IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 447 OF 2024 (DFR NO. 131 OF 2024)

Dated: 10th October, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

1. CITY CORPORATION LIMITED
Through its Managing Director
City Chambers, 917/19A, F.C. Road,
Pune, Maharashtra – 411004. … Appellant

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION (MERC)
Through its Secretary,
World Trade Centre, Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai – 400005. ... Respondent No.1

2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED
Through its Chairman and Managing Director
Plot No. G – 9, Prakashgad – 5th Floor,
Station Road, Bandra (East),
Mumbai – 400051. ... Respondent No.2

Counsel on record for the Appellant(s)	:	Dipali Sheth Shubham Mehta
Counsel on record for the Respondent(s)	:	Shashwat Kumar Rahul Chouhan Shikha Sood Raghav Kapoor for Res.2

J U D G M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

1. The present Appeal is filed against the order passed by the Maharashtra Electricity Regulatory Commission ("MERC" for short) in Case No. 198 of 2022 dated 20.04.2023. The Appellant herein filed the Petition, in Case No. 198 of 2022 before the MERC, under Sections 14, 86(1)(f) and 86(1)(k) of the Electricity Act, 2003, seeking reliefs in terms of the Distribution Franchisee Agreement ("DFA" for short) dated 16.10.2010 executed with the Maharashtra State Electricity Distribution Co. Ltd. ("MSEDCL" for short) and the subsequent renewals thereafter, read with the Orders passed by the MERC in Case Nos. 62 and 75 of 2007 dated 24.05.2010 and 01.06.2010 respectively.

II. A BRIEF BACKGROUND:

2. The facts, necessary for adjudication of this appeal, are that, while determining the ARR and tariff of a licensee for FY 2005-2006 and 2006-2007, MERC had, by its order in Case Nos. 25 and 53 of 2005 dated 03.10.2006, directed that HT industrial and commercial category consumers, undertaking sub-distribution to mixed loads, would have to either operate through a franchisee route or take individual connections under the relevant category. Aggrieved thereby, the Maharashtra Chamber of Commerce, Industry & Agriculture filed Case No. 75 of 2007 seeking clarifications, from the MERC, of its earlier orders. The Commission disposed of Petition No. 75 of 2007 on 01.06.2010 holding that, in the light of its earlier order dated 24.05.2010 in the matter of MSEDCL's Petition for in-principle approval of the MoU route for selection of Distribution Franchisees (Case No. 62 of 2009), the licensee could not refuse to appoint/ enter into a franchisee agreement.

3. Aggrieved thereby, two appeals were preferred before this Tribunal in Appeal Nos. 155 and 156 of 2010. The challenge in the two Appeals, among others, was to the directions issued by the Commission to all HT industrial and commercial category consumers, undertaking sub-distribution to mixed loads through a single point supply, to operate either through a franchise route, or take individual connection, within six months from the date of the order. The Appellants contended that such a direction was issued by MERC in a tariff petition filed by one licensee, without calling for objections and without examining the technical/ practical feasibility or legal aspects; and, consequent upon discontinuation of single point supply, the Commission did not amend the Standard of Performance as well as related Regulations, though the Standard of performance 2005 Regulations had made it mandatory for every consumer, having 186 Hp connected load, to apply for a separate transformer, metering kiosk, HT transformer, utility panel, etc.

4. It is in this context that this Tribunal, in **K. Raheja Corporation Pvt. Ltd. Vs. Maharashtra Electricity Regulatory Commission: (2011) SCC Online APTEL 105,** held that single point supply should be done away with, for all times to come, by making proper arrangements in the alternative as suggested by the Commission; and the Commission should enforce its order within a period of six months i.e. the parties get six months' time for implementation of the Commission's order. The Appeals were accordingly dismissed.

5. Even before the Appeals in **K. Raheja Corporation** were decided by this Tribunal, MSEDCL had filed a petition, under the seventh proviso to Section 14 of the Electricity Act, 2003, before the MERC in Case No. 62 of 2009 seeking in-principle approval of the MoU route for selection of Distribution Franchisees and Bulk Supply Tariff for the areas to be developed under Township Policy/ SEZ Policy/ Industrial Policy/ I.T. Policy,

etc. The reliefs sought by MSEDCL, in the said Petition, were for the Commission to (1) examine the proposal for a favourable dispensation; (2) approve the MoU route for appointment of distribution franchisees for the area to be developed under the Township Policy/ SEZ Policy/ industrial Policy/ I.T. Policy/ any planned development etc; (3) agree and approve or modify on the methodology to determine the Bulk Supply Tariff for Mixed Loads as well as Industrial Load wherein such Central/ State Government policies are applicable, to be charged to the Distribution Franchisee for the power to be supplied at a single input point; (4) approve the Bulk Supply Tariff as determined by MSEDCL as an interim measure till final orders are issued for Bulk Supply Tariff to be levied to the Franchisee by the Commission; (5) determine any commercial terms and conditions for carrying out the Distribution Franchisee Activities; and (6) provide directions under which the Distribution Franchisee Agreement needs to be finalised by MSEDCL and the Distribution Franchisee.

6. The Appellant was one of the parties referred to in the order passed by MERC in Case No. 62 of 2009, and had submitted a representation, along with several other Developers, to MSEDCL which had placed such representations on record before the MERC.

7. In its order, in Case No. 62 of 2009 dated 24.05.2010, the MERC observed as under:

> *"7. Having heard the Parties and after considering the material placed on record, the Commission is of the view as under:*
>
> *i) As regards MSEDCL's prayer for approval of the MoU route for appointment of Distribution Franchisee, the Commission holds that it is for the Distribution Licensee to adopt any method for selecting the Distribution Franchisee on such terms and conditions as it deems fit, and the Commission has no jurisdiction to approve either the process or the Party selected*

by the Distribution Licensee. However, as expressed by the stakeholders, the Commission is of the view that ideally, the Distribution Franchisee should be selected and appointed through a competitive bidding process to ensure complete transparency and competition.

ii) Under the particular circumstances brought out by MSEDCL in the Petition that in respect of the Developer of the Township/IT Park, etc., who has already invested in the distribution infrastructure for the area under consideration, it may not be possible to appoint the Distribution Franchisee through a Competitive Bidding process, as it would amount to treating the developer who has already invested capital in the area at par with another Party who has not invested any capital in that area. Further, the issues of asset value and transfer price, etc., would also have to be addressed under such a situation.

The Commission, therefore, recognises that in such cases, appointment of Distribution Franchisee through a Competitive Bidding process may not be feasible and MSEDCL may initiate the MoU route for appointing the Distribution Franchisee. However, while doing so, MSEDCL, as a Distribution Licensee, should take care to protect its own interests and that of its direct consumers, as well as the interest of the consumers within the Distribution Franchisee area, who are also primarily its consumers.

iv) MSEDCL has proposed the terms and conditions of the Distribution Franchisee Agreement, which is a matter to be decided by each Licensee. However, the Commission feels that every Distribution Licensee should evolve a Distribution Franchisee Agreement, which should be common to all its

Franchisees selected through MoU route, and hence, non-discriminatory. Also, a Distribution Franchisee cannot refuse if either the Developer or one of the Group of consumers comes forward to become a Franchisee.

The Commission further directs that the dispensation to become a Franchisee of the Distribution Licensee in the State will be available to all the following categories:

a) Residential colonies
b) Commercial buildings
c) Multiplexes and malls
d) Townships
e) Other single point consumers like Railways, Defence, etc.

The period of Franchisee Agreement should neither be less than five (5) years nor longer than the validity of the license period of the Distribution Licensee. The Distribution Licensee should prescribe and obtain quarterly returns from the Distribution Licensee in the following format:

Consumer Category	*Number of Consumers*	*Sales in MU per month*	*Amount billed in Rs. Lakh*	*Amount collected in Rs. Lakh*

The Licensees may also prescribe and collect information such as interruptions, billing disputes, etc., to monitor and ensure the discharge of its duties regarding Standards of Performance, Consumer Satisfaction, etc.

v) Over the past two to three years, the Commission has come across similar problems primarily in the case of existing Commercial and Office Complexes regarding supply at single point for distribution to mixed loads. In such cases, the

distribution licensees have neither installed the individual meters nor the subdistribution of electricity is being regulated in any manner. Though the Commission has directed the licensees to formulate a practical solution for this problem, there has not been any significant progress. Hence, the Commission is of the view that the practical solution being considered in the present case should be adopted for all such cases of supply at single point for further distribution to mixed loads, wherein one agency can be appointed as the Distribution Franchisee through the MoU route, and can supply to the individual users within the complex. This will ensure that all such cases will come squarely within the provisions of the EA 2003, which is not the case now.

vii) As regards availability of Open Access to the Distribution Franchisee to source power, the Commission holds that the right of eligible consumers to Open Access cannot be fettered in any manner irrespective of whether the Open Access is being sought for base power requirement or for sourcing the additional power to mitigate load shedding."

8. In Para 7(i), as afore-extracted, the Commission held that it was for the Distribution Licensee to adopt any method for selecting the Distribution Franchisee on such terms and conditions as it deems fit; the Commission had no jurisdiction to approve either the process or the party selected by the Distribution Licensee; and it was, however, of the view that, ideally, the Distribution Franchisee should be selected and appointed through a competitive bidding process to ensure complete transparency and competition. In Para 7(ii), the Commission observed that, in respect of the Developer of the Township, who had already invested in the distribution infrastructure for the area under consideration, it may not be possible to appoint the Distribution Franchisee through a competitive bidding process.

9. In Para 7(iv), the MERC, while taking note of the fact that MSEDCL had proposed the terms and conditions of the Distribution Franchisee Agreement, observed that it was a matter to be decided by each Licensee; however, every Distribution Licensee should evolve a Distribution Franchisee Agreement, which should be common to all its Franchisees selected through the MoU route and, hence, non-discriminatory; and a Distribution Franchisee cannot refuse if either the Developer or any one of the Group of consumers came forward to become a Franchisee. The Commission further observed that the period of the Franchisee Agreement should neither be less than five years nor longer than the validity of the licence period of the Distribution Licensee.

10. The Appellant entered into a Franchisee Agreement with MSEDCL on 16.10.2010 for a duration of one year, and subject to the approval of the MERC. Clause 14 the said Distribution Franchisee Agreement ("DFA") stipulated that Distribution losses beyond 8% would not be allowed, the same would be required to be made good at the average cost of supply, and the same would be recovered from the monthly payments to the Distribution Franchisee. The Franchisee was also required to make efforts to reduce losses, and increase collection efficiency. Clause 16(B) of the DFA required MSEDCL to pay the Franchisee, for the Operation & Maintenance of network for Township, at 7.5% of normative revenue collected excluding add-ons such as FAC, ED etc.

11. A second DFA was entered into on 25.03.2013 in terms of which the cap on Distribution Losses was fixed at 5% and the Reimbursement Charges was also fixed at 5%. This Agreement was also valid for a period of one year subject to approval of the MERC. A third DFA was entered into on 27.05.2014 which provided for a cap on the Distribution Losses at 3% and the Reimbursement Charges at 4%. This Agreement was also valid only for a period of one year from the date of signing, and was subject to

approval of the MERC. The last of the Distribution Franchisee Agreements, entered into between the Appellant and MSEDCL, was on 02.11.2015 which was valid for a period of three years upto 26.05.2018. This Agreement provided for a cap on Distribution Losses at 3%, and for payment of Reimbursement Charges at 4%. Clause 20 of the said Agreement related to Governing Law & Dispute Resolution, and provided that any dispute, arising out of compliance/ non-compliance of this agreement, shall be subject to the jurisdiction of Courts in Mumbai.

12. Even before the validity of the afore-said Distribution Franchisee Agreement expired on 26.05.2018, the Board of Directors of MSEDCL passed a resolution, in its meeting held on 20.05.2016, prescribing the criteria for maximum allowable Distribution Losses and Reimbursement Charges. For urban township areas, the Distribution Losses were capped at 2%, and Reimbursement Charges at 1%. The said Board Resolution further required the Distribution Franchisee to ensure collection efficiency, of the Distribution Franchisee area, at 100% for each quarter or there should be no arrears while producing the claims for Reimbursement Charges. As these conditions were found to be unduly onerous, the Appellant submitted representations to MSEDCL, but to no avail.

13. By their letter dated 26.09.2016, MSEDCL, while drawing the attention of the Appellant to the afore-said Board Resolution, informed them that it had become necessary to revise/ modify the existing agreement as per MSEDCL new Board Resolution so that the modifications were incorporated in the agreement executed with the Appellant. The Appellant was called upon to give its consent to the revision/ modification of the Agreement within seven days. The appellant claims to have expended nearly Rs. 176.33 Crores to set up the distribution infrastructure in its township. They invoked the jurisdiction of the MERC by way of a petition which culminated in the MERC passing an order which is impugned in the

present appeal. While refusing to consider the contentions urged by the appellant on the ground that it lacked jurisdiction to adjudicate a dispute between a Distribution Licensee and its Franchisee, the MERC however issued directions to both parties to immediately continue the DFA, or else stop the arrangement completely.

14. Despite expiry of the earlier DFA on 26.05.2018, and though no fresh Distribution Franchisee Agreement was entered into thereafter, MSEDCL has continued to supply electricity to the Appellant till date which, in turn, has been making payments, of the amount collected by it from the consumers toward tariff, periodically to MSEDCL.

III. PETITION FILED BY THE APPELLANT BEFORE MERC:

15. In the Petition filed by them before the MERC, in Case No. 198 of 2022, the Appellant herein sought the following reliefs:

(i) Direct MSEDCL to change and increase the percentage of DL to five percent (5%) and also increase the allowable RC to six percent (6%) to Urban Township Area MoU based Distribution Franchisee and accordingly revise the supplementary bills dated March 05, 2021 and May 18, 2022;

(ii) Direct MSEDCL to withdraw the demand penalty/ charges levied on the difference between recorded maximum demand and 50% of the sanctioned load on the feeder;

(iii) Direct MSEDCL to credit/ consider the benefit of 5% prepaid incentive given to the residents of the Township to the Petitioner amounting to Rs.2,54,47,416/- (Rupees Two Crores Fifty Four Lakhs Forty Seven Thousand Four Hundred and Sixteen only) along with interest @18% p.a. from the due date till payment or realization thereof;

(iv) Direct MSEDCL to pay an amount of Rs.12,56,05,021/- (Rupees Twelve Crores Fifty Six Lakhs Five Thousand Twenty One only) towards pending invoices for distribution franchisee along with interest @18% p.a. from due date till payment or realization thereof.

IV. IMPUGNED ORDER OF MERC DATED 20.04.2023:

16. In the order, impugned in this appeal dated 20.04.2023, the MERC noted the Appellant's submission that the Distribution Franchisee Agreement ("DFA" for short) was executed pursuant to the orders issued by the Commission in Case Nos. 62 and 75 of 2007; however, MSEDCL had been unilaterally changing the terms of the DFA which were not only unrealistic but also not in consonance with the Orders and Regulations of the Commission in respect thereof; the Appellant was mainly aggrieved by MSEDCL's insistence for further reduction, of the unrealistic condition relating to Distribution Losses, to 2% and reduction in the Reimbursement Charges to 1.5%; and the Appellant had also raised its grievance regarding non-receipt of the pre-paid metering incentives passed on to the consumers, levy of demand charges penalty and non-receipt of the payment due under the Distribution Franchisee Agreement.

17. After considering Section 2(27), the 7th proviso to Section 14, Section 86(1)(f) and Section 86(1)(k) of the Electricity Act, the MERC observed that the provisions of the Electricity Act do not confer any jurisdiction on the Commission to adjudicate a dispute between a Distribution Licensee and the Distribution Franchisee; M/s. Torrent Power Ltd. (which was the Distribution Franchisee of MSEDCL in Bhiwandi, Thane District) had approached the Commission seeking exemption from imposition of additional load shedding as suggested by MSEDCL; they had also sought re-classification of Bhiwandi Distribution Circle under the Load Shedding Protocol of MSEDCL; vide its order passed on 14.05.2007, the Commission had opined that the matter reflected an intra-party concern, which should

be resolved in accordance with the provisions of the distribution franchisee agreement; the Commission had further stated that a franchisee would have no locus standi to initiate proceedings before the Commission on such matters under the provisions of the Electricity Act as sought to be relied upon by the Petitioner therein; and, with the afore-said observations, the Commission had rejected the petition filed by M/s. Torrent Power Limited (TPL) as not maintainable.

18. In the Order, impugned in the present appeal, MERC further noted that the order of the Commission, rejecting the Petition as not maintainable, was challenged by M/s. Torrent Power Limited before APTEL in Appeal No. 105 of 2007 and, on 10.10.2007, APTEL passed the following order:

> *"As per the record, it appears that the Order has not been complied with by the MSEDCL and it has not considered the claim of the appellant, even though there is an improvement in the reduction of distribution loss in the Bhiwandi area. Obviously, the direction of the Commission has been violated, therefore, the appellant had a right to go before the Commission and point out that its order has not been implemented. In fact, any affected person including the appellant has a right to complain before the Commission in respect of violation of its directions and the infringement of the Electricity Act, 2003, and Rules and Regulations framed there under. It appears that perhaps the appellant did not specifically point out at the hearing that the Respondent-MSEDCL had violated the order of the Commission. In the circumstances, therefore, we hold that the Commission should hear the appellant."*

19. The MERC held, in the impugned Order, that the Distribution Franchisee can approach the Commission against the Distribution licensee only if the directions of the Commission had been violated, otherwise the Commission does not have an explicit jurisdiction under the Electricity Act to adjudicate disputes between the Distribution Licensee and the

Distribution Franchisee.

20. Thereafter, MERC noted the contents of its earlier order in Case No. 62 of 2009 dated 24.05.2010 and observed that, by the afore-said order, the method of selection of the Distribution franchisee had been left to the Distribution Licensees; the terms and conditions of selection of the Distribution Franchisee was also to be decided by the concerned Distribution Licensee, and the Commission had no role in such a selection process and the terms and conditions of such selection; the terms of the Distribution Franchisee Agreement was also required to be decided by the Distribution Licensees itself; however, it was suggested that there should be a common Distribution Franchisee Agreement to all its Franchisees, selected through the MoU route, to ensure that there was no discrimination among the Distribution Franchisees; it was not the case of the appellant that MSEDCL had committed any discrimination while entering into DFA with them; on the contrary, the appellant itself had pointed out that there were other similarly placed Distribution Franchisees; MSEDCL had also placed on record the Distribution Franchisee Agreements for other Distribution Franchisees wherein the conditions relating to Distribution Losses and the Reimbursement Charges had been stipulated in accordance with the Board Resolutions (Distribution Losses of 3% and Reimbursement Charges of 2% for M/s. Magarpatta Township Development and Construction Co. Ltd., Pune, the DFA executed on 31.05.2018; and Distribution Losses of 1% and Reimbursement Charges of 1% for M/s. The Manjiri Stud Farm Pvt. Ltd. (IT Single Building DF), Pune, DFA executed on 20.04.2017).

21. The MERC thereafter noted the submissions urged on behalf of the Appellant that, the permissible losses should either be equal to the average of the three best circles which had the least Transmission and Distribution Losses (T&D) Losses or to calculate the technical loss based on the load

flow study of the franchisee area, and additional 1% as commercial losses. The Commission, however, held that consideration of permissible losses, equal to average of the losses of three best circles of MSEDCL was the suggestion/ submission of MSEDCL in Case No. 62 of 2009, and there was no such direction of the Commission in this regard; and the Commission, in its earlier orders, had neither stipulated any such permissible Distribution Loss nor provided any such principle for arriving at the permissible Distribution Loss. The MERC further held that, while the condition imposed by MSEDCL for Distribution Losses of 2% and Reimbursement Charges of 1.5%, although at face value may look unreasonable, the Appellant was obligated to adhere to the terms and conditions of the agreements executed with MSEDCL which ensured the sanctity of the agreement/ DFA/ Contract, and Parties were required to honour their obligations under the contract.

22. The Commission concluded holding that it was satisfied that none of the earlier orders had been violated and, therefore, it did not get any jurisdiction to adjudicate the present matter; the DFA between the parties had expired way back in 2018, and the present arrangement was being continued without any formal agreement; there was no need to regularize the existing arrangement; and the Appellant and MSEDCL should immediately decide upon entering into a fresh agreement/ continuation of the DFA, else the existing arrangement should be stopped immediately, and the appropriate clause, relating to post termination of the DFA, should be invoked.

V. WRIT PETITION FILED BEFORE THE BOMBAY HIGH COURT:

23. Aggrieved by the afore-said order passed by the MERC, the Appellant herein filed WP No. 13555 of 2023 before the Bombay High Court. By its order, in WP No. 13555 of 2023 dated 12.02.2024, the Bombay High Court disposed of the Writ Petition granting liberty to the Appellant to file an appeal before this Tribunal under Section 111 of the Electricity Act, and

observed that, while deciding the issue of limitation, this Tribunal may take into consideration the pendency of the Writ Petition. While making it clear that it had not gone into the merits of the matter, the Bombay High Court, considering the alternate remedy which was available to the parties, and granted the Appellant liberty to avail the alternate remedy.

24. The Bombay High Court then noted the submission urged on behalf of the Appellant that they would file an appeal before this Tribunal within three weeks and observed that, considering the gravity of the issue which was involved, in as much as the Appellant had invested a substantial amount and was also supplier of electricity to the end consumers, the Appellate Tribunal should decide the appeal within a period of 6 weeks after the appeal was filed. While keeping the rights and contentions of both the parties open, the Bombay High Court stayed clause (ii) of the impugned order passed by the Commission which reads thus:

> *"2. The Petitioner and Maharashtra State Electricity Distribution Company Ltd. shall immediately decide upon entering into fresh agreement/ continuation of the Distribution Franchisee Agreement else the existing arrangement should be stopped immediately and appropriate clause related to post termination of the Distribution Franchisee Agreement shall be invoked."*

25. On the Appellant invoking the jurisdiction of this Tribunal by way of the present Appeal, this Tribunal, during the course of hearing on 04.07.2024, enquired from the Counsel for the Appellant as to how taking up an appeal of the year 2024 out of turn was justified, and as to how it was possible for their appeal, which had just been instituted, to be disposed of within six weeks, when time was yet to be granted for pleadings to be filed in the appeal. In response, Ms. Deepa Chavan, Learned Counsel for the Appellant, had submitted that the aforesaid directions, issued by the Bombay High Court, were not at the behest of either of the parties; they

were conscious of the time required for this Tribunal to dispose of first appeals preferred against orders passed by Regulatory Commissions all over the country; they were aware that it may not be possible to dispose of the main appeal, in which pleadings were not yet completed, within six weeks of its institution; they would move an application before the Bombay High Court requesting that the said portion of the order be deleted; and hearing of this application, to condone the delay in filing the appeal, be deferred by eight weeks. Acceding to her request, the matter was directed to be listed on 09.09.2014.

26. When the matter was listed on 09.09.2014, this Tribunal noted the Appellant's Counsel's failure to bring relevant facts to the notice of the Bombay High Court; that four voluminous records had been filed along with the appeal, a substantial part of which constituted documentary evidence; there were 2615 appeals pending before this Tribunal including appeals from the year 2014 onwards; taking up an appeal of the year 2024 for hearing out of turn would result in appeals of earlier years being kept pending; ordinarily, the Respondents in the appeals are given six weeks' time to file their reply, and the Appellant is given four weeks thereafter to file its rejoinder; and if time, as is usually given to the parties, is granted in the present case, this Tribunal would be violating the order of the Bombay High Court.

VI. SUBSEQUENT ORDERS OF THIS TRIBUNAL:

27. In the light of the directions of the Bombay High Court, this Tribunal deemed it appropriate to grant the Respondents two weeks' time to file reply and the Appellant three days thereafter to file rejoinder. Since the Bombay High Court had directed that the Appeal be disposed of within six weeks from 09.09.2024, Counsel on both sides were informed that they would be given 30 minutes each to complete their oral submissions on the next date of hearing; and that both the parties may file their written

submissions, not beyond three pages, before commencement of oral hearing. The appeal was directed to be listed on 30.09.2024.

28. Though 30 minutes time was given to the parties to put-forth their submissions, the submissions urged on behalf of the Appellant continued for a major portion of court working hours on 30.09.2024. The Respondents were partly heard on 30.09.2024 and on 01.10.2024, and thereafter judgment was reserved on 01.10.2024.

VII. RIVAL CONTENTIONS:

29. Elaborate submissions, both oral and written, were put-forth by Ms. Deepa Chavan, Learned Counsel appearing on behalf of the Appellant, and Mr. Buddy Ranganadhan along with Ms. Shikha Sood, Learned Counsel for the 2nd Respondent-MSEDCL. It is convenient to examine the rival submissions under different heads.

VIII. JURISDICTION OF THE STATE COMMISSION TO ADJUDICATE THE ISSUES INVOLVED IN THIS APPEAL:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

30. Ms. Deepa Chawan, Learned Counsel for the appellant, would submit that MSEDCL has contended that the jurisdiction of MERC to adjudicate disputes does not include a dispute between the appellant as a Distribution Franchisee and MSEDCL as the Distribution Licensee; MSEDCL seeks to contend that the Civil Court ought to decide infringement of the Single Point Supply (for short “SPS”) decisions of MERC and this Tribunal, when there is no DFA in existence between the parties since 2018; this Tribunal, in its order in Appeal No. 105 of 2007 dated 10.10.2007, held that any affected person including a Franchisee has a right to complain before the Commission for violation of its directions; MSEDCL has relied on orders passed by the MERC, particularly the order in Case No. 62 of 2009 dated 24.05.2010, to contend that MSEDCL may adopt the method for selecting

of a Distribution Franchisee. and decide the terms and conditions of the DFA; the Order dated 24.05.2010 deals with two types of Franchisees (i) covered by option under the SPS orders and referred as MoU Franchisee and (ii) others like Bhiwandi Distribution Franchisee wherein MSEDCL, pursuant to the tender process, created its own franchise; Para 3 (VII) and (VIII) of the order dated 24.05.2010 detail MSEDCL's submissions on MoU Distribution Franchisee arrangement, and reveals that MSEDCL did not inform MERC that it would decide Distribution Losses for the Distribution Franchisee area, independent of the MYT Regulations and Tariff Orders; the directions in Para 7 (ii) & 7 (v) apply to the case of the appellant; in Para 7 (iv), the MERC also gave guidelines relating to the terms and conditions for proposed DFAs; for instance, the duration of DFA had to be neither less than five years nor longer than the license period of the Distribution Licensee; this has selectively not been adhered to by MSEDCL; Para 7 (vii) permits the right of eligible consumers for Open Access which the MERC stated could not be fettered; however, MSEDCL has prohibited the same; and this is a clear infringement of the order dated 24.05.2010.

B. SUBMISSIONS OF MSEDCL:

31. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would submit that, since the Appellant did not invoke the jurisdiction of MERC under Section 60 of the Electricity Act, the question whether they had the jurisdiction to adjudicate the dispute raised in the petition was required to be considered only under Section 14, Section 86(1) (f) and Section 86(1) (k) of the Electricity Act; as per Section 2 (27) of the Electricity Act, a Franchisee is authorized by the Distribution Licensee to distribute electricity within a specific area; the franchisee operates under the framework established by the Franchisee Agreement, adhering to the tariff approved by the MERC; the 7th Proviso to Section 14 of the Electricity Act provides that a franchisee does not need to obtain a

separate license; the Distribution Licensee retains full responsibility and control over distribution of electricity, confirming the subservient/agent role of the franchisee; in other words, a franchisee is considered an agent of the Distribution Licensee, and not a deemed Distribution Licensee under the Electricity Act; needless to state that MERC has clarified that a consumer under a Franchisee Agreement remains a consumer of the Distribution Licensee, and all obligations rest with the Licensee; the Franchisees operate under the Licensee's control and are not regulated independently; with respect to the MoU route, the appellant claimed that MSEDCL contravened specific tariff orders related to the MoU-based selection of distribution franchisees; however, no concrete basis or rationale was provided to substantiate these claims; in terms of Clause 20 of the DFA, courts in Mumbai have jurisdiction to adjudicate disputes between the Distribution Licensee and the Franchisee; and the Appellant has not been able to show a single provision of the Electricity Act conferring jurisdiction on the Commission over a dispute between a Discom and its Franchisee.

C. ANALYSIS:

32. As conferment of jurisdiction is a legislative function, jurisdiction can neither be conferred on a court or tribunal with the consent of parties or by a superior court or Tribunal. (**Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).** A Tribunal, which is a creation of a Statute, has only the powers expressly conferred on it, or resulting directly from the powers so conferred. Acting otherwise goes to the very existence of the power. Statutory tribunals, set up under an Act of legislature, are creatures of the Statute, (**R.K. Jain v. Union of India, (1993) 4 SCC 119**), and should be guided by the conditions stipulated in the statutory provisions while exercising powers expressly conferred or those incidental thereto. (**Commissioner of Central Excise v. Sri Chaitanya Educational Committee, 2011 SCC OnLine AP 1078**). Statutory tribunals, created by

an Act of Parliament, have limited jurisdiction and must function within the four-corners of the Statute which created them. (**O.P. Gupta v. Dr. Rattan Singh, (1964) 1 SCR 259**). It is not open to the Tribunal to travel beyond the provisions of the statute. (**D. Ramakrishna Reddy v. Addl. Revenue Divisional Officers, (2000) 7 SCC 12**).

33. As these tribunals are required to function in accordance with the provisions of the Electricity Act, the restriction placed on the exercise of their jurisdiction, by the provisions of the said Act, cannot be said to interfere with their quasi-judicial functions under the Act. (**Tirupati Chemicals v. Deputy Commercial Tax Officer, 2010 SCC OnLine AP 1189**; **State of Telangana v. Md. Hayath Uddin, 2017 SCC OnLine Hyd 356).** Since the State Commission is a creation of the Electricity Act under Section 82(1), and a body corporate under Section 82(2) thereof, its jurisdiction is limited to those specifically conferred on it under the provisions of the Electricity Act, and not beyond.

34. The State Regulatory Commission exercises adjudicatory functions, and its tariff orders are both regulatory and quasi-judicial in nature (**BSES Rajdhani Power Ltd vs DERC: (Judgement of the Supreme Court in Civil Appeal No.4324 of 2015 dated 18.10.2022**). Such tribunals exercise limited jurisdiction (**S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252)** strictly in terms of the Electricity Act by which they are governed. Every tribunal of limited jurisdiction is bound to determine whether the matter, in which it is asked to exercise its jurisdiction, comes within the limits of its special jurisdiction, and whether the jurisdiction of such a tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it, and that statute also defines the conditions under which the tribunal can function, it goes without saying that, before that tribunal

assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. **(Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

35. The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act,2003, an Act of Parliament. Wherever jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and confer jurisdiction on it for, if they be not complied with, it would lack jurisdiction. (**Nusserwanjee Pestonjee v. Meer Mynoodeen Khan** [LR (1855) 6 MIA 134 (PC); **Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572).**

36. As it derives its powers from the express provisions of the Electricity Act, the powers, which have not been expressly given by the said Act, cannot be exercised by the State Regulatory Commission. (***Rajeev Hitendra Pathak* v. *Achyut Kashinath*, (2011) 9 SCC 541**). Quasi-judicial tribunals function within the limits of its jurisdiction, and its powers are limited. Its area of jurisdiction is clearly defined. (***Union of India* v. *Paras Laminated (P) Ltd.*, (1990) 4 SCC 453 : AIR 1991 SC 696**). An authority created by a statute must act under the Act and not outside it. As it is a creation of the statute, it can only decide the dispute in terms of the provisions of the Act. (***K.S. Venkataraman & Co.* v. *State of Madras*, AIR 1966 SC 1089; *Mysore Breweries Lt.* v. *Commissioner of Income-Tax*, (1987) 166 ITR 723 (KAR)**). The State Regulatory Commission can exercise jurisdiction only when the subject matter of adjudication falls within its competence, and the order that may be passed is within its authority, and not otherwise. (**Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium: 2007 Aptel 764; BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC OnLine APTEL 52).** Consequently, it is only when it is specifically

authorised by the Electricity Act, can the State Regulatory Commission entertain a petition from an entity which is statutorily entitled to file such a petition.

37. This aspect can be examined from another angle also. The chief distinction between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown, on the face of the proceedings, that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction, of superior courts of general jurisdiction, must show what other court has jurisdiction, so as to make it clear that exercise by the superior court of its general jurisdiction is unnecessary. This principle would squarely apply to Superior courts in India also. **(Halsbury's Laws of England (4th Edn., Vol. 10, para 713**; **M.M. Thomas v. State of Kerala, (2000) 1 SCC 666)**

38. Apart from the Supreme Court, the High Courts in India are also superior courts of record. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. **(Naresh Shridhar Mirajkar : AIR 1967 SC 1; M.V. Elisabeth v. Harwan Investment & Trading (P) Ltd. (1993) Supp (2) SCC 433: AIR 1993 SC 1014**; **M.M. Thomas v. State of Kerala, (2000) 1 SCC 666; Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216; and T.D. Dayal v. Madupu Harinarayana, 2013 SCC OnLine AP 565).**

39. While Superior Courts, like the Supreme Court and the High Courts, are courts of unlimited jurisdiction, the State Regulatory Commission, a creation of the Electricity Act, is a tribunal of limited jurisdiction ie its jurisdiction is limited to what has been specifically conferred on it by the

provisions of the Electricity Act, the Rules and Regulations made thereunder. Nothing is within the jurisdiction of an inferior court (or Tribunal such as the State Regulatory Commission) unless it is expressly shown, on the face of the proceedings, that the particular matter is within its cognizance. The test to determine the jurisdiction of a tribunal, created under a Statute, is whether the relevant Section of the said Enactment so provides, and not whether the said Section prohibits.

40. Consequently, since Section 86(1)(f) of the Electricity Act does not specifically provide for the franchisee to file a petition questioning prescription of a very low percentage towards distribution losses or reimbursement charges, the MERC must be held to lack jurisdiction, to entertain and adjudicate a petition filed by them, under the said provision. The MERC can exercise jurisdiction to determine tariff of a distribution licensee under Section 62(1)(d) of the Electricity Act in the exercise of its regulatory functions under Section 86(1)(b) on a petition filed by a Distribution licensee. It lacks jurisdiction to entertain and adjudicate a petition filed by anyone else, such as a franchisee, nor can a tariff order, passed with respect to a distribution licensee, be held to apply to a franchisee.

41. In considering the question whether MERC has jurisdiction to adjudicate a dispute between a distribution licensee and its franchisee, it is useful to examine the provisions of the Electricity Act relating to a franchisee. Section 2 (27) of the Electricity Act, 2003 stipulates that in the Electricity Act, unless the context otherwise requires, “franchisee” shall mean a person authorised by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply. Section 14 relates to grant of license and, under Section 14(b), the Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person to distribute electricity as a distribution licensee. Under the seventh

proviso to Section 14, in case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain a separate licence from the concerned State Commission, and such distribution licensee shall be responsible for distribution of electricity in his area of supply.

42. The person, referred to in the seventh proviso to Section 14, is the franchisee as defined in Section 2(27) of the Electricity Act. It is clear, from a conjoint reading of Section 2(27) and the seventh proviso to Section 14 of the Electricity Act, that (i) the franchisee is a person authorised by a distribution licensee to distribute electricity on its behalf, and (ii) such distribution of electricity by a franchisee is confined to a particular area within the area of supply of the distribution licensee. In other words, a distribution licensee can authorise another person as its franchisee to distribution electricity on its behalf within an area as may be specified by it, provided such a specified area forms part of the area of supply of the distribution licensee. Such a franchisee, in view of the seventh proviso to Section 14, does not require a separate licence since the responsibility to ensure distribution of electricity in its area of supply (including the specified area in which the franchisee supplies electricity on behalf of the distribution licensee) is that of the distribution licensee. In short, a distribution licensee is the principal and the franchisee is its agent. While the franchisee is, no doubt, accountable to the distribution licensee in the discharge of its obligations under the distribution franchisee agreement (entered into between the distribution licensee and the franchisee), it is the distribution licensee which is accountable to its consumers including those consumers to whom electricity is supplied, on its' behalf, by the franchisee. Except Section 2(27) and the Seventh Proviso to Section 14, which make it clear that the franchisee is merely the agent of the distribution licensee, and it is the distribution licensee which is eventually responsible, for distribution of

electricity, to the consumers in its area of supply, there is no other provision in the Electricity Act which specifically relates to a franchisee.

43. Since the petition filed by the Appellant herein before the MERC was under Section 86(1)(f) and Section 86(1)(k) of the Electricity Act, it is useful to examine the scope of both these provisions in considering whether the State Regulatory Commission has jurisdiction to adjudicate a dispute between a distribution licensee and a franchisee. Section 86 relates to the functions of the Commission, and among the functions which the State Commission is required to discharge under Section 86 (1) is, under clause (f), to adjudicate upon disputes between licensees and generating companies, and to refer any dispute for arbitration. It is clear from Section 14 of the Electricity Act that it is only for transmission, distribution and trading in electricity that a licensee is required to be obtained. Further the seventh proviso to Section 14 makes it clear that a franchisee is not required to obtain a separate licence. Consequently, a franchisee does not fall within the ambit of a "licensee" under Section 86(1)(f). Further the dispute in the present case is not between a licensee and a generator, but between a distribution licensee and its franchisee. It is, therefore, clear that such a dispute would not fall within the ambit of Section 86(1)(f) of the Electricity Act.

44. Reliance placed by the Appellant on the order of MERC, in Case No. 62 of 2009 dated 24.05.2010, is misplaced. As noted hereinabove, Case No. 62 of 2009 was filed by the 2nd Respondent-MSEDCL seeking in-principle approval from MERC of the MoU route for selection of Distribution Franchisees and Bulk Supply Tariff for the area to be developed under the Township Policy/ SEZ Policy/ Industrial Policy. The contents of Para 7 of the order of MERC, in Case No. 62 of 2009 dated 24.05.2010, has also been noted hereinabove. It is evident, from Para 7(i) thereof, that the MERC, in considering the 2nd Respondent-MSEDCL's prayer for approval

of the MoU route for appointment of Distribution Franchisees, held that it was for the Distribution Licensee to adopt any method for selecting the Distribution Franchisee on such terms and conditions as it deems fit, and the Commission had no jurisdiction to approve either the process or the party selected by MSEDCL as a Distribution Franchisee. All that the Commission observed in the said order was that, ideally, the Distribution Franchisee should be selected and appointed through a competitive bidding process to ensure complete transparency and competition. The MERC, however, acknowledge that, in respect of Developers of Township/ IT Park etc. who had already invested in the distribution infrastructure for the area under consideration, it may not be possible to appoint the Distribution Franchisee through a Competitive Bidding process and, in such cases. MSEDCL should initiate the MoU route for appointing a Distribution Franchisee. The MERC further observed that, while doing so, MSEDCL should take care to protect its own interest and that of its direct consumers, as well as the interest of the consumers within the Distribution Franchisee area, who were also primarily its consumers.

45. With respect to the terms and conditions of the Distribution Franchisee Agreement, MERC had observed, in its order in Case No. 62 of 2009 dated 24.05.2010, that it was a matter to be decided by each licensee. MERC had, however, held that the dispensation to become a Franchisee should be available, among others, to townships; and the period of the Franchisee Agreement should neither be less than five years nor longer than the validity of the license period of the Distribution Licensee. As regards availability of Open Access to the Distribution Franchisee to source power, the Commission observed that the right of eligible consumers to Open Access cannot be fettered in any manner irrespective of whether Open Access was being sought for base power requirement or for sourcing the additional power to mitigate load shedding.

46. As noted hereinabove, the order passed by MERC in Case No. 62 of 2019 dated 24.05.2010 was in a petition filed by MSEDCL seeking its in-principle approval for selection of Distribution Franchisees through the MoU route. The question whether MERC had jurisdiction even to stipulate guidelines for appointment of a Distribution Franchisee did not arise for consideration in the said case. In any event, this order of the MERC also makes it clear that the terms and conditions of the Distribution Franchisee Agreement (which would include Distribution Losses and Reimbursement Charges), should only be decided by the Distribution Licensee i.e. MSEDCL.

47. The Distribution Losses determined by MERC, in various tariff orders referred to by the Appellant, is for MSEDCL as a Distribution Licensee, and such determination is referable to Section 61 read with Section 62(1)(d) of the Electricity Act, which relates to determination of tariff for retail sale of electricity. While it is true that MSEDCL had executed two Distribution Franchisee Agreements earlier for a period of one year each and thereafter for three years, which was, strictly speaking, not in accordance with the order of the MERC in Case No 62 of 2009 dated 24.05.2010, the Appellant never had any complaint in this regard earlier, nor did it file any petition before the MERC seeking relief for non-adherence by MSEDCL with respect to the said conditions. It is also not the Appellant's case that any of the consumers have been denied open access. Suffice it to make it clear that for failure of MSEDCL to provide open access to consumers, which may fall foul of the provisions of the Electricity Act, it is always open to such consumers to seek redressal in appropriate legal proceedings.

48. We conclude our analysis under this head holding that MERC was justified in not entertaining the petition filed by the Appellant on the ground that it lacked jurisdiction to adjudicate a dispute between a Distribution Licensee and its Franchisee, or to stipulate the terms and conditions of a

Distribution Franchisee Agreement.

IX. HAS MSEDCL CONTRAVENED SECTIONS 60 AND 142 OF THE ELECTRICITY ACT?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

49. Ms. Deepa Chawan, Learned Counsel for the appellant, would submit that MSEDCL has contended that the issue of abuse of dominant position was raised by the appellant before the MERC in its Rejoinder and, therefore, it cannot be urged in the present Appeal; a perusal of the appellant's Rejoinder reveals the said averment made by the appellant; MERC has also noted this contention in Para 6.20 of the impugned order; additionally, though the relief was sought in commercial terms, the contents of the Petition filed before the MERC clearly reveals that the appellant had espoused its case against MSEDCL on abuse of dominant position and infringement of orders of the MERC, including on illustrative issue of Distribution Losses; MSEDCL seeks to obfuscate and render nugatory the option of appointing Distribution Franchisees, by imposing conditions, which cannot be adhered to and, thereafter, raising huge monetary demands; such a conduct, which seeks to render judgements otiose, comes within the purview of Section 142, and abuse of dominant position under Section 60 of the Electricity Act, 2003; these are also suo-motu powers; infringement of tariff orders and the order dated 24.05.2010 of the MERC would amount to non-compliance of orders under Section 142 of the Electricity Act, 2003; admittedly, there is no Agreement between the parties since 2018, and the issue relates to prohibition of SPS and the option of the franchisee as upheld by this Tribunal; and the issues squarely fall within the ambit of Sections 60 and 142 of the Electricity Act.

50. Ms. Deepa Chawan, Learned Counsel for the appellant, would further submit that imposition of unconscionable and illegal terms in the DFA has scuttled the option vis-à-vis SPS granted under orders of the MERC and

this Tribunal; in view thereof, certain franchisees such as Nanded City Development & Construction Company Limited have surrendered their franchise; it is understood that MSEDCL has not paid such the surrendered franchisees any amounts towards expenditure incurred for laying the Distribution System; the actions of MSEDCL were therefore required to be considered by. MERC under Sections 60 and 142 of the Electricity Act, 2003; however, MERC has come to the erroneous conclusion that there has been no violation of its orders by MSEDCL nor its Regulations, and therefore matter does not merit exercise of its jurisdiction.

B. SUBMISSIONS OF MSEDCL:

51. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would submit that the Petition before the MERC was not filed under Section 60 of the Electricity Act; at no time did the Appellant raise any contention or ground under the provisions of Section 60 of the Electricity Act; the only reference to the term 'dominant position' is found at Para 23 (c) of the rejoinder filed before the MERC; the Impugned Order also does not indicate that any such argument was raised before it; the Appellant's Petition, having been dismissed on the ground of lack of Jurisdiction, the appeal against the same should only be confined to the case laid at the original stage; the term 'dominant position' is defined under the Competition Act, 2002; however, the appellant is not a competitor or a consumer of MSEDCL; the appellant is a franchisee of MSEDCL, and receives monies from MSEDCL for services rendered; and, therefore, there cannot be a dominant relationship between the appellant and MSEDCL.

52. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would further submit that, from a bare perusal of Section 142 of the Electricity Act, it is clear that the said Section is only applicable when orders/ regulations passed by the Commission are violated; however, in the present case, no such orders have been violated;

the Appellant has failed to demonstrate that MSEDCL has violated any orders of the MERC; even if Section 142 is held applicable to the facts of the present case, the terms of the DFA cannot be amended by the Commission; the Appellant did not press the contention, regarding jurisdiction of the MERC being referrable to Section 142, before the MERC; however, since the Appellant had made certain allegations that MSEDCL had flouted orders of the MERC, the same was enquired into by MERC, which subsequently concluded that MSEDCL had not committed non-compliance of any orders of the MERC contrary to what the Appellant had alleged; MERC in the Impugned Order has, following its 24.05.2010 Order, held that the selection method for Distribution Licensees and the terms for selecting Distribution Franchisees are determined solely by the Distribution Licensees, with no involvement from the MERC, although it was recommended that a common DFA be created to prevent discrimination among Franchisees selected *via* MoU; the Appellant did not allege any discrimination by MSEDCL regarding the DFA, and has acknowledged the existence of other similar Franchisees; yet MSEDCL provided evidence of DFAs showing that similar conditions were imposed on similarly placed distribution franchisees; and the Appellant has not challenged the findings of the MERC in the Appeal, and has instead changed the basis of the Appeal to Section 60 of the Electricity Act.

C. ANALYSIS:

53. Section 86(1)(k), on which reliance is placed on behalf of the Appellant. requires the State Commission to discharge such other functions as may be assigned to it under the Electricity Act. It is only such functions, which are statutorily assigned to it under the Electricity Act, which can be discharged by the State Commission under Section 86(1)(k). As Ms. Deepa Chawan, Learned Counsel for the Appellant, places reliance on Sections 60 and 142 of the Electricity Act in this regard, it is useful to consider the

scope of these two provisions.

54. Section 60 of the Electricity Act relates to market domination and, thereunder, the Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company, if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry. It is only if Section 60 is attracted, in the facts of the present case, can the appellant be said to be justified in invoking the jurisdiction of the MERC under Section 86(1)(k) requesting it to discharge its functions under Section 60 to issue appropriate directions.

55. The appropriate directions, which the Appropriate Commission is empowered to issue under Section 60, would arise only in cases where (i) a licensee enters into any agreement, or (ii) a licensee abuses its dominant position, or (iii) a licensee enters into an agreement and abuses its dominant position. Any one of the afore-said three contingencies should also result in either (a) a situation which is likely to cause, or (b) has actually caused, an adverse effect on competition in the electricity industry.

56. The requirement of Section 60, of a licensee entering into an agreement, can be presumed to have been satisfied in the present case, as the second Respondent-MSEDCL has insisted on the Appellant-franchisee entering into a franchisee agreement with it. As the earlier agreement expired in the year 2018 more than six years ago, there is no franchisee agreement in force as on date between both these parties. The other limb of Section 60 would be attracted only if MSEDCL had abused its dominant position which would have an adverse effect on competition in electricity industry. We shall, for the purpose of the present case, proceed on the premise that MSEDCL holds a dominant position with respect to distribution of electricity in the State of Maharashtra.

57. The question which necessitates examination is whether, while insisting on the Appellant franchisee entering into an agreement capping distribution losses at 2% and fixing reimbursement compensation at 1.5%, MSEDCL can be said to have abused to its dominant position, thereby causing an adverse effect on competition in the electricity industry. As noted hereinabove, a franchisee is merely an agent of the distribution licensee and is not its competitor. It is only if insistence by MSEDCL, on the Appellant entering into a franchisee agreement with it, would cause an adverse effect on competition in the electricity industry ie an adverse effect on competition by a person other than the franchisee (such as the Appellant herein) would Section 60 be attracted.

58. While Ms. Shikha Sood, Learned Counsel for the second Respondent, would contend that the plea of violation of Section 60 of the Electricity Act has been taken for the first time only in the rejoinder filed before the MERC, the submission, urged on behalf of the Appellant, is that such a contention can be raised even at the appellate stage. It is not in dispute that no plea regarding applicability of Section 60 of the Electricity Act was taken by the appellant in the petition filed by them before the MERC, and was taken only in the rejoinder filed before the Commission.

59. In para 23 of the rejoinder, filed by the Appellant before the MERC, all that is stated is that the distribution franchise agreements were not amended/modified to include maximum demand charges as the same was not mutually agreed at any time, and MSEDCL was abusing its dominant position. Para 9 of the present Appeal contains the grounds raised with legal provisions. Ground 'ZZ' is that the appeal was not filed for violation of the terms of the contract, but the dominant position exercised by MSEDCL as a distribution licensee and, *inter alia,* the State Commission is not exercising its jurisdiction vested by it under law.

60. While Para 9 'ZZ' of the Appeal refers to the dominant position

exercised by MSEDCL as a distribution licensee, Para 23 of the rejoinder states that MSEDCL was abusing its dominant position because of their failure to amend/modify the distribution franchise agreement to include maximum demand charges as the same was not mutually agreed at any time. Even if we were to presume that the contention of abuse of dominant position by MSEDCL can be raised by the Appellant for the first time in its rejoinder filed before the Commission, or even at the appellate stage of these proceedings, the Appellant is required to establish not only that MSEDCL has abused its dominant position, but also that such abuse has actually caused, or is likely to cause, an adverse effect on competition in the electricity industry. It is only then can it claim that, in terms of Section 60, the Appropriate Commission should issue appropriate directions to MSEDCL.

61. Neither the appeal nor the rejoinder filed by the Appellant make any reference to any adverse effect, on competition in the electricity industry, having been caused by the failure of the second Respondent-MSEDCL to enter into an agreement with the Appellant, without insisting on the cap of 2% towards distribution losses and 1.5% towards reimbursement charges. In the absence of any such plea, either in the appeal or in the rejoinder filed before the MERC, the appellant cannot be heard to contend that they are were justified in filing the petition, under Section 86 (1)(k), requesting MERC to issue appropriate directions under Section 60 of the Electricity Act.

62. Reliance placed by the Appellant on the judgment of this Tribunal, in Appeal No. 105 of 2007 dated 10.10.2007, is also misplaced. The said appeal was filed by M/s. Torrent Power Ltd. aggrieved by the order passed by the MERC in Case No. 78 of 2006 dated 20.02.2007. This Tribunal disposed of Appeal No. 105 of 2007, by order dated 10.10.2007, extracting the order passed by the Commission on 20.02.2007, and observing that the

said order had not been complied with by MSEDCL, and they had not considered the claim of the appellant, even though there was an improvement in the reduction of distribution loss in the Bhiwandi area; as the direction of the Commission had been violated, the appellant had a right to go before the Commission and point out that its order had not been implemented; in fact, any affected person, including the appellant, had the right to complain before the Commission in respect of violation of its directions, and infringement of the Electricity Act, 2003, and Rules and Regulations framed thereunder. The Commission was directed to hear the Appellant, and the impugned order was set aside.

63. In its order in Case No. 80 of 2006 dated 17.05.2007, the Commission took note of its earlier orders in Case No. 78 of 2006 dated 20.02.2007, and observed that it was between MSEDCL and M/s. Torrent Power Ltd. to decide whether the claim for reduction in load shedding on the basis of improvement of distribution loss and collection efficiency, consequent to declassification of the franchisee area and other factors, should be allowed, based on performance monitoring as directed in the order dated 20.02.2007; the present matter reflected an intra-party concern, which should be resolved in accordance with the provisions of the distribution franchisee agreement; relaxation in load shedding protocol and/or reclassification of geographical area category could not be granted at the instance of a franchisee seeking such relaxation or re-classification as under the seventh proviso to Section 14 of Electricity Act, 2003 a franchisee distributes electricity in a specified area on behalf of a distribution licensee who, in turn, is responsible for distribution of electricity in that area of supply; and a franchisee would have no locus standi to initiate proceedings before the Commission on such matters. The petition filed by M/s. Torrent Power Ltd. was rejected as not maintainable. However, a direction was issued to MSEDCL in terms of the earlier order dated 20.02.2007.

64. It is settled law that a decree passed by a court, having no jurisdiction over the matter, is a nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of the party should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality the doctrine of waiver also does not apply. (**United Commercial Bank Ltd. v. Workmen: AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan: (1978) 1 SCC 58; Natraj Studios (P) Ltd. v. Navrang Studios: (1981) 1 SCC 523; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar: (1999) 3 SCC 722; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).**

65. The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject-matter. (**Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).** A decree without jurisdiction is a nullity. It is *coram non judice*. (**Sushil Kumar Mehta v. Gobind Ram Bohra: (1990) 1 SCC 193; Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke: (1976) 1 SCC 496; Kiran Singh v. Chaman Paswan: AIR 1954 SC 340; Chandrika Misir v. Bhaiya Lal: (1973) 2 SCC 474; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136).** Since the State Commission lacks jurisdiction either to entertain a dispute or to pass any orders with respect to a franchisee, the orders, if any which either the Commission or this Tribunal may have passed earlier, were evidently beyond its jurisdiction. Any such order passed without jurisdiction is a nullity and cannot be enforced. In any event, the order of the MERC in Case No. 80 of 2006 dated 17.05.2007, wherein the Commission took note of its earlier order in Case No. 78 of 2006 dated 20.02.2007, holds that the

present matter reflected an intra-party concern, which should be resolved in accordance with the provisions of the distribution franchisee agreement; relaxation could not be granted at the instance of a franchisee seeking such relaxation, as under the seventh proviso to Section 14 of Electricity Act, 2003 a franchisee distributes electricity in a specified area on behalf of a distribution licensee who, in turn, is responsible for distribution of electricity in that area of supply; and a franchisee would have no locus standi to initiate proceedings before the Commission on such matters.

66. The only other provision which is relied on behalf of the Appellant, to justify their filing the petition before the MERC under Section 86(1)(k), is Section 142 of the Electricity Act. Section 142 prescribes the punishment for non-compliance of directions by the Appropriate Commission and thereunder, in case any complaint is filed before the Appropriate Commission by any person, or if the Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may, after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and, in case of a continuing failure, with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

67. Failure to comply with the directions issued by the Commission would, under Section 142 of the Electricity Act, attract imposition of a penalty of one lakh rupees for each contravention, and rupees sixty thousand per day if such contravention continues. As failure to abide by the directions of the Commission would only attract a penalty under Section 142, the said provision evidently does not confer jurisdiction on the Commission to

stipulate terms and conditions for a distribution franchisee agreement to be entered into between the second Respondent-distribution licensee and the appellant franchisee. Even otherwise, the Appellant has not been able to show that MSEDCL has violated any earlier order issued by MERC justifying their filing a petition under Section 86(1)(K) invoking Section 142 of the Electricity Act.

68. As noted hereinabove, none of the tariff orders passed by the MERC, determining the tariff of the 2nd Respondent-MSEDCL as a Distribution Licensee, apply to the Appellant as a Franchisee; and their rights and obligations are governed only by the terms and conditions stipulated in the Distribution Franchisee Agreement executed by them with MSEDCL. At the cost of repetition, it is reiterated that there is nothing in the order passed by the MERC, in Case No. 62 of 2009 dated 24.05.2010, which has been violated by MSEDCL, and which can be thereby be said to have resulted in non-compliance of the directions issued by the Commission, warranting action being taken under Section 142 of the Electricity Act. It is only if any order of the MERC, which is applicable to the Appellant as a Franchisee, can be said to have been violated, can the Appellant then be held to be justified in contending that Section 142 of the Electricity Act is attracted.

69. While it does appear that prescription of merely 2% as Distribution Losses and 1.5% as Reimbursement Charges, by way of the Board Resolution of MSEDCL, is unduly harsh, the forum for adjudication thereof is not the State Commission, as it lacks jurisdiction, under Section 86(1) of the Electricity Act to entertain and adjudicate any such dispute. It is settled law that, if the dispute does not relate to enforcement of any right under a Statute, the remedy lies only in the Civil Court and, in the absence of any special remedy governed by the Statute, it is only the remedy of a civil suit which is available to be invoked by a person aggrieved. **(Premier Automobiles Limited vs. K. S. Wadhke: (1976) 1 SCC 496)**. The

contention of the appellant that other Franchisees have surrendered their franchise, in the light of these harsh conditions, would not confer jurisdiction on the State Commission to adjudicate any such dispute, since no such jurisdiction has been conferred on them by Parliament under the Electricity Act in so far as disputes involving franchisees and distribution licensees are concerned.

X. COULD MERC HAVE INTERFERED WITH THE BOARD RESOLUTION OF MSEDCL ON THE GROUND THAT IT INTENDED TO INSERT UNCONSCIONABLE CLAUSES IN THE DFA?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

70. Ms. Deepa Chawan, Learned Counsel for the appellant, would submit that the issue of unequal bargaining power and insistence on unconscionable clauses in an Agreement unilaterally by way of Board Resolution by MSEDCL, under the guise of freedom to decide terms of DFA, and blatant negation, in letter and spirit, of the orders passed by this Tribunal and the MERC, arise for consideration in this appeal; MSEDCL has been reducing the permissible Distribution Losses and Reimbursement Charges through various DFAs; on 26.09.2016, MSEDCL, vide its letter on the basis of the Board Resolution dated 20.05.2016, sought to revise the already executed DFA dated 27.05.2014 retrospectively; the appellant. vide its various communications including the letter dated 22.10.2016, represented against such unilateral imposition; the correspondence between the parties would reveal unilateral insistence of MSEDCL in imposition of Distribution losses ceilings, and other such terms and conditions; post 2018, there is no DFA between the parties; and the Appeal relates to non-exercise of jurisdiction, including the suo-motu jurisdiction vested in the MERC under Electricity Act, 2003. Learned Counsel would rely on (1) PTC India Limited Vs. CERC: 2010 (4) SCC 603; (2) Whirpool Corporation Vs. Registrar of Trade Marks, Mumbai: (1998) 8 SCC 1; (3)

Central Inland Water Transport Corpn. Vs. Brojo Nath Ganguly: (1986) 3 SCC 156; and (4) LIC Vs. Consumer Education & Research Centre - (1995) 5 SCC 48.

B. SUBMISSIONS OF MSEDCL:

71. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would submit that, initially, the losses and charges were agreed at 8% and 7.5% respectively, but were later revised with the appellant's acceptance since, in the last executed DFA on 02.11.2015, the permissible Distribution Loss is 3% and the Reimbursement charges are agreed at 4%; the appellant, even after this, expressed its willingness to extend the franchise arrangement; MSEDCL's revisions were mutually agreed upon; the appellant, having signed the agreements with full awareness, cannot now claim they were unfair; MSEDCL's arrangement with other franchisees, selected via competitive bidding, is not comparable due to differing terms from the DFAs entered into under the MoU route; the Appellant repeatedly sought extensions of the DFAs, with four agreements in place between 2010 and 2018, and expressed willingness to extend the last agreement; and the appellant is attempting to avoid its contractual obligations by filing this appeal, and raising unfounded claims to bypass its responsibilities as a Distribution Franchisee.

C. ANALYSIS:

72. In ***Central Inland Water Transport Corpn. Ltd.*** **v.** ***Brojo Nath Ganguly*****, (1986) 3 SCC 156,** both the respondents before the Supreme Court had filed writ petitions in the Calcutta High Court, under Article 226 of the Constitution, challenging termination of their services as also the validity of the applicable Rules. In both these writ petitions, an ex parte ad interim order, staying the operation of the notice of termination, was passed

by a learned Single Judge of the High Court. The appellants went in letters patent appeal before a Division Bench of the said High Court against the ad interim orders. The Division Bench transferred the matters to itself, and by a common judgment held that the Rule was ultra vires Article 14 of the Constitution. Consequently, the Division Bench struck down the said Rule as being void, and quashed the impugned orders of termination. It is against the said judgment and orders of the Calcutta High Court that appeals by special leave were filed.

73. It is in this context that the Supreme Court, while holding that Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power, opined that it was difficult to give an exhaustive list of all bargains of this type; this principle, however, would not apply where the bargaining power of the contracting parties is equal or almost equal; this principle may not apply where both parties are businessmen and the contract is a commercial transaction; and the court must judge each case on its own facts and circumstances.

74. In ***LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482,*** the respondents before the Supreme Court had sought policies under Table 58 for convertible term insurance plans for different amounts, which were turned down by the LIC. Consequently, the respondents filed writ petition before the Gujarat High Court assailing the conditions imposed, and denial to accept policies sought under Table 58, as arbitrary and discriminatory violating Articles 14, 19(1)(*g)* and 21 of the Constitution. The High Court, while upholding that prescription of conditions for first class lives as eligibility and other criteria laid down in the policy under Table 58 were neither unjust nor arbitrary, declared a part of the conditions, namely, “further, proposals for assurance under the plan will be entertained only

from persons in Government or quasi-Government organisation or a reputed commercial firm which can furnish details of leave taken during the preceding year under Table 58", as subversive of equality and, therefore, constitutionally invalid. Appeals and cross-Appeals were filed against the said order.

75. It is in this context that the Supreme Court observed that, every action of a public authority or a person acting in public interest or any act that gives rise to a public element, should be guided by public interest; it is the exercise of the public power or action hedged with public element that becomes open to challenge; if it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter, do in the field of private law; its actions must be based on some rational and relevant principles, and must not be guided by irrational or irrelevant considerations; every administrative decision must be hedged by reasons; in the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear the insignia of public element, action to public duty or obligation, are enjoined to act in a manner which is fair, just and equitable, after taking objectively all relevant options into consideration, and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest, and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision; the duty to act fairly is part of the fair procedure envisaged under Articles 14 and 21; and every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

76. The Supreme Court further observed that an unfair and untenable or

irrational clause in a contract is also unjust and amenable to judicial review; in **Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly: (1986) 3 SCC 156,** it was held that an instrumentality of the State cannot impose unconstitutional conditions in statutory rules vis-à-vis its employee to terminate the service of a permanent employee in terms of the rules; this principle, however, would not apply where the bargaining power of contracting parties is equal or almost equal; this principle may not apply where both parties are businessmen and the contract is a commercial transaction; and the court must judge each case on its own facts and circumstances.

77. The Supreme Court also held that it is settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties; in dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power; he has either to accept or leave the services or goods in terms of the dotted line contract; his option would be either to accept the unreasonable or unfair terms or forego the service for ever; and with a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

78. In both **Central Inland Water Transport Corporation v. Brojo Nath Ganguli: (1986) 3 SCC 156;** and **LIC v. Consumer Education and Research Centre: (1995) 5 SCC 448)**, the Supreme Court has made it amply clear that interference in contractual disputes, on the ground of unequal bargaining power, would not be justified where both the parties are businessmen and the contract is a commercial transaction. In the present case, the Appellant is carrying on business and the Distribution Franchisee Agreement, it seeks to enter into with MSEDCL (the earlier DFA having expired in 2018) with terms and conditions other than those stipulated by

MSEDCL, is undoubtedly a commercial transaction. Further, both the aforesaid judgments passed by the Supreme Court were in appeals preferred against orders passed by the High Court in writ proceedings under Article 226 of the Constitution of India. Since the power of judicial review, over administrative action/ contracts entered into by instrumentalities of the State, is constitutionally conferred on the Supreme Court and High Courts, the question of unequal bargaining power and unconscionable terms in a contract were considered by the Supreme Court in the aforesaid judgements.

79. In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** on which reliance is placed on behalf of the appellant, the Supreme Court held that to regulate is an exercise which is different from making of regulations; however, making of a regulation is not a precondition to the Commission taking any steps/measures under Section 79(1) of the Electricity Act; if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178; for example, under Section 79(1)(*g*), the Central Commission is required to levy fees for the purpose of the 2003 Act; an order imposing regulatory fees can be passed even in the absence of a regulation under Section 178; if the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process; making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*); however, if there is a regulation under Section 178 in that regard, then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation; a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities; a regulation under Section 178 is in the nature of a subordinate legislation; such subordinate legislation can even override the existing contracts including power

purchase agreements which have got to be aligned with the regulations under Section 178, and which could not have been done across the board by an order of the Central Commission under Section 79(1).

80. The Supreme Court then summarised its findings as under:- (*i*) in the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions); (*ii*) a regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation; (*iii*) a regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act; (*iv*) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words “orders”, “instructions” or “directions” in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity. (*v*) if a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178; and (*vi*) applying the principle of “generality versus enumeration”, it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(*ze*).

81. As held by the Supreme Court, in **PTC India Limitd v. CERC (2010) 4 SCC 603**, this Tribunal has not been conferred the power of judicial review. Further, both MERC and this Tribunal are creations of the Electricity Act and their jurisdiction is confined to the expressed provisions of the said Act and not beyond. Consequently, it is not open to the State Commission to undertake an examination as to whether or not the terms and conditions of a Distribution Franchisee Agreement, executed between a Distribution Licensee and its Franchisee, is unconscionable.

82. Reliance placed by the appellant on **Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1,** is wholly misplaced. In **Whirlpool Corpn,** the respondent Trust requested the Registrar of Trade Marks to take suo motu action under Section 56(4) of the Trade Marks Act for cancellation of the Certificate of Renewal granted to the appellant. The Registrar, acting on that request, issued a notice to the appellant requiring it to show cause why the Certificate of Registration be not cancelled. Against this notice, the appellant filed a writ petition in the Bombay High Court which was dismissed, and against the said judgment they filed an appeal to the Supreme Court.

83. It is in this context that the Supreme Court observed that, under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition; but the High Court has imposed upon itself certain restrictions one of which is that, if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction; but the alternative remedy does not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged; the jurisdiction of the High Court in entertaining a

writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, especially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

84. The question whether existence of an alternate remedy under Section 111 of the Electricity Act would bar a challenge to the order of MERC before the Bombay High Court is not a matter for examination by this Tribunal in the present proceedings, more so as the appellant has been relegated by the Bombay High Court to avail the remedy of an appeal before this Tribunal.

85. Viewed from any angle, it is impermissible for this Tribunal to examine, in appellate proceedings under Section 111 of the Electricity Act, whether or not the terms and conditions which the MSEDCL seeks to impose, in terms of the Board Resolution, on the appellant franchisee, under a DFA to be executed, are unconscionable and illegal. Suffice it to observe that the order now passed by us shall not disable the Appellant, if they so choose, from availing their other legal remedies including the remedy of a civil suit before the Civil Court of competent jurisdiction.

XI. WOULD TARIFF ORDERS PASSED BY MERC, DETERMINING DISTRIBUTION LOSSES OF MSEDCL, EXTEND TO THE APPELLANT-FRANCHISEE?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

86. Ms. Deepa Chawan, Learned Counsel for the appellant, would submit that the appellant exercised option for being appointed the distribution franchisee of MSEDCL for its township, with the 1st Agreement dated 16.10.2010; the DFAs, drafted by MSEDCL, contained various conditions, including terms relating to achieving maximum demand, reduction in Distribution losses, Reimbursement Charges and metering incentive to pre-

paid consumers of the appellant etc; the tariff charged by the appellant to consumers was the same as determined by MERC from time to time; for instance, one of terms unilaterally imposed by MSEDCL, in direct infringement of the distribution loss figures approved by the MERC in the Tariff Orders, is the arbitrary figure. of minimum distribution losses imposed on the Distribution Franchisee to be achieved; clause 14 of the DFA dated 16.10.2010 stipulated that Distribution losses beyond 8% will not be allowed; in the next two DFAs dated 25.03.2013 and 27.05.2014, the distribution losses figures were 5% and a reduced 3% respectively; during this period, MERC, in tariff proceedings under Sections 61, 62 and 64 of the Electricity Act, continued to determine distribution losses for MSEDCL, for its area of supply, which ranged from 20.54% to 12.00% for F. Y. 2017-18 to F.Y. 2024-25 respectively; in fact, the MYT order dated 31.03.2023, in Case No. 226/2022, approved distribution losses for F.Y. 2020-21 to F.Y. 2024-25 as 22.72%, 23.54%, 14%, 13%, 12% respectively; in respect of its own Franchisee at Bhiwandi, the order of MERC, in Case No. 322 of 2019 dated 30.03.2020, stipulated distribution loss of 13.01%, 12.76%, 12.51%, 12.26% & 12.01%; when the Board of MSEDCL decided to impose a distribution loss of 2%, vide its Board Resolution dated 20.05.2016, the tariff order in force, in Case No. 48 of 2016 dated 03.11.2016, stipulated a Distribution Loss figure for Bhiwandi as 19.54%;none of the tariff orders excluded areas under DFAs (SPS option) for Distribution Losses computation by the MERC; and, thus, MSEDCL imposed its own Distribution Losses figures in DFAs executed with the appellant and other Distribution Franchisees, and continued to alter them unilaterally, vide its own Board Resolutions in violation of the figures approved by MERC in the Tariff Orders, for the Distribution Franchisee areas which were part of its area of supply.

87. Ms. Deepa Chawan, Learned Counsel for the appellant, would further submit that the appellant had pleaded, in the Original Petition filed before

the MERC, that terms, unilaterally imposed by MSEDCL in the DFA, are not only unrealistic but are also not in consonance with orders and Regulations; a perusal of the impugned order reveals that MERC has considered violation of its orders, if any, on merits, and has come to the erroneous conclusion that there is no violation of its orders by MSEDCL; and, in respect of the illustrative element of Distribution Losses pleaded by the appellant, infringement of orders of the MERC is revealed from a mere perusal of the tariff orders and the order dated 24.05.2010, vis-à-vis the Board Resolution dated 20.05.2016.

B. SUBMISSIONS OF MSEDCL:

88. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would submit that the Appellant's contention that, specifying a permissible loss level of 2% is in violation of the Tariff Orders which stipulate the Distribution Losses for MSEDCL, is wrong, since:- (a) the loss levels for MSEDCL licensed area as a whole is the average for the whole State of Maharashtra, and it cannot be compared with the distribution losses for a minuscule area of 400 acres; (b) the Commission determining a loss level for the Discom as a whole cannot be compared to a Discom requiring its agent to achieve a certain loss level in a tiny area of the Discom's area of supply; (c) it is only by controlling distribution losses in small controllable areas of the State, can the Discom come within the overall average distribution losses for the State as a whole; (d) therefore, far from being in violation of the Tariff Orders, the requirement, that the Discom stipulates on its agents, is in furtherance of and in support of the Distribution losses allowable for the State as a whole.

C. ANALYSIS:

89. The tariff orders passed by the MERC prescribing a far higher distribution loss of 20.54% and 18.26%, for FY 2017-18 to FY 2019-20, and

at a similar percentage for subsequent years, for the distribution licensee cannot be said to extend to the distribution losses which a distribution franchisee is permitted by the distribution licensee to incur. The area of supply of electricity, by MSEDCL as a distribution licensee, is for a major part of the State of Maharashtra, unlike the specified area where the Appellant, as a franchisee, has been authorised by MSEDCL to supply electricity to consumers. Further, Section 62(1)(d) requires the Appropriate Commission to determine the tariff, for retail sale of electricity, in accordance with the provisions of the Electricity Act. The tariff, referred to in Section 62(1)(d) is for retail sale of electricity by a distribution licensee to its consumers, and has no application to supply of electricity by a franchisee on behalf of the distribution licensee.

90. Unlike the tariff of a distribution licensee (including the distribution losses it is permitted to incur) which is statutorily required to be determined by the Regulatory Commission under Section 62(1)(d) of the Electricity Act, the distribution losses which a franchisee is entitled to incur, and the reimbursement compensation it is entitled to receive, are not governed by any provision of the Electricity Act, but are those stipulated in the contractual provisions of the Distribution Franchisee Agreement which it enters into as an agent with the Distribution licensee, its principal. It is clear, therefore, that the tariff orders passed by MERC, for retail sale of electricity by the second Respondent- MSEDCL to the consumers in its area of supply, cannot be said to be an order passed by the Commission with respect to the Appellant franchisee, violation of which would require the MERC to adjudicate the dispute on its jurisdiction being invoked under Section 86(1)(k) read with Section 142 of the Electricity Act.

XII. DEMAND RAISED BY MSEDCL FOR DISTRIBUTION LOSSES OF THE APPELLANT BEYOND PERMISSIBLE LIMIT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

91. Ms. Deepa Chawan, Learned Counsel for the Appellant, would submit that MSEDCL also started raising monetary demands on the appellant and other Franchisees for loss in units beyond the permissible limit; Letter dated 31.12.2021, raising a demand of Rs. 11.45 Crores, was issued to the appellant for breaching the purported ceiling; since the year 2018 itself, the appellant not only opposed retrospective alteration of the distribution loss figures but also in the DFA dated 27.05.2014; the appellant made it clear to MSEDCL that 2% Distribution Losses was not achievable, and it could not therefore execute a DFA for the subsequent period with such a term which was unrealistic, unconscionable, and in violation of orders; and imposition of penalty by MSEDCL is also without sanction of law.

B. ANALYSIS:

92. It is not in dispute that the demand raised by MSEDCL, for failure of the Appellant to adhere to the contractual limit with respect to Distribution Losses, is in terms of the Distribution Franchisee Agreement, the validity of which cannot be agitated by the Appellant either before the MERC or this Tribunal. Suffice it to observe that, in case the Appellant avails the remedy of a civil suit, the Civil Court shall adjudicate the Appellant's claims on its merits uninfluenced by any observations made in the order passed by the MERC, which order is impugned in the present appeal.

XIII. OTHER CLAUSES SOUGHT TO BE INCORPORATED BY MSEDCL WHICH THE APPELLANT CLAIMS ARE UNCONSCIONABLE:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

93. Ms. Deepa Chawan, Learned Counsel for the appellant, would submit that unconscionable clauses, in respect of other items, have also been incorporated by MSEDCL; and to substantiate, unilateral imposition of terms and conditions by MSEDCL in DFAs, the appellant relies on

MSEDCL Board Resolution dated 20.05.2016 which also denies Open Access contrary to the order dated 24.05.2010 passed by the MERC.

B. SUBMISSIONS OF MSEDCL:

94. Sri. Buddy Ranganadhan and Ms. Shika Sood, Learned Counsel for the 2nd Respondent-MSEDCL, would submit that, before the Commission, the Appellant had raised certain other issues such as :- (a) the benefit of 5% prepaid incentive to consumers; and (b) stipulation of 50% Demand Charges; however, the Appellant has not argued or pressed either of the two issues before this Tribunal and, therefore, MSEDCL is not responding to the same**.**

C. ANALYSIS:

95. The challenge to the other conditions stipulated in the DFA are also matters which fall outside the jurisdiction of the MERC. Since an appeal under Section 111 of the Electricity Act lies only against orders passed by Regulatory Commissions, the Appellant cannot agitate its grievance, relating to the validity of, or the terms and conditions imposed under, the DFA in appellate proceedings before this Tribunal, as the State Commission lacked jurisdiction to examine these aspects. The issue of open access has been dealt with earlier in this order, and is therefore not being dealt with under this head.

XIV. CONCLUSION:

96. For the reasons afore-mentioned, we see no reason to interfere with the order of the MERC impugned in the present appeal. Suffice it, while dismissing the appeal, to make it clear that, in case the Appellant avails any other legal remedy available to them in law, the observations made by the MERC, in the impugned order, shall not disable the Appellant from agitating its grievance, and for the appropriate forum from considering the issues

raised before it, in accordance with law. The Appeal, however, fails and is accordingly dismissed.

Pronounced in the open court on this the **10th day of October, 2024**.

(Seema Gupta) Technical Member (Electricity)	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd/mk