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

I.A. NO. 91 OF 2015
IN
APPEAL NO. 64 OF 2015

Dated: 21st April, 2015.

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

IN THE MATTER OF:

1. Western Electricity Supply Company of Odisha Ltd. (WESCO).
2. North-Eastern Electricity Supply Company of Odisha Ltd. (NESCO)
3. Southern Electricity Supply Company of Odisha Ltd. (SOUTHCO).

... Applicants/ Appellants

Versus

1. Odisha Electricity Regulatory Commission, Bidyut Niyamak Bhawan, Unit-VIII,Bhubaneswar – 700 002. Dist: Khurda, Odisha State.
2. The Grid Corporation of Orissa Limited, Janpath, Bhubaneswar – 751 022, Odisha State.

3. The Odisha Power Transmission Company Limited, Janpath, Bhubaneswar – 751 022.)

4. The Commissioner-cum-Secretary to Government, Department of Energy, Government of Odisha, Bhubaneswar.) … Respondents

Counsel for the Appellant(s) … Mr. Kapil Sibal, Sr. Adv.
Mr. Buddy A. Ranganadhan
Mr. Salim Inamdar,
Mr. Hasan Murtaza,
Mr. Aditya Panda,
Ms. Malvika Prasad.

Counsel for the Respondent(s) … Mr. Shekhar Naphade, Sr. Adv.
Mr. Prashanto Chandra Sen
Mr. Rutwik Panda,
Ms. Anshu Malik
Ms. Shubangi Tuli
Ms. Anushruti for **R-1.**

Mr. Dushyant Dave, Sr. Adv.
Mr. R.K. Mehta
Mr. Abhishek Upadhyay
Mr. L.N. Mahapatra for **R-2 & R-3**.

Mr. Dushyant Dave, Sr. Adv.
Mr. G. Umapathy for **R-4**
Mr. Azeem Samuel,
Mr. Abid Nabi,
Ms. Mekhla.

O R D E R

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

1. In this appeal filed under Section 111 of the Electricity Act, 2003 ("**the Electricity Act**"), the Applicants/Appellants – Western Electricity Supply Company of Odisha Limited ("**WESCO**"), North-eastern Electricity Supply Company of Odisha Ltd. ("**NESCO**") and Southern Electricity Supply Company of Odisha Ltd. ("**SOUTHCO**"), who are distribution licensees (also referred to as "**DISCOMS**") have challenged order dated 4/3/2015 passed in Case No.55 of 2013 revoking the licences of the Appellants and order dated 4/3/2015 appointing an Administrator for the Appellants' Utilities. Respondent No.1 is the Odisha Electricity Regulatory Commission ("**OERC**"), who has passed the impugned orders. Respondent No.2 is the Grid Corporation of India Limited. Respondent No.3 is the Odisha Power Transmission Company Ltd. Respondent No.4 is the Commissioner-cum-Secretary to the Government, Department of Energy, Government of Odisha.

2. The Appellants have filed the instant application for interim reliefs. The prayers made in the interim application are as under:

IA NO.91 of 2015

(a) Stay the operation of the impugned order both dated 4/3/2015 in Case No.55 of 2013 revoking the licence of the Appellants and appointing the Administrator in continuation thereof;

(b) Direct that the status quo ante obtaining immediately prior to the issuance of the impugned order be continued till the disposal of the present Appeal;

(c) Direct the administrator and the Authorized Officers to immediately cease and desist from having in any way connected with the affairs and operation of the Appellant-DISCOMs.

3. Gist of the facts of the case needs to be stated. Action for suspension of licence of the Appellants was initiated in 2005 being Case No.32 of 2005 under Section 24 of the Electricity Act. Show Cause Notice was issued inter alia, on the following grounds :

"a) Apparent refusal of REL to renew shareholders agreement, resulting abdication by majority shareholder of DISCOMS of their responsibilities in discharging their regulatory obligations;

b) Failure to appoint Managers/MDs for the three DISCOMS, viz. WESCO, SOUTHCO and NORTHCO.

c) Failure to resolve the issue of servicing Rs.400 crore NTPC bonds.

d) Failure to evolve a convincing plan for meeting the outstanding PFC/REC and IBRD loans and BST dues of GRIDCO.

e) Failure to mobilize counterpart funding in respect of APDRP scheme.

f) Non-infusion of capital.

g) Failure to take up full-scale energy auditing.

h) Failure to introduce spot billing in entire areas of DISCOMs

i) Failure to recruit adequate manpower.

j) Failure to comply with Commission's orders dated 25/10/2005, 03/10/2005 and 30/9/2005."

4. The OERC appointed three special officers in each of the Appellants, providing them with powers to seek information,

documents and details of operation and management of the Appellants, etc. The Appellants challenged the said order in this Tribunal vide Appeal Nos.29, 30 and 31 of 2006. By order dated 13/12/2006, this Tribunal set aside the said order passed by the OERC. Being aggrieved by the said order, the OERC carried appeals to the Supreme Court being Civil Appeal No.946 of 2007 and Civil Appeal No.2309 of 2007.

5. On 5/1/2009, the Supreme Court partially allowed the appeals. The Supreme Court confirmed the order setting aside the order appointing special officers. The Supreme Court, however, set aside this Tribunal's order to the extent it had quashed the notice issued under Section 24(1) of the Electricity Act and granted liberty to the Appellants to file their objections. The OERC was directed to proceed with the matter in accordance with the law without being influenced by the observations made in the order impugned in the appeals. Order of the Supreme Court dated 5/1/2009 reads thus:

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

Accordingly, the appeal is allowed in-part. The impugned order of the Appellate Tribunal is quashed so far as it annuls the show cause notice issued by the Regulatory Commission under Section 24(1) of the Act. Now, it would be open to the respondents to file their representations/ objections before the Regulatory Commission, which shall proceed to decide the matter in accordance with law without being influenced by the observations made in the order impugned in these appeals.

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

Civil Appeal No.2309 of 2007:

In view of the order passed in Civil Appeal No.946 of 2007, it is not necessary to pass any further order in this appeal, but we clarify that any observation made

against the appellants in the impugned order shall not prejudice their cause before the Regulatory Commission."

6. Pursuant to the Supreme Court's order, the matters were heard afresh. After hearing the counsel for the parties and after perusing the written submissions filed by the parties, the OERC passed orders dated 12/5/2011. The OERC came to a conclusion that the Appellants' performance was unsatisfactory, *inter alia*, on the grounds that there was failure to control (AT&C) loss, that there was no proper Energy Audit and that there was large scale theft of electricity, that there was failure in servicing NTPC bond, that there was need to improve standard of service and that the organizations were not being run in a financially viable manner. Instead of penalizing the Appellants, the OERC gave further opportunity to the Appellants to improve their performance. There was to be a periodical review of the progress made by the Appellants. The order stated that in case of failure to carry out the instructions, the OERC will be at liberty to initiate action under Sections 19 and 24 of the Electricity Act. Demonstrable action was called for on the following counts:

"1) Mutually satisfactory arrangement as a remedy for Share Holders Agreement for future of DISCOMs.

2) NTPC Bond issue.

3) Counterpart funding for CAPEX Program.

4) To follow the Guidelines regarding procurement of materials and 3rd party verification in CAPEX.

5) CAPEX should be over and above the O&M expenditure and should not be utilized for regular O&M.

6) Discrimination should not be made in CAPEX between franchisee and non-franchisee areas.

7) There should be enough amount in the ESCROW account to meet O&M and other obligations as per order dated 12/4/2010.

8) Workout correct baseline data and furnish Division wise/project area wise by 31/8/2011 and improvement arrived by 31/3/2012 be submitted before 31/5/2012

9) For smooth implementation adequate material must be provided by DISCOM and in case of any cost overrun or time overrun due to inefficiency of DISCOM, the implication shall not be considered in ARR.

10) Advance action should be taken for procurement of material and awarding the contract in a

transparent manner for implementation in CAPEX program

11) *Concurrent action should be taken for Enforcement through Energy Police Stations (EPS), Vigilance Wing and MRT activities*

12) *AT&C loss and CAPEX program detailing to be done as per OERC Guideline.*

13) *DISCOMs to furnish progress report of implementation of CAPEX quarterly on 15th of following month of quarter.*

14) *Progress of implementation of CAPEX should be displayed on website and progress should be special agenda item on every quarter to the Board.*

15) *Fulltime Managing Director for each DISCOMs should be appointed.*

16) *Generate enough cash through improved billing and collection efficiency to pay the Outstanding Loans and BSP dues to GRIDCO in terms of OERC Order dated 1/12/2008.*

17. *Both Shareholders must take steps to infuse funds into the DISCOMs either by way of equity or by way of debt so as to ensure satisfactory implementation of ongoing CAPEX program or such other capital works as might be required.*

18. *Full scale of Energy Auditing be done.*

19) *Spot billing to be implemented covering entire areas.*

20) Undertake Manpower assessment and file before Commission for approval by 30/9/2011.

21) DISCOMS are required to maintain lines and substations through R&M to ensure quality of power to consumers.

22) DISCOMS should follow protocol on Power regulation.

23) Take up comprehensive plan to reduce losses in view of bench mark fixed by the OERC.

24) DISCOMS should strengthened by giving proper financial and infrastructural support to GRF and taking timely action to comply with the orders of GRF and ombudsman."

7. It must be stated here that this order has assumed finality. The Appellants have not challenged it.

8. It is the case of the Appellants that they have complied with majority of the directives issued by the OERC and compliance of some is in the pipeline and await stakeholders consent. The OERC's case is that it regularly conducted enquiries and performance reviews and came to a conclusion that the Appellants had failed to improve their performance. The OERC, therefore, issued show cause notice dated 13/5/2013 under

Section 19 of the Electricity Act for revocation of the Appellants' licences. Allegations in the show cause notice relate to the following:

"A. Energy Audit.

B. AT & C Loss.

C. Financial position of the Licensee.

D. Payment of arrears with regard to payment of BST.

E. NTPC Bond.

F. Securitization of dues.

G. Infusion of Capital.

H. R&M expenses.

I. Share Holding pattern in DISCOMS.

- *Legal & Operational Issues.*
- *Incorporation of certain clauses of SHA in the AoA.*
- *Disinvestment.*
- *Satisfying the technical & financial prequalification criteria by the shareholders.*

J. Construction and Startup power.

K. Compliance of statutory obligation towards the employees of the Licensee.

L. Non-monitoring of high value consumers (WESCO).

M. Non-compliance of Commission's direction.

N. Security deposit.

O. Breach of licence conditions rendering licence liable to revocation".

9. The Appellants filed their replies. There were three further communications from the OERC seeking further details and/or information. The Appellants responded to them. After several hearings, the OERC passed the impugned order dated 4/3/2015. By the impugned order dated 4/3/2015, the objections of the Appellants have been rejected and the Appellants' licences have been revoked. By the other impugned order of the same date, Administrator is appointed for the Appellants' utilities. The Appellants have filed the instant interim application for the reliefs as mentioned hereinabove.

10. We have heard Mr. Kapil Sibal, learned senior counsel appearing for the Appellants on the application for interim reliefs. We have carefully perused the written submissions filed by the Appellants. Gist of the submissions of the Appellants is as under:

(a) The OERC has not conducted any enquiry under Section 19(1) of the Electricity Act.

(b) The "enquiry" contemplated under Section 19(1) of the Electricity Act includes the OERC making the licensee aware that it is contemplating action under Section 19 of the Electricity Act and is enquiring into the matter to satisfy itself that the revocation is necessary in the public interest.

(c) The basis of an "enquiry" is to put the allegations to the person against whom such allegations are made to elicit his response. In the absence of such procedure, there would be

no "enquiry" at all. (***State of Orissa v. Dr. (Miss) Binapani Dei & Ors.***[1]).

(d) The OERC has equated the series of so-called "enquiries", reviews, inspections, etc. conducted during the scrutiny of the Annual Review Requirements of the licensee from 2011 to 2014 and the tariff proceedings conducted for four years prior thereto, to be the enquiry contemplated under Section 19(1) of the Electricity Act.

(e) Any proceedings by which the OERC collected material for revocation of the Appellants' licences behind their back and without putting them on notice that such materials were being enquired into for the purpose of revocation, could not constitute an "enquiry" contemplated under Section 19(1) of the Electricity Act.

(f) If the OERC had conducted an "enquiry" as is contemplated under Section 19(1) of the Electricity Act, the Appellants would have been able to place the materials before the

[1] AIR 1967 SC 1269 para 9

OERC to show that there is no requirement of "public interest" in revocation; that the criterion in the mind of the OERC to gauge the requirement of public interest, such as (i) distribution losses, (ii) Energy Audit, (ii) terminal benefit fund, etc. could never constitute reasons for the OERC to satisfy itself that the "public interest" required the Appellants' licences to be revoked.

(g) In fact, these issues have been held in favour of the Appellants by this Tribunal in four different judgments, namely,:

i) Judgment dated 13/12/2006 (para 27)
ii) Judgment dated 8/11/2010 (paras 21 & 22)
iii) Judgment dated 3/7/2013 (paras 17.13 to 17.14)
iv) Judgment dated 11/2/2014

(h) The OERC did not implement these judgments and on the very same issues, revoked the licences of the Appellants. Section 19(1) contemplates "satisfaction" of the Commission that it is in the "public interest" to revoke the licence. There

is no order in existence where the OERC has after conducting its so called "enquiry", "satisfied itself" that it is in public interest to initiate proceedings for revocation.

(i) The so-called reasons for infraction of public interest are ostensibly (i) dismal performance of the licensees in terms of consumer service; (ii) quality of power supply; (iii) mounting cases in the GRF and Ombudsman and (iv) violation of orders of the OERC. The first three of these criterions have not even been made reasons for revocation of the licence.

(j) The entire scheme of Sections 19, 20, 21 and 22 of the Electricity Act has been completely done away with by the impugned order.

(k) The reliance placed by the OERC on the earlier order dated 12/5/2011 is misplaced because the said order gives directions to the licensees and the matter was disposed of. The OERC had, therefore, rendered itself *functus officio*. Since the OERC stated in the order that it could initiate

proceedings under Sections 19 or 24, any such fresh proceedings were necessarily required to be started afresh and could not be a mere continuation of earlier proceedings.

(l) By the impugned order, the OERC decided to revoke the licence and make such revocation effective from 4/3/2015 itself (the date of order). This is in violation of Section 19(5) of the Electricity Act which mandates that after the OERC decides to revoke the licence it shall serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect. No notice, however, has been served on the Appellants of revocation of licence. Further, the revocation has been made effective on the same date as the decision to revoke. However, Section 19(5) contemplates two different dates. All this is in complete violation of Section 19(5) of the Electricity Act.

(m) The interregnum between the date of decision to revoke and the date when the revocation becomes effective is meant to permit the licensee to exercise his valuable right of sale of

utility under Section 19(6) which opportunity has been denied to the Appellants. This period is also meant to complete the entire procedure contemplated in Sections 20 to 22 i.e. the sale of the 'utility' of the licensee by the OERC.

(n) Section 21 vests the utility of the Appellants with the purchaser of such utility. On account of the impugned order, the Appellants are no longer the owners of the utility and, therefore, they cannot effect sale of their utility. The entire procedure of Section 19(6) and Section 20 has been done away with and for all practical purposes, the utility of the Appellants has been nationalized by the OERC without any compensation.

(o) Section 22 contemplates that if the utility is not sold in accordance with the procedure mandated in Section 20, the Commission has to frame a scheme for the operation of the utility. If no scheme is framed under Section 22(1), the Appellants are under Section 22(2), free to dispose of their utility. The OERC has not framed any scheme under

Section 22. Hence, by virtue of Section 22(2), the Appellants would be legally entitled to dispose off their utility as they deem fit. This valuable right has been denied to the Appellants.

(p) It is well settled that if a statute provides for a particular procedure, the authority has to follow the same, and cannot be permitted to act in contravention of the same. This will have to be applied to the provisions of the Electricity Act also. (See ***Selvi J. Jayalalithaa & Ors. v. State of Karnataka & Ors.***[2], ***State of Uttar Pradesh v. Singhara Singh & Ors.***[3] and ***Full Bench decision of this Tribunal dated 2/12/2013 in Appeal No.53 of 2012.***).

(q) If the contention of Respondent No.1 that orders of a statutory body are presumed to be legal and valid in law under Section114 of the Evidence Act is accepted that will render Section 111 of the Electricity Act redundant.

[2] (2013) 4 SCT 624 (SC)
[3] AIR 1964 SC 358

(r) Tribunal has inherent power to grant interim relief. This power is incidental and a necessary corollary to the power existing in a court to reverse, modify or amend the order of the lower court (***Income Tax Officer, Cannore v. M.K. Mohammed Kunhi in Civil Appeal No.1164 of 1996 decided by the Supreme Court on 11/9/1968***).

(s) Section 111(6) of the Electricity Act is a complete answer to the contentions of the respondents since the powers available to this Tribunal are as wide, if not wider, than the powers available to the ITAT as referred to in the Supreme Court's judgment mentioned hereinabove. Section 120(2)(i) provides that this Tribunal has power in respect of any other matter which may be prescribed by the Central Government. Under Section 176(2)(t), the Central Government has power to make rules on the additional matters in respect of which the Appellate Tribunal may exercise the powers of a civil court under the Clause (i) of sub-section (2) of Section 120. In exercise of the above powers, the Central Government made the Appellate

Tribunal for Electricity (Procedure, Form, Fees and Record of Proceeding) Rules, 2007. Rule 30 thereof provides for interlocutory application for stay, Rule 20 prescribes the format for the interlocutory application and Rule 22 mentions about jurisdiction of the Tribunal to pass interim order in case of urgency.

(t) By the second impugned order also dated 4/3/2015, the OERC has appointed an Administrator under Section 20(d) of the Electricity Act and has vested in him, the entire management and control of the Appellants' utilities along with their assets, interests and rights, etc. Under Section 20(d), the Administrator could be appointed only for "operation of the utilities". The vesting of the utility could only be in the "purchaser" under Sections 19(6), 20(1), 21 and 22 of the Electricity Act. This is clear even from a comparison of Sections 20(1)(d) and 24(2). In the case of revocation of licence, the utility of the licensee does not vest in the Administrator under Section 20(1)(d). However, in

the case of suspension of licence, under Section 24(2), the utility vests in the Administrator. The impugned order categorically vests the utility of the Appellants in the Administrator for which there is no legal sanction at all. Under scheme of Sections 19, 20 and 21 (as contra-distinct from Section 24), the utility does not vest in the Administrator but only in the ultimate purchaser and that too from a sale of such utility by the licensee. Today, the Appellants have been deprived of the utility and the same vests in the Administrator.

(u) On the merits of the case, the Appellants have strenuously contended that all the allegations made against them as regards alleged billing and collection efficiency, distribution losses, unrecovered receivables from consumers, Energy Audit, consumer metering and escrow relaxation, are baseless. The Appellants have relied upon some data noted in the tables set out in the written submissions to substantiate their contention. As regards outstanding dues payable to Respondent No.2 – GRIDCO as on 31/3/2014, it

is submitted that the Central Electricity Utility Service ("**CEUS**") managed by the OERC for around 14 years accounts for 50% of the loss and loan liabilities being Rs.3205 crores while the Appellants on a cumulative basis account for the remaining 50%. The ground reality is that the OERC is not approving the cost reflective tariff. There is no requisite support from the Government. The OERC failed to manage CESU to arrest the losses and liabilities even after 14 years of management. The Electricity Act does not state that any investment has to be in the nature of promoter's contribution. The Appellant's ability to raise further amounts had been constrained due to the failure of Respondent No.2 to release the security of the assets despite directions of this Tribunal. The case of misuse of public funds is vehemently denied by the Appellants.

(v) The case of the OERC that the difficulties of determination of realistic loss level in absence of comprehensive Energy Audit was a major reason for disallowing losses, was never

raised as a ground before it. It is a new alibi taken by the OERC so as to justify non-compliance of this Tribunal's order.

(w) As per the law laid down by this Tribunal in judgment dated 13/12/2006 in Appeal No.75 of 2005, the OERC has no jurisdiction to pass orders in respect of enforcement of the terms of the shareholders' agreement. In any event, the agreement has expired since 1/4/2004 with efflux of time.

(x) The licensee-company is a different legal entity and has a separate identity than that of the shareholders. The OERC has confused the capital investments of the licensee with the equity share contribution by the shareholders. The licensee has different legitimate options to raise funds among which equity funding is the costliest one.

(y) In many instances, the regulators limit the equity funding to 30% of project cost to minimize the tariff implications. Therefore, the OERC cannot use 'no equity investment by shareholders' as a ground to revoke licence.

(z) In any event, even if the Appellants were to infuse more equity, the OERC would have limited the return on such equity to only 30% of the capitalization and treated the balance as debt. Hence, if the Appellants have, in fact, brought in more investment by way of debt, it has only done so in accordance with the prevalent regulatory dispensation.

(aa) It is submitted that the Appellants' case is of higher standard than a prima facie case and, therefore, status-quo ante deserves to be restored.

11. We have heard Mr. Naphade, learned senior counsel appearing for the OERC. Written submissions have been filed on behalf of the OERC. Gist of the submissions of the OERC is as under:

(a) The orders of the statutory body/Commissions are presumed to be legal and valid in law under the Evidence Act (Section 114 of the Evidence Act).

(b) This Tribunal has no power to grant interim relief. Under Section 111 of the Electricity Act, it can set aside, modify or confirm the order of the Commission.

(c) Under Section 94(2) of the Electricity Act, the State Commission can pass appropriate interim directions. However, no such powers are conferred on this Tribunal. Absence of such provision in respect of this Tribunal shows that Parliament has not conferred power to grant interim relief on this Tribunal.

(d) This Tribunal has no inherent power apart from those conferred by the statute.

(e) Sufficient notice was given for revocation of licence. Show cause notice dated 13/5/2003 was issued.

(f) The OERC has correctly interpreted Section 19 of the Electricity Act.

(g) By order dated 12/5/2011 in Case No.35 of 2005 (***Sharat Chandra Mohanty v. Reliance Energy Ltd***.), the OERC had directed the Appellants to comply with certain directions. These directions were not complied with.

(h) For revoking the licence, investigation under Section 128 of the Electricity Act is not necessary. Section 19 contemplates inquiry and the said inquiry is different from investigation as mentioned under Section 128 of the Electricity Act. Section 128 does not control Section 19 of the Electricity Act.

(i) On admitted facts, there is violation of Section 19(1)(d) and Section 19(1)(c)(i).

(j) Section 19(5) does not prescribe any time period within which notice is to be given. The period of 22 months was

sufficient notice period given to the Appellants to respond to the show cause notice.

(k) This is a case of serious irregularities and financial impropriety for which the Appellants are responsible. Such circumstances warrant immediate revocation of licences.

(l) Assuming without conceding that the Tribunal has power to grant mandatory interim relief, status quo ante ought not to be granted in this case. The Administrator has already been appointed by order dated 4/3/2015. Supervision of Government is involved in this case. The Appellants have not highlighted any major prejudice in the application for stay. Only prejudice seems to be that some top management officers are asked to leave their office. Admittedly, ouster is complete.

(m) Where a person seeks mandatory interim reliefs, his case must be of a higher standard than that of a prima facie

case. Such orders are passed rarely and in exceptional cases. Reliance is placed on ***Dorab Cawasji Warden v. Coomi Sorab Warden***[4] and ***Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan***[5].

(n) As per Section 20(1)(c) of the Electricity Act, no right or title survives upon revocation and, as such, the vesting of the administrative power in Respondent No.2 is proper. The sale can also take place after revocation.

(o) The submission that the OERC had not fixed the realistic loss levels which has resulted in the Appellants getting financially crippled and that the OERC had repeatedly violated orders of this Tribunal is now pending before the Supreme Court where notice has been issued in the SLP as well as in the stay application.

(p) So far as the submission that the OERC has violated the orders of this Tribunal and has not provided funds for the

[4] (1990) 2 SCC 117
[5] (2013) 9 SCC 221

purpose of Energy Audit is concerned, it is contended that the OERC has specifically ordered that the Appellants can claim the expenses towards Energy Audit as additional administrative and general expenses.

(q) This Tribunal has ordered re-fixing of distribution loss levels and non-payment of Rs.4,500 crores. The amount of Rs.4,500 crores is an amount which has been claimed by the DISCOMS as being due to them as per their own accounts. It is not an admission by the OERC that the said amounts are due.

(r) The Appellants have made out no case for mandatory order granting status-quo ante. The Application, therefore, deserves to be dismissed.

12. We have heard Mr. Dushyant Dave, learned senior counsel appearing for Respondent Nos.2, 3 and 4. Written submissions

have been filed on their behalf. Gist of the submissions of Respondent Nos.2, 3 and 4 is as under:

(a) The predecessor in title of the Appellants, BSES Ltd. had entered into Shareholders Agreement on 1/4/1999 under which it acquired the controlling shareholding of the Appellant Companies. The purpose of the same was, *inter-alia*, to improve operational efficiency and reduce losses and reduce the need for funding by Government of Orissa in Electricity Sector.

(b) The BSES Ltd. (later, "RIL") purchased controlling shares of the Appellants for Rs.117 crores. However, it has not brought any funds or technical resources to nurture the Appellant Companies. The very purpose of the Electricity reforms and privatization has been defeated by the investor and its associate companies - the Appellants. Audited accounts show that as on 2012-13, the unrecovered amounts from Consumers were Rs.896.02, Rs.1166.75 and

Rs.393.63 crores for each of the three companies (Rs.2456.40 crores). The distribution loss for the last nine years from 2005 to 2014 against the targeted reduction of 1%-2% per annum was minuscule 3.24% i.e. 0.36% per annum for NESCO (from 37.08% to 33.84%) while for WESCO and SOUTHCO 1.12.% (from 37.80% to 36.68%) i.e. 0.12% per annum and 0.08% (from 41.07% to 40.99%) i.e. 0.009% per annum, respectively. If Distribution loss was achieved at even 2% per annum, the three DISCOMS would have saved Rs. 1350 crores over a period of 9 years.

(c) No Energy Audit has been carried out facilitating manipulation in figures including the Distribution Loss. The Appellants have been putting undue pressure on Respondent No.2 for funds through escrow relaxation. Pursuant to the orders of the OERC by 21/3/2015, Rs.4084 crores were released from the escrow account upon relaxation. The total dues in the form of non-payment of

bills to Respondent No.2, loan and other dues amount to Rs.3205 crores as on 31/3/2014.

(d) The revocation of licence is carried out in public interest under Sections 19(1) and (2). In the present case, the show cause notice was issued on 13/5/2013, reply was filed on 20/6/2013, hearing was concluded on 5/9/2014 and the orders were passed on 4/3/2015 almost after 32 months from the notice. The OERC has passed a detailed and reasoned order for revocation. Order of the OERC is fully sustainable in law because there is complete compliance of sub-sections (1), (2) and (3) of Section 19. Pertinently, the OERC declined to pass any order under sub-section (4) to allow licences to remain in force instead of revoking them.

(e) The Appellants' submission that enquiry as required under Section 19 has not been conducted before issuance of the notice under Section 19, is misconceived. No procedure for conducting the enquiry is specified under Section 19(1).

Full opportunity of hearing and showing cause was afforded to the Appellants after issuance of show cause notice. The OERC has regularly conducted periodic performance review after the order dated 12/5/2011. The proceedings of the said performance review were duly communicated to the Appellants. The submission that the enquiry pursuant to the proceedings under Section 24 could not be treated as an enquiry under Section 19 is without any merit.

(f) The directions given by the OERC in its order dated 12/5/2011 to improve efficiency, collection and metering have not yielded any results. They were not complied with.

(g) The orders dated 4/3/2015 revoking the Appellants' licence have already come into effect. Grant of any interim relief would amount to granting the final relief. Interim relief of the nature which can be granted at the final stage cannot

be granted at an interim stage. [***State of U.P. & Ors v. Ram Sukhi Devi***[6]].

(h) Today, the Administrators have taken over management and control of the Appellants. Granting of any interim order would amount to granting "status quo ante" or interim relief of mandatory nature. The Court or a Tribunal would grant such a relief only in exceptional and extraordinary circumstances. The present case is not of such a nature. [***Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh***[7]]

(i) Interim relief is always equitable in nature. Equity is clearly against the Appellants. Public interest demands that the Appellants be not protected. The majority shareholders of the Appellants (nominees of BSES/RIL) have no stake whatsoever in the Appellants having not invested any moneys since 1999. On the contrary, in the garb of

[6] (2005) 9 SCC 733
[7] (2006) 3 SCC 312

controlling shareholding, they have abused public funds beyond redemption and imagination. Therefore, it is submitted that no case is made out for grant any interim relief.

13. Having narrated the gist of submissions, we must now see whether the Appellants have made out a case for mandatory interim relief. Several contentions are raised by the Appellants but the gravamen of the Appellants' case is that no enquiry as contemplated under Section 19(1) of the Electricity Act was conducted by the OERC and any material collected behind the back of the Appellants without putting them on notice could not constitute an enquiry within the meaning of Section 19(1). The Respondents on the other hand contend that no procedure for conducting enquiry is specified under Section 19(1). In the written submissions supported by the affidavit of Mr. Shesadev Seth, Additional Secretary, Department of Energy, Government of Odisha, it is submitted that full opportunity of hearing and showing cause was afforded to the Appellants after issue of show

cause notice. It is pointed out that after order dated 12/5/2011 was passed by the OERC giving specific directions to the Appellants to improve their performance in terms of capital investment, loss reduction, Energy Audit and improvement in collection efficiency etc., the OERC regularly conducted periodic performance reviews. During the periodic performance reviews, the OERC made detailed enquiries and sought information involving technical, financial and commercial issues through various communications. The data furnished by the Appellants was analyzed and result of such analysis was communicated to the Appellants with further directions. It is submitted that thus a detailed and thorough enquiry was conducted before issuance of show cause notice. It is contended that the submission that the enquiry pursuant to the proceedings under Section 24 could not be treated as an enquiry under Section 19 is without any merit. It is also submitted that for revoking the licence, investigation under Section 128 of the Electricity Act is not necessary. Enquiry contemplated under Section 19 is different from investigation as mentioned in Section 128 of the Electricity

Act. Section 128 does not control Section 19 of the Electricity Act.

14. Another major grievance of the Appellants is that the OERC decided to revoke the licence and make such revocation effective from 4/3/2015 itself i.e. from the date of the order. This is in violation of Section 19(5) of the Electricity Act which mandates that after the OERC decides to revoke the licence, it shall serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect. No notice, however, has been served on the Appellants of revocation of licence. Section 19(5) contemplates two different dates. It is contended that the interregnum between the date of decision to revoke and the date when the revocation becomes effective is meant to permit the licensee to exercise his valuable right of sale of utility under Section 19(6) which opportunity has been denied to the Appellants. It is submitted that no scheme is framed under Section 22(1). If no scheme is framed under Section 22(1), the Appellants are under Section 22(2), free to dispose of their

utilities. Thus, there is violation of relevant provisions of the Electricity Act.

15. On the other hand, it is contended by the Respondents that sub-Section (5) of Section 19 only says that after the licence is revoked, notice has to be served on the licensees and a date has to be fixed on which the revocation shall take effect. Section 19(5) does not state that the date has to be a future date. It can be the date on which the order is passed if the exigencies of the case so require. It is submitted that in the instant case, serious allegations are leveled about the conduct of the Appellants. It is submitted that there are serious irregularities and glaring improprieties in the management and operation of the utilities having adverse impact on public funds. It is submitted that in public interest stringent action was necessary. Hence, the OERC has not committed any illegality in making the revocation effective on the date of the order by which the licences were revoked. Pertinently, Mr. Dave, learned senior counsel appearing for Respondent Nos.2, 3 and 4 has made a statement that the

order appointing Administrator is not an order under sub-section (6) of Section 19 read with Section 20 for sale of utilities of the licensees but, it is merely an order under clause (d) of sub-section (1) of Section 20 of the Electricity Act. Section 20(1)(d) states that the Appropriate Commission may make such interim arrangements in regard to the operation of the utility as may be considered appropriate including the appointment of Administrators. It is also submitted by Mr. Dave that Section 21 is not attracted and the utilities continue to vest in the DISCOMS. It is submitted that the option of sale is not closed.

16. Thus, on facts both sides have their own versions and both sides have their own interpretation of the legal provisions. The Respondents justify their action on the ground of public interest. The Appellants have denied this case. The OERC has dealt with the submissions of the parties at great length and by a reasoned order rendered a finding against the Appellants and has appointed Administrator for the Appellants' utilities.

17. This appeal involves extremely complex factual issues. There are also legal issues of importance which this Tribunal will have to deal with. Some appeals relating to issues involved in this appeal are stated to be pending in this Tribunal. Some appeals are stated to be pending in the Supreme Court. Several issues will require an indepth examination of facts and figures and that can only be done when the appeal is finally heard. However, since we are hearing application for interim relief, the basic principles which need to be kept in mind while dealing with applications for interim relief must be stated. When a Court or a Tribunal is dealing with an application for grant of prohibitory injunction, it has to examine whether there is a prima facie case, whether there is likelihood of irreparable or serious injury, which cannot be compensated in terms of money and whether balance of convenience is in favour of the one who seeks such relief. However, the Appellants are not seeking prohibitory injunction. Admittedly, the impugned order has taken effect. The Administrator appointed by the impugned order has taken over the management and control of the Appellants' utilities. The

Appellants are, therefore, seeking a mandatory order restoring status-quo ante. The question is, when can such order be passed and whether the Appellants have made out a case for such order.

18. It is well settled by a catena of judgments of the Supreme Court that mandatory injunction orders can be passed very rarely and in exceptional circumstances (***Kishore Kumar Khaitan***). Apart from the consideration of irreparable harm and injury and balance of convenience, the Court or the Tribunal has to see whether the person who seeks such a relief has a strong case of a higher standard than a prima facie case. In this connection, we may refer to ***Dorab Cawasji Warden,*** to which our attention is drawn. The relevant paragraphs of the Supreme Court's judgment could be quoted.

> *"The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that*

> *which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:*
>
> *(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. (3) The balance of convenience is in favour of the one seeking such relief."*

19. Reference may also be drawn to ***Mohd. Mehtab***. The relevant paragraphs of the Supreme Court's judgment could be quoted:

> *"There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require*

a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden v. Coomi SorabWarden & Ors. has come to be firmly embedded in our jurisprudence……"

20. Having examined the facts of the case in light of the above judgments, we are of the opinion that the Appellants have not made out a case which is higher than prima facie case. Counsel for the Respondents has made a statement that the DISCOMS have not been divested of their utilities. The Administrator is only in the management and control of the utilities. Option of sale is not closed. When the Administrator is appointed, under the direction of the OERC, his actions are amenable to the supervision of the OERC. Therefore, the apprehension of irreparable harm and injury being caused to the Appellants appear to be baseless. The officers of the DISCOMS have been replaced by the Administrator. They have no personal interest in the DISCOMS. Ultimately, it is the question of securing proper management of the DISCOMS. In the facts and circumstances of the case, it is not possible to say that balance of convenience tilts in favour of the Appellants.

21. The Respondents have urged that revocation is done in public interest. The Respondents have contended that Rs.2456 crores are yet to be recovered. There is a massive erosion of net worth to the tune of Rs.2424.23 crores. There is heavy financial dependence on Respondent No.2 and massive default thereafter. It is submitted that negative net worth precludes infusion of capital. There is heavy borrowing from the consumer security deposits. It is submitted that repair and maintenance was not carried out and there is negligible capital expenditure. It is submitted that auditing of escrow account shows that finances are in a mess. It is contended that it was in public interest to revoke the licences of the Appellants and appoint the Administrator. Undoubtedly, the Appellants have strenuously denied this case. We have also noted the contention of the Appellants that a number of judgments of this Tribunal in their favour have not been implemented by the OERC. But when the impugned order has already taken effect and the Administrator is appointed and public interest is stated to be ground for

revocation, having regard to the law laid down by the Supreme Court and having regard to the nature of allegations, it is not possible for this Tribunal to grant a mandatory order restoring status-quo ante. It is not possible for us to say in the facts of this case that the Appellants' case is of a higher standard than a prima facie case.

22. There is another reason which persuades us to take this view. It is well settled that the Court or the Tribunal should not grant an interim relief which would amount to final relief and make the pending lis infructuous. In this connection, we must refer to ***Ram Sukhi Devi***, where the Supreme Court has reiterated that interim relief of the nature which can be granted at the final stage cannot be granted at an interim stage. The Supreme Court has observed as under:

> *"Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case having been made out, without being concerned about the*

balance of convenience, the public interest and a host of other considerations."

23. If we restore status quo ante, the appeal will become infructuous. We cannot do so.

24. Mr. Kapil Sibal, learned senior counsel appearing for the Appellants submitted that if this court is not inclined to restore status-quo ante, the officers of the Appellants may be permitted to work under the directions of the Administrator. This suggestion is not acceptable to the Respondents. We are also of the opinion that in the circumstances of the case such an arrangement is not desirable and also not feasible.

25. In view of the above, it is not possible for us to grant any mandatory interim relief to the Appellants and restore status-quo ante. The interim application is therefore, dismissed. We make it clear, however, that we have not expressed any opinion on the merits of the case. Nothing said by us in this order should be

treated as our expression of final opinion on the merits of either the Appellants' case or the Respondents' case.

26. Pronounced in the Open Court on this 21st day of April, 2015.

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

√**REPORTABLE / ~~NON-REPORTABALE~~**