

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI (APPELLATE
JURISDICTION)

APPEAL NO. 222 OF 2014 &
APPEAL NO. 223 OF 2014

Dated: 28th February, 2025

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

APPEAL NO. 222 OF 2014

In the matter of:

**MULA PRAVARA ELECTRIC CO-OPERATIVE
SOCIETY LIMITED ("MPECS")**

Shrirampur, District Ahmednagar,
Maharashtra, PIN 413709.

...Appellant(s)

VERSUS

**1. MAHARASHTRA ELECTRICITY
REGULATORY COMMISSION**

13th Floor, Cuffe Parade,
Colaba, Mumbai – 400 005
Maharashtra.

... Respondent No.1

**2. MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION CO. LTD. ("MSEDCL")**

Prakashgad, Plot No. G-9,
Bandra (East), Mumbai – 400 051
Maharashtra.

... Respondent No.2

3. STATE OF MAHARASHTRA

Through its:

(a) Secretary,
Department of Co-operation,
Marketing and Textiles,
Government of Maharashtra,
Mant ralya, Mumbai – 400032
Maharashtra

And

(b) Secretary,
Department of Industries,
Energy and Labour,

Government of Maharashtra,
Mantralaya, Mumbai – 400032
Maharashtra.

... Respondent No.3

Counsel for the Appellant(s): Mulla and Mulla and Craigie Blunt
and Caroe
Aditya Panda
Hasan Murtaza for Appellant(s)

Counsel for the Respondent(s): Pratiti Rungta for Res.1
Ramni Taneja for Res.2

APPEAL NO. 223 OF 2014

In the matter of:

**MULA PRAVARA ELECTRIC CO-OPERATIVE
SOCIETY LIMITED (“MPECS”)**

Shrirampur, District Ahmednagar,
Maharashtra, PIN 413709.

...Appellant(s)

VERSUS

**1. MAHARASHTRA ELECTRICITY
REGULATORY COMMISSION**

World Trade Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai – 400 005
Maharashtra.

... Respondent No.1

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... Respondent No.3

Counsel for the Appellant(s): Hasan Murtaza
Aditya Panda for Appellant(s)

Counsel for the Respondent(s): Pratiti Rungta for Res.1

Ramni Taneja for Res.2

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

Appeal No. 222 of 2014 is preferred by the Appellant against the order passed by the MERC in Case No. 85 of 2010 dated 18.06.2014, whereby MERC held that the 2nd Respondent-MSEDCL was not required to make a fresh application for grant of license to supply electricity in MPECS area of supply as they were the successor of the erstwhile MSEB in the area of distribution, and a licensee for supply of electricity in these areas. In its order, in Case No. 85 of 2010 dated 18.06.2014, MERC held that the 2nd Respondent MSEDCL had a license to supply electricity in the MPECS area of supply; the distribution rights of the 2nd Respondent (erstwhile MSEB) were not forfeited because of non-supply in the appellant - MPECS area; in accordance with Section 26 of the Electricity (Supply) Act, 1948 read with Section 19(2) thereof, MSEB had been conferred the powers and obligations of the distribution licensee for the whole State of Maharashtra; MSEB, which was engaged in the business of distribution of electricity prior to enactment of the Electricity Act, 2003, continued to act as a deemed distribution licensee

as per the first proviso to Section 14 of the Electricity Act, 2003; in accordance with Section 131 read with the fifth proviso to Section 14 of the Electricity Act, 2003, and the subsequent notification of the Maharashtra Electricity Reforms Transfers Scheme dated 04.06.2005, the 2nd Respondent, being the successor of MSEB, had the same area of supply as MSEB for distribution of electricity, with no exceptions or deletions; the Appellant had been granted a license in the year 1971 for supplying electricity in four talukas i.e., Rahuri, Shrirampur, Sangamner, and Nevasa in the district of Ahmednagar; no documents had been presented before the Commission to show that the area of MPECS was deleted from the area of MSEB (now MSEDCL) in the year 1971, when the license was granted to MPECS; and, at the time of grant of license by the Government of Maharashtra to MPECS in 1971, the area of MPECS was not deleted from the area of MSEB (now MSEDCL), and MSEDCL continued to have the right to supply in that area. The MERC concluded holding that MSEDCL was not required to make a fresh application for grant of license to supply electricity in the MPECS area of supply by virtue of the fact that, as the successor body to the erstwhile MSEB in the area of distribution, it was a licensee for supply in these areas.

Appeal No. 223 of 2014 is filed by the Appellant to set aside the order passed by MERC in Case No. 87 of 2010 dated 18.06.2014 whereby MERC held that the Appellant was a subsequent applicant for grant of license; their application should be considered as a fresh application under Sections 14 and 15 of the Electricity Act, 2003; the application, should be evaluated on the criteria specified in the sixth proviso to Section 14 of the said Act, and the criteria prescribed in the MERC (General Conditions of Distribution Licence) Regulations, 2006; as the application submitted by them on 27.04.2010 was not in accordance with the sixth proviso to Section 14, the Appellant should re-submit a fresh application, for grant of licence for the MPECS area, in accordance with the sixth proviso to Section 14 within three months; and the

said application should clearly mention that the Appellant satisfied the additional requirements of Capital adequacy, Credit worthiness and Code of Conduct as per the Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 notified by the Central Government.

As the Appellant's contention of their being the sole distribution licensee in the MPECS area of supply till 31.01.2011, and the findings recorded by the MERC, in both the impugned orders, that the Appellant is a second licensee in the MPECS area of supply, is on the basis that MSEDCL, as the successor of the erstwhile MSEB, was the first licensee, this Tribunal would be required to consider whether or not MSEDCL, as the successor of the erstwhile MSEB, was also a licensee in the MPECS area of supply. It is but appropriate that the contentions raised in both these Appeals are considered together, and a common order is passed therein.

II. BACKGROUND FACTS:

Facts, to the extent relevant, are that the Appellant herein, a Co-operative Society, was established in the year 1969-70 and was granted a license by the Government of Maharashtra on 1st February 1971 for a period of 20 years to distribute electricity in four specific Talukas in the district of Ahmednagar in the State of Maharashtra. The Appellant commenced functioning w.e.f. 01.03.1971 and took over the electrical distribution network of the then Maharashtra State Electricity Board. The said license was renewed, vide the proceedings dated 21.05.1999, for a further period of 20 years from 1991 to 2011; and, eventually, the term of the extended license of the Appellant expired on 31.01.2011.

The 2nd Respondent MSEDCL is the successor of the distribution business of the erstwhile Maharashtra State Electricity Board which was

constituted under Section 5 of the Electricity (Supply) Act, 1948 on 20.06.1960, and was deemed to be a licensee, entitled to supply electricity in the entire State of Maharashtra, under Section 26 of the said Act. The MSEB continued to operate and discharge its functions till the Transfer Scheme came into force on 05.06.2004.

(i) ORDER OF MERC IN CASE NO. 85 AND 87 OF 2010 DATED 27.01.2011:

In the exercise of its powers under Section 86(1)(d), read with Section 14 of the Electricity Act, 2003, the MERC issued a Public Notice dated 18.07.2010 inviting "Expression of Interest" from prospective applicants, having expertise in electricity distribution, for distributing electricity in the MPECS area of supply. Six entities, including the 2nd Respondent (MSEDCL), submitted their respective proposals expressing their interest in distributing electricity in the area served by the Appellant-MPECS. On 05.10.2010, the MERC directed all the entities, which had submitted their respective Expressions of Interest, to submit an application for grant of Distribution License in the MPECS area, in accordance with Sections 14 and 15 of the Electricity Act, 2003, read with the MERC (General Conditions of Distribution Licence) Regulations, 2006.

The applications submitted by two parties, i.e the Appellant in Case No. 87 of 2010, and the MSEDCL (2nd Respondent) in Case No. 85 of 2010, were taken up for consideration by MERC. The 2nd Respondent herein had submitted its application, for grant of distribution license for the MPECS area, under Section 14 of the Electricity Act on 04.11.2010. The Commission conducted a Technical Validation Session on 02.12.2010, and directed MSEDCL to submit their reply on certain issues. After they submitted their reply, MSEDCL issued a Public Notice dated 05.12.2010, under Section 15(2) of the Electricity Act, 2003, inviting objections/ suggestions on its application

for Distribution Licence in the MPECS area. The objections were to be submitted within 30 days of publication of the notice in various newspapers.

In exercise of its powers under Section 15(5) of the Electricity Act, 2003, the Commission also published a notice, in various newspapers on 10.12.2010, inviting objections/ suggestions. Hearing in both the applications, submitted by the Appellant and the 2nd Respondent herein, was held on 27.01.2011.

Case No. 85 of 2010, filed before the MERC, related to the 2nd Respondent's application for grant of distribution licence for MPECS area of supply, and Case No. 87 of 2010 related to the Appellant's application for grant of distribution licensee for MPECS area of supply. A common order was passed by MERC, both in Case Nos. 85 and 87 of 2010, on 27.01.2011. In its order dated 27.01.2011, MERC made a comparative analysis of both MSEDCL and the Appellant's distribution licence applications on various parameter such as financial performance, credit worthiness, energy sales and units, revenue projections, power purchase cost, subsidy support from the Government of Maharashtra – capital, investment and financial plan, treatment of previous losses, debt restructuring plan etc. A technical comparison was also made on technical parameters. Thereafter, MERC referred to Section 42 of the Electricity Act and Section 61 (b) & (c) thereof, and then observed that Section 42 and 43 of the Electricity Act 2003 provided for universal service obligations on the part of the licensee to serve all and every consumer in the licensed area; Section 86(1)(b) empowered the Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be supplied; a harmonious reading of the provisions of the Electricity Act envisaged that the distribution licensee should be in a position to arrange for purchase of the electricity required for distribution and retail supply of electricity on its own

without the need for external support; the ability of a licensee to procure electricity in bulk, by making payment of the cost of such procurement, was one of the principle grounds for consideration; and to satisfy the above mandate of the Electricity Act, 2003, the distribution licensee-applicant should satisfy the following criteria (a) experience and technical capability, (b) power procurement plan and (c) capital adequacy and credit worthiness.

After making a comparative assessment of both the applicants on these parameters, the MERC concluded that both MSEDCL and MPECS had sufficient experience and technical capabilities to act as a distribution licensee in the licenced area under consideration; MSEDCL was having capability to meet the power requirement for the licenced area under consideration; MPECS would not be able to meet the power requirement of the licenced area under consideration; MPECS, in its letter dated 08.12.2010, had submitted that, without any external support, it did not have the financial capacity to procure power for supply to its consumers; the Appellant did not have the financial credibility and capability required to fulfil its duties and obligations for functioning as a distribution licensee as mandated under the Electricity Act, 2003; as MSEDCL had satisfactorily met all the three criteria, the Commission was inclined to grant a distribution license in the existing area of supply of MPECS to MSEDCL; and the Commission decided to grant MSEDCL license in terms of Section 14 Electricity Act, 2003 to distribution electricity in the concerned area effective from 01.02.2011.

After hearing both the parties, MERC passed an order in Case Nos. 85 and 87 of 2010 dated 27.01.2011 rejecting the application of the Appellant for grant of distribution licence for MPECS area of supply. On MSEDCL's request for merging of MPECS area with their existing licenced area, MERC observed that the existing consumer mix in the area under consideration, for grant of distribution license, was dominated by agricultural consumers whose share

was almost 75% of the total consumption; there was merit in MSEDCL's proposal for merger of MPECS licensed area with the existing licenced area of MSEDCL; the requirements of Section 18 of the Electricity Act, 2003 stood satisfied by MSEDCL; therefore, the distribution licensee of MSEDCL was amended to include the existing area of supply of MPECS; and the said amendment was to come into effect on 01.02.2011.

MERC also issued a direction to the Appellant to vest, effective from 01.02.2011, the entire infrastructure of electricity distribution and power system in MSEDCL pending adjustment of consideration for the above purpose in terms of the order to be passed by the Commission in due course. All assets and distribution network, currently belonging to the Appellant, were permitted to be used by MSEDCL without any wheeling charge for the same. The Appellant was directed to vest the undertaking of distribution to the new licensee. The Commission further directed the Appellant to handover their complete distribution network and allied equipment and assets to MSEDCL in consumer interest, and held that the Appellant would however be entitled to claim the value of the assets handed over. The Appellant was permitted to file a separate petition before the Commission for deciding the transfer value of their assets with all relevant documentary evidence. The Appellant was also directed to hand over all consumers and billing database to MSEDCL as well as security deposits paid by consumers.

Aggrieved thereby the Appellant filed Appeal No. 39 of 2011 before this Tribunal.

**(ii) JUDGEMENT OF THIS TRIBUNAL IN APPEAL NO.39 OF 2011
DATED 16.12.2011:**

In its order, in Appeal No. 39 of 2011 dated 16.12.2011, this Tribunal framed the following three issues:

(i) Whether the decision of the State Commission to grant license to Maharashtra Distribution Company rejecting the license application for the Mula Pravara is justified or not?

(ii) Whether the amendment of Maharashtra Distribution license to merge the Mula Pravara area is justified or not?

(iii) Whether the decision of the Commission to direct the handing over the Distribution assets of the Mula Pravara to the Maharashtra Distribution Company is justified or not?

On the first issue, this Tribunal observed that Section 15(6) of the Electricity Act required the State Commission, while rejecting the application for grant of license, to record its reasons in writing after giving an opportunity of being heard to the applicant; the said provision specifically provided that the application cannot be rejected unless the applicant is given an opportunity of being heard with regard to the proposal of rejection; after hearing the applicant, the State Commission is required to record its reasons as to why the application had been rejected after considering the explanation given by the Appellant in the opportunity of being heard.

After taking note of several dates, events and the impugned order passed by the MERC, this Tribunal observed that a plain reading of the impugned order made it clear that the public hearing was held only for hearing the comments/ objections from the public, and the same had been clarified by the State Commission, in its public notice dated 10.12.2010, that the final view in the matter would be taken only after hearing objections from various stake holders; it is only after the public hearing that the State Commission started comparing the offer made by the applicants namely the Appellant and MSEDCL, and had thereafter concluded that the offer of the Appellant did not meet the full requirements on merits; the State Commission had compared

various aspects relating to the competence of the parties for grant of license and, only after comparison, it had arrived at the conclusion that the application of the Appellant should be rejected; in such an event, the Appellant should have been given the opportunity of knowing the proposed conclusion to enable it to convince the State Commission that the proposed conclusion was not correct; admittedly, this was not done; the proviso to Section 15(6) provided that no application should be rejected unless the applicant has been given an opportunity of being heard; it is, therefore, clear that, before exercising its discretionary powers of rejecting the Appellant's application for grant of license, it was incumbent on the part of the State Commission to give the Appellant an opportunity of hearing under the proviso to Section 15(6); in the present case, the opportunity had not been given; and, therefore, the impugned order of the State Commission suffered from this infirmity. The first issue was decided in favour of the Appellant.

While holding that, in the light of the findings on the 1st issue, the other two issues became somewhat irrelevant, this Tribunal, however, addressed those issues also for completeness and for future guidance to the Appropriate Commissions.

On the second issue, this Tribunal observed that amendment of the license had been carried out by MERC under Section 14 of the Electricity Act which did not empower amendment; the procedure for amendment of license under Section 18 was distinct from the procedure for grant of license under Sections 14 and 15; Section 18 of the Act was the only Section which conferred the power to amend the license with regard to the area, and the same had not been followed; MERC had not followed the procedure for merger or amendment of the license as stipulated under the Electricity Act as well as the regulations; and the impugned order, amending the distribution license for the MSEB area of supply by merging it with the MPECS area of

supply, was violative of the provisions of the Electricity Act and the regulations and was, therefore, liable to be set aside. .

After referring to Section 2(62) and Section 14 of the Electricity Act, 2003, and Section 26 of the Electricity (Supply) Act, 1948, this Tribunal observed that MSEB had the powers and obligations of a licensee in respect of the whole State; the area of supply of MSEB was the whole of Maharashtra; no material had been produced to show that, while granting a distribution license to the Appellant in 1971, the State Government had deleted the area of supply from the area of supply of MSEB; MSEB's area of supply was modified by the executive order of the State Government; the question which would arise was whether the area of supply of MSEB could be modified through an executive order, and whether that would not amount to amendment of a provision of the Act; as per Section 26 of the Electricity (Supply) Act, 1948, the Act itself was a license for the Board; therefore any amendment, to the area of supply of the Board, could be done only through an amendment of the license; amendment of the area of supply by the executive order of the State Government would mean amendment of the 1948 Act itself; and this issue, which had an important bearing on the case, had to be properly addressed by MERC.

On the third issue, this Tribunal observed that the only provisions, for invoking the power of acquisition and transfer of assets of a licensee, were found under Sections 20, 21 and 24 of the Electricity Act; while holding proceedings under Section 14 and 15 of the Act, the Commission was not empowered to invoke these Sections which dealt with transfer of assets; to hold property was a constitutional right which could not be taken away except in accordance with the provisions of the statute or the law; and the directions given by the State Commission, directing the Appellant to transfer the assets

to MSEDCL, was not in accordance with the law, and the same was liable to be set aside.

This Tribunal then summarised its findings holding that the impugned order was passed on 27.01.2011 without complying with the proviso to Section 15(6), and therefore the impugned order of the State Commission suffered from this infirmity, and was liable to be set aside; and, accordingly, the first issue was decided in favour of the Appellant. This Tribunal further observed that a plain reading of Section 26 of the 1948 Act would reveal that the erstwhile MSEB had the powers and obligations of a licensee in respect of the whole State; in other words, the area of supply of MSEB was the whole of Maharashtra; if MSEB area of supply was not modified, then MSEB and, by virtue of being MSEB's successor, MSEDCL, as the distribution licensee, already had a licence to supply power in the MPECS area of supply; there was no bar for having multiple licensees in the same area under the 1910 Act; Section 3(e) of 1910 Act contained explicit provisions for a second licensee in the same area of supply; this issue, which had an important bearing on the case, had to be properly addressed by the State Commission; and, therefore, this issue was also decided in favour of the Appellant.

This Tribunal also observed that the directions given by MERC, directing the Appellant to transfer the assets to MSEDCL, was not in accordance with law; and this direction was also liable to be set aside. The third issue was also decided in favour of the Appellant. The impugned order dated 27.01.2011 was set aside, and the matter remanded to the MERC with a direction to reconsider the application of the Appellant for grant of a license, and to dispose it off on merits in accordance with the provisions of the Act, and the general conditions of supply regulations. Further directions were issued by this Tribunal to the MERC to consider grant of license to both the parties by allowing them to operate in the same area.

Soon after this Tribunal pronounced its judgment on 16.12.2011, Counsel for the parties requested it to issue consequential directions with regard to the existing arrangements, and the time frame. Accordingly, this Tribunal directed MERC to complete the process within three months from the date of the order and observed that, in the meantime, the existing arrangement may be continued subject to payment of charges to the Appellant to be decided by the Commission after hearing all the parties.

(iii) ORDER OF MERC IN CASE NO.85 OF 2010 DATED 18.06.2014:

In order to implement the Judgment of this Tribunal, in Appeal No. 39 of 2011 dated 16.12.2011, the MERC initiated proceeding on 31.01.2012 and passed an order on 18.06.2014, in Case No. 85 of 2010, dealing with the application of the MSEDCL for grant of Distribution licence for MPECS area of supply. During the combined hearing in Case Nos. 85 and 87 of 2010, held on 31.01.2012, the MERC identified the following issues to be addressed:

(a) Whether MSEDCL already has a Licence to supply electricity in the entire State of Maharashtra including the area of supply served by MPECS?

(b) Whether at the time of grant of licence by the Government of Maharashtra (GoM) to MPECS in 1971, the area of MPECS was deleted from the area of MSEB (now MSEDCL)?

(c) Whether at the time of grant of licence by the GoM to MPECS in the year 1971 was MSEDCL disentitled from conducting distribution operations in the area of supply of MPECS?

(d) What is the area of supply of MSEDCL under its provisional Transfer Scheme dated 4 June, 2005?

(e) Whether there any principle of law that by not supplying electricity in the last 40 years in the area of MPECS, MSEDCL

forfeited the right to carry out distribution of electricity in the area of supply served by MPECS?

On issue (a), the MERC observed, in its order in Case No.85 of 2010 dated 18.06.2014, that the erstwhile MSEB was established like any other State Electricity Board in the country under Section 5 of the Electricity (Supply) Act, 1948 on 20.06.1960; the objectives, for formation of the State Electricity Boards, were to co-ordinate development of electricity and establishment of the grid system on regional basis; the State Electricity Boards were also conferred with legislative power not only to facilitate the establishment of such grid system, but they were also conferred with legislative power like any other State Electricity Board. After taking note of certain definitions in the Electricity (Supply) Act, 1948, the MERC referred to Section 26 thereof, and then observed that Section 26 conferred MSEB with the powers and obligations of a licensee for the whole State of Maharashtra under the Indian Electricity Act 1910; the Electricity (Supply) Act, 1948 was itself a licence for the erstwhile MSEB to exercise such powers and obligations of a licensee under the 1910 Act; Section 26 of the Electricity (Supply) Act, 1948 provided that Sections 3 to 11 of the Indian Electricity Act, 1910 shall not be applicable to MSEB because of exclusion of these provisions; and the effect of exclusion of these provisions was that there could be no revocation or amendment of the licence of the MSEB.

After noting the contents of Section 19(2) of the Electricity (Supply) Act, 1948 and Section 31 of the Indian Electricity Act, 1910, the MERC observed that MSEB had been supplying in the area of MPECS, till MPECS started supplying electricity in that area of supply; subsequent to enactment of the Electricity Act, 2003, MSEB continued to act as a deemed distribution licensee under the first proviso to Section 14 thereof; under Section 131 of the Electricity Act, and the Transfer Scheme dated 04.06.2005, MSEB was

trifurcated into three companies with MSEDCL as the successor of MSEB for carrying on distribution functions in the State of Maharashtra; in view of the 5th proviso to Section 14 of the Electricity Act, 2003 the deemed distribution licence of MSEB, for the State of Maharashtra, had been transferred to MSEDCL, and MSEDCL had inherited the distribution assets, interest in the property, rights and liabilities of MSEB necessary for the business of distribution; no documents had been placed before it to show that the area of MPECS was deleted from the area of MSEB (now MSEDCL) in 1971, and the licence was granted to MPECS; in accordance with Section 26 read with Section 19(2) of the Electricity (Supply) Act, 1948, MSEB had been conferred the powers and obligations of a distribution licence for the whole State of Maharashtra; MSEB had been engaged in the business of distribution of electricity prior to enactment of the Electricity Act, 2003, and continued to act as a deemed distribution licensee as per the first proviso to Section 14 of the Electricity Act, 2003; further, in accordance with Section 131 read with the 5th proviso to Section 14 of the Electricity Act, 2003, and the subsequent notification of the Maharashtra Electricity Reforms Transfer Scheme dated 04.06.2015, MSEDCL was formed as the successor of MSEB for carrying out distribution functions in the State, and was a deemed distribution licensee under the Electricity Act, 2003 for the whole State of Maharashtra; MPECS had been granted a license in the year 1971 to supply electricity in 4 talukas in Ahmednagar District; no documents had been placed before the Commission to show that the area of MPECS was deleted from the area of MSEB (now MSEDCL) in 1971, and a license was granted to MPECS; and MSEDCL (erstwhile MSEB) already had a licence for supply in the whole State of Maharashtra including in the MPECS area of supply.

On issues (b) and (c), MERC observed that MPECS had been granted a licence under Section 3 of the Indian Electricity Act, 1910; Section 3 required the consent of MSEB for granting of the licence to MPECS, which was given

to MPECS by letter dated 09.12.1969; thereafter, the Government of Maharashtra, vide Notification dated 01.02.1971, had granted a distribution licence to MPECS for a period of 20 years for supplying electricity in four talukas of Ahmednagar; due procedure of consultation of MSEB, as required under Section 3(1) of the Indian Electricity Act, 1910, had been followed at the time of granting the licence to MPECS; the Government of Maharashtra, vide Notification dated 04.02.1971, had ceased and terminated the contractual obligations of MSEB for the MPECS area of supply pursuant to the grant of licence to MPECS; and, vide letter dated 01.03.1971, the Government of Maharashtra had granted approval to the transfer of assets of the distribution system of MSEB to MPECS.

With respect to the Appellant's contention that the area of supply of MSEB had been amended by the Notification dated 04.02.1971, MERC observed that the said notification did not mention any deletion/amendment in the area of supply of MSEB, and it only mentioned termination of contractual obligations of MSEB for supplying power in the MPECS area of supply; the said notification was issued by the Government of Maharashtra exercising its executive power, and not its legislative power; the powers and obligations of a licensee was conferred on MSEB by the Parliamentary Act, and the notification had to be considered as part of consultation with MSEB, and the consent given by it to the Appellant for its area of supply as required under Section 3 of the Indian Electricity Act, 1910; it is only thereafter that the transfer of the distribution assets of MSEB was made to the Appellant; the licenced area of MSEB could not be deleted by the Government of Maharashtra without following the procedure prescribed by law namely by legislative enactment; there was no enactment by the Legislature of the State of Maharashtra, and the licence granted by Parliament under the Electricity (Supply) Act, 1948 was the licence of MSEB; there were no statutory provisions conferring powers for altering the area of operation of any State

Board including the erstwhile MSEB under the repealed Acts; no documents were presented before the Commission to show that there was a directive to alter/modify/delete the area of operation of the erstwhile MSEB; the area of supply of MPECS, namely the four Talukas of Ahmednagar District, were not deleted from the area of operation of the erstwhile MSEB; for the MPECS area of supply, both the Appellant and MSEB were licensees to supply electricity; this parallel operation of licensees was also contemplated under Section 3(2)(e) of the Indian Electricity Act, 1910; it was implied from clause 6 of the licence, granted to the Appellant vide notification dated 01.02.1971, that the railways or any other government authority were allowed to meet their power requirement from MSEB also; this clause also supported the fact that, at the time of granting the licence to MPECS, MSEB was still allowed to supply in that area; Clause 14 of MPECS licence stipulated that the licence shall be subject to the provisions of the Electric (Supply) Act, 1948 and any other Act; this Clause of the licence conceived that the licence was given to the Appellant considering the overriding provisions of the Electricity (Supply) Act, 1948; a combined reading of Clause 14 and Section 26 of the Electricity (Supply) Act, 1948 implied that the licence of MPECS had taken cognizance of the fact that MSEB was authorized and had the licence to supply in the MPECS area; no document had been presented before the Commission to show that the area of MPECS was deleted from the area of MSEB (now MSEDCL) and that, at the time of grant of licence by the Government of Maharashtra to MPECS in 1971, the area of MPECS was deleted from the area of MSEB (now MSEDCL); and MSEDCL continued to have a right to supply in that area.

On issue (d), the MERC held that, prior to the enactment of the Electricity Act, 2003, the State Electricity Board was in operation under the Electricity (Supply) Act, 1948; Sections 131 to 133 of the Electricity Act, 2003 required re-organisation of such Electricity Board; accordingly, the transfer

scheme was required to be notified by the State Government for re-organisation of the State Electricity Board, and the properties, interest rights, obligations, proceedings of the State Electricity Board were required to be transferred and vested in the transferee companies; and by notification dated 04.06.2005, the Government of Maharashtra had, under Section 131 to 133 of the Electricity Act, 2003, issued the Transfer Scheme, 2005, and the MSEB was trifurcated into generation, transmission and distribution functions.

After taking note of certain provisions of the Transfer Scheme including Clause 1(2), Schedule (c) and (f) thereof, MERC observed that the provisions of the Transfer Scheme clearly mentioned that the functions, business, undertaking, rights and obligations of the MSEB related to distribution of electricity had been vested in MSEDCL; Clause 5 of the Transfer Scheme provided that the functions and business of MSEDCL was not limited to the belongings of the Board; the said clause 5 should be considered as inclusive in nature which binds the functions and obligations of the licensee specified under the Electricity Act, 2003 also; the transfer scheme extended to the whole State of Maharashtra; a combined reading of Schedule C PART I and Schedule F explained that the MSEDCL was authorised to supply in the Ahmednagar District which included the area of supply of MPECS also; and, as per the Transfer Scheme, the distribution rights and obligations of MSEDCL were vested from MSEB; and hence the area of supply of MSEDCL was the same as that of the whole State of Maharashtra which included the area of supply of MPECS.

On issue (e), the MERC held that MPECS had been granted a licence for the area of supply in 1971; thereafter, the distribution system assets of MSEB had been sold to MPECS for exercising the distribution of electricity in the said area; as envisaged in the Electricity Act, 1948, MSEB was formed with the larger objective and had ultimate responsibility of cordial

development of the grid in the whole State of Maharashtra, and to control the licensee's operation for cordial development; the Electricity (Supply) Act, 1948 did not have any provision for revocation or automatic revocation of the licence of MSEB; Section 26 of the Electricity (Supply) Act, 1948 also exempted MSEB from any amendment of the Licence for MSEB; since MSEB did not undertake distribution of electricity in MPECS area, that did not take away the distribution rights of MSEB which was conferred by statute; and MSEDCL had not forfeited its. distribution rights for the MPECS area of supply because of not supplying power in that area of supply.

After taking note of the prayer of MSEDCL, that they be granted the sole electricity licence from 01.02.2010 in the present MPECS area of supply, MERC observed that MSEDCL had made an application for grant of distribution licence in MPECS area of supply; MSEDCL, as the successor of MSEB, already had a licence for supplying electricity in the MPECS area of supply; and the distribution rights of MSEDCL (erstwhile MSEB) were not forfeited because of not supplying in the MPECS area. The MERC thereafter observed that, in accordance with Section 26 of the Electricity (Supply) Act, 1948 read with Section 19(2) of the Electricity (Supply) Act, 1948, MSEB had been conferred with the powers and obligations of the distribution licensee for the whole State of Maharashtra; MSEB, being engaged in the business of distribution of electricity prior to enactment of Electricity Act, 2003, continued to act as a deemed distribution licensee as per the first proviso to Section 14 of the Electricity Act, 2003; in accordance with Section 131 read with fifth fourth proviso to Section 14 of the Electricity Act, 2003 and the subsequent notification of the Maharashtra Electricity Reforms Transfers Scheme dated 04.06.2005, MSEDCL, being the successor of MSEB, had the same area of supply as MSEB for distribution of electricity, with no exceptions or deletion.

MERC further observed that the Appellant had been granted a licence in the year 1971 for supplying electricity in four talukas of Ahmednagar; no document had been presented before the Commission to show that the area of MPECS was deleted from the area of MSEB (now MSEDCL) in the year 1971, when the licence was granted to the Appellant; at the time of grant of licence by the Government of Maharashtra to the Appellant in 1971, the area of MPECS was not deleted from the area of MSEB (now MSEDCL), and MSEDCL continued to have a right to supply in that area; MSEDCL did not require a fresh application for the grant of licence to supply electricity in MPECS area of supply by virtue of the fact that, as the successor body to the erstwhile MSEB in the area of distribution, it was a licensee for supply in these areas. Case No. 85 of 2010 was, accordingly, disposed of.

It is against this this order passed by the MERC, in Case No. 85 of 2010 (filed by Respondent No.2 MSEDCL) dated 18.06.2014, that the Appeal No. 222 of 2014 has been filed, among others, to declare that MSEDCL is not a distribution licensee within the meaning of Section 2(17) read with Section 42 of the Electricity Act, 2003 in respect of the Appellant's licensed area; to declare that MSEDCL was not entitled to distribute electricity in retail in the Appellant's licensed area; to direct the 2nd Respondent MSEDCL to stop using the Appellant's distribution network and related assets; and to restore possession to the Appellants.

(iv) ORDER OF MERC IN CASE NO.87 OF 2010 DATED 18.06.2014:

Consequent on the remand order passed by this Tribunal, in Appeal No. 39 of 2011 dated 16.12.2011, the MERC, in its order in Case No. 87 of 2010 dated 18.06.2014, framed the following issues:

(a) What provisions of law are applicable to MPECS for distribution of electricity in the licence area in question? Whether

MPECS satisfies these provisions?

(b) If the license application of MPECS is granted, then would MPECS fulfill the requirements of the sixth proviso to Section 14 of the Electricity Act, 2003?

On Issue (a), the MERC observed that Section 18 of the Electricity Act, 2003 dealt with the amendment of licence on application by licensee; the MERC (General Conditions of Distribution Licence) Regulations, 2006 specified two separate provisions for the grant of licence and amendment of licence; in the procedure for amendment of the licence in Regulation 6 of MERC (General Conditions of Distribution Licence) Regulations, 2006, the licensee was required to make an application to the Commission for proposed amendments or alteration in the licence along with rationale and justification of the same and to issue and publish notice depicting the same; the Electricity Act, 2003 did not contain any provision for renewal of license; the provision for renewal of license was also not available in the repealed Indian Electricity Act, 1910; hence, the application for the grant of license, irrespective of whether it was made by the existing licensee or a new applicant, should be considered afresh, and was required to be processed as per Section 15 of the Electricity Act, 2003 and Regulation 5 of the MERC (General Conditions of Distribution Licence) Regulations, 2006.

The Commission was of view that the application made by MPECS did not fit under Section 18 of the Electricity Act, 2003 and had to be considered as a fresh application for the grant of distribution license as per Section 15 of the Electricity Act, 2003 and Regulation 5 of MERC (General Conditions of Distribution Licence) Regulations, 2006.

The MERC further observed that, pursuant to the direction of this Tribunal, in Appeal No. 39 of 2011 dated 16.12.2011, regarding the

application of MSEDCL for grant of license in the MPECS area, and the licensee status of MSEDCL in view of Section 26 of the Electricity (Supply) Act, 1948, the Commission had reconsidered the facts and had decided the matter; the Commission, in its Order in Case No. 85 of 2010 dated 18.06.2014, had held that MSEDCL (erstwhile MSEB) already had a license for the said area of supply from a time much before the grant of license to MPECS in 1971, and had been supplying to the consumers in the area; MPECS was given the License in 1971; and MPECS, being the subsequent applicant for a distribution License in the said area of supply, the sixth proviso of the Electricity Act, 2003 was applicable to MPECS for grant of license. MERC was of the view that MPECS' license application was required to be considered as a fresh application under Section 14 and 15 of the Electricity Act, 2003 and should be evaluated on the criteria specified in the sixth proviso to Section 14 of the Electricity Act, 2003 and other criteria specified by the Commission in MERC (General Conditions of Distribution Licence) Regulations, 2006.

On Issue (b), MERC observed that the Application submitted by MPECS on 27.04.2010 was not in accordance with the sixth proviso to Section 14 of the Electricity Act 2003, and MPECS should re-submit the fresh application for grant of licence for MPECS area in accordance with the sixth proviso to Section 14 of the Electricity Act, 2003 within three months; and the said application should mention that MPECS satisfied the additional requirements (requirements of Capital adequacy, Credit worthiness and Code of Conduct as per Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005) notified by the Central Government as per the provisions of sixth proviso Section 14 of the EA, 2003.

The MERC then summarized its Ruling holding that it had, in its order

in Case No. 85 of 2010 dated 18th June, 2014, held that MSEDCL already had a license for the said area of supply from the time much before the grant of license to MPECS in 1971, and was supplying to the consumers in the area; MPECS was given the License in 1971; hence MPECS, being the subsequent applicant for a distribution License in the said area of supply, the sixth proviso to Section 14 of the Electricity Act, 2003 was applicable to MPECS for grant of license; since MPECS was a subsequent applicant for the license, MPECS' license application was required to be considered as a fresh application under Section 14 and 15 of the Electricity Act, 2003 and should be evaluated on the criteria specified in the sixth proviso to Section 14 of the Electricity Act, 2003 and other criteria specified by the Commission in the MERC (General Conditions of Distribution Licence) Regulations, 2006; the application submitted by MPECS on 27.04.2010 was not in accordance with the sixth proviso to Section 14 of the Electricity Act, 2003; MPECS should re-submit a fresh application for grant of licence for MPECS area in accordance with the sixth proviso to Section 14 of the Electricity Act, 2003 within three months; the said application should clearly mention that MPECS satisfied the additional requirements (requirements of Capital adequacy, Credit worthiness and Code of Conduct as per Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005) notified by the Central Government as per the provisions of the sixth proviso to Section 14 of the Electricity Act, 2003. Case No. 87 of 2010 stood disposed of accordingly.

III. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the appellant, Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of the 2nd Respondent-MSEDCL and Ms. Pratiti Rungta, Learned Counsel appearing on

behalf of MERC. It is convenient to examine the rival contentions under different heads.

IV. WAS THE APPELLANT THE SOLE DISTRIBUTION LICENSEE WHEN THEY MADE THE APPLICATION?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would submit that the sole ground on which the Respondent-Maharashtra Electricity Regulatory Commission (“**MERC**”) rejected the License Application of the Appellant is that they were a subsequent applicant for grant of a distribution license in its area of supply, and was consequently required to re-submit a fresh Application in accordance with the sixth proviso to Section 14 of Electricity Act, 2003 (“**EA 2003**”); the sole ground on which the Application of Respondent No. 2 Maharashtra State Electricity Distribution Co. Ltd. (“**MSEDCL**”), for grant of license (Petition/Case No. 85 of 2010) in MPECS’ area of supply, has been allowed by MERC is that MSEDCL is a deemed licensee for the whole State of Maharashtra under Section 26 read with Section 19 of the Electricity (Supply) Act, 1948; it is, consequently, not required to make a fresh Application for grant of license to supply of electricity in the MPECS’ area of supply; the Appellant was the existing licensee in its area of supply at the time when it made its License Application; MPECS was an existing licensee for its designated area of supply; MPECS was a specific licensee which had purchased the prior existing distribution network of the erstwhile MSEB, and MSEB had ceased to supply to the area covered by the MPECS’ license; MPECS was an existing licensee for its designated area of supply; and MSEDCL had no power, authority, right or obligation to supply electricity in the area covered by the MPECS’ license.

B. ANALYSIS:

The main ground, on which MERC rejected the application of the Appellant for grant of a license, was that the Appellant was a subsequent applicant for a distribution license in the subject area of supply, and was consequently required to re-submit an application afresh in accordance with the 6th proviso to Section 14 of the Electricity Act, 2003. The application of the second Respondent-MSEDCL for grant of a license was also not accepted by MERC holding that MSEB was a deemed licensee, for the whole State of Maharashtra, under Section 26 read with Section 19(2) of the Electricity Supply Act, 1948; and MSEDCL, as its successor, was therefore not required to make a fresh application for grant of a license to supply electricity in the MPECS's area of supply.

In examining whether the MERC was justified in its conclusion, it is useful to take note of the relevant statutory provisions and certain facts and events.

Section 12(b) of the Electricity Act, 2003 stipulates that no person shall distribute electricity unless he is authorized to do so by a license issued under Section 14 or is exempt under Section 13 of the Electricity Act. It is common ground that Section 13 has no application and, consequently, we are concerned, in the present appeals, only with the scope and ambit of Section 14 of the Electricity Act, 2003 and its provisos.

Section 14(b) of the Electricity Act, 2003 enables the Appropriate Commission, on an application made to it under Section 15, to grant any person a license to distribute electricity as a distribution licensee. While Section 15 details the procedure for grant of license, Section 16 relates to the conditions of licensee. Section 17 details certain things which a licensee should not do, Section 18 relates to amendment of a license and Section 19 relates to its revocation.

The first proviso to Section 14 of the Electricity Act stipulates that any person engaged in the business of supply of electricity, under the provisions of the repealed laws (ie the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948), on or before the appointed date shall be deemed to be a licensee under the Electricity Act, 2003 for such period as may be stipulated in the license granted to him under the repealed laws. Both the Appellant and the 2nd Respondent MSEDCL were persons engaged in the business of supply of electricity under the provisions of the Indian Electricity Act and the Electricity (Supply) Act, 1948 which were repealed by Section 185(1) of the Electricity Act, 2003.

The first proviso to Section 14 of the Electricity Act, 2003 prescribes a time limit. The persons, engaged in the business of supply of electricity under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, are only deemed to be a licensee under the Electricity Act, 2003 for such period as may be stipulated in the license. Consequently, in terms of the extended license granted to them in 1999, the Appellant was a deemed licensee under the Electricity Act, 2003 till 31st January, 2011 when the license period, stipulated in its extended license, expired.

The second limb of the first proviso to Section 14 of the Electricity Act, 2003, which stipulates that the provisions of the repealed laws in respect of such license shall apply for a period of one year from the date of commencement of the Electricity Act, 2003, and the provisions of the Electricity Act 2003 shall apply to such business thereafter, means` that, while the Appellant continued to be a deemed distribution licensee for the period stipulated in its extended license, ie till 31st January, 2011 in view of the first limb of the first proviso to Section 14, the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 ceased to apply to them on or after 10.06.2004, ie one year from the date of commencement of the

Electricity Act, 2003. Notwithstanding their continuing to be a deemed distribution licensee from 10.06.2003 (when the Electricity Act, 2003 came into force) till 31st January, 2011 (when their extended license expired), the Appellant was, during this period 10.06.2004 till 31.01.2011, governed by the provisions of the Electricity Act, 2003 and not by the provisions of the Electricity (Supply) Act, 1948 or the Indian Electricity Act, 1910.

The 2nd Respondent claims to fall within the ambit of the 5th proviso to Section 14 which stipulates that a Government company or the company referred to in Section 131(2) of the Electricity Act, 2003 shall be deemed to be a licensee under the said Act.

The dispute, in the present appeal, revolves around the question whether the Appellant would fall within the ambit of the 6th proviso to Section 14 of the Electricity Act, 2003 as the sole licensee, since certain consequences ensue if it is held to be a second licensee falling within the ambit of the said 6th proviso.

The 6th proviso to Section 14 of the Electricity Act, 2003 enables the Appropriate Commission (in the present case, the MERC) to grant a license to more than one person for the distribution of electricity through their own distribution system within the same area. Consequently, in terms of the 6th proviso, MERC was empowered to grant a license both to the Appellant for distribution of electricity within the MPECS area, however through their own distribution system. When applications were invited in January, 2011, the distribution system in the MPECS area (ie in the four talukas of Ahmednagar District in the State of Maharashtra) was largely owned and operated by the Appellant.

The aforesaid conditions in the 6th proviso is, further, without prejudice to the other conditions or requirements under the Electricity Act, 2003. It is

also subject to the condition that the applicant, for grant of license within the same area, complies with the additional requirements relating to capital adequacy, credit worthiness or code of conduct as may be prescribed by the Central Government. If MSEDCL is held to be a deemed distribution licensee under the 5th proviso to Section 14 in the MPECS area of supply also, then the Appellant would be entitled to be granted a license only as a second applicant provided it complies with the additional requirements regarding capital adequacy, credit worthiness or code of conduct as is prescribed by way of the 2005 Rules made by the Central Government. The present appeal has been preferred by the Appellant, largely, questioning the MERC's conclusion that the Appellant, in effect, is a second licensee falling within the ambit of the 6th proviso to Section 14 of the Electricity Act, 2003.

In examining these aspects, it is necessary to first consider the manner in which both the Appellant and the 2nd Respondent-MSEDCL became distribution licensees for supply of electricity, the former in the MPCES area of supply and the latter in the entire State of Maharashtra.

In exercise of the powers conferred by Section 3(1) of the Indian Electricity Act, 1910, the Government of Maharashtra granted a license to the Appellant, for supply of electricity in the area and subject to the conditions of the license, which was notified in the State Gazette on 1st February, 1971. Clause 4 of the said license related to the area of supply, and stipulated that the area, within which the supply of energy was authorized by this license (area of supply) shall be the whole of the area comprised of 167 villages in four talukas of Ahmednagar District in the State of Maharashtra. Clause 6 of the License related to the purposes and limitation of supply. Clause 6(1) stipulated that, subject to the provisions of this license and the Act and the Rules, the licensee shall be entitled, during the continuance of this license, to supply energy within the area of supply for all purposes. The first proviso

thereto stipulated that nothing in this license shall be construed as preventing any railway or government authority from purchasing their power requirements from any other railway or government department or the Electricity Board for their own industrial, domestic or other use. Clause 9 of the license related to purchase of energy, and stipulated that the licensee (ie the Appellant) shall take from the Maharashtra State Electricity Board, or from any State Government generating station, such power as he requires for distribution at any time the Electricity Board or the State Government are in a position to supply. Clause 13 related to submission of annual accounts, and required the licensee to submit to the Government of Maharashtra, every year before 1st October, the accounts of the undertaking made up to 1st March of the same year in the form set forth in Annexure V to the Indian Electricity Rules, 1956 together with a statement showing the technical and financial data in the form prescribed by the Government. Clause 14 stipulated that the licensee shall be subject to the provisions of the Electricity (Supply) Act, 1948 and any other Act of the Union or State Government that may be passed hereafter affecting the public electric supply undertakings.

By proceedings dated 01.03.1971, the Government of Maharashtra informed MSEB that the Government had approved the transfer of assets of the distribution system of MSEB, situated in the area of operations referred to in the license granted to the Appellant under Section 3(1) of the Indian Electricity Act, 1910, at the depreciated book value of the assets. By its letter dated 01.08.1973, MSEB informed the State Government that the location of one of the villages, ie village Pichadgaon, was improperly shown in the map; the said village was situated far away from the villages of the licensed area; and it would not be proper to include Pichadgaon village in the Appellant's area of supply. MSEB requested the State Government to formally delete this village from the licensed area of supply of the Appellant. The Appellant, in turn, informed the Government of Maharashtra, by letter dated 04.08.1973,

that it had no objection for deletion of village Pichadgaon from their area of supply.

The duration of the license, granted to the Appellant by notification dated 01.02.1971, was for a period of 20 years. A notification was, subsequently, issued on 08.03.1990 by the Government of Maharashtra amending the Appellant's license to enable MSEB, if so required by the Ahmednagar Municipality, to make direct supply of energy to the consumer unit of the powerhouse at Mulla Dam, within the area of supply of the Appellant, for the purpose of making proper and regular water supply to Ahmednagar town.

By way of Government Resolution dated 21.05.1999, the Government of Maharashtra noted that the license for electricity distribution was granted to the Appellant in January, 1971 for 20 years under the provisions of the Indian Electricity Act, 1910; the Appellant purchases electricity from MSEB and sells it to its members/consumers in its area of operation; In terms of the Tri-partite Agreement, the electricity tariff was decided to be changed; as the license of the Appellant had expired; the issue of extension of license for electricity distribution was under consideration of the State Government; and the State Government had, on considering the financial and other aspects of the Appellant and as the Appellant was a consumer cooperative society, resolved that MSEB, instead of taking it over, should supply electricity to the society at a viable tariff.

The said resolution prescribes the method for proper determination of the viable tariff, and then records that, for the purposes of the above arrangement, MSEB should enter into necessary arrangement with the Appellant; and, accepting all the above aspects, the license of the appellant shall be extended for a further period of 20 years with effect from 01.02.1991; and, in this respect, necessary action be taken under the provisions of the Indian Electricity Act, 1910. The Government resolution dated 21.05.1999

was issued in the name of and on the order of the Governor of the State of Maharashtra, and is therefore an executive order referable to Article 162 of the Constitution of India. Though the earlier license, granted to the Appellant for a period of 20 years on 01.02.1971, expired on 30.01.1991, the Appellant continued to operate and distribute electricity in the MPECS area of supply, for a period of more than 8 years thereafter without a license, till 21.05.1999 when the Appellant's license was retrospectively extended for a further period of 20 years from 01.02.1991 till 31.01.2011.

Unlike the Appellant which is a cooperative society, the 2nd Respondent is a State Government utility and is the successor of the distribution undertaking of the erstwhile Maharashtra State Electricity Board, a statutory body constituted under Section 5 of the Electricity (Supply) Act, 1948. Section 2(2) of the 1948 Act defined "Board" to mean the State Electricity Board constituted under Section 5 thereof. Section 5 related to the constitution and composition of the State Electricity Board and, under sub-section (1) thereof, the State Government shall, as soon as may be after the issue of the notification under Section 1(4) of the 1948 Act, constitute, by notification in the official gazette, a State Electricity Board under such name as shall be specified in the notification.

Section 2(6) of the 1948 Act defined a "licensee" to mean a person licensed under Part II of the Indian Electricity Act, 1910 to supply energy or a person who has obtained sanction under Section 28 of the 1910 Act to engage in the business of supplying energy, but, the provisions of Section 26 or Section 26-A of the 1948 Act notwithstanding, does not include the Board or a generating company. Section 2(b) of the Indian Electricity Act, 1910 defined "area of supply" to mean the area within which alone a licensee was, for the time being, authorized by his license to supply energy. Section 2(h) of the 1910 Act defined a "licensee" to mean any person licensed under Part II to

supply energy. Part II of the 1910 Act related to supply of energy. Section 3, thereunder, related to the grant of licenses. Section 3(1) of the 1910 Act enabled the State Government, on application made in the prescribed form and on payment of the prescribed fee if any, to grant, after consulting the State Electricity Board, a license to any person to supply energy in any specified area, and also to lay down or place electric supply lines for the conveyance and transmission of energy.

The power conferred, under Section 3(1) of the 1910 Act, on the State Government was to grant a license to any person to supply energy in any specified area. Such a grant could only be made by the State Government after it had consulted the State Electricity Board. Section 28 of the 1910 Act related to the sanction required by non-licensees in certain cases. Section 28(1) stipulated that no person, other than a licensee, shall engage in the business of supplying energy to the public except with the previous sanction of the State Government, and in accordance with such conditions as the State Government may fix in this behalf, and any agreement to the contrary shall be void.

Section 19 of the Electricity (Supply) Act, 1948 related to the power of the Board to supply electricity. Section 19(1) enabled the Board, subject to the provisions of the 1948 Act, to supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force. Under the proviso thereto, the Board shall not (a) supply electricity, for any purpose, directly to any licensee, for use in any part of the area of supply of a bulk-licensee, without the consent of the bulk-licensee, unless the licensee to be supplied has an absolute right of veto on any right of the bulk-licensee to supply electricity for such purpose in the said part of such area, or unless the bulk-licensee is unable or unwilling to supply electricity for such purpose in the said part of such area, on reasonable terms

and conditions and within a reasonable time, or (b) supply electricity for any purpose to any person, not being a licensee for use in any part of the area of supply of a licensee without the consent of the licensee, unless - (i) the actual effective capacity of the licensee's generating station computed in accordance with Para. IX of the First Schedule at the time when such supply was required was less than twice the maximum demand asked for by any such person; or (ii) the maximum demand of the licensee, being a distributing licensee and taking supply of energy in bulk is, at the time of the request, less than twice the maximum demand asked for by any such person; or (iii) the licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time.

Section 19(2) of the Electricity (Supply) Act, 1948 stipulated that, after the Board had declared its intention to supply electricity for any purpose in any area for which purpose and in which area it was under this Section competent to supply electricity, no licensee shall, the provisions of his license notwithstanding, at any time, be entitled, without the consent of the Board, to supply electricity for the purpose in that area.

Section 26 of the Electricity (Supply) Act, 1948 stipulated that the Board shall, subject to the provisions of this Act, have the powers and obligations of a licensee under the 1910 Act and shall, in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910, and this Act (ie the 1948 Act) shall be deemed to be the license of the Board for the purpose of that Act.

Under the proviso thereto, nothing in Sections 3 to 11, sub-sections (2) and (3) of Section 21 and Section 22, sub-section (2) of Section. 22-A and Sections. 23 and 27 of that Act (ie the 1910 Act) or in clauses I to V, Clause VII and Clauses IX to XII of the Schedule to that Act, relating to the duties and obligations of a licensee, shall apply to the Board.

(i) PROVISO: ITS SCOPE:

In considering the scope of the proviso to Section 26 of the 1948 Act, it is useful to note, in brief, the purpose which a proviso serves, and the function it discharges. A proviso may serve four different purposes (1) qualifying or excepting certain provisions from the main enactment; (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable; (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision. (**S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591**).

As a proviso has several functions, the court, while interpreting a statutory provision, is required to carefully scrutinize and find out the real object of the proviso appended to that provision. A provision and the proviso thereto must be construed as a whole. (**S.SundaramPillai v.V.R. Pattabiraman; Craies: Statute Law 7thEdn.**). A proviso must be construed harmoniously with the main enactment (**Abdul Jabar Buttv.State of J&K, (1957) SCR 51; CIT v. Indo-Mercantile Bank Ltd., 1959 Supp(2) SCR256.; Ram Narain Sons Ltd.v. Asstt. CST, (1955) 2 SCR 483; State of Punjab v. Kailash Nath, (1989) 1 SCC 321**), and be considered in relation to the principal matter to which it stands as a proviso. A proviso cannot be torn apart from the main Section nor can it be used to nullify or set at naught the real object of the main Section. (**S. Sundaram Pillai v. V.R. Pattabiraman; Craies: Statute Law 7th Edn.**).

A proviso must be considered in relation to the principal matter to which it stands as a proviso, and should be construed harmoniously with the main

enactment. (***Abdul Jabar Butt v. State of J&K***, (1957) SCR 51). The golden rule is to read the whole Section, inclusive of the proviso, in such a manner that they mutually throw light on each other, and result in a harmonious construction. (***Dwarka Prasad v. Dwarka Das Saraf***, (1976) 1 SCC 128; ***S. Sundaram Pillai V.V.R. Pattabiraman***, (1985) 1 SCC 591; ***D. Mahesh Kumar v. State of Telangana***: 2016 SCC OnLine Hyd 382). As a general rule, it is proper to construe the main provision and the proviso together without making either of them redundant or otiose. (***J.K. Industries Ltd.***). A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. (***Tahsildar Singh***; ***Maxwell's Interpretation of Statutes***, 10 Edn., at p. 162; ***D. Mahesh Kumar v. State of Telangana***: 2016 SCC OnLine Hyd 382).

A proviso, to a particular provision of a statute, only embraces the field which is covered by the said provision. It carves out an exception to the provision to which it has been enacted as a proviso, and to no other. (***CIT v. Indo-Mercantile Bank Ltd.***, 1959 Supp (2) SCR 256; ***A.N. Sehgal v. Raje Ram Sheoran***: 1992 Supp (1) SCC 304; ***Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal***, (1991) 3 SCC 442; ***Kerala State Housing Board v. Rama Priya Hotels (P) Ltd.***, (1994) 5 SCC 672; ***Binani Binani Industries Ltd. v. CCT***, (2007) 15 SCC 435, ***Madras and Southern Mahratta Railway Co., Ltd. v. Bezwada Municipality***, 1944 SCC OnLine PC 7; ***Nagar Palika Nigam v. Krishi Upaj Mandi Samiti***, (2008) 12 SCC 364; ***Ram Narain Sons Ltd. v. Asstt. CST***, (1955) 2 SCR 483).

The ordinary and proper function of a proviso, coming after a general enactment, is to limit that general enactment in certain instances. (***Jennings v. Kelly***; ***Binani Industries Ltd. v. CCT***, (2007) 15 SCC 435). As a general rule, in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose.

(J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers, (1996) 6 SCC 665). It would not be a reasonable construction of any statute to say that a proviso, which in terms purports to create an exception, should be held to be otiose. **(Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories, (1965) 1 SCR 737).** A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. **(Tahsildar Singh v. State of U.P., 1959 Supp (2) SCR 875).**

A qualifying or an excepting proviso 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 as a proviso, and to no other. **(The Commissioner of Income-tax, Mysore Travencore-Cochin and Coorg, Bangalore v. The Indo Mercantile Bank Ltd.***; Ram Narain Sons Ltd. v. Asstt. CST, (1955) 2 SCR 483).** The effect of an excepting or qualifying proviso is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which, but for the proviso, would be within it. Such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect. **(Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subash Chandra Yograj Sinha, (1962) 2 SCR 159 ; Kedarnath Jute Mfg. Co. Ltd. v. CTO, (1965) 2 SCR 626; Craies on Statute Law, 5 Edn., pp. 201-202).** Such a proviso is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. **(LOCAL GOVERNMENT BOARD v SOUTH STONEHAM UNION: [1909] A.C.57; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591).** The natural presumption is that, but for the proviso, the enacting part of the Section would have included the subject-matter of the proviso. **(Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, (1962) 2 SCR 159; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591; Ishverlal Thakore lal Almaula v.**

Motibhai Nagjibhai, (1966) 1 SCR 367; Madras and Southern Mahrata Railway Co. Ltd. v. Bezwada Municipality**; Indo Mercantile Bank Ltd**.; Craies in his book Statute Law (7Edn.). Such a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded. (STO, Circle-I**, Jabalpur v. Hanuman Prasad; S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591; D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLine Hyd 382)***

A proviso is normally used to remove special cases from the general enactment, and provide for them specially. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision a portion which, but for the proviso, would be a part of the main provision. (***S. Sundaram Pillai v. V.R. Pattabiraman; Craies: Statute Law 7th Edn.***). The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment. (***Madras and Southern Mahratta Railway Co., Ltd. v. Bezwada Municipality, 1944 SCC OnLine PC 7; Holani Auto Links(P) Ltd. v. State of M.P., (2008)13 SCC 185; CIT v. Indo-Mercantile Bank Ltd.,1959 Supp (2) SCR 256; A.N. Sehgal v. Raje Ram Sheoran, 1992 Supp (1) SCC 304.*** A proviso is a qualification of the preceding provision, and is not to be interpreted as stating a general rule. (***Haryana State Coop. Land Development Bank Ltd.v.Banks Employees Union, (2004) 1 SCC 574; Shah Bhojraj Kuverji Oil Mills and Ginning Factory v.Subbash Chandra Yograj Sinha, (1962) 2 SCR 159; Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta ; A.N. Sehgal v. Raje Ram Sheoran 1992 Supp (1)SCC 304;Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal, (1991) 3 SCC 442 and Kerala State Housing Board v. Rama Priya Hotels (P) Ltd.,(1994) 5 SCC 672.***

A qualifying proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it, and what the legislature or rule or regulation making Authority desires should be excluded. It is well settled that where the meaning of a Section, Rule or Regulation is unclear, a proviso may be used as a guide to its interpretation. (***Sarathi in Interpretation of Statutes; S.Sundaram Pillai v. V.R. Pattabiraman, (1985)1SCC 591; D.Mahesh Kumar v. State of Telangana: 2016 SCC OnLine Hyd 382***).

It is evident, from the proviso to Section 26 of the 1948 Act, that nothing in Sections 3 to 11 of the 1910 Act, relating to the duties and obligations of a licensee, shall apply to the Board. Section 3 of the 1910 Act related to grant of licenses. Section 4 related to the revocation or amendment of licenses, Section 4-A of the 1910 Act (inserted by Act 32 of 1959) related to amendment of licenses, and Section 5 contained provisions where the license of a licensee is revoked. None of these provisions applied to State Electricity Board in view of the proviso to Section 26 of the 1948 Act. Consequently, the license of the Board could neither be amended or revoked by the State Government.

(ii) LEGAL FICTION: ITS SCOPE:

As noted hereinabove, Section 26 of the 1948 Act stipulated that the 1948 Act shall be deemed to be the license of the Board for the purposes of the 1910 Act. By use of the word “deemed”, in Section 26 of the 1948 Act, Parliament has created a legal fiction. ***Black's Law Dictionary*** defines “Legal Fiction” as an assumption that something is true even though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates, specifically a device by which a legal rule is diverted from its original purpose to accomplish indirectly some other object. When a statute enacts that something shall be deemed to have been done, which in fact and

in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion, and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate, (**Levy, Re, exp Walton. Hill v. East and West India Dock Co, [L.R.] 9 A.C. 448; Shanmugha Vilas Cashewnut Factory, (1953) 1 SCC 826 : AIR 1953 SC 333; American Home Products Corpn, (1986) 1 SCC 465; Vallabhapuram Ravi, (1984) 4 SCC 410 : AIR 1985 SC 870; S. Appukuttan, (1988) 2 SCC 372 : AIR 1988 SC 587; Parayankandiyal Eravath Kanapraivan Kalliani Amma, (1996) 4 SCC 76; and Ali M.K. v. State of Kerala, (2003) 11 SCC 632; DIT v. Schlumberger Asia Services Ltd., 2019 SCC OnLine Utt 274**).

Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction, the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. (**Gajraj Singh v. STAT, (1997) 1 SCC 650**). A legal fiction is essentially a presumption that certain facts, which do not exist in fact, will be treated as real and existing for the purpose of law. Courts have evolved two principles on the operation of legal fiction. The first is that a legal fiction must be confined to its “legitimate field”, for the specific purpose for which it was created. (**Industrial Supplies (P) Ltd. v. Union of India, (1980) 4 SCC 341;** **K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754; Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 6 STC 446 : 1955 SCC OnLine SC 2**). A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts should be

worked out to their logical extent. But due regard must be had in this behalf to the purpose for which the legal fiction has been created. (**State of Punjab v. Davinder Singh, (2025) 1 SCC 1**)

The second principle is that the scope of the legal fiction must be extended to the consequences which “logically” flow from its creation. The effect of a legal fiction must not be limited to treating facts that do not exist as real, but must be expanded to understand the effects and consequences that flow from the legal fiction. If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs. (**East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 (HL); State of Punjab v. Davinder Singh, (2025) 1 SCC 1**). When the law creates a legal fiction, such fiction should be carried to its logical end. (**Viceroy Hotels Ltd. v. Commercial Tax Officer, 2011 SCC OnLine AP 1089**).

Parliament has, by law (Section 26) created a legal fiction requiring the 1948 Act itself to be deemed to be a license in favour of the State Electricity Board for the purposes of the 1910 Act, thereby obviating the need for the State Electricity Boards to apply for and to be granted a license by the State Government under Section 3(1) of the 1910 Act, and to supply electricity which, in view of Section 28 of the 1948 Act, is an activity which only a licensee can undertake.

In view of the proviso to Section 26 of the 1948 Act, the provisions of the 1910 Act, relating to the grant of licenses (Section 3), revocation or amendment of license (Section 4), amendment of license (Section 4-A), and

provisions where the license of a licensee is revoked (Section 5), had no application to the State Electricity Boards. Consequently, on the State Electricity Board being constituted by the State Government by way of a notification in the official gazette, it is by law (Section 26 of the 1948 Act) a licensee under the 1910 Act, and is exempt from the stipulations of the 1910 Act relating to the grant, amendment or revocation of a license.

It does appear that, on and after its constitution under Section 5 of the 1948 Act on 20.06.1960, the Maharashtra State Electricity Board (“MSEB” for short), by law, became a licensee for the entire State of Maharashtra, and continued to remain as such, without its license being subjected to amendment or revocation under the 1910 Act, till the 1948 Act was repealed by Section 185(1) of the Electricity Act, 2003.

We must, however, bear in mind that Section 26 of the 1948 Act begins with the words “*subject to the provisions of this Act*” and, consequently, the Electricity Boards, being deemed to be a licensee under the Indian Electricity Act, 1910, in terms of Section 26 of the 1948 Act, was subject to the other provisions of the 1948 Act. The effect of this expression “*subject to the provisions of this Act*” shall be examined later in this judgement.

As noted hereinabove, the 6th proviso to Section 14 of the Electricity Act, 2003 enables the appropriate Commission to grant a license to two or more persons for distribution of electricity, through their own distribution system, within the same area, subject to the condition that the applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under the Electricity Act, 2003, comply with the additional requirements relating to (i) Capital adequacy, (ii) Credit worthiness, and (iii) Code of Conduct, as may be prescribed by the Central Government. The sixth proviso further stipulates that, on the applicant complying with all these requirements for grant of licence, they shall not be refused grant of

licence on the ground that there already exists a licensee in the same area for the same purpose.

The Appellant's emphasis, on their being the sole distribution licensee, is evidently to escape the rigor of the sixth proviso to Section 14, and their being required thereby to satisfy the requirements of Capital adequacy, Credit worthiness and Code of Conduct as stipulated in the applicable Rules. Their being held to be the sole distribution licensee, in the MPECS area of supply, would also result in the 2nd Respondent being held not to be a licensee in the MPECS area of supply disabling MSEDCL from supplying electricity to consumers in the said area, even if they are held to be a deemed licensee under the fifth proviso to Section 14 of the Electricity Act, 2003.

As shall be detailed later in this judgement, we are of the view that MSEDCL as the successor of the erstwhile MSEB (which was constituted under Section 5 of the 1948 Act on 20.06.1960 and was deemed by Section 26 of the 1948 Act to be a licensee for the entire State of Maharashtra), and in the light of the transfer scheme, is a deemed licensee under the fifth proviso to Section 14 of the Electricity Act. Consequently, the Appellant is entitled to make an application, for grant of a licence in the MPECS area, in terms of the sixth proviso to Section 14 of the Electricity Act, only as a 2nd licensee.

V. WAS MSEB AN EMBEDDED/ DEEMED STATUTORY LICENSEE OF WHICH MSEDCL WAS ITS SUCCESSOR?

A. SUBMISSIONS URGED ON BEHALF OF APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would submit that the 1948 Act makes a distinction between a State Electricity Board and a Licensee; the definition of "licensee" stipulates that a Board is not included within the definition of licensee; from proviso (b) to Section 19(1) of the 1948 Act, it is clear that the Board is authorized to supply directly to a

person other than a licensee only “if the Board is competent so to do”; the Board is authorized to supply to a person other than a licensee directly only in any one of the three situations specified under Section 19 (1) proviso (b) of the 1948 Act; if the Board has to supply electricity in retail to a person, other than a licensee, it would require authorization or a license; otherwise any such supply would be illegal; from a reading of Section 26 of the 1948 Act, it is clear that, by virtue of having been conferred the powers and obligations of a licensee, the Board is treated as a licensee for the purposes of the Indian Electricity Act, 1910 (“**the 1910 Act**”); if the Board had no power or obligation of a licensee in any area, it cannot, by the legal fiction created under the aforesaid Section 26 of the 1948 Act, be deemed to be or be treated as a licensee.

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would further submit that the phrase “*subject to the provisions of this Act*” would clearly mean that the Board is a deemed licensee only when it is authorized or is competent to provide electricity directly to a person other than a licensee in terms of Section 19 of the 1948 Act; a compendious reading of the aforesaid provisions would clearly show that the Board is a deemed statutory licensee (and would not require a separate specific license) for the purposes of providing electricity to a person other than a licensee only in circumstances set out under Section 19(1) proviso (b), and not generally; thus, the finding of MERC that the Board is a deemed licensee in the entire State of Maharashtra is clearly incorrect; the impugned order considers the provisions of Section 19(2) of the 1948 Act without considering the other provisions of the Act; Section 19(2) has to be read with Section 19(1), and cannot be read in isolation; Section 19(2) refers to a declaration of intention by the Board to supply electricity for any purpose in any area, for which purpose and in which area it is under this section competent to supply

electricity, which means competent in accordance with Section 19(1) proviso (b), and not generally; and the impugned order clearly overlooks this position.

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would also submit that, under the said provisions, the Board cannot supply electricity to any licensee or a person other than a licensee unless the Board is competent to do so under the Act; the provisions enjoin the Board not to supply electricity for any purpose to any person other than a licensee for use in any part of the area of the licensee, unless the case falls within the three exceptions carved out under Section 19(1) of the 1948 Act; if any person requires supply of electricity for any purpose for use in any part of the area of supply of a licensee, he must approach the licensee in the first instance and the licensee alone has the right to supply electricity to him, unless of course the licensee consents to his taking supply of electricity from the Board, in which event the Board would be free to supply electricity to him; in other words, there is a twin prohibition in the said provisions, namely (i) there is a prohibition upon the Board from supplying electricity to any person in an area where a licensee (other than the Board) has been given a license to distribute electricity, unless the eventualities mentioned in the exceptions contained in the said Section 19(1) have arisen and (ii) there is a further prohibition on any person existing within the area of a licensee (other than the Board) from obtaining electricity from anyone other than the licensee unless the exceptions mentioned in the said Section 19 have arisen or unless the Board has obtained the consent of the licensee (Refer: **(1) Sihor Electricity Works Ltd. vs. Gujarat Electricity Board & Anr, (1969) 1 SCC 423 (Para 5)** and **(2) The Western U.P. Electric Power and Supply Co. Ltd. vs. The State of U.P. & Others, (1968) 2 SCR 312**); the very fact that MSEDCL has had to make an application for a license, which application was considered by MERC in the earlier round, clearly shows that both MSEDCL as well as MERC

understood the provisions of the law to mean that MSEDCL was not an embedded licensee, but was required to make an application for a license.

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would state that MSEDCL was a deemed licensee under Section 26 of the 1948 Act read with the 1910 Act in respect of the State of Maharashtra only in respect of such areas where a licensee did not exist, and where a licensee existed, in respect of situations as contemplated under Section 19(1) proviso (b) read with Section 19(2) of the 1948 Act; MPECS was a specific licensee which had purchased the prior existing distribution network of the erstwhile MSEB, and MSEB had ceased to supply to the area covered by the MPECS' license; even in the area covered by MPECS' license where MSEB wanted to supply electricity for specific activities, it was required to take permission from MPECS as well as the State Government; and MSEDCL had no power or obligation to supply electricity to any consumer except with the consent of the Appellant.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that there cannot be any estoppel against the law; Section 26 of the 1948 Act stipulates that the enactment itself was a Licence of the erstwhile MSEB; the area of supply of MSEB, under Section 26 of the 1948 Act, was stipulated as "*the whole State*" of Maharashtra; when MPECS Licence dated. 01.02.1971 was granted, there was a specific statutory provision in force for amendment of licences; licences could be amended in accordance with Section 4A of the 1910 Act; however, the proviso to Section 26 of the 1948 Act explicitly stated, inter alia, that Section 3 to 11 of the 1910 Act would not apply to a Board like the MSEB; in other words, the Central

enactment prohibited amendment of the licence of any Board including MSEB; therefore, under Section 3(2)(e) of the 1910 Act, both MSEB and MPECS continued to be licensees for the subject four (4) talukas of MPECS area of supply; Section 26 of the 1948 Act itself lays down the area of supply of MSEB (the Board) as the “*whole State*” (i.e. the State of Maharashtra); this Section could not have been amended under Section 4-A of the 1910 Act; the proviso to Section 26 should be read as qualifying or excepting, inter alia, Section 4-A of the 1910 Act from being applicable to the Board; conferment / acquisition of a licence is pursuant to satisfying the requisite eligibility conditions; operationalization of a licence is different and distinct from conferment of licence; a Licence is coupled with a grant; the grant of a Licence under a statute contemplates adherence to the requirements of the statute which provides for the eligibility and procedure for grant of Licence (Refer: **Hurst Vs. Picture Theatres Limited : (1915) 1 K.B. 1 ; Mysore State Electricity Board Vs. Bangalore Woolen, Cotton and Silk Mills Ltd: 1962 SCC Online SC 44**) ; the area of supply, under Section 2 (b) of the 1910 Act, is the area within which a licensee is authorised by its licence to supply electricity; the terms of the distribution licence, under electricity enactments, mandatorily include incorporation of the term detailing the area of supply; Rule 13 of the 1956 Rules stipulated the contents of a draft licence; Sub-rule (b) of Rule 13 mandates incorporation of a statement of the boundaries of the proposed area of supply; and clause 14 of the License of the Appellant dated 01.02.1971 made the license subject to the provisions of Electricity (Supply) Act, 1948.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would further submit that distribution was /is a licenced activity, therefore a person applying for consent of an incumbent licensee under Section 19, had to hold a licence, to supply in that area pursuant to the grant

of consent; grant of Consent operationalized the licence in that area for which the Board continued to be an embedded licensee and without which, despite grant of consent by the incumbent licensee, it could not have supplied electricity; therefore, it is clear that the Board had the licence to supply in that area; however operationalization of the licence was subject to consent of the incumbent licensee; Section 19 of the Electricity (Supply) Act was never argued before the Commission and was raised for the first time before this Tribunal; the admitted factual position is that MSEB supplied electricity to the pumping station of Mula Dam even when the MPECS licence dated 01.02.1971 was subsisting; and thus the erstwhile MSEB was distributing and supplying electricity during the subsistence of the licence of the Appellant in their area of supply from 1971 to 1991, and thereafter till the date of submission of the application, in the subject area of supply; and Section 19 (1) (b) of the 1948 Act cannot be read in isolation only with respect to sub-clauses (i) to (iii) thereto.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would also submit that, even during the subsistence of MPECS Licence, MSEB had the right under Section 19 (1) (b) of the 1948 Act to supply electricity to any person not being a licensee, without MPECS's consent in the eventualities mentioned in sub-clauses (i) to (iii) of Section 19(1) (b); therefore, its status as a licensee continues to be recognized under Section 19 itself; the provision namely Section 19 (1), has to be read in its entirety; the term "**unless**", in Section 19 (1) (b) and its meaning cannot be ignored; therefore, in view of clauses (i) to (iii) of Section 19(1)(b), even during the subsistence of MPECS licence, MSEB (the predecessor of MSEDCL) was entitled to supply electricity in MPECS area of supply without the consent of the Appellant in the eventualities and circumstances covered by clauses (i) to (iii) of Section 19(1)(b); therefore, the Board (i.e.) MSEB continued to be a

licensee post 01.02.1971 for MPECS area of supply; deletion of Village Pichadgaon and Ahmednagar Municipal Corporation Pump House on Mula Dam for supplying water to Ahmednagar was pursuant to an amendment of MPECS licence, for deletion of these areas from its licence; the licence of MSEB under Section 26 was for the whole State, including the area of supply of MPECS, which remained intact, as MSEB commenced supply to Village Pichadgaon and AMC Pump House without any alteration to MSEB's Licence; if it was the intent of Parliament to delete any area from the ambit of Section 26, there would have been added a proviso excepting the areas, wherein other licensees are operating under Section 19 (1) of the Act from applicability of Section 26; such an addition of word / proviso cannot be inferred when statutory provisions are clear. (Refer: **(1) Union of India & Anr. Vs. Hansoli Devi & Ors. (2002) 7 SCC 273 ; (2) State of Tamil Nadu Vs. K. Shobana (2021) 4 SCC 686**); and Section 26 of 1948 Act does not create any exception qua the Board being licensed throughout the whole State.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would state that reliance placed by the appellant on **Western UP Electric Power Supply Company Ltd. Vs. State of UP: AIR 1968 SC 1099** is erroneous; the **Western UP** decision is inapplicable to present case for following reasons: (i) the judgement deals with the right of MSEB to supply electricity under Section 19 with the consent of licensee and not otherwise; it does not deal with extinguishing a licence for the subject area (Refer: (1) **Quinn Vs. Leathem : (1901) AC 495; (2) Bank of India Vs. K. Mohandas : 2009 (5) SCC 313**); (ii) **Western UP** does not expound on a distinct factual situation, like the one in which licence conditions of the second licensee (established in 1971) explicitly permitted MSEB (first licensee established in 1960) to supply electricity to inter alia the Government, to any Railway and Government Authority for their own domestic, industrial or other uses as a

condition of MPECS licence itself; thus, MPECS licence terms (Clauses 6 thereof) recognized the right of MSEB, as an embedded licensee in conformity with Section 3(2)(e) of the 1910 Act; the distinct contentions in **Western UP** case which were raised before the Supreme Court are culled out in paragraph 6 of the said judgement; (iii) the proviso to Section 19 (1) ought not to be read as a substantive provision in isolation to the main provision; (iv) the Licensee concerned ie Western UP Electric P & S Co. Ltd. was functioning as a licensee since 1937 prior to the establishment of the Board under the 1948 Act, and its licence did not seem to include conditions permitting the Board to supply like Clause 6 of the MPECS Licence dated 01.02.1971; (v) **Western UP** considered Section 26 of the 1948 Act and concluded that Section 26 is “**subject to the provision of the Act, which means that it is inter alia subject to the provision of Section 19**”; however, Section 19 reveals that it is also subject to the provisions of the 1948 Act; this interplay of the term “*subject to the provisions of this Act*” which is included in both Section 19 (1) and 26, has not been noted and considered in **Western UP** (*supra*); and **Western UP** is sub-silentio on the said point.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would further submit that the term “**subject to**” has been considered in a catena of decision by the Supreme Court ie in (1) **Ashok Leyland Ltd. Vs. State of T.N. & Anr. (2004) 3 SCC 1**; (2) **South India Corporation (P) Ltd. Vs. Secretary, Board of Revenue Trivandrum & Anr. (1964) 4 SCR 280**; therefore, inadvertent non-consideration of the said term as incorporated in Section.19 ought to be considered as sub-silentio; and the **Western UP** judgement will not apply to a scenario post 10.06.2003 when the 1948 Act stood repealed, and in any case post 09.06.2004.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that **Sihor Electricity Works Ltd. Vs. Gujarat Electricity Board & Anr: (1969) 1 SCC 423** is inapplicable to the present case, for the following reasons: (1) the judgement in **S. E. Works** does not deal with extinguishing of a licence for the subject area; (ii) the question of law in **S. E. Works** related to interpretation of the maximum demand as contemplated under Section 19(1)(b) (ii) of the 1948 Act and inability of the Gujarat Electricity Board to supply electricity, without consent of an existing licensee; this judgement is not a dispensation of the Supreme Court that Section 26 of 1948 Act stands amended by deletion of the area of supply of another licensee from the area of supply being the “**whole State**” under Section 26; (ii) the rationale of **S. E. Works** as set out in Paragraph 5 thereof is also important, as the present factual and regulatory matrix greatly differs; **S. E. Works** was incorporated on 15.07.1949; hence, the rationale to protect the financial interest of a prior licensee; in the instant case, entire distribution system of MSEB was transferred to MPECS at depreciated book value of assets; MSEB also continued to supply in MPECS area of supply during subsistence of MPECS licence dated 01.02.1971; (iii) the licensee concerned in **S. E. Works** was incorporated in 1949 prior to establishment of the Board under the 1948 Act, on 20.06.1960; these distinguishing features, when considered in the light of Clause 6 of the MPECS Licence dated 01.02.1971 which permitted certain supply by erstwhile MSEB, predecessor of MSEDCL, as part of MPECS licence terms itself, clearly reveals that **S. E. Works** is inapplicable to the present case.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would contend that MSEB held a licence for the whole State, including those areas which were not for the time being supplied or

adequately supplied electricity; the functions of both distribution and supply were conferred on MSEB under Section 18 of the 1948 Act; the term **“notwithstanding”** in Section 2(6) of the 1948 Act reveals that MSEB as a Deemed Licensee could not be equated with any other licensee qua its operations under the two erstwhile enactments (Refer: **Bharat Bank Ltd. Vs. Employees of Bharat Bank Ltd, 1950 SCC 470**); a contextual definition of the term **“licence & licensee”** should be applied to MSEB; and the definition sections with its words **“unless there is anything repugnant in the subject or context”** should be applied (Refer: (1) **K.V. Muthu Vs. Angamuthu Ammal, (1977) 2 SCC 53**; (2) **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors, 1998) 8 SCC 1**). Reliance is also placed on **Para 11 of Consolidated Coffee Ltd. Vs. Coffee Board, Bangalore : ((1980) 3 SCC 358)** to explain the concept of a Deemed Licensee.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

1. In **Mysore State Electricity Board Vs. Bangalore Woolen, Cotton and Silk Mills Ltd: 1962 SCC Online SC 44**, the Supreme Court held that the scheme of the 1910 Act was to empower the State Government to grant a license to any person to supply electric energy in any specified area; a person holding such a license was called the licensee; the State Government had certain powers to give directions to the licensee in regard to the supply of electric energy, and to control the distribution and consumption of electric energy etc; Section 28 of the 1910 Act laid down that no person other than a licensee shall engage in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such conditions as the State Government may fix in that behalf; under the 1910 Act there were two classes of persons who could supply electric energy, a licensee and a sanction holder; the 1948 Act made

some radical changes in the scheme; one such change was that the expression “licensee” was given an extended meaning to take in not merely a licensee licensed under Part II of the 1910 Act but also a person who had obtained sanction under Section 28 of the 1910 Act; the expression did not, however, include the State Electricity Board which was constituted for the first time under the 1948 Act; Section 26 of the 1948 Act laid down that, subject to the provisions of the 1948 Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under the 1910 Act, and the 1948 Act shall be deemed to be the license of the Board for the purposes of the 1910 Act; and there was a proviso which excepts the Board from the obligation of certain provisions of the 1910 Act.

2. In Union of India & Anr. Vs. Hansoli Devi & Ors. (2002) 7 SCC 273, the Supreme Court observed that it is a cardinal principle of construction of a statute that, when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act; a provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings; it would be hard to find anywhere a sentence of any length which does not contain such a word; a provision is ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning; if, on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute; it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute; the legislature is deemed not to waste its words

or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons; similarly, it is not permissible to add words to a statute which are not there unless, on a literal construction being given, a part of the statute becomes meaningless; but before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law.

3. In **State of Tamil Nadu Vs. K. Shobana (2021) 4 SCC 686**, the Supreme Court observed that, if an interpretation leads to a conclusion that the word used by the legislature is redundant, that should be avoided as the presumption is that the legislature has deliberately and consciously used the word for carrying out the purpose of the Act; the legal maxim *a verbis legis non est recedendum* which means, “from the words of law, there must be no departure” has to be kept in mind; there could be no assumption that a legislature committed a mistake when the language of the statute was plain and ambiguous; no word in a statute has to be construed as a surplusage nor could any word be rendered ineffective or purposeless if the Court required to carry out the legislative intent fully and completely; and, if a word is used in a statute, it cannot be made otiose.

4. In **Bank of India Vs. K. Mohandas: 2009 (5) SCC 313**, the Supreme Court held that it had, in several of its earlier judgements, followed the dicta laid down in **Quinn v. Leatham: (1901) 1 AC 495 (HL)**, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, *but are governed and qualified by the particular facts of the case* in which such expressions are to be found; and a case is only an authority for what it actually

decides, and cannot be quoted for a proposition that may seem to follow logically from it, for such a mode of reasoning assumes that the law is necessarily a logical code, whereas it must be acknowledged that the law is not always logical. The Supreme Court, in **Bank of India Vs. K. Mohandas: 2009 (5) SCC 313** also referred with approval to its earlier judgements in **State of Orissa v. Sudhansu Sekhar Misra: AIR 1968 SC 647**, **Ambica Quarry Works v. State of Gujarat: (1987) 1 SCC 213**, **Bhavnagar University v. Palitana Sugar Mill (P) Ltd: (2003) 2 SCC 111**, and **Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani: (2004) 8 SCC 579**.

5. In **South India Corporation (P) Ltd. Vs. Secretary, Board of Revenue Trivandrum & Anr: AIR 1964 SC 207**, the Supreme Court observed that the words “*subject to other provisions of the Constitution*” meant that, if there was an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency; and whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution, and cannot be built up on the supposed political philosophy underlying the Constitution.

6. In **Bharat Bank Ltd. Vs. Employees of Bharat Bank Ltd, 1950 SCC OnLine SC 23**, the Supreme Court held that the words “Notwithstanding anything in this Chapter” indicated that the intention of the Constitution was to disregard, in extraordinary cases, the limitations contained in the previous Articles on the Supreme Court's power to entertain appeals; these Articles dealt with the right of appeal against final decisions of High Courts within the territory of India; Article 136, however, overrides that qualification and empowers the Supreme Court to grant special leave even in cases where the judgment has not been given by a High Court, but has been given by any court in the territory of India; and, in other words, it contemplates grant of special leave in cases where a court subordinate to a High Court has passed

or made any order, and the situation demands that the order should be quashed or reversed even without having recourse to the usual procedure provided by law in the nature of an appeal, etc.

7. In **K.V. Muthu Vs. Angamuthu Ammal, (1977) 2 SCC 53**, the Supreme Court observed that Section 2 of the Act, in which various terms have been defined, opens with the words “in this Act, unless the context otherwise requires” which indicates that the definitions may not be treated to be conclusive if it was otherwise required by the context; this implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature; while interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act; and a construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.

8. In **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors, 1998) 8 SCC 1**, the Supreme Court held that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that, even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context; that is why all definitions in statutes generally begin with the qualifying words namely “unless there is anything repugnant in the subject or context”; thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used; and that will be giving effect to the opening sentence in the definition section, namely “unless there is anything repugnant in the subject or context”.

9. In Consolidated Coffee Ltd. Vs. Coffee Board, Bangalore : ((1980) 3 SCC 358), the Supreme Court observed that the word “deemed” is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction; a deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail; but in each case it would be a question as to with what object the legislature has made such a deeming provision.

D. ANALYSIS:

Section 2(b) of the Indian Electricity Act, 1910 (“the 1910 Act” for short) defined “*area of supply*” to mean the area within which alone a licensee was, for the time being, authorised by his license to supply energy. Section 2(c) defined “*consumer*” to mean any person who is supplied with energy by a licensee or the Government or by any other person engaged in the business of supplying energy to the public under this Act (ie the 1910 Act) or any other law for the time being in force (which would include the Electricity (Supply) Act, 1948). Section 3 of the 1910 Act related to the grant of license. Section 3(2) provided that, in respect of every such license and the grant thereof, the following provisions shall have effect, namely clauses (a) to (f) thereunder. Section 3(2)(d)(i) stipulated that a license, under Part-II of the 1910 Act, may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and generally as to such matters as the State Government may think fit. Section 3(2)(e) stipulated that the grant of a license, under Part-II of the 1910 Act, for any purpose shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose.

While the Appellant was granted a license under Section 3(1) of the 1910 Act, by the Government of Maharashtra, to supply energy in the MPECS area of supply, Section 3(2)(e), as noted hereinabove, enabled the State Government to grant more than one license within the same area of supply, including for a like purpose. The “*area of supply*” of the erstwhile MSEB was, in view of Section 26 of the Electricity (Supply) Act, 1948, the whole State of Maharashtra, which included the MPECS area of supply with respect to which the Appellant was granted a license to supply energy. Consequently, both the Appellant and the erstwhile MSEB were licensed to supply energy to consumers within the MPECS area of supply, the former in terms of Section 3(1) of the 1910 Act, and the latter in terms of Section 26 of the 1948 Act. The powers and obligations of a licensee under the 1910 Act, as statutorily conferred (by way of a legal fiction under Section 26 of the 1948 Act) on the erstwhile MSEB with respect to the whole State of Maharashtra for the purposes of the 1948 Act, were however subject to the provisions of the 1948 Act.

Section 2(6) of the 1948 Act defined “*licensee*” to mean a person licensed under Part II of the Indian Electricity Act, 1910 to supply energy, but did not include the State Electricity Board, the provisions of Section 26 of the 1948 Act notwithstanding. Since the 1948 Act itself was deemed to be the license of the Board, for the purposes of the 1948 Act in view of Section 26 thereof, Parliament thought it fit to make a distinction between the State Electricity Board as a statutorily deemed licensee, and other licensees who had to make an application and were granted a license under Part II (Section 3) of the 1910 Act, and therefore excluded the State Electricity Boards from the ambit of the definition of a “*licensee*” under Section 2(6) of the 1948 Act. As Section 26 of the 1948 Act makes the 1948 Act itself the licence of the Board, the need for the Board to be treated as a licensee under Section 2(6) of the 1948 Act was found unnecessary.

While it is true that Section 2 of the 1948 Act, which is the interpretation Section, uses the expression “*unless there is anything repugnant in the subject or context*” meaning thereby that the definitions in various clauses of Section 2 would apply except in cases where such a definition is repugnant to the subject and context of a statutory provision, it is un-necessary for us to delve into these aspects, since we are satisfied, for reasons to follow, that proviso (b) to Section 19(1) of the 1948 Act did not extinguish the licence of MSEB, and only disabled them from supplying electricity, in terms of the license held by them, without the Appellant licensee’s consent, in the MPECS area of supply.

Section 18 of the 1948 Act related to the general duties of the Board and provided that, subject to the provisions of the 1948 Act, the Board shall be charged with the following general duties, among others, (a) to arrange for the supply of electricity that may be required within the State, and for the distribution of the same, in the most efficient and economical manner, with particular reference to those areas which were not for the time being supplied or adequately supplied with electricity; (b) to supply electricity, as soon as practicable, to a licensee or other person requiring such supply, if the Board was competent under the 1948 Act so to do.

Section 19 of the 1948 Act related to the power of the Board to supply electricity. Section 19(1) enabled the Board, subject to the provisions of the 1948 Act, to supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V of the 1948 Act was in force. Under proviso (a) thereto, the Board was required not to supply electricity for any purpose directly to any licensee for use in any part of the area of supply of a bulk-licensee without the consent of the bulk-licensee. Proviso (b) to Section 19(1) required the Board not to supply electricity for any purpose to any person, not being a licensee for use in any part of the area of

supply of a licensee, without the consent of the licensee. Proviso (b) to Section 19(1) itself, as noted hereinabove, provided for three exceptions.

The embargo placed on the Board by proviso (b) to Section 19(1), related to supply of electricity to any person other than a licensee, within the area of supply of a licensee, except with the consent of the licensee. Proviso (b) of Section 19(1) neither prohibited supply of electricity by the Board to the licensee itself nor did it bar MSEB from supplying electricity to any person, in the MPECS area of supply, after obtaining the consent of the Appellant-licensee. Supply of energy was a licensed activity under the 1910 Act. It was only because Section 26 of the 1948 Act stipulated that the 1948 Act was itself a license to the Board, conferring on it the powers and obligations of a licensee under the 1910 Act, that the Board was empowered to supply energy. The area within which MSEB was entitled to supply energy was, again in view of Section 26 of the 1948 Act, the entire State of Maharashtra.

Since it is only a licensee, (including the Board in whose favour the 1948 Act itself was a license), who was entitled to supply energy, the restriction, placed by proviso (b) to Section 19(1), was only with respect to supply of energy to a person other than a licensee within the area of supply of the said licensee. This bar was inapplicable in case the Board were to supply electricity to the licensee itself or to any person with the consent of the licensee, Further, in any one of the three situations referred to under clauses (i) to (iii) under proviso (b) to Section 19(1), the Board was empowered to supply energy to any person even without the consent of the licensee.

Proviso (b) to Section 19(1) of the 1948 Act did not result in the Board ceasing to be a licensee in the MPECS area of supply, consequent upon a license being granted by the Government of Maharashtra to the Appellant on 01.02.1971 for, if the Board's license is held to have ceased to exist thereby, then it would not be licensed to supply energy, within the area of supply of the

Appellant- licensee, even with its consent, since it no longer had a license to do so.

In this context, it is relevant to note that the first proviso, to Clause 6(1) of the Appellant's license dated 01.02.1971, stipulated that, nothing in this license shall be construed as preventing any railway or government authority from purchasing their power requirements from, among others, the Electricity Board for their own industrial, domestic or other uses. Supply of power, to the Railways or govt authority, within the MPECS area of supply, could only have been effected by MSEB as a licensee, and not otherwise. The very fact that Clause 14 of the Appellant's license dated 01.02.1971 stipulated that the license shall be subject to the provisions of the Electricity (Supply) Act, 1948 would also go to show that the Appellant's licence was subject, among others, both to Sections 26 and 19 of the 1948 Act. Subject to the restrictions under proviso (b) to Section 19(1) of the 1948 Act, MSEB could, as a statutorily deemed licensee under Section 26 of the 1948 Act, supply power in the MPECS area of supply also, meaning thereby that MSEB was also a licensee within the said area of supply.

The distinction between the grant and holding of a license on the one hand, and the power to supply energy in terms of the license so granted on the other, must be borne in mind. The license which the Board had, in view of Section 26 of the 1948 Act, conferred on it the power and authority to supply energy in the entire State of Maharashtra subject to the provisions of the 1948 Act including proviso (b) to Section 19(1) thereof. Section 18(a) of the 1948 Act required the Board to arrange for the supply and distribution of electricity even to those areas which were not for the time being supplied or adequately supplied with electricity. The license, statutorily conferred on MSEB, was also for it to supply electricity in future to areas which did not have access to electricity. Inability of MSEB to supply electricity, for whatever reason, did not

therefore denude it of the status of a licensee for the entire State of Maharashtra.

The only restriction on MSEB's power to supply energy, in the MPECS area of supply, was the need for it to obtain the consent of the appellant before effecting supply of electricity under the authority of its license. It is not in dispute that MSEB was supplying electricity within the MPECS area of supply to the pump house at Mulla Dam and to the Ahmednagar Municipality, with the consent of the Appellant. It could supply electricity to these entities only because it continued to be a licensee, under Section 26 of the 1948 Act, for the entire State of Maharashtra.

Accepting the Appellant's contention that MSEB ceased to be a licensee, in the MPECS area of supply from 01.02.1971 onwards, would mean that, even with the Appellant's consent, the Board could not supply electricity in the MPECS area, as it was not a licensee in the said area. The Appellant's contention, if accepted, would make the license of MSEB conditional on the appellant's consent, for MSEB would only be a licensee entitled to supply electricity in the MPECS area with the Appellant's consent, and not be a licensee authorised to supply electricity in the MPECS area if the Appellant did not give its consent to effect such supplies. Such a convoluted construction of proviso (b) to Section 19(1) of the 1948 Act does not merit acceptance.

Section 19(2) of the 1948 Act provided that, after the Board had declared its intention to supply electricity for any purpose in any area, for which purpose and in which area it was under Section 19 competent to supply electricity, no licensee shall, the provisions of his license notwithstanding, at any time be entitled, without the consent of the Board, to supply electricity for that purpose in that area. The declaration of intention by the Board to supply electricity for any purpose under Section 19(2) is only with respect to such

area which the Board is entitled, under Section 19(1), to supply electricity. The Board was not entitled to supply electricity within the MPECS area without the Appellant- licensee's consent in view of proviso (b) to Section 19(1). This bar stood lifted the moment the Appellant gave its consent, and once the Board started supplying electricity to the pump house at Mulla Dam in Ahmednagar Municipality. Section 19(2) disentitled the Appellant, thereafter, to supply electricity, to the pump house at Mulla Dam in Ahmednagar Municipality, without the consent of the Board.

Section 26 of the 1948 Act stipulates that the 1948 Act shall itself be deemed to be the license of MSEB for the purposes of the 1910 Act. Except for certain provisions of the 1910 Act which are inapplicable (including Sections 3 to 11 thereof) MSEB was entitled to exercise all the other powers and discharge all the other obligations stipulated in the 1910 Act. In as much as the powers conferred and obligations placed on MSEB, by Section 26 of the 1948 Act, is that of a licensee under the 1910 Act in the entire State of Maharashtra, it is difficult for us to accept the submission, urged on behalf of the Appellant, that MSEB had no power or obligation as a licensee with respect to the MPECS area of supply.

While it is true that the powers and obligations of MSEB as a licensee under the 1910 Act, and the 1948 Act being deemed to be the license of MSEB for the purposes of the 1948 Act, are both subject to the provisions of the 1948 Act, which would include proviso (b) to Section 19(1) thereof, the fact remains that Section 19(1) was also subject to the provisions of the 1948 Act. Since the 1948 Act itself was the license of the Board for the entire State of Maharashtra, and as the provisions of Sections 3 to 11 of the 1910 Act were inapplicable to the MSEB in view of the proviso to Section 26 of the 1948 Act, we must express our inability to agree with the submission of the Appellant that MERC has erred in holding that the MSEB was a deemed licensee for

the entire State. As the 1948 Act itself was a license for MSEB for the entire State of Maharashtra for the purposes of the 1948 Act, and as the said license could neither be amended nor revoked (inasmuch as Sections 3 to 11 of the 1910 Act were specifically made inapplicable to the Board under the proviso to Section 26), the license of MSEB, for the entire State of Maharashtra, continued to remain in force till the 1948 Act was repealed by Section 185 of the Electricity Act, 2003.

It is no doubt true that the first right to supply electricity to consumers within the MPECS area of supply was that of the Appellant, and it is only on their either giving consent, or on their refusing to supply electricity, was the consumer then entitled to approach MSEB requesting it to supply electricity to them. That did not result in the MSEB (which was a licensee for the entire State of Maharashtra, including the MPECS area, under Section 26 of the 1948 Act), ceasing to remain a licensee for the MPECS area of supply, since it only disabled MSEB, as a licensee, to supply electricity to such a consumer without the consent of the Appellant-licensee, and nothing more. Reliance placed by the Appellant on the earlier order passed by MERC, in Case Nos. 85 and 87 of 2010 dated 27.01.2011, is of no avail in as much as the said order of MERC was set aside by the Order of this Tribunal in Appeal No. 39 of 2011 dated 16.12.2011, and the matter was remanded to the MERC for its re-consideration of the application of the Appellant for grant of licence, and for disposal on merits.

Consent of the licensee, under proviso (b) to Section 19(1) of the 1948 Act, enabled MSEB to operationalize its license by effecting supply to the consumer. Absence of consent only disabled MSEB from acting in terms of its licence, and did not result in extinguishing MSEB's licence itself. Further, if any of the eventualities in clauses (i) to (iii) below proviso (b) to Section 19(1) of the 1948 Act were attracted, then the bar under proviso (b) to Section 19(1)

no longer applied, and the MSEB was then entitled to supply electricity to any person in the area of supply of the Appellant licensee. The MSEB was entitled to effect such supplies only because it continued to be a licensee. It is evident, therefore, that MSEB continued to remain a licensee for the entire State of Maharashtra, (including the MPECS area of supply) even after a license was granted in favour of the Appellant on 01.02.1971. They were only disabled, from effecting supplies in the MPECS area, despite their continuing to be a licensee, in view of the restrictions placed by proviso (b) to Section 19(1) of the Electricity Supply Act, 1948. There is nothing in the language of the said proviso (b) which necessitates the conclusion that the license of MSEB ceased to exist, in the MPECS area of supply, the moment the Appellant was granted a license on 01.02.1971.

**(i) JUDGMENTS IN (1) WESTERN UP AND (2) SIHOR
ELECTRICITY WORKS:**

The Judgment of Supreme Court, in **the Western U.P. Electric Power and Supply Co. Ltd. vs. The State of U.P. & Others, (1968) 2 SCR 312; 1968 SCC Online SC 144**, related to a case where Section 3(2)(e) of the 1910 Act was amended by the UP Legislature stipulating that the grant of a license under Part-II of the 1910 Act would not restrict supply of energy, by the State Electricity Board, within the same area where the State Government deems such supply necessary in public interest. The scope and ambit of the amended Section 3(2)(e) fell for consideration in the said Judgment. Unlike in **Western UP Electric Power and Supply Company**, there is no such amendment applicable to the case on hand, and it is Section 3(2)(e) of the 1910 Act which continued to govern till the 1910 Act was repealed by the Electricity Act, 2003.

The Supreme Court, in **Western UP Electric Power and Supply Company**, was concerned with a situation where the Electricity Board sought

to supply electricity to a consumer without the licensee's consent, and it is in such circumstances that it was held that the Board could not do so, since the amended Section 3(2)(e) was inapplicable, and proviso(b) to Section 19(1) of the 1948 Act obligated the Board to obtain the consent of the licensee. The question whether such a requirement resulted in extinction of the licence of the Board, with respect to such area of supply for which a licence was granted in favour of another licensee, did not arise for consideration in the said Judgment.

In **Sihor Electricity Works Ltd. vs. Gujarat Electricity Board & Anr, (1969) 1 SCC 423**, the question which arose for consideration was whether the Board could supply electricity to a consumer within the area of supply of a licensee, without the consent of such a licensee. The Supreme Court held that the intention of the legislature, in enacting proviso (b) to Section 19(1), was that, if any person required supply of electricity for use in any part of the area of supply of a licensee, he must approach the licensee in the first instance, and it is the licensee alone which would have the right to supply electricity to him unless the licensee consents to his taking supply of electricity from the Board.

In this case also, the question whether restriction on the Board supplying electricity to a consumer, in the area of supply of another licensee, without the said licensee's consent, would result in extinction of the license of the Board, did not arise for consideration.

(ii) BINDING EFFECT OF JUDGEMENTS OF SUPREME COURT:

We must express our inability to agree with the submission, urged on behalf of the Respondents, that this Tribunal should ignore the said judgements holding them to have been passed sub-silentio since the words

“*subject to*” in Section 26 of the 1948 Act was considered, but similar use of the words “subject to” in Section 19(1) was not considered by the Supreme Court in **Western UP** and **Sihor**.

In view of Article 141 of the Constitution, all courts/tribunals in India are bound to follow the decisions of the Supreme Court. Judicial discipline requires, and decorum known to law warrants, that appellate directions should be taken as binding and followed. In the hierarchical system of courts which exist, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. (**Cassell & Co. v. Broome** : [1972] 1 ALL ER 801 (HL); **Smt. Kaushalya Devi Bogra v. The Land Acquisition Officer, 1984 2 SCC 324**).

When the Supreme Court decides a principle it would be the duty of the subordinate Court (or for that matter a statutory tribunal) to follow the said decision. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court is a nullity. (**Narinder Singh v. Surjit Singh, (1984) 2 SCC 402**); **Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324**; **Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838**; **Somprakash v. State of Uttarakhand, 2019 SCC OnLine Utt 648**; **Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638**).

As the Judgments of the Supreme Court, is binding on the lower courts/tribunals in the hierarchy, in the light of the Article 141 of the Constitution of India. It would amount to judicial heresy on the part of an inferior Tribunal to declare the Judgment of the Supreme Court sub-silentio, and to refuse to follow the said judgment on this score.

We must reiterate that this Tribunal is bound by the law declared by the Supreme Court in both the afore-said Judgments, notwithstanding the fact that the words “*subject to*” used in Section 19(1) of the 1948 Act was not specifically noticed therein.

(iii) A JUDGEMENT IS ONLY AN AUTHORITY FOR WHAT IT DECIDES:

A decision of a court (or Tribunal) is only an authority for what it decides and not what can logically be deduced therefrom. It cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. **(Quinn v. Leathem, [1901] AC 495; State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647; Delhi Administration (NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; Dr. Nalini Mahajan v. Director of Income-tax (Investigation), [2002] 257 ITR 123 Delhi) and Bhavnagar University v. Palitana Sugar Mill P. Ltd., (2003) 2 SCC 111; B.F. Ditiya v. Appropriate Authority, Income- Tax Department, 2008 SCC OnLine AP 904).**

(iv) JUDGEMENTS SHOULD NOT BE READ DEVOID OF ITS CONTEXT:

The Appellant is not entitled to rely on observations in a judgment, devoid of its context, in support of a proposition which did not even arise for consideration in the said judgment. A word here or a word there should not be made the basis for inferring inconsistency or conflict of opinion. Law does not develop in a casual manner. It develops by conscious, considered steps. **(SKCC Bank Limited v. N Seetharama Raju, 1990 SCC OnLine AP 32).** Observations of Courts are neither to be read as Euclid's theorems nor as provisions of a statute, and that too taken out of their context. **(Amar Nath Om Prakash v. State of Punjab (1985) 1 SCC 345; CCE v. Al noori**

Tobacco Products: (2004) 6 SCC 186; London Graving Dock Co. Ltd. v. Horton; 1951 AC 737; Home Office v. Dorset Yacht Co. (1970) 2 ALL.ER 294; Shepherd Homes Ltd. v. Sandham:1971 (1) WLR 1062; British Railways Board v. Herrington 1972 (2) WLR 537). What is of the essence in a decision is its ratio and not every observation found therein. It is the rule deducible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. (Union of India v. Dhanwanti Devi: (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas: (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay: (2005) 6 SCC 404; Girnar Traders v. State of Maharashtra (2007) 7 SCC 555; ADM, Jabalpur v. Shivakant Shukla:(1976) 2 SCC 521; Quinn v. Leathem: 1901 AC 495: (1900-03) All ER Rep. 1 (HL); State of Orissa v. Sudhansu Sekhar Misra: (AIR 1968 SC 647; T. Sharath v. Govt. of A.P., 2013 SCC OnLine AP 324).

It is not everything said by a Judge, while giving judgment, that constitutes a precedent. The only thing in a Judge's decision which is binding is the principle upon which the case is decided. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (Union of India v. Dhanwanti Devi (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra AIR 1968 SC 647; Quinn v. Leathem (1901) AC 495; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447). A deliberate judicial decision arrived at, after hearing an argument on a question which arises in the case, or is put in issue, would constitute a precedent. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. (Union of India v. Dhanwanti Devi (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. Of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra AIR 1968 SC 647;

Quinn v. Leathem (1901) AC 495; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447).

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The case cannot be quoted for a proposition that may seem to follow logically from it. (**State of Orissa v. Sudhansu Sekhar Misra [AIR 1968 SC 647]; Quinn v. Leathem (1901) A.C. 495; Parshuram v. State of Uttarakhand, 2019 SCC OnLine Utt 1866**). What is binding is the ratio of the decision, and not any finding of fact. It is the principle found upon a reading of a judgment as a whole, in the light of the questions before the Court, that forms the ratio and not any particular word or sentence. (**Director of Settlements, A.P. v. M.R. Appa rao (2002) 4 SCC 638**).

An order of a court (or Tribunal) must be construed having regard to its text and context and, for this purpose, the judgment should be read in its entirety. The factual matrix, the issues involved and the context in which the observations were made are relevant. Observations in a judgment should not be read in isolation or out of context. A judgment should not be read as a statute. (**Goan Real Estate & Construction Ltd. v. Union of India, (2010) 5 SCC 388**). No reliance should be placed on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations must be read in the context in which they appear to have been stated. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. (**Hindustan Petroleum Corpn. Ltd. v. Dolly Das:(1999) 4 SCC 450; Bharat Petroleum Corporation Ltd v. N.R. Vairamani: (2004) 8 SCC 579; T. Sharath v. Govt. of A.P., 2013 SCC**

OnLine AP 324).

We are of the view that the judgments of the Supreme Court, in (1) **Western UP** and (2) **Sihor Electricity Works**, are inapplicable, since the question, which arises for consideration in the present Appeals, did not fall for consideration in the said Judgments i.e. whether proviso (b) to Section 19(1) of the 1948 Act extinguishes the license of the Board with respect to the area of supply for which a licence was granted in favour of the appellant. As noted hereinabove, supply of electricity was an activity which could only have been undertaken either by a licensee in whose favour a license was granted under Section 3(1) of the Indian Electricity Act, 1910, or by the Board as a statutorily deemed licensee under Section 26 of the Electricity Supply Act, 1948. What is prohibited, by proviso (b) to Section 19(1) of the 1948 Act, is for the Board to supply electricity to a person other than the licensee, in the area of supply of the said licensee, without the consent of such licensee. As detailed hereinabove, such a bar/restriction does not result in extinguishing the license of MSEB.

(v) “SUBJECT TO”: ITS SCOPE:

In this context, it is relevant to note that both Sections 19(1) and 26 of the 1948 Act use the words “*subject to the provisions of this Act*”. Consequently, while Section 19(1) would be subject to Section 26, Section 26 would, likewise, be subject to Section 19(1).

While our attention has been drawn to the judgements of the Supreme Court, in **State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129**, and **Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750**, where two provisions in the same Act, each containing a *non obstante* clause, were held as requiring a harmonious interpretation of the two seemingly conflicting provisions, Learned Senior Counsel appearing on both sides, submit that,

despite their best efforts, they have not been able to lay their hands on any judgment of either the Supreme Court or a High Court which has considered the scope of two “*subject to*” provisions in two different Sections of the very same enactment.

The phrase ‘subject to’ conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject to. (**Ganv Bhavancho Ekvott v. South Western Railways, 2022 SCC OnLine Bom 7184; Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447 : AIR 1987 SC 117; South India Corpn. (P) Ltd. v. Secy., Board of Revenue, Trivandrum [1964] 15 STC 74 (SC) ; (1964) 4 SCR 280; Navayuga Engg. Co. v. Asst. Commr. (CT): 2014 SCC OnLine Hyd 996**). The words “subject to” would mean that if there is an irreconcilable conflict between the provisions of the said Section and the other provisions of the Act, the later shall prevail to the extent of the inconsistency. In other words, once inconsistency is spelt out, the other provision shall prevail. (**South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207; Atal Bihari Acharya v. Senior Registrar and Officer Commanding Troops Military Hospital, 2005 SCC OnLine AP 1268**). Where there is no clash, the phrase does nothing: If there is collision, the phrase shows what is to prevail. (**C & J Clark Ltd v. Inland Revenue Comrs., (1973) 2 All ER 513**).

It is well settled that the provisions of one section of a statute cannot be used to defeat those of another, unless it is impossible to effect reconciliation between them. (**Raj Krushna Bose v. Binod Kanungo: AIR 1954 SC 202; Sultana Begum: (1997) 1 SCC 373; Mohd. Sher Khan v. Raja Seth Swami Dayal : AIR 1922 PC 17; Kailash Chandra v. Mukundi Lal, (2002) 2 SCC 678**). We must, therefore, endeavour to read both Sections 19(1) and 26 of the 1948 Act in such a manner so as to give effect to both.

A harmonious construction of both Sections 19(1) and 26 of the 1948 Act, whereby collision or conflict between both these provisions can be avoided, is to hold that, while MSEB continued to remain a licensee for the entire State of Maharashtra which would include the MPECS area of supply, it was disabled, in view of proviso (b) to Section 19(1) and as long as the 1948 Act remained in force, to effect supply of electricity in terms of its license, within the MPECS area of supply, without the consent of the appellant. As supply of electricity was a licensed activity under the 1910 Act, it is only a licensee which could supply electricity to consumers. If, as is contended on behalf of the Appellant, MSEDCL is held not to be a licensee with respect to the MPECS area of supply, consequent on the appellant being granted a license for the said area on 01.02.1971, MSEB would have been disabled from supplying electricity to consumers in the MPECS area of supply even with the appellant's consent. It is only because they continued to be a licensee that proviso(b) to Section 19(1) required MSEB to obtain the consent of the appellant (also a licensee) to supply electricity in the MPECS area of supply.

As noted hereinabove, both the Appellant and MSEB continued to remain licensees, the former for the MPECS area of supply, and the latter for the entire State of Maharashtra (including the MPECS area of supply). MSEB remained a licensee from when it was constituted on 20.06.1960, and the Appellant from when it was granted a license on 01.02.1971, till 10.06.2003 when the Electricity Act, 2003 came into force. Let us now examine the situation thereafter.

(vi) TRANSFER SCHEME:

The Electricity Act, 2003 (except for Section 121) came into force on its notification in the official gazette on 10.06.2003. Section 172 of the Electricity Act, 2003 relates to transitional provisions, and stipulates that, notwithstanding anything to the contrary contained in the Electricity Act, 2003, (a) the State

Electricity Board, constituted under the repealed laws (The Electricity Supply Act, 1948 and the Indian Electricity Act, 1910), shall be deemed to be a licensee under the provisions of the Electricity Act, 2003 for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the licensee in accordance with the provisions of the Electricity Act, 2003, and the rules and regulations made there-under.

In terms of Section 172(a) of the Electricity Act, 2003, the MSEB was deemed to be a licensee under the said Act for a period of one year from the appointed date i.e. from 10.06.2003 till 09.06.2004. The proviso to Section 172(a) enabled the State Government, by notification, to authorize the State Electricity Board to continue to function as a licensee for such further period, beyond the said period of one year, as may be mutually decided by the Central Government and the State Government. In terms of the proviso to Section 172(a), the period of one year, stipulated in the said provision, was extended initially up to 10.12.2004, and thereafter till 09.06.2005. The transfer scheme, re-organizing the Maharashtra State Electricity Board, came into force on 04.06.2005 before the extended period, in terms of the proviso to Section 172(a), expired on 09.06.2005.

Part XIII of the Electricity Act, 2003 relates to reorganization of the State Electricity Board, and Section 131 there-under relates to vesting of property of the Board in the State Government. Section 131(1) stipulates that, with effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of the Electricity Act, 2003, is published or such further date as may be stipulated by the State Government (the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board, shall vest in the State Government on such terms as may

be agreed between the State Government and the Board. Section 131(2) stipulates that any property, interest in property, rights and liabilities vested in the State Government under Section 131(1), shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies, being the distribution licensee, as the case may be.

The Maharashtra Electricity Reforms Transfer Scheme 2005 ('the 2005 Scheme' for short) was notified on 04.06.2005, and came into force from the said date. The 2005 Scheme was made by the Government of Maharashtra, in the exercise of its powers under Sections 131, 133 and 134 of the Electricity Act, 2003, for providing and giving effect to the transfer of properties, interests, rights, liabilities, obligations, proceeding and personnel of MSEB to the transferees, and for matters incidental and ancillary thereto. Clause 3 of the 2005 Transfer Scheme related to classification of undertakings of the Board. Clause 3(1) stipulated that the undertakings of the Board were classified in the following Schedules i.e. Schedule (a) to Schedule (e). Clause 3(1)(c) stipulated that the Distribution Undertakings were as set out in Schedule-C. Clause 4 related to transfer of property to the State, and Clause 4(1) stipulated that, on and from such date of transfer to be notified by the State Government, the properties and all interests, rights and liabilities of the Board as specified, among others, in Schedule-D as the State Government decides shall stand transferred to and vest in the State Government for the purposes of further transfer under this Scheme. Clause 5 related to transfer of undertakings. Clause 5(3) stipulated that the functions, business and undertakings forming part of the Distribution Undertakings, as set out in Schedule-C, shall stand transferred and vest in the Maharashtra State

Distribution Company Limited on and from 6th June, 2005 or such other transfer date to be notified by the State Government for the purpose, subject to the terms and conditions specified in the Electricity Act, 2003 and this Scheme. Clause 9(1) stipulated that classification and transfer of property, rights, liabilities and proceedings were to be provisional for a period of one year from the respective date of transfer. Clause 9(3) stipulated that, on expiry of the period of one year, the transfer of undertakings, made in accordance with this Scheme, shall become final. Clause 10 related to transfer by operation of law and, thereunder, the transfer under this Scheme shall operate and be effective pursuant to the action of the State Government by publishing this Scheme and Orders issued in terms of this Scheme and without any further act, deed or thing to be done by the State Government, Board, Transferees or any other person, subject to the terms and conditions of this Scheme.

It is evident therefore that, pursuant to the 2005 Transfer Scheme, the distribution undertakings of the erstwhile MSEB stood vested in the 2nd Respondent-MSEDCL which, therefore, became its successor and, consequently, a deemed distribution licensee in terms of the fifth proviso to Section 14 of the Electricity Act, in terms of which the company referred to Section 131(2) shall be deemed to be a licensee under the Electricity Act, 2003.

In this context, it is also necessary to take note of the second limb of the first proviso to Section 14 of the Electricity Act, 2003. While the first limb enabled the Appellant to continue to supply electricity as a deemed distribution licensee for the period stipulated in its license which was till 31.01.2011, the second limb made it clear that, one year after the commencement of the Act i.e. on or after 10.06.2004, the Appellant would be governed by the provisions of the Electricity Act, 2003 and not those of the

Electricity (Supply) Act, 1948, in as much as the second limb makes the provisions of the repealed law (1948 Act) applicable only for a period of one year from the date of commencement of the Electricity Act, 2003. Consequently, on or after 10.06.2004, proviso (b) to Section 19(1) of the 1948 Act ceased to apply, in as much as the 1948 Act stood repealed by Section 185 of the Electricity Act, 2003. While the first limb of the first proviso to Section 14 of the Electricity Act, 2003 enabled the Appellant to continue as a licensee, supplying electricity in the MPECS area of supply, till its license expired on 31.01.2011, the 2nd Respondent-MSEDCL was also entitled, on or after 10.06.2004, to supply electricity in the MPECS area of supply without the Appellant's consent, since the bar under proviso (b) to Section 19(1) of the 1948 Act was no longer applicable in the light of the second limb of the first proviso to Section 14 of the Electricity Act, 2003.

The 5th proviso to Section 14 of the Electricity Act, 2003 stipulates that a Government company or the company referred to in Section 131(2) of the Electricity Act, 2003, shall be deemed to be a licensee under the said Act. As the distribution undertaking of the erstwhile MSEB stood vested in the State Government under Section 131(1), and the State Govt re-vested the said distribution undertaking in MSEDCL, in terms of the 2005 Transfer Scheme and in exercise of its powers under Section 131(2) of the Electricity Act, 2003, MSEDCL, a Government of Maharashtra Company and the Company referred to in Section 131(2), is the successor of the erstwhile MSEB and a deemed licensee under the fifth proviso to Section 14 of the Electricity Act, 2003. Further, MSEB was constituted on 20.06.1960 as a statutorily deemed licensee (under Section 26 of the 1948 Act) to supply electricity to the entire State of Maharashtra which, evidently, included the MPECS area of supply. Constitution of MSEB on 20.06.1960 was more than ten years before the Appellant was granted a license for the MPECS area of supply on 01.02.1971. Since MSEDCL, as the successor of the erstwhile MSEB and in view of the

2005 Transfer Scheme, continued to remain a licensee for the MPECS area of supply, the appellant was a second licensee entitled to apply for and seek a fresh license, under the sixth proviso to Section 14, consequent upon expiry of its license on 31.01.2011. It is relevant to note that neither the 1910 Act nor the 2003 Act explicitly provide for renewal of a license on its expiry. Consequently, the Appellant is only entitled to seek a fresh license, that too as a second licensee under the sixth proviso to Section 14 of the Electricity Act, 2003, for supply of electricity to the MPECS area of supply.

It is no doubt true that both the Appellant and MSEDCL had applied for the grant of licence to supply electricity in the MPECS area of supply. By the orders, impugned in these two appeals, the MERC returned the application filed by the MSEDCL holding that it was unnecessary for them to make an application. MERC rejected the Appellant's application permitting them to make an application afresh in terms of the 6th proviso to Section 14 of the Electricity Act, 2003.

We are unable to agree with the submission of the Appellant that, since MSEB had no right to distribute electricity within the MPECS area of supply, such a right could not have been transferred to MSEDCL nor could any such right have been created by the transfer scheme or any right vested in MSEDCL by mere transfer of the assets. While proviso (b) to Section 19(1) of the 1948 Act disabled MSEB to supply electricity to consumers in the Appellant's area of supply without the Appellant licensee's consent, that did not result in extinction of the license of MSEB, and it is this license of MSEB, for the entire State of Maharashtra, which stood transferred to MSEDCL under the transfer scheme. It is for this reason that Ahmednagar District, within which the MPECS area of supply falls, was specifically referred to in Schedule C Part-I and Schedule F of the Transfer Scheme.

As noted hereinabove, by Section 26 of the 1948 Act, the 1948 Act was itself deemed to be the license of the Board for the entire State of Maharashtra which would, evidently, include the MPECS area of supply also. It is also true that MSEDCL had no distribution assets in the MPECS area of supply, and it is pursuant to the directions of MERC, in its order in Case Nos. 85 and 87 of 2010 dated 27.01.2011, that the distribution system and allied assets of the Appellant, in the MPECS area of supply, were handed over to MSEDCL. The validity of such a direction, and the compensation paid/payable to the Appellant in this regard, is said to be the subject matter of an independent appeal pending before this Tribunal. We, therefore, refrain from expressing any opinion on the validity of such a direction issued by MERC. Suffice it to note that, when the Appellant was granted a licensee on 01.02.1971, they were handed over the then existing distribution system belonging to MSEB, albeit on payment of compensation.

Viewed from any angle, we are satisfied that MERC was justified in holding that MSEDCL was a deemed licensee under the 5th proviso to Section 14, and the Appellant was entitled to apply as a second licensee, for grant of a license for the MPECS area of supply, under the 6th proviso to Section 14 of the Electricity Act.

VI. APPLICATION MADE EARLIER BY MSEDCL FOR GRANT OF LICENSE IN MUMBAI: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the Appellant, would submit that MSEDCL had made a specific Application which Application was registered as MERC Case No. 6 of 2011 for grant of license in suburban Mumbai; in respect of Mumbai, where there are other licensees, i.e. licensees other than MSEDCL, it made an Application for license (even

though Mumbai is situated within the State of Maharashtra), and which Application was rejected by MERC on the ground that MSEDCL did not satisfy the criteria prescribed by the 6th proviso to Section 14 of the Electricity Act, 2003; and the said Application was rejected by MERC by Order dated 11th August 2011.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that MPECS has produced the order of the MERC dated 11.08.2011 in Case No. 6 of 2011, and has also referred to other such applications by MSEDCL in support of its contention that, if MSEB /MSEDCL had the Licence for the entire State, there was no reason for MSEDCL to apply for a licence in the area of supply of R-Infra or file other such applications; MSEDCL submits that (i) there cannot be any estoppel against the law; Section 26 of the 1948 Act conferred the status of a licensee on the erstwhile MSEB, and consequently on MSEDCL as its successor for the whole State; filing of application/s contrary to the statute would not, in any manner, render the operation of the Statute otiose; (ii) MSEDCL is entitled to retract from its stand taken earlier, on the basis of a legal principle, if it realises that the relevant statutory provisions provide otherwise (Refer: ***P. Nallammal Vs. State: (1999) 6 SCC 559***); the Judgement passed by this Tribunal, in Appeal No. 39 of 2011 dated 16.12.2011, has not been challenged by MPECS; and MSEDCL had accepted the directions therein, and has subsequently taken an informed and studied view / stand to alter its position on the point of law.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of

the MERC, would further submit that, by its judgement in Appeal No. 39 of 2011 dated 16.12.2011, this Tribunal remanded the licence issues for consideration of the MERC, in the light of the findings and directions issued therein; the said judgement dated 16.12.2011 has not been challenged by MPECS, and has attained finality; and, in the said judgement, this Tribunal directed MERC to ascertain whether the pre-decessor of MSEDCL, namely MSEB, was a Licensee under Section 26 of the 1948 Act for the whole State, and whether such a licence, which was an enactment qua the whole State, stood amended by an executive order of the State Government in 1971, particularly when under Section 3 (2)(e) of the 1910 Act multiple licensees were permitted in the same area of supply.

C. JUDGEMENT RELIED UNDER THIS HEAD:

1. In **P. Nallammal Vs. State: (1999) 6 SCC 559**, the Supreme Court held that it is open to the State or Union of India or even a private party to retrace or even resile from a concession once made in the court on a legal proposition; firstly, because the party concerned, on a reconsideration of the proposition could comprehend a different construction as more appropriate; secondly, the construction of statutory provision cannot rest entirely on the stand adopted by any party in the lis; thirdly, the parties must be left free to aid the court in reaching the correct construction to be placed on a statutory provision; they cannot be nailed to a position on the legal interpretation which they adopted at a particular point of time because saner thoughts can throw more light on the same subject at a later stage.

D. ANALYSIS:

On 06.10.2010, the MERC published an invitation for Expression of Interest, for distribution of electricity in the suburbs of Mumbai, in view of the ensuing expiry of license of Reliance Infrastructure Limited (R-Infra) on

15.08.2011. In response thereto, MERC received, by 04.11.2010, eight applications including from MSEDCL. In its application dated 17.01.2011 (registered as Case No. 6 of 2011), filed under Section 14 read with Section 15 of the Electricity Act, 2003 and in accordance with the provisions of the MERC (General Conditions of Distribution License) Regulations, 2006, MSEDCL requested MERC to grant sole electricity distribution license from 16.08.2011 to MSEDCL in the present R-Infra area of supply. Objections were called for, and MSEDCL's response was invited by the Commission. Thereafter, MERC examined the salient features of MSEDCL's application, and evaluated MSEDCL's eligibility for grant of distribution license.

In its order, in Case No. 6 of 2011 dated 11.08.2011, MERC observed that the application, filed by MSEDCL for grant of license, did not fulfill the requirements for grant of license on account of the following: (a) the minimum area of supply requirement, in terms of the explanation to Rule 3 of the Distribution of Electricity License) (Additional Requirements of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005 had not been complied with; (b) MSEDCL had not met the eligibility requirement for capital adequacy; (c) on account of lack of an action plan, in terms of geographical coverage and time frame for rolling out its own distribution network in the area of supply for which the license was sought for, the requirement laid down in the sixth proviso to Section 14 of the 2003 Act, of having its own distribution system, had not been complied with by MSEDCL; and (d) an exclusive license, being contrary to the 2003 Act as well as the same would run contrary to the expression "grant license to two or more persons for distribution of electricity" as expressly stated in the sixth proviso to Section 14 which also stipulated that "there already exists a license in the same area for the same purpose".

MERC further observed that the additional requirement as specified by the Central Government in the Distribution of Electricity License (Additional Requirements of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005, and the requirement laid down in the sixth proviso to Section 14 of the 2003 Electricity Act of having its own distribution system had not been complied with by MSEDCL, apart from seeking an exclusive license being contrary to the 2003 Act. MERC, therefore, rejected the application filed by MSEDCL as it did not conform to the provisions of the 2003 Act required for grant of distribution license.

MERC further observed that the statute enabled the making of an application for grant of distribution license at any time, and enabled the Commission to consider at any time the grant of two or more licenses in the same area; and, in view of the above, the application of MSEDCL for grant of Distribution License in and around the suburbs of Mumbai in Case No. 6 of 2011 stands dismissed. However, liberty was granted to MSEDCL to apply afresh for grant of distribution license keeping in view the statutory requirements of eligibility.

It is necessary to note that this order of MERC in Case No. 6 of 2011, was passed on 11.08.2011 prior to the order of this Tribunal in Appeal No. 39 of 2011 dated 16.12.2011. As noted hereinabove, Appeal No. 39 of 2011 was filed before this Tribunal against the common order passed by the MERC dated 27.01.2011. It is for the first time, in its order in Appeal No. 39 of 2011 dated 16.12.2011, that this Tribunal took note of Section 26 of the Electricity (Supply) Act, 1948, and observed that Section 26 itself was a license for the Board; any amendment to the area of supply of the Board had to be done only through an amendment of the license; amendment of the area of supply, by an executive order passed by the State Government, would mean amendment of the 1948 Act (License for the Board) itself; and this issue had

an important bearing on the case which had to be properly addressed by the State Commission. In the light of the order of remand by this Tribunal, in Appeal No. 39 of 39 of 2011 dated 16.12.2011, the MERC was obligated to examine this issue.

It is settled law that when a matter is remanded by the appellate forum to the lower court or the lower authority, the Court below, to which the matter is remanded by the Superior Court, is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit. **(Meghalaya State Electricity Board versus Meghalaya State Electricity Regulatory Commission (Judgement of this Tribunal in Appeal 37 of 2010 dated 10.08.2010); Mohan Lal vs. Anandibat (1971) 1 SCC 813; Paper Products Ltd. vs.CCE (2007) 7 SCC 352; Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad AIR 2004 Calcutta 63; K.P. Dwivedi vs. Tate of U.P. (2003) 12 SCC 572; Mr. Muneshwar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368; Amrik Singh vs. Union of India (2001) 10 SCC 424; Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 367; Prakash Singh Badal & Anr. Vs. State of Punjab and Ors. (2007) SCC 1).**

It is also settled law that matters finally disposed of by the order of remand cannot be re-opened when the matter comes back, after the final order upon remand, in appeal or otherwise to the Court remanding the matter. If no appeal is preferred against the order of remand, like in the present case, the matters finally decided in the order of remand can neither be subsequently re-agitated before the Court to which it was remanded nor before the Court where the order passed upon remand is challenged in appeal or otherwise from such order. The Court, to which the matter is remanded, has to act within the order of remand. It is not open to such Court or authority to do anything but to carry out the terms of the remand even if it considers it to be not in

accordance with law. Once a finality is reached, it cannot be reopened. (**Bidya Devi v. Commissioner of Income-tax, Allahabad: AIR 2004 Cal 63 (Calcutta HC DB); Uttar Haryana Bijli Vitran Nigam Limited & others vs CERC & others (Judgement of APTEL in Appeal No. 383 of 2022 dated 02.02.2024)**). It is in compliance with the remand directions of this Tribunal, in Appeal No. 39 of 2011 dated 16.12.2011, that the MERC examined this issue in the light of the observations of this Tribunal.

Further, the order passed by MERC, in Case No. 6 of 2011 dated 11.08.2011, was prior to the order of this Tribunal in Appeal No. 39 of 2011 dated 16.12.2011, and it is evident from the said order passed by the MERC that the scope and ambit of Section 26 of the 1948 Act, the applicability of the first and fifth proviso to Section 14 of the Electricity Act, 2003, and the question whether, by grant of a license to the Appellant, the statutory license of the 2nd Respondent-MSEDCL could be amended by an executive order, passed by the State Government, did not arise for consideration before the MERC in Case No. 6 of 2011. Reliance placed on behalf of the Appellant on the order passed by the MERC, in Case No. 6 of 2011 dated 11.08.2011, is therefore of no avail.

Even otherwise, there can be no estoppel against a statute. (**State of W.B. v. Gitashree Dutta (Dey), 2022 SCC OnLine SC 691; Thakur Amar Singhji v. State of Rajasthan, (1955) 2 SCR 303; Electronics Corpn. of India Ltd. v. Secy. Revenue Deptt., Govt. of A.P., (1999) 4 SCC 458; A.P. Pollution Control Board II v. Prof. M.V. Nayudu, (2001) 2 SCC 62**). When the actions of the government/authority is not in conformity with the law, the doctrine of estoppel would not apply. (**A.P. Dairy Development Corpn. Federation v. B Narasimha Reddy, (2011) 9 SCC 286**). The order passed by MERC in Case No. 6 of 2011 dated 11.08.2011, without even noticing the relevant statutory provisions under the Electricity (Supply) Act, 1948 and the

Electricity Act, 2003, would not disable MSEDCL from placing reliance thereupon to contend that they remain a licensee for the entire State of Maharashtra including the MPECS area for which a license was granted to the Appellant on 01.02.1971.

In any event, the 2nd Respondent-MSEDCL is not disabled from retracing or even resiling from its earlier view on a legal proposition, as it may later comprehend a different construction as more appropriate (**P. Nallammal Vs. State: (1999) 6 SCC 559**). The mere fact that they had submitted an application earlier for grant of a license for suburban Mumbai, and had permitted the order of the MERC, in Case No. 6 of 2011 dated 11.08.2011, to attain finality, would not disable it later from taking a different position on the legal interpretation to be placed on the relevant statutory provisions.

VII. FAILURE OF MSEDCL TO OBTAIN A LICENCE UNDER THE ELECTRICITY ACT, 2003:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would submit that MSEDCL applied for a license in MPECS' area of supply as is clear from the findings of MERC recorded in the impugned order in Case No. 85 of 2010; the position that MSEDCL is not a deemed licensee in the entire State of Maharashtra, even under Electricity, 2003, is strengthened by the provisions of Section 14 of the Electricity Act, 2003; the 1st proviso to Section 14 treats certain licensees as deemed licensees for a period of one year from the date of commencement of the Electricity Act, 2003; unlike the 3rd and 4th provisos to Section 14 which do not require a deemed distribution licensee to obtain a license, the 5th proviso to Section 14 requires a deemed distribution licensee to obtain a license; other than the "Appropriate Government" and the "Damodar Valley Corporation", every other person,

whether an existing licensee or not and whether a Government company or a company referred to under Section 131(2) of the said Electricity Act, 2003 or a company or companies created in pursuance of the Acts specified in the Schedule to the Electricity Act, 2003, though deemed to be a licensee, are required to apply for a license; the special privilege conferred upon the Appropriate Government and the Damodar Valley Corporation, of being absolved from the obligation to apply for a license, is not available to a Government company or a company referred to under Section 131 (2) of the Electricity Act, 2003 which includes MSEDCL. (Refer: **Sesa Sterlite Limited vs. Orissa Electricity Regulatory Commission**: (2014) 8 SCC 444 and **(2) Sundew Properties Limited vs. Telangana State Electricity Regulatory Commission**: (2024) 6 SCC 443); thus, MSEDCL was a deemed licensee under Section 26 of the 1948 Act read with the 1910 Act in respect of the State of Maharashtra only in respect of such areas where a licensee did not exist, and where a licensee existed, in respect of situations as contemplated under Section 19(1) proviso (b) read with Section 19(2) of the 1948 Act; even in the area covered by MPECS license, where MSEB wanted to supply electricity to specific activities, it was required to take special permission from MPECS as well as the State Government; in fact, MSEDCL applied for a license in MPECS' area of supply; MSEDCL had no power or obligation to supply electricity to any consumer except with the consent of MPECS; the Distribution System and allied assets were owned by MPECS and were forcibly directed to be handed over to MSEDCL, as MSEDCL had no Distribution System or allied assets in MPECS' area of supply – an essential ingredient of a license; and the aforesaid clearly shows that MSEDCL was not a licensee within the MPECS' area of supply or in any event was a default or a second licensee; and MPECS cannot be treated as a second licensee.

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would further submit that, if the finding of MERC based on Sections 131 to

133 of Electricity Act, 2003 relating to the transfer scheme is to be construed to mean that, whatever be the state of affairs prior to the transfer scheme, the transfer scheme transfers and/or vests in MSEDCL the right to distribute electricity in the entire State of Maharashtra, the same would be contrary to the provisions of Electricity Act, 2003 read with the transfer scheme and the various orders of the MERC itself; the transfer scheme can only transfer the pre-existing state of affairs and cannot create a new right in favor of the transferee, namely MSEDCL; MSEB had no right to distribute electricity within MPECS' area of supply; if that be so, such right cannot be transferred under the transfer scheme nor can it be created by the transfer scheme and vested in MSEDCL; by merely transferring certain assets of erstwhile MSEB to MSEDCL within the State of Maharashtra, it cannot be stated or concluded that MSEDCL had a license to supply within MPECS' area of supply or was a pre-existing licensee in respect thereof; just because Ahmednagar district in Nasik Zone is mentioned in Schedule C Part 1 and Schedule F of the transfer scheme, it did not mean that, by the transfer scheme, a license is created and/or transferred in favor of MSEDCL for distribution in the MPECS' area of supply, which is a part of Ahmednagar District, as is clear from MPECS' license; thus reliance placed on the transfer scheme is not correct; in fact, the impugned orders clearly hold that MPECS has been granted a License in the year 1971 for supplying electricity in four talukas, i.e. Rahuri, Shirampur, Sangamner, and Nevasa in the district of Ahmednagar; this clearly shows that the license of MPECS related to a part of Ahmednagar district, and MSEB continued to be a Distribution Licensee in respect of the balance part of Ahmednagar district; and, thus the transfer scheme could transfer assets belonging to MSEB situated anywhere, but it cannot be construed to mean that such a transfer results in an automatic transfer or creation of an erstwhile or a new license respectively.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that, in view of Section 26 of the 1948 Act, MSEDCL continued to be a licensee under the erstwhile Electricity Laws since repealed, and a deemed licensee under the fifth (5th) proviso to Section 14 read with Section 172 of the Electricity Act, 2003 as on 10.06.2003 till 04.06.2005; there cannot be any estoppel against the law; and, therefore, the area of supply of MSEDCL till 04.06.2005 was the whole State, which stood transferred to MSEDCL under Section 131 w.e.f. 04.06.2005. Reliance is placed on (1) **Krishna Rai & Ors. Vs. Banaras Hindu University & Ors. (2022) 8 SCC 713**; (2) **State of West Bengal Vs. Gitashree Dutta (Dey) 2022 SCC Online 691**.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would further submit that the erstwhile Board was re-organized under Section 131, 133 and 134 of the Electricity Act, 2003 vide Transfer Scheme dated 04.06.2005; the distribution undertaking, inter alia, of the area of supply consisting of Nashik Zone which includes the four (4) Talukas of MPECS area of supply stood transferred under the Transfer Scheme to MSEDCL; and MPECS has not challenged this incorporation of the entire Nashik Zone in the Transfer Scheme dated 04.06.2005 to MSEDCL for the past nineteen (19) years.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would also submit that reliance placed on behalf of the Appellant, on **Sundew Properties Limited Vs. Telangana State Electricity**

Regulatory Commission & Anr. (2024) 6 SCC 443, is misplaced; it is the contention of MPECS that MSEDCL was required to apply for licence, being a deemed licensee under the fifth (5th) proviso to Section 14 of the Electricity Act, 2003, in view of the dictum of the Supreme Court in Paragraph 32 of the said ***Sundew Properties judgement(supra)***; the procedure for applying for a licence is statutorily provided under Section 15 of the Electricity Act, 2003 to be ***specified*** by Regulations framed by the MERC; the MERC framed MERC (General Conditions of Distribution Licence) Regulations, 2006 by repealing the 2004 Regulations (*supra*) which also included an exemption qua MSEDCL as per proviso to Regulation 5.3 thereof; MERC notified the MERC (General Conditions of Distribution Licence) Regulations, 2006 on 27.11.2006; the **Sundew** judgment came in May, 2024 and, therefore, the 2006 Regulations cannot be said to be in violation of the said judgment; the judgement of the Supreme Court, in ***Sundew Properties (supra)***, does not deal with a fact situation wherein a deemed licensee is exempted from filing an application for licence under the applicable Regulations; in fact, in ***Sundew Properties (supra)***, Regulation 13 of the TSERC Regulations stipulated that deemed licensees shall file application to get identified as deemed licensees; the Supreme Court decision in **Sundew** does not hold that non-filing of an application would result in extinguishing of a deemed licensee status under the statute; the proviso to Regulation 5, exempting MSEDCL from applying for a licence, is an exemption which discharges MSEDCL from applying for and seeking grant of a license; this concession, under the Statutory Regulations, is binding on MSEDCL (Refer: ***PTC India Limited Vs. CERC*** 2010 (4) SCC 603); further, a concession can always be withdrawn; respondent No. 2, MSEDCL repeats and reiterates its submissions in respect of distinguishing ***Sundew Properties (supra) qua Noida Power Company Limited Vs. Uttar Pradesh Electricity Regulatory Commission, 2022 SCC Online APTEL 73, Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory***

Commission (2014) 8 SCC 444, **and M/s. Vedanta Aluminium Limited Vs. Odisha Electricity Regulatory Commission & Ors.** 2013 SCC Online APTEL 76 ; further, all the four (4) judgements namely, **Sundew Properties, Vedanta Aluminium, Noida Power and Sesa Sterlite** deal with the claim of SEZ Developers for being considered as a deemed distribution licensee without approaching the State Commission for a Distribution License; and none of these entities were supplying electricity akin to a Board for many decades.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

1. In **Krishna Rai & Ors. Vs. Banaras Hindu University & Ors.** (2022) 8 SCC 713, the Supreme Court relied on its earlier judgement in **Tata Chemicals Ltd. v. Commr. of Customs, (2015) 11 SCC 628**, to hold that there can be no estoppel against the law; if the law requires something to be done in a particular manner, then it must be done in that manner; and if it is not done in that manner, then it would have no existence in the eye of the law.

2. In **State of West Bengal Vs. Gitashree Dutta (Dey) : 2022 SCC Online SC 691**, the Supreme Court, following its earlier decision in **Thakur Amar Singhji v. State of Rajasthan, Electronics Corpn. of India Ltd. v. Secy. Revenue Deptt., Govt. of A.P, A.P. Dairy Development Corpn. Federation v. B Narasimha Reddy, and A.P. Pollution Control Board II v. Prof. M.V. Nayudu**, held that there can be no estoppel against a statute.

3. In **Sundew Properties Limited Vs. Telangana State Electricity Regulatory Commission & Anr. (2024) 6 SCC 443**, the Supreme Court held that the provisos to Section 14 of the Electricity Act distinguish between entities that are ipso facto deemed distribution licensees and those that are merely declared as deemed licensees without clarity on the necessity of

making an application to obtain a license; for instance, the third and fourth provisos to Section 14 not only confer the status of deemed licensees to the State Government and the Damodar Valley Corporation respectively, but also explicitly exempt them from the requirement to obtain a license; entities not covered by these specific provisos would, therefore, be required to obtain a license; the requirement of obtaining a license has to be read into the other provisos to Section 14 since, for instance, the second and fifth provisos to Section 14 grant deemed licensee status to Central/State Transmission Utilities and a government company, respectively, but neither specifies the requirement to obtain a license nor exempts them from obtaining a license.

4. In **PTC India Limited Vs. CERC** 2010 (4) SCC 603, the Supreme Court held that to regulate is an exercise which is different from making of the regulations; however, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1); if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178; making of a regulation under Section 178 is not a pre-condition to passing of an order levying a regulatory fee under Section 79(1)(g); however, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation; similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61; it is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the Regulations under Section 178; however, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

5. In **Noida Power Company Limited Vs. Uttar Pradesh Electricity Regulatory Commission, 2022 SCC Online APTEL 73**, this Tribunal held that Section 3 or Section 6 of the 1910 Act or any other provision therein do not have any provision of expiry or extension; the only provision which exists is revocation of the License; from a reading of the first proviso to Section 14 of the Electricity Act, 2003, it was clear that the Appellant, engaged in the business of supply of electricity under the Act of 1910, was a deemed licensee under the Electricity Act, 2003, and the provisions of its License as prescribed under the repealed law shall remain in place for a period of one year or for such period as decided by the State Commission; however, after such period, the Appellant has to obtain the License under the provisions of the Electricity Act, 2003 and the provisions contained therein shall come into force.

6. In **Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission** (2014) 8 SCC 444, the Supreme Court expressed its agreement with the opinion of this Tribunal, in **Vedanta Aluminium Ltd. v. Odisha Electricity Regulatory Commission, (Appeal No. 206 of 2012, decided on 3-5-2013 (Tri))**, that there were nine provisos to Section 14(b) of the Electricity Act and another was added in respect of the appellant vide Notification dated 3-3-2010; a reading of these provisos would indicate that some of them confer the status of a deemed distribution licensee on certain specified entities who are not required to take separate license from the State Commission under this Act, whereas some other provisos merely declare the party as deemed licensee and nothing specified as to whether they are required to obtain the license or not; however when it is specially provided in Proviso 4 and Proviso 3 that Damodar Valley Corporation and the State Government are not required to obtain license, and other provisos do not confer such privilege, they would be required to obtain license.

The Supreme Court further observed that this was the only manner in which the two Acts could be harmoniously construed; no doubt, by virtue of the status of a developer in the SEZ area, the appellant was also treated as deemed distribution licensee; however with this, it only gets exemption from specifically applying for license under Section 14 of the Act; and, in order to avail further benefits under the Electricity Act, the appellant is also required to show that it is in fact having a distribution system and has number of consumers to whom it is supplying electricity.

7. In **M/s. Vedanta Aluminium Limited Vs. Odisha Electricity Regulatory Commission & Ors.** 2013 SCC Online APTEL 76, this Tribunal observed that the State Commission had framed the Orissa Electricity Regulatory Commission (conduct of business) Regulation, 2004 under the powers conferred under Section 181 of the Electricity Act, 2003; and the distribution of electricity License (Additional requirement of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005, framed by the Central Government, would also apply to the Appellant for distribution license in addition to the requirements of the State Commission's Regulations.

D. ANALYSIS:

It is true that both the Appellant and MSEDCL had applied for the grant of licence to supply electricity in the MPECS area of supply. By the orders, impugned in these two appeals, the MERC returned the application filed by the MSEDCL holding that it was unnecessary for them to make an application. MERC rejected the Appellant's application permitting them to make an application afresh in terms of the 6th proviso to Section 14 of the Electricity Act, 2003.

We are unable to agree with the submission that, since MSEB had no right to distribute electricity within the MPECS area of supply, such a right

could not have been transferred to MSEDCL nor could any such right have been created by the transfer scheme or any right vested in MSEDCL by mere transfer of the assets. While proviso (b) to Section 19(1) of the 1948 Act disabled MSEB to supply electricity to consumers in the Appellant's area of supply without the Appellant's licensee's consent, that did not result in extinction of the license of MSEB, and it is this license of MSEB for the entire State of Maharashtra which stood transferred to MSEDCL under the transfer scheme. It is for this reason that Ahmednagar District, within which the MPECS area of supply falls, was specifically referred to in Schedule C Part-I and Schedule F of the Transfer Scheme.

As noted hereinabove, by Section 26 of the 1948 Act, the 1948 Act was itself deemed to be the license of the Board for the entire State of Maharashtra which would, evidently include the MPECS area of supply also. It is also true that MSEDCL had no distribution assets in the MPECS area of supply, and it is pursuant to the directions of MERC, in its order in Case Nos. 85 and 87 of 2010 dated 27.01.2011, that the distribution system and allied assets of the Appellant, in the MPECS area of supply, was handed over to MSEDCL. The validity of such a direction, and the compensation paid/payable to the Appellant in this regard, is said to be the subject matter of an independent appeal pending before this Tribunal. We, therefore, refrain from expressing any opinion on the validity of such a direction issued by MERC. Suffice it to note that, when the Appellant was granted a licensee on 01.02.1971, they were handed over the then existing distribution system belonging to MSEB, albeit on payment of compensation.

It is no doubt true that, unlike the third and fourth provisos to Section 14 of the Electricity Act, 2003, in terms of which the Appropriate Government and the Damodar Valley Corporation are deemed to be a licensee under the Electricity Act but are not required to obtain a license under the Act, the fifth

proviso to Section 14 does not absolve the deemed licensee of the requirement of obtaining a license under the Electricity Act, 2003.

In this context, it is necessary to note that the MERC made the Maharashtra Electricity Regulatory Commission (General Conditions of Distribution License) Regulations, 2006 (the "2006 Regulations" for short) which came into force on its publication in the official Gazette. Regulation 2(1) of the 2006 Regulations defines "Deemed Licensee" to mean a person authorized under the first, second, third, and fifth provisos to Section 14 of the Electricity Act, 2003 to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Regulation 3 stipulates that the 2006 Regulations shall apply to all distribution licensees in the State, and in respect of all applications for distribution license including applications pending before the Commission at the date of publication of these Regulations. Regulation 4 prescribes the procedure for grant of License, and Regulation 5.1 relates to application for grant of license. Regulation 5.1.1 provides that an application for grant of license shall be made in the form and shall be accompanied by documents and information as may be stipulated by the Commission from time to time, and which shall be available from the office of the Commission, and/or on its internet website. Regulation 5.2 relates to scrutiny of the application, and Regulation 5.3 relates to notice of application for grant of license. Regulation 5.3.1 requires an applicant to publish a notice of his application for grant of license within seven (7) days from the date of intimation as provided in Regulation 5.2.2 in not less than two (2) daily English language newspapers and two (2) daily Marathi language newspapers which are widely circulated in the proposed area of supply. What is of significance is the second proviso under Regulation 5.3 which expressly stipulates that nothing in Regulations 5.1 to 5.3 shall apply to deemed licensees. Consequently, the 2nd Respondent-MSEDCL, which is a deemed licensee under the fifth proviso to Section 14 of the

Electricity Act, 2003, is disabled by the 2006 Regulation itself from submitting an application for grant of license.

The submission, urged on behalf of the Respondents, that the judgement of the Supreme Court, in **Sundew Properties Limited vs. Telangana State Electricity Regulatory Commission: (2024) 6 SCC 443**, would have no application to the present case, as the 2006 Regulations were made prior thereto, necessitates rejection. The decision of the Supreme Court, enunciating a principle of law, is applicable to all cases irrespective of the stage of its pendency. The law laid down by the Supreme Court must be held to be the law from the inception, unless the Supreme Court itself indicates that its decision will operate prospectively. It is not open for Courts/Tribunals to apply the law laid down by the Supreme Court only from the date on which the judgment came to be passed. (**M.A. Murthy v. State of Karnataka, 2007 (4) ALD 105; G. Raja Babu v. The Govt. of A.P., 2007 (4) ALD 105; Vijaya Vasava Motors v. Assistant Commissioner, 2008 SCC OnLine AP 978**).

Unlike statutory provisions which, unless the context otherwise provides, are prospective in operation, declaration of law by Courts/Tribunals stand on a different footing. Courts declare the law. They do not bring a law into existence. Provisions of the Statute, as interpreted by Courts/Tribunals, must be deemed to be in existence right from the inception of the enactment. (**R. Sai Babu v. Bharat Sanchar Nigam Limited, New Delhi, 2006 SCC OnLine AP 1050; Dr. Suresh Chandra Verma v. The Chancellor, Nagpur University, (1990) 4 SCC 55**).

When the Court interprets a statutory provision, it is not making a law which operates from the date of its judgment. The principle, as accepted in our jurisprudence, is that the Court explains or expounds the law and does not bring the law into existence, which is the proper function of the competent

Legislature. Any exposition of the law made by the Court would, therefore, relate back to the date from which the statute became operative. (**Bombay Tyres International Limited v. B.P. Talathi, 1992 LAB IC 258** (Bombay HC)). The law declared by the court is presumed to be the law at all times. The decision of a court, enunciating a principle of law, is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the court is, in fact, the law from the inception. (**M.A. Murthy V. State of Karnataka: (2003) 7 SCC 517; State of Andhra Pradesh v. Seven Hills Constructions, 2011 SCC OnLine AP 1064**).

A judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a “new hale” but to maintain and expound the “old one”. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a sub-sequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which “was earlier not correctly understood”. (**Assistant Commissioner of Income-tax v. Saurashtra Kutch Stock Exchange Ltd: (2008) 14 SCC 171; State of Andhra Pradesh v. Seven Hills Constructions, 2011 SCC OnLine AP 1064**).

The law declared by the court is presumed to be the law at all times. The decision of a court, enunciating a principle of law, is applicable to all cases irrespective of its stage of pendency as it is assumed that what is enunciated by the court is, in fact, the law from the inception. (**State of Andhra Pradesh v. Seven Hills Constructions, 2011 SCC OnLine AP 1064**). Consequently, the law declared by the Supreme Court, in **Sundew**

Properties Limited, would apply to the present case, notwithstanding that such a declaration of law was during the pendency of the present appeals filed before this Tribunal in 2014, more than ten years ago.

While the submission urged on behalf of MSEDCL that, in the absence of any consequence being stipulated in the Electricity Act, 2003, for the inability/ failure of a deemed distribution licensee to apply for and obtain a license, the deemed licensee status would continue to prevail, cannot be readily brushed aside, suffice it merely to observe that we expect the MERC to ensure compliance with the law declared in the judgements of the Supreme Court, in **Sesa Sterlite Limited vs. Orissa Electricity Regulatory Commission: (2014) 8 SCC 444** and **Sundew Properties Limited vs. Telangana State Electricity Regulatory Commission: (202) 6 SCC 443**, and to consider framing appropriate Regulations for grant of a license to deemed licensees, and the terms and conditions subject to which such a license can be granted.

As noted hereinabove, MSEB was, by law, a distribution licensee for the entire State of Maharashtra, and MSEDCL is its successor and a deemed distribution licensee under the fifth proviso to Section 14 of the Electricity Act, 2003. The inability of deemed licensees to obtain a license, in view of the stipulation in the 2006 Regulations, will have huge ramifications on MSEDCL not only with respect to the MPECS area of supply, which is the subject matter of the present dispute, but also with respect to all other parts of the State of Maharashtra; and, if the consequence of their failure to obtain a licensee is held to result in their ceasing to be a deemed licensee, then they may not be in a position to distribute electricity in any part of the State of Maharashtra. Besides, the same difficulty may arise with respect to both the Central and the State Transmission Utilities, both of which are deemed licensees under the 2nd proviso to Section 14. They are also, akin to MSEDCL, required to

obtain a license. Unless the Regulations are suitably amended, all these utilities may, for no fault of theirs, face unforeseen consequences in future.

Suffice it to observe that, since MSEDCL has been disabled by the 2006 statutory Regulations made by the MERC itself, from making an application for grant of license, the legal embargo under the 2006 Regulations cannot result in their being deprived of their deemed licensee status under the Parent Act i.e. under the fifth proviso to Section 14 of the Electricity Act, 2003.

Consequently, MSEDCL must be held to continue to be a deemed distribution licensee under the fifth proviso to Section 14 of the Electricity Act, 2003 in which event they would continue to remain a deemed licensee, even for the MPECS area of supply, as the successor of the erstwhile MSEB, and as a Govt Company falling under the fifth proviso to Section 14. Since MSEB was constituted on 20.06.1960, and was a statutorily deemed licensee in terms of Section 26 of the 1948 Act from then, more than a decade prior to the Appellant being granted a license, to supply electricity in the MPECS area of supply, on 01.02.1971, the Appellant, which was granted a license later in point of time, would be a second licensee under the sixth proviso to Section 14 of the Electricity Act.

VIII. MSEDCL HAD NO DISTRIBUTION ASSETS IN MPECS AREA OF SUPPLY: ITS CONSEQUENCES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the Distribution System and allied assets were owned by MPECS and were forcibly directed to be handed over to MSEDCL, as MSEDCL had no Distribution System or allied assets in MPECS' area of supply – an essential ingredient of a license; the aforesaid clearly shows that

MSEDCL was not a licensee within MPECS' area of supply or, in any event, was a default or a second licensee; and MPECS cannot be treated as a second licensee.

B. ANALYSIS:

It is true that the earlier order passed by MERC, in Case Nos. 85 and 87 of 2010 dated 27.01.2011, required the Appellant to hand over the complete distribution network, the allied equipment and assets to MSEDCL permitting the Appellant to claim the value for the assets handed over by filing a petition before the Commission, with all relevant documentary evidence, for deciding the transfer value of these assets. While criticizing MERC in this regard, this Tribunal, in its order in Appeal No. 39 of 2011 dated 16.12.2011, also faulted them in directing the Appellant to transfer their assets to MSEDCL, and held that it was not in accordance with law. While holding that this direction was liable to be set aside, this Tribunal, while directing MERC to complete the process within three months, observed that the existing arrangements may continue subject to payment of charges to the Appellant to be decided by the Commission after hearing all the parties concerned. Pursuant thereto, MERC appears to have made some arrangement, with respect to payment of charges to the Appellant for the assets handed over by them to MSEDCL, which we are told is the subject matter of an independent and separate appeal which is pending on the file of this Tribunal. It may be inappropriate for us, therefore, to express any opinion on the justification or otherwise of MERC directing the Appellant to hand over its distribution system to MSEDCL.

IX. GRANT OF LICENSE TO MPECS BY AN EXECUTIVE ORDER: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the contention of MSEDCL and MERC is that grant of a license to MPECS was by way of an executive order, and could not over-ride the alleged provisions under Section 26 of the 1948 Act granting license to the Board, and its successor MSEDCL for the entire area of the State of Maharashtra; it was not a mere executive order of granting a license as understood by MSEDCL; and MPECS' license was granted under the specific power conferred upon the Government under Section 3 of the 1910 Act read with Section 19 of the 1948 Act.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that the Appellant-MPECS cannot be heard to contend that grant of a license to it on 01.02.1971 automatically resulted in deletion of the area of the four (4) talukas from the Board's area of supply because the same would have resulted in amendment of the Board's area of supply to the whole State of Maharashtra, except the subject four talukas of Ahmednagar district (Ahmednagar Circle, Nashik Zone); and plenary legislation cannot be negated or stultified by an executive order. Reliance is placed in this regard on **(1) S. Sundaram Pillai & Ors. Vs. V.R. Pattabiraman & Ors. (1985) 1 SCC 591** ; **(2) The Sales Tax Officer, Circle 1, Jabalpur Vs. Hanuman Prasad : AIR 1967 SC 565**; and **(3) Dwarka Prasad Vs. Dwarka Das Saraf (1976) 1 SCC 128**.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

1. In **S. Sundaram Pillai & Ors. Vs. V.R. Pattabiraman & Ors. (1985) 1 SCC 591**, the Supreme Court referred with approval to its earlier

decision, in **Dwarka Prasad v. Dwarka Das Saraf: (1976) 1 SCC 128**, wherein it was held that if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it; sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges; the rule of construction is that, prima facie, a proviso should be limited in its operation to the subject-matter of the enacting clause; 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 principal 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 a manner that they mutually throw light on each other, and result in a harmonious construction.

2. In **the Sales Tax Officer, Circle 1, Jabalpur Vs. Hanuman Prasad: AIR 1967 SC 565**, the Supreme Court held that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the Legislature desires should be excluded.

D. ANALYSIS:

It is true that the license granted by the Government of Maharashtra to the Appellant, on 01.02.1971 for the MPEC area of supply, was in the exercise of its powers under Section 3(1) of the Indian Electricity Act, 1910 which conferred power on the State Government to grant a license to any person to supply energy in a specified area. What cannot, however, be ignored is that Section 26 of the 1948 Act deemed the 1948 Act itself to be the license of MSEB for the purposes of the 1948 Act. Since the plenary legislation was, itself, deemed to be the license of MSEB for the entire State of Maharashtra, (which included the MPECS area of supply also), it is only by an amendment of the 1948 itself could the license, deemed to have been granted in favour of

the Board, been varied, amended or revoked. While it was always open to the State Government to grant a license to more than one licensee, as Section 3(2)(e) of the 1910 Act enabled them to do so, it could not have thereby amended the license, statutorily deemed in favour of MSEB, to supply electricity to the entire State of Maharashtra.

Any amendment to the plenary legislation (ie the 1948 Act), either to amend or vary the license deemed in favour of MSEB, could only have been made by Parliament by law, and not by the State Government in the exercise of its statutory powers under Section 3(1) of 1910 Act to grant a license, in as much the power conferred by a Statute can only be exercised in terms of the said Statute, and a law made by Parliament cannot be amended by an executive order passed by the State Government.

Further, since the proviso to Section 26 of 1948 makes Section 3 to 11 of the 1910 inapplicable to the MSEB, the State Government could also not have exercised its statutory powers under Section 4 and 4A of the 1910 Act to revoke or amend the license which MSEB had for the entire State. The only manner in which the action of the State Government, in granting the Appellant a license for the MPECS area of supply, can be upheld is only if both MSEB and the Appellant are held to be licensees for the MPECS area of supply, the former by the 1948 Act itself and the latter on the Govt of Maharashtra exercising its statutory powers under Section 3(1) of the 1910 Act. As noted herein above, while no license was required to be granted to MSEB under Section 3(1) of the 1910 Act as the 1948 Act itself was deemed to be a license in their favour, the fact remains that Section 3(2)(e) of the 1910 Act provides for the eventuality of a license being held by two or more persons to operate within the same area of supply.

The Government of Maharashtra granted a license to the Appellant, for supply of electricity in four Talukas of Ahmednagar District in the State of

Maharashtra, by notification dated 01.02.1971 and in exercise of the powers conferred under Section 3(1) of the Indian Electricity Act, 1910. While the power, exercised by the Government of Maharashtra to grant a license in favour of the Appellant by the Notification dated 01.02.1971, was undoubtedly an exercise of a statutory power, such exercise could only have been undertaken in terms of the 1910 Act, and in compliance with the laws then in force for it is settled law that exercise of executive power must be in accordance with law (**P. Sambamurthy v. State of A.P., (1987) 1 SCC 362**), and Plenary legislation can neither be negated, nullified or curtailed by an executive order.

When the Government of Maharashtra granted the Appellant a license on 01.02.1971, the Electricity (Supply) Act, 1948 was in force. The Maharashtra State Electricity Board, which was constituted under Section 5 of the 1948 Act on 20.06.1960, was also in existence by then. What the Government of Maharashtra failed to notice was that, since Section 26 of the 1948 Act required the 1948 Act to be deemed to be the license of MSEB for the purposes of the 1948 Act, no license could have been granted to the Appellant by effecting an amendment of the license statutory conferred on MSEB under Section 26 of the said Act, more so since the first proviso to Section 26 of the 1948 Act expressly excluded application of Sections 3 to 11 of the 1910 Act to the MSEB. As noted hereinabove, the effect of exclusion of Sections 3 to 11 of the 1910 Act was that the State Government was disabled from amending or revoking the license of the MSEB including changing its area of supply which, by legal fiction under Section 26 of the 1948 Act, extended to the whole State of Maharashtra.

In this context, it is useful to note that, in exercise of the powers conferred by Section 37 of the Indian Electricity Act, 1910, the Central Electricity Board made the Indian Electricity Rules, 1956. Chapter III of the

1956 Rules related to License. Rule 11, thereunder, related to application for license. Under Rule 11(1), every application for a license was required to be signed by or on behalf of the applicant, and addressed to such officer as the State Government may designate in this behalf, Further, the said application was required to be accompanied by the documents specified in Clauses (a) to (g) there-under. Clause (a) of Rule 11(1) required the applicant to enclose six copies of the draft license proposed by the applicant. Clause (b) of Rule 11(1) required the applicant to file three copies of the proposed area of supply. Rule 12 required the applicant to make available copies of the maps, referred to in Rule 11(1)(b), for public inspection. Rule 13 related to the contents of the draft license, and stipulated that the draft license shall contain the following particulars, among others, (b) a Statement of the boundaries of the proposed area of supply.

Since the area of supply of MSEB was, by law (Section 26 of the 1948 Act), the entire State of Maharashtra, grant of exclusive rights of supply of electricity, within the MPECS area to the Appellant, would, in effect, have amounted to amendment of the license statutorily granted by the 1948 Act to the Maharashtra State Electricity Board, which is impermissible not only in view of the first proviso to Section 26 of the 1948 Act, but also as the power to amend the 1948 Act could only have been exercised by Parliament or the State Legislature, and not by an executive order of the Govt of Maharashtra.

As a logical corollary thereto, and to avoid the action of the Govt of Maharashtra being tainted with illegality, it must be held that the license granted to the Appellant on 01.02.1971 was not to the exclusion of MSEB but was in addition thereto. In other words, on or after 01.02.1971, both MSEB and the Appellant must be held to have had a license to supply electricity to the MPECS area. That, in terms of such a license, MSEB could not have supplied electricity, to consumers within the MPECS area of supply, without

the appellant's consent, in the light of proviso (b) of Section 19(1) of 1948 Act, did not extinguish the license of MSEB. All that it did, was to disable MSEB from acting in terms of its license to effect supplies within the MPECS area of supply.

It is relevant to note that, when MSEB was constituted under Section 5 of the 1948 Act on 20.06.1960, electricity was not being supplied in several areas and large parts of the State of Maharashtra. The license of MSEB, in terms of Section 26 of the 1948 Act for the whole state of Maharashtra, could not have envisaged actual supply of electricity for the entire State, and the license, statutorily conferred on them, was to effect supplies in future also. It is necessary, therefore, to bear in mind the distinction between a license being granted to supply electricity, and actual supply of electricity in exercise of the power conferred by such a license, and to note that, even in cases where a license is granted to supply electricity, actual supply of electricity in terms of such a license can always be statutorily regulated or curtailed.

X. IS THE IMPUGNED ORDER IN CASE NO. 87 OF 2010 BEREFT OF REASONS:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the Appellant, would submit that only one line is stated, in paragraph 66 of the impugned order in Case No. 87 of 2010, that the Application submitted by MPECS is not in accordance with the sixth proviso to Section 14 of Electricity Act, 2003; the reasons why this application is found not to be in accordance with the said sixth proviso is not stated anywhere; on the other hand, MERC, while passing the earlier common order dated 27th January 2011 in Case Nos. 85 and 87 of 2010 (which was set aside in Appeal No. 39 of 2011 by this Tribunal by its judgment and order dated 16th December 2011), considered

the application of MPECS as being in accordance with and in compliance with the provisions of the sixth proviso to Section 14 of the Electricity Act, 2003, and the MERC (General Conditions of Distribution License) Regulations, 2006; a technical validation session was undertaken in respect of the MPECS' application and the so-called data gaps were required to be filled up; it was after the application was found to be in accordance with the said sixth proviso read with the said Regulations, and after a thorough scrutiny during the technical validation, that the MPECS' application was considered on merits and each of its ingredients were considered and pronounced upon; and thus the requirement to file a fresh application in the Order now impugned is both unreasoned and illegal; and is consequently liable to be set aside.

B. ANALYSIS:

Consequent upon expiry of their extended license period on 31.01.2011, and in as much as the Electricity Act, 2003 does not expressly provide for the renewal of a license, the Appellant's entitlement to be granted a license was only in terms of the 6th proviso to Section 14 of the Electricity Act. MSEB was a licensee for the entire State of Maharashtra (including the MPECS area of supply), from 20.06.1960 when it was constituted, long prior to a license being initially granted to the Appellant on 01.02.1971. MSEDCL was its successor and a licensee for the entire State of Maharashtra (including the MPECS area) under the fifth proviso to Section 14 of the Electricity Act, 2003. Consequently, the Appellant was only entitled to be granted a license for the MPECS area of supply as a second licensee.

As noted hereinabove, the 6th proviso permits grant of a second license within the same area of supply only on satisfaction of the conditions stipulated therein ie fulfilment of the additional requirements of capital adequacy, credit worthiness and code of conduct by the applicant seeking a second license. Since the Central Government has made the Distribution of electricity license

(Additional Requirements of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005 in this regard, the Appellant can only be granted a license for the MPECS area of supply, if it fulfils the criteria stipulated in the 2005 Rules. It is, evidently, for this reason that MERC had directed the appellant to make another application.

In this context it is necessary to note that an appeal to this Tribunal, under Section 111 of the Electricity Act, 2003, is a continuation of the hearing of the original petition filed before the MERC, as an appeal lies to this Tribunal both on facts and law. A first appeal is a full re-hearing of the original proceedings, and the appellate forum possesses all powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. (**Southern Power Distribution Company of AP Limited v. Andhra Pradesh Electricity Regulatory Commission, 2022 SCC OnLine APTEL 110; (H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17)**). An appeal is also a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on facts. (**Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, (1969) 2 SCC 74; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17)**),

As an appeal to this Tribunal is a continuation of the hearing of the original petition filed before the MERC, it is open for this Tribunal to examine this issue at the appellate stage of the proceedings, even if it is satisfied that

the reasons furnished by the MERC, for arriving at its conclusion, is inadequate or that it should have been more elaborate.

XI. LICENSEE UNDER THE 6TH PROVISIO TO SECTION 14 OF THE ELECTRICITY ACT, 2003:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri J.J. Bhatt, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the requirement of capital adequacy principally relates to the capability of a prospective licensee to be able to satisfy the appropriate Commission on a norm of 30% equity on the cost of investment; in the present case, MPECS had laid down the network in the entire area of supply, initially by purchasing the same from the erstwhile MSEB and then, over a period of 40 years, in expanding it to all its consumers (which network through a coercive order of MERC has since been handed over to MSEDCL for which MSEDCL has, pending the present proceedings, been directed to pay certain charges to MPECS); the requirement of capital adequacy and credit worthiness is ex-facie satisfied; there have been several reports, including of MERC and of agencies commissioned by MERC, which clearly show the credit worthiness and code of conduct of MPECS, and how MPECS has been doing a far better job than MSEDCL (or erstwhile MSEB); in compliance with MERC's directions in this regard, MPECS had, with its application, also filed the certificate of the Statutory Auditor along with an Affidavit that they are not guilty nor have been disqualified under the provisions of the Distribution of Electricity License (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules 2005; despite MPECS demonstrating that it has complied with all the requirements, it is not shown by MERC how MPECS does not satisfy the requirement of the 6th proviso to Section 14 of the Electricity Act 2003, nor did MERC give the Appellant an opportunity to deal with the same; MERC has not even

attempted to address that question, and has brushed it aside in the guise of requiring MPECS to make a fresh Application.

Sri J.J. Bhatt, Learned Senior Counsel appearing on the Appellant, would further submit that, in the earlier common Order dated 27th January 2011 which has since been set aside by this Tribunal in Appeal No.39 of 2011 on grounds principally of violation of natural justice, MERC did not reject MPECS' Application for license on the ground that it failed to satisfy the requirement of the 6th proviso to Section 14 of the Electricity Act read with the MERC (General Conditions of Distribution License) Regulations, 2006, which the Impugned Order dated 18th June 2014 does not even consider; the only ground on which the license application of MPECS was earlier rejected was the alleged lack of financial credibility or capability of MPECS to procure power for supply to the consumers; this observation of MERC was without taking into consideration the disputes pending before the Supreme Court where MPECS has contended that the rate of bulk supply tariff is clearly contrary to the principles for fixation of bulk supply tariff; if MPECS succeeds in the said appeals, the tariff would be substantially reduced; and, in these circumstances, MERC should be directed to grant a license to the Appellant to distribute electricity in its area of supply, and for payment of compensation to MPECS for use of its distribution network and allied assets by MSEDCL.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that the impugned order, in Case No. 87 of 2010 dated 18.06.2014, held that MPECS can re-submit an application in accordance with the sixth (6th) proviso to Section 14 of the Electricity Act, 2003; MPECS had a license only till 31.01.1991; MPECS licence was

directed, vide Government Resolution (**GR**) dt. 21.05.1999, to be extended retrospectively by taking steps under the 1910 Act; MSEDCL had been a licensee for the whole of the State and, as a subsequent applicant, MPECS is required to fulfil the requirements of Capital Adequacy and Creditworthiness as stipulated under the sixth (6th) proviso to Section 14 of the Electricity Act, 2003.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would further submit that the GR dt. 21.05.1999, extending MPECS licence retrospectively, laid down various conditions including Condition (D) directing MPECS to pay 25% of the arrears immediately; the GR provided that, subject to the conditions enumerated in the GR including Condition (D), the Licence should be extended, for a further twenty (20) year period from 01.02.1991; no executive action of the State Government can render the mandatory provisions of the Central Enactment namely, the 1910 Act, otiose; admittedly, the payment stipulation of 25% was never adhered to by MPECS, subject to which the licence was to be extended; it is well settled that, if an enactment provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner (Refer: **Chandra Kishore Jha Vs. Mahavir Prasad & Ors. (1999) 8 SCC 266; Ramchandra Keshav Adke & Ors. Vs. Govind Joti Chavare & Ors. (1973) 1 SCC 559; Tata Chemicals Ltd. Vs. Commissioner of Customs (Preventive) Jamnagar (2015) 11 SCC 628**); and, in support of its Application for Licence (Case No. 87 of 2010), MPECS made submissions on applicability of the eighth (8th) proviso to Section 14, which was not pressed before this Tribunal in the present proceedings.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of

MERC, would also submit that yet another contention of MPECS, in the Original proceedings before the MERC, was that its application was to be treated as an application for renewal of licence under Section 18 of the Electricity Act, 2003, and not a fresh license under Section 14 and 15 of the Electricity Act, 2003; this contention was also not pressed before this Tribunal in the present proceedings; in Paragraph 61 of the order, impugned in the present Appeal (Appeal No. 223 of 2014), MERC records that MSEDCL has been supplying electricity to consumers in the area since 1971 as well; this finding of MERC has not been challenged by raising a ground in the Memo of Appeal; admittedly, MSEDCL has been supplying electricity, even when the licence dated 01.02.1971 granted to MPECS was subsisting, to Ahmednagar Municipal Corporations, and Mula Dam Pumping Station; further, under the following orders of MERC, which were not challenged by MPECS, MSEDCL as an *embedded licensee* continued to supply electricity to consumers. (i) Order dated 21.07.2010 in Case No. 6 of 2010 [Sunfresh Agro Industries v Pvt Ltd v Mula Pravara Electric Co-operative Society Ltd & Anr], and (ii) Order Dated 04.11.2010 in Case No. 27 of 2010 [Prabhat Dairy Pvt Ltd. v Mula Pravara Electric Co-operative Society Ltd & Anr]; thus, MPECS application for licence is a fresh application which needs to be evaluated on the criteria specified in the sixth (6th) proviso to Section 14 of the Electricity Act, 2003 as there is no provision for renewal of license either in the 2003 Act or in the 1910 Act; paragraph 37 of the impugned order, which details the submissions of MPECS, reveals that the financial health of MPECS was needed to be considered by MERC as a Regulator; as regard availability of power, the submissions made by MPECS in Paragraph 37 (vii) (6) (a) to (d) reveal that MPECS had failed to apprise MERC of availability of any power for distribution; and, in fact, it contended that non-availability of electricity is not a criteria to be considered for renewal of licence.

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would state that MSEDCL, as the successor of MSEB, was the licensee for the entire State including the MPECS area of supply; in fact, the Transfer Scheme dated 04.06.2005 under Section 131, 133 and 134 of the Electricity Act, 2003 provided for transfer of Nashik Zone to MSEDCL which included the four (4) talukas of MPECS area of supply; in the event, it is established that MSEDCL continued to be a licensee for the entire State, the impugned order, in Case No. 87 of 2010 dated 18.06.2014 directing MPECS to re-submit its fresh application, for grant of licence in the MPECS area of supply, by satisfying the conditions under sixth (6th) proviso to Section 14, ought to be upheld; Regulation 4 lays down the “*Eligibility Conditions/Disqualifications*” for grant of licence; Regulation 4 specifically provides that no Applicant shall be qualified for grant of licence, if the Commission is of the opinion that conditions or circumstances exists that cast a doubt on the ability of the Applicant to perform its duties and obligations under the Act; the conditions or circumstances have been explained in the Explanation to the said Regulation 4; the conditions or circumstances mean and include pending legal proceedings, competence, *financial integrity* and any other sufficient reasons; and, further, MPECS licence dated 01.02.1971 incorporated conditions for filing of annual accounts.

With respect to financial integrity of MPECS, Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that the Annual Accounts of MPECS are on record before this Tribunal; a perusal of the said Annual Accounts would reveal that MPECS is in arrears in respect of payment to be made to MSEDCL towards Electricity Bill; the Balance Sheet of MPECS for F.Y 2008-09 and F.Y 2009-10 clearly reveals an outstanding amount of Rs 1695,08,74,331.70 and Rs.2070,36,26,639.21

respectively, due to MSEDCL towards Electricity Bill; thus, MPECS does not fulfil the eligibility criteria as provided under Regulation 4 of the MERC (General Conditions of Distribution Licence) Regulations, 2006; the entitlement for a licence cannot be considered in the light of non-entitlement of licence to another, with the exception of applicability of the sixth (6th) proviso to Section 14; the 2005 Rules provide for Capital Adequacy and Creditworthiness to be adhered to for an application under Section 15(1) of the Electricity Act; these Rules were amended on 08.09.2022, and were followed by further amendment on 28.11.2022; the amended Rules would apply to MPECS in the present case, as has been held by the Supreme Court in the following judgements, that pending application for license should be considered under the Rules in force at the time when the application is taken up for consideration and not under the Rules which were in force when the application was filed ie (i) **Delhi Metro Rail Corporation Ltd. Vs. Delhi Transco Ltd. 2008 SCC Online APTEL 62 = (2008) APTEL 62**; (ii) **Howrah Municipal Corpn. & Ors. Vs. Ganges Rope Co. Ltd. & Ors. (2004) 1 SCC 663**; (iii) **Union of India & Ors Vs Indian Charge Chrome & Anr. (1999) 7 SCC 314**; in ***M/s. Vedanta Aluminium Limited Vs. Odisha Electricity Regulatory Commission & Ors. 2013 SCC Online APTEL 76***, this Tribunal held that the aforesaid Rules will apply for grant of distribution licence; the area of supply of MPECS is four (4) talukas; and, as per the amended 2005 Rules, it does not include the entire area covering either a Municipal Corporation as defined in Article 243Q of the Constitution or three adjoining revenue districts, or a smaller area as may be notified by the Appropriate Government shall be the minimum area of supply.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

1. In **Ms. Chandra Kishore Jha Vs. Mahavir Prasad & Ors. (1999) 8 SCC 266**, the Supreme Court, relying on **Nazir Ahmad v. King Emperor:**

AIR 1936 PC 253 (II) , Rao Shiv Bahadur Singh v. State of V.P: AIR 1954 SC 322, and State of U.P. v. Singhara Singh: AIR 1964 SC 358, observed that, if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.

2. Following **Taylor v. Taylor: (1876) 1 Ch D 426, Nazir Ahmed v. Emperor: AIR 1936 PC 253, Shiv Bahadur Singh v. State of U.P., AIR 1954 SC 322, and Deep Chand v. State of Rajasthan, AIR 1961 SC 1527**, the Supreme Court, in **Ramchandra Keshav Adke & Ors. Vs. Govind Joti Chavare & Ors. (1973) 1 SCC 559**, observed that, where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all; and other methods of performance are necessarily forbidden.

3. In **Tata Chemicals Ltd. Vs. Commissioner of Customs (Preventive) Jamnagar (2015) 11 SCC 628**, the Supreme Court held that there can be no estoppel against the law; if the law requires that something be done in a particular manner, it must be done in that manner; if not done in that manner, it has no existence in the eye of the law at all; and something that is illegal cannot convert itself into something legal by the act of a third person.

4. In **Delhi Metro Rail Corporation Ltd. Vs. Delhi Transco Ltd. 2008 SCC Online APTEL 62**, this Tribunal, following the judgment of the Supreme Court in **Howrah Municipal Corporation v. Ganges Rope Company: 2004 (1) SCC 663**, held that the pending application for license should be considered under the Rules in force at the time when the application is taken up for consideration, and not under the Rules which were in force when the application was filed.

5. In Union of India & Ors Vs Indian Charge Chrome & Anr. (1999) 7 SCC 314, the Supreme Court held that mere making of an application for registration does not confer any vested right on the applicant; and the application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration.

D. ANALYSIS:

The sixth proviso to Section 14 of the Electricity Act, 2003 enables MERC to grant a license to two or more persons for distribution of electricity subject, among others, to the applicant complying with the additional requirements relating to capital adequacy, credit worthiness, or code of conduct as may be prescribed by the Central Government. In exercise of the powers conferred by Section 176(1) and 176(2)(b) of the Electricity Act, 2003, the Central Government made the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Credit Worthiness, and Code of Conduct) Rules, 2005 (the “2005 Rules” for short). While Rule 3 thereof relates to the requirements of capital adequacy, the explanation to Rule-3 stipulates that, for the grant of a license for distribution of electricity within the same area in terms of the sixth proviso to Section 14 of the Electricity Act, 2003, the area falling within a Municipal Council or a Municipal Corporation as defined in Article 243(Q) of the Constitution of India or a revenue district shall be the minimum area of supply.

The 2005 Rules appear to have been amended on 08.09.2022, followed by a further amendment on 28.11.2022, and the present requirement, for grant of a license under the sixth proviso to Section 14, appears to require the minimum area of supply either to be a Municipal Corporation as defined in Article 243Q of the Constitution or three adjoining revenue districts, or a smaller area as may be notified by the Appropriate Government. Rule 4 of the

2005 Rules stipulates the requirements of a Code of Conduct. Consequently, it is only if the Appellant satisfies the requirements of Rules 3 and 4 of the 2005 Rules would it then be entitled, as a second licensee, to be considered for grant of a second license.

As noted hereinabove, MERC has, by the impugned order, permitted the Appellant to make a fresh application, after holding that the earlier application submitted by them was not in accordance with the 6th proviso to Section 14 of the Electricity Act. While an appeal to this Tribunal is no doubt a continuation of the original hearing, it is not in substitution thereof. It is only after the MERC considers and decides whether the Appellant fulfils the tests stipulated in the 2005 Rules, of the requirements stipulated in the 6th proviso to Section 14 of the Electricity Act, 2003, would this Tribunal, on a challenge being mounted to the said order, examine the validity of the decision of the MERC.

We see no reason, in such circumstances, to undertake the exercise of determining whether the Appellant has complied with the requirements of the 6th proviso to Section 14 of the Electricity Act, 2003 or the 2005 Rules referred to hereinabove. The question whether there would be a reduction in tariff, if the Appeal before the Supreme Court is decided in the Appellant's favour, is again a matter which ought not to be examined by this Tribunal, since the Appeal before the Supreme Court is said to be still pending.

The submission of Ms. Deepa Chavan, Learned Senior Counsel, is that this requirement is not satisfied by the Appellant, and no useful purpose would be served in directing the MERC to consider its application for grant of a second license, more so as the appellant is ex-facie ineligible under the amended 2005 Rules. By the order, impugned in this Appeal, the MERC has directed the Appellant to make a fresh application, complying with the requirements of the 2005 Rules, for grant of a second license. The present

Appeal has been preferred by the Appellant, and not by the 2nd Respondent. In such an appeal, it is impermissible for the 2nd Respondent to seek a relief which they could only have sought by preferring an appeal against the impugned order.

We would also not be justified in examining the contention, urged on behalf of the second Respondent-MSEDCL, that the Appellant does not satisfy the conditions stipulated in the 2005 Rules, and in the 6th proviso to Section 14 of the Electricity Act, as this is for the MERC to examine in the first instance. Since the Appellant is required, in terms of the impugned order, to make a fresh application, the question whether their application should be considered in terms of the earlier 2005 Rules, or the amended 2005 Rules now in force, is again a matter for the MERC to consider, and not for this Tribunal to examine even before the MERC has considered the said issue.

XII. APPELLANT'S PRAYER FOR REMAND:

A. SUBMISSION URGED ON BEHALF OF RESPONDENTS:

Ms. Deepa Chawan, Learned Senior Counsel appearing on behalf of MSEDCL, and Ms. Pratiti Rungta, Learned Counsel appearing on behalf of the MERC, would submit that MPECS had contended that MERC, while considering its application for Distribution Licence vide order dated 18.06.2014, had directed MPECS to submit its application in accordance with the sixth proviso of Section 14 within three (3) months of the order; MPECS has prayed for remand in this context contending that MPECS had a valid licence to distribute electricity in four (4) talukas of District Ahmednagar from 01.02.1971 to 31.01.1991; post 1991 till 1999 MPECS functioned without a Licence; on 21.05.1999, the Government of Maharashtra issued a GR to determine viable tariff in view of the mounting arrears of MPECS for the electricity supplied by the erstwhile MSEDCL and for extending the licence of

MPECS for the next twenty (20) years from 01.02.1991; MPECS does not fulfil the requirements of the 2005 Rules (*supra*) as it has no power availability for distribution; it continued to flout each tariff order passed by the MERC till expiry of its licence in 2011, and its annual accounts reflect the vast sums due from it to MSEDCL; and, as all this is clear, remand of MPECS Application (Case No. 87 of 2010) would be an academic exercise (Refer: **Arvind Kumar Jaiswal v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146**).

B. JUDGEMENTS RELIED UNDER THIS HEAD :

In **Arvind Kumar Jaiswal v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146**, the Supreme Court opined that an order of remand prolongs and delays the litigation and, hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account; where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential; and the first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.

C. ANALYSIS:

We find no error in the impugned orders passed by the MERC, and see no justification in interdicting the impugned order or to take upon ourselves

the task of examining whether or not the appellant satisfies the requirement of the 6th proviso to Section 14 of the Electricity Act, 2003 or the 2005 Rules, more so as the appellant is now required to submit a fresh application as directed by the MERC in the impugned order.

As the order, impugned in Appeal No. 223 of 2014, requires the Appellant herein to resubmit a fresh application for the MPECS area, in accordance with the 6th proviso to Section 14 of the 2003 Act, within three months from the date of the impugned order, suffice it to permit the Appellant, if they so choose, to make a fresh application for grant of a second license for the MPECS area of supply, in terms of the 6th proviso to Section 14 of the Electricity Act, 2003, within three months from the date of receipt of a copy of this order.

XIII. CONCLUSION:

The impugned orders passed by the MERC, which are under challenge in both these appeals, do not warrant interference in the present appeals. Both the appeals fail and are, accordingly, dismissed. The Appellant is permitted, if it so chooses, to submit an application in terms of the impugned order, within three months from the date of receipt of a copy of the order now passed by us, for grant of a second license to supply electricity in the MPECS area of supply. All the IAs, in both the afore-said appeals, also stand dismissed.

Pronounced in the open court on this the **28th day of February, 2025.**

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd