THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 257 OF 2019

Dated: 30th June, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member (Electricity)

In the matter of:-

Aurangabad Industrial Township Limited
Through, its Managing Director
Udyog Sarathi, DMIC Cell
Mahakali Caves Road
Andheri (East), Mumbai - 400 093 **.... Appellant**

Versus

1. Maharashtra Electricity Regulatory Commission
Through, its Secretary
Centre 1, 13th Floor World Trade Centre,
Cuffe Parade, Mumbai 400 005

2. Maharashtra State Electricity Distribution Company Ltd.
Through, its Chairman & Managing Director
Prakashgad, Plot No.G-9,
Prof. Anant Kanekar Marg,
Bandra (East)
Mumbai – 400 051

... Respondents

Counsel for the Appellant(s) : Mr.M.G.Ramachandran, Sr.Adv.
Mr. Shubham Arya
Ms. Divya Chaturvedi

Mr. Sanjeev K. Kapoor
Mr. Saranshshaw App.-1

Counsel for the Respondent(s) : Mr. Udit Gupta
Mr.Anup Jain
Mr. S. Rama
Mr. K. Parmeshwar for R-2

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This Appeal is preferred by the Appellant partly challenging the Order dated 08.05.2019 passed by the Maharashtra Electricity Regulatory Commission in Case No. 29 of 2019.

2. The facts that led to filing of the present appeal, in brief, are as under:

The Appellant-Aurangabad Industrial Township Limited (for short "**AITL**") is a Company incorporated under the provisions of the Companies Act, 1956. The Respondent No.1-Maharashtra Electricity Regulatory Commission (for short "**theCommission**") has been established under the provisions of Section 82 of the Act and is exercising its powers and discharging functions under the provisions of the Act, as a sector regulator. Respondent No. 2-Maharashtra State Electricity Distribution Company

Limited is a deemed Distribution Licensee under the statutory provisions and a State entity.

3. In December 2006, a Memorandum of Understanding ("**MOU**") was signed by vice Minister, Ministry of Economy, Trade and Industry ("**METI**") of Government of Japan and the Secretary, Department of Industrial Policy & Promotion ("**DIPP**") for development of Delhi-Mumbai Industrial Corridor ("**DMIC**"). In terms thereof, a Final Project Concept was presented to both, the Prime Minister of India and the Prime Minister of Japan during latter's visit to India in 2007. DMIC is a mega infra-structure project covering an overall length of 1483 KMs between the political capital and the business capital of India, i.e. Delhi and Mumbai.DMIC will also include the development of 1540 km long Western Dedicated Freight Corridor ("**WDFC**") with 24 nodes (investment regions and industrial areas), including six large investment regions of 200 square kilometers, and will run through 6 states i.e., Delhi, western Uttar Pradesh, southern Haryana, eastern Rajasthan, eastern Gujarat, and western Maharashtra and it will also have influence zone and nodes in the 7thstate of Madhya Pradesh. The industrial corridor project will be carried out by Delhi-Mumbai Industrial

Corridor Development Corporation ("**DMICDC**"), an autonomous body composed of Government and the private sector.

4. As part of DMIC, the Government of Maharashtra ("**GoM**") has decided to develop the Shendra -Bidkin belt in Aurangabad as planned industrial township to act as major investment node. In this connection,an industrial park is being developed from Shendra on the east up to Bidkin on the south of Aurangabad city, which is situated upon 8400 hectares of land i.e. 20756 acres approximately. For the purpose of planning the township, one of the renowned US firm, AECOM, has been engaged as consultant. GoM has also decided to rope in a Japanese consortium to recommend the use of technology for infrastructure upgrades in these areas. Based on the investment potential of the area, the State has plans to develop the Aurangabad belt as an automobile and engineering hub.

5. The Government of India ("**GoI**") has announced a New National Manufacturing Policy to set up seven National Investment and Manufacturing Zones ("**NIMZ**"). It aims to set up mega industrial towns on waste and infertile land acquired by the Government. Shendra - Bidkin Industrial Park will be one of them. With this objective in mind it was decided to establish the Aurangabad Industrial City ("**AURIC**") as part of

the DMIC Project. In this regard, on 03.03.2014, GoM has executed the State Support Agreement ("**SSA**") with DMIC, to extend the necessary support required for implementation of AURIC industrial township project.

6. On 12.12.2014, the Appellant-AITL was incorporated pursuant to sub-section (2) of Section 7 of the Companies Act, 2013 and Rule 8 of the Companies (Incorporation) Rules, 2014. The development of AURIC is being carried out through the Appellant-AITL, which is a Special Purpose Vehicle ("**SPV**") and a Government Company.Between Maharashtra Industrial Development Corporation ("**MIDC**") and DMICDC, an agency of GoI, with 51% and 49% of the total stake in the SPV, respectively.

7. On 19.01.2015, vide its Resolution GoM has decided to further extend State support to the aforesaid SPV. Therefore, on 23.09.2016, GoM has notified the Appellant-AITL to act as 'Special Planning Authority' for the Notified Area and entrusted the planning, development, control and management of area of development of infrastructure of the AURIC Industrial Township project . The total area for development proposed to be covered through area of operations under this application is 4143.89 Hectares comprising Shendra (851.49 Ha) and Bidkin (3292.40 Ha).

8. On 15.01.2019, GoM vide its letter issued recommendation under Section 13 of the Act to the Commission to exempt the Appellant-AITL from licensing requirements. On 01.02.2019, the Appellant-AITL filed a petition vide Case No.29 of 2019before the Commission seeking exemption of Distribution Licence for Shendra-Bidkin Industrial Area (AURIC) in pursuance of recommendation of GoM.

9. After hearing learned counsel for the parties, on 08.05.2019, the Commission passed the impugned Order. Aggrieved by the said order dated 08.05.2019, the Appellant has filed the present appeal praying for the following reliefs:

(i) "Admit the appeal;

(ii) The Impugned Order dated 08.05.2019 in Case No.29 of 2019 being **Annexure "A"**hereto, as partly challenged in the present Appeal and in so far as it relates (A) Erroneous reliance in the Impugned Order on the commercial consideration of the State Distribution Licensee; (B) Erroneous consideration of ***"balancing of interest between the two Government Entities"*** in the Impugned Order; (C) Erroneous reliance on ***"quantum of surplus power"*** with the Respondent No.2 in FY 2018-19 and FY 2019-20, expected by the Respondent No.2/MSEDCL; (D) Misconstruing the provisions relating to "Distribution Franchisee"

under the Electricity Act, 2003 and (E) Misconstruing the provisions relating to Cross Subsidy; be modified and / or quashed and / or set aside to the extent as sought in this Appeal and / or the claim of the Appellant/AITL as detailed in the Petition being Case No.29 of 2019 be allowed; and

(iii) Pass such order or further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice."

10. Learned counsel for Respondent No.2 has filed reply/written submissions, the gist of which, in brief, is as under:

i) Lack of Pleading and Determination of Public Interest, in terms of Section 13 of the Electricity Act, 2003:

11. Learned counsel submits that Section 13 of the Electricity Act, 2003 empowers the State Government to make recommendations based only on public interest and in accordance with the national policy notified under Section 5 of the Act. But, no public interest, as such has been determined by the State Government. Neither in Government Resolution dated 19.01.2015 nor in the letter dated 15.01.2019 issued by the Government of Maharashtra, there is any determination of comparative public interest. No public interest will be served by allowing the Appellant to distribute in the

area especially when the Respondent has already laid down certain lines and is the distribution licensee as well.

ii) **Incorrect reading of the impugned order and misinterpreted premise for entire appeal i.e., State Commission weighed commercial interest of MSEDCL:**

12. Pertaining to the contention of the Appellant that the Commission had given weightage to the commercial interest of MSEDCL and it is clear that the State Commission has drawn a justified balance between the two contesting parties, considering the interest of the existing end consumers of MSEDCL, rather than to look for the commercial benefit of either of the contesting parties. The State Commission has evaluated the matter with the intention of assuring that the tariff for the existing consumers of MSEDCL does not increase because of the change in the consumer mix in the MSEDCL supply area. Undoubtedly, loss of revenue towards cross subsidy surcharge, which would be charged from the prospective consumers of the supply area in question, will have a direct and inter-linked connection with its proportionate impact (*increase*) on the tariff of the existing consumers ofMSEDCL. Therefore, the Commission had not evaluated the commercial interest of the Respondent No. 2/MSEDCL while passing the impugned order.

iii) <u>Area under consideration is already under the supply area of MSEDCL and the case is of carving out such supply area in favour of new distribution licensee, i.e., the Appellant</u>:

13. It is submitted that the area in question is already electrified and comes under MSEDCL's area of supply and it is not like allocating a new area of supply to one of the two applicants of the concerned area. Moreover, at present MSEDCL is supplying electricity to the Appellant for construction purposes and has also sanctioned application for supply of electricity to M/s Hyosung India Pvt. Ltd. having contract demand of 6.5 MVA which may further extend to 59.5 MVA. The issue is required to be seen beyond the interest of Appellant and Respondent No.2-MSEDCL. MSEDCL is already supplying 27 no. of connections. Further, carving out of Appellant's area from MSEDCL's Licence area will lead to third party disputes with existing consumers.

iv) <u>Grant of Distribution Licence cannot be claimed as right</u>:

14. Learned counsel vehemently contends that mere recommendation by the State Government would not confer a right on the Appellant for seeking grant of distribution licence. As per the Act, it is only the State Commission, which is legislatively empowered to decide the issue of grant and non-grant

of a distribution licence. Therefore, the Commission had applied its judicial mind while exercising its discretionary powers. Hence, the impugned order being a detailed and well-reasoned order cannot be held to be discriminatory, irrational and arbitrary. In support of this preposition, learned counsel refers the judgment of the Hon'ble Supreme Court in "***SAIL Vs. IspatKhadanJanta Mazdoor Union" (2019) 7 SCC 440***.

v) <u>Impugned Order balances two views in the most plausible way</u>:

15. Learned counsel submits that the impugned order is in complete consonance with the rules of interpretations, and also balanced the rights vis-à-vis reliefs sought between the contesting parties. In the case of "***S. Sethuaman Vs. R. Venkataraman &Ors.***,"***(2007) 6 SCC 382***the Hon'ble Supreme Court has laid down that judicial review is not permitted and order should not be interfered with, if two views are possible. In the instant case, the Commission upon due deliberation, had drawn a parlance between the tussle of rights of two contesting parties, and instead of finding favour from one of the two possible views, it had rather drawn balance, protecting the interest of both the parties, which is the core of any judicial/quasi-judicial order. Therefore, no interference with the impugned order is warranted.

(vi) Appellant is not entitled for exemption under Section 13 of Electricity Act, 2013

16. Learned counsel draws our attention to Section 12 and Section 13 of the Act.

17. A conjoint reading of the sections makes it clear that distribution of electricity within the supply area of a State can only be done by a person who holds such licence issued by the concerned State Electricity Regulatory Commission. The exemption to this rule is available only to the category of persons as carved under Section 13 and not to any other persons. The Appellant neither falls under any of the categories enumerated under Section 13 nor has made out its case in that manner before the Commission. Thus, in the absence of fulfillment of the pre-requisites i.e., being in any of the categories of persons enumerated under Section 13, the only route open for the Appellant to distribute electricity in the area in question is on being franchisee of MSEDCL as envisaged under Section 13. Therefore, according to the learned counsel, the Commission has rightly passed the impugned order.

(vii) Grant of exemption under Section 13 of the Electricity Act, 2003 to the Appellant would adversely impact the current control period vis-à-vis beneficial interest of end consumers of MSEDCL:

18. It is contended that since the tariff for the current control period has already been determined by the State Commission, any outflow of consumers to the Appellant's proposed area of supply would naturally have an adverse revenue impact and would alter the consumer mix of MSEDCL. In other words, loss of industrial consumers, who were subsidizing class of consumers, would disturb the cross subsidy balance, which otherwise naturally would have benefitted the existing and prospective end consumers of MSEDCL. Therefore the question of larger public interest also gets attracted as the issue is commercial interest of certain industrial consumers vis-à-vis beneficial interests of large number of end consumers of all variation.

(viii) Exemption sought is admittedly not in accordance with National Policy formulated under Section 5 ofthe Electricity Act, 2003:

19. Section 5 of the National Policy provides for rural electrification and management of local distribution of electricity in rural area, and exemption will be accorded only if the distribution is so done in such rural area. However, the area in question is being planned to develop as an

"Integrated Industrial Township", which is far away from the concept of "Rural Area". Clause 9.4 of the Rural Electrification Policy is relevant.

20. In terms of said policy, earlier, the State Government has not recommend any case of Rural Electrification for consideration under Section 13 of the Act. Since the very purpose of the Appellant is to manage local distribution for an 'Integrated Industrial Township', which is in contravention of the provisions under Section 13 of the Electricity Act, 2003, the State Commission has rightly opined that the Appellant can be the franchisee of the MSEDCL.

21. Learned counsel for the Appellant has filed rejoinder/written submissions, the gist of which is as under:

Appellant submits that the impugned order has been passed in violation of principles of natural justice by taking into account pleadings improperly filed by Respondent No.2. It is submitted that reply and rejoinder dated 22.04.2019& 23.04.2019were filed by Respondent No.2 and Appellant, respectively, in Case No. 29 of 2019 before the Commission. On 24.04.2019, the hearing was held by the Commission. Thereafter, Respondent No.2 had also filed a Reply dated 30.04.2019 to

the Rejoinder of the Appellant dated 23.04.2019, contentions of which were also recorded by the Commission in the impugned order. But Appellant came to know about the filing of the said reply dated 30.04.2019 only from a perusal of the Impugned Order issued by the Commission, since the said copy of the Reply was never provided to the Appellant. Further it is contended that the Commission without giving any opportunity to the Appellant to respond to the contentions raised in the reply dated 30.04.2019 has passed the impugned order, which is in contravention of established principles of natural justice. It is well established that a new plea cannot be allowed to be raised without effecting amendment of pleadings. In this regard, the Appellant places reliance on the judgment of the Hon'ble Supreme Court in "***RamnikVallabhdasMadhvani v. TarabenPravinlalMadhvani*" (2004) 1 SCC 497 (Para 14)**.

22. It is further submitted that the Appellant is entitled to exemption from grant of distribution licence under section 13 of the Electricity Act. On this aspect, it is submitted that the Commission in the Impugned Order noted that the Appellant was entitled to exemption under Section 13 of the Electricity Act in terms of *the*recommendation issued by the Appropriate Governmentin the larger interest of the State. Therefore,the

Commissionought to have exercised its judicial discretion under Section 13 of the Act and granted the exemption from obtaining distribution license to the Appellant. However, the Commission has not exercised its judicial discretion merely on extraneous circumstances, which are as under:

a) Erroneousconsideration of "*balancing of interest between the two government entities*" in the impugned order

23. It is submitted that the Commission, based on the vague allegation of Respondent No.2 as regards loss of cross subsidy element,has sought tobalance interest between the two Government entities, which is not contemplated under the provisions of Section 13 of the Electricity Act. It is further submitted that the Commission has failed to appreciate that the alleged loss of Cross-subsidy Surcharge will occur only if there are existing consumers of Respondent No. 2 in the Appellant's area. Further, the impugned order erroneously granted relief to the consumers of Respondent No.2, which was not an issue before the Commission.It is an established principle of law that Respondent cannot seek a relief in a petition filed by the Petitioner.

24. As regards the contention of Respondent No.2 that there is possibility of its own consumers getting additionally burdened with the recovery of additional cross subsidy amount which otherwise would have accrued from subsidizing the consumers in the area of the Appellant, it is submitted that the existing consumers of Respondent No.2 are not going to be burdened by grant of exemption under Section 13 of the Electricity Act to the Appellant. Such an interpretation would render the said provision completely otiose and in such case every application would be rejected by the State Regulator on perceived commercial considerations for the State Utility.

25. Placing reliance on the judgment of this Tribunal dated 05.07.2007 in Appeal No.169 of 2005 titled "***RVK Energy Pvt. Ltd. vs. Central Power Distribution Company of Andhra Pradesh Ltd. &Ors."*** (RVK Judgment), Appellant submits contends that when promotion of competition and efficiency has been statutorily recognised under the Preamble as well as Sections 61(c), Proviso to Section 62(1) and Section 86(2)(i) of the Electricity Act, how can the State Commission promote the commercial interest of Respondent No.2 by ensuring that any future consumers in the proposed supply area remain the consumers of Respondent No.2 and are

constrained to pay cross-subsidy surcharge. Further, in terms of Clause 8.3 of the National Tariff Policy, 2016 as well as Section 42 of the Electricity Act, the cross-subsidies are required to be progressivelyreduced and, therefore, the Commission's insistence on ensuring the cross-subsidy balance for Respondent No.2 is also in contravention of the aforesaid provisions.According to the Appellant, the impugned Order has the effect of stifling competition in the said area contrary to the Electricity Act. Contending that the decision of a quasi-judicial authority must be related to the purpose for which it is exercised, Appellant places reliance on the judgment of the Hon'ble Supreme Court in ***"Bangalore Medical Trust vs. B.S.Muddappa&Ors.*****," (1991) 4 SCC 54**.

26. Appellant further contends that the impugned Order misconstrues the provisions of the Electricity Act inasmuch as the prospective industrial and commercial consumers in the State have to mandatorily be the consumers of Respondent No.2, ultimately, denying them their right to choose alternate supplier. The finding that Respondent No.2 would be deprived of the opportunity of supplying to high end consumers in the area assigned to the Appellant is contrary to the factual and legal matrix concerning the case.

27. Further, it is submitted that the Commission has failed to appreciate that the establishment of AURIC was not only important for the State of Maharashtra, but also in pursuance of a national policy decision taken by the Government of India, since the AURIC project has received national importance at the behest of the Government of India. Therefore, such a crucial policy decision of the Government of India could not have been diluted by the Commission on mere extraneous consideration of Respondent No.2's financial aspects.

28. It is settled position of law that no relief can be sought or granted merely on the basis of apprehension of loss. Respondent No.2 is seeking loss of prospective revenue as opposed to any increase in tariff for the existing consumer. In this context, reliance is placed on the judgment of the Hon'ble Supreme Court in " ***State of Gujarat v. Kaushikbhai K. Patel*****," (2000) 5 SCC 615 (Para 9)**.

b) Erroneous reliance on "quantum of surplus power" with Respondent no.2 in FY 2018-19 and FY 2019-20, expected byRespondent no.2

29. It is contended that the Commission has erroneously considered the quantum of surplus power, which would be available with Respondent No.2 in FY 2018-19 and FY 2019-20, to hold that the interest of both i.e., the Appellant and Respondent No.2 will be best served if the Appellant functions as a franchisee of Respondent No.2. The Commission has erred in rejecting the prayer of the Appellant without considering the fact that Respondent No.2is unable to supply power to the consumers in the city of AURIC since Respondent No.2 is the sole distributor in the notified area and thus, the Appellant requires the waiver under Section 13 of the Electricity Act to enable it to supply the power to the consumers in the city of AURIC.

c) Discretion cannot be exercised by the state commission on the basis of extraneous circumstances

30. Appellant points out that the Commission cannot exercise its discretion on the basis of flimsy and extraneous circumstances in an arbitrary manner. It is submitted that while rejecting the application of the Appellant for exemption from grant of license, the Commission on the purported ground of public policy, has stated that the said exemption would financially burden the consumers of Respondent No.2, whereas

Respondent No.2 had failed to substantiate its opinion regarding impact on the cross-subsidy surcharge that could be recovered by Respondent No.2. It is well established that exercise of discretion by either judiciary or executive, has to be on the basis of relevant grounds and not on extraneous and irrelevant consideration. For this preposition, reliance is placed on the Judgment of the Hon'ble Supreme Court in "**S.R. Venkatraman vs. Union of India &Anr.," (1979) 2 SCC 491**, wherein in similar circumstances, the Hon'ble Supreme Court has held that an order, which is based on reasons which do not exist, merely purporting to be in "public interest" is liable to be set-aside:

d) Judicial discretion cannot be exercised in contravention of statutory provisions

31. Appellant further points out that judicial discretion cannot be exercised in contravention of statutory provisions. In this regard, it is submitted that the Appellant did not pray before the Commission that it will enter into a Franchisee Agreement with Respondent No.2. A perusal of the provisions of the Electricity Actmakes it clear that appointment of a franchisee is a contractual issue between Distribution Licensee and its franchisee. It is a bilateral transaction and an agency. The Act does not

confer any power on the State Commissions to direct any entity to enter into any Franchisee Agreement with Distribution Licensee. In this context, reliance is placed on the Hon'ble Supreme Court's judgment in "***Nidhi Kaim vs. State of M.P.*****," (2017) 4 SCC 1 Para 91**, wherein it was held that that the position that Court can do justice as it perceives, even when contrary to statute (and, declared pronouncement of law), should never as a rule, be entertained by any court/Judge.

32. With these submissions, Appellant seeks relief in favour of the Appellant by setting aside the impugned order by allowing the appeal.

ANALYSIS & REASONING

33. After hearing the arguments of the parties addressed through their counsel, what we notice is that the Respondent Commission though has concluded that the Appellant has duly satisfied the requirement as envisaged under Section 13 of the Act for grant of exemption as contemplated under the said provision, but while passing the discretionary order opined that the Appellant is not entitled for such exemption, therefore, the Appellant has partly challenged the findings of the State Commission in its Order dated 08.05.2019. According to the Appellant, the following are

the grounds upon which the State Commission has wrongly rejected the relief of exemption.

(a) erroneous reliance on the financial consideration of the State Distribton Licensee, ignoring the settled commercial principles as envisaged under the Electricity Act, 2003 ("**the Electricity Act**");
(b) erroneous consideration of ***"balancing of interest between the two government entities"***;
(c) erroneous reliance on ***"quantum of surplus power"*** with the Respondent No.2 in FY 2018-19 and FY 2019-20, expected by the Respondent No. 2;
(d) misconstruing the provisions relating to "Distribution Franchisee" under Section 2(27) read with Sections 13 and 14 of the Electricity Act; and
(e) misconstruing the provisions relating to cross subsidy under the Electricity Act.

34. According to the Respondents, such rejection was based on proper and genuine grounds, therefore, the State Commission was justified in rejecting the exemption sought by the Appellant.

35. According to Respondent No.2, the recommendation made by the State Government as stated in the National Policy notified under Section 5 of the Act, it has to be only based on public interest. Therefore, the State Commission was justified in rejecting the exemption since no such public interest was determined by the State Commission either in the Government Resolution dated 19.01.2015 or the letter dated 15.01.2019 issued by the

State Government. In other words, no comparative determination of public interest was considered by the State Government. Therefore, the Commission was justified in rejecting the exemption since by such exemption no public interest would be served.

36. According to the Appellant, the directions contained in Section 13 of the Act clearly indicate that the discretion contemplated under Section 13 of the Act is a judicial discretion.

37. Let us now see what exactly Sections 12 and 13 of the Act read:

> *"**Section 12. (Authorised persons to transmit, supply, etc., electricity):***
>
> *No person shall*
> *(a) transmit electricity; or*
> *(b) distribute electricity; or*
> *(c) undertake trading in electricity,*
> *unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13."*
>
> ***Section 13. (Power to exempt):***
>
> *The Appropriate Commission may, on the recommendations, of the Appropriate Government, in accordance with the national policy formulated under section 5 and in the public interest, direct, by notification that subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the notification, the provisions of section 12 shall not apply **toany local authority, Panchayat Institution, users' association, co-operative societies, non-governmental organizations, or franchisees**:"*
>
> (***emphasis supplied***)

38. In this provision it refers to Local Authority i.e., it refers to the authorities who are eligible for grant of exemption. Section 2 (41) of the Act defines 'Local Authority' as under:

> ***"local authority"*** *means any Nagar Panchayat, Municipal Council, municipal corporation, Panchayat constituted at the village, intermediate and district levels, body of port commissioners or other authority legally entitled to, or entrusted by the Union or any State Government with, the control or management of any area or local fund;"*

Clause 9.4 of the Rural Electrification Policy reads as under:

> *"9.4 In connection with Section 13 of the Act, the State Government shall, within 6 months of the notification of this Policy, recommend to the Appropriate Commission, for category of cases as considered appropriate, that the provision of Section 12 shall not be applicable to the persons mentioned in the said Section -13, subject to periodic review by the State Government in Public interest thereafter."*

39. As seen from the pleadings, the Appellant-Aurangabad Industrial Township Limited (**AITL)** is established as a Special Purpose Vehicle (SPV) of the Maharashtra Industrial Development Corporation (MIDC). Delhi Mumbai Industrial Development Corporation (DMIDC) is established for planning, development control and management of infrastructure of the Appellant-AURIC project. This AURIC project was set up with a purpose. In short, the background, objective, public importance and significance of

the said Project in terms of the pleadings and other papers referred to is as under:

(i) In December, 2006 a Memorandum of Understanding {hereinafter referred to as "**MOU**"} was signed between Vice Minister, Ministry of Economy, Trade and Industry {hereinafter referred to as "**METI**"} of Government of Japan and Secretary, Department of Industrial Policy & Promotion {hereinafter referred to as "**DIPP**"}, Government of India for development of Delhi-Mumbai Industrial Corridor {hereinafter referred to as "**DMIC**"};

(ii) DMIC is a mega infra-structure project of USD 90 billion with the financial and technical aids from Japan, covering an overall length of 1483 KMs between Delhi and Mumbai;

DMIC will include the development of the 1540km long Western Dedicated Freight Corridor {hereinafter referred to as "**WDFC**"} with 24 nodes {investment regions and industrial areas}, including six large investment regions of 200 square kilometers, and will run through 6 states:Delhi, western Uttar Pradesh, southern Haryana, eastern Rajasthan, eastern Gujarat, and western Maharashtra and it will also have influence zone and nodes in the 7th state of Madhya Pradesh;

(iii) The Government of Maharashtra {hereinafter referred to as **"GoM"**} as part of DMIC has decided to develop the Shendra - Bidkinbelt in Aurangabad as planned industrial township to act as

major investment node. The industrial park is being developed from Shendra on the east, up to Bidkin on the south of Aurangabad city;

(iv) Based on the investment potential of the area, the Maharashtra State has proposed to develop the Aurangabad belt as an automobile and engineering hub. An Exhibition and a Convention Center is also being developed at Shendra to this effect;

(v) On 29.01.2014, the GoM vide its Cabinet decision has recognised that, implementation of AURIC is required for both industrial and socio-economic development of the region and is in the overall interest of the State;

(vi) On 03.03.2014, GoM executed the State Support Agreement {hereinafter referred to as "**SSA**"} with DMIC, to extend the necessary support required for implementation of AURIC project. The GOM under Clause 3.2.2 of SSA signed with DMIC has also committed for extending support to SPV for obtaining Distribution Licence from the Ld. State Commission for the Applicant;

(vii) On 19.01.2015, GoM vide its Resolution has decided to further extend State support to the aforesaid SPV;

(viii) On 23.09.2016, GoM vide its Notification {TPS No. 3015/1480/CR-276/2015/UD-30} has notified the Appellant to act as 'Special Planning Authority';

(ix) On 15.01.2019, the GoM issued its recommendation under Section 13 of the Electricity Act, to exempt the Appellant from licensing requirements under Section 12 of the Electricity Act.; **and**

(x) In pursuance of the said letter, the Appellantfiled its Petition for consideration of the Ld. State Commission, seeking exemption of Distribution Licence for Shendra-Bidkin Industrial Area {hereinafter referred to as **"AURIC"**}as per and under the provisions of Section 13 of the Electricity Act.

40. From the above facts, it is clear that the Appellant is a Local Authority in terms of the above definition. It is also noted from the impugned order that the Appellant is an Authority, which is entitled for exemption as contemplated under Section 13 of the Act.

41. We have to consider "whether the recommendation of the Government of Maharashtra (Appropriate Government) was issued in terms of Section 13 of the Act in the larger interest of the State"? Apparently, the area where the project is proposed to come up is a rural area, which covers the villages of Shendra and Bidkin in Aurangabad district. Then we have to see "whether discretion that has to be exercised by the Respondent-Commission in fact was exercised properly in terms of

statutory provisions"? The State Commission has to exercise the discretion contemplated under Section 13 of the Act i.e., in a judicious manner.

42. It is the case of the Appellant that the project in question, in fact, encourages electrification in rural areas, therefore it falls within the purview of Section 13 of the Act apart from complying with the National Policy on rural electrification and local distribution. The distribution licensee as contemplated under Section 12 of the Act, in view of Section 13, a local authority, as stated above, is exempted from obtaining distribution licence. In fact, the Commission did opine that the Appellant's project would encourage electrification in rural areas. This observation is made at Para 22 of the impugned order, which reads as under:

> *"22) Considering the above analysis, the commission is of the view that prima facie AITL though eligible for consideration for exemption for grant of Distribution License as recommended by Government of Maharashtra, the aspect of the public interest needs to be balanced between the two government entities."*

43. Apparently in the Cabinet decision of Government of Maharashtra dated 29.01.2014, Government of Maharashtra recognised that implementation of the project in question which encourages not only

industrial growth but also socio economic development of the region, which in turn is required for over all interest of the State. The planned industrial park in Shendra and Bidkinwould also act as major investment place after noticing the investment potential of the area in question. After a detailed study by the State Government, Government of Maharashtra planned to develop this area as an automobile and engineering hub. With this objective and aim, the State of Maharashtra decided to establish AURIC as part of Delhi Mumbai Industrial Corridor project. Therefore, it is clear that the foundation for recommendation dated 15.01.2019 issued by Government of Maharashtra was in pursuance of earlier Cabinet decision dated 29.01.2014. Based on these facts in mind, the recommendation as contemplated under Section 13 of the Act was given to exempt the Appellant from obtaining the licence as distribution licensee as required under Section 12 of the Act. The relevant note of the Government of Maharashtra recommendation dated 15.01.2019 is quoted below to understand what exactly recommendation says:

> *"…Accordingly, the* ***Government of Maharashtra*** *hereby recommends, that AITL be recognized as 'Local Authority' as per provisions of Section 2(41) Electricity Act, 2003 for the purpose of electricity supply and distribution within the designated area (AITL). In view of the above, I am directed to communicate the recommendation of the Government of Maharashtra in respect of control and management of electricity supply*

and distribution activity of this Industrial township (AURIC) by AITL as under:

> *In pursuance of Section 13 of EA 2003,* ***Government of Maharashtra*** *hereby recommends that Aurangabad Industrial Township Limited (AITL), a joint venture company of Maharashtra Industrial Development Corporation (MIDC) and Delhi – Mumbai Industrial Corridor Development Corporation (DMICC) be reckoned as an Local Authority responsible for planning, development, control and management of the specified industrial township area [AURIC City]* ***including management and distribution of electricity in the said notified area for a period of 25 years from the date of notification by the Maharashtra Electricity Regulatory Commission (MERC). Further, GoM recommends that AITL may be granted exemption from availing license under Section 12 of EA 2003 but its electricity distribution activities shall be governed by conditions as may stipulated by MERC.***
> …"
>
> *[Emphasize supplied]*

44. Appellant is right in contending that the competency of such recommendation cannot be questioned by the Respondent at this stage for the first time since Respondent contended before this Tribunal that Government of Maharashtra has no jurisdiction to issue recommendation. The State Commission never opined that recommendation was not a valid recommendation and in fact acknowledges that the recommendation of Government of Maharashtra was in the public interest.

45. In fact, under the Electricity Act the word "Public Interest" is not defined, therefore, we have to construe the meaning of "Public Interest" in a generic sense. Even otherwise, the villages of Shendra and Bidkin are rural areas. This was not disputed by the Respondent Commission in its impugned order. Paras 17 and 18 of the impugned order clearly indicate that even the Commission opined that the Appellant was entitled to receive exemption under the National Policy read with Section 13 of the Act. Para 17 and 18 are reproduced hereunder for better understanding of the opinion of the Commission.

> "*17) It is therefore clear that the intent of Section 5 is for achieving the rural electrification.* ***Admittedly, the area is rural, covering the villages of Shendra and Bidkin in Aurangabad district****. Further the Rural Electrification Policy notified by the Central Government on 23 August, 2006 under Section 4 and 5 of the EA states as under:*
>
> > *"1.1 Electricity is an essential requirement for all facets of our life and it has been recognized as a basic human need. It is the key to accelerating economic growth, generation of employment, elimination of poverty and human development specially in rural areas.*
> > *…..*
> > *1.3 ……. Electricity supply at globally competitive rates would also make economic activity in the country competitive in the globalized environment.*
> >
> > *1.4 Rural Electrification ("RE") is viewed as the key for accelerating rural development. Provision of electricity is essential to cater for requirements of agriculture and other important activities including small and medium industries,*

> *khadi and village industries, cold chains, health care, education and information technology."*
>
> *18)* ***Thus, the rural electrification is not limited to ensuring the electricity supply to households, rather it covers the other requirements of industries, health care, information technology as a part of rural development. Therefore, considering this broader intent of the rural electrification, the Commission is of the view that the requirement of exemption of Licence to be in accordance with the national policy formulated under section 5 gets fulfilled in present case as*** *also supply through franchisees."*
>
> [*Emphasis Supplied*]

46. It is also noticed that the area in question was a barren land. The Appellant has undertaken to develop the same as an integrated industrial township in the rural area, therefore, there is no doubt that the exemption contemplated under Section 13 of the Act is to accelerate rural development. The Appellant has taken various steps to complete this Project under a smart city concept and at the same time it has to ensure the prescribed standards of ease of doing business prescribed by the Government of India. A single window clearance system for the prospective industrial units with all facilities required including uninterrupted power supply is the responsibility of the Appellant.

47. The main thrust of argument of Respondent No.2-DISCOM which weighed with the State Commission as noted in the impugned order is that

the existing consumers of Respondent No.2-MSEDCL would be affected and so also the prospective consumers especially who are entitled for concession of cross subsidy surcharge are going to be affected if the exemption in question is granted in favour of the Appellant. What we notice from the arguments addressed before us and also written submissions filed before us that MSEDCL is supplying power to some industrial units. But the fact remains that the entire infrastructure i.e., the network was set up by the Appellant. Through this network set up by the Appellant, Respondent No.2-MSEDCL is supplying power to industrial units, which are established in AURIC area under the control of the Appellant.

48. The distribution system established by the Appellant consists of more than 400 KMs of HT Cables (both 33 and 11 KV) more than 450 KMs Light and Low Tension Cables, more than 300 Ring Main Units, 45 transformers and 13 GIS stations. Though the Appellant had put up the entire infrastructure i.e., distribution network by investing huge amounts, it was not in a position to supply power to the industrial units for want of exemption under Section 13 of the Act. With the sole purpose to set up industrial units on time because the upcoming consumers needed power supply for setting up their industrial units, the arrangement to supply

through MSEDCL by sourcing the power was done only as a stop-gap arrangement. At present, Respondent No.2 is supplying power to same industrial units through the network of Appellant.

49. The entire expense required for the purpose of supply through MSETCL grid network and so also laying of underground cables to the above consumers were in fact spent by the Appellant. So far as other HT and LT Consumers, who are getting power from Respondent No.2 source/lines are laid far outside the boundary of AURIC. Therefore, the Appellant had to bear the expenses for laying the lines from MSEDCL source tapping points. Therefore, it is clear that the stand of Respondent No.2-MSEDCL that the existing system set up by MSEDCL may be sufficient to supply power to the upcoming consumers is totally contrary to the facts on record.

50. It is also noticed that the consumers were receiving low quality of power with heavy voltage fluctuations. The LT and HT consumers in AURIC were getting power through the distribution lines laid by the Appellant on account of long distance between the MSEDCL source point and the industrial units in AURIC. Low quality of power with high voltage fluctuation was happening. These frequent interruptions in the power

supply compelled the consumers to approach the Appellant, which prompted the Appellant to file the Petition before the Commission. The Appellant finally decided to energise its own 33 KV substation to ensure reliable source of power to its consumers. The MSETCL had not made ready the 220 KV substation of the Appellant, therefore 33 KV source point had to be used by approaching MSEDCL to energise its substation. The entire expenses for 33 KV lines was also met by the Appellant. The expected demand of power is about 850 MW in AURIC. The supply of power conveyed by MSEDCL is nowhere close to above said expected demand. MSEDCL is not in a position to meet such high demand. Even otherwise MSEDCL has to use the distribution network constructed by the Appellant or create its own infrastructure. For this, it has to prepare a detailed Project Report taking into consideration the consumer load requirement and the engineering network design practice, which requires in principle, approval of the State Commission. The entire scheme definitely takes long time. This will definitely create problems to the consumers in AURIC area, who are in need of immediate supply of power. It is seen that MSEDCL is merely supplying construction power to industrial units by using the Appellant's distribution network till the exemption obtained by the Appellant.

51. According to the Appellant, Respondent No.2 had filed reply dated 30.04.2019 to the rejoinder of the Appellant dated 23.04.2019. As per the Appellant's contention, such fact came to the knowledge of the Appellant only after perusal of the impugned order since the contentions raised in the said reply dated 30.04.2019 never came to the knowledge of the Appellant as the said contentions were not placed before the Appellant. Unless the Appellant had opportunity to respond to the said contentions raised in the reply of Respondent No.2 dated 30.04.2019, it is one sided contention which came to be considered by the Respondent-Commission in the impugned order. Unless a reasonable opportunity was given to the opposite party to respond and place on record its contentions, it is nothing but violation of principles of natural justice (reliance is placed in the case of ***RamnikVallabhdasMadhvani' v. TarabenPravinlalMadhvani.***

52. According to the Appellant based on the vague allegations of Respondent No.2 in respect of alleged loss of cross subsidy element, the Commission though proceeded to consider balancing of interest between the two Government entities in the impugned order, but proceeded to consider the same erroneously. That apart, it is not at all contemplated under the provisions of Section 13 of the Act. According to the Appellant,

the existing consumers of Respondent No.2 are not going to be burdened by grant of exemption sought by the Appellant. They further contend that such commercial considerations in favour of the State utility by the state Regulator is nothing but perceived commercial consideration. The interpretation given by the State Commission makes the very provision of Section 13, a total redundant clause. It is well settled principle that promotion of competition and efficiency is statutorily recognised. We opine so in the light of preamble as well as Section 61 (c), proviso to Section 62(1) and section 86(2)(i) of the Electricity Act (reference is made to the judgment dated 05.07.2007 in Appeal No. 169 of 2005 in the case of ***"RKV Energy Private Limited vs. Central Power Distribution Company of Andhra Pradesh Limited and Ors"***.

53. The very promotion of competition and efficiency, which is the core purpose of Electricity Act, in the light of above provisions, especially in terms of Clause 8.3 of National Tariff Policy so also Section 42 of the Act, one expects the State Commission (the Regulator) to exercise its powers in an appropriate manner while rendering a decision as quasi judicial authority (reference is made to ***Bangalore Medical Trust vs. B.S.Muddappa&Ors.'s case).***

54. We are of the opinion that there cannot be grant of relief based on apprehension of loss as contended by Respondent No.2-DISCOM. We are of the opinion that by virtue of impugned order, the high end consumers including prospective industrial and commercial consumers in the said locality are denied of their right to choose alternate supplier. This would lead to conclusion that Respondent No.2 is seeking loss of prospective revenue, which is contrary to any increase in tariff for the existing consumer (reference is made to ***State of Gujarat v. Kaushikbhai K. Patel's*** case).

55. Then coming to the contention of Respondent No.2 pertaining to quantum of surplus power for the financial year 2018-19 and 2019-20, we are of the opinion that the State Commission again went in wrong while considering the said issue. The very fact that Respondent No.2 was unable to supply power to the consumers in the city of AURIC being the sole distributor, the Appellant sought for waiver under Section 13 of the Act to supply uninterrupted power to the consumers of AURIC area. The State Commission opines that the grant of exemption to Appellant would financially burden the consumers of Respondent No.2. Apparently, Respondent No.2 has not placed any material how it impacts on the cross

subsidy. The so called and purported ground of public policy referred to in the impugned order by the State Commission is nothing but a masquerade to grant the relief to Respondent No.2 by the Commission on extraneous circumstances in an arbitrary manner. If the exercise of judicial discretion either by executive or judiciary is based on extraneous and irrelevant consideration totally ignoring the relevant grounds, such decision has to be interfered with. It is beneficial to refer to the Judgment of the Hon'ble Supreme Court in ***S.R. Venkatraman vs. Union of India &Anr's*** case. In this Judgment, the Hon'ble Supreme Court opined that if an order is based on reasons, which do not exist merely purporting to be in public interest, deserves to be set aside.

56. It is seen that the provisions of Electricity Act envisage appointment of a franchisee as a contractual issue between distribution licensee and its franchisee. It is a transaction between the two parties. The Act does not envisage any power on the State Commission to impose on any entity to enter into such franchise agreement i.e., the Appellant with the distribution licensee. The so called judicial discretion exercised by the State Commission, according to us is totally in contravention of statutory provisions. (reference is made to ***Nidhi Kaim vs. State of M.P's case).***

57. If there is competition between the Appellant as a distributor of power and MSEDCL as distribution licensee there will be healthy competition between these two, which would definitely prompt Respondent No.2 to improve its infrastructure. Respondent No.2 is not the only distribution company in the entire state of Maharashtra. So far as Mumbai is concerned, there are four distribution networks i.e., MSEDCL, Tata, Adani and BEST. As a matter of fact, there is no prohibition to permit more than one distributor to supply power in an area. It is rather prompted and encouraged in terms of the Electricity Act.

58. The contention of Respondent No.2 is that if cross subsidy surcharge is collected by it from industrial units, then the benefit would be passed on to its consumers. At present, Respondent No.2 do not have large consumers on its distribution network in the area in question. It has its distribution source at a long distance from the AURIC area. It has to develop its infrastructure to supply power to all the consumers in that area by investing huge amounts. As a matter of fact, for interim supply arrangement, the infrastructure set up by the Appellant is being used by Respondent No.2. If it were to establish its own distribution network, it has

to spend huge amounts, which would automatically fall on the shoulders of the consumers of Respondent No.2 Therefore, we fail to understand the stand of Respondent No.2 how its consumers are going to be benefitted if they have to supply power to the consumers in that area.

59. If the Appellant establishes integrated industrial township with proper facilities, which includes uninterrupted supply of power, this would encourage number of industrial units being set up in that locality, which in turn would create employment opportunities to the locals. Once industrial growth occurs, automatically economy of that area would be boosted since all such necessary infrastructure required for the industrial area would automatically come up in and around the place. Apart from boosting employment, it would also encourage several other commercial units to come up in and around the industrial area. This would definitely result in developing rural area as envisaged under National Policy.

60. Consideration of the facts on record from any angle would only suggest that public interest would be in favour of the Appellant. If interrupted power supply is in existence, it would discourage industrial units being set up in that locality. Therefore, consideration of grant of exemption

even based on commercial interest of the Appellant vis-à-vis beneficial interest of common end consumers according to us would definitely lead to the conclusion that granting exemption to the Appellant would be an answer. The contention of the Respondent that MSEDCL's common consumers would be burdened in paying more tariff is not appealing to us since the cost involved in setting up the infrastructure would also burden the common end user and compels them to pay higher tariff. The migration of existing consumers to Appellant's area and so also prospective consumers would entirely depend upon proper and uninterrupted supply of power by Respondent No.2 in a competitive manner. Therefore, we are of the opinion that the Commission has erroneously considered balancing of interest between two Government entities. We also note that the State Commission based its opinion not on the interest of end user but the exclusivity of supplying of power to the end consumer by Respondent No.2. By encouraging competition in the State of Maharashtra by allowing exemption to the Appellant, interest of all consumers can be served, therefore, we are of the opinion that the State Commission ought not to have directed the Appellant to enter into franchise agreement with Respondent No.2, which according to us, would be detrimental to the interest of end consumers since it deprives competitive tariff to be offered

to them by the Appellant. As a matter of fact, the commercial interest of Respondent No.2 was referred to by the State Commission to ensure that any future consumers in the proposed area remain the consumers of Respondent No.2. This would only obstruct any new prospective distribution licensee applying for a parallel licence in the area of Respondent No.2. In terms of Clause 8.3 of National Tariff Policy of 2016 as well as Section 42 of the Electricity Act, the cross subsidies are required to be progressively reduced and therefore, the duty of the State Commission is not ensuring the cross subsidy balance for Respondent No.2 since it is totally contravening the above provisions.

61. By virtue of the impugned order, by taking only the commercial interest of Respondent No.2, the State Commission has failed to note that public interest or general good or social betterment. It should not be a pretext to justify the arbitrary or illegal exercise of power. It is well settled that action or decision of a quasi judicial authority must not only be reached reasonably and intelligibly but it must be related to the purpose for which the power is exercised. Therefore, we are of the opinion that the State Commission ought to have given full effect to the recommendation of Government of Maharashtra without taking into account extraneous and

irrelevant circumstances like alleged outflow of consumers. We are of the opinion that the State Commission is duty bound to consider the true intent and purpose of the recommendation of Government of Maharashtra.

62. In view of the above discussion and reasoning, we are of the opinion that the impugned order deserves to be interfered with so far as rejection of exemption sought by the Appellant. Therefore, we allow the appeal and direct the Respondent-State Commission to grant the exemption from grant of distribution licence as provided under Section 13 of the Act to the Appellant within two months from the date of the order.

63. Accordingly, the appeal is allowed. In view of the disposal of the appeal, all the pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

64. Pronounced in the Virtual Court on this the 30th day of June, 2021.

(Ravindra Kumar Verma) **(Justice Manjula Chellur)**
Technical Member(Electricity) **Chairperson**

REPORTABLE/~~NON-REPORTABALE~~

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