

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 188 OF 2019 &
IA NO. 980 OF 2019

Dated: 27th February, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Indian Railways

Represented by Southern Railways,
7th Floor, NGO Complex, Park Town,
Chennai – 600 003

... Appellant

Versus

1. The Chairman and Managing Director
Tamil Nadu Electricity Board Limited,
10th Floor, NPKRR Maligai,
No. 144, Anna Salai,
Chennai – 600 002

2. The Director/Distribution,
**Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)**
10th Floor, NPKRR Maligai,
No. 144, Anna Salai,
Chennai – 600 002

3. The Director (Operation)
Tamil Nadu Transmission Corporation Limited,
(TANTRANSCO)
State Load Despatch Centre,
MLDC Block, TNEB Complex,
No. 144, Anna Salai,
Chennai – 600 002

4. Chief Engineer (Operation),
State Load Despatch Centre,
1st Floor, SLDC Block, TNEB Complex,
No. 144, Anna Salai,
Chennai – 600 002

5. The Superintending Engineer
Open Access and Coordination,
1st Floor, SLDC Block, TNEB Complex,
No. 144, Anna Salai,
Chennai – 600 002

6. **Tamil Nadu Electricity Regulatory Commission**
Through its Secretary
No.19-A, Rukmini Lakshmipathy Salai,
Egmore,
Chennai – 600 008

... Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Pulkit Agarwal
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. G. Umaphathy
Mr. S. Vallinayagam for R-1 to R-5

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER (ORAL)

1. Indian Railways, an establishment working under the control of the Central Government in terms of the Railways Act, 1989, has been constrained to come to this Tribunal by the present appeal under Section 111 of the Electricity Act, 2003 to assail the decision of the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as “TNERC”

or “*State Commission*”) dated 25.03.2019 passed in Petition No. M.P. 4 of 2019, declining to entertain the request, *inter-alia*, for direction to the respondents – State Transmission and Distribution Companies – to process the application and grant non-discriminatory open access based on its claim of being a deemed licensee with certain other ancillary reliefs, the prime reason being that the State Commission was not satisfied with the “*form*” in which such petition had been presented.

2. The Electricity Act, 2003 was enacted and brought on the statute book w.e.f. 10.06.2003. As per the Statement of Objects and Reasons leading to its enactment, the legislation is to ensure, *inter-alia*, that “*open access in transmission*” is available “*from the outset*”. There are detailed provisions in the Act assuring to all concerned non-discriminatory open access for the purposes, *inter-alia*, of transmission of electricity. It may be mentioned here itself that a conjoint reading of Sections 173 and 174 of the Electricity Act, 2003 shows that this piece of legislation is to have overriding effect over any other law for the time being in force; this, however, being subject to the exception in case of certain other special laws that include the Railways Act, 1989. Section 173 makes it unexceptionally clear that the Railways Act, 1989, in so far as the matter concerns the Railways, would prevail over the provisions of the Electricity Act in case of any inconsistency between the provisions of

former law, on one hand, and provisions of the latter statute or Rules and Regulations framed there-under, on the other.

3. Reference may also be made, for the purposes of the present discussion, to the almost identical provisions contained in Sections 38 to 40 of the Electricity Act, 2003. While Section 38 relates to establishment of a Central Transmission Utility (“CTU”), Section 39 provides for a State Transmission Utility (“STU”), they being established by the Central Government and the State Government respectively. The duties of transmission licensees are set out in Section 40. Almost similar clauses are contained in the said three provisions each insisting upon the duty of the transmission licensee, CTU or STU, as the case may be, “*to provide non-discriminatory open access to its transmission system for use by any licensee*”.

4. By virtue of the provisions contained in the third proviso to Section 14 of the Electricity Act read with Section 11 of the Indian Railways Act, 1989, the Appellant claims to be a deemed licensee.

5. It is explained by the learned counsel appearing on its behalf that the need to approach the State Commission had arisen for grant of open access not for distribution purpose but for transmission purposes within the State of Tamil Nadu. It was pointed out by the learned counsel for

the Appellant, this not being refuted by the learned counsel for the respondent transmission company or distribution company – the State Commission, a party respondent, not participating in the proceedings despite notice – that the State Commission has till date not framed any regulations on the subject of conditions to be specified for the grant of open access in terms of its obligation under Section 16 read with Section 42 and Section 181(2)(d). We may observe here that the impugned order is also silent on the existence of any regulations on the subject or the reasons for default on the part of the State Commission to frame such regulations till date.

6. It appears that the question as to whether Indian Railways' claim to be a deemed licensee, for such purposes as aforesaid, had come up for consideration before the Central Electricity Regulatory Commission (CERC) in Petition No. 197/MP/2015. It has been submitted that CERC had upheld the contention of the Appellant in such regard though, it is fairly conceded, that the said decision is subject matter of challenge in appeal, being Appeal No. 276 of 2015, presently pending before a co-ordinate Bench of this Tribunal. We may also add that during the hearing on its appeal, which essentially questions the propriety of the view taken by the State Commission to throw the petition out on finding fault with the "*form*", the respondent transmission company and

distribution companies through their respective counsel submitted that they would resist the claim of deemed licensee status and, thus, the question is still wide open. In this view, and also for the reason of the view that we are proceeding to take on the appeal at hand, we do not wish to presently express any opinion on the subject of the claim of the Appellant to the status of deemed licensee.

7. The reasons why the State Commission was not satisfied with its jurisdiction being invoked by the aforementioned petition of the Appellant are set out in the impugned order as under:-

“4. Findings of the Commission:-

4.1. Before proceeding to examine the main prayer of the petitioner for directing the respondents to process their application and grant non-discriminatory open access to Railways as Deemed Licensee, we find it appropriate to consider in the first instance as to whether Railways can be termed to be a Deemed Distribution Licensee in the State of Tamil Nadu.

4.2. We have already heard the counsel for the Railways on this question. The contention of the petitioner is that Indian Railways have the status of Deemed Distribution Licensee by virtue of the provisions contained in sections 11 (a) and 11(g) of Indian Railways Act, 1989 read with third proviso to section 14 and section 173 of the Electricity Act, 2003 and that the CERC in its order dated 05-11-2015 in Petition No.197/MP/2015 has accorded such status and the same has not yet been stayed by the Hon'ble APTEL in the appeal pending before it against the said decision. .

4.3. In view of the above, we are of the view that it would be premature on the part of the Commission to go into the merit of the submissions of the petitioner at this stage. To entertain a petition from anyone in the capacity as a Licensee or a Deemed Licensee, such petition should have been filed in the manner as provided for under section 15 of the Electricity Act, 2003. Even in such cases, such as the petitioner's who claim to be a Deemed Licensee under

section 14 (3) of the Electricity Act, 2003 which do not require obtaining of licence , still the provisions of section 16 of the Act would be applicable. The said section is reproduced for reference:-

“Section 16. (Condition of licence): The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence: Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.”

It may be seen that the above provision of law requires that general or specific condition applicable to the Deemed Licensee shall be specified by the appropriate Commission. This cannot be done unless a person who claims to be a Deemed Licensee approaches the Commission with such a petition.

4.4. Even the Hon'ble CERC's order which is relied upon by the petitioner specifically says in para 45 as follows:-

x x x

“Therefore, the Central Commission and State Commissions are required to specify the general or specific conditions of licence applicable to the deemed licensees. As and when Indian Railways decides to undertake transmission, distribution or trading in electricity as deemed licensee under third proviso under section 14 of the Electricity Act, they will be required to approach the respective State Commission for specifying the general or specific conditions of licence, if the concerned State Commission has not already specified the terms and conditions of licence under proviso to section 16 of the Act.”

4.5. Therefore, we are unable to be of any help to the petitioner as we cannot admit the petition in its present form and in the result, we are constrained to dismiss the same with liberty to the petitioner to approach the Commission appropriately in the manner known to law.

The petition is disposed of on the above lines.”

[Emphasis supplied]

8. On careful perusal of the above reasoning, we find the State Commission has actually abdicated its responsibility. As noted earlier, it is the statutory responsibility of the State Commission to frame Regulations in terms of Section 16 and 181 of the Electricity Act, 2003. The said clauses do not require petition to be moved by an interested party. There is no reason why there should have been a default in discharge of such responsibility particularly when the statute also speaks of “*general*” conditions and specifies certain time-lines on the subject [*Proviso to Section 16 and fifth Proviso to Section 42(2)*]. Be that as it may, the framing of Regulations is not a condition precedent for exercise of the jurisdiction. Further, the State Commission should have borne in mind that it is the substance of the prayer made in the petition which should regulate its procedure and action rather than the label of the provision of law under which a petition is presented. Finding fault with the “*form*” and losing out on the substance of the prayer is unacceptable.

9. For the foregoing reasons, we allow the Appeal. The impugned order is set aside. The State Commission is directed to consider the request made in the petition of the appellant in accordance with law. Need we remind the State Commission about its duty to frame the regulations without any further default or delay. We may add that even if

the exercise of framing Regulations were to take some time, nothing comes in its way to take an appropriate decision on the prayer of the Indian Railways for grant of open access.

10. The parties are directed to appear before the State Commission on **03.04.2020**.

11. Given importance of the subject and the stakes involved, it is desirable that the State Commission takes an appropriate decision as expeditiously as possible preferably within four months of the first date of hearing set by us.

12. The appeal and the application filed therewith are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 27TH DAY OF FEBRUARY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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