

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 36 of 2008

In the matter of
Petition filed by M/s. Kendriya Vihar Co-operative Housing Federation Ltd. under
Section 43, 45, 46 and 86 of the Electricity Act, 2003 for refund of SLC and to treat
the ORC Scheme of MSEDCL as null and void

Shri V. P. Raja, Chairman
Shri S. B. Kulkarni , Member
Shri V. L. Sonavane, Member

Kendriya Vihar Co-operative Housing Federation Ltd.Petitioner

Versus

Maharashtra State Electricity Distribution Co. Ltd.
Through the Managing Director,
Prakashgad, Plot No. G-9, Bandra (East),
Mumbai – 400 051.Respondent

ORDER

Dated: March 25, 2010

M/s. Kendriya Vihar Co-operative Housing Federation Ltd. (“the Petitioner”), a consumer of Maharashtra Electricity Distribution Co. Ltd. (“MSEDCL”) filed a Petition under affidavit before the Commission on 25.06.2008 seeking directives of the Commission for refund of SLC and to declare the ORC Scheme as null and void.

2. The following are the prayers of the Petitioner:

“



(a) that the Hon'ble Commission may kindly invoke its power under section 43, 45, 46 and 86 of the Electricity Act, 2003 and declare that the 'ORC Scheme' as null and void and to restrain the Respondent from implementing the same.

(b) that the Hon'ble Commission may kindly direct the Respondent to refund / re-imburse the Petitioner a sum of Rs. 5.43 crores, the capital expenditure incurred by the members of the Petitioner.

(c) that the Hon'ble Commission may direct the Respondent to compensate the Petitioners member by directing the Respondent to repay the amount of SLC recovered from the prospective consumer and / or to be recovered in future.

(d) that the Hon'ble Commission may also award interest on such sums of money as may deem fit and proper.

(e) that the Hon'ble Commission may direct the Respondent to compensate the Petitioner by directing the Respondent to repay the costs of infrastructure created along with the rental / license fees for use and occupation of the 360 Sq. Meters of land at such rates as may be directed by the Commission.

(f) that the Hon'ble Commission may also award costs of these proceedings to the Petitioners.

(g) that the Hon'ble Commission may pass such further order as may be fit and proper in the facts and circumstances given here in above."

3. The Petitioner submits that it is a federation of cooperative housing societies in Kendriya Vihar township, Kharghar, Navi Mumbai, consisting of a total of 1,230 flats in the township.

4. It is submitted that Central Government Employees Welfare Housing Organisation (CGEWHO), an organisation wholly owned and controlled by Govt. of India and taking up 'housing projects' for the welfare of Central Govt. employees at various locations of India on 'no-profit no-loss' basis, had taken up the project for construction of about 1230 residential units at Sector – 11, Kharghar, Navi Mumbai between the years 1994-1999. This housing complex had been named as "Kendriya Vihar". The erstwhile Maharashtra State Electricity Board (MSEB), the predecessor of the Respondent MSEDCL was approached in 1996 in order to provide electricity connection for the residential complex.

5. The Petitioner has referred to letter dated October 29, 1996 from the Dy. Exective Engineer, MSEB, Kalamboli sub-division to the Petitioner, where the total requirement of the electricity load for CGEWHO was asked to be worked out, i.e. 15W / sq. ft. for commercial area and 10W / sq. ft. for residential area with a diversity factor of 0.75. These details were prepared and submitted to MSEB vide letter dated June 26, 1997.



6. The Petitioner submits that all consumers in Kendriya Vihar are LT consumers and MSEB was responsible to provide suitable LT feeders. After getting some discrepancies cleared from the Petitioner vide its letter to MSEB dated August 5, 1997, MSEB directed CGEWHO to get the power supply under their "ORC Scheme" which the Petitioner had to accept for getting the power supply.

7. It is submitted that, under the "ORC Scheme", the responsibility for making arrangement of 11KV / 0.433KV network is with MSEB, but due to non-availability of funds, the same was entrusted to the LT consumers at their risk and cost. For this, the LT consumers were forced to pay for setting up the entire 11KV / 0.433 network, which included the cost of construction of sub-stations, procurement of equipment and 15% supervision charges. Further, it is submitted that MSEB had exorbitantly demanded CGEWHO to provide four numbers of sub-stations in its own plot with 14 nos. of 630 KVA transformers alongwith associated switching and protection equipment, thus the total capacity of network coming to 8820 KW as against the requirement of 7301.95 KW. This was however reduced to 8 nos. of 1000 KVA transformers.

8. It is submitted that the Petitioner was asked to pay Rs. 4,89,27,400/- to MSEB after sanctioning the power supply to CGEWHO complex. Also, an additional amount of Rs. 54,71,400/- was asked to be paid to MSEB on account of "Supervision Charges" for installation of equipment. This total expenditure of Rs. 5,43,98,800/- was apportioned and loaded on to the costs of each of the 1230 residential units and was charged from the members, thereby coming to Rs. 44,000/- for each residential unit. It is further submitted that, the normal cost for providing electric connection to a residential consumer in Navi Mumbai being of the order of Rs. 10,000/- that was subsequently charged by MSEB, the amount of Rs. 44,000/- is totally unreasonable and unjustified.

9. It is submitted that MSEB had physically occupied approximately 360 sq. meters of land in the complex owned by the Petitioner. MSEB is therefore under a legal obligation to compensate the Petitioner for the costs incurred by the Petitioner for completing the civil construction as well as reasonable compensation for the 360 sq. meters of land occupied by them. Thus, the entire expenditure of Rs. 5.43 crores approx. should be refunded to the Petitioners.

10. The Petitioner submits that, after the completion of the project, the management of the "Kendriya Vihar Complex" was taken over by the Kendriya Vihar Cooperative Housing Federation Limited (KVCHFL) i.e. the Petitioner.

11. The Petitioner had referred to the Order of the Commission dated August 10, 2004 in Case No. 29 of 2003 where MSEB was directed to reimburse the Petitioner the amount of excess SLC collected / to be collected from others to whom connections were to be given from the infrastructure erected by the Petitioner. Further, the Petitioner had sent a letter dated July 18, 2007 to the MD, MSEDCL for reviewing the issues and refunding the sum of Rs. 5.43 crores, but no response till date has been received by the Petitioner.



12. The Petitioner has referred to the Order of the Commission dated September 8, 2006 in Case No. 70 of 2005 in the matter of Approval of MSEDCL Schedule of Charges, where the Commission had directed that the costs towards infrastructure from delivery point of transmission system to distributing mains should be borne by MSEDCL. The relevant extracts of the said Order is reproduced below:

“6.4 Commission’s Ruling

The Commission totally rejects MSEDCL’s proposal to recover Service Line Charges from the prospective consumers except in cases of consumers requiring dedicated distribution facility. As per the provisions of the Act, developing infrastructure is the responsibility of Licensee. The Commission therefore directs that the cost towards infrastructure from delivery point of transmission system to distributing mains should be borne by MSEDCL. The recurring expenses related to the capital investment on infrastructure shall be considered during ARR determination. [For detailed Ruling refer Section-III (6)]”

13. The Commission, vide its Notice dated July 9, 2008, fixed the hearing in the matter on July 29, 2008 in the presence of consumer representatives authorized on a standing basis under Section 94(3) of the Electricity Act, 2003 (“EA 2003”) to represent the interest of consumers in the proceedings before the Commission. The Commission also directed the Petitioner to serve a copy of its Petition, along with its accompaniments, to the Maharashtra State Electricity Distribution Company Limited (MSEDCL) and the four authorised consumer representatives.

14. Further, the Petitioner and the Respondent (MSEDCL) requested the Commission to postpone the hearing in the matter vide their respective letters to the Commission. The Commission vide its Notice dated July 29, 2009, scheduled the hearing in the matter on August 21, 2008. Thereafter, the Petitioner further requested the Commission to postpone the hearing vide his email dated August 19, 2008. MSEDCL vide its letter dated August 20, 2008 also requested an adjournment in the matter.

15. The Commission, vide its Notice dated August 20, 2008, scheduled the hearing in the matter on October 21, 2008, which was further postponed on request of the Petitioner. Thereafter, the Commission vide its Notice dated October 20, 2008, scheduled the hearing in the matter on December 16, 2008 which was further postponed on request of the Respondent.

16. MSEDCL submitted its reply in the matter on October 24, 2008. The submissions of MSEDCL in its reply are as follows:

- a) That the Petitioner had applied for fresh electric power sometime in May 9, 1999. Thereafter, MSEDCL issued firm quotations for payment of Service Line Charges (SLC) and other charges as per rates prevailing at that time of their application in



- CIDCO Kharghar area on the basis of departmental circular issued from time to time for the SLC for LT Industries, Domestic and Commercial consumer.
- b) That MSEDCL had powers to amend charges for supply of power or fix tariff for different areas as per Section 49(3) of Electricity (Supply) Act, 1948. Also, according to the rules framed by MSEDCL namely “Conditions and Miscellaneous Charges for Supply of Electrical Energy”, the consumers have to pay the prescribed cost of work (i.e. SLC) as prescribed by MSEDCL from time to time.
 - c) That the SLC charged under the Out Right Contribution (ORC) Scheme is not to be refunded to the consumers, since they were charged SLC as per prevailing rate in force at the relevant time (September, 1999). Such is fully in the knowledge of the Petitioners. The work was executed in the year 1997-98 by paying 15% Supervision Charges to MSEB on a non-refundable basis.
 - d) It is submitted the Petitioners have applied for refund, seeing the reduction in the new applicable charges, which is not acceptable as per law. Also, the Petition is barred by limitation because the transaction had taken place in September 21, 1999 and the application by the Petitioner is on July 12, 2008.
 - e) It is further submitted that SLC are meant for development of infrastructure for the supply of power and covers the cost starting from generation point to distribution point of consumer mains, and this has been done maintaining the due process of law. On the question of refund of SLC, it has been submitted that the same are non-refundable charges which had been agreed to and paid by the Petitioners.
 - f) On the question of reliability of power supply, it is submitted that separate 11 kV feeder is provided to the Kendriya Vihar Colony from 33/11 kV sub-station, Kharghar, Sector-12 and also a second source of 11 kV supply is made available from 33/11 kV sub-station, Kharghar, Sector-19.
 - g) It is submitted that, during the relevant time, the MSEB in exercise of powers conferred under Section 49 of the Electricity (Supply) Act, 1948 (now repealed), had prescribed specific “Terms and Conditions” regarding recovery of capital cost from prospective consumers of electricity. The charging of SLC and also the ORC Scheme are according to those rules. These powers have been endorsed several times by the Supreme Court, being binding on the consumers.
 - h) It is submitted that the Commission had already examined the authority of the erstwhile MSEB to recover SLC and the principle of ORC Scheme and for the reason of such charges being pre-existing, have declined to interfere in such disputes. MSEDCL has referred to the Order dated August 10, 2004 passed by the Commission in Case No. 29 of 2003, a portion of which is as follows:

“There would, therefore, be a clear and transparent dispensation after these Regulations are notified, i.e. prospectively. Therefore, while appreciating the issues raised by the Petitioner, and also keeping in view MSEB’s arguments that some of these charges are pre-existing and continue to operate until they are duly revised by the Commission, the Commission is not inclined to interfere in the matter of ORC and SLC retrospectively.”



- i) It is submitted that since the Commission has abolished the charging of SLC by its Order dated September 8, 2006 in Case No. 70 of 2005, MSEDCL does not recover the same from prospective consumers. Further, it is submitted that the amount of Rs. 5.43 crores including Rs. 54,71,400/- paid to MSEDCL towards 15% supervision charges has been taken for creation of infrastructure required for power supply to residents of Kendriya Vihar Colony and is still in service. Also, the occupied area of 360 sq. meters is for the transformers installed in the premises of the colony, and according to prevailing practice, there is no such provision for giving rent for using such area.
- j) It is submitted that MSEDCL had challenged the order of the Commission dated September 8, 2006 regarding Schedule of Charges in the Appellate Tribunal. Further, the Appellate Tribunal's order dated May 14, 2007 was challenged in the Supreme Court in Civil Appeal No. 20340 of 2007, where the Hon'ble Supreme Court has granted interim stay on refund in its order dated August 31, 2008. This is still pending in the Supreme Court.
- k) MSEDCL has also referred to the Order of the Commission dated February 16, 2008 in Case No. 56 of 2007, which reads as follows:

“With reference to the prayers of the Petitioners to direct refund of ORC and such other head based charges, the Commission is of the view that taking into account the submissions of the MSEDCL that there have been many instances where there has been an overlap between ORC and SLC (for Dedicated Distribution Facilities) though different nomenclatures may have been used, hair splitting will not be possible in the present petition in this regard. It will not be appropriate to direct refund under this Order as the Order dated August 31, 2007 passed by the Hon'ble Supreme Court in Appeal No. 20340 of 2007 is still in force as such term SLC which is subject matter of appeal has purportedly been charged by MSEDCL herein using the nomenclature of ORC in many cases although they both are and pertain to SLC. In view of the admittedly overlapping nature of these charges with Service Line Charges which is sub-judice before the Hon'ble Supreme Court, the Commission declines to order refund as stipulated under its Order dated May 17, 2007.”

17. The Commission vide its Notice dated December 15, 2008, again scheduled the hearing on January 7, 2009. During the hearing held on January 7, 2009, the Petitioner requested the Commission to adjourn the hearing. Further hearing in the matter was scheduled on March 19, 2009 vide Commission's Notice dated March 4, 2009.

18. During the hearing on March 19, 2009, Shri Harinder Toor, Advocate alongwith Shri Ratnakar Singh, Advocate appeared for the Petitioner and Shri Ravi Prakash, Advocate appeared for MSEDCL. The Petitioner withdrew its prayers (a) and (b) and



informed that it is restricting its petition to prayers (c) and (d), the Commission accepted the Petitioner's request in this regard. Thereafter, the following issues were framed:

- a) Is the Petition time barred by Act of Limitation?
- b) Is the Respondent entitled to give connections, created out of the infrastructure for which the Petitioners have contributed, to non-members of the Kendriya Vihar Co-op. Hsg. Federation Ltd as per the then existing terms and conditions on the day the connection to the Petitioner was released?
- c) Whether the Petitioners are entitled to lease rent for the land as per the scheme and law, then existing?

19. The Commission notes that MSEB (now MSEDCL) had sanctioned electric supply to the Petitioner for their plot located in Sector 11 Kharghar during the year 1997-98. During the time, MSEB levied the connection charges as per Department Circular No. 486 dated August 8, 1991. The connection charges were recovered by MSEB at that time in exercise of powers conferred upon it under Section 49 of the Electricity (Supply) Act, 1948 and on the terms & conditions agreed and executed between the Petitioner and MSEB. The transaction had taken place in this regard on September 21, 1999.

20. Further to this, MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 came into force on January 20, 2005 which has defined **dedicated distribution facilities as under:**

" means such facilities, not including a service line, forming part of the distribution system of the Distribution Licensee which are clearly and solely dedicated to the supply of electricity to a single consumer or a group of consumers on the same premises or contiguous premises;

21. The Petitioner had obtained the electric supply connections during year 1997-98 from MSEB for 1230 residential units for the plot located in Sector 11 Kharghar by providing space for four nos. of 11/0.4 kV distribution substations admeasuring 360 sq. mtr. This electric supply / distribution infrastructure was provided to the Petitioner by MSEB as per agreed / accepted terms and conditions between them. The MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 which came into force on January 20, 2005, stipulated the following related provisions for lease of substation land:

"5.5 Where, in the opinion of the Distribution Licensee, the provision of supply requires installation of a distribution transformer within the applicant's premises, the applicant shall make available to the Distribution Licensee, by way of lease, for the period for which supply is given to the premises, a suitable piece of land or a suitable room within such premises for the distribution transformer:

Provided that the terms and conditions for such lease of land or room shall be mutually agreed between the Distribution Licensee and the applicant having regard to prevailing market rates:



Provided further that any existing agreement, as at the date of notification of these Regulations, for use of such land or room may, upon expiry, be renewed on such terms and conditions as may be mutually agreed between the parties, to be consistent with this Regulation 5.5:

Provided also that where, at the date of notification of these Regulations, the Distribution

Licensee is using any such land or room without an agreement for such use or under an agreement having no fixed expiry date, then such arrangement or agreement, as the case may be, for use of such land or room is deemed to have expired at the end of two (2) years from the date of notification of these Regulations, subsequent to which a fresh agreement may be entered into on such terms and conditions as may be mutually agreed between the parties, to be consistent with this Regulation 5.5.

5.6 Notwithstanding anything contained in Regulation 5.5, where the provision of land

or room is required under the Development Control Rules of the local authority or by any appropriate authority of the State Government, the terms and conditions for use of such land or room by the Distribution Licensee shall be as determined under the said Rules or by the said authority.”

22. The Commission vide Notice dated December 9, 2009 fixed the hearing in the matter on December 28, 2009, which was further postponed to January 1, 2010 vide Notice dated December 24, 2009. Thereafter, on request of the advocates of MSEDCL vide letter dated December 29, 2009, the hearing in the matter was fixed on January 14, 2010.

23. During the hearing on January 14, 2010, Shri Khurshed Ahmad and Shri H. C. Jha appeared for the Petitioner. Shri Abhishek Mitra, Advocate appeared for MSEDCL. The Petitioner submitted that MSEDCL has till date not submitted its written submissions on the issues framed by the Commission as per Record of Proceedings dated March 19, 2009, and that the Petitioner would submit its rejoinder thereafter. The Commission thereafter directed MSEDCL to submit its reply within two weeks. The Commission vide Notice dated January 15, 2010 fixed the hearing on February 22, 2010.

24. MSEDCL filed its written submissions on January 28, 2010. The averments put forward by MSEDCL are as follows:

- a) With respect to Issue 1 i.e. whether the Petition is barred by Limitation, it is submitted that the new electricity connection was provided in the 1999 under the then prevalent ORC Scheme, which the Petitioner opted for voluntarily and also paid the applicable Supervision Charges. The period of limitation has expired in the year 2002 i.e. 3 years from 1999, and there has been an unexplained delay of more than 6 years in filing the petition.
- b) With respect to Issue 2, i.e. whether the Respondent is entitled to give connections, created out of the infrastructure for which the Petitioners have contributed, to non-



members of the Kendriya Vihar Co-op. Hsg. Federation Ltd as per the then existing terms and conditions on the day the connection to the Petitioner was released, MSEDCL has referred to the letter dated October 6, 1999 issued by the Superintending Engineer, Vashi Circle. The relevant para at page 3 is as follows:

“After the entire work of the scheme is completed and commissioned, same shall be handed over by you to our Executive Engineer, Panvel Div. Since all the material will have a guarantee period of one year from the date of commission, you shall replace the same free of cost if failed during such guarantee period. On completion of guarantee period, all the equipment shall be our assets and thereafter will be maintained by us.”

- c) It has therefore been submitted that, having accepted the said offer, it is now not open to the Petitioner to challenge the same before the Commission. Further it is submitted that, as per then existing law, regulations and operating procedures of the erstwhile MSEB, it was adequately empowered to determine tariff for the supply of electricity and to determine the terms and conditions of supply and all circulars issued by MSEB was under a valid legal mandate and had the force of law. The orders of the Commission after the coming into force of EA, 2003 therefore will only have prospective validity in relation to their subject matter and not retrospective validity unless there is any express statutory provision to that effect. Therefore, it is submitted that MSEDCL is entitled to give connections created out of the infrastructure for which the Petitioner has contributed, to non-members of the Petitioner.
- d) With respect to Issue 3, i.e. whether the Petitioners are entitled to lease rent for the land as per the scheme and law then existing, it is submitted that under the prevalent regulations / circulars and also the terms and conditions agreed between the Petitioner and MSEDCL, there was no provision for payment of any rent by way of lease or license to the Petitioner for the use of any portion of the premises of the Petitioner for setting up of such distribution facility. Also, it is submitted that the Petitioner had never raised this issue prior to accepting the terms and conditions of the ORC Scheme or the terms offered by MSEB vide its letter dated October 6, 1999. Therefore, it is submitted that there is no binding obligation cast on MSEDCL to pay any rent by way of lease, license or otherwise for the premises occupied by the distribution equipment set up under the ORC both as per the agreed terms of the ORC Scheme as well as the regulatory framework in force during that period.

25. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the prayer to direct the Respondent to repay the amount of SLC recovered is time barred, as the electricity connection was provided in the year 1999 under the then prevalent ORC Scheme, which the Petitioner opted for voluntarily and also paid the applicable Supervision Charges. The period of limitation has expired in the year 2002 i.e. 3 years from 1999 and merely because the Petitioner has been corresponding/insisting on its claim with the distribution licensee does not explain the delay and the case cannot be held as have been “live”. The Commission also holds that the application of rules, stipulation, regulation etc made by the Commission cannot be applied



with retrospective effect and this aspect has been dealt with in the Order dated August 10, 2004 passed by the Commission in Case No. 29 of 2003. As such no direction can be given in the present case to the Respondent to repay the costs of infrastructure created along with the rental / license fees for use and occupation of the 360 Sq. Meters of land. The Commission is of the view that electric supply / distribution infrastructure was provided to the Petitioner by MSEB as per agreed / accepted terms and conditions between them. The MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 which came into force on January 20, 2005 stipulating provisions for lease of substation land, cannot be applied to the case of the Petitioner as there is a restriction against applying regulations with retrospective effect unless the parent Act expressly or by necessary implication confers a power to the effect. The Electricity Act, 2003 does not confer power to apply the said Regulations with retrospective effect.

In light of the above, the present petition stands dismissed. No order as to costs.

Sd/-
(V.L. Sonavane)
Member

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(K. N. Khawarey)
Secretary, MERC