

2021 Scej 1326

Supreme Court of India

*Justice M. R. Shah, Justice Sanjiv Khanna.*

**MAHARASHTRA STATE ELECTRICITY DISTRIBUTION CO. LTD. v. . M/S. JSW STEEL LIMITED & ORS.**

CIVIL APPEAL NOS. 5074-5075 OF 2019

10.12.2021

**Electricity Act, 2003, S. 42(4) - Whether such captive users are subject to levy of additional surcharge leviable under sub-section (4) of Section 42 - Additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 is not applicable to captive users to the extent of their self-consumption from such plants - Additional surcharge shall be applicable to all consumers who have availed open access to receive supply from sources other than the distribution licensee to which they are connected.**

*Held,*

Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional

surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. [Para 13, 14]

**(ii) Electricity Act, 2003, S. 42(4) - Captive generation - Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission - As provided under Section 9 any person may construct, maintain or operate a captive generating plant and dedicated transmission lines - Merely because 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 or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, it cannot be said that for captive generation plant, the State Commission's permission is required - Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission - The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate. [Para 13, 14]**

Additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 is not applicable to captive users to the extent of their self-consumption from such plants. The State Commission also held that the additional surcharge shall be applicable to all consumers who have availed open access to receive supply from sources other than the distribution licensee to which they are connected

## JUDGEMENT

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the Appellate Tribunal for Electricity, Delhi in Appeal Nos. 311 and 315 of 2018 whereby the Appellate Tribunal has allowed the said appeals preferred by the respondents herein - the 'captive consumers' and has set aside the order passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the "State Commission") in Petition No.195 of 2017 by which the State Commission has held that the group of 'captive consumers' are liable to pay additional surcharge, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as the "distribution licensee"), has preferred the present appeals.

2. That the appellant as distribution licensee filed a petition before the State Commission for MYT approval for FY 2014-2015, provisional trueing up of ARR for FY 2015-2016 and Multi Year Tariff for 3rd Control Period FY 2016-2017 to FY 2019-2020. The said petition was

numbered as Case No.48 of 2016. The State Commission held that the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 (hereinafter referred to as the “Act, 2003”) is not applicable to captive users to the extent of their self-consumption from such plants. The State Commission also held that the additional surcharge shall be applicable to all consumers who have availed open access to receive supply from sources other than the distribution licensee to which they are connected.

3. The appellant – distribution licensee submitted its revised Review Petition being Case No.195 of 2017, for approval of final true up of ARR for FY 2015-2016 and 2016-2017, provisional true up of ARR for FY 2017-2018 and approval for revised forecast of ARR for FY 2018-2019 and 2019-2020, inter alia, including the prayer “to approve additional surcharge for all open access consumers including those sourcing power from CPPS as proposed for FY 2018-2019 to FY 2019-2020”. The Captive Power Producers Association filed their objections including the objections with respect to levy of additional surcharge on such captive users. That by order dated 12.09.2018, the State Commission passed the order holding that additional surcharge is leviable under Section 42(4) of the Act, 2003 on the captive consumers/captive users.

4. Feeling aggrieved and dissatisfied with the order passed by the State Commission allowing the levy of additional surcharge from the captive consumers/captive users, the respondents herein – captive users/captive consumers approached the Appellate Tribunal. By impugned order dated 27.03.2019, the Appellate Tribunal has allowed the said appeals and has set aside the order passed by the State Commission ordering/permitting to levy the additional surcharge leviable under Section 42(4) of the Act, 2003 and has held that the group of captive consumers are not liable to pay additional surcharge to the distribution licensee.

5. Feeling aggrieved and dissatisfied with the impugned order passed by the Appellate Tribunal holding that the group of captive consumers/captive users are not liable to pay the additional surcharge leviable under section 42(4) of the Act, 2003, appellant – distribution licensee.

6. We have heard the learned counsel appearing for the appellant – distribution licensee as well as learned counsel appearing on behalf of the respective respondents – intervenors – the captive consumers/captive users at length.

7. The short question which is posed for the consideration of this Court is :

“Whether the captive consumers/captive users are liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003?

8. While deciding the aforesaid issue/question, the relevant provisions of Electricity Act, 2003 namely Sections 9 and 42 are required to be noted/visited, which reads as under:-

*“9. Captive generation.- (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 thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.*

*(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*

*Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:*

*Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.*

#### *42. Duties of distribution licensees and open access.-*

*(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

*(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

*Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:*

*Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:*

*Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:*

*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:*

*Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations,*

*provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.*

*(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.*

*(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

*(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.*

*(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.*

*(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.*

*(8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections."*

9. On a fair reading of Section 9, it can be seen that captive generation is permitted under sub-section (1) of Section 9. As per sub-section (2), every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use, but of-course subject to availability of adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be. So, the captive generation / captive use is statutorily provided / available and for which a permission of the State Commission is not required. The submission on behalf of the appellant that the captive generation under Section 9 is subject to the regulations as per first proviso to sub-section (1) of Section 9 and that even open access for the purpose of carrying electricity from his captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be, sub-section (4) of Section 42 shall be applicable and such captive users are liable to pay the additional surcharge leviable under sub-section (4) of section 42, has no substance and has to be rejected outright. Construction and/or maintenance and operation of a captive generating

plant and dedicated transmission lines is not subjected to any permission by the State Commission. As provided under Section 9 of the Act, 2003, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Merely because 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 or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate.

10. In light of the above observations and findings, the issue whether such captive users are subject to levy of additional surcharge leviable under sub-section (4) of Section 42 is required to be considered.

11. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee / licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

12. The term "consumer" is defined in Section 2(15), which reads as under:-

*"(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"*

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges

of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

16. It is reported that pursuant to the interim order passed by this Court dated 01.07.2019, staying the operation and implementation of the impugned order passed by the Appellate Tribunal, the appellant - distribution licensee has recovered the additional surcharge. Therefore, as such once it is held that the captive consumers/captive users are not liable to

pay the additional surcharge leviable under Section 42(4) of the Act, 2003, the appellant - distribution licensee has to refund the same.

However, considering the fact that there shall be huge liability on the appellant - distribution licensee if they have to now refund the amount of additional surcharge recovered at a stretch, we direct that the additional surcharge already recovered from the captive consumers/captive users shall be adjusted in the future wheeling charges bills.

17. Present appeals are accordingly dismissed with the above observations.