

COURT-I

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**APPEAL NO. 64 OF 2015 &
IA NOS. 92, 121, 131 & 136 OF 2015**

Dated: 17th February, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

Western Electricity Supply Company of Orissa Ltd & Ors.Appellant(s)

Versus

Orissa Electricity Regulatory Commission & Ors.Respondent(s)

Counsel for the Appellant (s) : Mr. Buddy A Ranganadhan
Mr. Hasan Murtaza
Ms. Malavika Prasad
Mr. D.V. Raghu Vamsy

Counsel for the Respondent (s) : Mr. P C Sen
Mr. Rutwik Panda
Mr. Udayan Verma &
Ms. Anshu Malik for R-1

Mr. R.K. Mehta,
Mr. Abhishek Upadhyay &
Ms. Himanshi Andley for R-2 & 3

Mr. G. Umapathy for R-4

Mr. Sitesh Mukherjee
Mr. Jafar Alam
Mr. Deep Rao for Intervenor in
I.A. No. 136/2015

ORDER**IA No. 136 OF 2015**
(Application for intervention)

The Applicants/Appellants are distribution licensees who have challenged the Order dated 04.03.2015 passed in Case No. 55 of 2013 revoking the licences of the Appellants and Order dated 04.03.2015 appointing an Administrator for the Appellants' utilities. The impugned orders are passed by Odisha Electricity Regulatory Commission ("**the State Commission**").

In this application, the Appellants have prayed that permission be granted to implead M/s Reliance Infrastructure Limited ("**RIL**") as Respondent No.5 in the instant Appeal.

This application is vehemently opposed by Mr. P.C. Sen, learned counsel for the State Commission; Mr. R.K. Mehta, learned counsel for the GRIDCO and Mr. G. Umapathy, learned counsel for State of Orissa.

Admittedly, the State Commission initiated suo-moto proceedings under Section 19 (3) of the Electricity Act, 2003 for revocation of licence of RIL managed DISCOMs. A notice, dated 09.08.2013, was issued by the State Commission to RIL. The notice reads as under:

“Take notice that the Commission has been pleased to register the above Case which is arising out of the notice dated 13.05.2013 issued under section 19 (3) of the Electricity Act, 2003 for revocation of the licenses granted to the RIL Managed three distribution licensees, namely, WESCO, SUTHCO AND NESCO, alleging breach of their license conditions and also violation of the directions and orders of the Commission. A copy of the said petition is enclosed herewith for your perusal.

You are hereby directed to appear in this case and file your reply supported by affidavit with seven (Original + 6 copies thereof) copies before this Commission on or before 16.08.2013 serving a copy thereof to the petitioner.

Take notice that the above case is posted on 20.08.2013 at 11.00 AM for hearing of the parties on the notice under Section 19 (3) of the Electricity Act, 2003 for revocation of license of the RIL Managed DISCOMs.

You may appear either in person or through your authorized representative/advocate on the aforesaid date of hearing at the Commission’s office. In case of failure on the part of the Respondents to appear on the above date the Commission may proceed ex parte and dispose the matter as per the provisions of law.”

After receipt of the notice, RIL filed its reply to the notice. RIL resisted impleadment and prayed that it may be deleted from the array of notices. RIL also by a separate application dated 03.10.2013 requested the State Commission to withdraw the directions issued by it vide Order dated 23.08.2013 and Letter dated 23.09.2013 stating therein that RIL had raised the issue of maintainability of the show cause notice issued to it in its reply.

We notice that despite this opposition, the State Commission impleaded RIL. This is reflected in the first paragraph of the impugned Order dated 04.03.2015. The relevant sentence reads as under:

“The Government of Odisha, the major investors of the DISCOMs, namely, Reliance Infrastructure Limited (in short Reliance Infra) and GRIDCO were also impleaded as respondents in the present proceeding.”

The State Commission in this Order also dealt with the issue regarding impleadment of RIL as party Respondent. Following are the relevant paragraphs of the impugned Order.

“30. Legal Issues:

It is necessary to analyse certain important legal issues arising out of this proceeding.

(I) Issue of making Reliance Infra a party to the proceeding

(i) During the course of hearing Reliance Infra which subsequently took over BSES and became majority shareholder in the DISCOMs contended that OERC should not have made Reliance Infra a party to this proceeding. They wanted that the Commission should have made a distinction between the licensee company and the share holders and for the acts of omission and commission; OERC may proceed against the licensee but not the shareholders.

(ii) This argument is too technical and is not acceptable on the facts of this particular proceeding. Ownership of a company changes completely or partially through the instrumentality of sale of shares. As a majority share holder, provisions of Section 17(3) of the Electricity Act, 2003 and Section 21(2) of Electricity Reform Act, 1995 have been violated by Reliance Infra by not taking prior permission of the Commission. They are also responsible for non-incorporation of relevant clauses of Shareholders Agreement in the

Articles of Association (AoA) of the DISCOMs. In this connection, issues raised during the hearing with regard to maintenance of Central Services Office by three DISCOMs at Bhubaneswar may be recalled. Reliance Infra cannot have it both ways – they want to exercise control over the functioning of the DISCOMS through the Central Services Office but at the same time they want to take shelter under the veil of incorporation by making assertion that it is the DISCOM and not the shareholders who should be proceeded against for their act of omission and commission. Fifty one percent shares of BSES which was subsequently taken over by Reliance Infra purported to have been divested in favour of their group companies but irrespective of the numbers of shares held by Reliance Infra its stranglehold over all the DISCOMs continues as a matter of fact and cannot be ignored by the Commission. The Commission is in fact, examining the conduct of licensee DISCOMs, but Reliance Infra is a successor to Reliance Energy Limited which took over M/s BSES whose association with licensee DISCOMs without prior written consent of the Commission is unsustainable in law and void on account of Section 21(2) read with Section 21(5) of the Orissa Electricity Reform Act, 1995 and this finding has to be recorded in presence of Reliance Infra.

(iii) The Reliance Infra has further contented that Hon'ble ATE in its judgement in Appeal No.75 of 2005 dated 13.12.2006 held that OERC could enforce license conditions and statutory provisions against the three contribution licensees but the same will not confer jurisdiction on the Commission to issue direction to Shareholders simpliciter. In this regard, it may relevant to note that Hon'ble ATE in the said order dated 13.12.2006 at para 41 have observed the following.

“41. Before parting with the Appeal we would like to point out that the Appellant as well as Respondents have taken up the responsibility of serving the consumers and this is not defeated on hyper-technicalities.....We do expect that the Appellant REL and contesting Respondents continue to strive for the common purpose of servicing consumers and the discussions, now being held in this behalf may be utilized to settle the disputes to the interest of Reform in the State of Orissa.

It is quite clear that the Hon'ble ATE has observed that the Parent company Reliance Infra has the responsibility of serving the consumers of Odisha and this is not frustrated by hyper-technicalities. The repeated contention of Reliance Infra that it should not be part of the proceeding is, therefore, misleading. Had Reliance Infra been validly a holding company of licensee-DISCOMs with prior consent in writing of the Commission, it

would not have been allowed to disown responsibility of serving the consumers of Odisha.”

We are informed that during the hearing before the State Commission, counsel for RIL was heard. The main objection of the respondents to the impleadment of RIL is that RIL itself had resisted its impleadment and therefore it should not be now impleaded in the present proceedings. It is also contended that RIL has not filed any impleadment application. But the impleadment application is filed by the Appellants–distribution companies.

We are unable to accept the submissions of counsel for the respondents. It is true that initially RIL resisted its impleadment. But ultimately, RIL was impleaded, its counsel was heard and the State Commission dealt with the issue regarding RIL’s impleadment in depth and made several observations against RIL. We have already quoted the State Commission’s observations hereinabove. Moreover, though GRIDCO is now opposing impleadment of RIL in this appeal, in its reply dated 09.03.2015 filed to the application for stay, GRIDCO has raised a contention that RIL be directed to be impleaded as it is a necessary and proper party since it has stepped into the shoes of

the BSES Limited in whose favour 51% shares of DISCOMs held by GRIDCO were diverted under the shareholder agreement dated 01.04.1999. The relevant paragraph reads as under:

“Although Reliance Infrastructure Limited (RIL, for short) had been impleaded as a Respondent in the proceedings before OERC (Para 1 of the impugned Order) (Page 182) and was duly represented, it has not been impleaded in the present appeal. RIL is a necessary and proper party since it has stepped into the shoes of the BSES Limited in whose favour 51% shares of DISCOMs held by GRIDCO were diverted under the shareholder agreement dated 01.04.1999. RIL may, therefore, be directed to be impleaded as a party to the Appeal.”

It is, therefore, surprising that GRIDCO should now resist the impleadment of RIL when in its reply affidavit sworn by Shri B.D. Ojha, Economist of GRIDCO Limited, has made a categorical statement that RIL is necessary and proper party. No doubt, RIL initially opposed its impleadment, but the situation changed after the State Commission made it a party respondent and made adverse comments against it. It is true that application for impleadment ought to have been filed by RIL. But we are not inclined to go into the question as to why RIL has not made any impleadment application at this stage. Since RIL was impleaded as party by the State Commission and the State Commission has passed comments against RIL for proper determination of the

issues involved in this Appeal, we are of the opinion that presence of RIL through its counsel is necessary before us. This, however, does not mean that we have expressed any opinion either way on the merits of the case of RIL or the appellants or the respondents. The observations made by us today are restricted only to the question of impleadment of RIL.

In the circumstances of the case, we feel that RIL is proper and necessary party. We, therefore, allow the application and permit the impleadment of RIL as additional respondent. We make it clear that all contentions raised by the parties are kept open to be decided at the final hearing of the appeal.

Accordingly, Application No.136 of 2015 is allowed. Learned counsel for the Appellants is directed to file amended memo of parties.

List the main Appeal on **16.03.2016**.

(I.J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

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