

6. Western Regional Load Despatch Centre,
F-3, MIDC Area, Marol,
Andheri (East), Mumbai 400093.
(through its General Manager)

.....Respondents

Counsel for the appellant : Mr. Valmiki Mehta, Senior Advocate and
Ms. Suparna Srivastava, Advocate

Counsel for the respondents : Mr. Sakesh Kumar advocate with
Mr. Rohit Singh advocate for MPSEB

Mr. Ajit Bhasme, advocate for MSEDCL.

Dated the 14th November, 2006.

J U D G M E N T

1. Appellant Chhatisgarh State Electricity Board has preferred the present appeal seeking to set aside order dated 8.12.2005 passed by the first respondent, Central Electricity Regulatory Commission in petition No. 43 of 2005 in accepting and giving effect to the report submitted by its one member bench on 13.9.2005 and that other consequential reliefs granted thereof.

2. Heard Mr. Valmiki Mehta, senior advocate appearing for Ms. Suparana Srivastava for the appellant, Mr. Sakesh Kumar advocate for Mr. Rohit Singh for respondent No. 3, Mr. Ajit Bhasme advocate appearing for

second respondent, while the other respondents have chosen not to appear despite service of notice.

3. Concedingly, in the light of the recent pronouncement of Hon'ble Supreme Court in C.W.P. No. 675 of 2004 with TC (C No. 44, 45 and 46 of 2005) MPSEB Vs. Union of India and Ors. dated 13.9.2006, substantial portion of relief prayed for by the appellant deserves to be sustained and the appeal deserves to be allowed in favour of the appellant. In respect of remaining portion, also it is represented that it is the appellant herein, who has moved the High Court of Delhi but there is no order of stay and hence the appellant urged the appeal on merits. It is sufficient to summarize the facts leading to the present appeal and it is not necessary to set out the case and counter case of both sides in light of the recent judgment of the Hon,ble Supreme Court between the same parties.

4. The appellant, a Electricity Board came to be established in terms of Section 58 of M.P. Reorganization Act 2000 and has become functional w.e.f. 15.11.2000. The erstwhile undivided Madhya Pradesh Electricity Board (hereinafter referred to as MPEB for brevity) was the predecessor of the appellant and the third respondent Madhya Pradesh State Electricity Board (hereinafter referred to MSEB for brevity). The dispute raised in this appeal relates to the payment of FLEE charges to beneficiaries in the

Western Region. FLEE charges are payable under the "Frequency Linked Energy Exchange" scheme which was introduced in the Western Region for grid discipline w.e.f. 1.6.1992. Imposition of FLEE charges was a part of energy accounting where-under the underdrawal/ overdrawal in respect of the constituent system is to be determined on an hourly basis and the same will attract penalty/incentive as the case may be. Such charges were payable to the beneficiaries in the region on the basis of monthly advices issued by the Western Regional Electricity Board (WREB). The charges payable depended upon the grid frequency and the overdrawal or underdrawal of the beneficiaries with respect to their respective shares from the central sector allocation. As per the arrangement, the beneficiaries are to bilaterally settle the charges as worked out by Western Regional Electricity Board (WREB) at the rate applicable from time to time.

5. On the introduction of ABT scheme in Western Region w.e.f. 1.7.2002 and the introduction of U.I. mechanism for payment of charges qua underdrawal/overdrawal of energy, the system of payment of FLEE charges by the beneficiaries in the Western Region came to an end. The dispute with respect to claims is restricted for the period ending with 30th June, 2002.

6. According to the appellant till the date of formation of two successor Boards undivided MPEB, such FLEE charges were raised by other beneficiaries in the region on MPEB and it is the liability of the said MPSEB. On and after the formation of the respective Boards, each of the successor Board has to bear their own liability qua FLEE charges based on the central sector power allocation in their favour.

7. MPEB Reorganization Act 2002 came into force w.e.f 15.11.2000 and the liabilities of the undivided MPEB upto the creation of successor Board were being shared between the appellant and respondent No.3 (MSEB) as per the Notification issued from time to time in that behalf by the Central Government. The FLEE charges found to be a part of the liability towards charges of power as per Notification dated 4.11.2004 issued by Government of India, Ministry of Power, while deciding the allocation assets and liabilities of the undivided MPEB between the appellant and respondent No. 3. The Government of India allocated the liability towards charges of power in its entirety to the MPSEB and no liability was apportioned to or fell to the share of the appellant with respect to FLEE charges payable to any of the beneficiaries in the Western Region for the period ending on 15.11.2000, viz. the date on which the appellant Board became functional.

8. According to the appellant, respondent No. 3 alone is liable to discharge the entire FLEE liability payable to other beneficiaries for the period ending with 15.11.2000 in terms of Notification dated 4.11.2004 issued by Government of India, Ministry of Power. The said Notification dated 4.11.2004 was the subject matter of challenge by the third respondent, as well as Government of Madhya Pradesh on the file of the Hon'ble Supreme Court in W.P. (C) No. 675/2004 and Suit No. 6/2004. Pending the proceedings the Hon'ble Supreme Court has ordered interim measure of status quo prevailing as on 25.4.2005 to continue.
9. Based on the advices issued by WREB in respect of FLEE charges, the second respondent Maharashtra SEB laid claim on the file of the first respondent for Rs. 137.82 crores from MPSEB in petition No. 43 of 2005 and sought for a direction to MPSEB to pay Rs. 114.83 crores due as on 30.11.2004.
10. After the contesting respondent filing reply and when the matter was pending, WREB submitted on 15.7.2005 the details of liability of composite MPEB/MSEB and the bills payable towards flee charges to the other beneficiaries v.z. MSEB and GEB for the breakup period from 1.6.92 to 30.11.2000 and 1.12.02 to 13.6.2004. Various contentions were advanced before the first respondent Commission. The first respondent

nominated one of its member to examine the dispute with respect to the allocation and liability and outstanding payable to the beneficiaries by the two successor Boards. The one member bench submitted a report and thereafter the first respondent Commission required the parties to file their respective objections.

11. The first respondent by the impugned order dated 8.12.2005 passed final orders accepting the report of the single member bench, which is the subject matter of challenge in this appeal before this Appellate Tribunal. MPSEB has already made payment of Rs. 13.47 crores on account of alleged first installment. In this appeal, the appellant challenged the order of the first respondent Commission, contended that the entire order is illegal, it is a misdirection, contrary to the statutory provisions of The Madhya Pradesh Reorganization Act 2000, besides raising various other contentions.
12. According to the appellant for the period upto 13.11.2000, the composite MPEB was liable to pay towards FLEE liability the sum of Rs. 292,327,494 to GEB and Rs. 718,335,339 to MSEB. The said liability of composite MPEB has to be solely borne by MPSEB (the third respondent) in terms of Government of India Notification dated 4.11.2004. With respect to the post reorganization period of the liability, the same has to be shared

between the beneficiaries as per Government of India Notification dated 3.11.2004. It may not be necessary to set out the details of the orders passed by the first respondent Commission in the light of the development viz. judgment of the Hon'ble Supreme Court since been delivered on 13.9.2006. With respect to the post reorganization, it is contended that the liability has to be fixed and paid as per the Government of India Notification dated 3.11.2004.

13. In this appeal the following points arise for consideration:
 - A. Whether the third respondent is liable to pay the FLEE charges for the period 1.6.1992 to 30.11.2000 to the beneficiaries as advised by WREB?
 - B. Who is liable to pay FLEE charges to the beneficiaries for the period subsequent to 1.12.2000 and till the introduction of ABT and UI system?
 - C. To what relief the appellant is entitled to?

14. Taking up point A, it is fairly represented by the counsel appearing for the appellant as well as the contesting respondent that the judgment of the Hon'ble Supreme Court in WP 675 of 2004 etc. is between the parties

and it squarely applies and the point has to be answered in favour of the appellant.

15. The Hon,ble Supreme Court after elaborate consideration upheld the Notification of Government of India dated 4.11.2004 allocating the assets and liabilities of the former MPEB. The Supreme Court held thus:

“ We, therefore, are of the opinion that the cut-off date fixed by the Central Government cannot be said to be so arbitrary so as to attract the wrath of Article 14 of the Constitution of India. The logical corollary of our finding would be that the said date has been fixed in supersession of the earlier orders.

We have noticed hereinbefore that the said order has been issued in supersession of all earlier orders. The writ petitions filed by the CSEB questioning the validity of the said order, therefore, become infructuous.

The only question which survives now is as to whether the order dated 4.11.2004 regarding division of assets and liabilities between two successor Boards is just and proper. The apportionment of current assets and liabilities has been made on the basis of power consumption ratio of states. Any other variable might not have any rational nexus with the apportionment of current assets and liabilities. It was submitted that the Central Government had adopted the most rational method of apportionment of current assets and liabilities as the power consumption ratio had a rational link with the subject matter of apportionment. It was further

submitted that any change from this principle would have resulted in the same grievance from the CSEB. Long term assets and liabilities were divided in the ratio of 90:10 and hence, overall, the MPSEB had been given 85% of the assets and 84% of the liabilities. The action on the part of the Central Government cannot hence be said to be irrational. It may be observed that the revenue generation capacity would be the most favourable variable to them as would be clear from the table given below:

<i>Criteria</i>	<i>Madhya Pradesh</i>	<i>Chhatisgarh</i>
<i>Consumption</i>	<i>77%</i>	<i>23%</i>
<i>Connected load</i>	<i>79%</i>	<i>21%</i>
<i>Energy consumption</i>	<i>77%</i>	<i>23%</i>
<i>Installed capacity</i>	<i>67%</i>	<i>33%</i>
<i>Revenue Generation</i>	<i>64%</i>	<i>36%</i>

We have noticed hereinbefore that at one point of time, the MPSEB was agreeable for apportionment of the assets on any of the grounds.

- *Revenue generation capacity may although be one of the grounds, the same cannot be said to be an irrelevant criteria as it has a rational nexus with current assets and liabilities. Fixing current liabilities on the basis of revenue generation capacity is not and cannot be held to be arbitrary or irrational.*

Population ratio as defined in Section 2(h) is not relevant for application of Section 58. Whenever population ratio is to be applied for the purpose of apportionment of assets and liabilities, the Parliament stated so categorically. We may refer to, by way of

example, that in Section 42 and 43 division of assets and liabilities have been made relatable to the population ratio. In the instant case, the Central Government had maintained two other criteria, viz., geographical constitution and fixed assets.

Ordinarily, in a matter of this nature, this court, in exercise of its discretionary/jurisdiction under Article 32 of the Constitution of India shall not interfere. It would exercise judicial restraint. It may be erroneous but not illegal. It may not be just and proper for one of the State Boards, but it is for the other."

16. While holding so, the challenge by the second respondent has been rejected by the Hon,ble Supreme Court. Concedingly, as per the Notification issued by the Government of India, Ministry of Power, the liability is that of the second respondent MPSEB and not that of the appellant to pay herein FLEE charges to the beneficiaries as calculated by WREB for the period 1.6.1992 to 30.11.2000 and the order of the first respondent directing the appellant Board to pay, deserves to be set aside. This will cover the FLEE charges payable for the period 1.6.92 to 30.11.2000. The Copy of the Government of India, Ministry of Power Notification dated 4.11.2004 was placed before us and it is clear that it is the second respondent, which is liable to pay the entire dues of the erstwhile MPEB. In fact direction was sought for against MPSEB to pay Rs. 118.83 crores due to MSEB as on 30.11.2004. That being so, there is no other alternative except to sustain the claim of the appellant.

17. The details of dues payable to beneficiaries as calculated by WREB are as hereunder:

(In Rs.)

Sl. No.		1.6.92 to 30.11.2000	1.12.2000 to 30.6.2002
1	Composite MPEB to GEB	292,357,494	
2	MPSEB to GEB	-	142,617,268
3	Composite MPEB to MPEB	718,335,339	-
4	MPSEB to MPEB	-	659,848,951
5	MPSEB to CSEB	-	2,621,654,715
6	GEB to CSEB	-	778,692,028
7	MPEB to CSEB	-	156,751,055
	Total:	1,010,692,833	

As seen from the above table Items 1 & 3 has to be paid by the composite MPEB respectively to GEB and MPEB. There is no controversy in this respect. Item No. 2, 4,5,6 and 7 are the amount payable by MPEB to the beneficiaries indicated therein. This is also not being controverted. Hence as per the working details various amounts, the liability has to be borne by the contesting respondent to the beneficiaries. In fact item No. 5,6 and 7 are the amount payable to the appellant herein. While item No. 2 & 4 are the amount which the contesting second respondent is liable to pay to GEB and MPEB respectively. Item No. 1 & 3 is the liability on MPSEB (second respondent) to GEB and MPEB.

18. The contrary view taken by the first respondent cannot be sustained and liable to be interfered. It is also fairly admitted by either side that the quantum of FLEE amount as calculated by WREB are not in dispute and there is no dispute to the amount shown in the FLEE account as calculated by WREB. The dispute has now been decided by the Hon'ble Supreme Court finally. Hence the learned counsel appearing for contesting second respondent has to admit the liability of the second respondent in the light of the recent judgment of the Hon'ble Supreme Court. The first point is answered holding that it is the second respondent who is liable to pay the entire FLEE charges for the period 1.6.92 to 30.11.2004.
19. On the second point, which is subsequent to bifurcation, the liability has to be worked out in terms of Government of India notification dated 3.11.2004, The Government of India Notification dated 3.11.2004 has not been challenged by the contesting second respondent, but it is the subject matter of challenge only by the appellant on file of the Hon'ble Supreme Court. As there is no orders of stay and the grievance if any only is that of the appellant, it follows that the notification dated 3.11.2004 has to be given effect by the parties herein. In the event of the appellant succeeding in the writ petition, it is still upon to the appellant to seek for reopening the matter before the competent forum

and work out its remedy. The second point is also answered in favour of the appellant.

20. It is brought to our notice that certain payments were already made and hence we direct WREB to give effect to the judgment in this appeal and it is not necessary for parties to move either the first respondent or any other authority. It is also represented by the counsel appearing on either side that once the controversy has been decided the parties will adjust and make the payment without any demur and WREB will give effect to the orders. In the circumstances, we answer the three points in favour of the appellant.

21. The appeal is allowed. The order of the first respondent is set aside and the second respondent directed to make payments of amounts outstanding in the light of this judgment within a period of eight weeks after communication of this judgment and WREB shall communicate the exact amount to be paid within four weeks from communication of judgment.

21. Parties shall bear their respective costs in this appeal.

Pronounced in the open court on this 14th day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

