief Sought:

a) To direct the Respondent to comply with the orders of the BIFR in letter and spirit by granting waiver of Minimum Demand Charges for the entire gestation period.

b) As a consequence of above, the extra payments of minimum demand charges made by the Company, pending compliance of BIFR order, against waiver of

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Minimum Demand Charges be refunded along with interest after adjusting corrected unpaid bills.

c) The Company be compensated for the mental and physical agony due to repeated attempts by MSEDCL to disconnect the power supply, as this Hon'ble Forum may deem fit.

d) Pending disposal of this complaint under CGRF, the department may kindly be directed not to take any coercive action including disconnecting the power supply.

4. The Respondent filed a reply by its letter dated 22.04.2022 stating in brief as under:

(i) The Appellant is an Industrial consumer (No. 003019014532) of the Respondent from 04.12.1987 with SL of 270 KW and CD of 120 kVA, at present, at Plot No. G 8/3, Cross Road No.3, MIDC Industrial Area Tarapur, Boisar, Dist. Palghar.

(ii) The Appellant, by its application dated 08.12.2019 submitted the BIFR Sanctioned Scheme Order dated 24.05.2013 to the Respondent. On the basis of the said Order, the Respondent was asked to refund the demand charges levied during the period from April 2013 to November 2018.

(iii) It is stated that, the electricity bill in respect of which refund of demand charges are claimed was already paid by the Appellant including demand charges without any demure and protest. The Appellant did not apply for waiver of demand charges at the relevant time in the year 2013 and then till 2019.The Appellant after a lapse of 7-8 years has suddenly raised the issue.

(iv) The BIFR in its Sanction Scheme dated 24.05.2013 at part IV granted a few concessions and directed the Govt. of Maharashtra at para (C) to consider to waive minimum demand charges, if any, for the closure/gestation period. The above direction is not in nature mandatory direction. It is advisory in nature, required state Govt. to consider it as per rules.

(v) The Appellant had varying consumption during the period from April 2013 to November 2018, and it was an ongoing concern during the period mentioned by it. It was not a closed unit. The Appellant has paid all charges including demand charges prior and subsequent to the Sanctioned scheme of BIFR i.e., during the

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period from 2013 to 2019. The Appellant has accepted all subsequent bills issued after BIFR order and paid the same without any demure and protest. The demand charges were levied as per relevant tariff order of the Commission, and paid by the Appellant, and now cannot be waived off and refunded.

(vi) That, the present case has been filed by the Appellant for compliance of the BIFR sanctioned scheme circulated vide order dated 24.05.2013 in Case No.69 of 1994. The Appellant did not have any other prayer, or sought any other relief except the compliance of BIFR order. The BIFR is not the creation of the Electricity Act, 2003(the Act) or Rules Regulations made thereunder. The remedy in respect of non-compliance of BIFR order lies elsewhere. The present grievance redressal mechanism is created as per the Regulations of the Maharashtra Electricity Regulatory Commission (the Commission) in exercise of the powers conferred by sub-sections (r) and (s) of Section 181 of the Act.

(vii) The Respondent referred to the definition of "Grievance" under Regulation 2(2.1) (c) CGRF & EO Regulations 2020. The instant representation does not fall within the definition of the grievance. It is stated that, by no stretch of imagination the grievance of Appellant, mentioned above, would be covered by this definition of "Grievance". Consumer's grievance contemplated under the Regulations is basically a complaint about fault or inadequacy in quality of performance of the Electricity Distribution Company. In this case, admittedly, there is no grievance that performance of the Respondent, as Distribution Licensee, had been imperfect or otherwise. The grievance of Appellant is in respect of noncompliance of BIFR order. So, the grievance would not fall within the four corners of the term "grievance" defined under the Regulations.

(viii) The Bombay High Court Nagpur Bench in its Judgment dated 08.01.2020 in W.P. No.1588 of 2019, in Case of MSEDCL Vs. Mahamaya Agro Industries has upheld the above ruling, and held that the Appellant's conduct to ask for refund of costs of infrastructure which he voluntarily incurred in order to get supply is inappropriate and unethical. Similarly, in the present case, asking for refund of amount which Appellant already paid to Respondent is unethical.

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(ix) The Respondent referred to the Regulation 7.9 of CGRF & EO Regulations 2020 where the limitation period is specified, that the Forum shall not admit any grievance unless it is filed within 2 years from the date on which the cause of action has arisen. Therefore, in view of the said Regulation the claim of the Appellant is not maintainable. Appellant has filed complaint in respect of compliance of BIFR order dated 24.05.2013. If the Appellant was aggrieved with the non-compliance of BIFR order, it should have raised grievance then, but on the contrary the Appellant has paid the energy bills received prior to and subsequent to the order of BIFR, and never objected till a long lapse of time, and suddenly awakened after 7-8 years and is now claiming the refund of amount of Demand charges based on BIFR order. The cause of action to file complaint arose in June 2013 for which no complaint was filed in time. The grievance of the Appellant in respect of compliance of order of BIFR dated 24.05.2013 is beyond two years, and granting relief beyond two years is not in consonance with Regulation 7.9 of CGRF & EO Regulations 2020. The Respondent states that, Appellant has agitated claims which he had not pursued. The Appellant was not vigilant but was content to be dormant, and chose to sit on the fence till long lapse of time.

(x) The Respondent referred to the Judgement dated 21.08.2018 of Bombay High Court Aurangabad Bench in W.P.No.6859 of 2017 in Case of MSEDCL V/s. Jawhar Shetkari Soot Girni Ltd. The High Court has discussed the order of HPCL and M/s.Shilpa Steel Pvt. and held that cause of action would mean an actual date of legal injury/grievance caused to Appellant and time limit of two years will start from there, and journey of grievance through IGRC should reach to the Forum within period of 2 years from cause of action. The Respondent would like to refer to and rely on this decision. The Electricity Ombudsman by its order dated 16.08.2019 upheld above view and dismissed the Representation No.68, 69 & 71 of 2019 in respect of M/s. G. M. Syntex. The Respondent referred the Judgement dated 08.01.2020 of the Bombay High Court Nagpur Bench in W.P.No.1588 of 2019 in Case of MSEDCL V/s. Mahamaya Agro Industries. The High Court has upheld the above view and held that limitation to file grievance before the Forum is two years from date of cause of action.

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(xi) It is stated that, there was no specific mention of which is the 'Gestation Period 'or the direction of refund of the demand charges in the BFIR order, therefore the request of Appellant is beyond the order of BFIR. Therefore, it cannot be considered and allowed. It is settled principle of law that the party to case cannot ask for that which was not mentioned or directed in order.

(xii) The Appellant approached the Forum on 12.03.2021. The Forum, by its order dated 20.01.2022 has dismissed the grievance application as grievance was time barred as per Regulation 7.9(c). The Appellant filed the Review Application as per Regulation 10 of CGRF & EO Regulations 2020. The Forum by its Review Order dated 24.02.2022 has rightly dismissed the Review Application in Case No. 007 of 2022.

(xiii) In view of above, the Respondent prays that the Representation of the Appellant be rejected.

5. E-hearing was held on 26.05.2022 through video conference. The Appellant argued in line with its written submissions. The Appellant argued that it is a chemical unit at Tarapur from the year 1989, manufacturing Sodium Carboxy Methyl Cellulose (CMC), having clients such as ONGC, Procter & Gamble, etc. However, its network got eroded and was registered as a sick unit in 1994 in BIFR. BIFR is a statutory court adjudicating SICA cases. During the hearing before BIFR, the Director of Industries represented the Government of Maharashtra. It seems that there was no direct representative of MSEDCL, the current Respondent Company, which came into existence in June 2005. Ultimately, BIFR issued its order dated 24.05.2013. Old staff of 70 years & above were removed from the unit, thus total strength of staff was reduced. This appeal centres on non-compliance of BIFR order by the Respondent. The Respondent allegedly did not take the order in the right spirit, and refused the concession of due to misinterpretation of BIFR order.

6. The Appellant cited the Judgement of Delhi High Court in W.P. (C) 626/2014in Case of Union of India V/S Cimmco Ltd. and Ors. The Appellant put on record the following directions of the Judgement of the High Court during argument.

> " …….. *the second AAIFR order dated 7.5.2013 have been three-fold:first, the Sanctioned Scheme – having been circulated to the Railways for its consent – is binding under Section 19, SICA, and Section 19 envisages concessions such as those incorporated in Clause 11.6;*

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……. ……. ……..

finally, Clause 11.6 is mandatory, and the use of the words "to consider" does not make it merely recommendatory."

The Appellant argued that the words "to consider" in the clause no 12 IV c of the Sanctioned Scheme giving rise to ambiguity, have been duly adjudicated by the said judgment of Delhi High Court. As per the said judgment, the words "to consider" therefore do not impart any discretionary powers to the concerned parties, and cannot be withdrawn by the parties after having given the consent under Section 19 after sanction of the Scheme.

The Appellant argued and put on record the following portion of the said Judgement.

"Moreover, the Sanctioned Scheme must operate – and those obligated by it to provide concessions must do so – for the entire period of the scheme, which in this case is this still operational. The scheme – after proper passage through the BIFR in terms of Sections 18 and 19 of the SICA – acquires a binding character backed by statute, and cannot be ignored by parties on the basis of individual assessment of the financials of a company, or the propriety of its continued application. Indeed, if any objections do arise, the proper forum for redress remains the BIFR, as opposed to unilateral determinations by the parties concerned. This conclusion is reinforced by the decision of a Division Bench of this Court in DGIT (Admn) and Anr. v. BIFR and Ors., [2012] 171 Comp Case 147 (Delhi):

> *".....One has to keep in mind that any scheme is a package to rehabilitate the company. It is possible that such rehabilitation may result in early success or at times may take a greater period of time to achieve financial stability. If the argument of the Department were to be accepted it would imply that if a sick industrial company achieves success in making its net worth positive, all benefits of a sanctioned scheme would stand withdrawn whether exhausted or not, even though the emergence from sickness, and its continued health is dependent on the sanctioned scheme being fully implemented. This would, defeat the very purpose of formulating a sanctioned scheme. "*

The Appellant argued that it is well-settled that the mere fact that a sick company starts to perform better is not a ground to set aside the Sanctioned Scheme.

The following points were also stated during the arguments of the Appellant :-

- The Hon'ble Delhi High Court in the same judgment has asserted that once the Scheme has been sanctioned after circulation of Draft Rehabilitation Scheme (DRS) to all concerned and consent obtained under Section 19 of the SICA, the

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concessions though worded as above, become mandatory and not recommendatory, and are binding on all parties concerned.

- This is made clear by Clause 2 of Section 19 of the SICA, which states that the DRS is to be circulated in order to obtain consent. Once consent is obtained, however, the provision becomes binding for the period of the sanctioned scheme. Crucially, in this regard, Section 19(2) of the SICA categorically provides that "if no consent is received within such period or further period, it shall be deemed that consent has been given."
- As per the said judgment the concessions granted are applicable for the entire period of operation, and those obligated by it to provide concessions do so for the entire period of the scheme.
- The gestation period pertaining to the Appellant is still ongoing.
- The provisions of the Scheme being mandatory and binding to the Respondent. The Appellant is not mandated /obliged to seek the concessions afresh from the Respondent after sanction of the Scheme and circulation of the same to all concerned including MSEDCL.
- The binding nature of the provisions of the Scheme do not make it obligatory on the part of Appellant to make payments "under protest".
- Similar observations and views have been expressed by Hon'ble Delhi High Court in the case of WPC 4750/2001 in Case of Air Control and Chemical Engineering Co. Ltd. V/s. Union of India (UOI) and Ors.

7. Considering the points referred as above and arguments at length, the Appellant prays that the Respondent be directed

a. to comply with the orders of the BIFR in letter and spirit by granting waiver of Minimum Demand Charges for the entire gestation period.
b. to refund the extra payments made by the Appellant, pending compliance of BIFR order, against waiver of Minimum Demand Charges along with interest after adjusting corrected unpaid bills.
c. not to take any coercive action including disconnecting the power supply.

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8. The Respondent argued in line with its written submission that the Appellant, by its application dated 08.12.2019, has requested the Respondent for implementation of the order of BIFR Sanctioned Scheme dated 24.05.2013, and for refund of the demand charges levied during the period from Apr. 2013 to Nov.2018. The Appellant has paid all charges including Demand charges prior to and subsequent to the Sanctioned scheme of BIFR without any demure and protest. The Demand charges are levied as per relevant tariff order of the Commission and are paid by the Appellant and could not be waived off and refunded. The Appellant did not apply for waiver of demand charges at the relevant time in the year 2013 and then till 2019.The Appellant after a lapse of 7-8 years has suddenly raised the issue. Also, the direction in BIFR Order is not in nature mandatory, but it is advisory in nature, and requires the State Govt. to consider it as per rules.

9. The Respondent argued that the Appellant did not have any other complaint and sought any relief except the compliance of BIFR order. The BIFR is not a creation of the Electricity Act, 2003 or Rules Regulations made thereunder. The remedy in respect of so called non-compliance of BIFR order lies elsewhere, specifically before the National Company Law Tribunal(the NCLT) or the Appellate Authority i.e., the National Company Law Appellate Tribunal (the NCLAT).The current grievance redressal mechanism is created as per the Regulations of the Maharashtra Electricity Regulatory Commission in exercise of the powers conferred by sub-sections (r) and (s) of Section 181 of the Electricity Act. The instant representation does not fall within the definition of 'grievance' under the Electricity Act. It is argued that, by no stretch of imagination the grievance of Appellant would be covered by the definition of 'Grievance'. There is no complaint about fault or inadequacy in quality of performance of the Respondent. The grievance of Appellant is in respect of noncompliance of BIFR order. So, the grievance would not fall within the four corners of the term "grievance" defined under the Regulations.

10. The Respondent argued that the Forum cannot admit any grievance unless it is filed within 2 years from the date on which the cause of action has arisen as per Regulation 7.9 of CGRF & EO Regulations 2020. Therefore, in view of the said Regulation the claim of the

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Appellant is not maintainable. Appellant has filed complaint of noncompliance of BIFR order dated 24.05.2013. If the Appellant was aggrieved with the non-compliance of BIFR order, it should have raised the grievance within time. But it has raised the issue after 7-8 years, and is claiming the refund of amount of Demand charges based on BIFR order. The Respondent referred the Judgement dated 21.08.2018 of Bombay High Court Aurangabad Bench in W.P.No.6859 of 2017 in Case of MSEDCL V/s. Jawhar Shetkari Soot Girni Ltd. The High Court has held that cause of action would mean an actual date of legal injury/grievance caused to the Appellant and time limit of two years will start there from and journey of grievance which should reach to the Forum within period of 2 years from cause of action.

It is also argued that, there was no specific direction to refund the demand charges in the BFIR order, therefore the request of Appellant is beyond the order of BIFR.

The Respondent argued that the Central Government dissolved BIFR on 01.12.2016, and referred all its proceedings to the National Company Law Tribunal and National Company Law Appellate Tribunal as per provisions of Insolvency and Bankruptcy Code. The Respondent stated that, therefore, the NCLAT was the right Appellate Authority before which the Appellant should have gone.

In view of above, the Respondent prays that the Representation of the Appellant be rejected.

11. Post hearing, the Respondent MSEDCL was directed by letter dated 03.06.2022 to explain the policy for relief and concession to sick industries after its trifurcation from the erstwhile MSEB in the year 2005. Accordingly, the Respondent visited this office on 16.06.2022 and explained the said policy. The Respondent also stated that due to the formation of Maharashtra Electricity Regulatory Commission and thereafter the enactment of the Electricity Act, 2003, the Corporate office of the Respondent has carried out review of the stand taken previously by the MSEB in the subject matter. Thereafter, the Executive Director (Dist. Comm. & Co.Ord.) by its letter dated 02.05.2006 had informed the Secretary (Energy) of Industries, Energy and Labour Department, Government of Maharashtra regarding the stand to be taken by the Respondent which is under:

(a) MSEDCL is unable to sacrifice any of its dues.

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(b) GOM may grant any rehabilitation scheme already approved by it vide above references.

(c) The actual amount of sacrifice / subsidy worked out by MSEDCL as per the package at Sr. No. (b) above in respect of the particular company will have to be deposited by the GOM in advance with MSEDCL.

(d) The advance granted by the GOM to MSEDCL will be paid by the company to the MSEDCL as per the provisions of package when the company turns around and the said amount will be paid as and when recovered.

In short, the stand and policy of MSEDCL is that unless the amount of intended relief is first received from the Government in advance, no relief can be provided to any sick unit in terms of waiver or reduction of electricity charges. In the instant case, no such relief or subsidy has been received by MSEDCL from the Government for granting relief to the Appellant. It is not even clear whether the Appellant has approached the Government for such relief, nor is there any G.R. or Government Order on record granting such relief to the Appellant as a sick unit. In view of this, the Respondent has prayed that the instant representation is not maintainable.

Analysis and Ruling

12. Heard the parties and perused the documents on record. The Appellant, Akay Organics Ltd. is an Industrial consumer (No. 003019014532) of the Respondent from 04.12.1987 with Sanctioned Load of 270 KW and CD of 120 kVA (at present) at Plot No G 8/3, Cross Road No.3, MIDC Industrial Area Tarapur, Boisar.

13. The Respondent contended that, the Appellant, by its application dated 08.12.2019 has submitted the BIFR Sanctioned Scheme Order dated 24.05.2013 of more than 6 years ago to the Respondent and claimed the refund of the demand charges levied during the period from Apr. 2013 to Nov.2018. The BIFR in its Sanction Scheme dated 24.05.2013 at part IV granted concessions and directed the Govt. of Maharashtra at para (C) to consider waiving of minimum

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demand charges, if any for the closure/gestation period. This gestation period has not been defined in the order and is open to interpretation and vague. Further, the above direction is advisory in nature, and requires the State Government to consider it as per its policy in force. This policy requires the State Government to give the funds to MSEDCL for any intended relief to sick units. MSEDCL cannot be expected to give relief out of its own fund. In the instant case, the Government has not provided any funds to MSEDCL for this purpose.

14. A perusal of Annexure I and II submitted by the Appellant i.e., the table of electricity consumption from April 2013 to July 2020 shows that for the initial period from July 2013 to April 2014, consumption was on the higher side ranging from about 7000 to 13000 units. Thereafter, in May 2014, consumption reduced, ranging from about 5000 to 7000 units and this trend continued till July 2020 with some variations. If it is to be decided on generous terms as to when the cause of action arose from the point of view of the Appellant, it can be said that the cause arose when it came to the notice of the Appellant that the electricity consumption trend had consistently reduced. Since the consumption reduced from May 2014 and was consistently lower henceforth, it can be said that the cause of action arose around May 2015. By this time, the trend of lower consumption for the past year should have been clear to the Appellant, and therefore, he should have raised the grievance at the most within two years from May 2015 i.e. latest by May 2017. However, the Appellant continued to pay the bills without question right till about November 2018, beyond the limitation period, even when such limitation period is counted generously from May 2014 or May 2015. If the limitation period is counted very rigorously, it has to be actually counted right from the date of order of BIFR i.e. from May 2013, in which case, the limitation period ends in May 2015 itself. Either way, it is clear that the Appellant did not raise the grievance either till May 2015 or till May 2017. Therefore, the grievance was clearly raised after the limitation period.

15. The other issues which arose from this case are as follows:

(i) Is the Forum and the Electricity Ombudsman, the appropriate forum to raise this grievance, given that the grievance does not fit within the definition mentioned in the Regulation under the CGRF & EO Regulations?

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The Respondent has argued that the Appellant should have approached the right forum, which is the NCLT or its Appellate Authority, NCLAT and not this current grievance mechanism. It is a fact that the BIFR was winded up on 01.12.2016 and all its proceedings were referred to the NCLT. This fact was left unmentioned by the Appellant, nor did he elaborate on the appropriate Appellate Authority above NCLT.

(ii) However, even if the benefit of doubt is given to the Appellant and he is allowed to raise this grievance before the Forum and the Electricity Ombudsman, the related issues arose as follows:

Is the BIFR order applicable to and binding on the current Respondent i.e. MSEDCL, given that it was not even a direct party before the original BIFR hearing? It is seen that the Respondent parties before the BIFR included Development Commissioner of Industries from the Industries department, and MSEB from the Energy Department of Government of Maharashtra. However, MSEB itself was trifurcated into three companies, and thus ceased to exist in the year 2005. Out of these, one of its companies, MSEDCL, the current Respondent came into existence only in 2005. However, somehow, MSEDCL was never made a direct party in the BIFR proceedings, and therefore, it seems that it was never given an opportunity to give its say before the BIFR on the issues mentioned above.

It may be argued that the Government was represented collectively and adequately before the BIFR through the Development Commissioner (Industries) or Directorate of Industries. If that is the case, it would be expected that the Directorate of Industries would have conveyed the order of the BIFR to the appropriate party i.e. to MSEDCL. This did not happen. Nowhere has the Appellant brought on record any correspondence or intimation made by the Directorate of Industries to Energy department or to MSEDCL, asking them to waive the demand charges of the Appellant.

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In fact, the Department of Energy or MSEDCL are not the competent parties to interpret the order of BIFR in terms of its technicalities; specifically, MSEDCL cannot be expected to interpret the meaning or intention of the "Closure / gestation period" as mentioned in the BIFR order. This seems to be a major unresolved issue in the order of the BIFR. Who is to decide the closure / gestation period? Ideally, this period should have been mentioned in the BIFR order itself, but this was not done. It is not clear whether this gestation period of the declared sick industrial unit refers to the past period, future period or both. How long is the gestation period expected to continue? It is not clear whether the gestation period continues till today, or whether it will continue in the future, and for how long? During oral arguments, it was indicated by the Appellant that 'gestation period' means the period till commissioning and full capacity utilisation of the plant. However, there are no documents to support this contention. The Appellant has interpreted the gestation period in its own interest, and prays before the Electricity Ombudsman that the gestation period be counted till the current period. The question is, who determines this period, or even the criteria based on which the gestation period is to be determined? The Appellant has used certain criteria, such as regressive / decreasing trend of electricity consumption through the table and graph attached. However, who is to decide whether this criterion is the correct criterion to determine the gestation period. Nowhere is this criterion mentioned in the order of the BIFR clearly, nor is there any correspondence or documents on record from the Directorate of Industries mentioning the criteria to be followed while determining the gestation period.

The words used in BIFR order are "Closure / gestation period". It is clear that "Closure" is not applicable, as the unit was admittedly never closed, only running at less than full capacity. Therefore, we come to the term "gestation period" Who is to determine what percentage capacity will qualify it to be declared under gestation? Again, there is no clarity in the BIFR Order on this aspect. The Appellant has submitted no documents to indicate the legal definition and criteria

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of 'gestation period'. For example, if the unit is running at 50% capacity, should it be considered as gestation period?

In fact, it can be argued that the gestation period indicated in the BIFR order was a period of five years. This period of five years has been mentioned in Section 12.1 IV (a) and (b) of the BIFR order, which can be interpreted to apply to (c) also. If so, this gestation period would have expired in May 2018, since the order of BIFR order is dated 24.05.2013. Thus, it is not clear on what grounds the Appellant is contending that the gestation period continues till today. This Forum is not the appropriate authority to go into the details of interpretation of gestation period. Suffice it to say that even with the best of intentions to implement the order of BIFR, it becomes impossible to implement it unless the gestation period is specified.

The Appellant has relied on the judgment of the Delhi High Court in W.P. No. (C) 626/2014, C.M.APPL.1246/2014, Union of India V/s. Cimmco Ltd and Ors, in order to argue that the words "to consider" cannot be interpreted as discretionary but that the BIFR order is binding on all the concerned parties. Even if this argument is allowed and the order of the Hon'ble Delhi High Court is accepted, the main underlying issue of the gestation period, as stated above, will remain, on which the original BIFR order itself is not clear or self-explanatory. Therefore, it is not clear how to implement it, specifically with regard to the determination of the gestation period.

16. The demand charges are levied as per relevant tariff order of the Commission. The major period of the Appellant for levying demand charges is covered by the Tariff orders of the Maharashtra Electricity Regulatory Commission and the relevant portion of billing of contract demand is reproduced as below:

1. Multi Year Tariff Order of MSEDCL for the period from FY 2016-17 to FY 2019-20

Billing Demand - HT tariff categories Billing Demand

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for HT I: Industry, HT II: Commercial, HT III Railway/Metro/Monorail, HT IV: Public Water Works, HT V: Agriculture, HT VI: Group Housing Society (Residential), HT VIII: Temporary Supply, HT IX: Public Services.
Monthly Billing Demand will be the higher of the following:
a) Actual Maximum Demand recorded in the month during 0600 hours to 2200 hours;
b) 75% of the highest Billing Demand recorded during the preceding eleven months, subject to the limit of Contract Demand.

2. Mid-Term Review Order for MSEDCL for FY 2016-17 to FY 2019-20

Billing Demand - HT tariff categories
Billing Demand for HT I: Industry, HT II: Commercial, HT III Railway/Metro/Monorail, HT IV: Public Water Works, HT V: Agriculture, HT VI: Group Housing Society (Residential), HT VIII: Temporary Supply, HT IX: Public Services, HT X: Electric Vehicle Charging Station
Monthly Billing Demand will be the higher of the following:
a) Actual Maximum Demand recorded in the month during 0600 hours to 2200 hours;
b) 75% of the highest Billing Demand recorded during the preceding eleven months, subject to the limit of Contract Demand;
c) 50% of the Contract Demand.
Note:
- Only the Demand registered during the period 0600 to 2200 Hrs. will be considered for determination of the Billing Demand.
- In case of a change in Contract Demand, the above period will be reckoned from the month following the month in which the change of Contract Demand is effected.

3. Multi Year Tariff Order of MSEDCL for FY 2020-21 to FY 2024-25

Billing Demand - HT tariff categories
Billing Demand for HT I: Industry, HT II: Commercial, HT III Railway/Metro/Monorail, HT IV: Public Water Works, HT V: Agriculture, HT VI: Group Housing Society (Residential),
HT VIII: Public Services and HT IX: HT – Electric Vehicle Charging Station
MYT Order of MSEDCL for FY 2020-21 to FY 2024-25
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Monthly Billing Demand will be the higher of the following:
a. Actual Maximum Demand recorded in the month during 0600 hours to 2200 hours;
b. 75% of the highest Billing Demand recorded during the preceding eleven months, subject to the limit of Contract Demand;
*c. 55% of the Contract Demand.**
**For FY 2020-21: 55%, FY 2021-22: 60%, FY 2022-23: 65%, FY 2023-24: 70%,*

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FY 2024-25: 75%
Note:
- Only the Demand registered during the period 0600 to 2200 Hrs. will be considered for determination of the Billing Demand.
- In case of a change in Contract Demand, the above period will be reckoned from the month following the month in which the change of Contract Demand is effected.

17. It is clear that the electricity consumption of the Appellant reduced right from May 2014. At that point of time, the Appellant should have monitored its electricity consumption as against its contract demand. Within a few months, it would have been clear that the unit is functioning at less capacity, and therefore the electricity consumption is consistently lower. Therefore, at that point of time, the Appellant could have reduced its CD, so that the minimum demand charges would also be reduced. Specifically, it is seen that the sanctioned CD was 250 kVA, however, actual recorded CD was 30 to 50 kVA. At this point of time, the Appellant could have reduced its sanctioned CD to about 70 to 80 kVA, and accordingly his bill could have reduced. Had the Appellant applied for lower sanctioned CD in time, it would have been approved within the second billing cycle, the amount of minimum demand charges would have reduced, and there would have been no question of raising the grievance in the first place. Even now, if the Appellant reduces his sanctioned CD, his future bills can be reduced.

18. On 01.12.2016, the Central Government dissolved the BIFR and referred all proceedings to the National Company Law Tribunal and the National Company Law Appellate Tribunal as per provisions of Insolvency and Bankruptcy Code. The Respondent contended that this particular grievance does not come within the definition of grievance. The definition of grievance as per Regulation 2.1(e) of CGRF & EO Regulations 2020 is quoted as below:

"2 Definitions
2.1 In these Regulations, unless the context otherwise requires –
…… ……. ……. ……. ……. …….
(e) *"**Grievance**" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance, which has been undertaken to be performed by a Distribution Licensee in pursuance of a licence, contract, agreement or under the Electricity Supply Code or in relation to Standards of Performance of Distribution Licensees as specified by the Commission and includes inter alia Grievances in respect of non-compliance of any Order of the Commission or any action to be taken in pursuance thereof, which are within the jurisdiction of the Forum or Electricity Ombudsman, as the case may be;"*

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The main prayer of the Appellant is to direct the Respondent to comply with the orders of the BIFR by granting waiver of Minimum Demand Charges for the entire gestation period. It is our ruling that the instant representation does not fall within the definition of 'grievance' under the Electricity Act, 2003 and Regulations thereunder made by the Maharashtra Electricity Regulatory Commission.

19. This apart, as already discussed previously, another important fact is that the Appellant approached the Forum after two years from the cause of action. The erstwhile Regulation 6.6 of CGRF & EO Regulations 2006, and now Regulation 7.8 of CGRF & EO Regulations 2020 is quoted below: -

> *"The Forum shall not admit any Grievance unless it is filed within two (2) years from the date on which the cause of action has arisen*."

The Appellant approached the ICRC on 28.08.2019 on a grievance related to the period from April 2013 to November 2018, where the cause of action has arisen as per BIFR Order dated 24.05.2013. The Appellant approached the Forum on 21.10.2021 and the Forum has issued its order on 21.10.2021. It is mandatory that the Appellant should approach the Forum within two (2) years from the date on which the cause of action has arisen. This Regulation is appropriately evaluated in W.P. No. 6859, 6860, 6861 and 6862 of 2017 decided on 21.08.2018 by the Hon'ble Bombay High Court, Bench at Aurangabad which is very much relevant to the instant Representation. The relevant portion of the Judgment is quoted below:-

> *"37. As such, owing to these distinguishing features in the Electricity Act r/w the Regulations and from the facts before the Hon'ble Supreme Court in the S.S. Rathore case (supra), it becomes necessary to reconcile Regulation 6.2 and 6.4 with 6.6 and 6.7. The Law of interpretations mandates that the interpretation of the provisions of the statutes should be such that while appreciating one provision, the meaning lend to the said provision should not render any other provision nugatory. In short, while dealing with such provisions, the interpretation should lead to a harmonious meaning in order to avoid violence to any particular provision. Needless to state, if it is inevitable, a Court may strike down a Regulation or a Rule as being inconsistent/incompatible to the Statutes. In no circumstances, the rules or the regulations would override the statutory provisions of an enactment which is a piece of parliamentary legislation.*
> *38. While considering the Law of Interpretation of Statutes, the Apex Court has concluded in the matter of Progressive Education Society and another Vs. Rajendra and another [(2008) 3 SCC 310] that while embarking upon the exercise of interpretation of statutes, aids like rules framed under the Statute have to be considered. However, there must be a harmonious*

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construction while interpreting the statute alongwith the rules. While concluding the effect of the rules on the statute, the Hon'ble Apex Court observed in paragraph No.17 that the rules cannot override the provisions of the Act.

39. In the matter of Security Association of India and another Vs. Union of India and others, the Hon'ble Apex Court held that it is a well established principle that there is a presumption towards the constitutionality of a statute and the Courts should proceed to construe a statute with a view to uphold its constitutionality. Several attempts should be made to reconcile a conflict between the two statutes by harmonious constructions of the provisions contained in the conflicting statutes.

42. I have concluded on the basis of the specific facts of these cases that once the FAC Bill is raised by the Company and the said amount has to be deposited by the consumer to avoid disconnection of the electricity supply, the consumer cannot pretend that he was not aware of the cause of action."

As such and in order to ensure that Section 42 (5) of the Act and Regulation is adhered to, we are of the view that, even if we consider that the CGRF is the right and appropriate Forum to approach as contended by the Appellant, the consumer has to approach the Forum within the period of 2 years from the date of the cause of action. We hold that in this case, the cause of action arose on 24.05.2013, or at the most, May 2015. The Appellant approached the Forum on 21.10.2021, therefore, at the most, a grievance from October 2019 onwards can be considered. The grievance case filed by the Appellant is therefore rejected for being beyond the limitation period. The Forum has rightly decided the grievance. Hence, it is not necessary to interfere in the order of the Forum.

20. In view of the above, the Representation of the Appellant is rejected. However, the Appellant is at liberty to approach the appropriate authority. The Representation is disposed of accordingly.

21. The secretariat of this office is directed to refund the amount of Rs.25000/- deposited by the Appellant by way of adjustment in the ensuing bills.

Sd/-
(Vandana Krishna)
Electricity Ombudsman (Mumbai)

(Dilip Dumbre)
Secretary
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