Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1368 OF 2007

M/s. Jayasawals Neco Ltd. **Appellant**

Versus

Chhattisgarh State Electricity Regulatory Commission and Another **Respondents**

J U D G M E N T

Dipak Misra, J.

The respondent No.2, Chhattisgarh State Electricity Board (CSEB), filed Petition No.5/2005 under Sections 45, 46 and 64 of the Electricity Act, 2003 (for brevity, 'the Act') for determination of Retail Supply Tariff for the financial year 2005-2006. The Chhattisgarh State Electricity Regulatory Commission (for short, 'the Commission'), while dealing with the power intensive industries adverted to the tariff that is to be determined qua the present appellant. Paragraph 3 of the HV-5 Power Intensive Industries that

deals with tariff reads thus:-

	Category of consumers	Demand Charges [Rs./KVA/month]	Energy Charges [Rs./KWh]
HV-5	Power Intensive Industries		
5.1.	220/132 KV Supply	260	2.55
5.2.	At 33 KV Supply	275	2.65

2. Paragraph 4(a) adverts to minimum monthly payment of charges. It reads as follows:-

> "4. Minimum Charge [a] For 220/132 KV Supply
>
> The consumer will guarantee a minimum monthly payment of charges of the unit [Kwh] equivalent to 30% load factor on the contract demand plus demand charges on the billing demand for the month irrespective of whether any energy is consumed during the month or not."

3. In the present appeal, we are only concerned with minimum charges as nothing else is in dispute. The Commission, while dealing with minimum charges, fixed 30% of the load factor taking into consideration the pattern of consumption as minimum charges. Be it noted, the said tariff determination was applicable for the said financial

year in respect of all the power intensive industries.

4. After the said order was passed, the appellant filed Petition No.19 of 2005 (M) under Section 94 of the Act. The Commission *vide* order dated 5th October, 2005, taking note of the consumption in the said year, reduced the minimum monthly payment of charges to 10% of the load factor. The analysis of the Commission is reproduced below:-

> "11. Based on last eight months consumption (January 2005 to August 2005), the average load factor is found to be as 11.4%. If the load factor is decided to be maintained at 10% then the TMG unit comes to 12,31,200 as against the average consumption of 11,27,525 units which would appear to be reasonable though marginally more for which the petitioner has to pay the charges irrespective of his consumption. In that case the petitioner will still be required to pay the demand charges of Rs.41.26 lakh per month which he was not required to pay earlier, and Rs.31.39 lakh towards energy charges totalling to Rs.72.65 lakh per month, as against Rs.60.50 lakh at the pre-revised tariff rate. According to this the average unit rate comes to Rs.6.44 as against Rs.5.37 earlier, i.e. rise by about 20%. The request of the petitioner for reducing the demand charge to 33% on the ground that he draws power only for 8 hours and exports power to CSEB for 16 hours has no logic as the concept of demand charge has been introduced to recover the fixed charges. In this case, the CSEB has to remain prepared to supply power to the petitioner for 8 hours and the power not drawn or less drawn by the petitioner from CSEB can not be allotted to other consumers.

> 12. In view of the petitioner's peculiar pattern of power consumption, the Commission feels that the minimum guaranteed consumption of the petitioner should be different from the other industries in his tariff category and should be fixed at a much lower level. The Commission accordingly directs that the petitioner be required to guarantee a minimum monthly payment of charges of units equivalent to 10% load factor on the contract demand plus demand charges on the billing demand per month irrespective of whether any energy is consumed during the month or not. This will not adversely affect the income of the CSEB, as it will be earning Rs.10 lakh extra per month as compared to the pre-revised tariff. This will be further increased due to increased rate of low P.F. penalty."

5. The aforesaid order was assailed before the Appellate Tribunal for Electricity (for short, 'the tribunal') in Appeal No.186 of 2005.

6. During the pendency of the appeal, the appellant along with others approached the Commission in Petition No.17 of 2005, making manifold prayers. The Commission enumerated the following aspects for consideration:-

> "(i) Set off on contract demand (CD) of the CPP-holder, captive consumer and non-captive consumers availing power from the CPP through open access.
>
> (ii) Parallel operation charges.

(iii) Separate tariff for start up power.

(iv) Tariff for supply to CSEB/licensee and definition for firm and infirm power.

(v) Issue of sale of electricity to third parties.

(vi) Wheeling charges.

(vii) Introduction of ABT for CPP-holders."

7. While dealing with the minimum charges, which was the part of issue No.1, the Commission came to hold that:-

"In view of the above, the Commission decides that for the present no set off on CD may be permitted. The Commission will review the position when the intra-State ABT regime is fully operational and the Balancing and Settlement Code is fully implemented. The Commission, however, decides that both the captive as also the non-captive consumers of the CPPs, while paying demand charges including tariff minimum charge, will not be required to pay monthly minimum charges on consumption considering the fact that their requirement of power is to be met from the CPP only and they may take very little power from the licensee/CSEB. Thus such consumers, whether EHV or HT, shall be required to pay tariff minimum charges on the contract demand or the recorded maximum demand, whichever is higher only. This dispensation will, however, be available to these captive/non-captive consumers who avail power both from a CPP and the licensee, on the condition that the supply from the CPP is more than 50% of their requirement in terms of unit consumption. Every captive and non-captive consumer will have to declare that they will be

> drawing more than 50% of their monthly consumption from the CPP failing which it will be presumed that their power requirement from the CSEB/licensee is more than 50% and they will not get the benefit of waiver of monthly minimum charge on consumption."

8. We may note here that the said order passed by the Commission was challenged in appeal before the appellate authority and the appeal has been disposed of affirming the same. It is also apt to note here that the appellant is not a party to the same and in the instant case, the only issue is levy of minimum charges at 10% for the financial year 2005-2006.

9. We have heard Mr. Devashish Bharuka, learned counsel for the appellant and Ms. Swapna Seshadri, learned counsel for the respondent No.1.

10. Mr. Bharuka, learned counsel for the appellant submits that the minimum charge has been abolished as a concept in the case of likes of the appellant and, therefore, there is no justification whatsoever to levy the same for the year 2005-2006. It is urged by him that though the order passed in Petition No.17 of 2005 was brought to the notice of the tribunal, the same has neither been appropriately

dealt with or addressed to inasmuch as the tribunal has concurred with the order passed in review by ascribing no reason.

11. Ms. Swapna Seshadri, learned counsel for the respondent-Commission, in support of the order contends that the appellant is enjoying the benefit of the order of the Commission that has been affirmed by the tribunal after the concept of levy of minimum charges has been abolished in respect of subsequent years, but the said principle cannot be made applicable to the year 2005-2006, for the "load factor", that is, 11.4% was specifically taken into consideration by the Commission in respect of the said year.

12. From the rivalized submissions canvassed at the Bar, we find that both sides lay emphasis on the "consumption pattern of the load factor" for the calculation of monthly minimum charges. It is the admitted position that the Commission while dealing with Petition No.17 of 2005 has returned a categorical finding that the likes of the appellant are not liable to pay the minimum charges. However, as we find, it is not a determination in absoluteness. It depends

upon the scrutiny and analysis of the factual score. To elucidate, abolition of minimum charges is not stated as a principle of law but has been so adjudicated on the basis of certain conditions precedent being satisfied. Therefore, the factual score, delineation thereof and the ultimate analysis thereon constitute the structural pillar of the discussion.

13. Our duty would have been easier had the tribunal adverted to the said aspect. As we find from paragraph 18 of the order passed by the tribunal, it has really not taken note of the order passed on 6th February, 2006, wherein as a concept which is founded on factual analysis, the minimum charges stood abolished. Needless to say, as the conclusion is based on appreciation of relevant facts and other enquiry, it was incumbent on the Commission to dwell upon the same and then only such analysis could be scrutinised in appeal by the appellate authority in its proper perspective. It is a statutory obligation. At this juncture, it is fairly stated by the learned counsel for the Commission that the factual analysis can be made in an apposite manner by the Commission but not by the tribunal at the first instance. Learned counsel for the appellant does not

dispute the said position.

14. As the factual analysis is necessary and certain conditions precedent are required to be gone into for the purpose of determination as regards the aspect whether there should be abolition of the minimum charges for the financial year 2005-2006 or not, the competent authority, we are disposed to think, should be the Commission. Therefore, we are inclined to remit the matter to the Commission for fresh determination.

15. In view of the aforesaid premises, the appeal is allowed, the order passed by the tribunal as well as by the Commission is set aside and the matter is remitted to the Commission for determination on the basis of the factual score keeping its own analysis that has been made while dealing with the grievance put forth in Petition No.17 of 2005. We may repeat at the cost of repetition that levy or non-levy being determinable on the factual base, every aspect relatable to the same has to be considered. Accordingly, we direct that the said determination shall be done within a period of four months from the date of receipt

of the order. We will be failing in our duty if we do not note that the tribunal has dealt with other aspects. As the learned counsels have restricted the argument pertaining to contract demand, we have only delved into the same. There shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Mohan M. Shantanagoudar)

New Delhi;
February 22, 2017.