

RECORD OF PROCEEDINGS

DATE OF HEARING : August 14, 2007 at 13.00 hrs
CASE No. : 27 of 2007
COMPLAINANTS : M/s. Eurotex Industries & Exports Limited
("Eurotex")
RESPONDENTS : Maharashtra State Electricity Distribution Company
Limited ("MSEDCL")

MATTER : Complaint filed by Eurotex seeking enforcement of
the Order passed by the Commission on May 21,
2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of
2003, refund of overcharged amounts paid under
protest, and benefits of load factor incentives and
discounts which have been disallowed by MSEDCL

CORAM : Chairman & Members.

Eurotex filed a complaint on June 28, 2007 under Sections 142 and 146 of the EA 2003, seeking enforcement of the Order passed by the Commission on May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003 (*in the matter of certain conditionalities applied by MSEB to Captive Power Plant consent holders and related matters*), refund of overcharged amounts paid under protest, and benefits of load factor incentives and discounts which have been disallowed by MSEDCL. The Commission scheduled the hearing in the matter for August 14, 2007 in the presence of MSEDCL and four consumer representatives authorized on a standing basis under the EA 2003. Notices were issued accordingly.

2. At the hearing held in the matter on August 14, 2007, Smt. Deepa Chawan, Counsel for MSEDCL, sought an adjournment of the hearing in view of appellate proceedings that have been initiated by MSEDCL before the Hon'ble Supreme Court on the judgment dated May 30, 2007 passed by the Appellate Tribunal for Electricity ("ATE") in Appeal No. 29 of 2007 [*MSEDCL vs. MERC and Ors.*]. Shri. Haresh Jagtiani, Counsel for Eurotex, strongly objected to the request of Smt. Deepa Chawan.

3. Shri. Jagtiani submitted that the present complaint has been filed by Eurotex seeking enforcement of the specific directives issued under Order dated May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003, which were upheld by the ATE in Appeal No. 29 of 2007 vide its order dated May 30, 2007. Referring to the averments made in the complaint, Shri. Jagtiani submitted that the Commission needs to consider three specific grievances of Eurotex while adjudicating the present complaint. Firstly, vide letter dated January 7, 1998, the erstwhile Maharashtra State Electricity Board ("MSEB") had granted an official sanction to Eurotex to set up a captive power plant ("CPP") and accordingly reduce their contract demand from 5300 kVA to 3000 kVA. However, after Eurotex had set up CPPs and reduced their contract demand from 5300 kVA to 3000

kVA, the erstwhile MSEB continued issuing energy bills to Eurotex based on the earlier contract demand of 5300 kVA. Secondly, as submitted by Shri. Jagtiani, Eurotex had applied to the erstwhile MSEB for an official permission to draw energy from one CPP situated at Plot No. E-23 to another CPP situated at Plot No. E-1, both located within the same unit. While no official permission was provided by the erstwhile MSEB, the then Chairman of MSEB provided an oral permission to Eurotex to draw power from its CPP situated at Plot No. E-23 to its CPP situated at Plot No. E-1. On Eurotex acting upon the said oral permission, the erstwhile MSEB officially required Eurotex to make additional payments for the said drawal of power from the separate CPPs as located in one unit. Thirdly, Eurotex has been aggrieved on the implementation of a circular dated September 2, 1999 issued by the erstwhile MSEB, wherein a 'take-or-pay' imposition of 25% of actual energy requirement was mandated on Eurotex, amongst other CPP holders.

4. Shri. Jagtiani further submitted that Eurotex had filed Writ Petition No. 6433 of 1999 before the High Court, Bombay to resolve all the three grievances as mentioned above, against the erstwhile MSEB,. The High Court, Bombay vide an order of admission, had granted stay to the erroneous billing as per the earlier contract demand of 5300 kVA, imposition of additional charges for drawal of energy within CPPs located within one unit, and imposition of the alleged 25% 'take-or-pay' obligation. This order of stay was in operation thereafter.

5. Shri. Jagtiani submitted that subsequently, post the enforcement of the Electricity Regulatory Commissions Act, 1998 and the constitution of the Commission, the High Court, Bombay vide a further order directed Eurotex to initiate appropriate proceedings before the Commission. Eurotex initiated proceedings under Case No. 35 of 2002 before the Commission. Counsel referred to operative part in the combined Order dated May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003, as reproduced hereunder:

“82. In summary, in view of the foregoing, the MSEB shall allow Eurotex the liberty to decide its level of contract demand, as clearly contemplated by their sanction letter dated 3.4.1997, and refund to Eurotex, by adjustment in energy bills or otherwise, any excess amount paid by them, on the basis of contract demand being 3000 KVA. Further, in the case of Eurotex, no prior permission of the MSEB is required for the extension of supply from their CPP at plot E-23 to their unit at plot E-1. Moreover, the condition imposed on the Petitioners to draw at least 25% of their energy from MSEB through the said Circular cannot be operative and must be deemed to be withdrawn from the date when it was imposed or sought to be imposed on them. In fact, the imposition of a take-or-pay condition on CPP holders by the MSEB through the said Circular and all other Circulars, viz., Circular No. 663 dated 5th October 2001 which provided for the supersession of certain Circulars, including Circular No. 602 dated 23rd July 1998, Circular No. 619 dated 25th May 1999, Circular No. 627 dated 2nd September 1999 and Circular No. 651 dated 19th September 2000, insofar as they purport to impose the take-or-pay obligation and minimum off-take requirement as also any additional tariff on CPP holders without the approval of the

Commission, are hereby quashed and set aside. The amounts representing such additional tariff and notional drawal of energy as contained in the bills raised on the Petitioners shall be withdrawn by the MSEB, and payments made by the Petitioners to MSEB on that basis ought to be refunded by the MSEB by way of adjustment through energy bills or otherwise.”

6. It was submitted that while the above cited portion of the Order dated May 21, 2004 is clear and creates no ambiguity as to the import of the provisions thereunder, the MSEB preferred Writ Petition No. 370 of 2005 [*MSEB vs. MERC & Ors.*] before the High Court, Bombay, in appeal of the said Order of the Commission dated May 21, 2004. The High Court, Bombay passed an order granting admission to the said Writ Petition No. 370 of 2005, directing parties to maintain status quo. Thereafter, a further order dated August 18, 2006 was passed by the High Court, Bombay, in Notice of Motion No. 413 of 2006 with Writ Petition No. 370 of 2005 whereunder MSEDCL was directed to institute appropriate proceedings before the ATE. It was provided in the said order that the order of status quo, earlier passed by the High Court, shall continue till the hearing and final disposal of the appeal that MSEDCL may initiate before the ATE. Further, MSEDCL should not make recovery of any arrears in respect of the disputed issues settled between the parties under Order dated May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003, passed by the Commission.

7. Shri. Jagtiani referred to the following portion of the judgment dated May 30, 2007 passed by the ATE in Appeal No. 29 of 2007:

“28. We are also of the opinion that despite this being the condition for grant of permission under Section 44 it will be contradiction in terms if the MSEB is allowed by a circular to impose upon the CPP holders a condition, after the CPP is installed, requiring them to consume a minimum amount of electricity or to pay the penalty for not doing so. We are in agreement with the view taken by the Commission in this regard.

29. In view of the forgoing we find no force in the appeal. The appeal is dismissed.”

Counsel submitted that the said judgment passed by the ATE confirmed the enforceability of the Order dated May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003. However, the energy bills that were issued to Eurotex post the passing of the said judgment dated May 30, 2007 erroneously imposed the payment of additional amounts and arrears, in flagrant violation to the Order dated May 21, 2004 and judgment of the ATE dated May 30, 2007. Further, the said erroneous billing failed to grant any load factor incentives, bulk discounts and other similar benefits that Eurotex was entitled to receive. It was vehemently pointed out by Counsel that even after repeated written requests being sent to MSEDCL, MSEDCL has continually treated Eurotex as a ‘defaulter’.

8. Shri. Jagtiani submitted that presently, Eurotex has been making payments to all the energy bills that MSEDCL has been issuing, in violation to the order passed by the Commission and the ATE, 'under protest'. Shri. Jagtiani submitted that while on one hand MSEDCL has been denying the basic load factor incentives and bulk discount to Eurotex and interest thereon, on the other hand, MSEDCL is continually charging additional amounts and arrears thereof. These acts of MSEDCL are demonstrative of 'highhandedness' which is not expected from a government company. In such an event, it is not proper for MSEDCL to presently take a stand that the hearing in the present matter should be adjourned owing to an appeal that has been filed in the registry of the Hon'ble Supreme Court. Counsel submitted that is well settled that unless a proceeding is admitted by a higher court, no rights can be sought for as against the said proceeding in matters pending before a subordinate court. Counsel filed a summary statement of Rs. 3,73,50,961/- as the total amount which is due from MSEDCL as on July 2007, as refund of amounts paid 'under protest'.

9. Smt. Deepa Chawan, Counsel for MSEDCL, submitted that at the relevant time when Writ Petition No. 370 of 2005 was preferred by MSEB before the High Court, Bombay, energy bills were being charged to Eurotex for recovery of the various amounts which as per the understanding of the erstwhile MSEB, were rightly recoverable from Eurotex. While the High Court, Bombay passed an order directing parties to maintain status quo, MSEDCL interpreted the said direction of status quo so as to continue the recovery of additional amounts for drawal of energy from the aforesaid CPP at Plot No. E-23 to the CPP at Plot No. E-1. Counsel referred to the provisions under Section 125 of the EA 2003 and contended that since appellate proceedings have been initiated before the Supreme Court, in terms of the said Section, the hearing in the present matter may be adjourned.

10. The Commission observed that the Order dated May 21, 2004 in Case Nos. 31, 33, 34, 35 of 2002 & 49 of 2003 should have been implemented by MSEDCL since no higher court had pronounced a stay to its operation. It was submitted by Smt. Chawan that though no higher court had granted stay to the operation of the said Order dated May 21, 2004, a statutory appeal has been preferred by MSEDCL before the Hon'ble Supreme Court in lieu of which the hearing in the present matter may be deferred. The Commission further observed that under the present proceedings, Eurotex has not sought any punitive action on MSEDCL under Section 142 or 146 of the EA 2003. Though the present proceedings have been initiated under the said Sections, the prayers of Eurotex are in the nature of refund of amounts unlawfully collected by MSEDCL in violation of the Order dated May 21, 2004 and the judgment of the ATE dated May 30, 2007, and allowance of benefits in the nature of load factor incentives and bulk discounts. Further, under the present proceedings, Eurotex has sought for prohibition on the levy of arrears. These reliefs, as sought for in the present proceedings, only press for enforcement of the said Order dated May 21, 2004. In view thereof, MSEDCL should justify the non-enforcement of the said Order dated May 21, 2004 while issuing energy bills to Eurotex. MSEDCL should further justify as to why the hearing of the present matter should be deferred on the pretext of an appeal that has been preferred by MSEDCL before the

Hon'ble Supreme Court, when no punitive action against MSEDCL has been sought for under the present proceedings.

11. Smt. Deepa Chawan submitted that the date of enforceability of the Order dated May 21, 2004, in effect, is May 30, 2007 on which date the ATE passed a final judgment in Appeal No. 29 of 2007. The Commission observed that the said stand of MSEDCL amounts to misinterpretation of the Order dated May 21, 2004, read with the orders of the High Court and the judgment passed by the ATE on May 30, 2007. It was observed by the Commission that the import of the order of status quo passed by the High Court in Writ Petition No. 370 of 2005 should be interpreted so as to give effect to the Order dated May 21, 2004 as it was. The directive of status quo should be as against enforcement of the Order dated May 21, 2004 and as against the acts of MSEDCL in violation to the same. The order of the High Court, Bombay and the judgment dated May 30, 2007 required the enforcement of the Order dated May 21, 2004 from the date of operation applicable to the Order dated May 21, 2004. MSEDCL has grossly misinterpreted to conclude that the Order dated May 21, 2004 should be operative on and from May 30, 2007, which is the date of passing of judgment by the ATE in Appeal No. 29 of 2007. The Commission further observed that had the High Court, Bombay, granted stay on the Order dated May 21, 2004 passed by the Commission, MSEDCL would have been justified inasmuch as not to give effect to the Order dated May 21, 2004, as against Eurotex. In this regard, the Commission enquired of both parties to furnish a copy of the order of the High Court, Bombay in Writ Petition No. 370 of 2005, vide which order, as contended by both parties, the High Court, Bombay admitted the said writ petition and directed status quo to continue till disposal.

12. Shri. Jagtiani submitted a photocopy of the order passed by the High Court, Bombay on April 4, 2005 in Writ Petition No. 370 of 2005, whereunder the direction for status quo till disposal of writ petition was passed.

13. On an enquiry made by the Commission as to the import of a status quo order, Counsel Smt. Deepa Chawan submitted that the term 'status quo' should be meant to imply 'as it was'. Therefore, the order of the High Court dated April 4, 2005 has, in effect, granted status quo to MSEDCL charging amounts to Eurotex as on the said date of April 4, 2005, whether the said acts, as alleged, was in deviation from the Order dated May 21, 2004 passed by the Commission, or not. Should the import of the status quo order dated April 4, 2005 not been such, the said order passed by the High Court, Bombay should have been redundant.

14. Smt. Deepa Chawan argued that had Eurotex not agreed to the interpretation of MSEDCL on the import of the order dated April 4, 2005 passed by the High Court, Bombay, and considered that the correct import of the same requires the immediate enforcement of the Order dated May 21, 2004, Eurotex should have initiated appropriate proceedings before the Commission in the year 2005. Having not done so, Eurotex have expressed its agreement to MSEDCL's interpretation of the order dated April 4, 2005. The Commission observed that MSEDCL should not attempt to escape its obligation to

enforce a legally binding order on the pretext of such an argument. The Commission further enquired of MSEDCL as to whether the order of the High Court, Bombay dated April 4, 2005 directed the stay of the Order dated May 21, 2004 together with status quo, or only directed status quo. Smt. Chawan submitted that the said order directed status quo only. It was further contended by Smt. Chawan, that the erstwhile MSEDCL had submitted on affidavit in the proceedings under Writ Petition No. 370 of 2005, that at the relevant time, the Order dated May 21, 2004 was not being implemented by MSEDCL. On the premise of the said facts and circumstances, the High Court had passed the order of status quo on April 4, 2005 granting the erstwhile MSEDCL the liberty to maintain status quo, i.e., the liberty to continue issuing energy bills as per the relevant practice. The Commission observed that the correct import of status quo is the continuance of that which is legally enforceable. Status quo cannot be interpreted to mean the continuance of what is not legally enforceable. An illegality prevalent at the time of an order of status quo, cannot be continued as authenticated by the status quo order.

15. Counsel Shri. Deepa Chawan submitted that the conduct of the parties prevalent at the time of passing of the status quo order should be considered to interpret the direction of status quo. Counsel submitted that at the relevant time, when the Order dated May 21, 2004 was not being implemented by the erstwhile MSEDCL and Eurotex was not pressing for enforcement of the said Order dated May 21, 2004 before the High Court, the High Court granting status quo would imply the continuance of the set of circumstances, including the non-enforcement of Order dated May 21, 2004, that was prevalent as on April 4, 2005. Shri. Jagtiani submitted as on the said prevalent period, i.e., before the High Court, Bombay passed its order dated April 4, 2005, the erstwhile MSEDCL was in receipt of several protest letters sent officially by Eurotex claiming the enforcement of the Order dated May 21, 2004, refund of amounts unlawfully charged and benefits that Eurotex was supposed to enjoy. Even after the passing of the said order dated April 4, 2005, Eurotex had sent several letters to MSEDCL explaining the true import of the term 'status quo' and accusing MSEDCL of 'highhandedness'. It was vehemently contended by Shri. Jagtiani that on and from May 2004, Eurotex has continued its operations 'under a siege of terror' and made payments on protest considering the fatal implications of disconnection of supply

16. The Commission enquired of MSEDCL as to whether MSEDCL has implemented the Order dated May 21, 2004 post the passing of judgment by the ATE in Appeal No. 29 of 2007 on May 30, 2007. Smt. Chawan accepted that as against Eurotex, MSEDCL has not implemented the Order dated May 21, 2004, even after the passing of the said judgment passed by the ATE.

17. The Commission enquired of Shri. Jagtiani as to the legal import of a status quo order. Shri. Jagtiani submitted that the terminology 'status quo' should be contradistinguished from the terminology 'status quo ante'. The term 'status quo ante' means the continuance of a given set of circumstances prior to any litigation or the passing of any judicial order. It was submitted that had the said order of the High Court,

Bombay dated April 4, 2005 been an order of status quo ante, the contentions of Shri. Chawan would have some weight.

18. Shri. Jagtiani invited the attention of the Commission to the historical context of the order of the High Court, Bombay dated April 4, 2005. At the time of the passing of the said order, an Appellate Tribunal for Electricity in terms of the EA 2003 was not constituted. The High Court, Bombay vide its order dated April 4, 2005 considering that the EA 2003 envisages the constitution of an Appellate Tribunal for Electricity, directed the parties to maintain status quo in the legal position of the matter as it was, and provided liberty to the erstwhile MSEB to initiate appropriate proceedings before the ATE for final adjudication. The import of the said status quo order cannot be twisted to hold Eurotex as a defaulter, as according to the Order dated May 21, 2004 passed by the Commission, Eurotex was not a defaulter. It was vehemently argued by Counsel that the intention of MSEDCL to deprive Eurotex of their legitimate benefits and incentives was germane to MSEDCL construing the order of the High Court, Bombay dated April 4, 2005 and treating Eurotex as a defaulter. It was submitted that mainly keeping in view the corrupt ground-level practices of MSEDCL, Eurotex had avoided initiating proceedings against MSEDCL's willful misinterpretation of the said status quo order dated April 4, 2005, apart from saving valuable time, effort and money. It was submitted that each and every time Eurotex sent a letter of protest to MSEDCL, they had sustained informal threats of disconnection of supply from MSEDCL. Shri. Jagtiani reiterated that the Commission should note that even after the ATE had passed a final judgment on May 30, 2007, MSEDCL has taken the stand of non-complying with the Order dated May 21, 2004 on the pretext that an appeal have been lodged by MSEDCL at the registry of the Hon'ble Supreme Court, under a statutory provision of law. It was submitted that having flouted all standing orders passed by judicial authorities on the subject, MSEDCL attempting to defer the disposal of the present matter in anticipation of a favourable order from the Hon'ble Supreme Court, requires the Commission to consider the conduct of MSEDCL under close scrutiny.

19. Per Contra, it was submitted by Smt. Chawan that the present complaint filed by Eurotex cannot be maintained under Sections 142 and 146 of the EA 2003 as the reliefs sought under the present complaint do not require invocation of the said Sections.

20. On an enquiry made by the Commission to Shri. Jagtiani as to the maintainability of the present complaint under Sections 142 and 146 of the EA 2003, Shri. Jagtiani submitted that though no punitive action against MSEDCL has been sought for under the present proceedings, the factual matrix of the matter should be considered in light of the said Sections of the EA 2003. Considering the contumacious conduct of MSEDCL in misinterpreting judicial orders as per their benefit, the present matter needs to be disposed of under Sections 142 and 146 of the EA 2003. It was submitted that Sections 142 and 146 of the EA 2003 are the only provisions under the EA 2003 under which any order passed by the Commission may be enforced. Further, the said Sections can be invoked to retrain the continuance of a default or contempt of an order that may be passed. It was contended by Smt. Chawan that a catena of judgments passed by the Hon'ble Supreme

Court firmly establish that penal provisions of a statute should not be invoked as a 'pressure tactic' for resolution of disputes qua parties.

21. Shri. Ashvin Treasurer, Laghu Udyog Bharati, submitted that the erstwhile MSEB have been committing billing malpractices from their very inception. It was submitted that delayed payment charges and interests thereon should not be charged to a defaulting consumer in the pendency of proceedings before any judicial forum under the EA 2003. Amounts pertaining to the same should be accounted in a separate account and charged to the consumer once a judicial forum holds the consumer as a defaulter.

The hearing in the matter was adjourned.

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List of Persons present at the hearing on August 14, 2007

1. Shri. P. L. Nene, Consultant, Eurotex Industries & Exports Ltd.
2. Shri. A.V. Treasurer, Advisor, Laghu Udyog Bharati.
3. Shri. R. K. Agarwal, Company Secretary, Eurotex Industries & Exports Ltd.
4. Smt. Shalini Shrivastav, Asst. Company Secretary, Eurotex Industries & Exports Ltd..
5. Shri. Shashidhar Kulhali, Chief Engineer, Eurotex Industries & Exports Ltd.
6. Shri. A. J. Deshpande, Suptd. Engineer (TRC), MSEDCL.
7. Shri. Haresh M. Jagtiani, Counsel for Eurotex Industries & Exports Ltd.
8. Smt. Deepa Chawan, Counsel for MSEDCL.
9. Shri. Anil D'souza, Advocate, Eurotex Industries & Exports Ltd.
10. Smt. Sukhada Wagle, Haresh Jagtiani & Associates.
11. Shri Shashi Gorjari, Haresh Jagtiani & Associates.
12. Shri. S. S. Shah.