

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 64 OF 2015

&

I.A. Nos. 92, 121 AND 131 OF 2015

Dated: 21st August, 2017

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

In the matter of:-

1. **WESTERN ELECTRICITY)
SUPPLY COMPANY OF ODISHA)
LTD. (WESCO), incorporated)
under the provisions of the)
Companies Act, 1956 and having)
its Registered office at Plot No. –)
N1/22, IRC Village, Nayapalli,)
Bhubaneswar – 700 015)**

2. **NORTH-EASTERN)
ELECTRICITY SUPPLY)
COMPANY OF ODISHA LTD)
(NESCO))
Incorporated under the)
provisions of the Companies Act,)
1956 and having its Registered)
Office at Plot No. N1/22, IRC)
Village, Nayapalli, Bhubaneswar)
– 700 015)**

3. **SOUTHERN ELECTRICITY)
SUPPLY COMPANY OF ODISHA)
LTD (SOUTHCO))
Incorporated under the)
provisions of the Companies Act,)**

1956 and having its Registered)
Office at Plot No – N1/22, IRC)
Village, Nayapalli, Bhubaneswar)
– 700 015) **... Appellants**

AND

1. **ODISHA ELECTRICITY)
REGULATORY COMMISSION)
Bidyut Niyamak Bhawan,)
Unit – VIII, Bhubaneswar -)
700 002)
Dist: Khurda, Odisha State)**
2. **THE GRID CORPORATION OF)
ORISSA LIMITED)
Janpath, Bhubaneswar -751 022)**
3. **THE ODISHA POWER)
TRNASMISSION COMPANY)
LIMITED)
Janpath,Bhubaneswar 751 022)**
4. **THE COMMISSIONER-CUM-)
SECRETARY TO GOVERNMENT)
Department of Energy,)
Government of Odisha,)
Bhubaneswar)**
5. **RELIANCE INFRASTRUCTURE)
LIMITED)
“H” Block, 1st Floor,)
Dhirubhai Ambani Knowledge City,)
Navi Mumbai-400 710) **... Respondents****

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

Counsel for the Respondent(s) : Mr. P.C. Sen, Sr. Adv.
Mr. Rutwik Panda, Mr. Udayan Verma
Ms. Anshu Malik for **R.1**

Mr. Dushyant Dave, Sr. Adv.
Mr. R.K. Mehta
Mr. Abhishek Upadhyay
Ms. Himanshi Andley
Mr. Elangbam Premjit Singh
For **R.2**

Mr. R.K. Mehta
Mr. Abhishek Upadhyay
Ms. Himanshi Andley
Mr. Elangbam Premjit Singh
For **R.3**

Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. G. Umopathy
Mr. Aditya Singh
Mr. Leo G. R for **R.4**

Mr. Sitesh Mukherjee
Mr. Gautam Chawla
Mr. Deep Rao for **R.5**

Mr. Tarun Patnaik for
Intervener
(I.A. No. 131/15)

J U D G M E N T

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

1. In this appeal filed under Section 111 of the Electricity Act, 2003 (“**the Electricity Act**”), the Appellants – Western

Electricity Supply Company of Odisha Limited (“**WESCO**”), North-eastern Electricity Supply Company of Odisha Ltd. (“**NESCO**”) and Southern Electricity Supply Company of Odisha Ltd. (“**SOUTHCO**”), who are distribution licensees (also referred to as “**DISCOMS**”) have challenged 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. Respondent No.1 is the Odisha Electricity Regulatory Commission (“**the State Commission**”), who has passed the impugned orders. Respondent No.2 is the Grid Corporation of India Limited (“**GRIDCO**”). Respondent No.3 is the Odisha Power Transmission Company Ltd.(“**OPTCL**”). Respondent No.4 is the Commissioner-cum-Secretary to the Government, Department of Energy, Government of Odisha.

2. Gist of the facts.

- (a) In 2005, one Sarat Chandra Mohanty stated to be a union leader and member of the State Commission

Advisory Committee filed a case before the State Commission seeking revocation of licenses of the Appellants/Discoms. On 21/01/2006, the State Commission passed an order appointing three Special Officers in each of the three Appellants providing them with the powers of a Director under the Companies Act. The State Commission also issued notice to the Appellants calling upon them to show cause why their licenses shall not be suspended.

- (b) Aggrieved by this Order, the Appellants filed appeals before this Tribunal being Appeal Nos.29, 30 and 31 of 2006. By its order dated 13/12/2006, this Tribunal set aside the State Commission's Order dated 27/01/2007. This Order was challenged in the Supreme Court. The Supreme Court by its order dated 05/01/2009 partially allowed the appeals. The Supreme Court confirmed this Tribunal's order to the extent it set aside the State Commission's order appointing special officers. The Supreme Court however, set aside this Tribunal's Order

to the extent it had quashed notice issued under Section 24(1) of the Electricity Act and granted liberty to the Appellants to file their objections. The State Commission was directed to proceed with the matter in accordance with the law without being influenced by the observations made in the order impugned in the appeals. Order of the Supreme Court dated 05/01/2009 reads thus:

“We have heard the learned counsel for the parties and perused the record. In our view, in the facts and circumstances of the case, the Regulatory Commission was justified in issuing notice to the respondents calling upon them to file representations against proposed suspension of their licences, but there was no warrant for appointment of special officers to oversee their work. Therefore, the Appellant Tribunal had rightly annulled the appointment of the special officers. However, it could not have set aside the order of the Regulatory Commission in its entirety without properly appreciating that only show cause notice had been issued to the respondents and final order was yet to be passed by the Regulatory Commission.

Accordingly, the appeal is allowed in-part. The impugned order of the Appellate Tribunal is quashed so far as it annuls the show cause notice issued by the Regulatory Commission under Section 24(1) of the Act. Now, it would be open to the respondents to file their

representations/objections before the Regulatory Commission, which shall proceed to decide the matter in accordance with law without being influenced by the observations made in the order impugned in these appeals.

Needless to say that we have not gone to the question as to whether while issuing notice under Section 24(1) of the Act proposing suspension of the licence, the Regulatory Commission could pass an order for appointment of special officer and this question is left to be decided in appropriate case.

Civil Appeal No.2309 of 2007:

In view of the order passed in Civil Appeal No.946 of 2007, it is not necessary to pass any further order in this appeal, but we clarify that any observation made against the appellants in the impugned order shall not prejudice their cause before the Regulatory Commission.”

3. Pursuant to the Supreme Court’s order, the matters were heard afresh. After hearing the counsel for the parties and after perusing the written submissions filed by the parties, the State Commission passed order dated 12/05/2011. The State Commission came to a conclusion that the Appellants’ performance was unsatisfactory, *inter alia*, on the grounds that there was failure to control (AT&C) loss, that there was no

proper Energy Audit and that there was large scale theft of electricity, that there was failure in servicing NTPC bond, that there was need to improve standard of service and that the organizations were not being run in a financially viable manner. Instead of penalizing the Appellants, the State Commission gave further opportunity to the Appellants to improve their performance. There was to be a periodical review of the progress made by the Appellants. The order stated that in case of failure to carry out the instructions, the State Commission will be at liberty to initiate action under Sections 19 and 24 of the Electricity Act.

4. It is the case of the Appellants that they had complied with majority of the directives issued by the State Commission and compliance of some was in the pipeline and awaiting stakeholders consent. The State Commission's case is that it regularly conducted enquiries and performance reviews and came to a conclusion that the Appellants had failed to improve their performance. The State Commission, therefore, issued show cause notice dated 13/05/2013 under Section 19 of the

Electricity Act for revocation of the Appellants' licenses setting out therein the grounds for revocation.

5. The Appellants filed their replies. There were three further communications from the State Commission seeking further details and/or information. The Appellants responded to them. By the impugned order dated 04/03/2015, the State Commission rejected the objections of the Appellants and revoked the Appellants' licences. By the other impugned order of the same date, Administrator is appointed for the Appellants' utilities.

6. We have heard Mr. Ranganadhan learned counsel for the Appellants. We have perused the written submissions filed by him. Gist of the submissions is as under:

- (a) The revocation of the licence is based on alleged non-compliance of certain obligations. The issues relating to said obligations have been held in favour of the Appellants by this

Tribunal. Without implementing the said judgments on the same issues the State Commission has revoked the Appellants' licence. Following are the said judgments:

- (i) **Judgment dated 13/12/2006 in Appeal Nos. 77-79 of 2006.**
- (ii) **Judgment dated 08/11/2010 in Appeal Nos.52-54 of 2007.**
- (iii) **Judgment dated 03/07/2009 in Appeal Nos. 26-29 of 2009, Appeal Nos.160-162 of 2010, Appeal Nos. 147-149 and Appeal Nos.193-196 of 2012.**
- (iv) **Judgment dated 11/02/2014 in Appeal Nos.112-114 of 2013.**

(b) The repeated non-compliance of this Tribunal's orders on the said issues has been severely criticized by this Tribunal in its judgment dated 30/11/2014 in Appeal Nos. 154,156 and 157 of 2014.

- (c) The requirement of public interest has completely been abrogated by the State Commission. The State Commission never undertook any enquiry contemplated under Section 19(1) of the Electricity Act. The Appellants were not put to any notice. There is no order in existence indicating that the State Commission has after conducting enquiry satisfied itself that it was in the public interest to initiate proceedings for revocation.
- (d) The reasons for infraction of public interest are *inter alia* stated to be (i) dismal performance of licensees in terms of consumer service, (ii) quality of power supply (iii) mounting cases in the GRF and before the Ombudsman. They are not even made reasons for revocation of the licence.
- (e) The Appellants had complied with the standards of performance of the licensees.

The State Commission has not rejected the numbers given by the Appellants. There is also no objection from the public.

- (f) The order dated 12/05/2011 issued under Section 24 of the Electricity Act cannot be termed as any enquiry or show cause notice under Section 19(1) of the Electricity Act. The show cause notice states that the State Commission may initiate proceedings under Section 24 or Section 19 of the Electricity Act. Thus the earlier proceedings were closed. Therefore fresh proceedings had to be initiated in accordance with law by an order of the State Commission under Regulation 47 of the OERC (Conduct of Business) Regulations, 2004 (“**the Conduct Regulations**”) and upon making an enquiry which was not done.
- (g) The Appellants have arranged loan funding of Rs.1599 crores, hence the submission that

they have not invested any money is without any basis.

- (h) The basis of an enquiry is to put the allegations to the person against whom allegations are made (**State of Orissa v. Dr. (Miss) Binapani Dei & Ors.**¹ Such a procedure was not adopted and hence there is no enquiry at all.
- (i) Enquiry cannot be equated with reviews and inspections conducted during the scrutiny of ARR's or Tariff proceedings. The Appellants were not put to notice about it. If enquiry as contemplated under Section 19(1) of the Electricity Act was conducted the Appellants would have been able to satisfy the State Commission that no case was made out for revocation of licence as public interest was not affected.

¹ AIR 1967 SC 1269

(j) Assuming the said proceedings could be considered as enquiry under Section 19(1) of the Electricity Act, the same would not qualify as 'enquiry' in the facts of this case, because the members who passed the impugned order are not the members who actually heard all the previous performance reviews. They had not participated in the so called enquiry resulting in the breach of fundamental principle "he who hears must decide". Three out of six performance reviews were in fact held after the issuance of show cause notice. Thus there is a violation of principles of natural justice. Certain directions of the State Commission to the Appellants for conduct of Energy Audit were given after the issue of the Show Cause Notice. Similarly letters dated 23/05/2013, 04/12/2013 and 04/06/2014 through which the State Commission has sought information were sent after the show

cause notice. Hence, there is no enquiry as contemplated under Section 19 of the Electricity Act.

- (k) Besides, show cause notice was issued on number of items which were not reviewed such as transfer of shares, infusion of capital, functioning of CSO, construction and start up power etc.
- (l) Section 19 of the Electricity Act contemplates two stage process i.e. one under Section 19(1) and the other under Section 19(3). The principles of natural justice must be observed even at Section 19(1) stage. (See: **Narayanan Sankaran Mooss v. State of Kerala**² which deals with Section 4(1) of the Indian Electricity Act, 1910 which is in *pari materia* with Section 19(1) of the Electricity Act.) The High Court's judgment in **Narayanan**

² (1974) 1 SCC 68

Sankaran Mooss v. State of Kerala³ was relied upon to contend that power under Section 4(1) of the Electricity Act 1910 was not a quasi judicial power. The said judgment was completely set aside by the Supreme Court.

- (m) In the impugned order the State Commission has not recorded as to where and when it has arrived at a 'satisfaction' that it was appropriate to initiate action under Section 19(3) of the Electricity Act. Regulation 47 of the Conduct Regulations requires the State Commission to pass an order before initiating proceedings for revocation of the licence. No such order exists in this case. Regulation 47(3) provides the manner in which enquiry is to be conducted and refers to Section 128 of the Electricity Act.

³ AIR 1965 Ker. 253

- (n) Section 111 of the Electricity Act provides for a statutory First Appeal. It is an appeal both on facts and law. A first appellate court can re-appraise the evidence and it has all the powers of the original forum. Under the Electricity Act 1910, there was no statutory first appeal. So the judgments relating to proceedings, under the Electricity Act 1910 relied upon to contend that revocation of a licence was an administrative decision has no application to this case.
- (o) In any case whether an order is administrative or quasi-judicial in nature, if it were to involve civil consequences natural justice has to be complied with (See: **Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati & Ors⁴**).

⁴ (2015) 8 SCC 519

- (p) Section 19(5) mandates that the State Commission has to serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect. No such notice is served on the Appellants and the revocation has been made effective on the same date.
- (q) There is a hiatus between the date of decision to revoke and the date when the revocation becomes effective. This interregnum period is meant to permit the licensee to sell his utility under Section 19(6) and to complete the procedure contemplated in Sections 20 to 22 to sell the utility. Due to the impugned order, the Appellants are no longer the owners of the utility. They cannot effect the sale of the utility. The entire procedure under Sections 19(6) and 20 has been done away with. No scheme is framed under Section 22. The

Appellants cannot sell their utility as they have been divested of their utility.

- (r) The Appellants' case that stage of sale has not yet reached is an express admission that Section 19(6) has not been resorted to. This statement is falsified by the express words of Section 20(1)(c) which state that all the rights of the licensee cease on and from the date of revocation.
- (s) Action taken by the State Commission is violative of Article 300-A of the Constitution of India. The "urgency argument" is fallacious. The impugned order does not speak about urgency. Where several crores are invested in fixed assets, situation requiring immediate revocation of licence cannot arise.
- (t) Judgments cited by GRIDCO to contend that the word "shall" in Section 19(5) and 19(6) of the Electricity Act should be read as 'may' are

in the realm of procedural provisions and, hence, are not applicable.

- (u) Under Section 20(1)(d), the Administrator could be appointed only for operation of the utilities. In the case of revocation of licence, the utility of the licensee does not vest in the Administrator. However, in the case of suspension of license under Section 24(2), the utility vests in the Administrator. By the impugned order, contrary to this, the management and control of the utilities is vested in the Administrator.

7. Mr. Ranganadhan has made submissions on various issues on which the Appellants have been found wanting. Many of them have been dealt with by the State Commission. Those which, in our opinion, need to be dealt with shall be dealt with as we proceed further.

8. We have heard Mr. Sen learned senior counsel appearing for Respondent No.1 the State Commission. We have perused the written submissions filed by him. Gist of his submissions is as under:

- (a) The word 'enquiry' is not defined in the Electricity Act. It would have to be given the common meaning i.e. to search for knowledge, investigate a question.
- (b) The words of a statute must be given their ordinary and plain meaning and words ought not to be read into the statute (**Nasiruddin & Ors. v. Sita Ram Agarwal**⁵)
- (c) The wording of the statute does not support the contention that there should have been a two stage process of a notice before enquiry was commenced. Where there was a legislative intent that a show cause notice is

⁵ (2003) 2 SCC 577

to be issued it has been explicitly provided for as in Section 19(3) of the Electricity Act.

- (d) The Electricity Act is a complete Code (***PTC (India) Limited v. CERC***⁶). Therefore a method or procedure not prescribed in it is completely barred.
- (e) The State Commission had issued an order on 12/5/2011. Pursuant to the same the State Commission carried out a detailed enquiry through Performance Reviews. Since the parameters laid down by the State Commission were not rectified second show cause notice dated 13/05/2013 was issued which led to the revocation of licence. Thus a proper enquiry was conducted under the Electricity Act.
- (f) Principles of natural justice ought not to be read into an enquiry which is a fact finding

⁶ (2010) 4 SCC 603

exercise (**Competition Commission of India v. Steel Authority of India Limited & Anr**⁷.)

(g) The impugned order is *inter alia* based on the subjective opinion of the State Commission and hence can be interfered with only if it is *mala fide* or issued for collateral purpose. Reliance is placed on **Hubli Electricity Company Ltd v. Province of Bombay**⁸ which discusses the nature of powers under Section 4 and 5 of the Electricity Act 1910 which is similarly worded as in the Electricity Act.

(h) Opinion formed by the Government with respect to revocation is a subjective matter which is not open to objective test. (See: **Barnagar Electric Supply and Industrial Co. Ltd v. State of Madhya Pradesh & Anr.**⁹, **Sikhar Electric Supply Ltd v.**

⁷ (2010) 10 SCC 744

⁸ ILR 1948 Bom 446

⁹ AIR 1963 MP 41

Secretary to Govt. of Assam¹⁰, judgment of the Kerala High Court in **Narayanan Sankaran Mooss.**)

- (i) Without prejudice to the above submissions, even though disclosure of material is not required, the impugned order discloses the material on the basis of which the subjective satisfactory was formed. Examining the said material, it cannot be said that there was no material to form the opinion as encapsulated in the impugned order.
- (j) The revocation and taking effect of the same within the same day is permissible in law. No period fixed between notice of revocation and the date when the revocation is to take effect.
- (k) The Electricity Act envisages revocation without the consent of the licensee as well as consensual revocation as contemplated in

¹⁰ AIR 1969 Assam & Ngld

Section 19(2) thereof. There would be cases where it would be detrimental for a licensee to continue in ownership/possession of the utility upon revocation in which case there need not be any time gap and it can take effect immediately. (**Vishnupur Electric Supply and Industrial Development Co. Ltd v. State of West Bengal and Ors.**¹¹)

- (1) The Electricity Act envisages two kinds of sale of the utility. One kind of sale is contemplated under Section 19(6) thereof. It is a direct sale by the licensee, usually in cases where the Commission does not need to revoke the licence immediately. It would also cover situations where revocation is done with the consent of the licensee contemplated under Section 19(2).

¹¹ AIR 1978 Cal.88

- (m) The second type of sale is carried out by the Commission under Section 20 to 22 of the Electricity Act upon revocation of the license.
- (n) The sale by the Commission can take place under Section 19(6) when the licensee despite being given time is not able to sell the utility. The sale by the Commission can also take place under Section 20 to 22 of the Electricity Act upon revocation of the license.
- (o) It is not mandatory to attempt a sale under Section 19(6) first for the Commission to get a right to carry out the sale. Had Section 19(6) been mandatory the legislature would have provided that the revocation would be rendered void if the said requirement was not followed.
- (p) If the sale is the only option the Appellant must give up its objection to the revocation.

- (r) The vesting of the utilities in the liquidator is proper.
- (s) On the meaning of the 'term' vesting reference be made to **Municipal Corporation of Hyderabad v. P.N. Murthy**¹², **National Textile Corporation Ltd. v. Naresh Kumar Badrikumar Jugad & Ors.**¹³
- (t) In the context of the Electricity Act, the licensee never had unqualified right to sell the electricity.
- (u) Once revocation is carried out under Section 20(1) all rights, duties obligations of the licensee cease.
- (v) The State Commission has enumerated the difficulties faced by it in implementing the orders of this Tribunal in Appeal No.112-114

¹² (1987) 1 SCC 568

¹³ (2011) 12 SCC 695

of 2014. This Tribunal allowed the said appeal filed by the Discoms against which the State Commission has filed appeal in the Supreme Court which is pending. Notices have been issued on the stay application.

- (w) Section 17(3) of the Electricity Act states that no licensee shall at any time assign his licence or transfer his utility, or any part thereof by sale, exchange, lease or otherwise without prior approval of the Appropriate Commission. In the instant case, sale of shares have been carried out by the Appellants without permission of the Commission and in the process, the control over the assets have been handed over to entities which have no experience in the sector. Such transfers are violative of Section 17 of the Electricity Act.
- (x) This Tribunal is authorised to examine the nature of the transaction in the present case

by lifting the corporate veil and is entitled to have full disclosure of facts vis-a-vis the transaction as the said share transfer has taken place contrary to Section 17(3) of the Electricity Act. (See: **State of Rajasthan v. Gotan Lime Stone Khanij Udyog Private Limited and Anr**¹⁴.)

9. We have heard Mr. Dushyant Dave, learned senior counsel and Mr. R.K. Mehta, learned counsel appearing for Respondent No.2-GRIDCO. We have perused the written submissions filed on behalf of Respondent No.2. Gist of the submissions is as under:

- a) There is no violation of Section 19 of the Electricity Act as the State Commission has conducted an enquiry, which began in the year 2005 in which the State Commission

¹⁴ (2016) 4 SCC 469

issued appropriate notices/directions to the Appellants to answer issues raised thereby.

- b) This Tribunal set aside the State Commission's order dated 27/01/2006, but reserved the liberty to the State Commission to initiate fresh action under Section 24 of the Electricity Act. The said order was challenged in the Supreme Court. The Supreme Court by its order dated 05/01/2009 allowed the appeal in part and permitted the State Commission to pursue the show cause notice under Section 24(1). The State Commission issued notices in light of the Supreme Court's order and by order dated 12/05/2011 issued certain directions to the Appellants. The said order has assumed finality. Hence, there is no violation of Section 19 as alleged. The Appellants participated in the proceedings in Case No.35 of 2005. The instant proceedings

are only a continuation of the said proceedings.

- c) Following the Show Cause Notice dated 13/05/2013, the State Commission heard the matter extensively in the course of its enquiry and afforded every opportunity to the Appellants. Paragraphs 7 to 10 of the impugned order show how the enquiry was conducted. Section 19 of the Electricity Act and Regulations 64 and 47 have been fully complied with.
- d) Sections 19(5) and (6) give the licensee an option to sell its utility to any person after prior approval of the State Commission. Sub-Section (6) of Section 19 does not give an absolute right to the licensee to sell his utility upon cancellation of a license under sub-section (1) thereof because sub-section (6) is couched in a directory language. Further, the

right to sell is subject to approval by the State Commission, which also shows that the provision does not give any absolute right. Further, Section 20(1)(d) gives the State Commission different options which includes clause (d) under which interim arrangement can be made by the State Commission.

- e) Under sub-section (1) of Section 22, if the utility is not sold as per Section 20 or Section 24, the State Commission may issue such directions as may be necessary for management of the utility. It is only if the State Commission has not issued such order that the licensee may dispose of his utility under sub-section (2) thereof.
- f) Section 23 gives an additional power to the State Commission to pass appropriate directions.

- g) The State Commission has exercised powers vested in it under Section 20(1)(d) by appointing Administrator in public interest. The Appellants have no vested right to insist upon sale of utilities. Such a course would have been highly inequitable in the facts of this case.
- h) Reliance placed on the Supreme Court's judgment in **Narayanan Sankaran Mooss** is misplaced in view of the scheme of Section 4 of the Indian Electricity Act, 1910 and Section 19 of the Electricity Act.
- (i) The purport of disinvestment/privatisation of the Appellants has been completely frustrated by the Appellants. Under their management, grave loss and prejudice is caused to public interest and to GRIDCO. Hence, the State Commission was fully justified in revoking the Appellants' license.

- (j) Findings of the State Commission recorded in Paragraphs 11 to 27 as regards lapses of the Appellants are based on cogent material. No other view is possible on the facts of this case.
- (k) The present proceedings arose on account of the Supreme Court's order dated 05/01/2009. The Appellants, therefore, cannot urge the point regarding non-compliance of directives of this Tribunal.
- (l) For the following reasons, the Appellants are not justified in contending that the State Commission did not comply with this Tribunal's orders.

“(a) The truing up of account on a particular item such as distribution loss as per the directives of this Tribunal has not taken place on account of non-submission of energy audit data by the licensees themselves. The other cost components have been trued up upto

2012-13 as per the audited accounts submitted by licensees;

- (b) As per audited accounts of the Licensees which are based on receivable audit carried out by them, they have a huge arrears of Rs.2456.40 Crs. up to the closure of financial year 2012-13 which has remained uncollected over the years from the consumers. This amount has already been allowed to the Licensees through tariff hike. Had the Licensees taken sincere steps to collect their arrears from the consumers this so called situation of acute financial deficit would not have arisen.*
- (c) Had the Licensees achieved their own target of loss reduction that would have generated substantial surplus from year to year which would have made their operation viable. One percent loss reduction at present level would have resulted in additional revenue of around Rs.26 Crs. for NESCO, Rs.36 Crs. for WESCO and Rs.13 Crs. for SOUTHCO.”*

- (m) The Appellants ought to have complained about the non-compliance of the orders to this Tribunal. In any case, all the orders of this Tribunal are subject matter of the pending appeals in the Supreme Court.
- (n) Assuming the orders of this Tribunal were to be given effect to, even then the Appellants' performance did not meet the requirement of the law, it was wholly below par and affected public interest seriously. This view of the State Commission is justified. The Appellants were wholly bankrupt, but they continued to hang on with the sole object of mismanaging and mis-utilizing funds at the cost of public.
- (p) The opinion of the State Commission referred to in Section 19 is a subjective opinion and not an opinion subject to objective tests by the Courts and unless the same is found to be based on irrelevant grounds, it has to be

considered as conclusive and cannot be reviewed by the Court. (**Hubli Electricity Company Limited v. Province of Bombay**¹⁵).

- (q) In the circumstances, there is no merit in the appeal and it deserves to be dismissed. It is important to note that after the State Commission's order, the utilities have in fact performed better. Hence, no interference is called for with the impugned order.

10. We have heard Mr. R.K. Mehta learned counsel appearing for Respondent No.3 - the Odisha Power Transmission Company Ltd. We have perused the written submissions filed by them. Gist of the submissions is as under:

- (a) Section 19(1) and (3) of the Electricity Act do not contemplate a two stage process. Section

¹⁵ AIR 1949 PC 136

19(1) (2) & (3) are a part of a composite scheme.

- (b) Section 19(1) gives the grounds on which licence can be revoked. Section 19(2) provides for the revocation of licence and Section 19(3) provides that no licence shall be revoked unless three months notice stating the grounds for revocation is issued.
- (c) Section 19(1) does not contemplate any independent enquiry. The legislature never intended two enquiries for revocation of licence. Two enquiries would be time consuming and that would render Section 19 otiose.
- (d) Enquiry mentioned in Section 19(1) is a condition precedent for revocation of licence but is not a condition precedent for issue of Show Cause Notice under Section 19(3). The Show Cause Notice is itself intended as

initiation of enquiry contemplated by Section 19.

- (e) Without prejudice to the above it is submitted that in the present case there was an elaborate and long drawn enquiry by the State Commission from 12/05/2011 till notice under Section 19(3) was issued by the State Commission on 13/05/2013. Only when it was found that there was no improvement after various Performance Reviews that action was taken of revocation of licence in public interest after issuing Show Cause Notice under Section 19(3).
- (f) While interpreting provisions of the Electricity Act, Rule of Purposive Construction will have to be applied so as to achieve the object thereof. Reliance is placed on the following judgments:

- i) **Abhiram Singh v. C.D. Commachen**¹⁶
- ii) **Vijay Kumar Mishra v. High Court of Judicature at Patna**¹⁷
- iii) **UCO Bank & Anr. v. Rajinder Lal Capoor**¹⁸

(g) The provision in Section 19(5) for fixing a date on which revocation shall effect does not mean that revocation order cannot be passed with immediate effect. The date from which the order of revocation should become effective has to be decided by the State Commission after taking into consideration the facts of each case (See: **Vishnupur Electric Supply**).

(h) Without prejudice to the above, it is submitted that in case it is held that Section 19(5) requires a future date to be fixed on which the revocation order will take effect, the provision contained in Section 19(5) should be treated

¹⁶ (2017) 2 SCC 629

¹⁷ (2016) 9 SCC 313

¹⁸ (2008) 5 SCC 257

as 'directory' in nature since the consequence of failure to comply with the requirements is not provided in the Electricity Act. The consequence has therefore to be determined with reference to other provisions of the Electricity Act, intention of the legislature, nature and purpose of the enactment and the effect of non-compliance.

- (i) It is well settled that the word 'shall' can be construed as directory in case the object and scope of the enactment and the context so demands. Reliance is placed on the following judgments:

- i) **Jagatjit Industries Limited v. The Intellectual Property Appellate Board & Anr.**¹⁹
- ii) **Kailash v. Nanhku & Ors.**²⁰
- iii) **MV Vali Pero v. Fernando Lopez**²¹

¹⁹ (2016) 4 SCC 381

²⁰ (2005) 4 SCC 480

²¹ (1989) 4 SCC 671

iv) Justice G.P. Singh's book on Principles of Statutory Interpretation (9th Edn. 2004)

- (j) Applying the above principles Regulation 47(1) is to be treated as directory and not mandatory.
- (k) Section 19(6) and Section 19(5) have to be read together.
- (l) Where the State Commission decides to revoke the licence under Section 19(1), under Section 19(5) it can either make the revocation effective immediately or give a notice of revocation and fix a date on which revocation shall take effect.
- (m) In case the State Commission gives notice of revocation and fixes a date on which revocation shall take effect by virtue of Section 19(6) the licensee may after prior approval of the State Commission sell its utility.

- (n) In case the State Commission makes the order of revocation effective immediately, Section 19(6) has no application and Section 20 comes into play.
- (o) The net effect of Section 19(5) and 19(6) read with Section 20(1)(c) is as under:
- (i) In case the order of revocation is made effective immediately, all rights, duties, obligations and liabilities of the licensee shall cease on and from the date of revocation of licence;
- (ii) In case notice of revocation is given and the date on which the revocation shall take place is fixed, all rights duties, obligations and liabilities of the licensee shall cease on and from the date of which utility of licensee is sold to the purchaser, in case the

utility is sold before the date fixed in the Notice.

(iii) In case notice of revocation is given and the date on which the revocation shall take place is fixed, and licensee is not able to sell the utility all rights, duties, obligations and liabilities of the licensee shall cease on and from the date fixed in the Notice for the revocation to take effect.

(p) Any other interpretation will make it impossible for revocation to come into effect immediately which cannot be the intention of the legislature. Opportunity under Section 19(5) does not arise as licences were revoked with immediate effect.

(q) The proceedings for sale of the utility under Section 20(1) will be taken by the State

Commission in due course. In any case, the Appellants have a negative net worth of Rs.2077.43 crore and the chance of their being able to sell the utility are extremely remote.

- (r) Initially, the State Commission fixed only 3% Distribution Loss Reduction Target per year. Since the Appellants could not even achieve that, the State Commission had to fix Distribution Loss Reduction Targets cumulatively in subsequent tariff orders.
- (s) The submission that non-achievement of High Distribution Loss Targets fixed by the State Commission by various orders has been made the basis for revocation of the Licence even though the said orders had been set aside by this Tribunal, is without any merit. Appeals against the said orders are pending in the Supreme Court. In **Kunhayammed & Ors. v.**

State of Kerala & Anr.²²., it is held by the Supreme Court that where a decree or order passed by an inferior court or Tribunal is subjected to a remedy available under law before a superior forum, its finality is put in jeopardy.

- (t) In any case, the Appellants have not achieved the targets proposed by them.

- (u) The Appellants' stand that they cannot reduce the Distribution Loss and carry out other functions effectively since all their incomings were escrowed to GRIDCO is incorrect. GRIDCO had relaxed Escrow to the extent of Rs.4084.91 crores.

- (v) The object of Shareholders' Agreement under which RIL acquired 51% share in the Appellants is violated by the Appellants.

²² (2000) 6 SCC 359

Investors failed to invest any money in the distribution business.

- (w) As a Transmission Licensee, OPTCL had made an investment of Rs.2316 Crores over the period of 16 years and had developed an efficient transmission system. The Appellants failed to make any proper investment for building downstream sub-transmission lines and sub-stations. Benefit of investment made by OPTCL did not reach the end consumers.
- (x) The provision contained in Regulation 47 requiring initiation of proceeding for revocation of licence by an order, is directory and not mandatory. The word 'shall' used in Section 47 has to be treated as 'may' in view of the context of the provision.
- (y) In any case, order dated 12/05/2011 can be treated as an order for the purpose of Regulation 47.

(z) RIL cannot escape the responsibility on the technical ground that the shareholders are different from the company and the Shareholders Agreement cannot be enforced in the present proceedings. RIL was in control of the Appellants who could not perform due to gross defaults by RIL. Corporate veil will have to be lifted in public interest (see: **Gotan Lime.**)

(aa) In any case, technicalities should not take precedence over substance. In larger public interest, impugned order needs to be upheld.

11. We have heard Mr. Vaidyanathan learned senior counsel and Mr. Umapathy learned counsel appearing for Respondent No.4, the State of Odisha. We have perused the written submissions filed by them. Gist of submissions is as under:

(a) The State of Odisha with a view to infusing investment and efficient running of the

Appellants proceeded for privatisation of 51% equity in the Appellants in favour of private investor i.e. RIL. RIL was expected to bring in substantial investment and improve the sector which it did not do. Conduct of the Appellants disentitles them from claiming any relief.

- (b) Section 19 of the Electricity Act is a complete code with regard to revocation. It does not involve two stage enquiry. All that is required in accordance with the principles of natural justice is that the person likely to be prejudicially affected must be given a show cause notice before an order of revocation is passed and thereafter an enquiry must be held. Where an enquiry is held for suspension of licence under Section 24 of the Electricity Act, such an enquiry itself would provide sufficient material for issuance of show cause

notice under Section 19(3) of the Electricity Act.

- (c) The State Commission had sufficient material before it for issue of show cause notice dated 23/05/2013. Full opportunity was afforded to the Appellants. Impugned order was passed in public interest after consideration of all relevant aspects, including Order dated 12/05/2011 and subsequent periodic reviews from 2011-12 till 2013-14.
- (d) To maintain continued supply of electricity in exercise of powers conferred under Section 20(1)(d) by a separate order the management and control of the Appellants was vested in CMD of GRIDCO who would function under the supervision and control of Government of Odisha.
- (e) The Appellants' case that there was substantial compliance of the directions

contained in the Order dated 12/05/2011 is denied. The State Commission had to issue several directions to the Appellants to improve their performance in terms of Capital Investment, Loss Reduction, Energy Audit and Improvement in collection efficiency which has not been adhered to.

- (f) The scheme of licensing is in part-IV of the Electricity Act. It is a complete code in itself. Section 16 and 17 *inter alia* provide for the conditions of licence and matters which licensees are not entitled to do without the approval of the Appropriate Commission i.e. assign licence or transfer utility thereof by sale, lease, exchange or otherwise.
- (g) The law requires an enquiry before recording a satisfaction for revocation of licence. During the periodic Performance Reviews detailed enquiries were made. In this case non

compliance of Order dated 12/05/2011 has been recorded. Performance Review proceedings for the period 2009-10 to 2013-14 *inter alia* form the basis for revocation of licence. Thus the conditions for invoking Section 19 were fully satisfied. The Appellants were already put on notice by Order dated 12/05/2011.

- (h) Section 17(3) of the Electricity Act, expressly provides that no licensee can at any time assign his licence or transfer his utility or any part thereof, by sale, lease, exchange or otherwise without prior approval of the Appropriate Commission. The fact that the sale of shares took place in 2002-2003 was never disclosed.
- (i) The provisions of the Electricity Act must be interpreted by applying principle of purposive construction. (See: **New India Assurance**

Co. Ltd v. Nusli Neville Wadia & Anr.²³).

There cannot be any estoppel against statute nor can the State Commission or GRIDCO be said to have acquiesced in such transfer.

- (j) The process contemplated under Section 20(1)(a) to (c) of the Electricity Act is yet to be undertaken by the State Commission.
- (k) Without prejudice to the above it is contended that the Appellants hold 0.02% of shareholding as against 51% acquired at the time of taking over the operations in 1999. They have not fulfilled the obligations under the Share Holders Agreement. Hence, their submission with regard to sale of utilities is wholly untenable.
- (l) In the process of privatisation 51% equity was divested in erstwhile BSES. RIL which took over the erstwhile BSES took over the

²³ (2008) 3SCC 279

obligation to manage the Appellants. RIL gradually diluted its shareholding in the Appellants from 51% to 0.02%. Shares were transferred to companies having no experience in Power Sector in violation of disinvestment scheme as evidenced by the Bidding Documents and Share Holders Agreement as well as Section 17 of the Electricity Act and Section 21 of the Orissa Electricity Reform Act. These transfers have been made without the approval of GRIDCO which is a prerequisite under Article 6 of the Share Holders Agreement. The submission of the Appellants that the State Commission has no jurisdiction to look into these aspects is misplaced.

- (m) There is no infirmity in the impugned order. The impugned order has correctly dealt with grounds of revocation such as Billing and

Collection, Efficiencies, Arrears of Consumers, Financial Unviability of the Appellants, Default to GRIDCO etc. Therefore the appeal deserves to be dismissed.

12. We have heard Mr. Sitesh Mukherjee learned counsel appearing for Respondent No.5 RIL. We have perused the written submissions filed by him. Gist of the written submissions is as under:

- (a) Neither the Electricity Act nor the Odisha Electricity Reform Act, 1995 vests any jurisdiction on the State Commission to examine the conduct of the shareholders of the licensees. This Tribunal in its judgment dated 13/12/2016 in Appeal No.75 of 2005 in relation to the same parties has said that the State Commission has no jurisdiction to issue directions to shareholders and if any action was to be taken against RIL related to Shareholders Agreement, it would be before

the competent forum and not before the State Commission. The State Commission had therefore no jurisdiction to comment on the conduct of the majority shareholder with respect to implementation or violation of the clauses of the Shareholders Agreement and/or non incorporation of clauses of Shareholders Agreement in the Articles of Association.

- (b) Since the State Commission has no jurisdiction as aforesaid, the submission that it can lift corporate veil in public interest is without any merit. The State Commission can only regulate the licensees.
- (c) The judgment of the Supreme Court in **Gotan Lime** is not applicable to this case. In that case the court was concerned with employment of dubious means/structuring to transfer mining rights (belonging to the

State) through concealment of facts and obviating a statutory approval process. Unlike mining rights given to the lessee, the work of distribution of licensee involves procurement and distribution of electricity in their supply area; and as such the distribution licensee does not belong to the State or held by the State in public interest. Moreover unlike **Gotan Lime** there is no allegation of concealment or suppression of facts or improper financial gain by RIL.

- (d) Without prejudice to the above, it is submitted that GRIDCO holds 49% shares of the Appellants. Selective targeting of majority shareholders is unsustainable in Law.
- (e) None of the conditions mentioned in Sections 19(1) (a) to (d) are attracted by any alleged acts of a shareholder of a licensee.

Licenses have not been revoked for any violation of Section 17 of the Electricity Act.

- (f) The conclusion of the State Commission that transfer of shares amounts to transferring part of the undertaking or assignment of 'licensee' is an erroneous understanding of the Electricity Act. If we read Section 9(2) of the Indian Electricity Act 1910, Section 21(2) of the Odisha Electricity Reform Act 1995 and Section 17(3) of the Electricity Act it is clear that the restriction on the licensee is not to transfer undertaking or utility. In this connection Section 2(75) of the Electricity Act which defines utility and Section 7A of the Electricity Act 1910 which refers to "undertaking" is material. Rules 2(y) and 2(k) of the OER Transfer Rules which define "undertaking" and "Distribution

Undertaking” are also material. Thus, “utility” and “undertaking” can be said to be in *pari materia* and relate to the unit of business assets.

- (g) A licensee is one to whom a license has been granted (Section 2(39) of the Electricity Act and Section 2(h) of the Indian Electricity Act 1910).
- (h) A conjoint reading of the above provisions make it clear that the transfer of shares by the entity holding shares of the ‘licensee’ (separate entity) does not and cannot amount to transfer of an undertaking/utility.
- (i) A shareholder has got no interest in the property of the company. The property is

owned by the company. (**Bacha F Guzdar v. CIT, Bombay**²⁴.)

- (j) Thus RIL does not have any interest in the utilities. Consequently transfer of shares of the company cannot be equated with the transfer of part of the undertaking/utility.
- (k) If transfer of shares of a licensee cannot be permitted under the Electricity Act, then the share of the distribution company can never be purchased/sold at stock exchange.
- (l) Pertinently, there are no regulations framed by the State Commission, requiring prior approval of transfer of shares of the licensee. There is also no restriction on transfer of shares.
- (m) The term “or otherwise” occurring in Section 17(3) of the Electricity Act cannot be interpreted as a separate category of

²⁴ AIR 1955 SC 74

transaction which require prior approval of the Appropriate Commission in addition to assignment of license and transfer of utility.

- (o) The term “or otherwise” takes colour from the context in which it is used and should be interpreted *ejusdem generis* [**Luxmi Tea Company Limited v. Pradeep Kumar Sarkar**²⁵, **George Da Costa v. Controller of Estate Duty in Mysore**²⁶]. Hence, the word “otherwise” in Section 17(3) cannot be interpreted to mean a residuary category in addition to assignment of license and transfer of utility.
- (p) Three conditions in 6th proviso to Section 14 are applicable only for a second distribution licensee in the same area (WESCO, NESCO, SOUTHCO i.e. the Appellants).

²⁵ (1989) Supp. (2) SCC 656

²⁶ AIR 1967 SC 849

- (q) These three conditions were added by way of amendment in the Electricity Act whereas the competitive bidding process and business licenses were awarded in 1989-99. Hence, 6th proviso to Section 14 has no application to this case at all.
- (r) No criteria for shareholders of the licensees have been provided anywhere. Hence, findings of the State Commission relating to them in the context of these entities are without any basis.
- (s) Transfer of shares was approved by the Board of Directors of the Appellants in the office of GRIDCO where GRIDCO's representative was present. Share transfers were not done without GRIDCO's knowledge.
- (t) The Company Law Board has in C.P. Nos.61, 62 and 63 of 2008 (CLB Judgment)

dated 23/09/2009 held that transfer of shares by RIL to non-group companies is valid.

- (u) Representations made by GRIDCO in the Acquisition Agreement clearly provide that GRIDCO was responsible for any consents/approvals for the acquisition of shares by RIL, assuming such approval was necessary from the State Commission.
- (v) The allegation that RIL did not infuse equity funding beyond the initial funding, is baseless. It is clear from the Shareholders' Agreement that RIL was first required to arrange debt financing which was duly arranged. There is evidence to show that the banks had approved loans for the Appellants as recently as in 2013.

13. We need to first quote the relevant provisions of the Electricity Act and then analyze them in the light of submissions made before us. Sections 19 to 24 are relevant.

They read as under:

“19. Revocation of licence. --- (1) *If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -*

- (a) *where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;*
- (b) *where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;*
- (c) *where the licensee fails, within the period fixed in this behalf by his licence, or any longer period which the Appropriate Commission may have granted therefor –*
 - (i) *to show, to the satisfaction of the Appropriate Commission, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence; or*

- (ii) *to make the deposit or furnish the security, or pay the fees or other charges required by his licence;*
- (d) *where in the opinion of the Appropriate Commission the financial position of the licensee is such that he is unable fully and efficiently to discharge the duties and obligations imposed on him by his licence.*

(2) *Where in its opinion the public interest so requires, the Appropriate Commission may, on application, or with the consent of the licensee, revoke his licence as to the whole or any part of his area of distribution or transmission or trading upon such terms and conditions as it thinks fit.*

(3) *No licence shall be revoked under sub-section (1) unless the Appropriate Commission has given to the licensee not less than three months' notice, in writing, stating the grounds on which it is proposed to revoke the licence, and has considered any cause shown by the licensee within the period of that notice, against the proposed revocation.*

(4) *The Appropriate Commission may, instead of revoking a licence under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose, and any further terms and conditions so imposed shall be binding upon and be observed by the licensee and shall be of like force and effect as if they were contained in the licence.*

(5) *Where the Commission revokes a licence under this section, it shall serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect.*

(6) *Where the Appropriate Commission has given notice for revocation of licence under sub-section (5), without prejudice to any penalty which may be imposed or prosecution proceeding which may be initiated under this Act, the licensee may, after prior approval of that Commission, sell his utility to any person who is found eligible by that Commission for grant of licence.*

20. Sale of utilities of licensees. --- (1)
Where the Appropriate Commission revokes under section 19 the licence of any licensee, the following provisions shall apply, namely:-

- (a) *the Appropriate Commission shall invite applications for acquiring the utility of the licensee whose licence has been revoked and determine which of such applications should be accepted, primarily on the basis of the highest and best price offered for the utility;*
- (b) *the Appropriate Commission may, by notice in writing, require the licensee to sell his utility and thereupon the licensee shall sell his utility to the person (hereafter in this section referred to as the “purchaser”) whose application has been accepted by that Commission;*
- (c) *all the rights, duties, obligations and liabilities of the licensee, on and from the date of revocation of licence or on and from the date, if earlier, on which the utility of the licensee is sold to a purchaser, shall absolutely cease except for any liabilities which have accrued prior to that date;*

(d) *the Appropriate Commission may make such interim arrangements in regard to the operation of the utility as may be considered appropriate including the appointment of Administrators;*

(e) *The Administrator appointed under clause (d) shall exercise such powers and discharge such functions as the Appropriate Commission may direct.*

(2) *Where a utility is sold under sub-section (1), the purchaser shall pay to the licensee the purchase price of the utility in such manner as may be agreed upon.*

(3) *Where the Appropriate Commission issues any notice under sub-section (1) requiring the licensee to sell the utility, it may, by such notice, require the licensee to deliver the utility, and thereupon the licensee shall deliver on a date specified in the notice, the utility to the designated purchaser on payment of the purchase price thereof.*

(4) *Where the licensee has delivered the utility referred to in sub-section (3) to the purchaser but its sale has not been completed by the date fixed in the notice issued under that sub-section, the Appropriate Commission may, if it deems fit, permit the intending purchaser to operate and maintain the utility system pending the completion of the sale.*

21. Vesting of utility in purchaser.----

Where a utility is sold under section 20 or section 24, then, upon completion of the sale or on the date on which the utility is delivered to the intending purchaser, as the case may be, whichever is earlier-

- (a) *the utility shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the utility: Provided that any such debt, mortgage or similar obligation shall attach to the purchase money in substitution for the utility; and*
- (b) *the rights, powers, authorities, duties and obligations of the licensee under his licence shall stand transferred to the purchaser and such purchaser shall be deemed to be the licensee.*

22. Provisions where no purchase takes place. --- (1) *If the utility is not sold in the manner provided under section 20 or section 24, the Appropriate Commission may, to protect the interest of consumers or in the public interest, issue such directions or formulate such scheme as it may deem necessary for operation of the utility.*

(2) *Where no directions are issued or scheme is formulated by the Appropriate Commission under sub-section (1), the licensee referred to in section 20 or section 24 may dispose of the utility in such manner as it may deem fit:*

Provided that, if the licensee does not dispose of the utility, within a period of six months from the date of revocation, under section 20 or section 24, the Appropriate Commission may cause the works of the licensee in, under, over, along, or across any street or public land to be removed and every such street or public land to be reinstated, and recover the cost of such removal and reinstatement from the licensee.

23. Directions to licensees.---- If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

24. Suspension of distribution licence and sale of utility. --- (1) If at any time the Appropriate Commission is of the opinion that a distribution licensee –

- (a) has persistently failed to maintain uninterrupted supply of electricity conforming to standards regarding quality of electricity to the consumers; or
- (b) is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
- (c) has persistently defaulted in complying with any direction given by the Appropriate Commission under this Act; or
- (d) has broken the terms and conditions of licence, and circumstances exist which render it necessary for it in public interest so to do, the Appropriate Commission may, for reasons to be recorded in writing, suspend, for a period not exceeding one year, the licence of the distribution licensee and appoint an Administrator to discharge the functions of the distribution licensee in accordance with the terms and conditions of the licence:

Provided that before suspending a licence under this section, the Appropriate Commission shall give a reasonable opportunity to the distribution licensee to make representations against the proposed suspension of license and shall consider the representations, if any, of the distribution licensee.

(2) Upon suspension of license under sub-section (1) the utilities of the distribution licensee shall vest in the Administrator for a period not exceeding one year or up to the date on which such utility is sold in accordance with the provisions contained in section 20, whichever is later.

(3) The Appropriate Commission shall, within one year of appointment of the Administrator under sub-section (1) either revoke the licence in accordance with the provisions contained in section 19 or revoke suspension of the licence and restore the utility to the distribution licensee whose licence had been suspended, as the case may be.

(4) In a case where the Appropriate Commission revokes the licence under sub-section (3), the utility of the distribution licensee shall be sold within a period of one year from the date of revocation of the licence in accordance with the provisions of section 20 and the price after deducting the administrative and other expenses on sale of utilities be remitted to the distribution licensee.”

14. Before we proceed further, we would like to refer to the principle of purposive construction of a statute as in our opinion while dealing with this case, the said principle will

have to be kept in mind. One of the avowed objects of the Electricity Act is to protect interest of consumers as is evident from its Statement of Objects and Reasons and from its Preamble. It is the basic rule of interpretation that if a statute is clear and unambiguous, it should be literally interpreted. But if there is any ambiguity or lack of clarity leading to frustration of the object of the statute, the courts must resort to the principle of purposive construction so as to achieve the object. Following observations of the Supreme Court in **UCO Bank** are material in this regard:

“26. It is now a well-settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation, be made applicable in a case of this nature.

27. In New India Assurance Co. Ltd. v. Nusli Neville Wadia this Court held:

“51[50]... With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to

interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled, which in turn would lead the beneficiary under the statutory scheme to fulfil its constitutional obligations as held by the Court inter alia in Ashoka Marketing Ltd.

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15. In yet another judgment of the Supreme Court in **Vijay Kumar Mishra** while concurring with Justice Chelameswar, Justice Sapre has observed as under:

“25. It is a settled principle of rule of interpretation that one must have regard to subject and the object for which the Act is enacted. To interpret a statute in a reasonable manner, the Court must place itself in a chair of reasonable legislator/author. So done, the rules of purposive construction have to be resorted to so that the object of the Act is fulfilled. Similarly, it is also a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in the sense in which they best harmonise with the object of the statute and which effectuate the object of the legislature.(See Interpretation of Statues, 12th Edn., pp.119 and 127 by G.P. Singh).”

In light of the above observations, we shall deal with the relevant provisions of the Electricity Act.

16. Mr. Ranganadhan, learned counsel for the Appellants has submitted that in this case there is a violation of principles of natural justice. We need to examine this submission. For that purpose, we shall refer to some authoritative pronouncements of the Supreme Court.

17. “Natural justice” is the heart of our legal system. The courts have always reacted sharply to any violation of principles of natural justice. In **Maneka Gandhi v. Union of India**²⁷ the Supreme Court has observed that natural justice is a great humanising principle intended to invest law with fairness and to secure justice. The Supreme Court has observed that the soul of natural justice is fair-play in action. The Supreme Court has *inter alia* discussed the importance of the doctrine of *audi alteram partem* : no decision shall be given against a party without affording him a reasonable hearing.

²⁷ (1978) 1 SCC 248

The Supreme Court reiterated what it had said in **Dr. (Miss) Binapani Dei** on which reliance is placed by Mr. Ranganadhan that the rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons involved with authority to adjudicate upon matters involving civil consequences. But while discussing the nature of concept of 'natural justice' the Supreme Court observed as under:

“It must not be forgotten that “natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances”. The audi alteram partem rule is not cast in rigid mould and judicial decisions establish that it may suffer situational modifications.”

18. In **The Chairman Board of Mining Examination and Chief Inspector of Mines & Anr. v. Ramjee**²⁸ Justice Krishna Iyer observed that natural justice is no unruly horse, no lurking land mine nor a judicial cure-all. If fairness is shown by the decision maker to the man proceeded against, the form, features and fundamentals of such essential

²⁸ (1977) 2 SCC 256

processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. It was further observed that unnatural expansion of natural justice without reference to the administrative realities and other factors of a given case, can be exasperating. These principles have also been stated by the Supreme Court in **Shiv Sagar Tiwari v. Union of India**²⁹. In **P.D. Agrawal v. State Bank of India & Ors.**³⁰ the Supreme Court again reiterated that the principles of natural justice have undergone a sea change; that the court applies the said principles having regard to the fact situation obtaining in each case; that they cannot be applied in a vacuum without reference to the relevant facts and circumstances; that they cannot be put in a straitjacket formula and that natural justice is no unruly horse. We cannot for a moment dispute that if an administrative order or a quasi-judicial order involves civil consequences, principles of natural justice must be complied with (See: **Dharampal Satyapal**). But whether there is compliance with the principles of natural justice has to be

²⁹ (1997) 1 SCC 444

³⁰ (2006) 8 SCC 776

examined keeping in view the above law laid down by the Supreme Court.

19. We shall now analyse the above quoted provisions. The term “enquiry” used in Section 19(1) of the Electricity Act has been the subject matter of debate. It is important to note that the Electricity Act does not provide for any procedure or method of enquiry. It does not prescribe any time limit for enquiry. Since the Electricity Act does not define the term “enquiry”, we must turn to its dictionary meaning. **Chamber’s 20th Century Dictionary (New Edition 1983)** defines the terms **inquire**, **enquire** as to ask questions : to make an investigation. The **Oxford English Reference Dictionary 1955** defines “enquiry” as the act or an instance of asking or seeking information. **Black’s Law Dictionary, Eighth Edition** defines “inquiry” as ‘fact finding’. Thus, enquiry means the act of seeking information or fact finding. Since Section 19 does not prescribe any time limit, enquiry can be an enquiry or the process of fact finding spread over or covering an antecedent time span. The important

requirement of such a process is that the material collected in such enquiry should be confronted to the licensee in the proceeding under Section 19(3) which requirement has been met in this case as we shall soon see.

20. Section 19(1)(a), (b), (c) and (d) state situations under which a licence may be revoked if after making an enquiry the Appropriate Commission is satisfied that public interest so requires. Section 19(2) provides for revocation of licence partially or wholly on an application or with the consent of the licensee. Public interest is the relevant consideration for action under Section 19. Sub-section (3) of Section 19 provides for notice before revocation of licence under sub-section (1). Section 19(1) and (3) of the Electricity Act do not contemplate a two stage process. In fact, Section 19(1), (2) and (3) are a part of a composite scheme. Two enquiries are not contemplated in this scheme. Section 19(3) mandates that no licence shall be revoked under sub-section (1) unless the Appropriate Commission has given to the licensee not less than three months' notice, in writing, stating the grounds on

which it is proposed to revoke the licence, and has considered any cause shown by the licensee within the period of that notice against the proposed revocation. Under sub-section (4) of Section 19, the Appropriate Commission may, instead of revoking a licence under sub-section (1) permit the licence to remain in force subject to such further terms and conditions as it thinks fit to impose, and any terms and conditions so imposed shall be binding upon and be observed by the licensee and shall be of like force and effect as if they were contained in the licence. Sub-section (5) of Section 19 states that where the Commission revokes a licence, it shall serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect. In our opinion, this provision does not prevent the Commission from effecting revocation on the date of order if the circumstances so demand. Sub-section (5) contemplates a situation where revocation is to take effect on a future date. Sub-section (6) is a corollary to sub-section (5). It states that if the Appropriate Commission has given notice for revocation of licence under sub-section (5), without prejudice to any penalty which may be imposed or prosecution

proceeding which may be initiated under the Electricity Act, the licensee may, after approval of the Commission, sell his utility to any person who is found eligible by that Commission for grant of licence. This provision gives to the licensee an option to sell his utility upon revocation of licence under sub-section (1) of Section 19. The use of the word 'may' is significant. This option to sell is subject to the approval by the Commission. Sub-section (6) does not have a mandatory flavour.

21. Section 20 relates to sale of utilities of licensees. Sub-section (1)(a) thereof states that the Appropriate Commission shall invite applications for sale of the utility and determine which of such applications should be accepted. Sub-section (1)(b) contemplates a notice to be issued by the Appropriate Commission to the licensee to sell his utility to the person whose application is accepted by it. Sub-section (1)(c) states that all the rights, duties, obligations and liabilities of the licensee, on and from the date of revocation of licence or on

and from the date, if earlier, on which the utility of the licensee is sold to a purchaser, shall absolutely cease except for any liabilities which have accrued prior to that date. Pertinently, sub-section 1(d) permits the Appropriate Commission to make such interim arrangements in regard to the operation of the utility as may be considered appropriate including the appointment of Administrators and sub-section (1)(e) states that the Administrator so appointed shall exercise such powers and discharge such functions as the Appropriate Commission may direct. Sub-sections (2), (3) and (4) provide for further modalities such as delivery of possession, payment of purchase price, etc. The intention of the legislature reflected in these provisions is clear. The option of sale can be exercised only if the Appropriate Commission approves it. Section 21 relates to vesting of utility in a purchaser where it is sold under Section 20 or Section 24. Section 22 deals with a situation where no purchase takes place in a manner provided in Section 20 or Section 24. Section 22(1) says that if the utility is not sold in the manner provided under Section 20 or Section 24, the Appropriate Commission may, to protect the

interest of consumers or in public interest issue such directions or formulate such scheme as it may deem necessary for operation of the utility. Section 22(2) permits the licensee referred to in Section 20 or Section 24 to dispose of the utility only if no directions are issued or no scheme is framed by the Appropriate Commission. Section 23 gives an additional power to the Appropriate Commission to pass appropriate directions. Section 24 provides for suspension of distribution licence and sale of utility.

22. We shall now revisit the facts and examine them in the background of the above statutory provisions, our analysis thereof and the submissions of the parties. As already noted, on 03/09/2005 one Shri Mohanty filed a petition under Section 18 of the Orissa Electricity Reforms Act 1995 and Section 19 of the Electricity Act for revocation of licence of the Appellants *inter alia* on the grounds of violation of licence conditions and non-implementation of directions of the State

Commission. The Appellants, REL, GRIDCO and the Government of Odisha were party to the petition. Notices were issued to them. All the parties were heard on 30/09/2005. Following issues were raised by the State Commission which were to be answered by the Respondents:

- a) *The exact role, function and tenure of Chief Executive Officer of three Distcos. Are they Directors in the respective board? Why their designation was changed from MD to CEO?*
- b) *The role of Central Procurement Group and procedure for procurement of materials.*
- c) *Implementation of energy audit and spot billing.*
- d) *Induction of manpower as against the vacant posts for the proper management of Distcos.*
- e) *Details about the procurement/installation of old and new meters.*
- f) *Investment approval from the Commission.*
- g) *Reasons for non-implementation of APDRP scheme.*
- h) *Distcos' support for establishment of Special Courts and police stations.*
- i) *R & M works are not being taken up for lines and sub stations although Commission has*

permitted requisite sums under this head while finalizing ARR of Distcos.

- j) Establishment of transparent process for procurement of materials through competitive bidding with due approval of the Distco Boards.*
- k) Strengthening the Central Services office for coordinating the activities of the three Distcos.*
- l) Non infusion of capital by the majority share holders after privatization of distribution business.”*

23. Replies filed by the Respondents were not satisfactory, so on 07/10/2005 the State Commission framed seven points for reply by the Respondents i.e. discharge of obligations by the Appellants towards GRIDCO, question of appointment of CEOs, infusion of capital, requirement of manpower, process of procurement of materials, approval of investment proposals, year wise expenditure on Operation & Maintenance. The State Commission directed the Respondents to file replies on the points raised in Order dated 30/09/2005 and in Order dated 07/10/2005. Replies filed by the Appellants were again found not satisfactory. They were given further chance to file replies. However, the situation did not improve. Ultimately, after

considering the replies and the submissions and the material in support of the allegations on 27/01/2006 the State Commission passed the following order:

“26. The Commission finds tour de force in the submissions of the Petitioners, as also of GRIDCO and Government of Orissa regarding the acts of commissions and omissions of the three distribution companies which have adverse impact on their licensed businesses and regulatory commitments. The Commission has carefully gone through the materials in support of the allegations and the defences of Respondent Nos. 1, 2, 3 and 4. All the aforesaid defaults, misfeasance and malfeasance indicate that the affairs of the three distribution companies are not being carried on in the best interest of the company and also in the interest of the consumers and the general public. We summarize them as follows:-

- (a) Apparent refusal of REL to renew shareholders agreement, resulting in abdication by majority shareholder of Distcos of their responsibilities in discharging their regulatory obligations.*
- (b) Failure to appoint Managers / MDs for the three Distcos, viz., WESCO, NESCO and SOUTHCO.*
- (c) Failure to resolve the issue of servicing Rs.400 crore NTPC bonds.*
- (d) Failure to evolve a convincing plan for meeting the outstanding PFC / REC, and IBRD loans and BST dues of GRIDCO.*

- (e) *Failure to mobilize counterpart funding in respect of APDRP scheme.*
- (f) *Non-infusion of capital.*
- (g) *Failure to take up full-scale energy auditing*
- (h) *Failure to introduce spot billing in entire areas of DISCOs.*
- (i) *Failure to recruit adequate manpower.*
- (j) *Failure to comply with Commission's orders dated 25.10.05, 03.10.05, 30.09.05.*

27. Besides, the following serious allegations have been made by the Petitioner, Respondents No. 5 and 6 and the general public. The DISCTCOS, during this inquiry, have not been able to rebut these allegations:-

- (k) *Failure in timely procurement of materials for different works*
- (l) *Failure to attend to maintenance of lines, upgradation of transformers, power supply for LI load.*
- (m) *Failure to procure materials in a transparent manner*
- (n) *Restricting power-supply through load-shedding to reduce the input energy*
- (o) *Failure to attend to maintenance of lines, upgradation of transformers, power supply for LI load.*

- (p) *Restricting power-supply through load-shedding to reduce the input energy.*
- (q) *Failure to achieve the target in T&D and AT&C loss reduction as fixed by the Commission.*
- (r) *Non-redressal of consumer grievances.”*

24. The State Commission then recorded its *prima facie* conclusion that the Appellants had violated the terms and conditions of their respective licences and it is necessary in public interest to suspend the licences of the Appellants and appoint an Administrator. The State Commission therefore ordered that notice be issued to the Appellants in terms of the proviso to Section 24(1) of the Electricity Act as regards the proposed suspension of the licences. Notice was accordingly issued and served on the Appellants alongwith copy of order dated 27/01/2006. Thus the Appellants were given complete idea as to what were the allegations against them. By the same order as an interim measure the State Commission appointed special officers to oversee operation of the Appellants, seek information and submit report.

25. The Appellants filed Appeals Nos.29,30 & 31 of 2006 challenging the order dated 27/01/2006. They sought setting aside of the said order calling upon them to show cause as to why their respective licences should not be suspended. By order dated 13/12/2006 this Tribunal allowed the appeals. This Tribunal set aside the order dated 27/01/2006 issuing notice to the Appellants in terms of the proviso to Section 24(1) as regards the proposed suspension. This Tribunal revoked the order appointing special officers.

26. The State Commission challenged the said order in the Supreme Court. We have already reproduced the Supreme Court's order dated 05/01/2009 passed in the State Commission's appeals. The Supreme Court confirmed this Tribunal's order revoking appointment of special officers, but observed that this Tribunal could not have set aside, the State Commission's order in entirety without appreciating that only show cause notice had been issued and final order was yet to be passed. The Supreme Court set aside this Tribunal's order

to the extent it had annulled the show cause notice and observed that the Appellants can file their objections to the show cause notice. The Supreme Court directed the State Commission to proceed with the matter in accordance with law without being influenced by the observations made in the order of this Tribunal dated 13/12/2006. It must be borne in mind therefore that pursuant to the Supreme Court's order the State Commission proceeded further in Case No.35/2005. It is important to note that the Appellants filed voluminous objections to the allegations made against them, before the State Commission. The State Commission directed the Government of Odisha to serve a copy of the report of the Task Force Committee on the Appellants.

27. The Appellants filed their replies on legal and factual issues. They stated that action under Section 24 was not tenable; that no grounds existed for suspension; that default regarding renewal of Shareholders Agreement related to REL which is distinct from the Appellants; that the process of appointment of MDs had been initiated; that GRIDCO was

responsible for NTPC bonds default and GRIDCO had settled the issue with NTPC and hence the said issue does not survive; that so far as PFL/REC and IBRD loan and BST dues of GRIDCO are concerned the State Commission in its securitization order dated 01/12/2008 directed that these outstandings were to be repaid within 10 years by monthly installments and that Kanungo Committee's recommendation that World Bank loan shall be passed on to the Appellants had to be implemented. The Appellants also dealt with the issues such as failure to mobilize counterpart funding in respect of APDRP programme of the Government of Orissa, non infusion of capital, failure to take up full energy auditing and failure to introduce spot billing in entire areas of the Appellants, failure to recruit adequate manpower, failure to comply with the State Commission's orders dated 25/10/2005, 03/10/2005, 30/09/2005, failure in procurement of materials in transparent manner, failure to attend to maintenance of lines, upgradation of transformers, power supply to LI load, restricting power supply through load shedding to reduce the

input of energy, failure to achieve the target of T&D and AT&C losses reduction and non-redressal of consumers grievances.

28. REL and GRIDCO and Government of Orissa also filed their detailed replies as directed by the State Commission. It appears that bulky replies were filed by the Appellants. It is clear therefore that the Appellants knew what was being alleged against them. The allegations held out against the Appellants were communicated to them which enabled them to file exhaustive replies refuting the allegations.

29. The State Commission in its order dated 12/05/2011 dealt with all the issues in light of the submissions advanced by the parties and it came to a conclusion that there was a total lack of commitment on the part of the licensees. The State Commission however observed that suspension and revocation are extreme steps and at this stage it would give a wrong signal to the financial institutions which may sanction loan for enabling the Appellants to arrange counterpart funding. The State Commission further observed that

suspension of licence, could also lead to revocation thereof which is an extreme step and a step of the last resort, when all efforts in normalizing the situation or achieving the desired results fail despite the best efforts. The State Commission thus decided to give an opportunity to the Appellants to improve their performance. We are of the opinion that the approach of the State Commission displayed awareness of its responsibility as a sector regulator to protect all stakeholders and particularly the consumers. The State Commission identified the areas where demonstrable action was called for in paragraph 64 of the order. Following are the areas which required the Appellants immediate attention and action.

- “1. *Mutually satisfactory arrangement as a remedy for Share Holders Agreement for future of DISCOMs.*
2. *NTPC Bond issue.*
3. *Counterpart funding for CAPEX Program.*
4. *To follow the Guidelines regarding procurement of materials and 3rd party verification in CAPEX.*

5. *CAPEX should be over and above the O&M expenditure and should not be utilized for regular O&M.*
6. *Discrimination should not be made in CAPEX between franchisee and non-franchisee areas.*
7. *There should be enough amount in the ESCROW account to meet O&M and other obligations as per order dated 12/04/2010.*
8. *Workout correct baseline data and furnish Division wise/project area wise by 31/08/2011 and improvement arrived by 31/03/2012 be submitted before 31/05/2012.*
9. *For smooth implementation adequate material must be provided by DISCOM and in case of any cost overrun or time overrun due to inefficiency of DISCOM, the implication shall not be considered in ARR.*
10. *Advance action should be taken for procurement of material and awarding the contract in a transparent manner for implementation in CAPEX program.*
11. *Concurrent action should be taken for Enforcement through Energy Police Stations (EPS), Vigilance Wing and MRT activities.*
12. *AT&C loss and CAPEX program detailing to be done as per OERC Guideline.*
13. *DISCOMs to furnish progress report of implementation of CAPEX quarterly on 15th of following month of quarter.*

14. *Progress of implementation of CAPEX should be displayed on website and progress should be special agenda item on every quarter to the Board.*
15. *Fulltime Managing Director for each DISCOMs should be appointed.*
16. *Generate enough cash through improved billing and collection efficiency to pay the Outstanding Loans and BSP dues to GRIDCO in terms of OERC Order dated 01/12/2008.*
17. *Both Shareholders must take steps to infuse funds into the DISCOMs either by way of equity or by way of debt so as to ensure satisfactory implementation of ongoing CAPEX program or such other capital works as might be required.*
18. *Full scale of Energy Auditing be done.*
19. *Spot billing to be implemented covering entire areas.*
20. *Undertake Manpower assessment and file before Commission for approval by 30/09/2011.*
21. *DISCOMs are required to maintain lines and substations through R&M to ensure quality of power to consumers.*
22. *DISCOMs should follow protocol on Power regulation.*
23. *Take up comprehensive plan to reduce losses in view of bench mark fixed by the OERC.*

24. *DISCOMs should be strengthened by giving proper financial and infrastructural support to GRF and taking timely action to comply with the orders of GRF and ombudsman.”*

30. The State Commission while disposing of the petition reserved its right to initiate action either under Section 19 or Section 24 of the Electricity Act if after reviewing the progress made by the Appellants, it comes to a conclusion that the Appellants are not taking effective steps. The relevant paragraph needs to be quoted:

“65. The Commission would review from time to time (not less than once in a 3 months) the progress made for complying with the stipulations as indicted above in Para 64. These stipulations must show satisfactory progress. At any time if the Commission feels that the distribution companies are not taking effective and adequate steps to reduce the loss and improve the quality of supply the Commission would be at liberty to initiate action either under Section 19 or Section 24 of the Act.”

It must be stated here that this order has assumed finality. The Appellants have not challenged it. The fact that the Appellants participated in the proceedings in Case No.35 of

2005 and they did not challenge Order dated 12/05/2011 makes a huge dent in their case.

31. At this stage it would be appropriate to deal with Mr. Ranganadhan's submission that since the State Commission had disposed of the petition, it had become *functus officio* and therefore, it cannot place reliance on order dated 12/05/2011. It was urged that there is no continuation of earlier proceedings. The State Commission it was contended was required to initiate fresh proceedings upon making an enquiry and satisfying itself that public interest required to do so. We have no hesitation in rejecting this submission. It may be recalled that the Supreme Court had by its order dated 05/01/2009, permitted the State Commission to proceed with the notice issued under Section 24(1). Pursuant to that order the proceedings were continued by the State Commission. This is a vital aspect of this case. While concluding those proceedings by order dated 12/05/2011, the State Commission in the above quoted paragraph expressly reserved its right to initiate action either under Section 19 or Section 24

of the Electricity Act, if it feels that the Appellants are not taking effective and adequate steps to reduce the loss and improve the quality of supply. Thus the argument that the State Commission had become *functus officio* will have to be rejected. The proceedings initiated after order dated 12/05/2011 vide Show Cause Notice dated 13/05/2013 are continuation of the earlier proceedings. Order dated 12/05/2011, Show Cause Notice dated 13/05/2013 and the impugned order dated 04/03/2015 will have to be read together. So read it is abundantly clear that there is no violation of principles of natural justice. We will advert to this more in detail as we proceed further.

32. We must revert to the order dated 12/05/2011 and state the sequence of events. It appears that the opportunity given to the Appellants to improve their performance and make good the deficiencies was not utilised by them. This was realised by the State Commission from periodic reviews conducted by it and after ascertaining facts. The State Commission therefore initiated a *suo motu* proceeding being Case No.55 of 2013 and

issued Notice dated 13/05/2013 under Section 19(3) of the Electricity Act calling upon the Appellants to show cause why licences granted in their favour should not be revoked. It is necessary now to focus on this notice. The notice makes a reference to the proceeding under Section 24 of the Electricity Act being Case No. 35/2005 initiated against the Appellants for suspension of licence. It refers to the State Commission's order dated 12/05/2011 in Case No. 35/2005, wherein the Appellants were found to have incurred liability of suspension of their respective licences. It states that instead of suspending the licence the Appellants were given chance to comply with directions given in the order dated 12/05/2011 and liberty was reserved to initiate action under Section 19 or Section 24 of the Electricity Act in the event the Appellants fail to make satisfactory progress towards compliance of the directions. The notice further states that from the periodic reviews conducted and facts ascertained it appears that licence granted to the Appellants ought to be revoked in public interest. The following extract of the said notice is material:

“WHEREAS, it appears to the Commission from the periodic reviews conducted by it and facts ascertained and set forth in Annexure A to this Notice, which may be read as part of this Notice that

A. Your company is making prolonged and wilful default in doing things required of it by or under the Electricity Act, 2003 and rules and regulations there under and thereby appears to have incurred liability to revocation of the licence on ground stated in S.19(1)(a) of the said Act.

B. Your company has broken conditions of licence, the breach of which has been expressly declared by the licence to render the licence liable to revocation and therefore appears to have incurred the liability to revocation of the licence on ground stated in S.19(1)(b) of the said Act.

C. Your company has failed to show, to the satisfaction of the Commission, within the time allowed to it, that it is in a position fully and efficiently to discharge the duties and obligations imposed on it by the Commission and thus appears to have rendered the licence liable to revocation on ground stated in S.19(1)(c)(i) of the said Act.

D. Your company’s financial position appears to be such that it is unable fully

and efficiently to discharge the duties and obligations imposed on it by the Commission and thus appears to have incurred the liability to revocation of the licence on ground stated in S. 19(1)(d) of the said Act, and

E. It appears that the aforesaid licence, granted to your company ought to be revoked in public interest.”

NOW THEREFORE Notice is hereby given, in terms of Section 19(3) of the said Act, to show cause, within three months after service of this Notice, why the aforesaid licence granted to your Company shall not be revoked.

Annexure “A” to the notice exhaustively sets out the reasons for revocation of licence, *inter alia*, as Energy Audit, AT&C Loss, Financial Position of the licensee, Non-payment of Arrears with regard to Bulk Supply Price (BSP) and NTPC Bond, Infusion of Capital, R&M Expenses, Securitization of Dues, Share Holding Pattern in the Appellants, Construction and Start-up Power, Liability towards Terminal Benefits and Non-compliance of Commission’s directions.

33. In the impugned order, the State Commission has briefly described the reasons for revocation as under:

- “(a) Highly unsatisfactory performance of the licensees in different key areas, such as energy audit, inability to control technical and commercial loss, poor billing efficiency, non payment of arrears with regard to Bulk Supply Price (BSP) and NTPC Bond, failure to create requisite corpus for terminal benefits of employees and non-compliance of various directions of the Commission spelt out in Retail Supply Tariff (RST) orders and during performance reviews;*
- (b) Non-incorporation of important clauses of Shareholders Agreement in the Articles of Association of the distribution company when 51% of share in NESCO, WESCO and SOUTHCO were divested by GRIDCO in favour of private investors leading to public breach of trust and compliance of mandatory legal provisions of the Act;*
- (c) Subsequent transfer of shares to companies which were not group companies; and, thereby, violating the provisions of Shareholder Agreement;*
- (d) Gradual dilution of shares in favour of companies who did not have the original technical and financial pre qualifying criteria specified at the time of initial divestment; and*
- (e) Violation of Section 17(3) of the Electricity Act, 2003 and violation of Section 21(2) of the Orissa*

Electricity Reform Act, 1995, in as much as part ownership of the utility has been systematically transferred to other companies by way of sale (transfer) of shares without permission of the Commission.”

34. It is the case of the State Commission that pursuant to its order dated 12/05/2011 in Case No.35 of 2005, the State Commission conducted a series of enquiries, reviews and inspections while scrutinizing Annual Revenue Requirements (ARRs) of the Appellants and also while conducting performance reviews of the Appellants twice a year. They cover all the key parameters of the Appellants such as completion of energy audit, improvement of billing and collection efficiency, payment of arrear, Bulk Supply Price (BSP), improvement of Standard of Performance (SoP), reduction of Aggregate Technical and Commercial (At&C) loss, redressal of consumers grievances, etc. The result of such enquiries has been communicated to the Appellants. Following are the examples of the enquiries conducted by the State Commission, results whereof have been communicated to the Appellants.

- a) *Proceeding of Performance Review for FY 2010-11 communicated on 11.07.2011, 14.7.2011 and 15.07.2011 to NESCO, WESCO and SOUTHCO respectively;*
- b) *Proceeding of Performance Review for 2011-12 (April 2011 to September 2011) communicated on 14.2.2012 to NESCO, WESCO and SOUTHCO;*
- c) *Proceeding of Performance Review for complete financial year 2011-12 communicated on 18.06.2012, 29.6.2012 and 04.07.2012 to NESCO, WESCO and SOUTHCO respectively;*
- d) *Proceeding of Performance Review for FY 2012-13 communicated on 03.07.2013, 27.6.2013 and 02.07.2013 to NESCO, WESCO and SOUTHCO respectively;*
- e) *Proceeding of Performance Review for the period (April 2013 to September 2013) communicated on 06.01.2014, 06.01.2014 and 02.01.2014 to NESCO, WESCO and SOUTHCO respectively;*
- f) *Proceeding of Performance Review for FY 2013-14 communicated on 22.08.2014 to NESCO, WESCO and SOUTHCO;*
- g) *Direction of the Commission vide Letter No. 3817 dt.28.04.2010 to DISCOMs to make pilot studies on Energy Audit;*
- h) *Direction of the Commission vide Letter No. 1197 dt.11.11.2013 to the Reliance Managed DISCOMs to focus on Energy Audit of 11 KV feeders;*
- i) *Letter Nos. 1417, 1418 & 1419 dt.09.12.2013 of the Commission directing the DISCOMs to make metering and other allied arrangements necessary for energy audit for all consumers fed from at least one 33/11 KV sub-station of each circle;*
- j) *Letter No. 340 dated 22.02.2014 to furnish the Energy Audit report by end of February, 2014; and*
- k) *Letter No. 637 dtd. 05.05.2014 to furnish the action taken report / subsequent Energy Audit report.”*

During the proceedings in response to the show cause notice under Section 19(3), the Appellants were confronted with these materials. This factual position can hardly be disputed.

35. At this stage it is necessary to deal with Mr. Ranganadhan's submission that three out of six performance reviews were held after the issuance of show cause notice and hence there is a violation of the principles of natural justice. In this connection it is pertinent to note that the State Commission has clarified in the impugned order that the Show Cause Notice dated 13/05/2013 contained information relating to the performance of the licensees upto 31/03/2012 available with the State Commission. These figures were updated on the basis of the latest audited balance sheets and also the figures submitted by the licensees during the performance review conducted for FY 2013-14. According to the State Commission the results of these performance reviews were communicated to the Appellants and during hearing they

were confronted with them. Thus there is no violation of principles of natural justice. It is also urged that those who actually passed the impugned order are not the Members who actually heard all the performance reviews. This objection does not appear to have been raised before the State Commission. The Appellants ought to have raised this point as a preliminary submission. We are not inclined to entertain this submission at this stage. In any event, assuming what the Appellants' state is true, no prejudice has been caused to them, because all documents were served on them, they were confronted with the case against them, their counsel were heard at length and their detailed submissions were perused by the State Commission. They had every opportunity to rebut whatever was stated in the performance reviews. This submission has therefore no merit.

36. Under Regulation 47(3) the inquiry for revocation, in so far it is applicable, shall be in the same manner as provided in Chapter II of the Conduct Regulations. Chapter II relates to

proceedings before the State Commission. Regulation 9(1) empowers the State Commission to initiate suo motu enquiry. Regulation 9(4) empowers the State Commission to designate an officer of the State Commission, to present the matter before the State Commission. The State Commission has recorded in the impugned order that after coming to a conclusion as enjoined in Section 19(1) of the Electricity Act, it designated an officer of the State Commission as a Petitioner, who filed a petition which was registered as Case No.53 of 2013. Regulation 64 of the Conduct Regulations pertains to collection of information. Regulation 64(b) states that the State Commission in exercise of powers under Section 128 of the Electricity Act may by an order direct an investigating agency to investigate the affairs of the licensees. Regulation 65 relates to assistance of experts. The State Commission may as per this provision take assistance from experts on any matter or issue. It must be noted that appointment of investigating officer is clearly not mandatory. At the cost of repetition we must state that no procedure for inquiry is laid down in the Electricity Act. No time limit is also laid down.

The State Commission has since 2005 focussed its attention on the conduct of the Appellants. The State Commission issued notice of suspension but instead of suspending licences gave the Appellants time to improve. Thereafter Performance Review proceedings revealed that there was no improvement, hence the notice for revocation was sent. Hence, this is not a case of any arbitrary action. A long drawn inquiry and investigation was conducted in which the Appellants participated. The Appellants had full knowledge of the proceedings. Therefore there is sufficient compliance with the provisions of the Electricity Act and the relevant regulations. In this connection it is necessary to quote the following observations of the State Commission:

“During the periodic performance reviews which were conducted after the order dated 12.05.2011 the Commission have made detailed enquiries and sought a number of information involving the issues which are technical, commercial and financial in nature. The Commission in their letter dated 03.12.2011, 08.05.2012, 11.12.2012, 23.05.2013, 04.12.2013 and 04.06.2014 have sought numbers of information from the DISCOMs which inter alia includes the following:

- “• Overall performance, system performance, division-wise performance, cash flow, progress of Capex programme and electrical accidents.
- Amount released by GRIDCO towards escrow relaxation.
- Metering and energy audit, quality of supply, loss reduction and turnaround strategy.
- Implementation of safety measures.
- Collection of arrears.
- Plan of action to implement various direction given in the Retail Supply Tariff (RST) order for FY 2011-12.”

The DISCOMs have furnished the data accordingly. The results of such information have been analysed and communicated to them along with further direction.

37. Thus the Appellants furnished data to the State Commission which they have never disowned. The State Commission analysed the said data. The data constitutes material for enquiry and investigation. After being satisfied that the Appellants' licences were required to be revoked in public interest that the action of revocation was taken. Thus, the requirement of enquiry and investigation was complied with.

38. Mr. Ranganadhan has relied on judgment of the Supreme Court in **Narayanan Mooss** where the Supreme Court was concerned with Section 4(1) of the Indian Electricity Act 1910. It was urged that in this case the Supreme Court read into Section 4(1), the requirement of the Board hearing the licensee before it may recommend to the State Government initiation of proceedings for revocation and the State Government can on the basis of the said recommendation form an opinion to initiate proceedings for revocation under Section 4(1). It was urged that Section 19 of the Electricity Act stands on a much higher footing because thereunder the State Commission has to satisfy itself after making an inquiry that the licence needs to be revoked and such an inquiry cannot be conducted and satisfaction cannot be recorded without hearing the licensee. We do not want to reproduce the factual matrix which we have laid down in sufficient detail. The facts of this case are peculiar and are clearly distinguishable from the judgment of the Supreme Court in **Narayanan Mooss**. We have after discussing the facts clearly held that there was inquiry and

investigation, there were prior orders, there was opportunity of hearing and action was taken after communicating to the Appellants the case against them. The judgment of the Supreme Court in **Narayanan Mooss** has no application to this case.

39. The facts of this case disclose that the State Commission has passed several orders and has conducted extensive exercise of fact finding. Information has been elicited from the Appellants. They were confronted with the material against them, which was also communicated to them. The Appellants were given ample opportunities of hearing. Their exhaustive replies are on record, which were perused by the State Commission. The requirements of the Electricity Act and the relevant regulations have therefore been complied with. There is no infraction of principles of natural justice. As stated by the Supreme Court in the judgments which we have referred to hereinabove, natural justice is fair play in action and it is no unruly horse. The principles of natural justice cannot be put in a straitjacket formula. They are pragmatically flexible.

In our opinion, in this case, there is no violation of the principles of natural justice.

40. Before we go to the grounds of revocation we need to advert to the general submission made by Mr. Ranganadhan that the revocation of the licenses is based on alleged non-compliance of certain obligations such as reduction of Distribution losses, Energy Audit, Funding for terminal benefits of employees etc. According to counsel these issues have been held in favour of the Appellants by this Tribunal, however without implementing judgements of this Tribunal, the State Commission has, inter alia, on the very same issues revoked the Appellants licenses relying on its earlier orders which have been set aside by this Tribunal. In this connection the State Commission has observed that this Tribunal has passed several orders, against its tariff orders. The said orders have been challenged by the State Commission in the Supreme Court and the appeals are pending. The Appellants' appeal raising challenge to Tariff Order for FY 2013-24 is also

pending before the Supreme Court. Undoubtedly the State Commission has to comply with the orders of this Tribunal. But the facts of this case are peculiar. In any case, ultimately, all actions of the State Commission, in this case, will abide by the final orders that may be passed in the pending appeals. Mr. Mehta learned counsel for GRIDCO has relied on judgement of the Supreme Court in **Kunhayammed.** While examining the doctrine of merger the Supreme Court has observed that where a decree or order passed by an inferior court was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. We do not want to dwell more on this aspect. Suffice it to say that the issues involved in the pending appeals have yet to attain finality. In any case, the impugned order reveals that even if this Tribunal's orders were given effect, the situation would not have improved. The performance of the Appellants was below par, they did not achieve their own targets of loss reduction, their

collection efficiency was miserably low. In the facts of this case, the observations of the State Commission which is an expert body of regulators cannot be brushed aside lightly.

41. We shall now turn to the reasons for cancellation of the Appellants' licences which have been noted in the impugned order. The State Commission has analyzed the performance of the Appellants and also dealt with the Appellant's submissions. We will give gist of the said discussion item wise.

a) High Distribution Loss

The main reason why the Appellants failed to run the distribution business in a viable, efficient and commercially sustainable manner is its total inability to realise costs from end users and reduce distribution loss by making necessary investment and initiating administrative reforms. Following

table shows that instead of reducing loss gradually over a period of nine years, the loss has remained more or less constant and in some years it has increased.

Table - 1

Overall Distribution Loss Proposed and Actual Level Achieved By Licensees (In %)

	NESCO			WESCO			SOUTHCO		
	Proposed by the Licensee	Approved by the Commission	Actual attained by the Licensee	Proposed by the Licensee	Approved by the Commission	Actual attained by the Licensee	Proposed by the Licensee	Approved by the Commission	Actual attained by the Licensee
2005-06	36.63%	35.00%	37.08%	32.65%	31.00%	37.80%	37.30%	36.00%	41.07%
2006-07	33.58%	31.51%	33.22%	33.00%	33.75%	36.36%	35.88%	33.00%	43.39%
2007-08	30.00%	26.00%	31.17%	31.00%	25.00%	36.13%	40.16%	30.40%	45.49%
2008-09	27.58%	25.50%	34.57%	31.51%	25.00%	33.55%	39.31%	30.42%	47.78%
2009-10	29.20%	23.00%	32.52%	33.66%	22.50%	35.09%	39.48%	27.92%	48.03%
2010-11	28.30%	18.46%	32.75%	28.45%	19.93%	38.89%	42.76%	27.82%	48.22%
2011-12	27.66%	18.40%	34.28%	31.29%	19.70%	38.89%	42.67%	26.50%	46.42%
2012-13	29.00%	18.35%	34.93%	34.51%	19.60%	38.27%	43.72%	25.50%	43.68%
2013-14	32.53%	18.35%	33.84%	35.01%	19.60%	36.68%	40.03%	25.50%	40.99%

The Appellant's contention that the State Commission has fixed notional loss in an unrealistic manner is not correct because the above table shows that the State Commission more or less accepted the loss projection made by the Appellants and gradually reduced the target figure, but the Appellants made no efforts to achieve the target. The real test for the Appellants is to reduce the distribution loss in the Low Tension (LT) segment where it has failed miserably. Once

Extra High Tension (EHT) consumers are taken out from the above table, the loss figure will rise because of poor performance at LT sector. The Appellants did not even achieve their own target of loss reduction. Had they done that they would have generated surplus revenue. Managerial performance of the Appellants in the Low Tension segment is reflected in the following tables:

Table -2
Division-wise LT Performance of NESCO

Name of Division	FY 2013-14			
	Distribution Loss	AT & C Loss	Billing Efficiency	Realisation Per Unit (Rs.)
BSED, Bhadrak	54%	66%	46%	1.28
AED, Anandpur	51%	66%	49%	1.33
CED, Balasore	57%	65%	43%	1.35
BTED, Basta	59%	58%	41%	1.38
JED, Jaleswar	57%	57%	43%	1.42
RED, Rairangpur	51%	61%	49%	1.42
UED, Udla	47%	55%	53%	1.45
JTED, Jajpur Town	56%	61%	44%	1.47
KUED, Kuakhia	56%	63%	44%	1.49
BNED, Bhadrak	51%	59%	49%	1.69
JRED, Jajpur Road	59%	59%	41%	1.74
BPED, Baripada	42%	49%	58%	1.98
SED, Soro	47%	46%	53%	2.10
KED, Keonjhar	43%	42%	57%	2.43
JOED, Joda	46%	46%	54%	2.45
BED, Balasore	38%	36%	62%	3.02
NESCO	51%	56%	49%	1.74

Table – 3
Division-wise LT Performance of WESCO

DIVISION	FY 2013-14			
	Distribution Loss	Billing Efficiency	A T & C Loss	Realisation Per Unit (Rs.)
BWED, Bargarh(W)	68%	32%	85%	0.61
SED, Sonepur	58%	42%	79%	0.83
BED, Bargarh	65%	35%	75%	0.99
BED, Bolangir	66%	34%	76%	1.00
TED, Titlagarh	59%	41%	76%	1.03
NED, Nuapada	64%	36%	74%	1.13
SED, Sundergarh	64%	36%	71%	1.21
DED, Deogarh	56%	44%	71%	1.24
SEED, Sambalpur (E)	63%	37%	71%	1.25
BED, Brajrajnagar	57%	43%	67%	1.43
KEED, Kalahandi (E)	55%	45%	69%	1.44
SED, Sambalpur	54%	46%	68%	1.45
KWED, Kalahandi (W)	58%	42%	68%	1.45
JED, Jharsuguda	50%	50%	62%	1.67
RSED, Rourkela-Sadar	52%	48%	58%	1.97
RED, Rajgangpur	52%	48%	54%	2.20
RED, Rourkela	51%	49%	52%	2.21
WESCO	59%	41%	70%	1.30

Table - 4
Division-wise LT Performance of SOUTHCO

DIVISION	FY 2013-14			
	Distribution Loss	Billing Efficiency	At & C Loss	Realisation Per Unit (Rs)
MED, Malkangiri	65%	35%	77%	0.91
AED II, Aska	68%	32%	75%	1.01
BOED, Boudh	46%	54%	66%	1.19
PSED, Purusottampur	54%	46%	66%	1.30
NED, Nowrangpur	45%	55%	65%	1.33
AED I, Aska	61%	39%	65%	1.37
KED, Koraput	62%	38%	67%	1.39
GNED, Chatrapur	50%	50%	63%	1.46
GSED, Digapahandi	50%	50%	61%	1.49
BED, Bhanjanagar	56%	44%	61%	1.55

PED, Phulbani	41%	59%	50%	1.77
PKED, Paralakhemundi	40%	60%	46%	2.09
JED, Jeypore	45%	55%	51%	2.09
GED, Gunupur	25%	75%	34%	2.51
RED, Rayagada	25%	75%	36%	2.58
BED III, Berhampur	31%	69%	35%	2.74
BED II, Berhampur	24%	76%	25%	3.40
BED I, Berhampur	24%	76%	22%	3.58
SOUTHCO	46%	54%	54%	1.85

(Source: Data submitted by the Licensees for Review of Performance for FY 2013-14.)

LT realisation per unit is far below the average cost of supply for the State as a whole for that year which is at 466.68 paisa per unit. This has adversely affected cash flow of the Appellants resulting in poor service to the consumers.

b) Erosion of Net Worth

Non-performance of the Appellants has gradually eroded their net-worth. This has led to accumulation of huge losses progressively as shown in their audited accounts. Following tables show the Appellants eroded net-worth and staggering accumulated loss position.

Table -5

**Net worth and Accumulated loss position as on 31.03.2013
(NESCO)**

Rs. In Crs.

Financial Year ending March 31st	Net worth	Accumulated Loss
2005-06	-534.67	-658.08
2006-07	-520.84	-646.03
2007-08	-495.91	-623.85
2008-09	-498.89	-626.07
2009-10	-528.87	-656.57
2010-11	-602.63	-730.98
2011-12	-696.67	-826.40
2012-13	-775.21	-906.31

Table – 6

**Net worth and Accumulated loss position as on 31.03.2013
WESCO**

(Rs. In Crs.)

Financial Year ending March 31st	Net worth	Accumulated Loss
2005-06	-331.73	-449.86
2006-07	-298.03	-418.04
2007-08	-351.28	-467.73
2008-09	-340.25	-457.14
2009-10	-369.28	-486.73
2010-11	-408.54	-526.68
2011-12	-462.45	-581.45
2012-13	- 595.63	-715.62

Table – 7

**Net worth and Accumulated loss position as on 31.03.2013
SOUTHCO**

(Rs. In Crs.)

Financial Year ending March 31st	Net worth	Accumulated Loss
2005-06	-449.14	-538.28

2006-07	-526.87	-617.43
2007-08	-552.27	-643.23
2008-09	-588.90	-680.88
2009-10	-629.48	-722.33
2010-11	-649.26	-743.03
2011-12	-671.63	-766.34
2012-13	-706.59	-802.30

The equity infused by the investors at the beginning of the privatisation was Rs. 65.91 crores, Rs. 48.65 crores and Rs. 37.66 crores for NESCO, WESCO and SOUTHCO, respectively. The net-worth has eroded continuously for the last eight years. Because of this negative net-worth, the Appellants are unable to access funds from the market. Because of this financial position, the Appellants are unable to efficiently discharge the duties and obligations imposed on them by their licensees as envisaged under Section 19(1) (d) of the Electricity Act.

c) Financial Un-viability of the Appellants:

The Appellants have been depending on GRIDCO months after months through Escrow relaxation for their day-to-day

expenses such as payment of salary to their employees. In order to ensure smooth Escrow mechanism for the Appellants, the State Commission had prioritised the relaxation norms for GRIDCO to release funds from Escrow. However, the Appellants did not put enough funds through their improved collection efficiency in order to have leeway for GRIDCO to release funds from Escrow. Since the Appellants seek relaxation of Escrow in spite of poor collection, conflicts are rising between GRIDCO and the Appellants. The Appellants finances are on artificial support system. Section 19(1) (d) of the Electricity Act is therefore attracted.

d) Default to GRIDCO (Supplier of Power)

The Appellants have been surviving on the consumer security deposit, capital contribution from the consumers and loan borrowed by GRIDCO as a part of reform process from different agencies such as PFC, REC, World Bank etc. and relaxation of Escrow on payment of their BSP dues. This has affected the viability of GRIDCO. GRIDCO has borrowed

heavily from different sources to pay the Generators for power purchased from them to meet the demand of the Appellants, thereby escalating the per unit cost of energy. Following table shows the alarming position:

Table - 8

Default in payment made by DISCOMs to GRIDCO as on 31.03.2014

(Rs. in Crs.)

	NESCO	WESCO	SOUTHCO
Arrear on Bills served till 31.03.2013	667.97	762.40	156.06
Outstanding BSP for 2013-14	98.09	174.76	128.28
Total BSP outstanding arrear as on 31.03.2014	766.06	937.16	284.34
Securitisation of past power purchase dues as per order of the Commission on 01.12.2008.	216.64	206.38	202.89
Total	982.70	1143.54	487.23

This default may entail power regulation affecting the consumer service. Section 19(1) (a) and (d) of the Electricity Act are attracted to this default.

e) None-payment of Securitisation amount payable to GRIDCO

The securitisation order dated 01/12/2008 is a clarificatory order of the State Commission in relation to order

dated 28/02/2005 in Case No. 115/2004, which deals with Business Plan of the Appellants. During the hearing of original Business Plan, the Appellants proposed reconciliation and securitisation of arrear BSP/loan in 120 equal instalments. Both the orders attained finality as they were not challenged. The Appellants have failed to adhere to the securitisation order dated 01/12/2008. The Appellants have also entered into an agreement with GRIDCO on 28/10/1999 promising that they would clear all the loans which is a part of the securitised amount by FY 2015-16. The Appellants cannot renege from their obligation through different alibis such as so-called notional sales and DPS on arrear dues not being considered in subsequent truing-up order. This is an afterthought. Section 19(1) (a) of the Electricity Act is attracted to this contractual violation.

f) Energy Audit

Energy audit is the first step towards ascertaining the actual distribution loss. It helps to segregate technical and commercial loss. It can lead to fixing responsibility among

officials to raise and collect bills for the amount of energy actually utilised by the consumer. Metering is the first step towards energy audit programme. If there is no energy audit, there will be a tendency to exaggerate distribution loss thereby diluting the responsibility of the Appellants in controlling theft and commercial losses. Following table indicating metering position shows the hollowness of the assertion of the licensees that they have credible loss figure:

Table -9
Metering Position as on 01.04.2014 (in Nos.

	NESCO	WESCO	SOUTHCO
No. of 33 KV feeders (excluding GRIDCO interface)	70	113	165
No. of 33 KV feeder metering	70	96	42
No. of 11 KV feeders	486	545	452
No. of 11 KV feeder metering	81	274	20
No. of 33 / 11 kv transformers	304	309	262
No. of 33/11 kv transformer metering position	40	0	0
No. of distribution transformers (11/0.4 & 33/ 0.4 kv)	43763	29456	27,232
No. of distribution transformer metering position	175	12658	215

This table shows that NESCO and SOUTHCO have not metered even ten percent of 11 KV feeders. WESCO and SOUTHCO have done no metering of 33/11 KV feeders NESCO

and SOUTHCO have done less than one percent metering in respect of distribution transformers. In view of such metering position , the Appellants have not carried out any energy audit and have shown loss figure based on presumptive sales which has no scientific basis. It is difficult to pass on the impact of such presumptive distribution loss to the consumer through tariff hike. Several orders of the State Commission asking the Appellants to carry out energy audit are ignored.

The contention of the Appellants that no allocation has been made to energy audit in ARR is baseless. Energy audit is a part of the Appellants regular activity of Administrative and General (A&G) expenses. Had the Appellants made the expenditure for energy audit the State Commission would have allowed it in the next true-up. In this connection, following extract from MYT order dated 28/01/2011 is material.

“In addition to the above, the Commission would allow expenses in addition to the normal A&G expenses for special measures undertaken by the DISCOMs towards reduction of AT&C losses and improving collection efficiency after prudent check.”

Analysis of the A&G expenses shows that the Appellants have been incurring more expenses than the approved amounts in the ARR in that head. The additional expenditure incurred has been allowed in true-up exercise. Therefore, energy audit would not have been hampered due to alleged lack of funds. Up to 2012-13, dues of electricity amounting to Rs.2756.40 crores have remained uncollected. The Appellants ought to have collected the dues and done energy audit. Any allocation for energy audit would have become fruitless. The Appellants are claiming huge amounts for metering. These steps should have been taken by the Appellants at the right time after privatisation. Section 19(1) (c) (i) of the Electricity Act, is attracted to this default.

g) Repair & Maintenance (R&M) Expenses.

There is a shortfall in R&M expenses compared to the approved expenditure of the Appellants for R&M. This affects the distribution network and makes the consumers vulnerable to power failures. This is due to the casual approach of the Appellants towards collecting their dues. The entire revenue

of the Appellants is to be deposited in the escrow account under Escrow Agreement from which GRIDCO recovers its dues towards sale of power as first charge. Thereafter, GRIDCO relaxes the escrow for the Appellants for their various requirements including R&M expenditure. The Appellants are responsible for not collecting revenue dues of the consumers and depositing the same in the escrow account. When the deposit in escrow account is insufficient to meet the requirement of power sale dues of GRIDCO, there is a deficit to meet other requirements, which includes the Appellants' requirements. The table below shows the unrecovered amount from the consumers towards tariff dues.

Table – 10

Arrears from Consumers

Rs. in Crs.

	NESCO	WESCO	SOUTHCO	Total
Net arrears as on 31.03.2005 (As per Receivable Audit report)	241.63	529.61	171.40	942.64
Gross arrear from 2005-06 to 2012-13 as per Audited account of the DISCOMs	654.39	637.14	222.23	1513.76
TOTAL	896.02	1166.75	393.63	2456.40

Table below shows the R&M Expenses incurred by the Appellant and the approved R&M expenses of the Appellants.

Table - 11

Repair and Maintenance Expenses (2005-06 to 2012-13)

(Rs. in Crs.)

	Approved by the Commission	Actual amount spent	Shortfall in expenditure
NESCO	261.14	133.91	127.23
WESCO	233.68	119.64	114.04
SOUTHCO	176.95	66.83	110.12
TOTAL	671.77	320.38	351.39

The Appellants have contended that this is because of the lower tariff due to approval of normative loss level for the Appellants. This has no relevance to the arrear collection. In fact, the allegedly lower tariff allowed to the Appellants has also not been collected by the Appellants. Section 19(1)(c) of the Electricity Act is attracted to this situation.

h) Billing Efficiency and Collection Efficiency.

The Appellants are not billing all its consumers. Whatever bills they are generating, are not collected since

money receipts generated are far less than the numbers of bills disbursed. Following table reveals this.

Table - 12
Billing and Collection mismatch

Name of DISCOMs	No. of consumers	No. of bill generated	No. of bill distributed	No. of money receipt	%age of receipt issued against bill distributed
NESCO (FY 2013-14)	13088484	13088484	13088484	5365923	41.00
WESCO (FY April, 2013-January, 2014)	9667906	7067490	7067490	2683913	37.98
SOUTHCO (FY	14269026	13371866	13371865	5234212	39.14

It is evident that in case of NESCO, only 41% money receipts are generated. In case of WESCO, all consumers are not billed and money receipts issued are only 37.98% of the bills distributed. In case of SOUTHCO, all consumers are not billed and only 39.14% money receipts are issued of the bills distributed. If NESCO, WESCO and SOUTHCO had collected bills of 60% of the consumers, they would have generated extra revenue of Rs.250 crores, Rs.200 crores and Rs.280 crores respectively. This figure would have gone up if the percentage of collection had improved leaving substantial surplus with the Appellants, enabling them to wipe-out their

arrears and to make investment in network improvement. Thus, the Appellants are causal about revenue collection.

i) Impact of Rural Electrification.

Schemes of rural electrification such as Rajiv Gandhi Grameen Vidyut Karan Yojana and Biju Gram Jyoti Yojana are fully funded Government Schemes. The State Commission allows special R&M expenses in ARR of the Appellants once infrastructure is put up for the schemes. Several subsidized categories such as Kutir Jyoti are cross-subsidised in tariff by other high end categories. Hence, the Appellants do not bear any tariff subsidy burden in this regard. The High Voltage Distribution System under Rajiv Gandhi Grameen Vidyut Karan Yojana has reduced the level loss of the Discoms except of SOUTHCO. The contention of the Appellants that rural electrification programme of the Government has adversely affected their revenue sustainability is unacceptable. The real problem is the total reluctance on the part of the Appellants to bill such consumers.

j) Violation of Contractual Agreement with the Power Supplier (Mismanagement of Escrow Account).

On 06/05/2013, the State Commission had awarded the work of independent Escrow Audit for four distribution divisions of the Appellant to two independent Chartered Accountant Firms. The important observations of the auditors are as below:

- “(a) There is no system in place at division level to ensure that all the regular consumers have been billed for the month;*
- (b) There is no system in place to ensure that the amount collected from consumers is properly booked under the heads on which they have been billed;*
- (c) In some of the cases money deposited in the division office by the bill collectors is less than the money collected and is being deposited subsequently after the verification by the division office on a different date;*
- (d) The exact amount of money collected on account of ESCROW and NON-ESCROW account is not deposited on day to day basis in the respective Bank account. The amount is being deposited on an approximate basis and adjusted in subsequent month after preparation of the assessment report;*

- (e) *The money collected is not deposited within the schedule time of 48 hours;*
- (f) *Money due to be collected during the month are extended till the 7th of the next month. The money so collected is shown as previous month receipt by putting the month end date on the money receipt; and*
- (g) *The time lag between the collection and deposit by the bill collector in certain cases varies from 8 to 10 days which amounts to ‘teeming and lading’ practice.”*

The above observations disclose that the Appellants are not in a position to pay Full Bulk Supply Price (BSP) through escrow account. They are unable to manage the account properly through regular billing and collection of money for energy sold and depositing the same in the escrow account. This is in violation of Escrow Agreement for onward transmission to Generators through GRIDCO. This leads to hardship to the consumers and attracts Section 19(1)(c)(i) of the Electricity Act.

k) Liability towards Terminal benefits.

Payment towards pension corpus is a statutory obligation of the licensees towards the employers. Following table shows

that there is a huge deficit in the pension corpus of the Appellants.

Table - 13

Approved Corpus requirement vrs. Actual availability

(Rs. in Crs.)

Name of the Licensee	NESCO	WESCO	SOUTHCO
Approved Corpus requirement as on 31.03.2013	375.8	408.41	379.21
Actual Corpus availability as on 31.03.2013	107.47	122.62	42.57
Deficit in Terminal Benefit Corpus Fund	268.33	285.79	336.64

While fixing the initial fund requirement, the State Commission has accepted the audited accounts of GRIDCO as on 31/03/1999 as mandated under Transfer notification No.16019 dated 25/11/1998 of Government of Odisha. The contention of the Appellants that GRIDCO had understated terminal liability must be rejected.

The contention that while computing the corpus requirement, the State Commission has not considered the payout from the corpus is not tenable because payout is to be made out of investment in the corpus. In any case, in trueing up exercise, the State Commission has allowed the

requirement as per the audited accounts submitted to the State Commission. It is the inefficiency of the Appellants to recover tariff which has resulted in less funding of the pension corpus thereby risking the interest of the employees.

Audited accounts reveal that the Appellants are spending more on employees cost than that has been approved in the ARR of respective year. Following table shows total employees' cost inclusive of terminal liability as per the audited accounts and as appointed by the State Commission for the period FY 1999-2000 to 2012-13:

Table - 14
Approval of Employee Cost vrs Actual Expenses
(From FY 1999-2000 to 2012-13)

(Rs. in Crs.)

	NESCO	WESCO	SOUTHCO
Approved by the Commission	1216.02	1380.56	1170.72
Actual as per audited account	1476.19	1707.18	1344.53
Excess spent	260.17	326.62	173.81

Callous approach of the Appellants towards pension corpus contribution is an example of fiscal mismanagement attracting Section 19(1)(a) of the Electricity Act.

1) Inability of the Appellants to invest in capital works.

From reports received on consumer grievances and from periodic performance review of the Appellants, it is revealed that low voltage and power interruptions have become order of the day. The distribution loss has become uncontrollable. From the audited accounts, it is revealed that the Appellants have failed to garner any cash towards capital expenditure. Following table reveals how negligible is the funding of the capital expenditure by the Appellants.

Table - 15

Year Wise Capital Expenditure after Reform and Source of Funding

**(Rs in
Crs.**

	Capital Expenditure (1990-2000 to 2012-13)	Source of Funding						Total
		Consumer contribution	GRIDCO loan as per securitisation order of	World Bank loan	APDRP	CAPEX (Goo)	Own source & borrowing	
1	2	3	4	5	6	7	8	9 (3 to 8)
NESCO	703.41	380.01	94.64	91.27	6.36	17.17	113.96	703.41
WESCO	466.35	173.63	138.46	90.96	5.48	6.95	50.87	466.35
SOUTHCO	271.00	59.56	134.36	72.59	6.62	20.38	0	293.51

The Government of Odisha has invested till date an amount of Rs.72.16 crores, Rs.56.13 crores and Rs.52.08 crores in the three Appellants i.e. NESCO, WESCO and

SOUTHCO respectively under its CAPEX programme aimed at reducing Aggregate Technical and Commercial (At&C) loss and to improve quality of supply. However, the Appellants have failed to arrange counterpart funding as required. This has affected the CAPEX programme and quality of supply of power. This attracts Section 19(1)(c) of the Electricity Act.

m) Status of Central Services Office (CSO)

In Case No.35 of 2005, the State Commission observed that the Managing Director appointed by the Appellants should take steps to allow the respective companies to function independently rather than centralized management at the Central Service Office (CSO). The Appellants were directed by interim order dated 23/08/2013 to furnish the legal status of their CSO office and its funding pattern. The Appellants responded that in its order dated 30/09/2015, the State Commission has suggested strengthening of CSO for coordinating the activities of the Appellants. However, it is improper on the part of CSO office to take important policy decisions which go against the corporate identity of the

individual licensees. Creation of CSO amounts to each Appellants associating itself with other licensee (other Appellants) without prior consent in writing of the State Commission which is void by virtue of Section 21(1) read with Section 21(5) of the Orissa Electricity Reforms Act.

n) Issue of Start up and Construction Power.

The Appellants were asked in Show Cause Notice dated 13/05/2013 to furnish details of all the industries having CD above 110 KW and IPP/CGP above 5MW established after 2003 onwards indicating the name of the industries, total amount of construction and start up power enjoyed by them and revenue realization on such account. The Appellants did not furnish the information and stated that they were following the provisions of the Electricity Act. The Enquiry Team constituted by the State Commission has come across a gross violation in the case of EHT industry, M/s. Vedanta Aluminum Ltd. with regard to start up and construction power in the licence area of WESCO indicating entrenchment of vested interest within the Appellants. During enquiry, it was

found that WESCO had not taken any steps to ascertain the quantum of construction power availed of by the IPP of M/s. SEL during its construction of captive power plant of M/s. Vedanta Aluminum Ltd. IPP authorities claim that the said construction work had been carried out by the use of power from their own diesel generators. This appears to be unacceptable because the testing and commissioning of huge machineries require large starting current which is not possible through diesel generators without grid support. This is revenue leakage by the Appellants. Consistent failure to send bills to EHT consumers for start-up and construction power establishes that the Appellants are not serious in running the distribution business in a commercially viable manner. This attracts Section 19(1)(b) of the Electricity Act.

o) Breach of Licence Condition (Non-compliance of the Commission's directions).

Under Part-II of the Licence Conditions (General Conditions of Licence) (Para 6.1), it is inter alia provided that

the licensee shall comply with the provisions of the Electricity Act, the Rules, Regulations including Policies, Notifications, Circulars and Orders made thereunder and all directions issued by the State Commission from time to time. The State Commission has issued several important directions to the Appellants. The Appellants have not complied with them fully as per their submissions in various performance reviews, ARR filings and Business Plan filings. Due to this non-compliance, the Licensees attract mischief under Section 19(1)(b) of the Electricity Act. This non-compliance affects consumer service adversely. Quality of service has deteriorated.

p) Issue of Shareholders Agreement.

The Appellants were 100% subsidiary of GRIDCO. They were granted distribution licence by the State Commission on 31/03/1999. On 01/04/1999, GRIDCO divested 51% of the shares in favour of BSES Limited through a competitive bidding process after getting satisfied about the necessary technical and financial criteria. BSES and GRIDCO signed a Shareholders Agreement and it was stipulated that necessary

clauses of Shareholders Agreement will be incorporated in the Articles of Association of the licensee company. Thereafter, BSES Limited diluted its shares over a period of years in favour of Reliance Group of Companies. According to the Appellants, the transfer of shares has been effected by following provisions of the Companies Act, 1956 which has been upheld by CLB and the provisions of the Shareholders Agreement have been duly incorporated in the Articles of Association.

The assertion that all the relevant clauses of Shareholders Agreement have been incorporated in Articles of Association is wrong. Clause a – Purpose of disinvestment, Clause b – Support by Investor and Clause c – Financing by Investor have not been incorporated in the Articles of Association. This is a violation of the original legal arrangement with regard to privatisation of the Appellants which will give them handle to abdicate their responsibility with regard to infusion of capital etc. Transfer of shares might have been upheld by CLB, but the Appellants were asked to

furnish audited balance sheet of the transferee companies which they avoided. Finally when the information was furnished, it was realised that the transferee companies are not group companies as envisaged in Article 9A(1) of the Articles of Association. There is glaring deficiency with regard to Shareholders Agreement, non-fulfillment of technical and financial criteria, unauthorised entry of non-group companies. The State Commission as a professional statutory regulatory body can examine whether the transfer is as per law and it is in the larger public interest and whether it will help the electricity sector as a whole. There is a close connection between possible violation contemplated in Section 17 and the violation spelt out in Section 19 of the Electricity Act.

42. The above analysis of the State Commission meets with our approval. It is true that we are dealing with a statutory first appeal, which is appeal both on facts and law. Therefore, we can go into sufficiency of the material and examine the correctness of the reasons given by the State Commission. We have conducted that exercise and we find the impugned order

to be legal. We will also have to keep in mind that the impugned order is passed by a sector regulator, which is a body having necessary expertise to deal with complicated technical issues. Therefore, unless the impugned order ignores any vital material or misreads or misinterprets the material before it or is perverse we will not interfere with it. We are unable to find any such infirmity in the impugned order.

43. Similar points have been raised before us. Basically, it is urged by the Appellants that there was lack of funds and Government support and that is why certain directions could not be carried out resulting in deficiency in consumer service and quality of supply. The State Commission has correctly dealt with this issue. The Appellants' billing and collection efficiency was extremely low. Though Government support cannot be held to be a pre-condition for privatization, the Government did offer support. The Government of Odisha had initiated Capex Programme of Rs.1464 crores for the Appellants out of which the Government was to provide

Rs.732 crores and the Appellants were to provide counterpart funding. The Government of Odisha provided Rs.180.37 crores, but the Appellants did not invest anything. The Government of Odisha started Odisha Distribution System Strengthening Programme. It took several other measures but the Appellants did not reciprocate. The Appellants could not contain losses because of their inefficiency. The State Commission has rightly observed that truing up of accounts on a particular item such as distribution loss, as per directive of this Tribunal, could not take place on account of non-submission of energy audit data by the licensees and the presumptive loss figure cannot be taken into consideration for truing up. As per the Shareholders Agreement, the Appellants have to make all efforts to obtain finance. But the Appellants did precious little in this behalf. We have also noted that GRIDCO had relaxed Escrow to the extent of Rs.4084.91 crores. It is asserted by the State Commission that the Kanungo Committee report is not fully accepted by the Appropriate Authorities and, therefore, reliance placed on it is misplaced. We have also noted that on 31/03/2011, the High

Court of Orissa had stayed the Retail Supply Tariff order of the State Commission for the Financial Year 2011-12. On 30/03/2012, the stay was vacated. The State Commission therefore directed the Appellants to recover arrears of dues in eight monthly instalments. The Appellants did not do so, but contended that the said arrears be adjusted in bulk supply dues of GRIDCO which was not responsible for collecting the dues. Thus, the Appellants did not carry out their responsibilities resulting in chaos.

44. We need to separately deal with the issue regarding Shareholders Agreement and transfer of shares. Mr. Ranganadhan, the Appellants' counsel has submitted that the State Commission has no jurisdiction to pass orders in terms of the Shareholders Agreement. Mr. Sitesh Mukherjee, learned counsel appearing for RIL, Respondent No.5 adopted this submission and added that the State Commission can only assess the conduct and performance of the licensees. Counsel has placed reliance on the judgment of this Tribunal dated 13/12/2006 in Appeal No.75 of 2005. Counsel

submitted that **Gotan Lime** on which reliance is placed by Mr. P.C. Sen, counsel appearing for the State Commission in support of the argument of lifting of corporate veil is not applicable to this case because there the Supreme Court was concerned with employment of dubious means to transfer mining rights (belonging to the State). Counsel submitted that CLB has held transfer of shares by RIL to non-group companies to be valid. Besides, GRIDCO had knowledge of this transfer.

45. The duty of an expert sector regulator like the State Commission is to keep interest of all the stakeholders, which include the consumers in mind and deal with issues that fall for its consideration. What may apparently appear to be legal, may on a deeper examination turn out to be not in public interest or in the interest of electricity sector, which is the vital consideration in all actions of the State Commission. In such a situation, it will have to take action permissible in the Electricity Act and that does not amount to showing disrespect to any other forum like CLB. In this case, the State

Commission on examination of record found that there are glaring deficiencies in the Shareholders Agreement, which is giving handle to the Appellants to evade their responsibilities and that the entry of non-group companies with no proven track record is not in larger public interest and in the interest of electricity sector. An expert body like the State Commission is well equipped to give such opinion and unless it is perverse deserves to be accepted. Following observations of the State Commission made in the impugned order are in tune with our view.

“35. The Commission as a professional statutory regulatory body as distinguished from the executive can examine whether the transfer is as per law and it is in the larger public interest and whether it will help the electricity sector as a whole. Entry of non-serious players with no proven track record in licensing business can be prevented and the tariff implication arising out of such transfer can be ascertained. The glaring deficiency with regard to Shareholders Agreement, non-fulfilment of technical and financial criteria, unauthorised entry of non-group companies could have been prevented if subjected to proper scrutiny by the Commission.”

Therefore the issue regarding Shareholders Agreement and transfer of shares has to be viewed from the electricity sector's perspective, because what may be legal may also have adverse impact on the electricity sector. It is the State Commission which can assess the effects of such actions from the point of view of the consumers.

46. Admittedly, Shareholders Agreement stipulated that necessary clauses of Shareholders Agreement will be incorporated in the Articles of Association of the Appellants. According to the State Commission, following clauses are not so incorporated.

“a. Purpose of disinvestment

“2. Purpose

2.1 The Investor recognises that GRIDCO's principal objectives in selling a majority stake in NESCO to the Investor are to:

2.1.1. Improve the quality of service to customers by improving the security and reliability of the supply system and make available electricity at a competitive price;

- 2.1.2 *Improve operational efficiencies and reduce losses;*
- 2.1.3 *Contribute to the increased economic growth in Orissa through the provision of superior electricity supply;*
- 2.1.4 *Attract private investment into the distribution business;”*

b. Support by Investor

“5.6 The Investor undertakes to provide to WESCO (DISCOMs) the technical resources and capability as may be reasonably necessary to enable the Business to operate efficiently.

c. Financing by Investor

- 8.1 *If WESCO (DISCOMs) requires further financing, it shall use and the Investor shall procure that it uses, all reasonable endeavours to obtain such finance from a third party lender on reasonable commercial terms without breaching covenants in WESCO’s loan documentation at the time of such further financing provided always that nothing shall oblige a Shareholder to provide any guarantee or security in respect thereof.*
- 8.2 *if and to the extent that it is not possible to obtain debt finance in accordance with clause 8.1 or by any other reasonable*

means, then such further financing may be sought by an issue of ordinary share capital at a price agreed with the Auditors as being a fair and reasonable price. Any such issue of ordinary share capital shall be offered on a pre-emptive basis to the existing Shareholders and subject to clause 3.2 shall include a right of renunciation by Shareholders.”

The State Commission is right in holding that these were essential clauses and their absence gives the Appellants a handle to abdicate their responsibility.

47. Admittedly, RIL took over 51% shares in the Appellants. Having obtained controlling interest at a sum of Rs.117 crores, it was expected to invest sufficient funds to improve performance of the Appellants. Instead of doing that, RIL gradually diluted its shareholding from 51% to 0.002%. The shares were transferred to companies having no relevant experience in the power sector. This was in gross violation of disinvestment scheme, the provisions of the Shareholders Agreement and Section 17 of the Electricity Act and Section 21 of the Orissa Electricity Reforms Act. Even if the CLB, as

stated by the Appellants and RIL, has approved the transfer of shares, from the perspective of the electricity sector, the State Commission found the same to be not in public interest. The State Commission cannot be faulted for it. Reliance is placed by the Appellants and RIL on the judgment of this Tribunal dated 13/12/2016 in Appeal No.75 of 2005 where in the context of the Shareholders Agreement, this Tribunal has expressed that RIL (“the Appellants therein”) being not a licensee to distribute power is not amenable to the jurisdiction of the State Commission and the State Commission cannot issue any directions to it. But, we would like to reproduce last paragraph of the said judgment. It reads as under:

“41. Before parting with this appeal we would like to point out that the appellant as well as respondents have taken up the responsibility of serving the consumers and they shall take every effort to see that the privatization in the State of Orissa is not defeated on hyper-technicalities and every effort should be made to continue the distribution of power effectively to the satisfaction of everyone, while avoiding friction and mutual misunderstandings and suspicions. We do expect that the appellant REL and contesting respondents continue to strive for the common purpose of serving consumers and the discussions, now being

held in this behalf may be utilized to settle the disputes in the interest of Reform in the State of Orissa.”

So this Tribunal warned the parties that privatisation should not be defeated on hyper-technicalities. Unfortunately, this advice was not heeded. In any case, no directions are issued by the State Commission to RIL in the impugned order. Having taken over the controlling interest in the Appellants, it is unfortunate that RIL is arguing that it is not a licensee and has no responsibility in this privatisation scheme.

48. In our opinion, reliance placed by Mr. P.C. Sen, on **Gotan Lime**, is apt. In that case, there was transfer of shares to cover up the real transaction which was for sale of mining lease for consideration without the previous consent of competent authority as statutorily required. While dealing with this situation, the Supreme Court observed that the sale of shares by itself is no sale of assets, but this principle is subject to the doctrine of piercing of corporate veil wherever necessary to give effect to the policy of law. We are of the

opinion that it would be open to pierce the corporate veil to see whether what is stated to be perfectly legal has any adverse effect on the electricity sector. We reject the submission of Mr. Sitesh Mukherjee that the State Commission cannot pierce the veil. If the veil is pierced in this case, the impugned order will have to be confirmed without hesitation. We are not impressed by Mr. Sitesh Mukherjee's attempt to distinguish this judgment on the ground that in **Gotan Lime**, the court was concerned with employment of dubious means to transfer mining rights through concealment of facts and obviating a statutory approval process. Facts of two cases are never alike. It is the principle laid down in the judgment which is material. In the circumstances, we hold that the State Commission's view on Shareholders Agreement and transfer of shares cannot be faulted. We would however like to add here that it is difficult to accept the submission that GRIDCO, a major partner was completely in dark about transfer of shares by RIL.

49. In the ultimate analysis, we have no hesitation in holding that the impugned order revoking the Appellants' licences and appointing Administrator is legal. No substantial point is raised before us, which can persuade us to set aside the impugned order. It was urged by Mr. Ranganadhan that some grounds were not raised in the show cause notice. An overall reading of the show cause notice and the impugned order and taking into account the chequered history of this case, we feel that on the substratum of the case, there is total consistency. In any case and assuming that Mr. Ranganadhan is right, even if findings on such issues are obliterated, the remaining grounds can form a firm basis for the impugned order.

50. A statement is made before us by the counsel for Respondent Nos.1, 2, 3 and 4 that the sale has yet to take effect. Mr. Ranganadhan, counsel for the Appellant submitted that this statement makes the entire exercise conducted by the Respondents, illegal. Counsel submitted that Section 20(1)(c) states that where the licence is revoked under Section 19, all the rights, duties, obligations and liabilities of the

licensee, on and from the date of revocation of licence or on and from the date, if earlier, on which the utility of the licensee is sold to a purchaser, shall absolutely cease. Counsel submitted that if in view of revocation of licence under Section 19(1), all rights of the Appellants have ceased to exist, they can never sell the utilities. Thus, the important step in the entire scheme of revocation, namely opportunity to be given to the Appellants to sell their utilities is obliterated. The Appellants are deprived of their right to sell their utilities. We will now examine this submission.

51. As we have already noted Section 19(5) does not rule out immediate revocation of licence in case of emergent situation. In this connection, we can draw support from the judgment of the Calcutta High Court in **Vishnupur Electric Supply** where the Calcutta High Court was dealing with Section 4(1) of the Indian Electricity Act, 1910 pertaining to revocation of license which is similar to Section 19(1) of the Electricity Act. The Calcutta High Court observed that since the order of revocation is to be effected in public interest, it may be

necessary in certain circumstances to make the order at once without giving prior indication. In this case clearly there is immediate revocation of the licence. Pertinently in the first impugned order dated 04/03/2015 the State Commission has clearly stated that the present case is one of the rarest of rare cases where all conditions prescribed under Section 19 are satisfied and in view of this position licence is revoked. The State Commission has further categorically stated that the licence of the Appellants is revoked under Section 19 with immediate effect i.e. from 04/03/2015 which is the date of the impugned order. The State Commission has further stated that the necessary arrangements after such revocation as contemplated under Section 20 are being specified through a separate order. Direction is given to communicate the revocation order to the Appellant. By the second impugned order dated 04/03/2015, Administrator was appointed under Section 20(1)(d) to which we shall advert more in detail little later.

52. Admittedly, the utilities are not sold under Section 20(1)(a) and (b) of the said Act as yet. Therefore, Section 20(2) requiring the purchaser to pay purchase price, Section 20(3) requiring licensee to deliver possession to the purchaser and Section 20(4) which relates to permitting the intending purchaser to operate and maintain the utility pending the completion of sale, also does not come into play. Section 21 has no application because, it relates to vesting of utility in the purchaser and, in this case, the sale has not taken place. Section 24 relates to suspension of licence, appointment of Administrator, either revocation of licence or restoration of licence within one year of appointment of Administrator and in case licence is revoked sale of utility within one year from the date of revocation and remitting price to the licensee after deducting administrative and other expenses. Section 24 has no application because here there is no suspension of licence.

53. Under Section 22(1) if the utility is not sold in the manner provided under Section 20 or Section 24, the Appropriate Commission may issue necessary directions or

formulate a scheme for operation of the utility. Under Section 22(2) if no directions are issued or no scheme is formulated the licensee can dispose of its utility in such manner as it may deem fit but if the licensee does not dispose of the utility within a period of six months from the date of revocation under Section 20 or Section 24, the Appropriate Commission may take action prescribed therein against the licensee. In this case, so far no scheme is framed, no directions are given but the Administrator is appointed under Section 20(1)(d).

54. The idea behind all these provisions appears to be to ensure that the utility is operated in an efficient manner so as not to cause any inconvenience to the consumers and if the State Commission feels that it is in public interest to sell the utility, effect its sale and after deducting the costs and expenses make over the remaining purchase money to the licensee. This scheme is based on equitable considerations. It is intended to enable the State Commission to adjust equities. In a given case the licensee may get a part of the purchase price. In another case if its financial condition is extremely

stressed and its net-worth is negative and it is heavily indebted it may not get anything.

55. In our opinion this scheme does not rule out a sale by the Administrator appointed under Section 20(1)(d). Under Section 20(1)(e) the Administrator appointed under Clause (d) has to exercise such powers and discharge such functions as the Appropriate Commission may direct. Therefore, if the Appropriate Commission is so minded it can in public interest direct the Administrator to sell the utility. There is nothing in the relevant provisions which prevents the Administrator from selling the utility if the State Commission so directs. After all the Administrator is appointed to ensure that the utility is operated in efficient manner. The Administrator has to submit periodic reports to the State Commission. He is an appointee of the State Commission and the State Commission acts through him in public interest. If public interest requires, sale can be effected through the Administrator. Pertinently, Section 20(1)(c) says that all the rights, duties, obligations and liabilities of the licensee on and from the date of revocation of

the licence shall absolutely cease. As noted above Mr. Ranganadhan learned counsel appearing for the Appellants submitted that in view of this provision after revocation the licensee cannot sell his property. But in our opinion that does not create any impediment in sale. On the directions given under Section 20(1)(e), the Administrator can always sell the utility and adjust the equities. Pertinently by the second impugned order dated 04/03/2015 while appointing CMD of GRIDCO as the Administrator under Section 20(1)(d) of the Electricity Act, the State Commission has vested the management and control of the Appellants along with their assets, interests and rights in the Administrator. When rights are vested in the Administrator, the Administrator can sell the utility if a direction to that effect is given by the State Commission under Section 20(1)(e). But the sale is subject to the sanction of the State Commission. The licensees have no vested right to insist that the utilities be sold in a particular manner. In our opinion, in light of judgments of the Supreme Court, which we have quoted hereinabove, such a purposive

construction of Sections 19 to 25 of the Electricity Act will help in achieving the object and purport of the Electricity Act.

56. Since a statement is made before us that the stage of sale has yet to come, the State Commission will have to take necessary steps as per the provisions of the Electricity Act in that direction. It is submitted on behalf of Respondent No.2 that it would have been highly inequitable to sell the utilities when the strategic investor i.e. Respondent No.5 - RIL, had merely invested Rs.117 crores to buy controlling interest in the Appellants and during their running crores of rupees have been lost, and outstanding dues of GRIDCO are worth approximately Rs.2600 crores. We do not want to comment on this aspect. But we want to make it clear that the provisions of the Electricity Act in respect of sale will have to be complied with. Whether the Appellants are entitled to any part of the purchase money if the sale is effected, is for the State Commission to decide after accounting is done when it sells the utilities. It is for the State Commission to chart out future course of action after considering all the circumstances in

proper perspective keeping public interest in mind. The State Commission is expected to be just and must be guided by principles of equity and fair play.

57. In the view that we have taken, both the impugned orders are confirmed. The appeal is accordingly dismissed. Needless to say that all connected IAs shall also stand disposed of.

58. Pronounced in the Open Court on this **21st day of August, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE/NON-REPORTABLE**