**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**
**APPELLATE JURISDICTIION, NEW DELHI**

Appeal No. 31 of 2005 and 43 of 2005

Dated this 22nd day of May 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
**Hon'ble Mr. H. L. Bajaj, Technical Member**

**1. Appeal No.31 of 2005**

Reliance Energy Limited, Mumbai
(Formerly known as BSES LTD.)

... Appellant

Versus

1. The Tata Power Company Limited
2. The State of Maharashtra
3. Maharashtra Electricity Regulatory Commission
4. Bombay Small Scale Industries Association
5. The President, Mumbai Grahak Panchayat
6. Prayas
7. The President, Thane-Belapur Industries Association
8. The President, Vidarbha Industries Association

... Respondents

**2. Appeal No.43 of 2005**

The Tata Power Company Limited

... Appellant

Versus

1. Reliance Energy Limited (Formerly known as BSES Limited)
2. The State of Maharashtra
3. Bombay Small Scale Industries Association
4. The Mumbai Grahak Panchayat
5. Prayas
6. Thane-Belapur Industries Association
7. Vidarbha Industries Association, Nagpur
8. The Maharashtra Electricity Regulatory Commisison

... Respondents

Appeal No.31 of 2005

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| Counsel for the Appellant | Mr. J.J. Bhatt, Sr. Advocate along with Ms. Anjali Chandurkar, Ms. Smieeta Inna, Advocates |
| Counsel for the Respondent | Mr. D.J. Khambata, Sr. Advocate along with Mr. S.V. Doijode, Mr. P.A. Kabadi, Ms. Pragya Baghel, Advocates |

No. of corrections :

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Appeal No.43 of 2005

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| Counsel for the Appellant | Mr. D.J. Khambata, Sr. Advocate along with Mr. S.V. Doijode, Mr. P.A. Kabadi, Ms. Pragya Baghel, Advocates |
| Counsel for the Respondent | Mr. J.J. Bhatt, Sr. Advocate along with Ms. Anjali Chandurkar, Ms. Smieeta Inna, Advocates |

"One man discovers electricity and all humanity benefits from it"– so goes the common saying. Yet for Reliance and Tatas, "Electricity means eternal litigation from forum to forum in the game of generation and distribution of Electricity."

**COMMON JUDGMENT**

1. In appeal 31 of 2005, the appellant, M/s Reliance Energy, hereinafter referred as "REL" for brevity, has prayed this Appellate Tribunal:-

(i) To set aside the Order dated 3rd July, 2003, passed by the Maharashtra Electricity Regulatory Commission (MERC) in Case No.14 of 2002 – "In the matter of interpretation of licenses issued to Tata Power Company, to the extent that Tata Power could also undertake retail supply of energy directly to retail consumers and to declare that Tata Power is not entitled or empowered to effect direct supply of energy to consumers except to other licensees and consumers contemplated in Clause 15 of their licenses read with Clause VI of the Schedule to the 1910 Act;

(ii) To restrain Tata Power by an Order of injunction from effecting any direct supply to energy consumers other than the permitted consumers and also to restrain Tata Power under their licenses from effecting any direct supply of energy to such consumers having a maximum demand less than 1000 KVA.

(iii) To declare that the acts of Tata Power in seeking to effect direct supply of energy to consumers is contrary to the Government policy and to restrain Tata Power from effecting such supplies except to permitted consumers.

(iv) To direct Tata power to discontinue the supply of electricity to such direct retail consumers.

(v) To direct Tata Power to hand over the financial gains made by it to the appellant, by virtue of breach of terms of their licenses and the provisions of the Electricity Laws.

2. M/s Tata Power, the appellant in appeal No.43 of 2005, has prayed this Appellate Tribunal:-

(i) To quash and set aside the Order dated 3rd July, 2003 passed by MERC to the extent of the findings, orders and directions contained in Paragraphs 81.10; 81.11; 81.12; 81.14 and the finding that the terms of Tata Power's Licenses militate against the provisions of Sections 22(i)(d) and 22(ii)(e) of the Electricity Regulatory Commission's Act.

(ii) To stay the impugned proceedings dated 3rd July, 2003 to the extent it restrains Tata Power from offering new connections to consumers with a maximum demand of less then 1000 KVA and engaging to a consultancy firm to study the issues relating to Sections 14 and 42 of the Electricity Act, 2003 or from taking further action in terms of directions contained in the Paragraphs 81.12 and 81.14 of the Order passed by MERC.

3. The above two appeals have been preferred as against the one and the same order of MERC in so far as the appellant in each of the appeal is prejudiced by the directions issued or by the findings recorded by the MERC in its Order. At the outset, it is essential to summarise the facts leading to the above appeals and at the appropriate stage, we could trace the details of claim of each of the parties.

4. According to REL in terms of The Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and The Electricity Regulatory Commissions Act, 1998, a person who has been granted license by the State Government alone is entitled and permitted to distribute electric energy in accordance with and subject to the terms of the license granted and the provisions of the said three enactments. REL moved an application before MERC on 23.07.2002 citing Section 22(2)(e) and (n) of The Electricity Regulatory Commissions Act, 1998 complaining violation by TATA Power and sought for the following reliefs:-

(i) To restrain Tata Power from in any manner supplying and distributing electricity to consumers situated within the area of supply of REL in contravention of terms and conditions of their licenses and the policy of the Government of Maharashtra.

(ii) The Tata Power be ordered to pay REL all profits and gains made from January, 1998 until it discontinue sale of energy to such consumers within the license area of REL and having energy requirement below 1000 KVA.

5. Pending disposal, REL sought for an Order of restraint against Tata Power from offering new connections to any entities for sale, supply or distribution of electricity in REL's license area of supply, with energy requirement below 1000 KVA and/ or with lighting consumption exceeding 20% of the total. The said application was resisted by Tata Power. REL and Tata Power submitted written objections or submissions and the Government of Maharashtra also, responded before the Commission, when Commission has sought elaboration of the policy of the Government of Maharashtra in its letter dated 23rd March, 1998. There were interveners in the said petition and they also prayed for the orders as set out in the intervention.

6. With respect to the interim relief, the parties agreed at the hearing before the Regulatory Commission, held on 31.10.2002, that they would

maintain the status quo till the disposal of the petition and that they would not encourage any existing consumers to switch over from one to the other. This understanding was also continued during appeal.

7. According to REL, Tata Power is contravening the terms and conditions of license granted to them by Government of Maharashtra and the policy of the said Government, by poaching the consumers of REL. Tata Power, secured four licenses from Government of Maharashtra, which have been amended from time to time. The Tata Power, it is contended, is not entitled to distribute/ or directly sell power to consumers in contravention of the Indian Electricity Act, 1910, The Electricity (Supply) Act, 1948 and as per the policy of the State Government. It was the alternate contention of REL that Tata Power cannot effect or engage in retail supply of energy to consumers with a maximum demand below 1000 KVA, even in terms of its license. Apart from the license conditions, sale of power by Tata Power directly to retailers is in contravention of Government policy and by their conduct, Tata Power have acquiesced to the legal position and it is estopped from effecting direct supply to consumers with maximum demand below 1000 KVA.

8. In any event, it is pointed that the Commission should exercise its discretion under the Electricity Regulatory Commission's Act and restrain Tata power from effecting supply to retail consumers within REL'S (BSES') territory. Per contra Tata Power while denying the allegations of contravention of terms and conditions of their license, it is submitted that Tata power holds four licenses issued by Government of Maharashtra, which have been amended from time to time. According to Tata Power, they are also entitled to engage or undertake retail supply of electricity as they are also licensed to distribute directly to the consumers, as they have got a valid license in this respect. Tata power relied upon the very four licenses granted in its favour from time to time and as amended to establish that it could engage itself in direct distribution of power in retail in the very area where REL is distributing power.

9. The MERC heard detailed arguments on various days, considered the materials placed by either side and interveners and after detailed consideration of respective contention advanced by the counsel appearing on either side, ultimately by its Order dated 3rd July, 2003 recorded its findings on various issues. According to MERC, Tata Power is entitled to effect retail distribution of energy, w.e.f., 1934 in terms of notification issued by government of Maharashtra, the licenses of Tata Power have been amended from 1964 to enable the said company to effect retail supply of energy to all consumers for all purposes without any fetter or limitations, that the Tata Power did not press the question of jurisdiction raised by it, that the Tata Power has not only a right but also an obligation to supply to all and a large number of categories of consumers on demand, that the claim of Tata Power that they have an unfettered right but no obligation to provide power to consumers, to whom REL has an obligation, militates against the requirement of a level playing field for promoting competition and that the Commission has to take into account, many other factors, the provision of a level playing field and stimulates competitive conditions and introduce such conditions progressively.

10. The Commission considered various options in the light of the provisions of The Electricity Act, 2003 and after considering Section 42, Section 22, Section 14 and other connected provisions and while taking the view that the surplus power is available and the two utilities, viz., Tata Power and REL have overlapping distribution networks in many areas of suburbs and both are technically and financially well equipped to enter the phase of competitive electricity market, the Commission issued directions for engaging a consultancy service to study the issues relating to Section 42 and 14 of the Electricity Act, 2003 and the Commission restrained Tata Power from offering new connections to any consumer with energy requirement below 1000 KVA (maximum demand). The Commission was of the view that it is in the interest of both to introduce competition and it should be at a level playing field.

11. In so far as the MERC held that Tata Power has a license to under-take retail distribution of power, REL has preferred the Appeal No.31 of 2005 and sought for various reliefs. In so far as the Commission has issued directions and restraint orders against Tata Power, Appeal No.43 of 2005 has been preferred by Tata Power. Appeal No.31 and 43 of 2005 were consolidated and taken up for hearing. The counsel on either submitted detailed arguments and also made written submissions. The other Respondents in both the appeals either filed counter/ reply, besides filing written submissions, which were taken into consideration. As these appeals arise out of the same order of MERC, we refer to the contesting parties by their names.

12. The following points arise for consideration in this appeal:-

(i) Whether Tata Power is a grantee of license to under-take distribution of electricity in the area, within which REL has been distributing power in retail, in terms of license granted to it?

(ii) Whether Tata Power has been licensed to undertake bulk supply of power to licensees alone, as contended by REL?

(iii) Whether the directions issued by MERC are sustainable and warranted?

(iv) Whether Tata Power has been undertaking distribution of power as a licensee at any time prior to REL, becoming a generator and competing with Tata Power?

(v) Whether there could be more than one distribution licensee under The Electricity Act, 2003?

(vi) Whether REL is entitled to a restraint Order against Tata Powers on its complaint that Tata Power is trying to snatch away its retail customers?

(vii) To what relief REL is entitled to in Appeal No.31 of 2005?

(viii) To what relief Tata Power is entitled to in Appeal No.43 of 2005?

13. REL initiated proceedings under Section 22(2)(e) and 22(2) of The Electricity Regulatory Commissions Act, 1998, complaining violations of license conditions by Tata Power. It is alleged that Tata Power, a generating company and supplier of bulk power to REL, a distribution licensee, has violated the terms and conditions of The Indian Electricity Act, 1910 and the license granted there-under. It is the complaint that by supplying energy directly to consumers on retail basis and also to consumers having energy requirement of less than 1000 KVA (maximum demand) and to consumers having lighting load in excess of 20% of the total load. Tata Power has contravened the License conditions. The gravamen of the allegation being that Tata Power has acted beyond the scope of its license and in violation of the provisions of The Indian Electricity Act, 1910 as well as The Electricity (Supply) Act, 1948. In the absence of valid license secured by Tata Power, it is impermissible for Tata Power to undertake retail distribution of power in the very area to which REL has been licensed to distribute.

14. It is also alleged that Tata Power violated the directions issued by the State Government on 23rd March, 1998. Under Section 22B of the Indian Electricity Act, 1910, such directions are binding on Tata Power. Tata Power is attempting to lure away the existing customers of REL and to effect direct retail supply to customers within REL area of license, which militates against the Order of State Government dated 23rd March, 1998 and it contravenes Section 22(1)(d) of The Electricity Regulatory Commissions Act, 1998. The said application was resisted by Tata Power by filing a detailed counter and producing a number of documents

in support of its claim that the Tata Power is entitled to retail distribution in the very area of supply and distribution for which a license has already been granted in favour of REL.

15. It is not in dispute that the present case has a chequered career and there were conciliation between parties attempted at the level of Hon. Ministers in the State of Maharashtra. The points framed are being taken together for consideration as most of them overlap each other. That apart, if the two main points are answered, for the remaining points, the conclusion follows as a matter of course. To begin with we shall consider points (i), (ii) and (iii).

16. It is not in dispute that for decades Tata Power is supplying power in bulk to REL, and REL distributes the said power in their area of license. Initially REL did not engage in generation of power and recently it started generation of power. The power so generated is also being distributed by REL. Disputes between the parties to this appeal arose only after REL became a generator. Prior to that, and till then there was no attempt by Tata power to distribute power in retail and admittedly REL alone has been supplying and distributing power in retail while Tata power has been supplying power in bulk to REL right through.

17. Before proceeding further and taking up the points for consideration, it would be appropriate to refer to statutory provisions of the enactments and also to set out certain undisputed facts and aspects which will have a bearing on the issues to be answered in this appeal:-

(a) Tata Power has four licenses issued in its favour or its Predecessor by the Government of Maharashtra, viz., (i) 1907 license, (ii) 1919 license, (iii) 1921 license and (iv) 1953 license. All these licenses stand transferred in favour of Tata Power.

(b) License necessarily implies a permission or authorization or authority or mandate to carry out things in terms of the license.

Absence of appropriation license will not imply that a licensee has the license to do such other things of its choice.

(c) The Indian Electricity Act, 1910 came into force on 1st January, 1911, Tatas were generating energy as well as engaged in bulk supply, even before the 1910 Act. Section (2)(h) defines the expression "Licensee" as any person licensed under Part II to supply energy.

(d) Section 3(2)(f) appearing in Part II of the 1910 Act mandates that the provisions contained in the schedule shall be deemed to be incorporated with and to form part of every license granted under the said part except expressly ordered or varied or excepted.

Proviso to Sec 3(2)(f) also provides that where a license is granted in accordance with Clause IX of the schedule for the supply of energy to other licensees for distribution by them, in so far as such license relates to such supply, Clauses IV, V, VI, VII, VIII and XII of the schedule are excluded, and they shall not be deemed to have been incorporated in such license.

(e) Section 2 (3) of The Electricity (Supply) Act defines the expression "Bulk Licensee" as a licensee who is authorised by a license to supply electricity to other licensees for distribution by them.

(f) It is settled law that in terms of Sec. 3(2)(f) all the clauses in the Schedule are deemed to have been incorporated in the license granted by the State Government under Section 3 of the Act of 1910 and the licensee shall comply with the terms of that schedule. In other words, the schedule would prevail over the terms of any previously granted license or the provisions of the Act of 1910, or any other law, agreement or instrument inconsistent with the Schedule. (See Amalgamated Electricity Co. Ltd. *versus* N.S. Bathena, AIR 1959 SC 711:1959 Supp (2) SCR 213).

(g) No provision of 1910 Act or any rules made thereunder shall have any effect so far as it is inconsistent with any of the provisions of the 1948 Act; where, however, the provisions of the two Acts are not inconsistent, the provisions of the 1948 Act shall be in addition to, and not in derogation of, the 1910 Act. (See Mysore State Electricity Board versus Bangalore Woolen, Cotton, and Silk Mills Ltd., AIR 1963 SC 1128: 1963 Supp (2) SCR 127).

(h) Admittedly since 1926 and till 1997, Tata Power was never engaged in distribution of power in retail and the conflict has arisen between the Parties only after REL has set up its own generation Plant or soon thereafter.

(i) On and after 1st January, 1997 only Tata Power had introduced tariff for its retail consumers. At no point of time earlier to 1st January, 1997, such a tariff has been notified by Tata power.

(j) On and after 1st December, 1998, alone Tata Power introduced retail tariff in so far as residential premises are concerned and prior to that there was no tariff notification for supply of such power or tariff rate by Tata Power was issued or laid.

(k) Concedingly since its inception, REL has engaged in retail distribution of power in the area exclusively in the area.

(l) It is admitted that REL had been purchasing and continue to purchase bulk energy from TATA Power for its retail distribution in the area in Question right from the inception.

(m) Even after setting up own generation, REL has been sourcing energy from Tata Power for supply or for retail distribution to the

consumers in the area in Question in terms of its Distribution License.

18. In the light of the above matrix, we shall proceed to consider the details of licenses and their effect. Factually it is seen that Tata Power has four licenses issued to it by the Government of Maharashtra as amended from time to time, their details are:-

(i) The 1907 License – The Bombay (Hydro-electric) License dated 5th March, 1907 originally granted to Dorabji J. Tata and Ratanji J. Tata. This license was assigned on 7th September, 1910 in favour of The Tata Hydro Electric Power Supply Co. Ltd.;

(ii) The 1919 License – The Andhra Valley (Hydro-electric) License dated 3rd April, 1919 issued in favour of the Tata Hydro Electric Supply Co. Ltd.;

(iii) The 1921 License – The Nila Mula Valley (Hydro-Electric) License dated 15th November, 1921 issued in favour of Tata Power;

(iv) The 1953 License – The Trombay Thermal Power Electric License dated 19th November, 1953 in favour of The Tata Hydro Electric Power Supply Co. Ltd., The Andhra Valley Power Supply Co. Ltd. and Tata Power.

Consequent to amalgamation of the Tata Hydro Electric Power Supply Co. Ltd. and The Andhra Valley Power Supply Co. Ltd. into Tata Power, the Government of Maharashtra by its resolution dated 12th July, 2001 transferred the said 1907 license, 1919 license and the 1953 license to Tata Power. Tata Power contends that its licenses entitle it to sell, supply and distribute electricity not only to other distributing licensees such as REL and the Bombay Electricity Supply & Transport Undertaking ("the BEST"), but also to consumers of electricity. Such

privilege, it is claimed by the learned counsel appearing for Tata Power, is according to plain language of the licenses.

19. It is the repeated claim of Tata Power that the said licenses permit Tata Power to Supply electricity to all Consumers directly and not through REL. It is the contention that the very language of each of the aforesaid licenses confer the privilege on Tata Power to sell, supply and distribute electricity to all consumers, whether their maximum demand exceeds or below 1000 KVA or without such limit, and for all purposes. It is claimed that Clause 6 of license permits Tata Power to supply energy "for all purposes". Clause 6, it is pointed out, will "include supply to other licensees for their own purposes and in bulk…". It is claimed by Mr. Khambata, the learned counsel for the Tata Power, that there is no restriction on the privilege and right of Tata Power to supply energy as licensee.

20. With the reference to supply to other licensees, it is to be pointed out that it is qualified by the word "including". It is claimed that "inclusive" expression word "including" or "includes" is used to enlarge the meaning of the preceding words and is by way of extension and not by way of restriction. Such an interpretation will not stand to scrutiny of law as it is only a privilege and not a statutory enactment. In this connection, it is pointed that Pronouncements relied upon by TATA Power has no application at all.

21. The contention of REL that the expression "energy shall be supplied for all purposes including supply to other licensees" should be given its full meaning and implication and there is a purpose behind it. The further contention of REL that the words "in bulk" has with respect to "supply to other licensees for their own purposes" deserves to be sustained. In respect of license no hair splitting argument is permissible nor it is permissible. The Qualifying expression is in respect of distribution licensee, who are to supply for all purposes. There is a definite purpose

and distinction between a "Bulk" licensee and the area distributing licensee.

22. We shall now advert to licensing provisions in the Act. The Indian Electricity Act, 1910 prohibits supplying energy by any person to another person without a license issued by the State Government. Section 3(1) of the 1903 Act provided thus:

> *" 3(1) No person shall supply energy for electric transaction or to the public for any purpose except under, and in accordance with the terms and conditions of, a license granted by Local government under this part:*
>
> *Provided that nothing in this Section shall apply to any railway of tramway subject to the provisions of the Indian Railways Act, 1890."*

The 1903 Act stands repealed by 1910 Act. Section 3(1) of the 1910 Act provides as follows:

> *"3(1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any), [grant after consulting the State Electricity Board, a license to any person] to supply energy suppy-lines for the conveyance and transmission of energy:-*
>
> *(a) where the energy to be supplied is to be generated outside such area, from a generating station situated outside such area to the boundary of such area, or*
>
> *(b) where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area."*

23 The term "licensee" is defined in Section 2(k) of the 1903 Act, Section 2(h) of the 1910 Act and under Section 2(6) of the 1948 Act. These definitions are reproduced hereunder for immediate reference:-

<u>The 1903 Act</u>

> *"2(k) "Licensee" means any person licensed under part II to supply energy;"*

<u>The 1910 Act:</u>

> *"2(h) "Licensee" means any person licensed under Part II to supply energy;"*

The 1948 Act:

> *"2(6) "Licensee" means a person licensed under Part II of the Indian Electricity Act, 1910 (9 of 1910) to supply energy or a person who has obtained sanction under Sec.28 of that Act to engage in the business of supplying energy but, the provisions of the Sec.26 or 26A of this Act notwithstanding, does not include the Board or a Generating Company;"*

The term "bulk Licensee" is defined in Section 2(3) of the 1948 Act and the said definition is reproduced:-

> *"2(3) "bulk-licensee" means a licensee who is authorized by his license to supply electricity to other licensees for distribution by them;"*

24. The concept of a "bulk licensee" has to be viewed in the light of Clause IX of the Schedule to the 1910 Act. Clause IX of the Schedule to the 1910 Act makes provision for a licensee, if authorized by his license, to supply energy to other licensees for distribution by such other licensees. The said licensee is a "bulk licensee" and the other licensees to whom energy is supplied are "distributing licensees".

25. Section 3(2)(d) of the 1910 Act provides as under:-

> *"3(2)(d) a license under this Part-*
> *(i) may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and generally as to such matters as the State Government may think fit;"*

The provisions in the Schedule to the 1910 Act are deemed to be incorporated with and they form part of every License granted under Part II of the 1910 Act. The Schedule has to be read as Part of the statutory provisions of the Act and Rules. This is clear from Sec. 3(2), which reads thus:

> *"3(2) in respect of every such license and the grant thereof the following provisions shall have effect, namely:*
> *(f) the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every license granted under this Part, save in so far as they are expressly added to, varied or excepted by the license, and shall, subject to any such additions, variations or exceptions which the State Government is hereby*

*empowered to make apply to the undertaking authorized by the license:*
*Provided that where a license is granted in accordance with the provisions of Clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, in so far as such license relates to such supply, the provisions of Clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the license."(emphases supplied)*

26. Proviso to Section 3(2)(e) of the 1910 Act reads thus:

> *"The grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose."*

Here and now we hasten to point that this is only an enabling provision. There is nothing to show an additional license has been granted under Sec. 4(1)(e) by State of Maharashtra in favour of appellant or for that matter, the license of REL is not suggested to be additional License.

The scheme and provision of the 1910 Act and its Schedule are to be read as a whole and it has to be given its full meaning and not a restricted meaning as sought to be advanced on behalf of Tata Power. The construction placed on the terms of License by Tata Power is not acceptable as it is an attempt to strain and strangulate the plain language of the License its terms and conditions.

27. It is not as if only one type of licensee, alone is contemplated under the 1910 Act, there is yet another license to be granted under Part III of the Act and the same shall not be ignored.

28. Section 3 provides for grant of licenses. Sub section (2)(f) of Section 3 which is relevant and has a bearing reads thus:-

3(2)(f) "the provisions contained in the Schedule shall be deemed to be incorporated with and to form part of, every license granted under this Part, save in so far as they are expressly added to, varied or excepted by the license, and shall, subject to any such additions, variations or exceptions which the State Government is hereby empowered to make, apply to the undertaking authorized by the license:

Provided that where a license is granted in accordance with the provisions of clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the license."

29. Concedingly there has been no express addition or variation or exception in respect of the licenses granted in favour of Tata Power. Though State Government is empowered to make such additions, variations or exceptions in respect of license granted to the undertaking, yet concedingly there has been no variation or exception or addition in respect of the license granted to Tata Power. Therefore, it follows that the license granted under Section 3 is circumscribed by the provisions contained in the Schedule and the schedules stand incorporated in all the licenses, traced by Tata Power. Proviso to the clause (f) of sub section (2) of Section 3 mandates that where a license is granted in accordance with clause IX of the Schedule for the supply of energy to other licensees for distribution, then, in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VII and XII of the Schedule shall not be deemed to be incorporated in the license. As a corollary in respect of license granted other than clause IX, it is obvious, other clauses in this Schedule shall stand incorporated in the license. Apart from Section 3 Part III of the Act, namely, Section 28 enables the State Government, to authorize other than a licensee, to engage in supplying power to public. This is in addition to part II of the Act.

30. The Indian Electricity Act, 1910, in no uncertain terms provides that PROVISIONS IN THE SCHEDULE TO BE DEEMED TO BE INCORPORATED WITH AND TO FORM PART OF EVERY LICENSE GRANTED UNDER PART II, so far as ordered to be varied or excepted. Clause IX of the Schedule is in respect of "bulk licensees", who is authorized by which license to supply energy to other licensees for distribution by them, referred as distributing licensees. The privileges and obligations of the bulk licensees as well as the distributing licensee, to whom the bulk licensee is authorized to supply energy, is in terms of Clauses (a) (b) of Clause IX. The very heading of Clause IX is "SUPPLY

BY BULK LICENSEES". In terms of proviso to Clause (f) of Sub Sec (2) of Section 3, it follows that provisions of clauses IV, V, VI, VII, VIII & XII of this Schedule, shall not be deemed to be incorporated with respect to the bulk licensee. Hence it follows that what has been granted to Tata Power is only a "Bulk License" in so far as the area to which REL has been licensed to distribute.

31. In the case on hand, the repeated license or renewals granted in favour of Tata Power defines the expression "licensees", "other licensees" as here under:-

> "The expression "the Corporation" shall mean the Municipal Corporation of the City of Bombay for the time being.
>
> The expression "other licensees" shall mean any person or persons other than the licensees, at the date of this license duly authorized by license under the Act to supply energy to the public within the area of supply or who may hereafter be authorized by license to generate and supply energy for the purpose of traction on the tramways of the Bombay Electric Supply and Tramways Company Limited."

The purpose of supply in terms of the license finds place in clause VI of the license. The license also prescribes the area and the rates to be charged.

32. Nextly, it is to be mentioned that there were orders by the State Government of Maharashtra extending the areas, but while extending the areas, it has been stipulated that the licensees shall not be entitled to supply energy to any consumer except with a written consent of the Government given after consulting the existing licensees or permit holders under Section 28 of the Indian Electricity Act, 1910. In other words, Tata Power is not entitled to supply energy to any consumer other than such licensees or permit holders within their respective areas. This is an important factor which has been rightly highlighted by REL and lost sight by MERC and the learned counsel appearing for Tata power.

33. The extension granted in favour of Tata Power on 26th of February, 1942 with respect to areas also stipulated that Tata Power shall not be entitled to supply energy to any consumer other than such licensees in bulk within their respective areas of supply. On 23rd October, 1964, the expression "other licensee" has been amended and it reads thus:-

"The expression "other licensees" shall mean any person or persons (other than the licensees) who are duly authorised by a license for the time being in force under the Act to supply energy to the public within the area of supply of the Licensee or some part thereof and includes the Maharashtra State Electricity Board."

34. Clause 5 of the earlier licenses have been substituted by amendment with respect to purposes of supply and it proceeds thus:-

"Purposes of supply-

(1) Subject to the provisions of this license, of the Act, of the Electricity (Supply) Act, 1948, and of the Rules threunder, energy shall be supplied under this license for all purposes including supply to other licensees for their own purposes and in bulk: Provided that the licensees shall not be under obligation to supply energy in bulk to other licensees for the purpose of enabling such other licensees to supply any consumer whose maximum demand exceeds 250 KVA, except that in the case of the undermentioned other licensees the maximum demand limit shall be:-
300 KVA for a consumer in the area of supply of the Thana Electric Supply Company Limited.

1,000 KVA for a consumer in the area of supply of the Bombay Suburban Electric Supply Company Limited.

5,000 KVA for a consumer of the Maharashtra State Electricity Board.

These demand limits shall, in the case of a factory, be the total requirements of the consumer, estimated on the basis of plant and machinery to be installed in his factory premises for meeting his full production schedule as envisaged in his industrial license at the time he begins operation and not on the basis of the load at which he begins to operate, nor on the basis of future expansion which may result in amendments to his industrial license.

These limits are open to amendment by the Government, when circumstances so warrant, generally or individually in respect of the abovementioned other licensees in consultation with the licensees, and the amendments so made shall be notified by government in the Government Gazette. The Licensees may, however, with the written

consent of the Government suppy energy in bulk to the other licensee, mentioned above for enabling them to supply any person whose demand exceeds the limit specified above or as amended and so notified in the Gazette.

(II) The energy supplied under this license to any consumer for power may be used by such consumer for lighting his premises provided that the energy used by such consumer for such lighting purposes shall not in any year exceed twenty per centum of the total amount of energy supplied to such consumer."

35. The Maharashtra Government, in all the licenses, granted and renewed, has excluded all the clauses in Schedule with respect to the license granted under clause IX. The material portion of 1964 License reads thus:-

"Exclusion from License of certain clauses in Schedule to Act-

The provisions contained in clauses IV, V, VII, VIII and XII of the Schedule to the Act shall be excepted from incorporation with and forming part of this license; and the other provisions contained in the said Schedule shall also be excepted from incorporation with and forming part of this license insofar as they are inconsistent with the terms, clause VI shall also be excepted in respect of consumers referred to in clause 5(1) of this license making a demand less than the limits specified therein."

36. The Andhra Valley (Hydro-Electric) Predecessor of Tata Power was granted license on 3rd April, 1919. The purposes of 1919 License, as set out in the License reads thus:-

"5. Unless herein otherwise expressly provided energy shall be supplied under this license only –
(I) For power-
(a) To other licensees for their own purposes and in bulk; provided that the ….

(II) For lighting and general purposes other than power including the supply of energy in bulk to other licensees for distribution by them-

The energy supplied under this license to any consumer for power may be used by such consumer for lighting his premises, provided that the energy used by such consumer for such lighting purposes shall not in any year exceed twenty per centum of the total amount of energy

supplied to such consumer and save as aforesaid, the Licensees shall not supply energy for lighting purposes except by agreement with the Bombay Electric Supply and Tramways Company, Limited.

(III) In the event of any difference or dispute arising between the licensees and the Bombay Electric Supply and Tramways Company Limited, by reason of any objection by the latter Company raised in any case of supply made by the Licensees under sub-clause (I) (b) or sub-clause (II) of this clause or in regard to the interpretation of the terms of any part of this clause, such dispute shall be referred to an Arbitrator appointed by the Government on the application of either party and the decision of such Arbitrator shall be final.

(IV) No restriction imposed upon the Licensees by sub-clauses (I)(b) and (II) of this clause shall be applicable to supply of energy given in any portion of the area of supply other than the City of Bombay as defined in clause (a) of the First Annexure."

37 Clause 15, 1919 License, which is relevant, reads thus:-

"15. The provisions contained in Clauses IV, V, VI, VII, VIII and XII of the Schedule to the Act shall be excepted from incorporation with and forming part of this license; and the other provisions contained in the said Schedule shall also be excepted from incorporation with and forming part of this license in so far as they are inconsistent with its terms."

The 1910, 1907, 1919 and 1921 Licenses were amended with respect to the area of supply as well as with respect to the expression "other licenses". So also purpose of supply as well as the exclusion of clauses IV, V, VI, VII, VIII & XII of the Schedule. Again on 7th December, 1978, at the instance of Tata Power, certain amendments proposed were notified in the licenses already granted in favour of predecessors with respect to area of supply, purpose of supply and in respect of consumers of Maharashtra State Electricity Board.

38. The License issued to Nila Mula Valley (Hydro-Electric) License, 1921, is also identical to the other three licenses in every respect and the same has also been amended from time to time identically. The four licenses, under which Tata Power claims privileges inclusive of its claim to distribute in retail are identical from its inception and amended from

time to time identically. On a reading of the Licenses, as amended from time to time, with respect to the purpose, area of supply and the definition of "licensee" as well as "other licenses", it is amply clear that the Tata Power has been conferred with privilege of supplying power in bulk to other licensees for distribution.

39. In other words, when all the licenses granted in favour of Tata Power squarely falls within clause IX and when clauses IV, V, VI, VII, VIII and XII are excluded, it follows automatically that Tata Power has been conferred with a privilege under the licenses to supply power in bulk to other licensees for distribution, subject to the exception, if any, set out in the very licenses granted in their favour. We have already extracted the exceptions under the heading "purpose". It follows that Tata Power is entitled to supply energy only with respect to the purposes enumerated in their license and only as a bulk licensee, to other licensees like REL within their respective area of license granted in their favour for distribution. On a conjoint reading of the licenses, the amendment there of, the definitions and the admitted fact that Tata power has not been distributing power in retail to customers in the areas to which the REL has been granted license, we are of the considered view that Tata Power could only supply power in bulk to other licensees, not in retail, as claimed by it. The persuasive and attractive arguments advanced by Mr. Khambata, with erudition are not acceptable to us.

40. It is seen that Reliance has not placed a copy of license in its favour, so also the contract entered between the bulk licensee, namely, the Tata power and the distribution licensee, viz., REL, has not been placed before MERC or before us. It is stated, licenses and the contract are lost and not traceable. It is clear from the contentions that, all that we are called upon to decide is, as to what is the nature and scope of license which has been granted in favour of Tata Power and its predecessors. We are of the considered view and we hold that Tata Power is a bulk licensee as its license falls under clause IX of the Schedule read with Section 3 of the Indian Electricity Act, 1910.

41. Being a bulk licensee, it is obliged to supply power to the distribution licensee like REL. We hold that Tata power cannot claim that it is also entitled to a privilege of supplying the power in retail, over the area to which REL holds a distribution license. That apart concedingly, Section 3(2)(e) enables the State Government to grant additional license to another within the same area of supply for a like purpose. The said sub section reads thus:-

> "(e) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of license to another person within the same area of supply for a like purpose;"

42. It is not the case of Tata power, a license has been granted in its favour for distribution in terms of Section 3(2)(e), for the purpose of distribution has been granted in its favour in addition to the distribution license of REL at any point of time. Concedingly no such license has been granted nor such license has been granted as admitted by Tata Power. It is not as if REL's license came to issued under Sec 3(2)(e).

43. One of the persistent contentions advanced and resisted, just deserves to be mentioned for being rejected. Mr. D.J. Khambata, learned counsel appearing for Tata Power, in his usual, cool, indomitable style and persuasiveness sought to contend that even as a retail distributor Tata Power has its choice to select its consumers and it is not an universal obligation of Tata Power to supply to all those in the area who apply for connections and the universal obligation is on REL to supply power without discrimination. This contention is highlighted and rightly resisted by vociferous, Mr. Bhatt, the learned counsel for REL, demonstrates the hallowness of the plea of being a retail licensee, put forward by Tata Power. The plea advanced on behalf of Tata Power in this respect is nothing but farce and deserves to be rejected. We find there is merit and force in the Point made by REL.

44. The construction placed by the Maharashtra Electricity Regulatory Commission on the licenses granted in favour of Tata Power and its predecessors, in our considered view can't be sustained and it is not as if that Tata Power holds bulk as well as retail license over the same area to which REL has been granted distribution license. Such construction placed by Commission cannot be sustained. REL admittedly holds a distribution license for the area from inception and for such distribution, REL is being supplied by Tata Power as a bulk licensee. Interpretation placed on the license and reliance placed upon by the Tata Power, in support of its claim, cannot be sustained as it runs counter to the very license conditions and statutory provisions of the Act. The privileges which have been granted in favour of Tata Power from time to time and its predecessors, as reflected by the licenses, alone could be sustained and not the claim of Tata Power that it is entitled to engage in the distribution of power directly to consumers in retail. Such a plea runs counter to the terms of very licenses. Much has been pointed out with respect to the expression "for all purposes". In our view the expression "for all purposes" mean and refer to the use of power by the consumers to whom retail licensee supply power, to whom the bulk supply is made by the Tata Power. Also we draw our conclusion on the strength of the Pronouncement of the Hon'ble Supreme Court referred above, viz, Amalgamated Electricity Co. Ltd. Vs. N.S. Bathena, AIR 1959 SC 711:1959 Supp(2) SCR 213 and Mysore State Electricity Board Vs. Bangalore Woolen, Cotton and Silk Mills Ltd., AIR 1963 SC 1128: 1963 Supp (2) SCR 127.

45. Clause IX in the Schedule appended to the Indian Electricity Act, 1910 which provides for supply by bulk licensees, as incorporated in the licenses of Tata power and its predecessors, clinchingly establish that Tata Power is only a bulk licensee and it has no privilege to supply in retail or distribute power, as the other schedules have been excluded, in the areas where REL has been authorized to distribute power. It is conclusive by virtue of the deeming incorporation of the clause in terms of license condition, namely, clause IX, read with Section 3(2)(f). Hence,

the Tata Power could claim only a license to supply in bulk to other licensees, namely, REL which is a licensee as defined in Section 2(h) and as incorporated in licenses.

46. The Schedule appended to the Act is part of the Act which the legislature has incorporated, clause (f) of sub section (2) of Section 3 mandates that the Schedule is deemed to be incorporated and to form part of every license granted under part II for interpretation is based upon the following dictas of Hon'ble Supreme Court.

In Union of India Vs. Rajiv Kumar, (2003) 6 SCC 516: AIR 2003 SC 2917, it has been laid down thus:

"It is a well-settled principle in law that the court cannot read anything into a statutory provision or rewrite a provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute or any statutory provision is the determinative factor of legislative intent of policy-makers. Words and phrases are symbols that stimulate mental references to referents."

47. In Shiv Shakti Coop. Housing Society Vs. Swaraj Developers, (2003) 6 SCC 659: AIR 2003 SC 2434: (2003) 2 KLT 503, it has been held thus:

"It is a well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate material references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (Para 19)

The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution or words or which results in rejection of words as meaningless has to be avoided. (Para 19)"

48. The learned counsel, Mr. D.J. Khambata, with ingenuity and persuasiveness, has been referring to the license and in particular "for all purposes" and claimed that it refers to the bulk licensee while contending such bulk licensee is authorized to supply energy for all purposes. This interpretation advanced by the learned counsel cannot

be sustained. Such interpretation, if accepted, will lead to anomalous situation. As already pointed out, it is not the case of Tata Power that it was granted distribution license over the area for which REL has been granted as an additional license or vice versa in exercise of power conferred under Section 3(2)(e) of the Indian Electricity Act, 1910. In our view, the word "bulk licensee" appears only in the schedule and in part II clause IX, and the said clause alone governs the license granted in favour of Tata Power read with Section 3 of the Act.

49. Rules have been framed under the Indian Electricity Act, initially during the year 1937 and subsequently, during the year 1956 in exercise of powers conferred by Section 37 of the Indian Electricity Act. Section 37 confers power on the Central Electricity Board to make rules and prescribe the form of application for licenses, etc., to be granted under part II. The Indian Electricity Rules 1956 was published in June 1956 by the Central Electricity Board. The said rules are applicable with respect to the grant and removal of grant of licenses under part II. Further, it has been pointed out neither the Maharashtra Government nor the other authorities have chosen to issue or renew of license in terms of chapter III of the rules. According to chapter III of the rules, conditions in the schedule to the Act are also conditions to be imposed. Annexure III of the rules prescribed the draft license under Section 3 of the Indian Electricity Act, 1910 prescribes the format. Annexure VI is a license issued in terms of rule 27 of the 1956 rules. However, we are not concerned with the details of conditions set out therein. The said 1956 Rules which was in force during the relevant period has been lost sight of, the effect of it is well known.

50 As a result of the above discussions:-

(A) On the point (i) & (ii), we hold that Tata Power has not been granted license to undertake retail distribution of electricity in the area within which REL has been distributing power in retail to customers directly. The point is answered in favour of REL and

against Tata Power. The order and findings recorded by the Regulatory Commision are set aside.

It is clear that Tata Power has licenses only to undertake bulk supply to licensees like REL as contended by REL. Points (i) & (ii) are answered in favour of REL and against Tata Power.

(B) On the third point, since we have already held that Tata Power is not a grantee of license to distribute power but only a license to supply power in bulk to other licensees, the directions and the findings recorded in this respect by the MERC are set aside.

(C) On the fourth point, we hold that Tata power was not undertaking retail distribution of power but was only undertaking distribution of power in bulk to licensees prior to the differences that arose between REL and Tata Power.

(D) On the fifth point, we hold that there could be more than one distribution licensee in terms of The Electricity Act, 2003 as seen from proviso to sub section (1) of Section 62, which directs that appropriate Commission has to fix only maximum ceiling of tariff for retail sale of electricity in case of distribution of electricity in the same are by two or more distribution licensees. That apart, Sixth proviso to Section 14, enables the appropriate Commission to grant a license to two or more for distribution of electricity in the same area, subject to the applicant applying with all requirements for grant of license. The same proviso also mandates that no application for distribution license shall be refused on the ground that there already exists a licensee in the same area for the same purpose. We make it clear that there may not be any requirement to issue a restraint Order against Tata Power, as we have held that Tata Power has no license to supply energy as a DISCOM to the consumers. However, it is needless to add that in

case of any future violation, it is well open to REL to work out its remedies. The fifth point is answered accordingly.

(E) On point seven, as a whole, we allow the Appeal No.31 of 2005 preferred by Reliance Energy Limited and on point eight, we dismiss the Appeal No.43 of 2005 preferred by Tata Power Company Limited.

51. Before parting with the case, we express our anguish against both parties in engaging themselves in a spate of litigations to spite the other, while they could usefully serve power to consumers of Mumbai as leading and reputed generators, bulk suppliers and DISCOMS to the power starved city of Mumbai and suburban areas and also make more profits by such service.

52. We conclude, while quoting the great jurist:

**"Citizens were ranked in the society, not by wealth or power but by virtue and character they possessed" – Nani Palkhiwala.**

Pronounced in open Court on this 22nd day of May 2006.

**(Mr. H. L. Bajaj)**
**Technical Member**

**(Mr. Justice E Padmanabhan)**
**Judicial Member**