

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 8 of 2006

In the matter of
**Petition of Maharashtra State Electricity Distribution Company Limited seeking review
of Order dated March 28, 2006 in Case No. 39 of 2005 (in the matter of Application of
M/s. Hanil Era Textiles Ltd., for Transmission Licence).**

**Dr. Pramod Deo, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member**

ORDER

Dated: 20th June, 2007

Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) filed a Petition before the Commission on May 11, 2006 seeking a review of the Commission’s Order dated March 28, 2006 passed in Case No. 39 of 2005 in the matter of application of M/s. Hanil Era Textiles Ltd (“HETL”) for grant of transmission license. It is averred in the Petition that the impugned Order suffers from an error apparent on the face of the record. It is claimed that in view of the judgment dated April 4, 2005 passed by the Hon’ble High Court of Judicature of Bombay in Writ Petition No. 882 of 2005 (*MSEB Vs. State of Maharashtra, Bhushan Steels & Ors.*) and as affirmed by the Hon’ble Supreme Court in SLP (Civil) No. 10881/2005 (*M/s. Bhushan Steel and Strips Ltd Vs. MSEB & Ors.*), as the said Judgments would operate as a precedent for the Commission to follow in other cases, HETL (a CPP holder) would need to obtain a licence for selling surplus power from its CPP. It is averred in the Petition that the provisions of Section 172(b) of the Electricity Act (“EA 2003”) 2003 requires to be read harmoniously with the said judgments of the Hon’ble High Court and the Hon’ble Supreme Court. It is asserted that the sanction accorded to HETL for setting up a captive power plant (“CPP”), under the laws repealed by the Electricity Act, (“EA 2003”) ought not to have been relied upon in the impugned Order as the same has no nexus with the application dated December 9, 2005 filed by HETL for grant of transmission license, for transmission of surplus electricity from their CPP at Vanivali village, Khalapur Taluka. It is also submitted that the impugned Order is contrary to Sections 12 to 14 of the EA 2003, which lays down licensing requirements for transmission, distribution and trading of electricity. MSEDCL has prayed that the impugned Order may be recalled and set aside and pending the hearing and final disposition of the present Petition, the implementation, operation and execution of the impugned Order be stayed.



2. An admissibility hearing was held in the matter on June 6, 2006, wherein *inter alia*, the Commission had directed MSEDCL to produce a copy of (i) Order dated 13th August 2003 passed by the Learned Senior District Judge, Panvel in Special Civil Suit No. 40 of 2003 (*HETL Vs. MSEDCL & Ors.*), (ii) Order of the Hon'ble Bombay High Court passed in Civil Application No. 1047 of 2003 (*MSEDCL Vs. HETL*) which *inter alia* granted stay of the aforesaid order dated August 13, 2003. The Commission had further directed HETL to submit its affidavit-in-reply, within two weeks of the hearing held on June 6, 2006. HETL submitted its affidavit-in-reply on July 26, 2006. MSEDCL submitted necessary documents on September 25, 2006. Thereafter, a notice was issued by the Commission notifying the parties of a further hearing. At the further hearing so held in the matter on October 31, 2006, Smt. Deepa Chawan, appeared for MSEDCL. Shri. V.C. Gopalkrishnan, Director, appeared for HETL. Smt. Deepa Chawan, Counsel for MSEDCL submitted that the Hon'ble Supreme Court in the case of *M/s. Bhushan Steel and Strips Ltd. Vs. Maharashtra State Electricity Board & Ors.* [(Civil) No. 10881/2005] has held that sale of electricity by a captive power plant to a "third party" requires the obtaining of a valid licence under the EA 2003. Further, in *A.P. Gas Power Corporation Ltd. Vs. A.P. State Regulatory Commission & Anr.* [2004(3) Scale], the Apex Court has held that even sale of power to "sister concerns or concerns under the same group" of any one consumer, would amount to distribution, sale or supply of electricity from that consumer to such sister or group concern, and this mandates the obtaining of valid licence. It has been submitted that the Commission needs to consider the said judgments in the light of Article 141 of the Constitution of India, wherein it is provided that the law passed by the Supreme Court is binding on all Courts within the territory of India. Next, it has been contended on behalf of MSEDCL that the sanction/ authorisation given by the Government of Maharashtra (GoM) to HETL vide its letter dated May 22, 1998 was under Section 28 of Indian Electricity Act, 1910 ("IE Act"). The provisions of the Section 28 of the IE Act should not be equated with the licensing requirements under Section 3 and other relevant provisions of the IE Act, 1910.

3. Smt. Chawan submitted that HETL, in its affidavit-in-reply, has cited an order passed by the Hon'ble Supreme Court in the case of *Grid Corporation of Orissa Ltd. Vs. M/s. Indian Carriage Chrome Ltd.*[JT 1998(4) S.C. 43]. It is HETL's contention that in the said judgment, on consideration of an authorisation granted by the State Government of Orissa to the respondents for sale of surplus electricity from their CPP, it has been held that the respondents need not be required to obtain a licence. Smt. Chawan has contended that the said judgment is clearly distinguishable as (i) being passed under the laws prevailing prior to the enactment of EA 2003, it would not have a bearing on the present matter of HETL which is under EA 2003, and (ii) the authorisation granted therein was under the Reform Act, 1995 passed by the Government of Orissa and not under the EA 2003. It is essential that HETL adheres to the licensing requirements under the EA 2003 being so bound within the prevalent regulatory framework.

4. Smt. Chawan clarified that the Special Civil Suit No. 40 of 2003 which was pending before the Learned Senior Civil Judge, Panvel, had been withdrawn by HETL. The order of the High Court of Bombay (in Civil Application No. 1047 of 2003) granting a stay of the order dated 13th August 2003 passed by the Learned Senior District Judge, Panvel, had become infructuous, as the Special Civil Suit had been withdrawn, as aforesaid.



5. During the course of the hearing, the Commission had observed that under the MERC (Distribution Open Access) Regulations, 2005, HETL has the right to distribute surplus power. Therefore, the Commission gave six weeks time to the parties to consider the practical issues involved in the matter and come to a logical solution. Shri. Gopalkrishnan of HETL had submitted that upto 40% of the installed capacity of HETL would be available for sale. Keeping the above issues in view, the case was adjourned for six weeks to consider solutions as worked out by the parties. However, even after sending a reminder letter dated 2nd April, 2007, till date, MSEDCL has not submitted any compliance report and have not taken steps to follow up with the Review Petition. Nonetheless, it would not be judicious to dismiss the Review Petition for non-prosecution as justice would demand that the Review Petition be decided.

6. As the factual matrix pertaining to the establishment of CPP by HETL, various contentions raised by HETL, application filed by HETL seeking transmission license, *et all*, have been considered while passing the impugned Order, the Commission does not propose to again deal with the same herein. In *MSEB Vs. State of Maharashtra, Bhushan Steels & Ors*, MSEB had challenged an Order dated August 3, 2004 passed by the Commission in Case No. 57 of 2003 wherein the Commission had held that the CPP holder, after using the power mostly for their own requirements, can sell remaining power to third parties using their own dedicated transmission lines without a license or permission from the Commission. One essential fact that is similar in the present case concerning the impugned Order relating to requirement of licence by HETL and in the case of *MSEB Vs. State of Maharashtra, Bhushan Steels & Ors* is that in both the cases, the CPP holder wanted to sell excess power to certain third parties. In the Bhushan Steels case as well as HETL case (Case No. 39 of 2005), MSEB (now MSEDCL) has stressed that a captive generating plant is not entitled to sell power to third party in the absence of a valid licence. The High Court of Bombay has held that “*there is no need to read anything more into Sections 12 to 15 that the fact that such licenses are mandatory to the CPPs, the moment there is an element of sale to a third party as observed by the Apex court in the case of A.P. Gas Power Corpn. Ltd*”.

7. While, the Commission does not sustain the contentions of Counsel for MSEDCL that the order dated May 12, 2005 passed by the Hon’ble Supreme Court in SLP (Civil) No. 10881/2005 (M/s. Bhushan Steel and Strips Ltd Vs. MSEB & Ors.) dismissing the Special Leave Petition filed by Bhushan Steels, is the law declared under Article 141 of the Constitution and is, therefore, binding on all Courts within the territory of India, judicial propriety requires that the aforesaid judgment of the Hon’ble High Court is to be considered. The Supreme Court has settled the law in respect of dismissal of a Special Leave Petition in the case of *Kunhayammed v. State of Kerala*, in AIR 2000 Supreme Court 2587 = 2000 AIR SCW 2608. The portion of the judgment relevant for consideration of the contentions raised by MSEDCL, are as under:

27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of



law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared....”

Therefore, the order dated May 12, 2005 passed by the Hon’ble Supreme Court in SLP (Civil) No. 10881/2005 (M/s. Bhushan Steel and Strips Ltd Vs. MSEB & Ors.) being a non-speaking order, i.e., it does not assign reasons for dismissing the Special Leave Petition, is not a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. However, as neither party has apprised the Commission as to whether the High Court has modified its Judgment dated April 4, 2005 in review, judicial propriety demands that when the Hon’ble High Court has held that *“there is no need to read anything more into Sections 12 to 15 that the fact that such licenses are mandatory to the CPPs, the moment there is an element of sale to a third party as observed by the Apex court in the case of A.P. Gas Power Corpn. Ltd”*, the same has to be considered by the Commission.

8. Subsequent to the filing of the aforesaid Review Petition, the Parliament has, vide notification dated May 29, 2007, notified the Electricity (Amendment) Act, 2007 (26 of 2007). The Ministry of Power vide notification dated June 12, 2007 has appointed June 15, 2007 as the date on which the provisions of the Electricity (Amendment) Act, 2007 shall come into force. Section 3 of the said amending Act provides as under:

“3. In Section 9 of the principal Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:-

“Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made hereunder and to any consumer subject to the regulations made under sub-section (2) of section 42”

9. A complete reading of the existing provisions of sub-section (1) of section 9 alongwith the aforesaid amendment, will be as under:

“9. (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made hereunder and to any consumer subject to the regulations made under sub-section (2) of section 42”



It is clear from the above that the aforesaid Electricity (Amendment) Act, 2007 expressly allows a captive generating plant to supply electricity generated to a licensee or consumer without requiring the captive generating plant to obtain any licence under the EA 2003. In view thereof, the Commission is of the view that the Review Petition filed by MSEDCL asserting that HETL would require to obtain a licence to sell surplus power to third parties, is rendered infructuous by the Electricity (Amendment) Act, 2007 and, therefore, stands disposed of. There is no requirement of issuing any stay order, as prayed for

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman



Secretary, MERC