

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**I.A. NO.445 OF 2015
IN
APPEAL NO.276 OF 2015**

Dated: 16th December, 2015

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

In the matter of:-

**WEST BENGAL STATE)
ELECTRICITY DISTRIBUTION)
COMPANY LIMITED)
Vidyut Bhaan, Bidhannagar, Block)
DJ, Sector-II, Kolkata – 700 091.) ... **Appellant****

AND

1. **CENTRAL ELECTRICITY)
REGULATORY COMMISSION,)
3rd and 4th Floor, Chanderlok)
Building, 36, Janpath, New)
Delhi – 110001.)**
2. **INDIAN RAILWAYS,)
Government of India through)
Deputy Chief Electrical Engineer)
(TRD), Rail Bhawan, Raisina)
Road, New Delhi – 110 001.)**
3. **POWER GRID CORPORATION)
OF INDIA LIMITED,)
Saudamini, Plot No.2, Sector 29,)**

- Near IFCO Chowk, Gurgaon -)
122 001.)
4. **POWER SYSTEM OPERATION)
CORPORATION LIMITED,)
B-9, Qutub Institutional Area,)
Katwaria Sarai, New Delhi - 110)
066.)**
5. **CENTRAL ELECTRICITY)
AUTHORITY,)
R.K. Puram, New Delhi - 110)
066.)**
6. **GUJARAT ELECTRICITY)
TRANSMISSION CO. LTD.)
Sardar Patel Vidyut Bhavan,)
Race Course Circle, Vadodara,)
Gujarat - 390 007.)**
7. **MAHARASHTRA STATE)
ELECTRICITY TRANSMISSION)
CO. LTD.)
Prakash Gad, Bandra East,)
Mumbai - Maharashtra - 400)
051.)**
8. **WEST BENGAL STATE)
ELECTRICITY TRANSMISSION)
CO. LTD.)
Vidyut Bhavan, Bidhannagar,)
Block DJ, Sector II, Kolkata -)
700 091.)**
9. **JHARKHAND URJA)
SANCHARAN NIGAM LIMITED)
Sardar Patel, Vidyut Bhawan,)
Race Course Circle, Vadodara,)
Gujarat - 390 007.)**

10. **RATNAGIRI GAS AND POWER)
PRIVATE LIMITED,)
5th Floor, GAIL, Jubilee Tower,)
B-35-36, Sector – 1, NOIDA (UP))
– 201 301.) ... **Respondents****

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Sakya Singh Chaudhuri
Mr. Avijeet Lala
Mr. Molshree Bhatnagar

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal for **R-2.**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Appellant - West Bengal State Electricity Distribution Company Limited (“**WBSEDCL**”) has challenged in this appeal Order dated 5/11/2015 passed by the Central Electricity Regulatory Commission. We have admitted the appeal. In this application, WBSEDCL has prayed for stay of the impugned order.

2. Respondent No.1 is the Central Electricity Regulatory Commission (“**the Central Commission**”). Respondent No.2 is

the Indian Railways. Respondent No.3 is the Power Grid Corporation of India Limited. Respondent No.4 is the Power System Operation Corporation Limited. Respondent No.5 is the Central Electricity Authority. Respondent No.6 is the Gujarat Electricity Transmission Co. Ltd. Respondent No.7 is the Maharashtra State Electricity Transmission Co. Ltd. Respondent No.8 is the West Bengal State Electricity Transmission Co. Ltd. Respondent No.9 is the Jharkhand Urja Sancharan Nigam Limited and Respondent No.10 is the Ratnagiri Gas and Power Private Limited.

3. Respondent No.2 – Indian Railways procures power from the generating stations of Respondent Nos.8 and 9 and other generating stations. Respondent No.2 filed Petition No.197/MP/2015 before the Central Commission praying for the following reliefs:

“(a) Direct that Indian Railways are entitled to the grant of open access for the power to be procured from the Respondents No.8 and 9 and other generating stations or sources through the Inter-State Transmission Network of the Central Transmission Utility and the Transmission Network of the Respondent States including the Respondent Nos.4 to

7 till the facilities and network of the Indian Railways;

(b) Direct that Indian Railways in their capacity as an authorized entity to distribute and supply electricity in connection with its working as railways and across a number of States shall be a separate participating entity, like any other State entity in the Deviation and Settlement Mechanism notified by the Hon'ble Commission for the purposes of Scheduling and Dispatch of electricity;

(c) Direct that all the State Transmission Utilities and the State Load Dispatch Centers (they are part of the State Transmission Companies such as Respondent No.4 to 7) to give connectivity and to process the application for Open Access – long term or medium term or short term, as the case may be – treating the Indian Railways as an entity akin to a person who has been granted a distribution license in their State and allow the use of the intra-State transmission facilities of such Respondents as incidental to inter-State transmission of electricity from the place of generation.”

4. The Central Commission by the impugned order allowed the petition. The Central Commission *inter alia* held that Respondent No.2 is a deemed licensee under 3rd proviso to Section 14 of the Electricity Act, 2003 (“**the Electricity Act**”) and that Respondent No.2 shall be bound by the terms and

conditions of licence specified by the Appropriate Commission under proviso to Section 16 of the Electricity Act. The Central Commission directed all concerned RLDCs, State Transmission Utilities (STUs) and SLDCs to facilitate long term access and medium term access in terms of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Open Access and Medium Term Open Access in the Inter State Transmission and related matters) Regulations, 2009 (“**Connectivity Regulations**”) from the generating stations or other sources to the facilities and network of Respondent No.2.

5. While praying for interim relief, Mr. Sanjay Sen, learned counsel for the Appellant assailed the impugned order on several counts. Written submissions have also been filed. Gist of the written submissions is as follows:

(a) Respondent No.2 had applied to the Maharashtra State Electricity Transmission Co. Ltd. (“**MSETCL**”) for

connectivity which was not granted. Respondent No.2 applied for No Objection Certificate to MSETCL for open access to which there was no response. Since as per Regulation 32 of the Connectivity Regulations all disputes arising out of or under the Connectivity Regulations are to be decided by the Central Commission, Respondent No.2 filed petition before the Central Commission seeking its directions to the Respondents for long term access. Therefore, there is a dispute qua inter-state open access in relation to MSETCL. No dispute qua inter-state open access has been raised against any other utility. Jurisdiction of the Central Commission can be invoked only if there exists a dispute under the Connectivity Regulations. Since there is no dispute between Respondent No.2 and the Appellant, jurisdiction of the Central Commission could not have been invoked qua the Appellant.

- (b) Since no cause of action has been disclosed against the Appellant and this fact was pointed out to the Central

Commission, the Central Commission should not have proceeded with the petition qua the Appellant. (**Kusum Ingots & Alloys Ltd v. Union of India**¹).

- (c) There is no application for open access made for supply to West Bengal and, as such, the jurisdictional facts for invoking jurisdiction under Regulation 32 are not in existence. In the absence of an open access application, there was no occasion for the Central Commission to invoke its jurisdiction under Regulation 32 of the Connectivity Regulations or Section 79(1)(c) or (f) of the Electricity Act. No statutory authority or tribunal can assume jurisdiction in respect of the subject matter which the statute does not confer upon it. (**Shrisht Dhawan (Smt) v. Shaw Bros.**²).

- (d) The Central Commission has granted relief beyond the scope of its powers and prayers in the petition.

- (e) Respondent No.2 has not made application in the manner provided by law. The Central Commission

¹ (2004) 6 SCC 254

² (1992) 1 SCC 534

cannot grant any relief in deviation of such procedure prescribed in law. (**Chief Information Commissioner v. State of Manipur**³). The Central Commission being a statutory body can only have jurisdiction to the extent provided in the statute and not otherwise.

- (f) There is no provision in the Electricity Act under which the Central Commission can make a declaration that Respondent No.2 is an authorised entity.
- (g) The Central Commission has held that Respondent No.2 is a deemed distribution licensee under third proviso of Section 14 and no separate declaration to that effect is required from the Appropriate Commission. This finding is without jurisdiction since the Central Commission does not have power to issue distribution licence under Section 14 of Electricity Act. This direction is an usurpation of the powers and functions of the State Commission that enjoys exclusive and parallel coordinate

³ (2011) 15 SCC 1

jurisdiction under the Electricity Act qua distribution licence.

- (h) The Central Commission has wrongly relied on Central Government clarification dated 6/5/2014 regarding deemed licensee status of Respondent No.2 as if it is a statutory declaration. Clarifications/circulars issued by the Government represent merely their understanding of the statutory provisions. They are not binding upon the courts.
- (i) Judgment of the Supreme Court in **Union of India v. UPSEB**⁴ on which reliance is placed by the Central Commission is not applicable to the present case. In that case the Supreme Court was not called upon to decide whether Respondent No.2 is a deemed transmission or distribution licensee. On the contrary the Supreme Court found that Respondent No.2 like a consumer has the ability to procure power directly from a generator. Pertinently the Supreme Court has in **Vedanta**

⁴ (2012) 3 SCC 329

Aluminium Limited v. Odisha Electricity Regulatory Commission & Ors.⁵ and in M/s Sesa Sterlite Limited v. Odisha Electricity Regulatory Commission & Ors.⁶

held that a distribution licensee must distribute electricity and if it is procuring power for self consumption it does not get the deemed distribution licensee status. Since Respondent No.2 procures the power for self consumption it cannot be a distribution licensee.

- (j) The impugned order has been passed in violation of principles of natural justice as all the utilities were not heard.
- (k) Impugned order gravely prejudices the interest of the Appellant and, in turn, would affect the interest of the consumers whom the Appellant serves in the State of West Bengal. It is therefore necessary for this Tribunal to stay the impugned order.

⁵ Civil Appeal No.206 of 2012

⁶ (2014) 8 SCC 444

6. We have heard Mr. Ramachandran, learned counsel appearing for Respondent No.2. Written submissions have also been filed opposing the application for stay. Gist of the written submissions is as under:

- (a) A conjoint reading of Section 79(1)(c), Section 2(36), Section 38(2)(d) and Section 40(c) of the Electricity Act indicates that all licensees, generating companies and consumers are entitled to open access in a non-discriminatory manner to the use of Inter State Transmission System. Respondent No.2 has right to open access irrespective of the fact whether it is a licensee or a consumer or a generating company. The Appellant cannot object to the grant of open access to Respondent No.2 through the transmission network of Central Transmission Utility or through distribution system of Respondent No.8.
- (b) Issue before the Central Commission was restricted to the open access to be made available to Respondent No.2. MSETCL had refused to grant No Objection

Certificate to Respondent No.2. The Appellant had therefore filed the petition before the Central Commission. The Central Commission has jurisdiction under Regulation 32 of the Connectivity Regulations to deal with such a dispute. The Central Commission directed all concerned to grant long term access in terms of the Connectivity Regulations. Respondent No.2 would, therefore, file the necessary application.

- (c) A conjoint reading of Sections 11, 12 and 33 of the Indian Railways Act, 1989 (“**the Railways Act**”) make it clear that the Railway Administration has power to execute all necessary works for the purpose of constructing and maintaining the Railways. Section 11(g) empowers the Railways to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with the working of the Railways. This provision includes power to distribute or supply electricity.
- (d) Pertinently, Section 173 of the Electricity Act saves the Railways Act in case of inconsistency.

- (e) Judgment of the Supreme Court in **UPSEB** supports the Appellant. In that case, it is held that it is not possible to read Section 11 of the Railways Act in a restricted manner.
- (f) Third proviso to Section 14 of the Electricity Act provides that the Central and State Governments are deemed licensees. Respondent No.3 is a part of the Central Government and, hence, it is a deemed licensee.
- (g) Respondent No.2 is of strategic importance to the country and, hence, it is essential for it to construct, operate and maintain the railway network in an efficient and economical manner. If the impugned order is stayed, it will cause great prejudice to the general public. Hence, the application for stay may be rejected.

7. We are concerned only with the interim application for stay. We will, therefore, concentrate on the major points of attack on the impugned order. We have quoted the prayers made by the Appellant before the Central Commission. The

issue before the Central Commission was restricted to the open access to be made available to Respondent No.2 on the Inter State Transmission System either of the Central Transmission Utility or when the transmission network of others is used as incidental to the Inter State Transmission. The Appellant had approached the MSETCL for No Objection Certificate required as per Regulation 7 of the Connectivity Regulations. Respondent No.2 had sought open access in its capacity as a distribution licensee. Since there was no response, as per Regulation 32 of the Connectivity Regulations, which states that all disputes arising out of or under the Connectivity Regulations shall be decided by the Central Commission on an application made in that behalf by the person aggrieved, the Appellant filed a petition before the Central Commission. *Prima facie*, it appears to us that no issue was raised before the Central Commission in regard to the distribution activity of Respondent No.2. In our *prima facie* opinion, therefore, the Central Commission had jurisdiction to entertain the petition. No orders were sought by Respondent No.2 in regard to its electricity distribution

and/or retail supply activities. It is categorically contended by Respondent No.2 that it is not its case that activities of distribution and retail supply of the distribution licensee can be regulated by the Central Commission in exercise of its functions under Section 79 of the Electricity Act.

8. The Central Commission has directed all concerned RLDCs, State Transmission Utilities and SLDCs to facilitate long term access and medium term access in terms of the Connectivity Regulations from generating stations or other sources to the facilities and network of Respondent No.2. Therefore, Respondent No.2 would be required to satisfy the conditions of the Connectivity Regulations for grant of open access including filing of an application as per the Connectivity Regulations. Thus, *prima facie* the contention of the Appellant that Respondent No.2 has not even made an application deserves to be rejected as being premature.

9. So far as the controversy regarding status of Respondent No.2 as a distribution licensee is concerned, it is necessary to refer to Section 31 of the Railways Act, which defines the term “railways”. The term “railways” does not merely mean a railway for public carriage of passengers or goods as a common man would think. It *inter alia* includes all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway, all electric traction equipment, power supply and distribution installations used for the purposes of, or in connection with, a Railway. Section 11 of the Railways Act delineates the power of Railway Administration to execute all necessary works. This section states what construction can be done by Respondent No.2 for the purposes of maintaining a Railway. Sub-section (g) of Section 11 of the Railways Act could be quoted hereunder.

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of railways.

10. We find substance in the contention of Respondent No.2 that the power to erect, maintain and operate traction equipment, lines, power supply and distribution installation necessarily includes the distribution and supply of electricity because otherwise the power to erect, operate and maintain these equipment and installations would serve no purpose. This provision necessarily implies use of traction equipment, lines, distribution installation, etc. to distribute and supply electricity for the working of the Railways. Pertinently, power of the Railway Administration under Section 11 of the Railways Act is not curtailed by any provisions of the Electricity Act. Section 173 of the Electricity Act saves the Railways Act in case of inconsistency. Thus, prima facie, it appears to us that Respondent No.2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act particularly Section 11 thereof.

11. In this connection, Respondent No.2 has rightly relied on the judgment of the Supreme Court in **UPSEB**. In that case

UP State Electricity Board (UPSEB) was purchasing power from the power plants of NTPC and supplying it to Northern Railways through transmission lines of the UPSEB. The Railways found the tariff of UPSEB to be excessive, and therefore, decided to enter into a power purchase agreement with NTPC and to construct their own transmission lines to carry the supply. The Railways moved the Central Government for permission in this behalf and obtained approval from the Cabinet Committee on 6/6/1990. Thereafter, the Railways started constructing transmission lines from Dadri Gas Power Plant and Auraria Gas Power Plant of NTPC upto the sub-station of Railways at Dadri, District Ghaziabad, U.P. UPSEB issued notice to the Railways calling upon the Railways to stop the construction. The Railways challenged the said notice by filing writ petition in the Allahabad High Court. On 12/5/2000 the Allahabad High Court allowed the Railways to carry on their construction. After construction of transmission lines, the Railways started drawing power from the NTPC power plants through those lines. UPSEB filed writ petition in Allahabad High Court to

challenge this act of the Railways. On a request made by the Railways, the Supreme Court transferred both the writ petitions to itself. On behalf of the Railways it was, *inter alia*, contended that the action of the Railways to erect, operate, maintain or repair any electric traction equipment was very much within the jurisdiction of the Railways, inasmuch as Section 11(a) and (g) of the Railways Act empower them to carry out such activity and all such necessary works for the purposes of constructing or maintaining a Railway. Reliance was placed on Section 173 of the Electricity Act, which saves the Railways Act in case of inconsistency between the Electricity Act, and the Railways Act. On behalf of UPSEB, it was *inter alia* contended that the Government of India was not competent to grant permission to the Railways to buy power from NTPC or to construct transmission lines. So far as the provisions of Section 11(a) and (g) of the Railways Act are concerned, it was submitted that these provisions authorise the Railways to have their electricity supply lines only for working and maintenance of the Railways and not for transmitting energy from generating stations. While dealing

with these submissions the Supreme Court held that in case of the Railways the transmission of electricity is governed by the provisions of a special enactment, that is, Railways Act and not by the enactments governing electricity. The Supreme Court further held that Section 11(a) and (g) of Railways Act authorise the Railways to construct necessary transmission lines, dedicated for their own purpose and it is not possible to read this Section in a restricted manner. While holding that the action of the Railways of constructing transmission lines is legal, the Supreme Court observed as under:

“(ii) That apart, Sections 11(a) and (g) of the Railways Act, 1989 clearly authorise the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because this principal part of Section 11 authorizes the Railway administration to executive all necessary works for the purpose of constructing or maintaining railways. Sub-section (a) of this Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-section (g), thereof, the Railways are authorized to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with working of the

railways. This sub-section clearly empowers Railways to erect any electric traction equipment, and power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so there is no substance in this submission made by the UPSEB as well.” (emphasis supplied).

12. Bearing in mind the Supreme Court’s observation that Section 11 of the Railways Act cannot be given a restricted meaning, we need to approach this case. *Prima facie*, we feel that Respondent No.2 is empowered to carry out construction work necessary for power supply and distribution installations in connection with the working of the Railways and, therefore, it can distribute and supply electricity. It is not possible to agree with the submission of the Appellant that this judgment is not applicable to the present case because there the Supreme Court was not called upon to decide whether the Railway is a deemed distribution licensee or a distribution licensee.

13. The matter can be looked at from another angle. The third proviso to Section 14 of the Electricity Act states that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, such Government shall be deemed to be a licensee under the Electricity Act, but shall not, be required to obtain a licence under the Electricity Act. Respondent No.2 is a department and part of the Central Government. Therefore, it is a deemed licensee. In this connection, Respondent No.2 has relied upon the Government of India, Ministry of Power's letter dated 6/5/2014.

14. It is the contention of the Appellant that a distribution licensee has to distribute electricity and if it is procuring power for self consumption it does not get the deemed distribution licensee status. It is submitted that Respondent No.2 is procuring electricity for self consumption. Respondent No.2 is not distributing electricity and, therefore, it does not get the status of deemed licensee. In this connection reliance is placed on **Sesa Sterlite Ltd.**

15. We must therefore, refer to **Sesa Sterlite Ltd.** The Appellant therein was engaged in the business of production and export of aluminium. The Appellant had set up a project in Special Economic Zone. The Appellant obtained all approvals including the approval for captive power plant. Under the proviso added to Section 14(b) of the Electricity Act a developer of Special Economic Zone is declared as deemed licensee authorised to distribute electricity within the Special Economic Zone area. The Appellant therefore became a deemed distribution licensee. The Appellant entered into a PPA with Sterlite Energy Ltd. and filed a petition before the State Commission for approval of the PPA. The State Commission rejected the application. This Tribunal upheld the State Commission's order. Appeal was carried to the Supreme Court. Before the Supreme Court, the Appellant relied on proviso added to Section 14(b) of the Electricity Act which states that a developer of Special Economic Zone shall be deemed to be a licensee with effect from the date of notification of Special Economic Zone. The Appellant

contended that in view of this proviso it is already a deemed licensee. Hence, it need not apply for the licence to the Commission. The Supreme Court noted that Section 49 of the Special Economic Zone Act gives authority to the Central Government to declare that any provisions of a Central Act shall apply to the Special Economic Zone and in furtherance to this, Government of India had issued a notification with regard to power generation in Special Economic Zone declaring that all provisions of the Electricity Act shall be applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Supreme Court framed following question for consideration.

“Whether a developer of a notified special economic zone, who has been deemed by law to be a licensee for distribution of electricity, is required to, once again, apply to the Electricity Regulatory Commission under the Electricity Act for grant of a license or the deeming fiction carved out in Section 14 of the Electricity Act automatically dispenses with this requirement and ipso fact makes such SEZ developer a distribution licensee.”

The Supreme Court considered the definition of the term “distribution licensee” contained in Section 2(17) of Electricity Act and Section 2(70) of the Electricity Act which defines “supply” to mean sale of electricity to a licensee or a consumer. While confirming this Tribunal’s order, the Supreme Court held that by virtue of the status of a developer in the Special Economic Zone, the Appellant therein was undoubtedly treated as a deemed distribution licensee. However, because of deemed distribution licensee status, the Appellant merely gets exemption from specially applying for license under Section 14 of the Electricity Act. In order to avail further benefits under the Electricity Act it has to show that it is in fact having distribution system and it has a number of consumers to whom it is supplying electricity.

16. In our *prima facie* opinion, the Appellant cannot draw any support from **Sesa Sterlite Limited**. In **Sesa Sterlite Limited**, the Supreme Court was concerned with Special Economic Zones Act and the Electricity Act. As per Section 49 of the Special Economic Zones Act, the Central Government

had issued a notification making all provisions of the Electricity Act applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Appellant therein had placed reliance on third proviso to Section 14 of the Electricity Act to claim deemed distribution licensee status. The Supreme Court considered Section 2(17) of the Electricity Act, which emphasis upon the distribution licensee to operate and maintain distribution system and supply power to the consumers. The Supreme Court considered definition of the term 'supply' appearing in Section 2(70) of the Electricity Act and observed that 'supply' means sale of electricity to consumers. The Supreme Court observed that being authorized to operate and maintain a distribution system as a deemed licensee would not confer the status of distribution licensee to any person. Power must be supplied to consumers and since the Appellant therein was consuming the power purchased by it for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee. It must, however, be noted here that the Supreme Court was considering the provisions of the Special

Economic Zones Act. Whereas Section 173 of the Electricity Act saves the Railways Act in case of inconsistency, it does not save the Special Economic Zones Act. Section 174 states that the Electricity Act shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act. Section 175 of the Electricity Act provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law time being in force. The observations of the Supreme Court must be considered against the backdrop of these provisions.

17. In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No.2 is not affected by the provisions of the Electricity Act. Respondent No.2 has full authority to

undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not lose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on **Sesa Sterlite Ltd.** *prima facie* appears to us to be misplaced.

18. *Prima facie*, we also find substance in the contention of Respondent No.2 that there is no infirmity in the proceedings before the Central Commission. The concerned parties were only the State Transmission Utility as defined in Section 39 of the Electricity Act. The concerned States were Gujarat, Maharashtra, Jharkhand and West Bengal to which places the electricity was intended to be conveyed through open access. The Transmission Company discharges the functions of the State Transmission Utility as well as the State Load Dispatch Centre. *Prima facie*, it appears that distribution licensees of various States were not necessary or proper party for the matter which was in issue before the Central Commission.

19. Respondent No.2's basic prayer before the Central Commission was for grant of open access through the Inter State Transmission Network of the Central Transmission Utility and the Transmission Network of the Respondent States. Section 2(36) of the Electricity Act defines "Inter State Transmission System". Under Section 79(1)(c) thereof, it is for the Central Commission to regulate the Inter State Transmission of electricity. Section 38 thereof states the functions of the Central Transmission Utility. Section 38(2)(d) thereof states that the Central Transmission Utility has to provide non-discriminatory open access to its transmission system for use by any licensee or generating company or consumer subject to fulfilment of conditions stated therein. Section 40(c) thereof says that a transmission licensee has to provide non-discriminatory open access to its transmission system for use by any licensee, generating company or consumer subject to the conditions stated therein. All these provisions are in tune with the definition of the term 'open access' contained in Section 2(47). These provisions indicate

that all licensees, generating companies and consumers are entitled to a non-discriminatory open access subject to fulfilment of certain conditions. In our *prima facie* opinion therefore Respondent No.2 will be entitled to open access if it fulfils the conditions and there can be no valid objection to its entitlement. We find substance in the contention that Respondent No.2 can get open access through the network of the Central Transmission Utility or other sources. The Appellant's resistance to it *prima facie* appears to us to be without substance. It is rightly pointed out that Respondent No.2. i.e. the Indian Railways has one of the largest networks in the world. This network is an essential part of the transport infrastructure in India. It is the backbone of the Indian economy. It is, therefore, essential for Respondent No.2 to get reasonably priced power. If it is denied open access, it will be forced to procure more expensive power from the distribution licensees in the State which will ultimately adversely affect the general public. At this interim stage, these considerations outweigh the Appellant's possible loss of revenue as a distribution licensee, if Respondent No.2 moves away from it.

The application for interim stay will have to be, therefore, rejected and is rejected accordingly.

20. We, however, make it clear that all observations made by us in this order which may touch the merits of the case of either side are *prima facie* observations made for the purpose of disposal of this application.

21. The Registry to place the appeal on board for final hearing on 9/2/2016.

22. Pronounced in the Open Court on this 16th day of December, 2015.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**