

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:31st October, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.155 OF 2013

In the Matter of:

1. **The Indian Hotels Co. Ltd.& Anr.**
Mandlik House, Mandlik Road
Colaba, Mumbai – 401 001

2. **Piem Hotels Limited**
Vivanta by Taj – President
90, Cuff Parade
Mumbai – 500 005

..... Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission & Anr.**
World Trade Centre No. 1, 13th Floor
Cuff Parade, Colaba, Mumbai – 400 005

2. **Brihanmumbai Electric Supply and Transport**
Undertaking (BEST)
Best Marg, P.O. Box. No. 102
Mumbai 400 001

...Respondent(s)

Counsel for the Appellant(s) : **Mr. Sitesh Mukherjee**
Ms. Kanika Chugh

Counsel for the Respondent(s):**Mr. Harinder Toor**
Mr. Mukesh Kumar
Mr. R. Dubal (Rep) for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. The Indian Hotels Co. Ltd. & Piem Hotels Ltd are the Appellants herein.
2. Aggrieved by the order dated 26.12.2012 passed by the Maharashtra Electricity Regulatory Commission by which the State Commission approved the inclusion and allowance of the entire deficit of transport business of the BEST in the determination of its Annual Revenue Requirement (ARR) for the tariff for the Financial Years 2004-05 to 2008-09 in respect of Electricity Business, as claimed by BEST, the Appellants have presented this Appeal. The State Commission has further approved the recovery of transport business deficit of BEST in the form of Transport Deficit Loss Recovery Charges to be levied on the electricity consumers.
3. Short facts leading to the present Appeal are as follows:-
 - (a) The Appellants are the consumers of the Brihanmumbai Electric Supply and Transport Undertaking (BEST), the Distribution Licensee.

(b) The Indian Hotels Co. Ltd., the first Appellant is in the hospitality business and runs and operates two Hotels namely; Taj Mahal Mumbai and Taj Wellington Mews, in the licensed area of supply of the BEST.

(c) Similarly, Piem Hotels Ltd, the second Appellant also runs hotels under hospitality business and operates and manages the Hotel Vivanta by Taj President in Mumbai within the supply area of BEST.

(d) The BEST is not only doing the business of distribution of electricity but also operating the transport business. BEST is also a local authority as defined under Section 2 (41) of the Electricity Act, 2003. Originally, the BEST filed the petition before the State Commission on 27.09.2005 in case No. 4 of 2004 claiming the deficit of its transport business as a part of the ARR of its Electricity Business for the year 2004-05 and year 2005-06.

(e) However, the State Commission by order dated 09.03.2006 had disallowed the claim of the BEST holding that as per Section 51 of the Act, the "Other Business" should support the distribution business and not the other way round.

(f) Aggrieved by this order, the BEST filed an Appeal before this Tribunal in Appeal No. 61 of 2006.

(g) This Tribunal by the Judgment dated 18.08.2006 in Appeal No. 61 of 2006 after examining Section 51 of the Act confirmed the findings of the State Commission and dismissed the Appeal filed by the BEST.

(h) Aggrieved by this judgement, the BEST filed a Civil Appeal No. 848 of 2007 before the Hon'ble Supreme Court.

(i) After hearing the parties, the Hon'ble Supreme Court through its order dated 08.02.2011 set aside the judgement of this Tribunal dated 18.08.2006 holding that the third proviso of Section 51 exempt the BEST being a Local Authority from the entire section including the first and second provisos of Section 51.

(j) On the strength of this order passed by the Hon'ble Supreme Court, the BEST filed a fresh petition in case No. 125 of 2011 on 26.08.2011 before the State Commission for allowing the Transport business deficits to the tune of Rs.400.53 Crores and Rs.295.94 Crores in the ARR of the Electricity Business for the year 2009-10 and the year 2010-11 respectively. The State Commission allowed this Petition through order dated

16.03.2012, relying upon the order of the Supreme Court.

(k) Again the BEST filed the case No. 171 of 2011 on 30.11.2011 for allowing the Transport business deficit of Rs.215.68 Crores in the ARR for the year 2011-12. In this petition, also the State Commission passed an order on 16.05.2012 allowing the inclusion of transport deficit in the ARR of Electricity Business for the year 2011-12. In addition to that, the State Commission allowed the levy of Transport Deficit Loss Recovery Charges (TDLR Charges) as part of the tariff for Electricity distribution business and approved the recovery of the same. Against this order dated 16.05.2012, the Appellants filed an Appeal before this Tribunal but the same was dismissed by the order dated 04.07.2014 not on merits but on the ground of long delay in filing the said Appeal.

(l) Thereafter, the BEST filed instant Petition in the case No. 80 of 2012 before State Commission seeking inclusion of transport deficit to the tune of Rs.205.02 Crores in 2004-05, Rs.149.90 Crores for FY 2005-06 and Rs.835.56 Crores for FY 2006-07 to 2008-09 in the ARR of Electricity Business for 2004-05 to 2008-09.

(m) The State Commission after hearing the parties allowed the petition through impugned order dated 26.12.2012 by permitting the Transport business deficit to the tune of Rs.1187.71 Crores for the year 2004-05 to 2008-09 to be recovered from the electricity consumers of the BEST during the MYT control period from the year 2013-14 to year 2015-16.

(n) Aggrieved by this impugned order, the Appellants have presented this Appeal.

4. The Learned Counsel for the Appellants, while assailing the impugned order has urged the following grounds:-

(a) After the enactment of the 2003 Act, it is not open to a Distribution Licensee to subsidize or club any other business with the business of distribution of electricity as the same is contrary to the provision of the Section 51 of 2003 Act. Section 51 prohibits a Distribution Licensee from subsidizing its other businesses even in a situation when the licensee carries on any other business after intimation to the State Commission.

(b) Allowing transport business deficit as part of the ARR of the BEST Electricity distribution business is contrary to the objects of the Electricity Act, 2003 as it

ignores the criteria laid down for fixation of tariff under Sections 61 and 62 of the Act.

(c) The State Commission has failed to appreciate the true effect of the Third Proviso to Section 51 of the Act. The State Commission has misconstrued the same in as much as the BEST has been allowed to cross-subsidize and recoup its transport business deficits by loading 100% of the transport deficits on the BEST electricity distribution business.

(d) The State Commission failed to appreciate the true scope of Third Proviso to Section 51 of the Act that creates a special dispensation in favour of a Local Authority, which is engaged in the business of distribution of the electricity prior to the commencement of the 2003 Act.

(e) The Section 51 of Act 2003 provides that “nothing contained in this section shall apply to a local authority...”, implying thereby that such Local Authority is exempted only from the above three conditions envisaged under Section 51 alone. All the other provisions of the Act, would apply with full force to Local Authority, in the same manner as any other distribution licensee under the Act.

(f) The Hon'ble Supreme Court in fact has not given any findings or direction upholding the actual claim of the BEST to subsidize its transport business through this distributing business.

(g) The interpretation of the said Proviso has to be confined to the entire Section 51 alone. The exemption granted by the said Proviso was not intended to be extended to the other provisions of Act. In other words, the exemption provided to a local authority is limited to the applicability of Section 51 of the Act alone and should not be extended source to permit a complete exclusion of the Act itself, to a local authority.

(h) The legislature has explicitly provided for exemptions to the Local Authority, wherein it intended such exemptions to apply. Therefore, an exemption to the Local Authority under Section 51 of the Act contemplates exemption only from such a requirement as specified by the regulations of the State Commission. The exemption now claimed with BEST i.e. 100% subsidization to its other businesses by the electricity distribution business is not permitted under the Act or any of the allied regulations.

(i) The State Commission without understanding the true crux of the decision of the Hon'ble Supreme Court, has wrongly held that the BEST is entitled to subsidize the other business run by the Distributing Licensee.

On these grounds, the impugned order is sought to be set aside by the Appellants.

5. Refuting these grounds, the learned Counsel for the Respondent, the BEST has made the following reply:-

(i) The impugned Order dated 26.12.2012 in the present Appeal has been duly passed by the State Commission in lawful compliance with the binding law declared by the Hon'ble Supreme Court under its Order dated 08.02.2011 passed in the Civil Appeal No. 848 of 2007 filed by the BEST.

(ii) Since the law declared by the Hon'ble Supreme Court through the order dated 08.02.2011 is a binding precedent, the State Commission as well as the Tribunal under Article 141 and 144 of the Constitution of India have to follow the said order.

(iii) The earlier Order passed by the State Commission dated 09.03.2006 in Case No. 4 of 2004 quoting that the "Other Business" alone should support the electricity

distribution business and not the other way round, has been set aside by the Hon'ble Supreme Court, even though that interpretation given by the State Commission, has been held valid by the Tribunal. Therefore, the Hon'ble Supreme Court once held that the interpretation placed on Section 51 of the Electricity Act by the State Commission as well as the Tribunal is not sustainable, the State Commission as well as the Tribunal has to accept the interpretation given by the Hon'ble Supreme Court and to follow the same.

(iv) Whether the interpretation of a particular Section given by the Hon'ble Supreme Court is correct or not, cannot be decided by this Tribunal. The contentions of the learned Counsel for the Appellant that the Hon'ble Supreme Court order is *per incuriam* is not only misconceived but also improper. In any event, the question as to whether a decision of the Hon'ble Supreme Court is *per incuriam* or not, could only be decided by larger Bench of the Hon'ble Supreme Court and not by this Tribunal.

On these grounds, the learned Counsel for the BEST Respondent is seeking for the dismissal of the Appeal as devoid of merits.

6. In the light of the rival contentions urged by the learned Counsel for the parties, the following questions would arise for consideration:-

- (i) Whether the BEST could be allowed to subsidize its transport business by its electricity distribution business under Section 51 of the Electricity Act?**
- (ii) Whether the State Commission has correctly interpreted the Hon'ble Supreme Court's Order dated 08.02.2011 while deciding to allow loading to entire transport deficits of the BEST on its electricity distribution business?**
- (iii) Whether the State Commission has abdicated its statutory duties by shirking its responsibility to give appropriate interpretation in order to protect the interests of the consumers?**

7. In view of the fact that all the three questions quoted above are inter-connected; it would be proper to take them up together to deal with the same.

8. This Appeal deals with the interpretation of the third proviso of Section 51 of the Electricity Act, 2003 which seeks to regulate a situation where Distribution Licensee embarks upon a business other than business of distribution of electricity.

9. The BEST, second Respondent is the Distribution Licensee in the Island City of Mumbai. It also provides public road transport services across the entire city of Mumbai. The BEST is the Local Authority under the definition Section 2(41) of the Electricity Act.

10. This Section 51 requires that before embarking on any business other than the distribution of electricity, the Distribution Licensee ought to intimate the Appropriate Commission about its embarking upon any 'other business'. Apart from the main section, there are two other provisos which regulate the activities of the Distribution Licensee while carrying on any 'other business' apart from the distribution business of electricity.

11. The first proviso of Section 51 requires that a portion from the revenue of other business will be used by the Distribution Licensee to reduce the charges for wheeling of the electricity as may be specified by the Commission. The second proviso requires the distribution licensee to maintain separate accounts of its distribution business and 'other business'. The second proviso further requires the distribution licensee to ensure that the 'other business' is not subsidized by the distribution business. However, the third proviso provides that nothing "in this Section" (Section 51), is applied to a Local Authority engaged in the commencement of the Act in the business of distribution of electricity.

12. Before dealing with the applicability of this proviso in the present case, it would be appropriate to recall the relevant events leading to the filing of this Appeal in order to understand the issue raised in this Appeal in the proper prospective. Those events are as follows:-

- (a) The BEST, who is doing the business of distribution of electricity, has been operating the other business namely transport business also. The BEST being the Distribution Licensee for the electricity, on 27.09.2005 filed a petition before the State Commission in case No. 4 of 2004, claiming the deficit or loss of its transport business as a part of the ARR of electricity business for the year 2004-05 and the year 2005-06.
- (b) The State Commission by its Order dated 09.03.2006, interpreting Section 51, disallowed the transport business deficit or loss of the BEST as a part of the ARR of its electricity business, holding that the "other business" could support the distribution business and not the other way round.
- (c) Having been aggrieved by this Order dated 09.03.2006, the BEST filed an Appeal before this Tribunal in Appeal No. 61 of 2006. Ultimately, the Tribunal rendered the judgement in the Appeal No. 61

of 2006 dated 18.08.2006, upholding the State Commission's Order and decided that the last proviso to the Section 51 is confined to the main Section 51 only and does not apply to the first and second provisos to Section 51 and thereby disallowed BEST from subsidizing its transport business by its electricity distribution business. The basis of the finding of the Tribunal in the judgement solely rested on an interpretation of the scope of the last proviso of the Section 51.

- (d) Aggrieved by this judgement, the BEST filed a Civil Appeal before the Hon'ble Supreme Court in Civil Appeal No. 848 of 2007. The Hon'ble Supreme Court after hearing the parties allowed the Appeal by setting aside the judgement of the Tribunal holding that the third proviso to Section 51 exempted the Local Authority like the BEST from the entire section including the first and second provisos of Section 51.
- (e) Thereafter, the BEST filed a fresh petition in case No. 125 of 2011 before the State Commission for claiming the transport business deficits or losses to be included in the ARR of electricity business for the year 2009-10 and 2010-11. The State Commission allowed the said

Petition by order dated 16.03.2012, relying upon the order of the Supreme Court.

- (f) Again BEST filed another Petition in Case No. 171 of 2011 for allowing the transport business deficit in the ARR for the year 2011-12. This was also allowed by the State Commission by the Order dated 16.05.2012 in respect of the ARR for the year 2011-12.
- (g) Thereafter, BEST initiated the present proceedings by filing another petition in Case No. 80 of 2012 before the State Commission seeking for the inclusion of the transport business loss in ARR for the year 2004-05 to 2008-09. In the said petition, the State Commission passed this impugned Order, allowing the transport business deficit in the ARR for the year 2004-05 to 2008-09, to be recovered from the electricity consumers of the BEST during the MYT Control Period for the year 2013-14 to 2015-16. Though, the earlier Order dated 16.05.2012 was challenged before this Tribunal, the Tribunal did not entertain the said Appeal, since there was a huge delay which was not satisfactorily explained and as such in that Appeal, the merits were not considered. However, as against the present impugned Order namely 26.12.2012, the Appellants have presented this Appeal in time.

13. These factual aspects, which are not disputed, have to be borne in mind while deciding the issues raised in this Appeal.

14. According to the Appellant, the Hon'ble Supreme Court in the earlier Order passed on 08.02.2011, though not satisfied with the judgement of Tribunal did not give any finding upholding the actual claim of the BEST to subsidize its transport business through its distribution business and as such, the State Commission had wrongly interpreted Section 51, in such a way as to allow the transport business deficit or loss to be in the ARR of electricity business thereby burdening the Electricity Consumers. On the other hand, the Respondent submits that the decision by the Hon'ble Supreme Court in the order dated 08.02.2011 is binding on all the Courts including the State Commission and Tribunal under Article 141 and 144 of the Constitution of India and therefore, the State Commission's interpretation of Section 51 in the light of the decision taken by the Hon'ble Supreme Court is perfectly correct and the same should not be interfered with.

15. In the light of the above rival contention, it would be appropriate to quote the relevant observations made by the Hon'ble Supreme Court in Civil Appeal 848 of 2007. Those observations are as follows:-

"Undisputedly the appellant was engaged inter alia in the business of distribution of electricity prior to the

commencement of the Act. In our opinion it would be not correct to hold that despite the third proviso to Section 51 of the Act, the distribution licensee must not only maintain separate accounts for each of its businesses but must also ensure that the electricity distribution business should not subsidize the other business undertakings. Hence the view of the Tribunal in paragraphs 56 and 57 of its order is not correct.

*In our opinion in view of the third proviso to Section 51 of the Act, a certain limited electricity distribution licensees **are exempt from the operation of the section insofar as the requirement of prior intimation to the commission or the obligations of the first and proviso are concerned.** The Appellant is admittedly doing business of transport besides electricity distribution for several decades. On the facts of the case, we are of the opinion that the third proviso to Section 51 of the Act applies and hence the impugned judgment and order cannot be sustained."*

16. Thus, the Hon'ble Supreme Court Order dealt with interpretation of 3rd proviso of Section 51 and the extent of its applicability. In this context it should be worthwhile to quote the entire Section of 51 with the provisos:-

"51. (1) A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilised for reducing its charges for wheeling:

Provided further that distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business.

Provides also that nothing contained in this section shall apply to a local authority engaged, before the commencement of this Act, in the business of distribution of electricity."

17. As mentioned earlier, the first proviso of Section 51 requires that the portion from the revenues of the other business namely transport business will be used by the Distribution Licensee, BEST to reduce the charges for wheeling of the electricity. The second proviso requires the distribution licensee to maintain separate accounts of its distribution business and the other business to ensure that the distribution business neither subsidises the other business nor impedes or burdens its distribution assets in any way to support the other business. The third proviso provides that "nothing contained in this section" (Section 51) is applied to a Local authority engaged before the commencement of the Act in the business of distribution of electricity.

18. The Tribunal's finding in Appeal No.61 of 2006 was that the third proviso was confined to the main Section 51 alone and not to the first and second provisos to Section 51. On the other hand, the Hon'ble Supreme Court has given its interpretation

holding that the third proviso of the Section 51 exempts BEST as a Local Authority from the requirements of the not only main Section but also two other provisos. The meaning of this interpretation is that the Local Authority like the BEST should be exempted from the operational sections in so far as requirements of prior intimation to the Commission are concerned as well as the obligations of the first and second proviso. By virtue of the Supreme Court judgement, BEST is to be exempted from the requirements of these three elements:-

- (i) Information to be sent to the Regulatory Commission in advance before engaging in any other business.
- (ii) The requirement of the specified proportion of revenues derived from the other business having to be utilized for reducing the wheeling charges of the licensee.
- (iii) The requirement of maintaining separate accounts for each of its other business undertakings.

19. Hence, the Local Authority need not have to maintain separate accounts and by virtue of that it may utilize same distribution business assets for the transport business. From plain reading of the Order of Supreme Court Orders, it is evident that the Hon'ble Supreme Court did not give any finding that local authority can or should subsidize the other business from

the their electricity distribution business, thereby allowing BEST to load its entire deficits or losses from its transport business on to the electricity consumers.

20. It is true that the Supreme Court Order is a binding precedent under Article 141 and 144 of the Constitution of India but we should also be conscious of the fact that it is settled principle of law that a case is a precedent and binding for what it explicitly decides and no more. It is also incumbent on the part of the Courts to find out the ratio of the judgement by applying it to the facts before them. In other words, it is important to ascertain the ratio of the judgement in view of the settled law that a decision is binding not because of its conclusion but in regard to its ratio of the principle laid down therein. These principles have been laid down by the Hon'ble Supreme Court :-

- (i) Union of India and Ors v. Dhanwati Devi and Ors (1996) 6 SCC 44
- (ii) Union of India (UOI) V. Chajju Ram (Dead) by Lrs. and Ors. (2003) 5 SCC 568
- (ii) Delhi Admn. v. Manohar Lal, (2002) 7 SCC 222
- (iii) S.P. Gupta v. Union of India, 1981 Supp SCC 87

21. It is also worthwhile at this stage to refer to the Hon'ble Supreme Court observations in (1979) 3 SCC 745 in the case

Dalbir Singh v. State of Punjab. The following are the observations :-

"...According to the well-settled theory of precedents every decision contains three basic ingredients:

- "(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;*
- (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and*
- (iii) judgement based on the combined effect of (i) and (ii) above."*

*For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. **It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.** In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes 12 it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts*

*as found, upon which the decision is based. The other two elements in the decisions are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the finding of facts. **This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case.***"

22. As laid down by the Hon'ble Supreme Court, it is not everything observed by a Judge while giving judgment that construed the precedent but the only thing in the decision binding on the party is the principle upon which the case is decided. Therefore, the Courts have to analyse a decision and cull out the ratio decidendi and isolate the obiter dicta. In view of the above settled principle of law, the duty of this Tribunal to find out the ratio of the Hon'ble Supreme Court judgement and ascertain the law. Thus, on a careful perusal of the Order of the Hon'ble Supreme Court dated 08.02.2011, it is clear that the ratio decided in this, the BEST is exempted from the requirements not only from main Section 51 but also from the first two provisos of the said Section as well as from last proviso to Section 51 and not all the provisions of the Act, 2003.

23. To put it in a nutshell, the Hon'ble Supreme Court's Order cannot be interpreted to mean that BEST has the right or privilege granted by Section 51 to transfer its entire deficits or loss from its other transport business to the electricity business,

thereby burdening the electricity consumers. There is no such finding giving the ratio in the order passed by the Hon'ble Supreme Court. The construction of the third proviso under Section 51 of the Act to allow its substantial subsidy of the other businesses by the electricity distribution business as claimed by the BEST would tantamount to a complete exclusion of applicability of the Act, on such a Distribution Licensee. In fact, the Supreme Court Order does not say so in the said Order. In other words, the Supreme Court Order cannot be interpreted to hold something which is contrary to the law. The Hon'ble Supreme Court had not given such directions to allow the BEST to load the entire deficit or loss of its transport business on the distribution business and consequently charge the same from its electricity consumers, as sought to be claimed by the BEST.

24. According to the Respondent as indicated above, the Order dated 08.02.2011 passed by the Hon'ble Supreme Court had declared that under the Electricity Act 2003, the electricity distribution business of BEST can or should subsidize the other business being the transport business of BEST and this law declared by the Hon'ble Supreme Court of India is a binding precedent which has to be followed by both State Commission and the Appellate Tribunal under Article 141 and 144 of the Constitution of India and when this issue has already attained finality binding, it becomes precedent under Article 144 of the

Constitution of India and hence the same cannot be altered by this Tribunal.

25. We have carefully considered this submission of the Respondent and gone through the various authorities cited by him. As far as the law laid down by the Supreme Court holding that the ratio decided by the Supreme Court would be binding on the State Commission as well as this Tribunal cannot be disputed. However, in view of the law declared, the duty of this Tribunal is to find out the ratio of the Supreme Court Judgement and ascertain the law.

26. According to the Appellant, the Supreme Court Order dated 08.02.2011 is the binding precedent for the ratio to the effect that the BEST being a Local Authority is exempted from the requirements of the main Section 51 as well as its first two provisos, in view of the last proviso of Section 51 and not to the other provisions of the entire Act. But, on the other hand, the interpretation as projected by the BEST is that the exemption shall be not only from Section 51 and provisos but also from all the provisions of the Act. This interpretation could not be legally valid. If the interpretation projected by the BEST is accepted, thereby the construction of the third proviso to allow a substantial subsidy to other businesses of a Local Authority by the electricity distribution business, it would tantamount to a complete exclusion of the applicability of the Act on such

Distribution Licensee. Hence, this interpretation cannot be accepted to hold something which is contrary to the law in this case.

27. In short, the interpretation of the last proviso has to be confined to the two other provisos Section 51 alone. The exemption granted by the said proviso cannot be intended to be extended to the other provisions of the Act. It is a settled principle of law that a proviso to a provision cannot be interpreted to enlarge scope of the exemption envisaged under the proviso. As has been mentioned above, Section 51 of the Act explicitly states that "*nothing contained in this Section shall apply to a Local Authority...*". Therefore, the exemption provided to a local authority is limited to the applicability of Section 51 of the Act alone. In other words, the third proviso to Section 51 cannot be interpreted to enlarge the exemption cast under this proviso thereby permitting a complete go-by to the Act itself. This interpretation would be against the letter and spirit of the Act. In this regard, the Learned Counsel for the Appellant has referred to the observations made in the various judgements of the Hon'ble Supreme Court. The same is as follows:-

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and no other." - A. N. Sehgal v.

Raje Ram Sheoran (1992) Supp 1 SCC 304 @ para 14.

Similarly, it has been held by the Hon'ble Supreme Court in **S. Sundaram Pillai and Others v. V. R. Pattambiraman and Others. (1985) 1 SCC 591 @ para 27** that, "a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment."

Further on this point, in **Dwarka Prasad v. Dwarka Das Saraf (1976) 1 SCC 128**, the Hon'ble Supreme Court went on to hold the following :

"18. If the rule of construction is that prima facie a proviso should be limited in its operation to the subject matter of the enacting clause, the stand we have taken is sound, to expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principle matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner as they mutually throw light on each other and result in harmonious construction."

The law on interpretation of a proviso was reiterated in **J. K. Industries and Others v. Chief Inspector of Factories and Boilers and Other (1996) 6 SCC 665**, wherein it was held that

"33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinise and find out the real object of the proviso appended to that provision...

34. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A

proviso should be read as if providing something by way of addition to the main provision which is foreign to the main provision itself."

28. As quoted by the Hon'ble Supreme Court in the judgements referred above, the exemption provided to the Local Authority is limited to the applicability of Section 51 of the Act alone and should not be extended beyond so as to permit a complete exclusion of the Act itself, to a Local Authority.

29. It is settled law that the statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. The provisions of one Section of the statute cannot be used to defeat the other Sections, unless it is impossible to effect reconciliation between them.

30. The Hon'ble Supreme Court has categorically held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject-matter is dealt with in different sections. Therefore, all the related provisions of the Act have to be read together for the purpose of the harmonious construction. These principles have been laid down in the following judgements:-

- (i) Commissioner of Income Tax Hindustan Bulk Carriers
(2003) 3 SCC 57.

- (ii) Kailash Chandra and Another v. Mukund Lal and Others (2002) 2 SCC 678
- (iii) O.P. Singla v. Union of India (1984) 4 SCC 450
- (iv) Sultana Begum v. Prem Chand Jain (1997) 1 SCC 373

31. As laid down by the Hon'ble Supreme Court, it is settled law that a provision of the Act should not be interpreted to defeat the other provisions in the Act. In other words, the proviso to Section 51 of the Act should not be interpreted in a manner that defeats the tariff determination principles contained under Sections 61, 62, 64 and 65 of the Act and the regulations framed there under.

32. One of the foremost objectives of the Act as referred to the Preamble is to protect the interests of consumers and rationalize electricity tariffs. Therefore, the judicial authorities have to adopt an interpretation which promotes and advances the object sought to be achieved by the legislature, in preference to an interpretation which defeats such objectives. Therefore, interpretation projected by the State Commission in impugned order with reference to the provisions of Section 51 cannot be accepted in the light of the fact that the Hon'ble Supreme Court had not given any direction to allow the BEST to subsidize its transport business by this distribution business.

33. As indicated earlier, the ratio of the Hon'ble Supreme Court decision in Civil Appeal is only that the third proviso of Section 51 exempts BEST as a Local Authority from the requirements of the main Section as well the two other provisos of the said Section. As a result of the Supreme Court decision, BEST may be exempted only from the following requirements as indicated earlier:-

- (i) Informing the regulatory commission in advance before engaging in any other business;
- (ii) The requirement of a specified proportion of revenues derived from the other business having to be utilised for reducing the wheeling charges of the licensee; and
- (iii) The requirement of maintaining separate accounts for each of each of its other business undertakings.

Thus, only these requirements have been exempted and could be exempted.

34. The Hon'ble Supreme Court's Order does not provide for BEST loading its entire losses from its transport business on to the electricity consumers. It is to be pointed out in this context that the issue of the extent of the exemption granted to a Local Authority under Section 51 in relation to its other business and the question as to whether such exemption could negate the

application of the entire set of tariff determination principles formulated under Section 61, 62, 64 and 65 of the Act to a Local Authority were not the subject matter of consideration before the Hon'ble Supreme Court.

35. In the light of the above, we have to find out the ratio from the observations made by the Hon'ble Supreme Court. The legislature has specifically carved out exceptions under the Act, where it intended Local Authorities to be exempted from certain obligations to which other distribution licensees were subjected to.

36. As indicated above, the only two provisions from which local authorities have been exempted from are Section 42(3) of the Act and Section 51 of the Act.

37. Under Section 42(3) of the Act, a specific exemption has been carved out for a Local authority, from the mandate to provide open access on its wires. In accordance with the Section 42(3) of the Act, Regulation 19 of the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005, would exempt the local authorities engaged in the business of distribution of electricity before the appointed date, from the applicability of the said Regulations.

38. Similarly, in accordance with the Section 51 of the Act, Local Authority is exempted from the applicability of the MERC

(Uniform Recording, Maintenance and Reporting of Information) Regulations, 2009 which otherwise require licensees to maintain separate accounts based on certain principles. That apart, Regulation 2 of the MERC (Multi Year Tariff) Regulations, 2011, would exempt a Local Authority from the requirement of maintaining accounting statements as per the prescribed form and permits local authorities to maintain accounts in accordance with the relevant act or statute applicable to the local authority.

39. Similarly, Regulation 94 of the MYT Regulations 2011 would exempt a local authority from the requirement of deducting one-third of the revenues generated from the other business from the aggregate revenue requirement in determining the tariff of retail supply of the electricity by the Distribution Licensee. In the same way the Regulation 2 of the MERC (General Conditions of Distribution License) Regulations, 2006 exempts a Local Authority from the requirement of maintaining accounting statements as per the prescribed form therein, and permits Local Authorities to maintain accounts in accordance with the relevant act or statute applicable to the local authority.

40. Similarly, the Local Authority would be exempted from the requirements of the prior intimation to the Appropriate Commission regarding carrying on any other business by Distribution Licensee. Further, the Local Authority under these

regulations would be exempted from the requirements of a specified proportion of revenues derived from other business having to be utilized for reducing the wheeling charges of the licensee and the requirement of maintaining separate accounts for each of its other business undertakings. Thus, BEST can utilise the assets of the distribution business for transport business and in that case there is no need for BEST to maintain a separate account for the same to ensure that the distribution business does not subsidise the transport business.

41. Thus, The details as referred to above would clearly show that an exemption to Local Authorities under Section 51 of the Act would contemplate exemptions only from such requirements as specified above by these regulations. The exemption now being claimed by the BEST i.e. 100% subsidization of its other businesses by the electricity distribution business, is not permitted under the Act, or any of the allied Regulations. If the contention of BEST is entertained, it will result in passing on the entire loss of the unregulated transport business of BEST including its inefficiency to the electricity distribution business and ultimately to the end consumers of electricity against their interest which is required to be safeguarded by the State Commission under Section 61 (d) of the Electricity Act. The contention of the Respondent is definitely not in consonance

with the ratio of the Hon'ble Supreme Court's Order dated 8.2.2011.

42. In this context, it would be worthwhile to quote some of the other provisions of the Act and the relevant Regulations which would clearly indicate that the interpretation projected by the BEST would amount to complete exclusion of various provisions under the Act and the allied Regulations. Those provisions are given below:-

(a) The preamble to the Electricity Act, 2003 lays down "An act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, ...protecting interest of consumers... rationalization of electricity tariff, ensuring transparent policies regarding subsidies..."

(b) As per Section 61 of the Act, the Appropriate Commission has to specify the terms and conditions for determination of tariff based on the factors enumerated. These factors specify that the tariff should progressively reflect the cost of supply of electricity and also reduce cross-subsidies and the distribution business is conducted on commercial principles.

(c) As per Section 62, the Appropriate Commission has to determine the tariff in accordance with the provisions of the Act. This would require a licensee to furnish separate details in respect of its generation, transmission and distribution of businesses, which are factored in while determining tariff.

(d) As per Section 64, every licensee has to make an application to the appropriate Commission for determination of tariff in accordance with the provisions of the Act.

(e) Section 65 provides that if the State Government grants any subsidy to any consumer or class of consumers in the tariff determined by the State Commission u/s 62 of the Act, the said subsidy is to be paid in advance to compensate the person affected by the grant of subsidy.

(f) Regulation 4 of Tariff Regulations, 2005 provides for the guiding principle for the determination of tariff, specifying that "the Commission, while specifying the terms and conditions for the determination of tariff under these Regulations, shall be guided by the principles contained in Section 61 of the Act".

(g) Regulation 71 of the MYT Regulations, 2011 provides that even within the distribution business, a Distribution

Licensee is required to make a separate application for determination of tariff for wheeling of electricity and retail sale of electricity.

(h) Regulation 73 of MERC (Multi Year Tariff) Regulations, 2011 provides for the components of Annual Revenue Requirement for distribution wires business. This would require that the wheeling charges of the Distribution Licensee shall provide for the recovery of the aggregate revenue requirement, and shall comprise of the following components: (a) Return on Equity capital; (b) Interest on Loan Capital; (c) Depreciation; (d) Operation and maintenance expenses; (e) Interest on working capital and deposits from consumers and Distribution System Users; (f) Provision for bad and doubtful debts; and (g) Contribution to contingency reserves.

43. The above provisions would make it clear that BEST being a Distribution Licensee under the Act is subject to all these provisions of the Act as well as Regulations and the BEST cannot claim exemptions from these Provisions and Regulations.

44. As indicated above, Section 51 clearly provides that "nothing contained in this Section shall apply to a local authority..." This implies that such Local Authority is exempted

only from three conditions through provisos envisaged under Section 51. In other words, all the other provisions of the Act and the Regulations issued there under would apply with full force to the BEST being a Local Authority, in the same manner as any other distribution licensee under the Act. This interpretation of the third proviso to Section 51 would be in line with the settled laws on the interpretation of a proviso.

45. We should now again quote the Supreme Court's Order in its Civil Appeal No. 848 of 2007:

"Undisputedly the Appellant was engaged inter alia in the business of distribution of electricity prior to the commencement of the Act. In our opinion it would be not correct to hold that despite the third proviso to Section 51 of the Act, the distribution licensee must not only maintain separate accounts for each of its businesses but must also ensure that the electricity business should not subsidize the other business undertakings. Hence the view of the Tribunal in paragraphs 56 and 57 of its order is not correct.

In our opinion in view of the third proviso to Section 51 of the Act a certain limited electricity distribution licensees are exempt from the operation of the Section insofar as the requirement of prior intimation to the commission or the obligations of the first and second proviso are concerned. The appellant is admittedly doing business of transport besides electricity distribution for several decades. On the facts of the case, we are of the opinion that the third proviso to Section 51 of the Act applies and hence the impugned judgement and order cannot be sustained."

46. The careful reading of the above observation could make it clear the ratio of the Supreme Court is only that the third proviso of Section 51 exempts BEST as a Local Authority from the requirements of the main Section as well as two other provisos and not the other Sections of the Act. As mentioned earlier, BEST may be exempted from the requirements of (i) informing the State Commission in advance before engaging any other business; (ii) the requirements of a specified proportion of revenues derived from other business having to be utilized for reducing the wheeling charges of the licensee; and (iii) the requirement of maintaining separate accounts for each of its other business undertakings. This would not apply to the other provisions of the Act.

47. In the light of the above analysis and discussion, it can be concluded that the Hon'ble Supreme Court's judgement does not provide for BEST loading its entire losses from the transport business on to the electricity consumers. In other words, the finding of the Hon'ble Supreme Court judgement cannot be interpreted to mean that the BEST is authorised or entitled to load the entire losses from its transport business on to the electricity consumers, when there was no such ratio decided by the Supreme Court in its judgement in Civil Appeal No. 848 of 2007.

48. SUMMARY OF THE FINDINGS:

(i) It cannot be disputed that as far as the law laid down by the Hon'ble Supreme Court holding that the ratio decided by the Supreme Court would be binding on the State Commission as well as Tribunal. However, it is the duty of this Tribunal to find out the ratio of the Supreme Court Judgement dated 8.2.2011 and ascertain the law.

(ii) On a careful perusal of the Order of the Hon'ble Supreme Court dated 08.02.2011, it is clear that the ratio decided in the order is that the BEST is exempted from the requirements not only of the main Section 51 but also from the first two provisos of the said Section. However, BEST is not exempted from other provisions of the Electricity Act, 2003. The Hon'ble Supreme Court's Order cannot be interpreted to mean that BEST has the right or privilege granted by Section

51 to transfer the entire deficits or loss from its transport business to the electricity business, thereby burdening the electricity consumers due to consequential increase in the retail supply tariff. There is no such finding in the order passed by the Hon'ble Supreme Court. The Hon'ble Supreme Court had not given directions to allow the BEST to load the entire deficit of its transport business on the distribution business and consequently on the retail supply tariff for electricity charges from its consumers, as sought to be claimed by the BEST.

(iii) The interpretation of the last proviso has to be confined to the other provisos of Section 51 alone. The exemption granted by the said proviso cannot be intended to be extended to the other provisions of the Act. It is a settled law that the statute must be read as a whole and one provision

of the Act should be construed with reference to other proviso in the same Act so as to make a consistent enactment of the whole statute. The provisions of one Section of the statute cannot be used to defeat the other Sections, unless it is impossible to effect reconciliation between them.

(iv) There are only two provisions of the Electricity Act from which local authorities have been exempted viz Section 42(3) and Section 51 of the Act. In accordance with these Sections, the Regulations of the State Commission also provide exemption to the Local authorities engaged in the business of distribution of electricity from the relevant Regulations.

(v) As per the order of the Hon'ble Supreme Court dated 8.2.2011, the BEST would be exempted from the requirements of the prior intimation to the Appropriate Commission

regarding carrying on any other business. Further, BEST would be exempted from the requirements of a proportion of revenues derived from the other business to be utilized for reducing the wheeling charges and BEST would not be required to maintain separate accounts for each of its other business undertakings. BEST can utilise the assets of the distribution business for transport business and in that case there is no need for BEST to maintain a separate account for the same to ensure that the distribution business does not subsidise the transport business.

(vi) The interpretation projected by the BEST would amount to complete exclusion of various provisions under the Act and the Regulations, namely the preamble of the Act, Sections 61, 62, 64, 65 and Regulations 4, 71 and 73. BEST being a Distribution Licensee under the Act is subject to

all these provisions of the Act as well as Regulations and hence, the BEST cannot claim exemptions from these provisions and Regulations. If the contention of BEST is entertained, it will result in passing on the entire loss of the transport business of BEST including its inefficiency to the electricity distribution business and ultimately to the end consumers of electricity against their interest which is to be safeguarded by the State Commission under Section 61 (d) of the Electricity Act, 2003. The contention of the Respondent is definitely not in consonance with the ratio of the Hon'ble Supreme Court's order dated 8.2.2011.

49. In view of above, the Appeal is allowed and the impugned order is set aside. The State Commission is directed to pass consequential orders at the earliest. No order as to costs.

50. Pronounced in the open court on this
31st day of October, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated :31st October, 2014

✓ **REPORTABLE / ~~NON-REPORTABLE~~**