

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

**APPEAL NO.243 OF 2014
AND
IA NO.282 OF 2015**

Dated: 4TH NOVEMBER, 2016.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble I.J.Kapoor, Technical Member**

IN THE MATTER OF:

**MUNICIPAL CORPORATION OF GREATER)
MUMBAI)
(Through the General Manager)
Brihanmumbai Electric Supply and)
Transport Undertaking of the Municipal)
Corporation of Greater Mumbai) (“BEST”),)
Having office at BEST Bhawan, Best Marg,)
Post Box No.192, Colaba, Mumbai-400 001.) **....Appellant(s)****

Versus

1. **MAHARASHTRA ELECTRICITY)
REGULATORY COMMISSION (MERC))
Through its Secretary, Having office at)
World Trade Centre, Centre No.1,13th)
Floor, Cuffe Parade, Mumbai -400 005.)**
2. **TATA POWER COMPANY LIMITED)
(TPC))
Having its registered office at Bombay)
House, 24, Homi Mody Street, Fort,)
Mumbai – 400 001.)**
3. **RELIANCE INFRASTRUCTURE)
LIMITED (R-Infra))
Having office at H-Block, 1st Floor,)
Dhirubhai Ambani Knowledge City, Navi)
Mumbai – 400 710.)**

4. **GOVERNMENT OF MAHARASHTRA**)
(GOM))
Through the Principal Secretary)
Industries, Energy and Labour)
Department, Mantralaya, Mumbai – 400)
032.)
5. **STATE ADVISORY COMMITTEE (SAC)**)
Through the Secretary having office at)
Centre No.1, 13th Floor, World Trade)
Centre Cuffe Parade, Mumbai – 400)
005.) **... Respondents**

Counsel for the Appellant(s) ... Mr.Harinder Toor
Mr. Simranjeet Singh
Mr. Karan Grover
Mr. R.Dubal
Mr. R.Patstute(Reps.)

Counsel for the Respondent(s) ...Mr. Buddy A.Ranganadhan
Mr. Raghu Vamsy
Mr. Shashank Khurana
Mr. S. Venkatesh for **R.1**

Mr. C.S. Vaidhyanathan, Sr.Adv.
Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Kunal Kaul
Mr. Akshat Jain for **R.2**

Mr. Aditya Dewan
Mr. Samir Malik for **R.4**

J U D G M E N T

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

1. The Appellant – Municipal Corporation of Greater Mumbai is a Municipal Corporation duly constituted under the Mumbai

Municipal Corporation Act 1888. Respondent No.1 is the Maharashtra Electricity Regulatory Commission (“**the State Commission**”). Respondent No.2 is Tata Power Company Limited (“**TPC**”) is a distribution licensee. Respondent No.3 is Reliance Infrastructure Limited (“**R-Infra**”). It is a licensee under the Electricity Act, 2003 (“**the said Act**”). Respondent No.4 is the Government of Maharashtra which is the Appropriate Government having jurisdiction under the said Act. Respondent No.5 is the State Advisory Committee notified and established by the State Commission under Section 87 of the said Act. In this appeal the Appellant has challenged order dated 14/08/2014 passed by the State Commission in Case No.37 of 2014.

2. It is necessary to state the background and relevant facts of the case.

3. The Appellant is a Local Authority under Part IX-A of the Constitution of India. The Brihanmumbai Electric Supply and Transport Undertaking (“**BEST**”) is duly constituted under the Bombay Municipal Corporation Act 1888. Being a statutory undertaking of the Appellant, it is also a local authority under

Section 2 (41) of the said Act. BEST is entrusted with the important task of distribution of electricity in Island City of Mumbai (i.e the area from Colaba upto Mahim and Sion). This appeal is filed through General Manager, BEST. In this judgment the Appellant is also referred to as BEST.

4. TPC was earlier a licensee/bulk licensee under the erstwhile Indian Electricity Act 1903 and erstwhile Indian Electricity Act 1910. Under those Acts TPC was licensed to supply electricity under (i) The Bombay (Hydro-Electric) Licence 1907, (ii) The Andhra Valley (Hydro-Electric) Licence 1999, (iii) The Nila Mula Valley (Hydro-Electric) Licence 1921 and (iv) The Trombay Thermal Power Electric Licence 1953. The area of supply of TPC under its four licences overlapped with the area of BEST. TPC has subsequently been granted a distribution licence in supersession of the said four licences by the State Commission vide its order dated 14/08/2014 passed by the State Commission in Case No.90 of 2014 filed by TPC for grant of distribution licence under Section 15(2) of the said Act. This order was challenged by BEST in another appeal being Appeal No.216 of 2014. We shall advert to Case No.90 of 2014 and Appeal No.216

of 2014 more in detail because they have great relevance to the issues raised in this appeal.

5. In 1964, the said four licences were amended by the Government of India to supply electricity under the said four licences for all purposes, including supply to other licensees for their own purposes and in bulk. TPC, however, did not lay out any distribution network for supply of electricity in retail, residential or commercial purpose in the area of supply of BEST, pursuant to the said amendment of the four licences.

6. In 2002 disputes arose between TPC and R-Infra under Case No.14 of 2002 before the State Commission, about initiation of supply of electricity in retail by TPC in the area of supply of R-Infra i.e. suburban Mumbai. The said proceedings culminated in the Supreme Court's judgment dated 08/07/2008 in **Tata Power Co. Ltd v. Reliance Energy Ltd.**¹ wherein the Supreme Court held *inter alia* that TPC under its four licences was authorised to distribute electricity directly to consumers, including those whose maximum demand is less than 1000 KVA apart from its

¹ (2008) 10 SCC 321

entitlement to supply electricity to other licensees. After this judgment, on 20/08/2008, the State Commission issued the Maharashtra Electricity Regulatory Commission (specific conditions of Distribution Licence applicable to the Tata Power Company Limited) Regulations, 2008. Under these regulations TPC was *inter alia* deemed to be a distribution licensee under the said Act until 15/08/2014 and was authorised to supply electricity to the public for all purposes in the area of supply as described in the said four licences of TPC, in accordance with the said Act.

7. One Mr. Shetty, a consumer of electricity (Under LT-II category) whose premises are situated within the area of supply of BEST, filed Case No.60 of 2009 before the State Commission on or about 25/09/2009 against TPC praying *inter alia* for a direction to TPC to provide electricity to him either on BEST network or by extending its own network, as may be necessary. Five other consumers also filed similar petitions. All the cases were heard together. By order dated 22/02/2010 the State Commission *inter alia* held that TPC is bound to supply electricity in terms of applicable regulations. The State Commission gave

direction to the TPC to supply electricity to the consumers either through BEST wires or its own wires.

8. Being aggrieved by the State Commission's order dated 22/02/2010, BEST filed an appeal in this Tribunal being Appeal No.149 of 2010. This Tribunal did not find any infirmity in the State Commission's order dated 22/02/2010. Consequently the appeal was dismissed by this Tribunal vide its judgment and order dated 04/04/2012.

9. Being aggrieved by the said judgment dated 04/04/2012, BEST filed Civil Appeal No.4223 of 2012 before the Supreme Court. The Supreme Court admitted the said appeal on 10/05/2012 and by the order of the same date directed that status quo as on 10/05/2012 shall be maintained by the parties.

10. During the pendency of the said appeal an Invitation for Expression of Interest for distribution of electricity in Mumbai City and part of Mumbai Suburban Area was issued and published on 01/01/2014 in various newspapers by the State Commission. Therefore on 30/01/2014, BEST filed Case No.37

of 2014 before the State Commission against TPC and others praying that the State Commission ought not and should not (i) allow distribution of electricity in retail in the area of supply of BEST by any licensee (other than BEST) and/or (ii) grant distribution licence in the area of supply of BEST to any person (other than BEST). Following are the prayers made by BEST:

- “(a) that the Hon’ble MERC be pleased to refuse grant of distribution licence in the area of supply of BEST to TPC, RInfra and/ or any person (other than BEST);*
- (b) that the Hon’ble MERC be pleased to order that distribution licence cannot be granted to TPC, RInfra and/or any other persons (other than BEST) for the area of supply of BEST.*
- (c) that the Hon’ble MERC be pleased to refuse distribution of electricity in retail in the area of supply of BEST, by TPC, RInfra and/or any person (other than BEST).*
- (d) that the Hon’ble MERC be pleased to set aside the Invitation for Expression in Interest for Distribution of Electricity in Mumbai City and Part of Mumbai Suburban Area, issued and published on 01/01/2014 in various newspapers and on the website of the MERC and/or any proceedings or steps taken thereunder, to the extent of the area of supply of BEST.”*

11. On 07/04/2014 TPC filed Case No.90 of 2014 before the State Commission for grant of distribution licence under Section 15 (2) of the said Act. TPC in this case made the following prayers:

- “(a) Admit the present Application along with the attached documents, submitted by Tata Power for grant of license under Section 14 and 15 read with Section 86 (1) (d) of Electricity Act,2003;*
- (b) Grant Distribution License to Tata Power for a period of 25 years with effect from 16th August, 2014, in accordance with the provision of Section 14 read and 15 of the Electricity Act, 2003, read with MERC (General Conditions of Distribution License) Regulations, 2006 for the entire distribution which includes South Mumbai and parts of Mumbai Suburban Areas, areas of Mira Bhayandar Municipal Corporation including area covered under Chene and Varsave.”*

12. Civil Appeal No.4223 of 2012 was decided by the Supreme Court on 08/05/2014 (**Brihanmumbai Electric Supply and Transport Undertaking v. Maharashtra Electricity Regulatory Commission (MERC) and others²**). The Supreme Court *inter alia* held that TPC is a deemed distribution licensee under the first proviso to Section 14 of the said Act. We shall advert to this judgment in detail a little later.

² (2015) 2 SCC 438

13. By order dated 14/08/2014 the State Commission disposed of Case No.90 of 2014 filed by TPC. By this order TPC was granted distribution licence to supply electricity in the area of supply proposed by TPC for a period of 25 years. BEST challenged the said order vide Appeal No.216 of 2014. In the said appeal BEST prayed that this Tribunal may set aside the order dated 14/08/2014 as far as it relates to grant of distribution licence in the area already served by BEST.

14. By order of the same date i.e. 14/08/2014 passed in Case No.37 of 2014 filed by BEST, the State Commission rejected the prayers made by BEST *inter alia* that the State Commission may refuse to grant distribution licence in the area of supply of BEST to TPC, RInfra and/or any person (other than BEST). BEST has challenged the said order in this appeal.

15. On 25/11/2014, this Tribunal dismissed Appeal No.216 of 2014 filed by BEST on the ground that BEST cannot be a person aggrieved in respect of grant of licence to other area of supply. It was urged before this Tribunal that the grant of distribution licence in favour of TPC is not in accordance with the judgment of

this Tribunal in **Appeal No.7 of 2010 in Noida Power Company Limited v. Paschimanchal Vidyut Vitran Nigam Ltd. & Anr. decided on 6/11/2011.** It was pointed out that in **Noida Power** it was held that the Applicant for the second licence should establish the capital adequacy and creditworthiness. This Tribunal held that findings in **Noida Power** will not be applicable to this case. The summary of the judgment is found in paragraph 68 of the judgment dated 25/11/2014. It reads thus:

“68. Sum-Up

- (a) *This Appeal No.216 of 2017 is not maintainable as the Appellant cannot be a person aggrieved in respect of grant of license to other area of supply. As regards the area of supply of BEST, the points raised to the merits will be considered in Appeal No.243 of 2014 pending before this Tribunal.*
- (b) *Findings of this Tribunal in Appeal No.7 of 2010 in Noida Power case will not be applicable to the present case as Tata Power, in this case has met the conditions for credit worthiness and capital adequacy for the entire area of supply.”*

It may be stated here that Mr. Toor learned counsel appearing for BEST has made a statement that BEST does not dispute the capital adequacy and creditworthiness of TPC.

16. BEST filed Review Petition No.5 of 2015 seeking review of the judgment dated 25/11/2014. By judgment dated 12/03/2015 this Tribunal dismissed the review petition. BEST has impugned the judgment dated 12/03/2015 in the Supreme Court vide Civil Appeal No.4074 of 2015. BEST has also impugned the judgment dated 25/11/2014 in the Supreme Court vide Civil Appeal No.4862 of 2015. On 15/05/2015, the Supreme Court has admitted both these appeals keeping the issue of maintainability and limitation open. It may be stated here that one of the grounds of challenge raised by BEST is that this Tribunal has erred in transferring grounds of Appeal No.216 of 2014 to the present appeal.

17. BEST has filed the instant Interim Application No.282 of 2015 pursuant to the observation made by this Tribunal in its judgment in Appeal No.216 of 2014 that as regards the area of supply of BEST the points raised regarding the merits will be considered in the present appeal being Appeal No.243 of 2014. BEST has filed this application without prejudice to the aforesaid appeals pending in the Supreme Court. Mr. Toor learned counsel

for BEST has urged that it is necessary to allow the amendment to the instant appeal, as per the schedule annexed thereto because it is crucial for determining the real question in controversy.

18. Mr. Vaidyanathan learned senior counsel appearing for TPC has strongly resisted the amendment application. Counsel submitted that in the garb of seeking an amendment to the present appeal being Appeal No.243 of 2014, BEST has sought to expand the scope of the said appeal. The proposed amendment goes beyond the scope of the challenge before the State Commission in Case No.37 of 2014 as well as before this Tribunal in the present appeal. Particularly, drawing our attention to prayer (aa) of the application, counsel submitted that this prayer has been rejected by this Tribunal in Appeal No.216 of 2014 and therefore it cannot be inserted in this appeal by allowing the amendment. Written submissions have also been filed by the parties. We shall give gist of the submissions of the parties.

19. Gist of the Appellant's submissions is as under:

- (a) It is wrong to contend that the amendment application is barred by *res-judicata* as BEST

seeks to re-agitate issues which were concluded by the judgment dated 25/11/2014 of this Tribunal in Appeal No.216 of 2014. In that judgment it is held that Appeal No.216 of 2014 was not maintainable, as BEST cannot be aggrieved in respect of grant of licence to TPC for the other area of supply which did not overlap its area of supply. The said judgment has left all points raised about the merits of the case to be considered in the present appeal. Pursuant to the said judgment the application for amendment is filed by BEST. The Appellant's challenge to the licence granted to TPC with respect to the area of supply overlapping that of BEST cannot be non-suited.

- (b) It is erroneously submitted that the present appeal is barred by *res-judicata* as BEST seeks to re-agitate issues which were concluded by the Supreme Court in **Brihanmumbai Electric Supply and Transport Undertaking**. Neither the parties in the said matter are same as the

parties in the present appeal nor are the issues raised in the present appeal are adjudicated by the Supreme Court in the above matter.

- (c) TPC is estopped from opposing the adjudication in the present appeal of the points raised in Appeal No.216 of 2014 because the same was ordered by this Tribunal by its judgment dated 25/11/2014. There is therefore no question of BEST enlarging the scope of the present appeal.
- (d) BEST is not approbating and reprobating at the same time as alleged because BEST is lawfully proceeding ahead with the matter without prejudice to pending appeals before the Supreme Court.
- (e) It is wrong to contend that the present appeal is an abuse of process of law by BEST to perpetuate its monopoly. BEST is not claiming any monopoly. BEST is bound by the judgment of the Supreme Court in **Brihanmumbai**

Electricity Supply and Transport
Undertaking.

- (f) During the pendency of the aforementioned case before the Supreme Court BEST had filed Case No.37 of 2014 *inter alia* praying that the State Commission should not allow distribution of electricity in retail in the area of supply of BEST by any licensee other than BEST. It was urged before the Supreme Court that Invitation for Expression of Interest was issued by the State Commission in breach of the Supreme Court's order of status quo passed in the above stated matter. The Supreme Court in its aforementioned judgment held that TPC was a "deemed licensee" under Section 14 of the said Act. Although some of the grounds raised in Case No.37 of 2014 are covered by the said judgment, Grounds B, F and H are not covered by the said judgment. Challenge to the Invitation for Expression of Interest was not considered by the Supreme Court.

- (g) Appeal No.201 of 2014 filed by R-Infra is a distinct and independent statutory appeal. It has been unnecessarily referred to.
- (h) Judgment dated 02/03/2016 passed by the Bombay High Court in W.P No.264 of 2014 has been challenged by BEST by filing SLP (Civil) No.23470 of 2016 before the Supreme Court. The Supreme Court has issued notice to the parties:
- (i) In the circumstances the amendment needs to be allowed and the grounds raised therein which are not covered by the Supreme Court's judgment in **Brihanmumbai Electric Supply and Transport Undertaking** must be considered and decided in favour of the Appellant.

20. We have heard Mr. Buddy Ranganadhan learned counsel for the State Commission and perused the written submissions filed by him. Gist of the submissions is as under:

- (a) Relief sought by BEST in Case No.37 of 2014 is covered by the Supreme Court's judgement in **Brihanmumbai Electric Supply and Transport Undertaking**. The present appeal is therefore barred by the principle of *res-judicata*.
- (b) The Invitation for Expression of Interest issued by the State Commission was not in contravention of the Supreme Court's interim order dated 10/05/2012 because it, in no manner, altered the position of BEST. At no point it permitted TPC to lay its network within BEST's area. If there was any violation, BEST would have initiated proceedings against TPC which it did not.
- (c) The findings of the Supreme Court in **Brihanmumbai Electric Supply and Transport Undertaking** are based on interpretation of the said Act, Tariff Policy and National Electricity Policy. It is not based on interpretation of clauses of licences. Such

findings are applicable in *rem* and are not restricted to TPC.

- (d) The liberty granted in Appeal No.216 of 2014 does not confer right on BEST to expand the scope of present proceedings by raising additional issues. Issues which have already been decided cannot be raised.
- (e) Ground raised by BEST that no licence can be granted without creation of a network has been conclusively decided against BEST by the State Commission and this Tribunal in Appeal No.216 of 2014. It cannot be raised in this appeal through the present amendment.
- (f) In the circumstances the present appeal is liable to be dismissed.

21. Gist of the submissions of Respondent No.2 – TPC is as under:

- (a) By its judgment in **Brihanmumbai Electric Supply and Transport Undertaking**, the

Supreme Court rejected BEST's contention that there cannot be any other distribution licensee in the area where BEST is licensed to supply electricity. Submissions made by BEST in Case No.37 of 2014 were identical to the submissions made by it before the Supreme Court in the above mentioned case.

- (b) Present appeal is abuse of process of law. BEST wants to perpetuate its monopoly. BEST is trying to re-agitate the issues finally decided by the Supreme Court in the above mentioned case. This is barred by the principles of *res-judicata* and constructive *res-judicata*. On this ground alone the appeal deserves to be dismissed.
- (c) BEST had filed Civil Appeals No.4862 of 2015 and 4074 of 2015 before the Supreme Court challenging this Tribunal's order dated 25/11/2014 whereby BEST's challenge to grant of distribution licence to TPC was rejected and order dated 12/03/2015 whereby prayer for

review of the said order was rejected, respectively. On the one hand BEST has challenged the said order and on the other hand BEST is seeking implementation of the same. BEST is trying to approbate and reprobate at the same time.

- (d) BEST wants to perpetuate monopoly. This approach of BEST has been deprecated by the Bombay High Court in its judgment dated 02/03/2016 in W.P. No.2641 of 2014. **Noida Power** does not support BEST's case because it does not stipulate that the entire distribution network of the second licensee must be laid to be eligible for grant of licence. **Noida Power** prohibits issuance of a parallel licence to an applicant who has failed to prove its creditworthiness and capital adequacy. Tata Power has proved both.
- (e) Issue regarding the compliance of the previous directions in order dated 14/08/2014 in Case

No.90 of 2014 has also been raised by R-Infra in its Appeal No.201 of 2014. It will be considered by this Tribunal while adjudicating Appeal No.201 of 2014.

- (f) So far as the grounds sought to be included are concerned the table provided by TPC containing amendments proposed to be made by BEST vis-a-vis TPC's objections thereto be seen. A perusal of the table would show that BEST is trying to re-agitate the issues settled by the Supreme Court and by this Tribunal. It is trying to widen the scope of this appeal. In the circumstances the application for amendment as well as the appeal deserves to be dismissed.

22. We have given our anxious consideration to the submissions advanced by the parties. However, in view of the specific observation of the coordinate bench of this Tribunal that as regards the area of supply of BEST, the points raised relating to the merits will be considered in Appeal No.243 of 2014 i.e. the present appeal, it is not possible for us to disallow the proposed

amendments except prayer 'aa'. We cannot permit prayer 'aa' made in this application to be included in this appeal. The said prayer reads as under:

“aa) That this Hon’ble Tribunal be pleased to set aside the impugned order dated 14/08/2014 passed by MERC in Case No.90 of 2014 filed by TPC, as far as it relates to grant of distribution licence in area already served by BEST.”

23. In this connection it must be noted that BEST’s Appeal No.216 of 2014 challenging the State Commission’s order dated 14/08/2014 in Case No.90 of 2014 was dismissed by this Tribunal by its order dated 25/11/2014. The above prayer which is sought to be included in this appeal was rejected by the said order. Review Petition filed against the said order was also rejected by this Tribunal. It is, therefore, not possible to allow this prayer to be included in this appeal. That would amount to permitting BEST to file a second review petition which is not permissible. We, therefore, reject the application to the extent of the said prayer. So far as other grounds are concerned we allow the amendment.

24. Counsel for Respondent No.1 and 2 have strongly urged that the judgement of the Supreme Court in **Brihanmumbai Electric**

Supply and Transport Undertaking has finally decided the issues raised by the Appellant through the amendment. We must, therefore, go to that judgment. In that case a consumer whose premises were situated within the area of supply of BEST approached TPC with a request that he be supplied the electricity by TPC. In response, TPC advised the consumer to approach BEST for its permission to use distribution network of BEST. BEST declined to give permission. Hence, the consumer approached the State Commission *inter alia* for a direction to TPC to provide electricity to him either on BEST Network or by extending its own network. BEST resisted the consumer's prayers. BEST stated that the State Commission did not have the jurisdiction to entertain a dispute between the consumer and a distribution licensee; that TPC was not a deemed distribution licensee for the area in question and therefore was not permitted to supply electricity to any consumer in that area; that unlike other distribution licensees, BEST being a local authority, no person situated in BEST's area of supply could avail electricity from any other licensee on account of BEST invoking a statutory exemption available to a local authority under Section 42 (3) of the said Act and that TPC could not extend its network in BEST's

area of supply without BEST's consent. The State Commission disposed of the complaint holding *inter alia* that TPC was bound to supply electricity in terms of the applicable regulations. BEST's appeal challenging the said order was dismissed by this Tribunal. BEST carried the matter to the Supreme Court. BEST raised similar contentions. The Supreme Court upon consideration of rival contentions held that the State Commission had the requisite jurisdiction to entertain the petition filed by the consumer. The Supreme Court further held that TPC can be treated as a deemed distribution licensee under the first proviso to Section 14 of the said Act and the area of the licensee is the same which overlaps the area covered by BEST. Argument predicated on the sixth proviso to Section 14 would not be available to BEST. It was further held that when an application is made by a consumer to a distribution licensee for supply of electricity, such distribution licensee can request other distribution licensee in the area to provide its network for wheeling electricity to such consumers and this open access is to be given as per the provisions of Section 42 (3) of the said Act. The Supreme Court rejected the contention of BEST that BEST being a local authority, there cannot be any parallel licence

granted in its area of supply owing to the special privileges bestowed upon it under the said Act. The relevant paragraphs of the said judgment could be quoted:

“27. Thus, on a conjoint reading of Section 42 and 43 of the Act along with the objectives and purpose for which the 2003 Act is enacted, it becomes clear that there are two ways in which a consumer stated in a particular area can avail supply of electricity, as pointed out by the learned Senior Counsel for TPC and noted above. When an application is made by a consumer to a distribution licensee for supply of electricity, such a distribution licensee can request other distribution licensee in the area to provide its network to make available for wheeling electricity to such consumers and this open access is to be given as per the provisions of Section 42 (3) of the Act. It is here only that local authority is exempted from such an obligation and may refuse to provide or make its network available. Second option is, under Section 43 of the Act, to provide the electricity to the consumer by the distribution licensee from its own network. Therefore, if in a particular area local authority has its network and it does not permit wheeling of electricity by making available its network, the other distribution licensee will have to provide the electricity from its own network. For this purpose, if it is not having its network, it will have to lay down its network if it requires in order to supply electricity to a consumer seeking supply.

30. Once we read the provisions in the aforesaid manner, it becomes clear that there is no exemption from universal service obligation to any distribution licensee under the Act, on account of the presence of a “local authority” as a distribution licensee in the particular area of supply, which is also reinforced by Para 5.4.7 of the National Electricity Policy which

clearly states that the second licensee in the same area shall have the obligation to supply to all consumers in accordance with Section 43. In this context, it is relevant to reproduce the following observations in Chandu Khamaru v. Nayan Malik: (SCC p.316, para 7)

“7.....These provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee”.

31. It is, therefore, difficult to accept the extreme position taken by the appellant that if local authority is a distribution licensee in a particular area, there cannot be any other distribution licensee in that area without the permission of such a local authority. Not only such a contention would negate the effect of universal supply obligation under Section 43, it will also amount to providing an exception which is not there either in Section 43 of Section 14 of the Act, namely, to treat local authority in special category and by giving it the benefit even that benefit which is not specified under the Act.”

25. We will now consider whether the above case decides the points raised by the Appellant in this appeal. Since in this appeal the challenge is to the order dated 14/08/2014 passed in Case No.37 of 2014 filed by BEST whereby BEST’s prayers were

rejected, we must revisit that case. In that case BEST had prayed that the State Commission should refuse to grant distribution licence in the area of supply of BEST to TPC, R-Infra and/or any person (other than BEST); that it may be ordered that distribution licence cannot be granted to TPC, R-Infra and/or any other persons (other than BEST) for the area of supply of BEST; that the State Commission may refuse distribution of electricity in retail in the area of supply of BEST, by TPC, R-Infra and/or any person (other than BEST) and that Invitation for Expression of Interest for distribution of electricity in Mumbai City and part of Mumbai Suburban Area issued by the State Commission be set aside to the extent of the area of supply of BEST. Therefore, the basic case of BEST was that parallel licence cannot be granted in its area of supply. From the paragraphs of the judgment of the Supreme Court in **Brihanmumbai Electricity Supply and Transport Undertaking** which we have quoted hereinabove it is clear that substratum of BEST's case has given way. The basic contention of BEST that there cannot be any parallel licence in BEST's area of supply without the permission of BEST, BEST being a local authority, was rejected. TPC was held to be a deemed distribution licensee. We have no doubt that these

findings throw the case of BEST pleaded in this case overboard. Its prayer that parallel licence should not be granted to TPC must therefore be rejected. All other consequential prayers made in Case No.37 of 2014 out of which the present appeal arises are also liable to be rejected. Any ground relating to the issues raised by BEST in Case No.37 of 2014 and decided by the Supreme Court cannot be re-agitated in this appeal.

26. We had directed counsel for the parties to file a copy of the appeal memo filed by the Appellant in the Supreme Court in the above matter to find out whether all points which are now sought to be urged were raised before the Supreme Court. Accordingly copy of the appeal memo along with interim application for stay was furnished to us. We have gone through it very carefully and we are of the opinion that points raised by the Appellant were raised therein. Pertinently, the Appellant's counsel has also stated that though some of the grounds raised in Case No.37 of 2014 are covered by the above judgment, Grounds 'B' , 'F' and 'H' are not covered by it. Challenge to the Invitation for Expression of Interest was not considered by the Supreme Court. We have therefore gone through these grounds and examined whether they were raised in the memo of civil appeal or in the interim

application for stay. In Ground 'B' it is stated that the very existence of BEST will be endangered and jeopardized if parallel licences are permitted. The same contention was raised in Ground 'O' of the civil appeal where it is *inter alia* averred that this Tribunal erred in failing to appreciate that the extension or setting up of a distribution system by a parallel licensee like TPC within the area of supply of BEST would be gravely detrimental or prejudicial to the electricity distribution business of BEST. Same contention is raised in paragraph 6 of the interim application. Ground 'H' states that distribution of electricity in BEST's area of supply may not be practically feasible due to severe congestion and/or paucity of space in Greater Mumbai. This contention is raised in Ground 'P' of the appeal memo. It is averred therein that this Tribunal erred in failing to appreciate that in a congested metropolis/suburban city, like Mumbai the extension or setting up of a distribution system or network by TPC may not be feasible or practicable and furthermore would entail needless capital expenses which would ultimately be passed on to the electricity consumers of TPC. It is also raised in paragraph 7 of the interim application.

27. Ground 'F' is a narrative of facts. It refers to the amendment of the Development Control Regulations for Greater Bombay 1991 which permitted development of mill land areas of Bombay which was upheld by the Supreme Court. It is stated that TPC had not laid any network in these areas, but only recently after development of the mill lands TPC is illegally attempting to lay its distribution network. This is a devious attempt by TPC to 'cherry pick' lucrative consumers and it is actuated by crass-profiteering. Reference is made to the State Commission's order dated 22/08/2012 in the case of R-Infra and this Tribunal's judgment in Appeal No.132 of 2014 and batch of appeals.

28. The entire thrust of this ground is TPC's laying its distribution network in mill land areas. The Supreme Court having held that TPC is a deemed distribution licensee and the Supreme Court having rejected TPC's case that a parallel licence cannot be granted in BEST's area of supply without BEST's permission, the above facts about mill land areas of Mumbai and TPC laying its network therein are not of any significance at all. Alleged 'cherry picking' by TPC is not held to be cherry picking in BEST's area of supply. In any case we are informed by counsel

for TPC that TPC has been absolved of cherry picking of consumers in R-Infra's area of supply by this Tribunal in its judgment dated 28/11/2014 in Appeal No.246 of 2012 and batch.

29. We also find that Grounds 'A' and 'B' of Case No.37 of 2014 which pertain to BEST's special status under the said Act, are raised in Ground 'H(i)' to 'H(ix)' of the civil appeal. Grounds 'C(i)' to 'C(ix)' relate to BEST's case that TPC is neither a licensee nor a deemed licensee. They are raised in Ground 'D(i)' to 'D(ix)' of the civil appeal. Ground 'D' of Case No.37 of 2014 contains the submission that reliance on MERC (Specific Conditions of Distribution Licence applicable to the Tata Power Company Limited) is fundamentally flawed and misconceived. This contention is raised in Ground 'E' of the civil appeal. Ground 'E' of Case No.37 of 2014 states that TPC as a parallel licensee is not eligible to distribute electricity in retail, in the area of supply common to BEST and TPC. This ground is raised in Ground 'F' and 'G' of the civil appeal. Thus all the contentions raised in Case No.37 of 2014 were before the Supreme Court. The Supreme Court has considered them and settled all the issues. We cannot re-examine them.

30. So far as the argument that there is a breach of the Supreme Court's order dated 10/05/2012 is concerned, it has in no manner altered the position of BEST in any way as at no point the Invitation for Expression of Interest permitted any party to lay its network within the area of BEST. BEST could have taken up this issue before the Supreme Court during the hearing of Civil Appeal No.4223 of 2012 which culminated in **Brihanmumbai Electricity Supply and Transport Undertaking** but it did not.

31. We have carefully perused all the grounds raised through the amendment application. We are of the opinion that they were raised in the appeal memo of Civil Appeal No.4223 of 2012 and are covered by the Supreme Court's judgment.

32. Some of these grounds are also covered by judgment of this Tribunal dated 25/11/2014 in Appeal No.216 of 2014 as rightly pointed out by the counsel for the State Commission. Counsel has drawn our attention to questions of law at (ii) 10 and 11, at (iii) 8, 10 and 12 and Grounds 'N', 'O', 'S', 'U', 'V' and 'W' of the Schedule to the interim application for amendment. These grounds pertain to one specific issue that whether a licensee could be permitted to develop its distribution network after the

grant of licence. BEST had raised this issue in Appeal No.216 of 2014. Reliance was placed on this Tribunal's judgment in Appeal No.7 of 2010. It is necessary to reproduce the relevant portions of the said judgment to which our attention is drawn by counsel for the State Commission to show what submission was raised by BEST and how it was dealt with. Following are the relevant paragraphs.

“9. At the threshold, it has to be mentioned that the argument of the learned Senior Counsel for the Appellant that the grant of distribution licence in favour of the Tata Power is not in accordance with the ratio decided by the judgment of this Tribunal in Appeal No.7 of 2010 in the case of Noida Power Company Limited Vs Paschimachal Vidyut Vikas Nigam Limited is misplaced.

10. According to the Appellant, the direction to roll out the network in the phased manner is contrary to the judgment of this Tribunal in Appeal No.7 of 2010. The Appellant has placed heavy reliance on the judgment in Para 26 of the judgment. The same is reproduced as below:

“26. In terms of provisions of the Act and the second licence Rules, there cannot be a phased development of the distribution network in the case of the second licence. The applicant for the second licence should establish the capital adequacy and creditworthiness to meet service obligation for the entire area under Section 43 first in the manner mentioned above before this second licence is made effective. Otherwise, the purpose of granting second licence, to provide level playing field and competition to the existing licensee in the interest of the consumer will never be achieved. In

this context, the relevant provisions of the National Electricity Policy, 2005 is relevant.....

27. The reading of the above clause would make it clear that the Applicant for the second licence should not be allowed to resort to cherry picking few areas and it shall have the obligation of supply to all consumers in accordance with the provisions of Section 43 of the 2003 Act....”

11. The reliance is placed on the above paragraph, would not support the Appellant for the following reasons:

(a) The judgment of this Tribunal in Noida Power case does not at any point stipulate that the entire network of the second licensee over its distribution area must be laid to be eligible for grant of licence.

(b) The judgment of this Tribunal mandates that the Applicant for the second licensee must prove its credit worthiness and capital adequacy for the entire area of supply and the same cannot be judged for a phased development of network.

(c) Therefore, the judgment prohibits the issuance of a second licence without proving its credit worthiness and capital adequacy to cover for the network only for a part of the area of supply.

12. On the basis of these findings the ratio has been decided by this Tribunal as against the grant of licence. But in the present case, the Tata Power in fact has proved its credit worthiness and capital adequacy as held by the State Commission.

13. Therefore, there is no merit in the contention of the Appellant that the Noida Power Company case would apply to the present Appeal.....”

33. Thus the question that no licence can be granted without creation of a distribution network has been conclusively ruled against BEST by this Tribunal and hence the said question and related grounds cannot be raised before this Tribunal. In the same appeal, grant of distribution licence to TPC was challenged which was dismissed by this Tribunal. BEST's review petition challenging the said judgment was dismissed by this Tribunal. It is true that BEST's challenge to both these orders is pending in the Supreme Court. But so far as this bench is concerned, the coordinate bench's findings are binding. These grounds therefore cannot be urged in this appeal.

34. In the ultimate analysis we are of the view, that the Supreme Court's decision in **Brihan Mumbai Electricity Supply and Transport Undertaking** has settled the basic issues raised by BEST. We have discussed them in detail hereinabove. All the grounds raised in Case No.37 of 2014 and in the instant appeal memo including those introduced through the amendment application have been conclusively decided. The Supreme Court has interpreted the relevant provisions of the said Act. It has considered the provisions of the Tariff Policy and National Electricity Policy which have a bearing on the issues raised by

BEST and held that there can be a parallel licence in the area where a local authority is licensed to supply electricity. These findings are in *rem*. They are not restricted to TPC only. In any case all the points raised by BEST against TPC are covered by it. It is not possible for us to set aside the impugned order on the basis of any of the grounds raised in the original appeal memo and those introduced through amendment application. The appeal is, therefore, dismissed.

35. Pronounced in the Open Court on this 4th day of November, 2016.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE/~~NON-REPORTABLE~~**