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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6891 OF 2010

Rajendra G. Shah .. Petitioner
V/s
Maharashtra State Electricity Distributiohn .. Respondent
Company Limited

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Mr. J. Shekhar i/b J. Shekhar & Co. for the petitioner.

Mr. Dipankar Das i/b M.V. Kini & Co. for the respondent.

CORAM : D.G. KARNIK, J.

DATE OF RESERVING THE JUDGMENT : 29th July 2011

DATE OF PRONOUNCING THE JUDGMENT: 4th August 2011

JUDGMENT:

1. The petitioner carries on his profession as an advocate in the city of Pune. He has his office in flat no.10B, Anandmayee Apartments, Survey No.15A/1, Karve Road, Erandvana, Pune-411004 (for short "the suit flat") and carries on his legal profession from the suit flat. The respondent supplies electric power to the suit flat. The petitioner was initially charged for the electric power at the rate applicable for residential use. In the year 2000, the Maharashtra State Electricity Board (for

short "the MSEB") sought to charge the petitioner for the electric power at the rate applicable for commercial use. The petitioner filed a suit, bearing Regular Civil Suit No. 194 of 2000, for a declaration that the petitioner was not using the electric power for a commercial use and for an injunction restraining the MSEB from applying tariff meant for commercial use instead of residential use. The suit was decreed by the Civil Judge, Junior Division, Pune in favour of the petitioner on 5th May 2001. The Court granted a declaration that the petitioner was a domestic user of electricity and was not using electric power for commercial use. Accordingly it granted permanent injunction restraining the MSEB from charging tariff applicable for commercial use as opposed to the residential use. Appeal filed by the MSEB was dismissed by the District Court, Pune on 1st August 2001.

2. Subsequent to the decision of the appeal, operations of MSEB were divided into different companies formed for carrying out different operations like generation, transmission and distribution of electricity. The operations of distribution of power to the retail consumers were taken over by the Maharashtra State Electricity Distribution Company Limited - the respondent herein. After taking over of the operation of

retail distribution of electricity to the consumers, relying upon various orders passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as "the MERC"), the respondent sought to bill the petitioner for the electricity supplied at the rate applicable to non-domestic users. The petitioner objected to the change of tariff and contended that the respondent can charge for the electric power consumed by him in the suit flat only at the rate applicable for residential use. He then put to execution the decree passed by the Civil Judge, Junior Division in RCS No. 194 of 2000 and confirmed by the District Court by filing an execution petition bearing Regular Darkhast No. 29 of 2009. In the execution petition, he asserted that as a permanent injunction was granted against the MSEB, the respondent, which was its successor, was bound by the decree and was bound to charge for the electricity at the rate applicable for residential use. He prayed that appropriate action be taken against the respondent for breach of the injunction.

3. The execution petition was resisted by the respondent by filing say-cum-objection under section 47 of the Code of Civil Procedure. The respondent contended that the decree in RCS No. 194 of 2000 was passed on the basis of the provisions of

the Indian Electricity Act, 1910 and the Electric (Supply) Act, 1948 and the tariff fixed by the MSEB thereunder. Both the Acts were repealed by the Parliament by enacting the Electricity Act, 2003 which came into force with effect from 10th June 2003. The Electricity Act, 2003 contemplates setting up of Electricity Regulatory Commissions which have been conferred a power to determine the tariff for electric power. The MERC has accordingly been set up for the State of Maharashtra, which has fixed a new tariff for electricity in the State of Maharashtra. As per the new tariff fixed by MERC, the petitioner is liable to pay for the electric power at a rate applicable to non-domestic users. As regards the decision in RCS No. 194 of 2000, the respondent contended that the decision has become inexecutable in view of fixation of new tariffs by the MERC and the decision has ceased to have a binding force. The contention of the respondent was accepted by the executing court which by its order dated 29th March 2010 held that the decree in RCS No. 194 of 2000 cannot be executed. Aggrieved by the decision of the executing Court, the petitioner has approached this Court.

4. Before I proceed to consider what is the appropriate tariff to be charged for the electric power consumed by the

petitioner in the suit flat, it would be necessary to consider the effect of the decree passed in RCS No. 194 of 2000. Learned counsel for the petitioner submitted that the decree passed in RCS No. 194 of 2000 became final on it being upheld by the District Court in appeal. The decree passed by the Civil Court cannot be set aside by an enactment passed by the legislature. The decree would continue to be binding on the parties and since the respondent was successor of the MSEB, it was bound by the decree. It cannot be disputed that a legislature cannot set at naught a decision of a Court by passing a legislation overruling the decision. However, where a decision of a Court is based upon an interpretation of any provision of law, it is open for the legislature to amend the provision. If the provision on which the decision is based is so altered that the very basis of the decision of the Court goes away, then the decision would become inapplicable and would cease to be binding in future. I am fortified in my view by a decision of the Supreme Court in the case of *Indian Aluminium Co. v. State of Kerala*, AIR 1996 SC 1431. After considering its several earlier decisions, the Supreme Court summarised the position of law in paragraph 56 of its decision. Sub-para (9) of paragraph 56 is material and reads thus:

"(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the Legislature must have competence to do the same."

It is not the case of the petitioner that the Parliament was not competent to pass the Electricity Act, 2003. The validity of the Electricity Act, 2003 as also the setting up of MERC is not a subject matter of challenge. It would therefore be appropriate to see whether the basis of the decision rendered by the Civil Judge, Junior Division in RCS No. 194 of 2000 was altered by the Electricity Act, 2003 and the tariff for electric power fixed by MERC in pursuance of the power on it by the Electricity Act, 2003.

5. Section 2(4) of the Electricity Act, 2003 defines "appropriate commission" to mean Central Regulatory Commission" referred to in sub-section (1) of section 76, "State Regulatory Commission" referred to in section 82 or

“Joint Commission” referred to in section 83 as the case may be. In pursuance of the Electricity Act, 2003, the State of Maharashtra has set up Maharashtra Electricity Regulatory Commission (MERC) which is the appropriate Commission in the present case. Section 62 of the Electricity Act, 2003 confers a power on the commission to determine the tariff for electricity in accordance with the provisions of the Act for (a) supply of electricity by generating company to a distribution company, (b) transmission of electricity, (c) wheeling of electricity, and (d) retail sale of electricity. Section 62 of the Electricity Act, 2003 thus confers a power on the MERC to determine the electricity tariff for retail sale of electricity by the respondent. The tariff determined by the MERC in accordance with the powers conferred on it by section 62 would override the tariff which was fixed by the MSEB in the past. The tariff which was in force and the classification for different kinds of uses that were fixed by the MSEB prior to the fixation of the new tariff by the MERC would cease to apply with effect from the date from which the MERC determines the tariff. Therefore, the tariff which was in force when RCS No. 194 of 2000 and the appeal arising therefrom were decided and the classifications of consumers made by MSEB in the tariff ceased to apply with effect from the date the MERC determined

the electricity tariff in accordance with the power conferred on it by section 62 of the Electricity Act, 2003. The trial Court, therefore, committed no error in holding that the decree passed in RCS 194 of 2000 was not enforceable when the execution petition was filed as new tariff filed by MERC was applicable.

6. The next question that arises for my consideration is: What is the rate applicable for use of electric power consumed by professionals like doctors, lawyers, professional engineers and chartered accountants as per the tariff fixed by the MERC? The respondent has produced before me copies of the orders of MERC dated 18th May 2007, 20th June 2008, 17th August 2009 and 10th September 2010 under which tariff has been fixed or revised for retail consumption of electricity by the MERC. The tariff fixed by the MERC by its order dated 18th May 2007 was to remain in force from 1st May 2007 to 31st March 2008 and its period was extended until further orders by an extension order dated 1st April 2008. The tariff was revised and refixed by the order of the MERC dated 20th June 2008 which was to remain in force from 1st June 2008 to 31st March 2009. Its period was extended until further orders by the order of the MERC dated 1st April 2009. The tariff was further revised by

the MERC by its order dated 17th August 2009 and a further order dated 12th September 2010 which is applicable from 1st September 2010 till date.

7. Before I turn to the tariff fixed under the aforementioned orders of the MERC, it would be appropriate to refer to various decisions cited by the parties.

8. In *New Delhi Municipal Council v. Sohanlal Sachdev*, (2000) 2 SCC 494, the facts were that the landlord of the premises let out the first floor and the barsati floor of his property to Sachdeva Guest House for running a guest house. On intimation of the letting by the landlord to the New Delhi Municipal Council (NDMC), it demanded charges for the electricity at the rate applicable to non-domestic user. The landlord challenged the levy contending that the running of a guest house cannot be said to be a commercial use as opposed to a domestic use because the guests (lodgers) reside in the premises though for short or temporary periods during the period of their visit to Delhi. The trial Judge held that the user of the premises for running of a guest house in the suit premises cannot be termed as commercial user though it cannot be termed as domestic user either. Therefore, NDMC

had a right to charge at the non-domestic rate for the supply of electricity. The appeal filed to the Court of Senior Civil Judge was dismissed. However, on second appeal the High Court reversed the decision of the two lower Courts below and held that the user of the suit premises for running a guest house without any kitchen facility was user for residential purpose and therefore NDMC was not entitled to charge electricity on the basis of commercial user. On appeal by special leave, the Supreme Court by reversing the decision of the High Court restored the decision of the trial Court. The Supreme Court held that the term "domestic user and commercial user" were not defined in the Act and therefore the expressions must be given common parlance meaning and must be understood in their natural, ordinary and popular sense. It then referred to the classification of uses made in the tariff and held that for the purpose of charging electric power, the NDMC had set out category of "domestic" user as contra-distinguished from "commercial" user or to put it differently "non-domestic" user. The intent and purpose of classification was to make a distinction between purely private residential purpose as against commercial purpose. The use of the guest house may be for residence by the guest but the user of the premises by the keeper of the guest house must certainly be commercial

user and that was the purpose for which the keeper of the guest house must be using the premises. The levy of electricity charges by the NDMC for commercial user was thus upheld by the Supreme Court.

9. In *M.P. Electricity Board v. Shiv Narayan*, (2005) 7 SCC 283, another Bench of co-equal strength of two judges of the Supreme Court differed with the view taken in the case of *New Delhi Municipal Council v. Sohanlal* (*supra*). In that case, respondent no.2 – G.D. Padraha, an advocate, was occupying a house as a tenant. He used it for the residential purpose till the year 1981. Thereafter he shifted to his own house but he maintained his office in the tenanted premises. In January 1986, the officials of the Electricity Board inspected the service meter and served a notice to the landlord alleging that the premises were used for commercial purpose instead of domestic purpose. The landlord replied saying that he was never using the premises for commercial purpose, though the respondent no.2 had his office in the premises. The dispute reached the Supreme Court. After considering the meaning of the words “residence”, “commerce” and “profession”, the Bench was of the view that profession was required to be distinguished from commerce and therefore tariff could not be

charged on the basis of the commercial use in respect of the lawyer's office. However, in view of the earlier decision of the earlier Bench rendered in the case of *New Delhi Municipal Council v. Sohanlal (supra)*, the matter was referred for decision to a Larger Bench.

10. A copy of the decision, though unreported, rendered on the reference by a Bench of three Hon'ble Judges of the Supreme Court on 27th October 2005 in Civil Appeal No. 1065 of 2000 (the Chairman, M.P. Electricity Board vs. Shiv Narayan), has been placed before me by the learned counsel for the petitioner. The Larger Bench of the Supreme Court held that the tariff entries classify user into two categories, namely (a) domestic purposes and (b) commercial and non-domestic purposes. This is done statutorily in exercise of the powers under section 49 of the Electricity (Supply) Act, 1948. The classification clubs the commercial and non-domestic purposes into one category. The Court was of the view that question whether an advocate can be said to be carrying on commercial activity did not call for a decision for deciding the applicability of the rate of the charges for electricity used by him. As the user of the premises by an advocate for his office was admittedly not "domestic", it would fall in the category of

"commercial and non-domestic". For any non-domestic use, the commercial rates were to be charged. The Supreme Court further held that exclusively running an office (of an advocate) was clearly a non-domestic uses.

11. These decisions make it clear that the statute, namely section 49 of the Electricity (Supply) Act, 1948 conferred power on the Board to make a classification for the purpose of tariff. After the enactment of Electricity Act, 2003 the power to fix tariff for supply of electric power is conferred on the Electricity Commission (in this case on MERC) by section 62. For fixing the tariff, the MERC is entitled to make a classification of users. Consequently, the relevant entries in the classification made by the MERC in fixing the tariff would be relevant for the purpose of determining what rate would be charged for the electricity used for a particular activity or avocation carried out by the consumers of electricity.

12. It is in the light of the entries in the tariff fixed by the MERC for various categories of users that it would have to be determined what tariff would be application for the electric power consumed for a professional activity like (i) an office of an advocate or a chartered accountant or (ii) a

dispensary/clinic of a doctor. The MERC has fixed the tariff by different orders referred to above and each of the orders fixes the tariff for different periods, each being about an year. Every year new tariff is fixed and while doing so, the MERC has also tweaked in some of the categories of users. The relevant period for our purpose is the financial year 2008-2009 when the respondent demanded from the petitioner the charges for electricity consumed at the rate applicable to non-domestic user. Paragraph 6 of the MERC order dated 20th June 2008 states that the tariff (fixed by it) would be applicable from 1st June 2008 till 31 March 2009. The MERC order categorises the Low Tension users of electricity in 9 categories for the purpose of tariff. The categories are:

- (1) LT I .. Domestic
- (2) LT II .. Non Domestic
- (3) LT III .. Public Water Works
- (4) LT IV .. Agriculture
- (5) LT V .. LT Industrial
- (6) LT VI .. Street Lights
- (7) LT VII .. Temporary Connections
- (8) LT VIII .. Advertisements and Hoardings
- (9) LT IX .. Crematorium and Burial Grounds

Different rates of power have been fixed for these 9 categories of users of low tension electricity. Admittedly, offices of professional persons like lawyers, doctors etc. would not fall in any of the categories from LT-III to LT-IX. The short question that arises for my consideration is whether a lawyer's office or a doctor's clinic would fall under the category LT-I (domestic) or LT-II (non-domestic). By no stretch of imagination, the premises which are used exclusively for the purpose of an office of a lawyer or an office of a chartered accountant or a dispensary/ clinic of a doctor can be regarded as a domestic use. In a sense, a lawyer, a chartered accountant or a doctor does not carry on any commercial activity. The vocation of a lawyer, a chartered accountant and a doctor is regarded in common parlance as a "profession" contra-distinguished from a commerce. But certainly these vocations are not domestic vocations like avocation of a housewife. The classification made by the MERC for charging electricity is not "residential use" as opposed to "commercial use". The classification is made by the MERC as "domestic use" as opposed to "non-domestic use". The use of any premises exclusively for an office of a lawyer or an office of a chartered accountant or a dispensary/clinic of a doctor cannot be regarded as domestic use. The domestic use in common parlance is where a person

or family resides; it ordinarily has a living space and a cooking space. We are not concerned with exceptional cases wherein there may be a domestic use without there being a separate cooking space like a single person taking premises on rent for his residence but eating out everyday with no cooking space in the premises occupied by him. Similarly, the premises which are exclusively used for profession may have a facility of a pantry or a cooking space where tea or coffee is prepared for serving to the staff and/or clients/patients but that would not make the use of the premises as a domestic use. The face of all professions is changing. Though still a vast majority of lawyers, who essentially carry on the profession of pleading in the Court, use their residence as an office where they meet their clients; and that may still be the face of a traditional lawyer practising in smaller cities and towns. However, in large commercial metro-cities, multi partner lawyers firms dominate the legal profession. Some of them carry on every activity of legal profession but pleading in the Court. They do the drafting and conveyancing work relating to the sale and transfer of properties, they do legal financial work relating to public issues and raising of capital (debt or equity), they undertake completing all legal formalities for obtaining of various licences, sanctions and do legal consultancy and every

work other than pleading in the Court. Can their activity be regarded as a domestic activity? Even a man on the street would not call it to be a domestic activity. Similar is the case in respect of large firms of chartered accountants. Doctors have polyclinics, laboratories, diagnostic centres in their clinics. In such large offices and clinics, there may be a place used as kitchen or a pantry for preparation of tea and coffee and even for warming of food which the professionals may often consume in the office. But such use cannot be regarded as a "domestic use". The tariff entries fixed by the MERC for charging for electricity consumed are "domestic" and "non-domestic" user and not "residential" or "commercial" user. Every non-domestic use may not be a commercial use, but nonetheless it is not a domestic use. The user of the premises by doctors, lawyers or chartered accountants exclusively for the purpose of carrying on their profession, in the facts and circumstances as they exist today, though cannot be regarded as a commercial use, is certainly not a domestic use. It is a non-domestic use and therefore the tariff payable for the electric power consumed would be as applicable for non-domestic user.

13. Learned counsel for the petitioner invited my attention to the classification made for levying the electricity tariff by the

MERC in its order dated 17th August 2009 applicable for the financial year 2009-2010. He submitted that since this is a recurring issue and tariff is fixed yearly and different classifications are made for the next year onwards, the tariff entries for the next year should also be taken into consideration for determining the applicable entry/classification in the tariff. For the financial year 2009-2010, low tension consumers have again been classified into 9 categories which are -

- (1) LT - I ... Residential -
(a) BPL (Below Poverty Line)
(b) Non-BPL
- (2) LT - II ... Non-residential or commercial
- (3) LT - III ... Public Water Works & Sewage Treatment Plants
- (4) LT - IV Agriculture
- (5) LT - V Industry
- (6) LT - VI Street Lights
- (7) LT VII (A) Temporary Supply (Religious)
(B) Temporary Supply (Others)
- (8) LT - VIII .. Advertisements and Hoardings
- (9) LT - IX .. Crematoriums and Burial Grounds

Counsel invited my attention to the note appearing below the category "LT I - Residential". The note is titled as

"Applicability" and mentions the various uses for which the LT -
I Residential Tariff would be applicable. The note reads thus:

"Electricity used at Low/Medium Voltage for operating various appliances used for purposes like lighting, heating, cooling, cooking, washing/cleaning, entertainment/leisure and pumping in the following places.

- (a))
- (b))
- (c)) Not relevant and hence omitted
- (d))
- (e))
- (f))
- (g) Residential premises used by professionals like Lawyers, Doctors, Professional Engineers, Chartered Accountants, etc. in furtherance of their professional activity in their residences but shall not include Nursing Homes and any Surgical Wards or Hospitals."

(underlining supplied)

The note similar to clause (g) is also found in the tariffs fixed by

the MERC for the earlier and subsequent years. The note is only absent in the tariffs for the financial year 2008-2009. I would therefore consider the effect of clause (g) of note appearing in the tariff fixed by the MERC for almost all years except F.Y. 2008-2009. The note says that the residential premises used by the professionals like lawyers, doctors, professional engineers, chartered accountants, etc. in furtherance of their professional activity in their residences, shall be charged at the residential tariff. In my view, key words in clause (g) of the note are "in furtherance of their professional activity in their residences". These words show that the lawyers, doctors, professional engineers and chartered accountants, who carry on their professional activities in their residences, i.e. the very premises in which they reside, would be charged the tariff meant for "Residential use". The note does not authorise the respondent to determine what is the dominant user of the premises. The lawyers, doctors, professional engineers and chartered accountants, who are using the premises for their own residence and are using the very premises or part of the premises for their professional activities, would be charged "Residential tariff". Traditional professionals in smaller cities and towns usually for the convenience of their clients have their offices in the very

premises in which they reside. If this is the case, then it is not open to the respondent to bifurcate and determine which part of the residence is used for the purpose of residence and which part is used for the purpose of office or determine what proportion of electric power consumed be attributed to use for residence and what part can be attributed to professional use. It would not be necessary for such professionals to have separate meters or submeters, one to be used for measuring domestic consumption of power and another for measuring consumption for professional activity. That is the object of the note. In respect of the premises which are used by the professionals like lawyers and doctors for their own residence, the tariff for the electricity supplied to the premises would be charged on the basis of domestic use irrespective of the fact that the premises are used for whole or part of the day also for the purpose of carrying on their professional activity in the whole or part of the premises.

14. Initially it was contended that the petitioner was also residing in the suit premises. However, when he was asked to file an affidavit along with the necessary documents showing his residence, learned counsel for the petitioner fairly stated that the petitioner does not intend to file the affidavit nor

press his case of composite use. Averments in the plaint in RCS No. 194 of 2000 also indicate that the suit premises are used exclusively for the profession. The plaint states:

"The plaintiff is a tenant in that premises along with (name omitted) who is normally practicing in the High Court, Bombay. The meter was installed on payment of charges in the year 1990. It is submitted that classification of the office of a lawyer does not come under the commercial activity. Consumption of electricity is exclusively for the purpose of lawyer's office".

The petitioner had thus admitted even in the plaint in the suit that the premises were used exclusively for the purpose of office not only by him but were shared with another advocate principally practicing in Mumbai. In view of the fact that the suit premises are exclusively used for the purpose of office, the petitioner is not entitled to claim that he should be charged for electricity consumed at the rate meant for domestic use, i.e. LT I - Residential use. The user of the suit is clearly a non-domestic and non-residential. The executing Court below therefore did not commit any error in holding that the decree

which was passed in RCS No. 194 of 2000 was non-executable in view of the fact that the revised tariff had been fixed by the MERC which make the classification of the tariff only on the basis of domestic and non-domestic uses and not on the basis of residential use as opposed to commercial use.

15. For these reasons, there is no merit in the writ petition which is hereby dismissed. In the facts and circumstances of the case, the parties shall bear their own costs throughout.

(D.G. KARNIK, J.)