

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4223 OF 2012Brihanmumbai Electric Supply &
Transport Undertaking

....Appellant

Vs.

Maharashtra Electricity Regulatory
Commission (MERC) & Ors.

....Respondents

J U D G M E N T**A.K.SIKRI,J.**

1. Respondent No.3 is a consumer (hereinafter referred to as the “consumer”) of electricity (LT-II Category) whose premises are situated within area of supply of the appellant namely Brihanmumbai Electricity Supply and Transport Undertaking (BEST). In April 2009, he approached respondent No.2 i.e. Tata Power Company Limited (TPC) with a request that he be supplied the electricity by TPC. In nutshell, he wants to switch over from BEST to TPC for his electricity requirement. In response to his request, TPC advised the consumer vide letter dated 8.7.2009 to

approach the BEST for its permission to use its distribution network of the BEST to enable TPC to supply electricity to the consumer using that network. The consumer, accordingly, turned to BEST requesting it to give the said permission. It was, however, denied by BEST vide letter dated 31.7.2009 and again on 10.8.2009. After receiving this rejection, the consumer approached Mumbai Electricity Regulatory Commission (hereinafter referred to as the "Regulatory Commission") with petition seeking the following directions:

"(a) That this Hon'ble Commission may be pleased to direct TPC to provide electricity supply to the Petitioner and make such supply available as early as possible, either on BEST Network or by extending its own network, as may be necessary, failing which TPC's distribution license should be cancelled by this Hon'ble Commission;

(b) that the Hon'ble Commission may be pleased to direct the respondent to pay compensation to the petitioner under Regulations 3.2 and 12 of MERC (Standards of Performance of Distribution Licensees, Period of Giving Supply and Determination of Compensation) Regulations 2005;"

2. In the meantime, respondent Nos.4 to 8 also filed similar petitions before the Regulatory Commission with same relief as they also wanted to switch over to TPC for their electricity requirement. Since direction was sought for TPC, only TPC was

made party. However, at the instance of Regulatory Commission BEST and Reliance Industries Limited (RIL) were also impleaded in these matters. After hearing all the parties, Regulatory Commission passed orders dated 22.2.2010 holding that TPC was bound to supply electricity in terms of applicable Regulations and therefore direction was given to the TPC to supply electricity to the consumers either through BEST wires or its own wires. The operative part of that order reads as under:

“In view of the above there is no requirement to issue a direction in regard to the Petitioner’s claim of compensation under Regulation 3.2 and 12 of the SOP regulations. However, TPC is bound by Regulation 4.7 of MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2005 in terms of the timelines as mentioned in the said Regulation. Time has started ticking from the date of receipt of applications by TPC from the Petitioners who have requisitioned for electricity supply. TPC will have to adhere to the timelines specified in the regulations.”

3. We may point out here that the BEST (the appellant herein) had resisted the demand of the consumers in their petitions with the following contentions:

(a) The Regulatory Commission did not have the jurisdiction to

entertain a dispute between the consumer and a distribution licensee;

(b) TPC was not a deemed distribution licensee for the area in question and therefore was not permitted to supply the electricity to any consumer in that area;

(c) that unlike other distribution licensees, BEST being a local authority, no persons situated in BEST's area of supply could avail electricity from any other licensee, on account of BEST invoking a statutory exemption available to a local authority under Section 42(3) of The Electricity Act, 2003 Act (hereinafter referred to as the Act).

(d) Since TPC had clarified that it was willing to extend its network and supply electricity, BEST also contended that TPC could not extend its network in BEST's area of supply, without BEST's consent and agreement.

4. In its order dated 22.2.2010 while issuing the directions extracted above, the Regulatory Commission rejected BEST's contentions and held that Tata Power had a duty under the Act to extend its distribution network and supply electricity, if the consumers so required, in the South Mumbai area. In light of

TPC's position that it was willing to extend its network and supply electricity, the MERC held that there was no requirement to give any directions to it. The Regulatory Commission also held that TPC would be deemed distribution licensee for the area in question.

5. BEST challenged the aforesaid order of the Regulatory Commission by filing appeal before the Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as the "Appellate Tribunal"). This appeal, however, has been dismissed by the Appellate Tribunal vide orders dated 4.4.2012, thereby affirming the findings and direction of the Regulatory Commission. Not satisfied, BEST has filed the instant appeal statutorily provided under Section 125 of the Electricity Act.

6. We have already stated in brief the four contentions which were raised by BEST before the Regulatory Commission. Same contentions were raised before the Appellate Tribunal, which are the submissions before us as well. Therefore, we proceed to deal with these submissions hereinafter:

RE: Jurisdiction of the Regulatory Commission.

7. This contention was raised primarily on the ground that there was an alternative remedy provided to the consumer to raise his grievances before the Consumer Grievances Redressal Forum (CGRF) established under Section 42 (5) of the Act. Therefore, the consumer should have approached the said Forum instead of filing petition before the Regulatory Commission. This contention is totally misconceived and rightly rejected by the authorities below. As noted above, petition was filed by the consumer seeking direction against TPC to supply electricity to him. Thus, he approached the Regulatory Commission to enforce a distribution licensee obligation under the Act. As on that date, he was not the consumer of TPC but wanted to become its consumer. In so far as CGRF is concerned, which each distribution licensee is required to set up under Section 42 (5) of the Act, it deals with the grievances of the consumer. Consumer is defined under Section 2 (15) of the Act and reads as under:

“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 purposes of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.”

8. Thus, respondent No.3 not being a consumer could not have approached CGRF. Further, we find that in **Maharashtra Electricity Regulatory v. Reliance Energy Ltd.** (2007) 8 SCC 381, this Court has held that the Regulatory Commission has the power to require a licensee to fulfill its obligations under the Act. Thus, we are of the opinion that the Regulatory Commission had the requisite jurisdiction to entertain the petition filed by the consumer. Presumably, for this reason, this contention was pressed half hearted before us and given up in the middle.

RE: Whether TPC is deemed distribution licensee

9. Before we take note of the argument of the parties on this aspect and deal with the same, some background facts need a mention. TPC is the successor of the Bombay Hydroelectric License, 1907, the Andhra Valley Hydro-electric License, 1919, the Nila Mula Valley Hydro-electric License, 1921 and Trombay Thermal Power Electric License 1953 to supply electricity to consumers in specified areas in and around Mumbai (Erstwhile Licenses). The Erstwhile Licenses were subsequently amalgamated and transferred to Tata Power on 12.7.2001.

10. The Government of Maharashtra, in exercise of powers under the Indian Electricity Act, 1910 amended the area of supply under the Erstwhile Licenses from time to time. This included addition of new areas as well as handing over of certain areas to the Government owned distribution company, earlier known as the Maharashtra State Electricity Board.

11. TPC's area of supply overlaps with that of Reliance Infrastructure Limited (R Infra) another distribution licensee in the suburban Mumbai area, and with that of the Appellant (BEST) in South Mumbai. In 2002, R Infra filed a petition before the Respondent No.1 (MERC) alleging that Tata Power's license did not authorize Tata Power to supply electricity to direct retail consumers (with a maximum demand below 1000KVA). While the petition was pending, the Electricity Act, 2003 came into force.

12. On the basis of aforesaid facts TPC claimed that by virtue of first proviso to Section 14 of the Act, it was a deemed licensee for the area of supply of BEST. Under Section 14 the Regulatory Commission is empowered to grant a license to any person on an application made to it under Section 15 of the Act. This license may pertain to transmit electricity as a transmission licensee; or distribute electricity as a distribution licensee; or to undertake

trading in electricity as an electricity trader, in any area, as may be specified in the license. This section has nine provisos which stipulated various circumstances under which no specific license is required by making an application under Section 15 and if the conditions stipulated in any of these provisos are satisfied, such a person is treated as deemed licensee. We are here concerned with 1st proviso under which TPC claims to be a deemed distribution licensee as well as 6th proviso which is invoked by BEST in contending TPC cannot be a deemed distribution licensee in the area where BEST operates. Therefore, we reproduce both these provisos:

1st Proviso: "Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business.

6th Proviso: Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to

the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to the capital adequacy, creditworthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of license on the ground that there already exists a licensee in the same area for the same purpose.”

13. As per the first proviso if any person was engaged in the business of transmission or supply of electricity under the provisions of the repealed laws etc. that person is deemed to be a licensee under the Act, 2003 as well. The period for such deemed licence is the one that is stipulated in the licence, clearance or approval granted to him under the repealed laws. If it is under any Act specified in the Schedule in respect of such licence, then the period of licence is for one year from the date of commencement of the Act or such period as may be specified by the Appropriate Commission. It would mean that either the period of deemed licence for such a person is the period which is stipulated in the licence, clearance or approval granted to him under the repealed laws or for a period of one year from the date of commencement of the Act or the period which may be specified, at the request of the licensee by the Regulatory

Commission. Once, such a period is over, then that person is supposed to apply for licence under Section 14.

Proviso six, on the other hand, deals with a different situation. As per this provision, the Regulatory Commission is authorized to grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area. It is subject to the conditions that the applicant for grant of licence within the same area shall apply with the additional requirements relating to the capital adequacy, creditworthiness, or code of conduct as may be prescribed by the Central Government. It further provides that merely because there exists a licensee in the same area would not be a ground to reject an application for another applicant for same purpose. This provision deals with open access policy.

14. As per the TPC, proviso one is applicable in their case since its predecessor were granted licence under the Act, 1910 and therefore it continuous to be licensee as per the aforesaid deeming provision under the Act, 2003 as well. The case set up by the TPC in this behalf is such a licence granted under the old Act is valid upto 15.8.2014 which is categorical stipulated in the Specific Licence Conditions by the Regulatory Commission.

Therefore, it is only after 15.8.2014 that the TPC would be required to take fresh licence by making application under Section 15 of the Act, 2003. This is stated on the ground that the MERC formulated the MERC (Specific Conditions of License applicable to the Tata Power Company Limited) Regulations, 2008 (Specific License Conditions) under Section 16 of the Act. The Specific License Conditions read with the MERC (General Conditions of Distribution License) Regulations, 2006 set out the terms and conditions of Tata Power's license in supersession of the Erstwhile Licenses, and authorize Tata Power to supply electricity in its area of supply to the public for all purposes in accordance with the Act. The Specific License Conditions further stipulate that the term of Tata Power's license is up to 15.8.2014.

15. The argument of BEST, on the other hand, is that the Appellate Tribunal was wrong in holding TPC was a deemed licensee under the first proviso to Section 14, as well as a parallel licensee under the sixth proviso to Section 14 of the Act 2003. According to Mr. Naphade, the Appellate Tribunal gravely erred in failing to appreciate that network of TPC cannot be allowed or extended within the area of supply of BEST in the absence of distribution licensee which TPC failed to obtain from Regulatory

Commission, though it is a necessary requirement under sections 14 and 15 read with Section 12 of the Act. It was argued that as per the first proviso to Section 14, a person is treated deemed licensee only if it is engaged in the business of supply of electricity under the provisions of the repealed laws and it is for such period "as may be stipulated in the licence granted to him under the repealed laws". It was argued that the protection was only for that period which is stipulated in the licence and not on the basis of licence and there is no such period specified in the business up to 15.8.14 specified in the licence. It was, further, argued that the provisions of the repealed laws in respect of such licences are applicable for a period of one year within which and thereafter licence was to be obtained under Section 14 by moving an application under Section 15, as per the procedure prescribed in the Act 2003. It was argued that for the deeming fiction in the first proviso to said Section 14 to arise, (i) a person must be engaged in the business of supply of electricity under the repealed laws on or before 10.6.2003, and (ii) a period (being, period of subsistence of licence) be stipulated in the licence granted to such person under the repealed laws. It was further

pointed out that said deeming fiction applies (i) to such a person, and (ii) for such stipulated period.

16. There are two facets of the submissions made by Mr. Naphade. In the first instance it is to be found that there is a stipulation of period in the manner stated in the first proviso. Second aspect is as to whether it is incumbent, in all cases, to apply for licence under the provisions of Sections 14 and 15 of the Act immediately after the expiry of one year from the date of commencement of the said Act. In so far as first aspect is concerned, the argument of the appellant loses sight of the fact that in the first proviso the period for which any person can be a deemed licensee is not only such period which is stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule. It also provides that the provisions of repealed laws or such Act specified in the Schedule in respect of such a licence shall apply for a period of one year from the date of commencement of Act 2003 or such earlier period as may be specified at the request of the licensee by the Regulatory Commission. In the present case, the Regulatory Commission formulated MERC (Specific Conditions of License Applicable to TPCL) Regulation 2008 i.e. Specific Licence

Conditions. These were formulated under Section 16 of the Act 2003 and it is in these conditions there is a specific stipulation regarding term of TPC licence up to 15.8.2014. We, therefore, are unable to accept the submissions of the appellant that the licence was valid for a period of one year only. It would be useful to refer to Section 16 of the Act under which aforesaid Specific Licence Conditions of TPC are formulated.

“16. Conditions of licence.- The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.”

Proviso to the aforesaid section very categorically enables the Regulatory Commission to specify general or specific condition of licence applicable to licensees referred to in the first to fifth proviso to Section 14 after expiry of one year after the commencement of that Act. Since as on the date of commencement of the Act, TPC became deemed licensee under the first proviso as its predecessors were holding the distribution

licence under the repealed laws and thereafter specific conditions of licence are formulated by the Regulatory Commission under Section 16 mentioning the period of 15.8.2014, it becomes clear that the combined fact of that would be that YPC would be deemed licence till 15.8.2014. Tata

Power's license to supply electricity in the South Mumbai area is clearly established by virtue of the following:

(a) The Erstwhile Licensee authorized Tata Power to supply electricity to all consumers in Mumbai, including the South Mumbai area;

(b) When the new Act came into force, by virtue of the 1st Proviso to Section 14, Tata Power was deemed to be a licensee under that Act.

This is also clear from Section 172(b) of the Act. It is trite law that once the purpose of the deeming provision is ascertained, full effect must be given to the statutory fiction and the fiction is to be carried to its logical end.

17. An argument was sought to be raised before us that Regulation 2008 laying down specific conditions for TPC are flouted as they were not made by the Regulatory Commission

within the mandatory period of one year. However, no such argument was raised earlier and there is no challenge to the validity of the aforesaid Regulations which are made by the Regulatory Commission under its statutory powers and therefore are having statutory force. Once, we come to the conclusion that TPC can be treated as deemed distribution licensee under the first proviso to Section 14 of the Act 2003 and the area of the licence is the same which overlaps with the area covered by BEST, argument predicated on sixth proviso to Section 14 would not be available to the BEST.

**RE: AVAILABILITY OF OPEN ACCESS TO TPC IN THE AREA
COVERED BY BEST, WHICH IS A LOCAL AUTHORITY
AND**

**PERMISSIBILITY OF TPC TO EXTEND ITS NETWORK IN BEST
AREA OF SUPPLY WITHOUT ITS APPROVAL/CONSENT.**

18. It was argued by Mr. Naphade that under the Act neither open access can be allowed nor distribution system or network of a purported parallel licensee (such as TPC) can be laid or extended within area of supply of BEST. The learned senior counsel labored on the aspect that admittedly BEST was a Public

Sector Undertaking and such bodies are given due recognition of and grant of exemption and/or protection to a special category of licensee being a local authority in the business of distribution of electricity before the appointed day. He submitted that as BEST would be covered by the expression “a local authority” protected measures provided under the Act would be applicable to it as well. According to him, a local authority was always placed on a special footing under Act, 1910 as well as Act, 1948 and now under Act, 2003 which was clear from the provisions of Section 42 (3) of the Act that reads as under:

“42(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 day) 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.”

This provision which deals with the duties of distribution licensee as well as open access specifically excludes a local authority.

Mr. Naphade thus argued that if the Legislature, having regard to the special status of a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST), has duly exempted open access in its area of supply, then it is but consequential and/or a fortiori that a distribution system or network of a purported parallel licensee (such as TPC) cannot be laid or extended within the area of supply of a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST). His submission was that the Legislature could never have and in fact, has not intended that such special status (inclusive of exemption from open access) be in vain or rendered illusory/infructuous/nugatory, and more so by a mere lay out or extension of a distribution system or network of the purported parallel licensee. It is a fundamental principle of law that duly made legislation can never be and should not be in vain or to no avail. Hence, such special status (inclusive of exemption from open access) cannot be ignored, but must necessarily be given full effect to and enforced. According to him an irrational situation would arise if the purported parallel licensee (such as TPC) could not supply electricity under open access in the area of supply of a

local authority engaged in the business of distribution of electricity before the appointed date (such as BEST), but could lay or extend its distribution system or network in the area of supply of a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST). As such, Section 42 (3) necessarily has to be interpreted to qualify or restrict aforesaid Sixth Proviso to Section 14, Section 43(1), Section 42(1) and/or Section 42(2), to the extent that any person, whose premises are situated within the area of supply of a distribution licensee, (which is a local authority engaged in the business of distribution of electricity before the appointed date) cannot require a supply of electricity from a generating company or any licensee other than such distribution licensee, through (i) open access and/or (ii) otherwise (including under parallel license). Moreover, as the provisions of the Electricity Act, 2003, provide for protection of interest of electricity consumers, and as such ought not and should not be interpreted to entail unnecessary burden of said capital expenditure on electricity consumers; a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST) is ex-facie placed on a special pedestal vis-à-vis ordinary

distribution licensees, under the Third Proviso to Section 51 of the Electricity Act, 2003, which has been liberally interpreted in favour of and to advantage of a local authority engaged, before the commencement of the Electricity Act, 2003, in the business of distribution of electricity (such as BEST), by the Hon'ble Supreme Court of India in the Order dated 8.2.2011 made in Civil Appeal No.848 of 2011 (Municipal Corporation of Greater Mumbai vs. Maharashtra Electricity Regulatory Commission & Ors.).

19. On the other hand, Mr. Dhruv Mehta, learned senior counsel appearing for TPC submitted that by this argument of the appellant was mixing the otherwise two distinct concepts, namely that of open access under Section 42 (3) of the Act and that of Universal Service of Relations contained in Section 43 of the Act. Highlighting the purpose of the Act which has, inter-alia, provided emphasizing the need for efficiency and competition in the distribution business as well as open access system and also multiple licences system in the same area of supply, he submitted that if the contention of the appellant is accepted it would negate the very objective which is sought to be achieved by the aforesaid provisions. Mr. Mehta argued that under the Act, there are two ways in which a consumer situated in a particular

area can avail supply of electricity: (i) from a distribution licensee authorized to supply electricity in that area under Section 43; or (ii) from any other supplier through the distribution network of a distribution licensee by seeking “open access” in terms of Section 42(3). In the first option, the distribution licensee operating in a particular area is required to lay down its network if required, in order to supply electricity to a consumer seeking supply. The second option, which is known as open access is provided under Section 42 read with Section 2(47) of the 2003 Act. Under Section 42(3) of the 2003 Act, a consumer has the right to require a distribution licensee to make its network available for wheeling electricity to such consumer from a third party supplier (i.e. a supplier of electricity not being a distribution licensee in the area where the consumer is situated). He submitted that this distinction between the two different concepts is to be born in mind and the matter is seen in its proper perspective. Section 42(3) carries out an exception in favour of local authority only qua open access which would mean that a consumer is disallowed from seeking open access from a distribution licensee which is a local authority like BEST. That would mean that a consumer being supplied by BEST cannot demand that BEST

allow a third party subject to supply electricity to such consumer through the network of BEST. According to him, this exception would extend to position contained in section 43 which casts “Universal Service Obligation” on all distribution licensees to give supply to any owner or occupier within its supply area. That would only mean if there is an another distribution licensee in the area in which a local authority like BEST also operates, a consumer can approach that distribution licensee to supply him the electricity. However, for that purpose, the said distribution licensee will have to supply the electricity from its own laid in the network without using the network of local authority.

20. After considering the rival contentions, we are of the opinion that the interpretation suggested by Mr. Mehta needs to prevail and therefore we do not find any fault with the view taken by the Appellate Tribunal. We have already reproduced above provisions of Section 42 (3) of the Act. As pointed out above, Section 42 of the Act deals with the duties of distribution licensee and open access. Sub-Section (1) thereof provides that 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 the Act. Sub-section (2) casts an obligation upon the State Commission to introduce open access in phases and subject to such conditions, as may be specified, these conditions may include the cross subsidies and other operational constraints. It is thereafter in sub-section (3) of Section 42 provision is made for wheeling of electricity with respect to supply stating that duties of distribution licensee shall be of a common carrier providing non-discriminatory open access. Thus sub-section (3) provides for open access and casts a duty upon the distribution licensee in this behalf. Here, it excludes local authority, as distributor of electricity from such an obligation. However, when it comes to the duty of distribution licensee to supply the electricity under section 43, it mandates that same is to be given to the owner or occupier of any premises on his application within one month from the receipt of the said application. This duty under Section 43 imposed upon a distribution licensee does not distinguish between a local authority and other distribution licensee. It is also not a case of the appellant that in a particular area where a local authority is a distribution licensee, there cannot be any other distribution licensee at all.

21. Thus, on a conjoint reading of Sections 42 and 43 of the Act along with the objectives and purpose for which Act 2003 is enacted, it becomes clear that there are two ways in which a consumer stated in a particular area can avail supply of electricity, as pointed out by the learned senior counsel for TPC and noted above. When an application is made by a consumer to a distribution licensee for supply of electricity, such a distribution licensee for supply of electricity, such a distribution licensee can request other distribution licensee in the area to provide it network to make available for wheeling electricity to such consumers and this open access is to be given as per the provisions of section 42 (3) of the Act. It is here only that local authority is exempted from such an obligation and may refuse to provide makes it network available. Second option is, under section 43 of the Act, to provide the electricity to the consumer by the distribution licensee from its own network. Therefore, if in a particular area local authority has its network and it does not permit wheeling of electricity from by making available its network, the other distribution licensee will have to provide the electricity from its own network. For this purpose, if it is not having its network, it will have to lay down its network if it

requires in order to supply electricity to a consumer seeking supply.

22. This interpretation of ours is in consonance of the objective and purpose of the Act. The aforesaid objective is further clarified by the Tariff Policy and the National Electricity Policy under section 3 of the Act which emphasized the need for efficiency and competition in the distribution business. On going through the statement of objects and reasons contained in the new Act, the interpretation, which we are leading to, gets further facilitated. Prior to this Act, there were three Acts, namely of 1910, 1948 and 1998 which were governing the laws relating to electricity and were operating in the field. Within few years, it was felt that the three Acts of 1910, 1948 and 1998 which were operating in the field needed to be brought in a new self contained comprehensive legislation with the policy of encouraging private sector participation in generation, transmission and distribution and also the objectives of distancing the regulatory responsibilities from the Government and giving it to the Regulatory Commissions. With these objectives in mind the Electricity Act, 2003 has been enacted. Significant addition is the provisions for newer concepts like power trading and open

access. Various features of the 2003 Act which are outlined in the statement of objects and reasons to this Act. Notably, generation is being delicensed and captive generation is being freely permitted. The Act makes provision for private transmission licensees. It now provides open access in transmission from the outset. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution, with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee.

23. The concept of open access under the Act enables competing generating companies and trading licensees, besides the area distribution licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. Supply by way of open access is a completely different regime as is also clear from the fact that consumers who have been allowed open access under Section 42 may enter into an agreement with any person for

supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them under Section 49 of the Act unlike consumers who take supply under section 43 of the Act.

24. Once we read the provisions in the aforesaid manner, it becomes clear that there is no exemption from universal service obligation to any distribution licensee under the Act, on account of the presence of a “local authority” as a distribution licensee in the particular area of supply, which is also reinforced by Paragraph 5.4.7 of the National Electricity Policy which clearly states that the second licensee in the same area shall have the obligation to supply to all consumers in accordance with Section 43. In this context, it is relevant to reproduce the following observations in **Chandu Khamaru v. Nayan Malik** reported in (2011) 12 SCC 314:

“7...These provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee.”

25. It is, therefore, difficult to accept the extreme position taken by the appellant that if local authority is a distribution licensee in a particular area, there cannot be any other distribution licensee in that area without the permission of such a local authority. Not only such a contention would negate the effect of universal supply obligation under Section 43, it will also amount to providing an exception which is not there either in Section 43 or Section 14 of the Act namely to treat local authority in special category and by giving it the benefit even that benefit which is not specified under the Act.

26. It is trite that Court should lean in favour of an interpretation which subserves the objective of the Act namely the purposive interpretation. In **Tata Power Co.Ltd. v. Reliance Energy Ltd. & Ors.** (2008) 10 SCC 321, this Court gave due recognition to objective behind the Act viz. to promote competition and give the consumer open to choose the distribution licensee from which it seeks electricity as is clear from the following paragraphs:

102. On the other hand, in our view, the provisions of both the 1903 and 1910 Electricity Acts encourage competition in the electricity trade and the same is also incorporated in the licences issued in favour of the distribution licensees, which also include

licensees generating power for supply. The element of competition has been included in the Preamble to the 2003 Act and permeates the same in its various provisions.

103. As submitted by Mr Chagla, the Act is meant to be consumer-friendly and one of the objectives it sets out to achieve is to give the consumer an option to choose the distribution licensee from whom it wishes to receive supply of electrical energy. The intervention of MIDC, Marol Industries Association and the appeals filed by it, has obviously been made in that context.

In **MSR Leathers vs. S.Palaniappan & Anr.** (2013) 1 SCC

177 it was observed:

“24. That brings us to the question whether an offence punishable under Section 138 can be committed only once as held by this Court in *Sadanandan case*¹. The holder of a cheque as seen earlier can present it before a bank any number of times within the period of six months or during the period of its validity, whichever is earlier. This right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-à-vis the holder of the cheque. If the holder of the cheque has a right, as indeed is in the unanimous opinion expressed in the decisions on the subject, there is no reason why the corresponding obligation of the drawer should also not continue every time the cheque is presented for encashment if it satisfies the requirements stipulated in clause (a) of the proviso to Section 138. There is nothing in that proviso to even remotely suggest that clause (a) would have no application to a cheque presented for the second time if the same has already

been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision a dishonour whether based on a second or any successive presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) of the proviso thereto. We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied."

While dealing with the issue No.2 above, we have already held that TPC and BEST are parallel distribution licensee in the South Bombay Area.

27. The appellant has sought to rely on the expression "Save as otherwise provided in this Act" in Section 43(1) of the Act to read into Section 43(1) the exception for local authorities provided for in Section 42(3). The TPC has successfully refuted this submission by pointing out that these words in Section 43(1)

are required to be read in the context in which they appear. The said words were inserted in the section by way of an amendment to the Act in 2007. An “Explanation” to Section 43(1) was also added by the same amendment providing that “application” by a consumer in Section 43(1) means an application complete in all respects along with documents showing payment of necessary charges and other compliances, meaning thereby that the obligation of the distribution licensee to supply within the specified time period will begin only after it has received such completed application by the applicant. Further, Sections 45 and 46 provide for the distribution licensee’s powers to recover charges for electricity supplied and the expenditure incurred in providing electric line or plant for giving supply. Section 47 provides that the distribution licensee may require any person demanding electricity supply from him to give a reasonable security, failing which the distribution licensee may refuse to give supply of electricity to such consumer. We are of the opinion that it is in this context that the expression “save as otherwise provided in this Act” in Section 43 (1) is to be construed.

28. Before we part with we would like to make it clear that there is a dispute between TPC and R-infra) (respondent No.9)

which is the subject matter of Civil Appeal Nos. 4667-68/2013. R Infra is a distribution licensee in suburban Bombay where TPC is also a licensee. Both supply electricity to different consumers. Dispute is between them with regard to cross subsidiary surcharge (CSS) payable by consumer taking supply from TPC or R Infra network. We make it clear, by way of abundant caution, that we have not touched upon the said dispute and obviously so as even otherwise the subject matter in the instance case is totally different. Therefore Civil Appeal Nos.4667-68/2013 shall be decided on its own merits.

29. We, thus, do not find any merit in any of the contentions of the appellant. As a consequence, this appeal fails and is hereby dismissed with cost thereby affirming the order of the Appellate Tribunal.

.....J.
(Surinder Singh Nijjar)

.....J.
(A.K. Sikri)

JUDGMENT

New Delhi
May 8, 2014

SUPREME COURT OF INDIA



JUDGMENT