

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

**(APPELLATE JURISDICTION)**

**APPEAL NO.175 OF 2013**

**Dated: 26<sup>th</sup> March, 2015**

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.  
Hon'ble Shri Rakesh Nath, Technical Member.**

**IN THE MATTER OF:**

**DNH Power Distribution Company  
Limited  
(Formerly Electricity Department,  
Dadra and Nagar Haveli)  
Opposite Secretariat Silvassa-396230  
Union Territory of Dadra & Nagar  
Haveli.**

**... Appellant**

**Versus**

**1. Joint Electricity Regulatory  
Commission 2<sup>nd</sup> Floor, HSIDC  
Office Complex,  
Vanijya Nikung Complex, Udyog  
Vihar Phase-V, Gurgaon-122016  
Haryana.**

**... Respondents**

**2. Silvassa Industries &  
Manufacturers Association  
(SIMA),  
Office No.8, Danudyog Shopping  
Centre, Opposite Hirvanan  
Garden,  
Piparia, Sivassa, (U.T. of Dadra &  
Nagar Havelli).**

**3. Silvassa Industries  
Association (SIA)  
202, Radhekrishna Tower,  
Silvassa-Vapi Road,  
Silvassa,(UT of Dadra &  
Nagar Haveli)**

**4. Dadra & Nagar Haveli Industries  
Association(DNHIA)  
Office No:10,  
Danudyog Shopping Centre,  
Opposite Hirvanan Garden,  
Piparia, Silvassa,(U.T. of Dadra &  
Nagar Haveli)**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Mandhakini Ghosh

Counsel for the Respondent(s) : Mr. Varun Pathak  
Mr. Samir Malik  
Mr. Suyash Guru  
Mr. Anish Garg(Rep.)  
for R.1

Ms. Savita Sinha for R.2 to 4

Mr. Prem N. Chandan for R-3

**J U D G M E N T**

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

1. The Appellant DNH Power Distribution Company Limited is a Company incorporated under the provisions of the Companies Act,1956. The Appellant is an unbundled utility of the Electricity Department, Dadra & Nagar Haveli and has been vested with the functions of distribution of electricity in the Union Territory of Dadra & Nagar Haveli.

2. Respondent No.1, Joint Electricity Regulatory Commission is the Electricity Regulatory Commission for the Union Territories and the State of Goa (for short the Joint Commission) exercising jurisdiction and discharging functions under Sections 61,62, 86 and other applicable provisions of the Electricity Act,2003 (**the said Act**).

3. Respondent No.2 is the Association of Industries situated in Union Territory of Dadra and Nagar Haveli. Most of the members of the Association are from MSME sector and are the consumers of the Appellant.

4. Respondent No.3 is the Association of Industries at Silvassa, having more than five hundred members and has been functioning since 1973. Its members are electricity consumers.

5. Respondent No.4 is the Association of Industries at Silvassa having more than three hundred members and has been functioning since the year 2002.

6. The distribution of retail supply functions of the Appellant including the determination of retail supply tariff chargeable from consumers in the Union Territory are regulated by the Joint Commission under the provisions of the said Act .

7. According to the Appellant it does not have any source of generation of its own and takes electricity from generating

companies and others to meet the demand of electricity from consumers in the Union Territory. The primary demand of electricity by the Appellant is met out of allocations by the Government of India from central sector generating stations such as NTPC Ltd., NTPC-SAIL Joint Venture at Bhilai etc.

8. It is the case of the Appellant that prior to 1/4/2013 the distribution and retail supply activities were undertaken by the Electricity Department for the Union Territory (Electricity Department), which was a department of the Government of India. It is the case of the Appellant that being a government department and not an incorporated company or a separate legal entity, the accounts, receipts, payments etc were maintained by the Electricity Department as per government norms. There was no system of accounting as applicable to companies under the Companies Act.

9. For the year 2011-12 the Joint Commission had by order dated 13/9/2011 determined the Annual Revenue Requirements of the Electricity Department and the retail supply tariff applicable.

In the said order the Joint Commission had devised a formula for power purchase cost adjustment.

10. The Electricity Department had applied the said order and recovered the tariff from the consumers at large by applying tariff as determined by the Joint Commission and also the power purchase cost adjustment formula as formulated by the Joint Commission.

11. The order of the Joint Commission dated 13/9/2011 determining the Annual Revenue Requirements was appealed against by certain consumers. This Tribunal by judgment and order dated 14/03/2012 passed in Appeal No.175 of 2011 partly allowed the appeal and while upholding the recovery of power purchase cost adjustment in the tariff had remanded the matter to the Joint Commission for re-determination of the formula.

12. The Joint Commission by order dated 31/7/2012 while undertaking provisional true-up of the Annual Revenue Requirements for the year 2010-11 and 2011-12 and determining

the Annual Revenue Requirements and retail supply tariff for the year 2012-13 also took up the proceeding remanded by this Tribunal by judgment dated 15/3/2012 for hearing.

13. In the said order dated 31/7/2012, the Joint Commission while reworking the formula for power purchase cost adjustment gave direction to the Electricity Department to refund an amount of Rs.81.11 crores to the consumers with interest as purported excess collection of power purchase cost adjustment.

14. Being aggrieved by the order dated 31/7/2012 the Electricity Department filed a review petition before the Joint Commission. The Electricity Department was aggrieved by the direction for refund, the computation of charges and also the direction to pay interest on such refund.

15. The review petition was disposed of by the Joint Commission by order dated 24/01/2013 wherein the Joint Commission accepted that there were certain errors in the computation of amounts directed to be refunded and had agreed to re-examine the

issue. The Joint Commission was however not impressed by the objection to pay interest on the refund and directed that interest be paid.

16. The Joint Commission's order dated 24/01/2013 was challenged by the Appellant on the issue of interest in Appeal No.117 of 2013. The said appeal was allowed by this Tribunal by order dated 14/11/2013. Thus the direction as regards payment of interest on the amounts to be refunded has assumed finality.

17. By the impugned order dated 25.3.2013 the Joint Commission has trued up the finances of the Electricity Department for the year 2011-12. By the impugned order while accepting that the amount of Rs.81.11 crores earlier arrived at as alleged excess recovery was not correct and that the amount of surplus was actually Rs.41.86 crores the Joint Commission directed the Appellant to refund the amount of Rs.41.86 crores. The said judgment is challenged in this appeal. The Appellant has restricted the scope of appeal to only one issue i.e. whether the Appellant can be directed to refund Rs.41.86



crores. The Appellant's case is that it is not liable to refund the said amount.

18. We have heard learned counsel for the Appellant at some length. We have also perused the written submissions filed by the Appellant. Following submissions are made by the Appellant:-

i) The Appellant has been incorporated and vested with functions of distribution of supply of electricity in the Union Territory only with effect from 1/4/2013. The amount directed to be refunded does not relate to the period subsequent to 1/4/2013 but as purported excess recovery by the Electricity Department in the year 2011-12.

ii) The Electricity Department was recovering the amounts in terms of the tariff order passed by the Joint Commission then prevalent.

iii) The Electricity Department was functioning as a department of Union of India and all receipts were deposited with the Consolidated Fund of India in terms of Article 266 of the Constitution of India.

The appropriation from the Consolidated Fund of India is not within the powers of the Appellant and can only be done in terms of law.

iv) The Appellant has not succeeded to any alleged surplus previously recovered or is not in possession of any such amount which has now been directed to be refunded to the consumers. The certificate of the Chartered Accountant of the Appellant will substantiate this contention.

v) The Appellant was incorporated and vested with the functions of the distribution of electricity in terms of statutory Transfer Scheme notified by the Government of India in terms of Section 131 of the said Act. The Transfer Scheme is binding on all as is specifically provided under Section 131(3)(b).

vi) Statutory Authority is bound to operate within the four corners of the statute. It is not open to the Joint Commission to go against the statutory Transfer Scheme notified by the Government **(M. Wafk Board Vs. Subhan Shah).**<sup>1</sup>

vii) When the Appellant was formed under a statutory scheme it was not in possession of the alleged surplus of Rs.41.86 crores relating to the period 2011-12, therefore, the question of the

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<sup>1</sup> **(2006) 10 SCC 696.**

Appellant being directed to refund any such excess amount to the consumers does not arise.

viii) The Appellant has filed the Transfer Scheme and closing balance sheet of the Electricity Department as on 31.3.2014. Only the specified (Schedule B) assets and liabilities were transferred to the Appellant and not all. The transfer of assets and liabilities was only to the extent specified in the Opening Balance Sheet.

ix) It is not the case of the Respondents that the amounts that have been collected or deposited illegally or otherwise has gone to provide profit to any person. The amounts have been collected or deposited with the Consolidated Fund of India.

x) When the basis of refund namely alleged surplus amount of Rs.41.86 crores is not there, the question of the liability being serviced by the Appellant does not arise.

xi) Every liability has to have corresponding source of funding. Inasmuch as there is no source of corresponding funding of Rs.41.86 crores, the question of refund does not arise.

xii) The only source of revenue to the Appellant is from retail supply tariff. If the Joint Commission is unable to direct the Government to pay Rs.41.86 crores to the Appellant it is not

possible for the Appellant to refund the said amount. In the absence of any funds in the hands of the Appellant, the Appellant cannot be directed to refund the amount.

xiii) The Appellant is a licensee who collects charges and is entitled to revenue requirements only as determined by the Joint Commission. The Appellant does not have the liberty to collect excess money from the consumers which are not approved by the Joint Commission.

xiv) If the Appellant is required to pay any amount to a group of consumers such expenditure to be incurred by the Appellant needs to be recovered in its Annual Revenue Requirements. Otherwise there is no avenue for the Appellant to refund the amounts to be paid to the consumers in the Annual Revenue Requirements of the Appellant for the year 2013-14.

xv) In the circumstances the impugned order directing the payment of Rs.41.86 crores to the consumers as alleged excess recovery in the year 2011-12 without including the same in the Annual Revenue Requirements of the Appellant for the year 2013-14 is not sustainable and ought to be set aside.

19. We have heard the learned counsel for Respondent No.1 and we have also perused the written submissions filed on behalf of Respondent No.1. Submissions of Respondent No.1 could be summarized as under:

i) The definition of term “liabilities” found in the Transfer Scheme dated 7/3/2013 is an inclusive definition. It includes contingent liabilities which may arise with respect to dealings prior to the effective date of transfer. In the present case the liability of Rs.81.11 crores which was crystallized in order dated 31/7/2012 was reduced to Rs.41.86 crores by way of the impugned order. Therefore, much larger liability of Rs.81.11 crores was already existent on the date of the Transfer Scheme. The impugned order also came into existence before the effective date of transfer i.e. 01/4/2013. In the circumstances the liability of Rs.41.86 crores stands transferred to the Appellant.

ii) The definition of term “proceedings” incorporated in the Transfer Scheme is an inclusive definition. In the present case, the proceedings with respect to liability of Rs.81.11 crores were already over by way of order dated 31/7/2012 and subsequent proceedings

for true up in which the impugned order is passed were pending on the date of Transfer Scheme.

iii) As per clause 4(1) of the Transfer Scheme the distribution functions of the erstwhile licensee i.e. Electricity Department were transferred to the Appellant licensee.

iv) As per clause 4(a)(b) of the Transfer Scheme the assets, proceedings and liabilities as set out in Schedule B shall stand transferred to and vested with the Appellant. Significantly the amount of Rs.41.86 crores has been provided in the Opening Balance Sheet in sub clause IV which reads as “Current and other liabilities and provisions to the extent specified in the Opening Balance Sheet and all contingent liabilities”. This means all the liabilities in the Opening Balance Sheet and contingent liabilities which have not been foreseen and are relatable to function of distribution have been transferred to the Appellant.

v) The Transfer Scheme makes it evident that all assets, liabilities, proceedings and functions pertaining to distribution stand transferred to the Appellant.

vi) Pertinently the opening balance was notified on 4/6/2014 and the present appeal was filed on 17/5/2013. This fact is noted in

the significant account policies provided with the Opening Balance Sheet. The note indicates all known contingent liabilities, the liability for Rs.41.86 has not been specifically provided for. Contingent liabilities are uncertain liabilities. They are unforeseen in nature and therefore are covered under definition of liabilities in the Transfer Scheme.

vii) The present appeal is covered by the judgment of this Tribunal dated 30/5/14 in **Appeal No.227 of 2012 Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors. (MSEDCL v. MERC for short)**. The appeal has in the circumstances no substance and therefore deserves to be dismissed.

20. On behalf of Respondent Nos.2, 3 & 4 written submissions have been filed. Gist of the said written submissions is as under:

- a) There is no difference between the Electricity Department and the Appellant. The Appellant is only a re-organised entity and in terms of Section 131(2) of the said Act all the rights and liabilities of the Electricity Department stood vested in the

Appellant. This is clear from the averments made in the appeal memo and the affidavit filed by the Executive Engineer of the Appellant on 5/1/2015.

- b) The amount of Rs.41.86 crores is explicitly stated as part of the contingent liability which is included in the definition of the term “liabilities” incorporated in the Transfer Scheme notified on 8/3/13. In this connection reliance is placed on clause 2(h) of the Transfer Scheme, which defines “liabilities”. It includes contingent liabilities which may arise in regard to dealings prior to the effective date of transfer in respect of the Distribution and Associated Division of the Electricity Department. In this connection reliance is placed on schedule B iv (i) & (iv) of the Transfer Scheme. Reliance is also placed on Notes of Balance Sheet which form part of accounts. On the basis of this material it is contended that there is no question of the refund as directed by Respondent No.1 to be a part of any independent liability of the Appellant but it forms part of the contingent liability. For understanding the meaning of the term “contingent liability” Accounting Standards 29 may be referred to.



- c) Certificate of Chartered Accountant Mr. Maheshwari ought not to be relied upon as he has failed to appreciate the accounting procedures.
- d) The Appellant's contention that there is no imprudence on its part is rejected by the Joint Commission as well as this Tribunal in its judgment dated 14/11/13 in Appeal No.117 of 2013. In its earlier petition being Petition No.117 of 2013 the Appellant did not contest the case of refund but only contested the interest part.
- e) The refund is in no way related to the Appellant being a regulated entity and its only source of income being tariff. This amount ought not to be allocated from the revenue. The Appellant has acquired all the assets & liabilities from the Electricity Department. This liability is the part of the contingent liability which the Appellant must fulfill. This amount is a surplus already charged from the consumers. Now the consumers cannot be burdened once again with this amount.
- f) The Transfer Scheme is a delegated legislation and hence it has to be so construed as to be within the limits of the said

Act. The Transfer Scheme only implements what is mandated by Section 131(2) of the said Act. This is reflected in opening paragraphs of the Transfer Scheme. In this connection reliance is placed on this Tribunal's judgment dated 30/5/2014 in **Maharashtra State Electricity Distribution Co. Ltd., v. Maharashtra Electricity Regulatory Commission (MSEDCL v. MSERC)**. Reliance is also placed on **JAGIR SINGH v. RANBIR SINGH & ANR.<sup>2</sup> & FOX v. BISHOP OF CHESTER<sup>3</sup>**.

- g) **MP Wakf Board** supports the case of the Respondent as it is stated therein that where a statute creates different authorities to exercise their respective functions thereunder, each of such authorities must exercise the functions within the four corners of the statute. In view thereof, the Appellant which is a deemed licensee as per clause 3(2) of the said scheme must fulfill its obligations as per Section 131(2) of the said Act.

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<sup>2</sup> **AIR 1979 SCC381**

<sup>3</sup> **(1824) 2 B & C 635**

- h) Clauses 2(j), 3(2), 4(2)(3)(6), 7(1), 7(2) of the Transfer Scheme establish that the Electricity Department was replaced by the Appellant. At the time when the Transfer Scheme was notified, the Appellant had already started pursuing this case of surplus amount as the Appellant had been formed on 20/9/2012 itself. Therefore as per the Transfer Scheme & Section 131 of the said Act the proceedings which can be enforced against the Electricity Department can be enforced against the Appellant.
- i) The principle of lifting of corporate veil will apply in this case **NEW HORIZONS LIMITED & ANR v. UNION Of INDIA & ORS.<sup>4</sup> and CALCUTTA CHROMOTYPE LTD v. CCE CALCUTTA<sup>5</sup>.**
- j) This is a fit case where costs should be imposed on the Appellant as it has been instituting cases after cases at the expense of public money to delay the refund of public money.
- k) Excess amount which was deposited in the Consolidated Fund of India needs to be refunded to the consumers as it rightly belongs to them. In compliance with Article 266 of the

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<sup>4</sup> **(1995) 1 SCC 478**

<sup>5</sup> **(1993) 3 SCC 681**

Constitution the amount deposited in the Consolidated Fund of India ought to be appropriated in accordance with law. Since this amount was an over recovery, it was not meant for Consolidated Fund of India. It ought to be refunded and not covered under Revenue by the Appellant. The Appellant is a trustee of public money and it must operate within the purview of the law.

- 1) As regards surplus and contingent liability **LIFE INSURANCE CORPORATION v. S V OAK & ANR.**<sup>6</sup> may be referred to.

21. Having narrated the gist of rival contentions we shall now proceed to deal with them. Shortly stated the case of the Appellant is that it has been incorporated and vested with the functions of distribution of the Electricity Department w.e.f. 1/4/2013. Amount of Rs. 41.86 Crores does not relate to the period subsequent to 01/4/2013 but it is a purported excess recovery by the Electricity department in the year 2011-12. The amount was recovered, according to the Appellant as per tariff order prevailing at that time. The receipts were deposited with the Consolidated Fund of India.

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<sup>6</sup> **1965 SCR(1) 403**

According to the Appellant it has not succeeded to any surplus previously recovered and it is not in possession of any such amount. The same does not form part of the said scheme and the balance sheet notified by the Government under Section 131 of the said Act. Since the Appellant is not in possession of any alleged surplus of Rs.41.86 crores relating to 2011-12, there is no question of the Appellant being directed to refund the said amount. The Appellant has no source of revenue apart from the tariff through its Annual Revenue Requirements as determined by the Joint Commission. The Appellant does not have liberty to collect excess money from the consumers which are not approved by the Joint Commission. Such expenditure needs to be recovered in its Annual Revenue Requirements. The Appellant's grievance is that the Joint Commission has however not included the amount of Rs.41.86 crores to be refunded to the consumers in the Annual Revenue Requirements for the year 2013-14. The only grievance which is pressed in this appeal is that the Appellant is not liable to pay the said amount. The quantum or the direction per se is not under challenge. The Appellant wants to absolve itself of the liability fastened on it.

22. To understand whether the Appellant's grievance is genuine we need to first ascertain the facts. The functions of purchase, transmission and distribution of electricity in the Union Territory of Dadra & Nagar Haveli were earlier discharged by the Electricity Department. The Government of India decided to corporatize the Electricity Department and accordingly the Appellant was incorporated under the Companies Act, 1956. The Dadra & Nagar Haveli Reforms Transfer Scheme 2013 (the Transfer Scheme) was made under Section 131 of the said Act to transfer and vest rights and liabilities of the Electricity Department in the Appellant. The Transfer Scheme was made *inter alia* for providing and giving effect to the transfer of assets, liabilities, rights, functions, obligations and proceedings of the Electricity Department to the Appellant. The Transfer Scheme was notified on 07.03.2013. It is necessary to quote the opening paragraphs of the said scheme as they have some relevance to the present case.

***“WHEREAS the Electricity Department of the Administration of Union Territory of Dadra & Nagar Haveli is undertaking the functions of purchase ,***

***transmission and distribution of electricity in the Union Territory of Dadra & Nagar Haveli;***

***AND WHEREAS Government of India, Ministry of Power has advised to corporatize the Electricity Department, Dadra and Nagar Haveli;***

***AND WHEREAS, the Ministry of Home Affairs, Government of India vide letter No.U-3034/59/201-CPD dated 29<sup>th</sup> September, 2011 has conveyed its approval for taking up the matter for Corporatisation of Electricity Department of Dadra and Nagar Haveli with Ministry of Power, Government of India.***

***AND WHEREAS, the Ministry of Power, Government of India vide letter No.36/1/201-R&R dated 29<sup>th</sup> February 2012 has conveyed its No Objection for the Corporatisation of Electricity Department, Dadra and Nagar Haveli;***

***AND WHEREAS the Administrator, having satisfied with the necessity to Corporatise the functions of the Distribution and its associated Divisions of the Electricity department, Dadra and Nagar Haveli, has incorporated a Power Distribution Corporation in the name of “DNH Power Distribution Corporation Limited” with Registrar of Companies, Gujarat under the Companies Act, 1956 on 13<sup>th</sup> July,2012;***

***AND WHEREAS the Administrator is satisfied that circumstances exist which render it necessary for him to make scheme for the peace, progress and good governance of the Union Territory of Dadra & Nagar Haveli and to transfer and vest specified assets, liabilities, proceedings and assign personnel of the Distribution and associated Divisions of the Electricity Department of Union Territory of Dadra & Naga Haveli to the newly incorporated DNH Power Distribution Corporation Limited.***

***NOW THEREFORE, the Administrator, Dadra & Nagar Haveli in exercise of powers conferred vide Notification No.F No U-11030/2/2003-UTL dated 22<sup>nd</sup> June 2004, by Ministry of Home Affairs, Government of India and under section 131,133 and 134 of the Electricity Act, 2003, is pleased to make the following scheme for providing and giving effect to the transfer of assets, liabilities, rights, functions, obligations, proceedings and personnel of Distribution and associated Divisions of Electricity Department, Dadra & Nagar Haveli to the above referred corporation.***

23. Since the Transfer Scheme is framed under Section 131 of the said Act, it would be advantageous to quote Section 131 to the extent it is relevant to this case.



**“S. 131 Vesting of property of Board in State Government: -**

**(1) With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereinafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.**

**(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be:**

**Provided that the transfer value of any assets transferred hereunder shall be determined, as far as may be, based on the**

***revenue potential of such assets at such terms and conditions as may be agreed between the State Government and the State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be.***

.....”

Reading of the above provision makes it clear that from the effective date which in this case is 01.04.2013, any property, interest in property, rights & liabilities which vested in the Electricity Department were vested in the Appellant.

24. It is pertinent to note at this juncture certain admitted facts. For the year 2011-2012 the Joint Commission had by Order dated 13.09.2011 determined the Annual Revenue Requirements of the Electricity Department and retail supply tariff applicable. The Electricity Department applied the said order and recovered tariff from the consumers at large. Certain consumers challenged the said order. The said appeal being Appeal No. 175 of 2011 was partly allowed by this Tribunal. This Tribunal upheld the recovery of power purchase cost adjustment in the tariff. The matter was

however remanded for redetermination of the formula. The Joint Commission by Order dated 31.07.2012 while undertaking provisional true up of the Annual Revenue Requirements for the year 2010-2011 and 2011-2012 and while determining the Annual Revenue Requirements and retail supply tariff for the year 2012-2013 also dealt with the proceedings remanded by this Tribunal vide Judgment dated 15.03.2012. The Joint Commission while reworking the formula for power purchase cost adjustment gave direction to the Electricity Department to refund an amount of Rs. 81.11 Crores with interest as purported excess collection of power purchase cost adjustment. Being aggrieved by this order, the Electricity Department filed a Review Petition before the Joint Commission. The grievance of the Electricity Department was about direction for refund, the computation charges and also about the direction to pay interest on such refund. On 24.01.2013 the Review Petition was disposed of by the Joint Commission. The Joint Commission accepted that there were certain errors in the computation of amount. The Review Petition was partly allowed but the prayer to set aside the direction to pay interest was rejected. It must be noted here that the functions of the Electricity Department

were vested in the Appellant on 01.04.2013. The Appellant having stepped into the shoes of the Electricity Department and having been vested with all the rights and liabilities of the Electricity Department under the Transfer Scheme challenged the Joint Commission's Order dated 24.01.2013 in Appeal No. 117 of 2013 in this Tribunal only on the issue of interest. This is evident from the question formulated by this Tribunal for its consideration. It reads as under:

***“Whether the Appellant is liable to pay interest on the amounts to be refunded by the appellant to the consumers on account of a revision in the tariff for the Financial Year 2011-2012 in implementation of Remand Order passed by this Tribunal after setting aside the Power Purchase Cost Adjustment approved by the Joint Commission.”***

Thus the Appellant raised no challenge to the order directing it to refund the amount which was in the opinion of the Joint Commission excess collection of power purchase cost adjustment. By Order dated 14.11.2013, this Tribunal allowed the Appellants appeal and set aside the direction to pay interest. The fact that the Appellant did not at that stage raise any grievance about the

direction to refund Rs. 81.11 Crores which is reduced under the impugned Order to Rs. 41.86 Crores is significant and makes a dent in the case of the Appellant that it is not liable to refund the said amount.

25. It is now necessary to refer to the Transfer Scheme to examine which clause thereof covers the amount of Rs.41.86 crores. The term 'licensee' has been defined under clause 2(g) of the Transfer Scheme as a person who has been granted a licence or a deemed licensee under Section 14 of the said Act. The incorporation of the Appellant has been mentioned in clause 3(1) of the Transfer Scheme and clause 3(2) thereof states that the Appellant shall be deemed to be a licensee for undertaking the activities of electricity distribution and retail supply under Sections 12 & 14 of the said Act. As per clause 4(1) (a) of the Transfer Scheme the distribution function of the Electricity Department stood transferred to the Appellant with effect from effective date of transfer i.e. 1/4/13. Similarly as per clause 4(b) thereof the Assets, Proceedings & Liabilities as set out in schedule 'B' stood transferred to the Appellant with effect from the effective date of transfer i.e. 1/4/13. Thus the Appellant is the

successor in interest of the Electricity Department which was the erstwhile distribution licensee under the said Act.

26. Clause 2(h) of the Transfer Scheme defines the term “liabilities”. It is an inclusive definition. It includes the applicable contingent liabilities which may arise in regard to dealings prior to the effective date of transfer in respect of the Distribution and Associated Division of Electricity Department. It reads thus:

***“(h) “Liabilities” includes the liabilities, debts, duties, obligations and other outgoing of whatever nature transferred to the Company as per the Opening Balance Sheet to be notified and shall include the applicable contingent liabilities which may arise in regard to dealings prior to the Effective Date of Transfer in respect of the Distribution and associated Division of Electricity Department;”***

Clause 2(j) of the said scheme defines the term ‘Proceedings’. It reads thus:

***(j) “Proceedings” shall include all proceedings, exclusively relating to the Distribution and associated Divisions of Electricity Department, of whatever nature including suits,***

*appeals, complaints, petitions, applications, conciliatory proceedings, arbitrations or any other proceeding whether civil or criminal or otherwise.”*

27. By order dated 31/7/12 the Joint Commission gave a direction to the Electricity Department to refund an amount of Rs.81.11 crores to the consumers. The effective date of transfer of the Electricity Department as already noted is 01/4/2013. The proceedings of true up by way of the impugned order were pending on the date of the Transfer Scheme. The impugned order also came into existence prior to the effective date of transfer. As already noted as per clause 4(1)(b) the Assets, Proceedings & Liabilities as set out in Schedule 'B' stood transferred to and vested in the Appellant. It is now therefore necessary to turn to Schedule 'B'.

Schedule 'B' is titled as "Assets, Proceedings and Liabilities transferred to the Company". So far as it is relevant it reads thus:

*“Unless otherwise specified by the Administration, **Company shall be vested with and shall comprise** of all the Assets, **Liabilities and proceedings concerning distribution** and*

*retail supply activities of the Administration forming part of the Opening Balance Sheet and excluding assets, liabilities, personnel and proceeding specified under Schedule 'C' and the same shall consist of:..*

*IV. Miscellaneous:*

*...*

- iv. Current and other liabilities and provisions to the extent specified in the Opening Balance Sheet and **all contingent liabilities;***
- v. Proceedings to the **extent they are exclusively or primarily associated with or related to Distribution and Laboratory/meter testing activities or assets referred to in items I to III above.**"*

Thus as per this schedule current and other liabilities and provisions to the extent specified in the Opening Balance Sheet and all contingent liabilities and proceedings to the extent they are exclusively or primarily associated with or related to distribution activities of the Appellant shall vest in the Appellant. Thus the proceedings which we have mentioned hereinabove which were pending prior to the effective date of transfer relating *inter alia* to the distribution activities of the Electricity Department stood transferred and vested in the Appellant. At the cost of repetition we



must state that this is evident from the fact that the Appellant prosecuted those proceedings.

Pertinently schedule 'C' clearly states which of the assets, liabilities, personnel and proceedings are not transferred to the Appellant. Schedule 'C' reads thus:

***“Unless otherwise specified by the Administration, the assets, liabilities, personnel and proceedings in relation to the following shall not be transferred to the Company:***

- 1. Function of the generation of electricity except non conventional source of energy.***
- 2. Functions of transmission of electricity;***
- 3. Functions of Policy making, Planning & Coordination;***
- 4. Functions which are not transferred to the Company under this Scheme.”***

Schedule 'C' makes it clear that except those specifically excluded thereunder all other assets, liabilities and proceedings stood transferred to the Appellant. The liability or the proceedings with which we are concerned here do not fall in any of the excepted

items mentioned in Schedule 'C'. This strengthens the Respondents' case that since the liability to refund Rs.41.86 crores related to functions of distribution of Electricity Department it stood transferred to the Appellant.

28. It is contended that as per the Transfer Scheme only assets, liabilities and proceedings concerning distribution and retail supply activities of the Electricity Department forming part of the Opening Balance Sheet stood transferred to the Appellant. Rs.41.86 crores did not form part of the Opening Balance Sheet and therefore was not covered by the term "liabilities" and hence was not transferred to the Appellant. This contention deserves to be rejected without hesitation. We have already quoted the definition of the term "liabilities". It is an inclusive definition. It states that liabilities shall include the applicable contingent liabilities which may arise in regard to dealings prior to the effective date of transfer. In our opinion, assuming the amount of Rs.41.86 crores did not form part of the Opening Balance Sheet it can be covered by the term 'contingent liabilities'. Contingent liability is a liability that is unforeseen in nature, but there is a possibility of its arising in

future. Our conclusion that this amount is a contingent liability is supported by Note 5 appended to the balance sheet. Note 5 reads as under:

***“5. The Contingent Liabilities not provided for JERC has passed an order to refund an amount of Rs.81.11 crores to the consumers with an interest at the rate of 9.50% in regard to the excess PPCA charges, recovered from the consumers which has been subsequently reduced to Rs.41.86 crores with interest. The interest has also been waived by the APTEL till the date of signing the Balance Sheet and the department is still in appeals for the waiver of 41.86 crores in the APTEL. If the order comes against the department then the liability of payment of Rs.41.86 crores may arise.”***

Thus Rs.81.11 crores which was subsequently reduced to 41.86 crores is treated as a possible liability that may arise. If the definition of the term ‘liabilities’ is read along with other provisions of the Transfer Scheme it is clear that the said sum is clearly covered by the term ‘contingent liability’.

29. The Joint Commission vide its order dated 31/7/2012 found that the excess amount charged was Rs.41.86 crores. The Appellant's case is that the said surplus amount relates to the period 2011-12. The Appellant has not succeeded to the said amount nor is it in possession thereof. It is the case of the Appellant based on balance sheet of the Electricity Department as on 31/3/2014 that only assets and liabilities specified in Schedule 'B' were transferred to the Appellant. We have already rejected these submissions of the Appellant by holding that even if it is assumed that the said amount is not covered by the term 'specified in the Opening Balance Sheet' it will fall in the category of 'all contingent liabilities'. Similarly, the Appellant's argument that it has not recovered the alleged surplus amount; that it is not in its possession; that it has gone to the Consolidated Fund of India; that the only source of revenue of the Appellant is from retail supply tariff and in the absence of funds in the hands of the Appellant the Appellant cannot be made to refund the said amount; that if the Appellant is required to refund the amount such expenditure needs to be recovered in its Annual Revenue Requirements, otherwise it is not possible for the Appellant to refund the said amount to the

consumers in the Annual Revenue Requirements of the Appellant for the year 2013-14 deserve to be rejected. If these arguments are accepted Section 131 of the said Act would be rendered nugatory. The said Section contemplates creation of a Company and transfer of rights and liabilities vested in the State Electricity Board to the State Government and re-vesting them in the Company incorporated as per Section 131(2). Transfer Scheme framed under Section 131(1) for this purpose contains elaborate provisions for smooth transfer of such rights and liabilities. The Company steps into the shoes of the erstwhile Electricity Department. It cannot adopt specious arguments to evade liabilities transferred to it, mentioned in the balance sheet or contingent liabilities.

30. In this connection we may usefully refer to this Tribunal's judgment in **MSEDCL v. MERC & Ors.** In that case the State Government under the Transfer Scheme made under Section 131 of the said Act vested in the distribution licensee rights and liabilities as successor of the Electricity Board. As per Section 47(1) of the said Act the distribution licensee was entitled to recover security from the consumers and as per Section 47(4) the distribution

licensee had to pay interest on the said deposit as specified by the State Commission and refund such security on the request of the person who gave such security. The question was whether the entire amount of consumer security deposit as reflected in the books of accounts of the Appellant could be considered in calculating the working capital requirement of the Appellant as per the Regulations. The State Commission had disallowed the entire amount of security deposit from the working capital requirement. The Appellant's contention was that the said deduction was wrong as the security deposits as reflected in the books of amounts of the Appellant are only a notional amount. Though it was reflected in the Balance Sheet, the same was never received from the erstwhile Board. The Appellant therein urged that the consumer deposits actually received by the Appellant after formation of the distribution Company as a successor of the erstwhile Electricity Board for distribution functions may be considered for deduction from the working capital. Rejecting this submission this Tribunal observed as under:

***“21. The State Government under the transfer scheme under Section 131 of the Electricity Act has vested in***

*the Appellant distribution licensee the property, interest in property and rights and liabilities as successor of the Electricity Board for distribution business. Accordingly, the balance sheet of the Appellant has been drawn up and the consumer security amount as held by the Electricity Board just prior to the unbundling stand transferred in the books of accounts of the Appellant through transfer scheme. The Appellant is now responsible to meet the liability of the erstwhile Electricity Board in respect of the consumer security deposit. In case consumer security deposit has been utilized by the erstwhile Electricity Board to meet its revenue gap in the past due to its own inefficiency or otherwise and is not available as cash to the Appellant on unbundling of the Board, it could not be a reason for not considering the entire amount of consumer security deposit as reflected in the books of accounts of the Appellant in calculating the working capital requirement as per the Regulations. We feel that the consumers cannot be burdened by restricting the deduction of consumer security deposit to the amount actually recovered by the Appellant after formation of the distribution company as a successor of the erstwhile Electricity Board, while computing the working capital requirements.”*

31. In our opinion the ratio of this judgment is attracted to the facts of the present case. We find substance in the submission of the contesting Respondents that the Appellant has acquired all the assets and liabilities from the Electricity Department. This liability is part of the contingent liabilities which the Appellant must discharge. This amount is a surplus already charged and recovered from the consumers. Now the consumers cannot be burdened once again with this amount. The submission that the impugned order directing the payment of Rs.41.86 crores to the consumers as excess recovery in the year 2011-12 without including the same in the Annual Revenue Requirements of the Appellant for the year 2013-24, is not sustainable and must be rejected.

32. Having given our anxious consideration to the submissions advanced by both sides, we are of the considered opinion that there is no substance in the appeal. The appeal therefore deserves to be dismissed and is dismissed as such.



33. Pronounced in the Open Court on this **26<sup>th</sup> day of March, 2015.**

**(Rakesh Nath)**  
**Technical Member**

**(Justice Ranjana P. Desai)**  
**Chairperson**

✓ **REPORTABLE/~~NON-REPORTABLE~~**