IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APPEAL NO. 276 OF 2015,
APPEAL NO.320 OF 2018,
APPEAL NO.114 OF 2020 & IA NOS. 635 OF 2020& 654 OF 2023,
APPEAL NO. 73 OF 2021 & IA NO. 969 OF 2020,
APPEAL NO. 213 OF 2021 & IA NO. 915 OF 2021,
APPEAL NO. 170 OF 2019 & IA NO. 709 OF 2019 & IA NO. 809 OF 2021,
APPEAL NO. 343 OF 2019 & IA NO. 1787 OF 2019 &
APPEAL NO.133 OF 2020 & IA NOS. 934 OF 2020, 873 OF 2021& 709 OF 2023

Dated: 12th February, 2024

Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Mr. Sandesh Kumar Sharma, Technical Member

APPEAL NO. 276 OF 2015

In the matter of:

West Bengal State Electricity Distribution Company Limited
Through its Chairman and Managing Director
Vidyut Bhavan, Bidhannagar
Block DJ, Sector – II,
Kolkata – 700 091 … Appellant(s)

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
3rd& 4th Floor, Chanderlok Building,
36, Janpath New Delhi - 110001 … Respondent No.1

2. Indian Railways

Government of India
Through Deputy Chief Electrical Engineer (TRD)
Railway Bhawan, Raisina Road
New Delhi – 110 001 … Respondent No.2

3. Power Grid Corporation of India Limited
Through its Chairman and Managing Director
Saudamini, Plot No.2, Sector 29,
Near IFFCO Chowk,
Gurgaon – 122 001 … Respondent No.3

4. Power System Operation Corporation Limited
Chairman and Managing Director
B-9, Qutub Institutional Area
Katwaria Sarai, New Delhi – 110 066 … Respondent No.4

5. Central Electricity Authority
Through its Chairperson
R.K. Puram, New Delhi – 110 066 … Respondent No.5

6. Gujarat Electricity Transmission Co. Ltd.
Through its Chairperson
Sardar Patel Vidyut Bhavan
Race Course Circle
Vadodara, Gujarat – 390 007 … Respondent No.6

7. Maharashtra State Electricity Transmission Co. Ltd.
Through its Chairman and Managing Director
Prakash Gad, Bandra East
Mumbai, Maharashtra – 400 051 … Respondent No.7

8. West Bengal State Electricity Transmission Co. Ltd.

Vidyut Bhavan, Bidhannagar
Block DJ, Sector –II,
Kolkata – 700 091 … Respondent No.8

9. Jharkhand Urja Sancharan Nigam Limited
Through its Managing Director
Sardar Patel, Vidyut Bhawan
Race Course Circle
Vadodara, Gujarat – 390 007 … Respondent No.9

10. Ratnagiri Gas and Power Private Limited
Through its General Manager
5th Floor, GAIL, Jubliee Tower, B-35-36 Sector – 1, NOIDA
(U.P.) – 201 301 … Respondent No.10

11 Uttar Pradesh Power Corporation Limited
Through its Managing Director
Shakti Bhawan,14, Ashok Marg,
Lucknow, UP, India, U.P. 226001 … Respondent No.11

12 Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
Through its Chairman cum Managing Director
10th Floor, NPKRR Maaligai, 144,
Anna Salai , Chennai,-600002 … Respondent No.12

13 Grid Corporation of Odisha Limited (GRIDCO)
The Managing Director
Janpath, Bhubaneshwar, Bhoi Nagar
Odisha-751022 … Respondent No.13

14 Madhya Pradesh Power Management Company Limited

The Managing Director
Shakti Bhawan Road, MPSEB Colony, Rampur, Jabalpur, MADHYA PRADESH, -482008 … Respondent No.14

Counsel on record for the Appellant(s) : Aniket Prasoon
Abhishek Kumar
Srishti Rai

Counsel on record for the Respondent(s): Dhananjay Baijal For Res1
Pulkit Agarwal For Res2
Suparna Srivastava For Res3
M.Y. Deshmukh For Res7
Rajiv Srivastava For Res11
S.Vallinayagam For Res12
Arijit Maitra For Res13
Aditya Singh For Res14

APPEAL NO.320 OF 2018

In the matter of:

Punjab State Power Corporation Ltd.
Through Chief Engineer
ARR &TR, Patiala 147 001 … Appellant(s)

Versus

1. Punjab State Electricity Regulatory Commission
Through its Secretary
SCO 220-221, Sector 34-A, Chandigarh – 160 022 … Respondent No.1

2. The Northern Railways, (Ambala Division)
Through its Chief Electrical Distribution Engineer, Baroda House,
New Delhi – 110 001 … Respondent No.2

3. Punjab State Transmission Corp. Ltd.
Through its Managing Director
The Mall Patiala – 147 001 … Respondent No.3

Counsel on record for the Appellant(s)	:	Suparna Srivastava For App1
Counsel on record for the Respondent(s)	:	Sakesh Kuma For Res1
		Pulkit Agarwal For Res2
		Anand K. Ganesan Swapna Seshadri Neha Garg Parichita Chowdhury For Res3

APPEAL NO.114 OF 2020 & IA NOS. 635 OF 2020 & 654 OF 2023

In the matter of:

Indian Railways
Represented by East Coast Railway,
Through the Chief Electrical
Distribution Engineer, Rail Sadan, 3rd
Floor, South Block,
Chandrasekharpur,
Bhubaneswar – 751 017 … Appellant(s)

Versus

1. Odisha Power Transmission Corporation Limited,
Through its Chairman and Managing Director Janpath,
Bhubaneswar – 751 022 … Respondent No.1

2. State Load Despatch Centre,
Through its Chief Load Despatcher
Odisha Power Transmission Corporation Limited,
Mancheswar GRIDCO Colony,
Bhubaneswar – 751 017 … Respondent No.2

3. Grid Corporation of Orissa Limited (GRIDCO),
Through its Chairman and Managing Director
Janpath, Bhubaneswar – 751 022 … Respondent No.3

4. TP Central Odisha Distribution Limited (Erstwhile known as Central Electricity Supply Utility of Orissa)
Through its Head (Legal Services)
2nd Floor, IDCO TOWER,
Janpath, Bhubaneswar -751022 … Respondent No.4

5. Western Electricity Supply Company of Orissa Ltd. (WESCO Utility)
Through its Authorised Officer
Dist - Sambalpur , Burla- 768017 … Respondent No.5

6. North Eastern Electricity Supply Company of Odisha Limited (NESCO Utility)
Through its Authorised Officer
Januganj, Balasore -756019 … Respondent No.6

7. SOUTHCO Utility
Through its Authorised Officer
Courtpeta, Berhampur,
Ganjam, Orissa - 760 004 … Respondent No.7

8. Government of Odisha,
Through Department of Energy,
Secretariat Building,
Bhubaneswar … Respondent No.8

9. Eastern Region Load Despatch Centre (ERLDC)
Through its General Manager,
14, Golf Club Road, Tollygunje,
Kolkata – 700 033 … Respondent No.9

10. Shri. Akshya Kumar Sahani,
Retd. Electrical Inspector,
Government of Odisha,
B/L-108, VSS Nagar,
Bhubaneswar – 751 007 … Respondent No.10

11. Odisha Electricity Regulatory Commission
Through its Secretary
Bidyut Niyamak Bhawan,
Plot No.4, Chunukoli, Shailashree Vihar, Bhubaneswar – 751 021 … Respondent No.11

Counsel on record for the Appellant(s) : Pulkit Agarwal For App1

Counsel on record for the Respondent(s) : Sakesh Kumar
Gitanjali N Sharma For Res1

Rutwik Panda For Res11

Arijit Maitra For Res3

Anand Kumar Shrivastava
Shruti Kanodia
Shivam Sinha
Anubhuti Sinha
Chandrika Bhadu
Nilesh Panda
Anandini Sood
Rahul Jajoo For Res4

Anand Kumar Shrivastava
Shruti Kanodia
Prabhat Kr. Shrivastava
Shivam Sinha
Ishita Jain
Priya Goyal
Nilesh Panda
Amrita Bakhshi
Rishika Garg
Ankit Bhandari
Akash Dash
Anuja Jain For Res5

Anand Kumar Shrivastava
Shruti Kanodia
Prabhat Kr. Shrivastava
Anuja Jain
Ishita Jain
Sam C. Mathew
Priya Goyal
Nilesh Panda
Amrita Bakhshi
Rishika Garg
Ankit Bhandari

Akash Dash For Res6

Arunav Patnaik For Res8

APPEAL NO. 73 OF 2021 & IA NO. 969 OF 2020

In the matter of:

Indian Railways
Represented by Southern Railway,
Through the Chief Electrical Distribution Engineer,
Office of the Principal Chief Electrical Engineer, Southern Railway, 7th Floor, NGO Annex, Park Town,
Chennai 600 003 … Appellant(s)

Versus

1. Kerala State Electricity Board Limited
Through its Chairman and Managing Director,
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram – 695004
(Kerala) … Respondent No.1

2. State Load Despatch Centre (Kerala)
Through its Chief Engineer
(Transmission & System Operation)

Kerala State Electricity Board Limited
Kalamassery, Ernakulam– 683503 … Respondent No.2

3. Kerala State Electricity Regulatory Commission
Through its Secretary
KPFC Bhavanam, C.V. Raman Pillai Road, Vellayambalam
Thiruvananthapuram – 695010 (Kerala) … Respondent No.3

Counsel on record for the Appellant(s)	:	Pulkit Agarwal For App1
Counsel on record for the Respondent(s)	:	P.V. Dinesh Mukund .P. Unny Sindhu T.P Ashwini Kumar Singh For Res1 M. T. George For Res3

APPEAL NO. 213 OF 2021 & IA NO. 915 OF 2021

In the matter of:

Indian Railways
Represented by West Central Railways,
Through the Deputy Chief Electrical Engineer,
GM Office, 3rd Floor,
Annex Building, Indira Market,
Jabalpur,Madhya Pradesh – 482 068 … Appellant(s)

Versus

1. M. P. Poorv Kshetra Vidyut Vitaran Company Limited,
Through its Managing Director,
Block No. 7, Shakti Bhawan,
Rampur, Jabalpur – 482008 … Respondent No.1

2. M. P. Paschim Kshetra Vidyut Vitaran

Company Limited,
Through its Managing Director,
GPH Compound, Pologround,
Indore – 452001 … Respondent No.2

3. M. P. Madhya Kshetra Vidyut Vitaran Company Limited,
Through its Managing Director,
Nishtha Parisar, Govindpura,
Bhopal – 462023 … Respondent No.3

4. M.P. Power Transmission Company Limited,
Through its Managing Director,
Block No. 2, Shakti Bhawan,
Rampur, Jabalpur – 482008 … Respondent No.4

5. State Load Despatch Centre (SLDC)
M.P. Power Transmission Company Limited,
Through its Chief Engineer ,
Block No. 2, Shakti Bhawan,
Rampur, Jabalpur – 482008 … Respondent No.5

6. Madhya Pradesh Electricity Regulatory Commission
Through its Secretary
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal 462 016 … Respondent No.6

Counsel on record for the Appellant(s) : Pulkit Agarwal For App1

Counsel on record for the Respondent(s) : Alok Shankar For Res1

Alok Shankar
Divya Anand For Res2

Alok Shankar For Res3

Aashish Anand Bernard

Paramhans Sahani For Res5

Shlok Chandra For Res6

APPEAL NO. 170 OF 2019 & IA NO. 709 OF 2019 & IA NO. 809 OF 2021,

In the matter of:

Indian Railways
Represented by West Central Railways,
Through the Principal Chief Electrical Engineer,
GM Office, 3rd Floor,
Annex Building, Indira Market, Jabalpur,
Madhya Pradesh – 482 068 … Appellant(s)

Versus

1. Jaipur Vidyut Vitaran Nigam Limited,
Through its Managing Director,
Vidyut Bhawan, Jyoti Nagar, Jaipur – 302005 Rajasthan … Respondent No.1

2. Rajasthan Electricity Regulatory Commission
Through its Secretary
Vidyut Viniyamak Bhawan
(Near State Motor Garage),
Sahakar Marg, Jaipur – 302005, Rajasthan … Respondent No.2

3. Punjab State Power Corporation Ltd.
Through its Dy. CE/Power Regulations
Shed No. T-1, Thermal Design Complex,
Shakti Vihar, Patiala – 147 001, Punjab … Respondent No.3

Counsel on record for the Appellant(s) : Ranjitha Ramachandran
Pulkit Agarwal
Poorva Saigal
Shubham Arya

Anushree Bardhan For App1

Counsel on record for the Respondent(s) : Sandeep Pathak For Res1

C.K. Rai For Res2

Suparna Srivastava For Res3

APPEAL NO. 343 OF 2019 & IA NO. 1787 OF 2019

In the matter of:

Indian Railways
Represented through Dy. CEE/TRD/HQ
Central Railways, Electrical Branch
Second Floor, Parcel Office Building
Mumbai – 400 001 … Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
Through its Secretary
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai-400005 … Respondent No.1

2. Tata Power Company Limited (Distribution)
Through its Managing Director
Mumbai House, 21, Homi Modi Street
Mumbai – 400 001 … Respondent No.2

Counsel on record for the Appellant(s) : Pulkit Agarwal For App1

Counsel on record for the Respondent(s) : Pratiti Rungta For Res1

Shri Venkatesh
Nishtha Kumar
Somesh Srivastava
Vikas Maini
Suhael Buttan

Lasya Pamidi
Revanta Solanki For Res2

**APPEAL NO.133 OF 2020 & IA NOS. 934 OF 2020,
873 OF 2021 & 709 OF 2023**

In the matter of:

Indian Railways
Represented by Northern Railway,
Through the Deputy Chief Electrical Engineer/TRD/HQ,
Headquarters Office, Northern Railway,
Baroda House, New Delhi – 110 001 … Appellant(s)

Versus

1. Dakshin Haryana Bijli Vitran Nigam Limited,
Through its Chairman and Managing Director,
Vidyut Sadan, Vidyut Nagar,
Hisar -125 005 (Haryana) … Respondent No.1

2. Haryana Vidyut Prasaran Nigam Limited,
Through its Managing Director,
Shakti Bhawan, Sector – 6,
Panchkula – 134 109 (Haryana) … Respondent No.2

3. Haryana Electricity Regulatory Commission
Through its Secretary
Bays No. 33-36, Sector – 4
Panchkula, Haryana – 134 112 … Respondent No.3

Counsel on record for the Appellant(s) : Pulkit Agarwal For App1

Counsel on record for the Respondent(s) : Samir Malik
Divya Anand
Rimali Batra
Nikita Choukse For Res1

Rimali Batra
Nikita Choukse
Samir Malik
Divya Anand For Res2

Sandeep Kumar Mahapatra For Res3

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

Indian Railways, a part of the Central Government, operates India's national railway system - the fourth largest national railway system in the world. The railway operations are integrated across the country with 1,28,305 Kms of running track, of which more than 67,452 kms was electrified as on 31.03.2022. The Railways Act, 1989 was enacted by Parliament under Entries 22 and 30 of List I of the Seventh Schedule to the Constitution of India. While Entry 22 of List I of the Seventh Schedule relates to *"Railway"*, Entry 30 thereof relates, among others, to *"carriage of passengers and goods by Railway"*. Prior thereto, the Indian Railways Act, 1890 governed the field. The Electricity Act, 2003 was enacted by Parliament under Entry 38 of List III of the Seventh Schedule to the Constitution of India, which entry relates to *"Electricity".*

The crux of the dispute, in this batch of appeals, is whether Indian Railways is a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act and, if so, whether it is still required to pay

additional/cross-subsidy surcharge to different distribution licensees under Section 42 of the Electricity Act, if it chooses to procure electricity from sources other than the concerned distribution licensees within whose area of supply it is situated. Railways claim the status of a deemed distribution licensee as that would result in their not being mulcted with additional/cross subsidy surcharge under Section 42 of the Electricity Act. Their case, in short, is that, if they are held entitled to procure electricity directly from generators as deemed distribution licensees, they would be able to reduce their financial burden to the extent they are otherwise required to pay additional/cross-subsidy surcharge to different distribution licensees in different States in the country; and this would, in turn, enable them to reduce the rates being charged on railway passengers and for transportation of goods by the Railways.

While Indian Railways claims to be a deemed distribution licensee and to distribute electricity to itself as a consumer, besides distributing it to others carrying on business associated with the Railways, the submission, urged on behalf of the Respondents (mainly distribution licensees in different States), are two-fold. Firstly, that Indian Railways is merely a consumer of electricity, and not a deemed distribution licensee; and secondly, even if it is presumed to be so, it is nonetheless required to pay additional/cross-subsidy surcharge, under Section 42 of the Electricity Act, to the concerned distribution licensees on availing open access and procuring electricity directly from generators and others.

It is pointed out by them that, in the State of Odisha, the total financial losses to distribution licensees and to GRIDCO would be approximately Rs.393 crores per annum in the event Railways is granted open access as a deemed distribution licensee; the approximate losses include Rs.193

crores per annum loss to GRIDCO alone towards fixed charges payable for the stranded capacity under long term PPAs with ISGS sources; the losses suffered by distribution licensees all over India would translate into a higher retail cost of electricity, the burden of which would fall on individual consumers which is totally against public interest; and Railways have been a consumer of GRIDCO for decades.

The financial burden to be borne by parties on either side, depending on- the outcome of this batch of appeals, has little bearing on the adjudication of the present lis, and the rival contentions shall be considered on its merits, and in the light of the relevant legislations, both plenary and subordinate, as is in force as on date.

While several ancilliary questions have been raised in this batch of appeals, which shall be dealt with issue-wise later in this Order, the main questions which arise for consideration is whether Railways are, in fact, distributing electricity which is a pre-requisite for it to be held to be a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003 (the "2003 Act" for short); and whether it can, even if it is held to be a deemed distribution licensee, avoid payment of cross-subsidy surcharge and additional surcharge, under Section 42(2) & (4) of the 2003 Act, while availing open access.

II.BRIEF DETAILS OF THE ORDERS IMPUGNED IN THIS BATCH OF APPEALS:

Appeal No. 276 of 2015 is filed by the West Bengal State Electricity Distribution Company Ltd ("WBSEDCL" for short) against the Order passed by the Central Electricity Regulatory Commission ("the CERC" for short) in Petition No. 197/MP/2015 dated 05.11.2015. Respondent No.2-Indian

Railways had filed Petition No. 197/MP/2015 before the CERC requesting them to hold that they were entitled for grant of open access for procurement of power from Respondent Nos.8 and 9 and other generating stations, or source power through the Inter-State Transmission Network of the Central Transmission Utility and the Transmission Network of the Respondent States including Respondent Nos. 4 to 7, till the facilities and network of the Indian Railways is ready; to direct that they, in their capacity as an authorized entity, were entitled to distribute and supply electricity in connection with its working as railways and across a number of states; to be a separate participating entity, like any other state entity, in the DSM mechanism notified by the CERC for the purpose of scheduling and dispatch of electricity; direct all the STUs and SLDCs to give connectivity, and to process the application for open access (Long Term, Medium Term, Short Term), treating Indian Railways as an entity akin to a person who has been granted a distribution license in their State, and to allow use of the Intra- State Transmission facilities of such respondents as incidental to Inter State Transmission of electricity from the place of generation.

In the Order now under appeal before us, i.e. in Petition No. 197/MP/2015 dated 05.11.2015, the CERC held that, in the light of the judgement of the Supreme Court in **UOI vs. UPSEB :(2012) 3 SCC 329,** the Indian Railways was an authorized entity under the Railways Act to undertake transmission and distribution activities in connection with the working of the Railways, independent of its status under the Electricity Act; therefore the information sought by MSETCL, vide letter dated 06.07.2015, was not relevant for the grant of connectivity and concurrence to the Indian Railways for scheduling of power from RGPPL and GUVNL, through the

ISTS and State network by availing long term access or medium term open access in terms of the Connectivity Regulations; Indian Railways was a deemed license under the third proviso to Section 14 of the Act, and no separate declaration to that effect was required from the Commission; Indian Railways was a deemed licensee, and shall be bound by the terms and conditions of the license under the proviso to Section 16 of the Act; drawal points from ISTS, located within the State, shall be treated as a single entity for the purpose of scheduling; the group TSS, situated in a State and connected directly with ISTS, may be treated as fragmented control areas, and the responsibility for scheduling, metering , balancing applicability of ISTS charges and loss shall vest in the concerned RLDC; and for the TSS situated in the State, and connected to the State network, these function shall vest in the concerned SLDC. All concerned RLDCs, STUs and SLDCs were directed to facilitate LTA and MTA, in terms of the Connectivity Regulations, from the generating stations or other sources to the facilities and network of Indian Railways.

Appeal No. 114 OF 2020 is filed by Indian Railways against the Order passed by the Odisha Electricity Regulatory Commission (“OERC” for short) in Petition No. 55 of 2016 dated 25.02.2020. Respondent No.1-Odisha Power Transmission Corporation Limited had filed the said petition before the OERC to acknowledge Indian Railway as a Deemed Distribution Licensee, and declare them as the fifth discom to be operative in the State of Odisha, apart from the existing four DISCOMS (CESU,WESCO,NESCO and SOUTHCO); to specify the general or specific conditions to be applicable upon Indian Railways in accordance with Section 16 of the Electricity Act, 2003, and the CERC order dated 05.11.2015; to decide the

operation and commercial modalities to be followed, by the Indian Railways and the other Railway utilities, like OPTCL, SLDC, GRIDCO and DISCOMS in line with the minutes of various meetings; and to approve the proposal of OPTCL to collect charges from the Indian Railways for the proposed open access transaction, besides intra-state transmission charges and losses approved by the State Commission.

In the Order, now under appeal before us, the OERC held that they were not agreeable to declare Railway a “deemed distribution licensee” either under the provisions of the Railways Act, 1989 or under the Electricity Act, 2003; the Ministry of Power had declared Railways a ‘Deemed Licensee’, not a ‘Deemed Distribution Licensee’; they were a ‘deemed licensee’ for the purpose of a transmission license, and not for distribution license; they could carry on transmission activity without obtaining a transmission license, in addition to consuming power like a normal consumer due to their special and superior status under the Railways Act, 1989, in contrast to the provisions of the Electricity Act, 2003; and, as a consumer under the Electricity Act, 2003, they had the full right to avail open access under the relevant Regulations made under the Electricity Act, 2003.

Appeal No. 73 of 2021 is filed by the Indian Railways against the Order passed by the Kerela State Electricity Regulatory Commission (“KSERC” for short) in OP.No. 31/19 dated 12.12.2019. Indian Railways had filed the said petition before the KSERC to Issue a directive to the respondents herein to issue a “No Objection Certificate”, and convey their concurrence to the Indian Railways for non-discriminatory open access to avail power supply from M/s. Bharatiya Rail Bijlee Company Limited

(BRBCL) 2 Power plant at Nabinagar, Bihar or any other source to the Railway Traction Sub-Stations as a deemed licensee.

In the Order, now under appeal before us, KSERC held that Southern Railway was an existing consumer of KSEB Ltd, with a total contract demand of 91 MVA, for 'railway traction; at present they were availing supply at 12 drawal points across the State; and Indian Railways was also a deemed licensee as per the provisions of the Electricity Act, 2003. After referring to Section 39(2)(d) and Section 42(2) of the Electricity Act, and Regulation 11 of the Kerala State Electricity Regulatory Commission (Connectivity and Intra-State Open Access) Regulation, 2013, the KSERC held that it had, vide order dated 08.07.2019 in OA No. 15/2018, approved the charges applicable to open access consumers within the State of Kerala; and the same was applicable to Southern Railways also if they availed the open access facility. KSERC directed KSEB Ltd to issue a 'No objection Certificate' to Southern Railway for open access for availing power from any source, on payment of the charges applicable for open access consumers in the State, and subject to assessment of appropriate compensation, if any, after its approval by the Commission.

As, despite their being considered a Deemed Licensee, they were called upon to pay certain charges, Indian Railways filed a petition seeking review of the Impugned Order which was rejected by the KSERC vide order dated 26.06.2020. KSERC held that, as per the judgment of the Supreme Court dated 25th April 2014 in Civil Appeal No. 5479 of 2013 (ie ***Sesa Strerlite)***, even a licensee, purchasing power through open access for their own consumption, was liable to pay cross subsidy surcharge under the Electricity Act, 2003; since Southern Railways, as a deemed licensee,

proposed to avail power through open access for their own consumption, they were also bound to pay cross subsidy surcharge as per the provisions of the Electricity Act. 2003; and they were of the considered view that Railways was liable to bear cross subsidy surcharge while availing power through open access for their own consumption. The KSERC rejected the review petition as not maintainable.

Appeal No. 213 of 2021 is filed by Indian Railways against the order passed by the Madhya Pradesh Electricity Regulatory Commission ("MPERC" for short) in Petition No. 11 of 2020 dated 05.05.2021. Respondent No. 1-3, ie the Madhya Pradesh Discoms, had filed the said petition before the MPERC seeking levy of open access charges, such as cross subsidy surcharge and additional surcharge, on the electricity being drawn by the Western Central Railway through open access.

In the said Order, now under appeal before us, the MPERC held that the Supreme Court, in **Sesa Sterlite,** had observed that, being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of a distribution licensee to any person; power must be supplied to consumers; since the Western Central Railway was consuming the power purchased by it for its own use, and was not distributing and supplying it to consumers, it was not a distribution licensee; the Appellant, in **Sesa Sterlite,** had the status of a deemed distribution licensee through the Special Economic Zones Act, 2005, whereas the Western Central Railway was conferred power, through the Railways Act, 1989 to distribute electricity for its own establishment/use; it also had the status of a deemed licensee through the Electricity Act, 2003; both were

drawing electricity through open access in the area of the distribution licensee, and both were not consumers of the distribution licensee of their areas; admittedly, the Western Central Railway was not supplying electricity to consumers, and it did not maintain a distribution system for this purpose; the Western Central Railway had no universal supply obligation under Section 43 of the Electricity Act 2003; it had no consumer network, hence no distribution system for supply to the consumers; the status of the Appellant in **Sesa Sterlite** case, and the Western Central Railway in the present case, was similar; the Judgment passed by the Supreme Court, in the **Sesa Sterlite** case, was squarely applicable; a similar view was taken by the Rajasthan Electricity Regulatory Commission in a petition filed on the same issue; and they were of the view that the Western Central Railway was liable to pay open access charges i.e., cross subsidy surcharge and additional surcharge. The Western Central Railway was directed to pay the aforesaid open access charges without any further delay.

Appeal No. 170 of 2019 is filed by the Indian Railways against the order passed by the Rajasthan Electricity Regulatory Commission ("RERC" for short) in Petition No. RERC-1452/19 dated 23.04.2019. Jaipur Vidyut Vitaran Nigam Limited-Respondent No.1 had filed the said petition before the RERC seeking levy of open access charges, such as cross subsidy surcharge and additional surcharge on the electricity being drawn by Indian Railways through open access.

In the Order, now under appeal before us, the RERC held that merely being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of a distribution licensee on

any person; Section 2(17) of the Electricity Act, 2003 emphasized upon the distribution licensee to operate and maintain a distribution system and supply power to the consumers; in the present case, Railways did not supply to any consumer, but used power for its own use; and in view of judgment of the Supreme Court in **Sesa Sterlite** case, being similar to the facts of the present case, it was of the view that the Respondent was liable to pay open access charges i.e. cross subsidy surcharge and additional surcharge.

Appeal No. 343 of 2019 is filed by Indian Railways against the order passed by the Maharashtra Electricity Regulatory Commission ("MERC" for short) in Petition No. 154 of 2019 dated 05.04.2019. MERC had earlier initiated a suo-moto petition to take on record the Deemed Distribution Licensee status of Indian Railways, and for issuing specific conditions of Distribution License for Indian Railways. In the order under appeal, the MERC observed that CERC had held that Indian Railways, as a Deemed Licensee, shall be bound by the terms and conditions of the License specified or to be specified by the Appropriate Commission under the proviso to Section 16 of the Electricity Act; APTEL had also upheld the above CERC Order; and, in view of the Orders of the CERC and APTEL, they considered it appropriate to specify certain specific conditions of the Distribution License for Indian Railways as a Deemed Distribution Licensee under Section 16 of the Electricity Act.

MERC directed Indian Railways to adhere and comply with following Regulations with immediate effect on a provisional basis, which could also form part of their Specific Conditions to be specified by the Commission after following due process: (i) MERC (State Grid Code Regulations)

2006; (ii) MERC (Transmission Open Access) Regulations, 2016; (iii) MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016; (iv) MERC (Fees and Charges) Regulations, 2017; (v) Order issued by the Commission in Case No. 42 of 2007 (ABT) Order and FBSM mechanism; (vi). Transmission Pricing framework as specified under Multi-Year Tariff Regulations (In STS Order dated 12 September, 2018 passed by the Commission and other relevant Orders/Directions issued by the Commission in respect of Indian Railways); and (vii) Commission's Orders/Practice directions/ amendments, if any in the Regulations mentioned above in relating to Indian Railways; and the above conditions would be applicable till issuance of Specific Conditions. Indian Railways was directed to examine other Regulations notified by the MERC, and submit its Petition proposing the Specific Conditions of its Distribution License, considering the peculiarity of operations of the Indian Railways within six months; and the Petition should cover aspects such as the area of operations for the Indian Railways in the State of Maharashtra (Central Railway, Western Railway and South Eastern Railway), and any other additional condition applicable to the Indian Railways etc.

In its order in Petition No. 154 of 2019 dated 05.04.2019, impugned in the present appeal, MERC relied on the Judgment of the Supreme Court, in **Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Ors (2014) 8 SCC 444,** as regards applicability of cross subsidy surcharge on the Indian Railways, and held that, prima facie, Indian Railways would be required to pay cross subsidy surcharge and such other charges as may

be applicable under the Open Access Regulations to the incumbent Licensee.

MERC further held that the term of Distribution License for Indian Railways shall be 25 years with effect from 5th November, 2015 and the same shall be valid till 4th November, 2040, unless revoked by the Commission; Section 18 of the EA relating to License amendment and Section 19 of the EA relating to License revocation were equally applicable to Indian Railways as no distinction had been made in these provisions for Deemed Licensees; the Distribution License of Indian Railways was liable to be revoked in case of non-compliances / willful and prolonged defaults/ breach of terms and conditions of Distribution License in accordance with the procedure laid down under EA in case such circumstances get created in future; there could be amendments, in the terms and conditions of license, based on requirements / issues that may be raised in future; it was essential that Indian Railways adhered to the same payment security mechanism as was provided in the TOA Regulations; hence, they were not inclined to grant the prayer made by Indian Railways to permit it to provide Letter of Assurance from RBI or Letter of Mandate from RBI or any other similar mode of payment security mechanism as may be provided for by RBI, towards compliance of Regulation 24 of TOA.

Appeal No. 133 of 2020 is filed by the Indian Railways against the order passed by the Haryana Electricity Regulatory Commission ("HERC" for short) in Petition No. HERC/PRO-11 of 2017 dated 17.06.2020. Dakshin Haryana Bijli Vitran Nigam Ltd. (Respondent No.1 in the Appeal) had filed the petition before the HERC seeking clarification on various applicable charges in terms of the Regulations framed by the State Commission to be

levied on Indian Railways for availing medium term open access as a Deemed Licensee.

In the Order, now under appeal before us, HERC held, on the issue of Deemed Licensee Status**,** that this issue was res-judicata; the Commission had examined whether Northern Railway was a deemed distribution licensee in Haryana; in view of the judgement of APTEL dated 3rd May, 2013 and the Judgement of the Supreme Court dated 25th April, 2014 in Civil Appeal No. 5479 of 2013 (**M/s Sesa Sterlite Vs. OERC & Ors**), Northern Railway was not in the business of supplying electricity to public/consumers at large, but was distributing electricity within its own operational area and in connection with the working of the Railways; an entity i.e. Northern Railway which utilizes the entire quantum of electricity for its own consumption, and does not have any other consumers, cannot be deemed to be a distribution licensee; if this was to be so, quite a few consumer category (Government Connections like Public Water Works, Street Light, Lift Irrigation / MITC etc) would also become deemed distribution licensee(s) and, in case they also fully source power under Open Access mechanism, they would also claim exemption from various charges, making the distribution and retail supply business of the existing distribution licensee(s) unviable; Northern Railway, by merely being authorized to operate and maintain a distribution system under the Railways Act, 1989, could not be conferred the status of distribution licensee in Haryana; a deemed distribution licensee is merely exempted from obtaining license under Section 14 of the Electricity Act, 2003; pursuant to Section 16 of the Electricity Act, the Commission had framed and notified the Haryana Electricity Regulatory Commission (Conditions of License for Distribution and Retail Supply Business) Regulations, 2004

dated 30th November, 2004; all the general terms and conditions specified therein had to be necessarily complied with by a distribution licensee, including a deemed distribution licensee, which is not the case in the present matter of Northern Railway as well as Military Engineering Services (MES) - a case earlier dealt with by the Commission; the dispensation flowing from the judgements of the Supreme Court, as well as Appellate Tribunal for Electricity, was squarely applicable to Northern Railway; and, as far as Haryana was concerned, Northern Railway was fully a Medium-Term Open Access Consumer having connectivity agreement and medium-term open access agreements.

Having so held, the Commission (which was also agreed to by the parties i.e. HVPNL, Discoms and NR) considered it appropriate to frame / notify specific set of Regulations applicable to the deemed distribution licensee, as some of the terms and conditions in the HERC (Conditions of License for Distribution and Retail Supply Business) Regulations, 2004 may not be relevant in the case of a deemed to be a distribution licensee. HERC held that Northern Railway was liable to bear, besides intra state transmission loss, the distribution system network cost as determined by the Commission for the relevant year; and, in addition to the above, Indian Railways was liable to pay Cross Subsidy Surcharge and Additional Surcharge.

Appeal No. 320 of 2018 is filed by the Punjab State Power Corporation Ltd against the Order passed by the Punjab State Electricity Regulatory Commission (“PSERC” for short) in Petition No. 3 of 2017 dated 28.02.2018. The appellant herein filed a petition before the PSERC to direct the respondent-railways to follow Section 16 of the Electricity Act,

2003 while getting STOA and MTOA in the State of Punjab, and to direct the respondent-railways to follow the terms and condition required to be followed while getting STOA and MTOA as per PSERC (Terms and condition for intra state open access) Regulations, 2011. PSPCL claimed two charges namely (i) charges for actual consumption of electricity, and (ii) charges for stranded power.

In the Order, now under appeal before us, the PSERC held, with respect to stranded power charges, that such exigencies / overdrawals by open access customers are to be dealt under “Imbalance Charges” as per the provisions of the Punjab State Commission terms and conditions for intra state open access) Regulations, 2011; the provisions for standby charges, as proposed by PSPCL, did not exist in the existing Regulations; and Regulation 31(1)(a) of the Punjab State Electricity Regulatory Commission (Terms and conditions for Intra-state Open Access) Regulations, 2011, in case of overdrawal by Open Access Customers, provided for charging of highest tariff for any permanent consumer category applicable at that point of time.

On the proposal of fixed charges, the Commission held that the Punjab State Commission (Terms and conditions for intra state open access) Regulations, 2011 did not include any such provision for payment of fixed charges. Moreover, Fuel Cost Adjustment Charges (FCA) and Time of Day (ToD)/Peal Load exemption charges were also denied to the appellant.

III.RIVAL CONTENTIONS AND ANALYSIS: ISSUE WISE:

Issues were framed with the consent of Learned Senior Counsel and learned counsel appearing for all the parties in this batch of appeals. As 14 issues were framed, some of them again containing sub-issues, and submissions have been repeated by Learned Senior Counsel and Learned Counsel appearing on both sides, we could not avoid repeating our analysis and findings as each issue had to be dealt separately.

While several of the appeals, in this batch, have been filed by Indian Railways, some others have filed appeals also. Apart from the Railways, the other parties to this batch of appeals are, for convenience sake, being commonly referred to as the Respondents.

While we would, ordinarily, have examined the rival submissions with respect to each issue seriatim, the submission urged on behalf of the Respondents that Indian Railways is not the Appropriate Government must be examined at the outset, since the third proviso to Section 14 of the Electricity Act is applicable only to the "Appropriate Government", and none else.

IV.ISSUE 14:

Whether Indian Railways falls within the term "Appropriate Government" under Section 14 of the Electricity Act, 2003?

A.SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that Indian Railways is a department of the Central Government and, therefore, the Appropriate Government under Section 14-third proviso; the description of Indian Railways as 'Railways Administration', 'General Manager', 'Zonal Railway', 'Union of

India', or similar such expressions in the proceedings filed before the Court, cannot render the Indian Railways not being an appropriate government; and the contentions to the contrary are misplaced.

B.SUBMISSION OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the appeals filed by Railways proceed on the basis that they fall within the scope and ambit of the third proviso to Section 14 of the Electricity Act; however, Railways has not made any submission as to whether it fulfils the twin tests/ criteria to fall within the scope of the third proviso to Section 14, namely: (a) is Railways the "Appropriate Government" within the meaning of the third proviso to Section 14?, and (b) whether Railways distributes electricity within the meaning and scope of the third proviso to Section 14?

On the first test, it is submitted that the term/expression "Appropriate Government" in the third proviso to Section 14 means the State Government, and not the Central Government; the ownership of the Railway Administration/Railways by Union of India/Central Government is not being questioned in these submissions; Section 2(5) of the electricity Act, defining "Appropriate Government", does not apply to the third proviso to Section 14 of the Electricity Act; Section 2 starts with the words "*unless the context otherwise requires*"; Section 2(5), defining "***Appropriate Government***", applies to Sections 13, 15(7), 37, 64(4), 67(2), 68, 90(2)(b), 91(3), 106, 132, 143, 148, 152, 161(2), 162, 164, 165, 166(5), 168, 171, 172(b) of the Electricity Act; it would be the Central Government "*in relation to… Railways*" for the purposes of Sections 67(2), 68, 150(2), 161(2), 162, 165, 171, but not the third proviso to Section 14; if Section 2 (5) of the Electricity Act were to be interpreted in a way that the Central Government is Railways for all purposes wherever the term "Appropriate Government" is

used in the Electricity Act, then all "*inter-State generation, transmission, trading or supply of electricity"* would be the Central Government, but that is not the case since private enterprises also won and operate "*inter-State generation, transmission, trading or supply of electricity";* private companies also own "*mines, oilfields"*; Port Trusts also own "*dockyard';* hence, the interpretation cannot be that the Central Government is "*inter-State generation, transmission, trading or supply of electricity "mines, oilfields,"* "*dockyard';* Section 51A of the 1910 Act was inserted by Act 32 of 1959; the State Government was engaged in the business of supplying energy to the public, and had all the powers and obligations of a licensee under the 1910 Act; hence "*Appropriate Government*" means the State Government, and not the Appellant which is part of the Central Government; absence of the words "*Railway Administration*", used in Section 11 of the Railways Act, in the third proviso to Section 14, means that Parliament never intended the third proviso to Section 14 to include the Railways; Section 11 of the Railways Act, through Clauses (a) to (h), gives various powers to "*the Railway Administration*" inter alia to make electricity supply lines, erect, operate and maintain or repair electric traction equipment, power supply and distribution installation in connection with the working of the Railway; Parliament could not have intended *"Railway Administration"/ Railways"* to be an "Appropriate Government" in the third proviso to Section 14, when the proviso to Section 54 (1) of the 2003 Act employs the word "***Railway***", Section 67(1)(a) & (b), (2)(j), (m) employ the word "***Railway***", and Section 57 uses the word "***Railway***"; the Railways, being owned by the Union of India, does not automatically make the third proviso to Section 14 applicable to the Railways; and the fact that it is "*the General Manager of a Zonal Railway*" or the "*Railway Administration*" which sues by the said

names / nomenclature, and when it is sued Section 80 of the Code of Civil Procedure, 1908 would mandate that the Union of India be impleaded, would necessarily indicate that the third proviso to Section 14 ought to have used the words "*the General Manager of a Zonal Railway" or "the Railway Administration*" instead of the words "Appropriate Government".

C.ANALYSIS:

The submissions, urged on behalf of the Respondents under this head, are two-fold. Firstly, Railways is not the Appropriate Government, as referred to in third proviso to Section 14 of the Act; and (2) as it is not distributing electricity, it cannot be held to be a distribution licensee in terms of the third proviso to Section 14. The question whether Railways is, in fact, distributing electricity shall be examined later in this order. We shall, therefore, confine our analysis under this head only to the question whether Railways is the Appropriate Government referred to in the third proviso to Section 14.

Section 2(5)(a)(ii) of the Electricity Act defines "Appropriate Government" to mean the Central Government in relation to, among others, supply of electricity and with respect to, among others, the Railways. On a plain reading of Section 2(5)(a)(ii), in case Railways are held to be supplying electricity, the Appropriate Government would be the Central Government.

Since reference is made, on behalf of the Respondents, to several provisions of the Electricity Act, it is useful to note what some of these provisions relate to. Section 13 relates to the power to exempt, and enables the Appropriate Commission, on the recommendations of the Appropriate Government, to direct that the provisions of Section 12 (which prohibits a person from distributing electricity unless he is authorized to do so) shall

not apply to any local authority, Panchayat Institution, users' association etc. It is not even contended before us that the Railway is entitled to be granted exemption under Section 13 of the Act.

Section 15(7) requires the Appropriate Commission, immediately after issuance of a license, to forward a copy to the Appropriate Government and to others. It is nobody's case that the Central Government consists only of the Railways. As noted hereinabove, Section 2(5)(a)(ii) brings within its ambit mines, oil fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations, as also entities referred to under clauses (i), (iii) and (iv) of Section 2(5)(a).

Section 107 of the Electricity Act requires the Central Commission to be guided by the directions issued by the Central Government in the public interest. The direction which the Central Government gives, under Section 107, is ordinarily through the Ministry of Power. What Section 2(5)(a) stipulates is that, in relation to supply of electricity with respect to Railways, the Appropriate Government is the Central Government. That does not mean that, wherever the word "Appropriate Government" is used, the said word should be substituted with the word "Railways". We have referred to those provisions which deal with licenses, and what has been held herein would apply equally to the other provisions referred to on behalf of the Respondents. It would be difficult for us, therefore, to agree with the submission of the Respondents, or to hold that Railways would not form part of the "Appropriate Government" with respect to which the third proviso to Section 14 of the Electricity Act is attracted.

Section 51(a) of the Indian Electricity Act, 1910 provided that, when the State Government engages in the business of supplying energy

to the public, it shall have all the powers and obligations of the licensee under the Act. Reliance placed, on behalf of the Respondents, on Section 51(a) of the 1910 Act is misplaced since, by Section 185 of the Electricity Act, the Indian Electricity Act, 1910 stood repealed.

Further, where an expression is defined under the Electricity Act, 2003, it would be wholly inappropriate to refer to the provisions of any other enactment to understand what the said expression means. As Section 2(5)(a)(ii) of the Electricity Act is attracted in relation to supply of electricity with respect to Railways, in case Railways is held to be supplying electricity, it must be held to be the appropriate government falling within the ambit of the third proviso to Section 14 of the Electricity Act.

Section 2(32)(a) of the Railways Act, 1989, defines "Railway Administration, in relation to a Government Railway, to mean the General Manager of the Zonal Railway". Section 3(1) enables the Central Government, for the purpose of efficient administration of the Government Railways, by notification, to constitute such railways into as many Zonal Railways as it may deem fit and to specify, in such notification, the names and headquarters of such Zonal Railways, and the area in respect of which they shall exercise jurisdiction.

Section 4(1) of the Railways Act requires the Central Government, by notification, to appoint a person to be the General Manager of the Zonal Railway. Section 4(2) stipulates that the general superintendence and control of Zonal Railway would vest in the General Manager. The aforesaid provisions entrust the general superintendence and control of Zonal Railway to the General Manager. That does not mean that the General Manager or the Railway Administration, referred to in the aforesaid provisions, must be held to be the Railways itself. The word "Railway" is a

defined expression under Section 2(31) of the Railways Act, and means not only a railway or any portion of a railway for the public carriage of passengers or goods, but includes everything contained in Clauses (a) to (f) thereunder. The submission, that failure to use the words "General Manager of the Zonal Railway" or the "Railway Administration" in the third proviso to Section 14, instead of the words "Appropriate Government", is fatal, does not merit acceptance.

The first limb of the submission urged on behalf of the Respondent under this head, that Railways is not the Appropriate Government under the third proviso to Section 14 of the Act, necessitates rejection. The second limb of the submissions, put forth on behalf of the Respondents, shall be examined later in this order.

V.ISSUE NO. 1:

Issue No.1 is divided into two parts, Issue Nos. 1(A) and 1(B) which read thus:-

ISSUE 1(A):

*Whether the activities of Railways, as provided under Section 11(g) and (h) read with Section 2(31) of the Railways Act, 1989, constitute '**distribution of electricity**'?*

ISSUE 1(B):

*Whether the activity of Indian Railways, of conveying electricity from its traction sub-station to the various points of consumption, including locomotives, station premises, vendors and service providers constitutes '**distribution of electricity**' as contemplated under the Electricity Act, 2003*?

A. SUBMISSIONS ON BEHALF OF RAILWAYS:

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Indian Railways, would submit that the authority, powers, rights, privileges and obligations of the Indian Railways, vis a vis others including licensees, in regard to electricity matters, regulatory control over Railways etc, should be considered in terms of the provisions of the Railways Act, 1989 and the Electricity Act, 2003; the Railways Act, 1989 specifically deals with 'electric traction equipment', 'power supply and distribution installation' *in connection with or for the purposes of the Railways"* (Sections 2(31)(c) and 11(g) of the Railways Act, 1989); these are obviously for (a) conveyance of electricity in the area of operation of the Railways for end use or consumption, and (b) is not restricted to any one specific use or to locomotive operations, but for a wide range of works, operations and activities, so long as they are (i) '*for the purposes of constructing or maintaining a railway*' as stated in the opening part of Section 11, (ii) '*in connection with the working of the railway*' as stated in Section 11 (g), and (iii) further to *do all other acts necessary for making, maintaining, altering or repairing; and using the railway*, as stated in Section 11(h); Section 11(d) of the Railways Act, 1989 extends the authority of Railways to *erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;* Section 18 of the Railways Act, 1989 empowers the Central Government to fence the Railway area of operations, and no trespass in the said area is permissible; it is only the Indian Railways, or a person duly authorized by the Indian Railways and no other, which can undertake

activities, including in regard to electricity activities in the said area; conveyance of electricity in the area of operation of Railways is also not merely point to point as per the definition of ‘transmission line’ in Section 2(72), or ‘transmit’ or ‘transmission’ in Section 2(74), of the Electricity Act, 2003; and electricity gets distributed to several and diverse end uses/consumption through the network/system in an integrated manner throughout the area of operation of the Railways in the country.

Learned Senior Counsel would submit that conveyance of electricity, in the area of operation of Railways, is through electric wires and installations including overhead equipment (OHE) running along the railway traction from where (i) the locomotives draw electricity on a continuous basis, and use/consume electricity at different points, for running of the trains; and (ii) other installations which draw electricity for end use/consumption for signalling, communication equipment, railway yards, railway sidings and other works at different places, station facilities, vendors and other service providers etc; electricity is also conveyed from the Non-TSS sub-stations/switchyards receiving electricity at the inter-connection point of the grid within a railway network for various purposes including for end use/ consumption by other entities/agencies providing facilities and amenities to passengers; and each traction sub-station/non traction sub-station/switchyard of Railways, which receives electricity from outside the area of operations of the Railways, is the starting point for distribution of electricity with each section running into around 20 to 30 Kms and servicing the requirement of electricity at different places of consumption.

Learned Senior Counsel would further submit that the term ‘distribute’ or ‘distribution’ is not a defined term either under the Railways Act, 1989 or

the Electricity Act, 2003; the term 'distribute' would, in its natural sense, mean spreading of goods anywhere by whatever means that may be employed; from **(1) P Ramanathan Aiyar, 6th Edition, (2) State -v- Nathulal Damumal, AIR 1962 Bom 21;** and **(3) Halsbury's Laws of England, 5th Edition,** referring to the English Act on Electricity, it is clear that distribute or distribution of electricity is not synonymous with 'sale' of electricity by one to another**;** the activities undertaken by Railways constitutes distribution of electricity within the area of operation of the Railways, and further in connection with or for the purposes of Railways as defined in Section 2(31) of the Railways Act, 1989; there is, indisputably, conveyance of electricity within the area of operation of the Railways from the traction sub-stations (TSSs)/ sub stations/switchyard of Railways (connected upstream to the Grid/ power system of other licensees) to different points of end use of electricity namely where electricity gets consumed within the area of operations of the Railways; thus there is distribution of electricity, and not merely transmission or use of electricity in the area of operations of the Railways; and such distribution of electricity also constitutes "distribution of electricity" within the meaning and scope of the Electricity Act, 2003 also, as dealt with separately under Issue No.5.

B. SUBMISSIONS ON BEHALF OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that, in order to ascertain whether the activities of Indian Railways constitute 'distribution of electricity', it is important to understand what 'distribution of electricity' means; 'Distribution of electricity', as envisaged under the Electricity Act, 2003, is a function which is performed by a 'distribution licensee' (Section 2(17) of the Electricity Act); as held in **Sesa Sterlite Ltd. v. OERC & Ors:**

(2014) 8 SCC 444, a ‘distribution licensee’ has mainly two important components, namely: (a) operate and maintain a distribution system for supplying electricity to consumers, and (b) actual supply of electricity to the consumers in his area of supply; with respect to the first ingredient of a ‘distribution licensee’, the term ‘distribution system’ is defined in Section 2(19) of the Electricity Act; the purpose of the ‘distribution system’, as envisaged under the Electricity Act, is for ‘*connection to the installation of the consumer*’ or in other words last mile connectivity; a ‘system’ which does not ultimately connect to the installation of the consumer, is not a ‘distribution system’ within the scheme of the Electricity Act; a ‘distribution system’ is also distinct from a ‘transmission line’, which is not an essential part of the distribution system of a licensee under Section 2(72) of the Electricity Act; there is no requirement for a ‘transmission line’ to be connected to the installation of the consumer, which is a specific requirement for a ‘distribution system’; with respect to the second ingredient of ‘distribution licensee’, i.e., supply of electricity to the consumers in his area of supply; the term ‘supply’ is defined in Section 2(70) of the Electricity Act, and ‘area of supply’ is defined in Section 2(3) of the Electricity Act; ‘area of supply’ is designated by the relevant State Electricity Regulatory Commissions while granting license, and thereafter license conditions of a ‘distribution licensee’ are determined; and no alteration or modification can be carried out in this ‘area of supply’ without seeking approval of the relevant SERC under Section 18 of the Electricity Act.

It is submitted, on behalf of the Respondents, that a common aspect in the definitions of ‘distribution licensee’, ‘distribution system’ and ‘supply’, is a ‘consumer’; therefore, distribution of electricity is for the specific purpose

of ‘supply’ of electricity to a ‘consumer’; a ‘consumer’ is defined under Section 2(15) of the Electricity Act; Section 42 and 43 of the Electricity Act provides for duties of a distribution licensee; the handbook on power supply installation in electric traction, issued by the Indian Railway Engineering Institute, gives details of the power supply arrangement at the Railway installations and supply system for Railway traction sub-stations; power is availed by the Railways, through the power supply and distribution system maintained by them, from the ‘supply authority’ either as a consumer of a distribution licensee or through a bilateral transaction (via open access); however, in both situations, power delivery from the supply authority remains at the traction sub-station.

It is submitted, on behalf of the Respondents, that the definition of ‘distribution system’ reveals that a distribution system is a system of wires between two points i.e.,(a) delivery point on the transmission line/generating station connection; and (b) point of connection of the consumers; ‘distribution of electricity’ is done by a ‘distribution licensee’ through a ‘distribution system’ whereby electricity is ‘supplied’ to a consumer by way of sale; the words ‘distribution of electricity’ should be strictly interpreted; mere conveyance of electricity from one point to another is not ‘distribution of electricity’; and mere construction of an electric system, for transfer of electricity to various points of consumption within the premises of an establishment, is also not ‘distribution of electricity’.

On the activities of Railways under the Railways Act, it is submitted, on behalf of the Respondents that the two primary requirements for being a ‘distribution licensee’ (or a ‘deemed distribution licensee’ as the case may be), are (i) distribution system and (ii) supply of electricity to the consumers; the functions of the Railways should be looked at from this

prism; it is only when the aforesaid two criteria are fulfilled, that the Railways can be stated to be performing the activity of 'distribution of electricity'; Chapter IV of the Railways Act, 1989 deals with "*Construction and Maintenance of Works*"; Section 11 of the Railways Act relates to the power of the Railways Administration to execute all necessary works, for the purposes of constructing and maintaining a railway; Section 2(31)(c) of the Railways Act defines Railways; the above provisions, including Sections 11(g) and 11(h), cannot be read in isolation, and should be looked at, considering the object and reasons; the scheme of the Railways Act, entrusting the power of construction upon the Railway Administration, is clear from the heading of Chapter-IV ie "Construction and Maintenance of Works"; the clauses under Section 11 of the Railways Act must therefore receive a limited construction; the power conferred by Section 11 is only to be exercised for the purpose of construction of the railways; to test the submission, that the activities described under Section 11(g) constitute 'distribution of electricity', it is necessary to consider whether the following essential criteria are being met by the Railways under Section 11(g): (a) whether Railways has been authorised to operate and maintain a distribution system?, (b) whether Railways has been authorised to supply electricity to the consumers in its area of supply?; this condition pre-supposes existence of 'consumers', 'area of supply' and sale of electricity; Railways does not fulfil any of the above criteria; Railways neither maintains nor operates a 'distribution system', nor does the Railways have any 'consumer' or 'area of supply' for sale of electricity to qualify as supply of electricity; neither of the above Sections empower the Railways or the Railways Administration to '*supply*' electricity to '*consumers*' by way of *sale*;

and, further, the Railways do not also have an ‘area of supply’ for alleged distribution of electricity by it.

It is submitted, on behalf of the Respondents, that the mere act of operation or maintenance of a ‘*power supply and distribution installation*’ is not akin to ‘distribution of electricity’; even if it is assumed, for the sake of argument, that the installation of Railways is similar to the installation of a distribution licensee, the activities of the Railways, of transferring electricity from its traction sub-station to the various points of consumption, would still not constitute ‘distribution of electricity’ as contemplated under the Electricity Act; admittedly, supply of power to the Railways occurs at various traction sub-stations of the Railways; the Railways Handbook also makes it clear that supply of power at the traction sub-station from the supply authorities is 3-phase power supplied at 132 kV, Railways uses stepping down transformers installed at the traction sub-stations to step down the said power to single-phase power at 22 kV, thereafter Railways uses this single-phase 50 Hz power (at 22 kV), primarily for electric traction and, in the process, also conveys the same to different locations within the Railway premises**;** when the said power supply and distribution installation being maintained by the Railways, beyond its traction sub-station, is examined through the lens of Section 2(19) of the Electricity Act, it becomes clear that the said system can never be a distribution system as defined therein in as much as (a) if the traction sub-station (the point of delivery of power) is to be construed as the first point as mentioned in Section 2(19) i.e. delivery point on the transmission line/generating station connection, since consumption of power is also at this very traction sub-station, the same also becomes the second point as mentioned in Section 2(19) i.e. the point of installation of the consumer leaving no scope for any

system of wires to exist between them; (b) on the other hand, if the traction sub-station is presumed not to be the point of installation of the consumer, and the various entities located within the Railway premises are to be construed as the point of installation of the consumer, the same would mean that the sad entities are different/distinct from the Railways which is in direct contradiction to Section 2(31) of the Railways Act and particularly sub-clause (d); as such, it is clear that it is the traction sub-station itself which is the 'installation of the consumer' within the meaning of Section 2(19) of the Electricity Act; and anything beyond the said point, i.e the power supply and distribution installation being maintained by the Railways, cannot be construed as a distribution system as defined under Section 2(19) of the Electricity Act.

On the contention of the Railways, that Electricity is conveyed to various points of consumption, including locomotives, station premises, vendors, and service providers, it is submitted, on behalf of the Respondents, that the purpose of the 'distribution system', as envisaged under the Electricity Act, is for '*connection to the installation of the consumer*' or last mile connectivity; the Electricity Act defines 'consumer' under Section 2(15) of the Electricity Act; 'person' is defined in Section 2(49) of the Electricity Act; Railways has alleged that electricity is 'supplied' to various consumers such as trains/ locomotives, signaling, communication yard, sidings etc; in the light of the definition in Section 2(49), such entities/ instruments do not qualify to be consumers within the meaning of the Electricity Act; such entities/ instruments are not 'person', and are in fact an extension of the Railways itself; and a person is someone/ something capable of having rights and duties, which is concededly missing in the case of the alleged consumers of the Railways

(Refer: **S. Kireetendranath Reddy v. A.P. TRANSCO, Vidyut Soudha, Hyderabad & Ors. (1999 (5) ALD 398).**

It is submitted, on behalf of the Respondents, that, at the time of enactment of the Railways Act by Parliament, the .1910 Act was holding the field; the said 1910 Act provided for supply of electricity as a licensed activity; therefore, the provisions of the Railways Act, and especially with regard to the power of the Railway Administration to execute all necessary works for the purpose of constructing and maintaining a Railway by erecting, operating, maintaining or repairing any electric traction equipment, power supply and distribution installation in connection with the working of the Railways, has nothing to do with the distribution of electricity; the provisions of Section 11(g) & (h) read with Section 2(31) of the Railways Act authorise transmission of electricity for the purposes of running of the Railways; the distribution installations help conveyance of electricity in the traction lines to go in different directions, so that the locomotives can carry passengers or goods to different destinations within India; this is nothing but a traction distribution system for transmission of electricity; the definition of ‘overhead line’ in Section 2(48) does not include live rails of a traction system; therefore, the traction lines, being overhead lines, are not “transmission lines” as understood under Section 2(72) of the Electricity Act; therefore working of the Railways within their premises, as authorized under the above referred provisions of the Railways Act operating through electric traction system, is peculiar to the Railways; conveyance of electricity under such traction designed at 25 KV, for use by locomotives and stations etc, are not through transmission lines or distribution lines or system as understood under the Electricity Act; even assuming that the Railway engine is a consumer of electricity, its point of consumption is the

entire traction line, and there is no specific installation of the consumer; the entire traction line is the installation of the consumer being the Railways itself through its locomotive(s); and further there is no billing to such consumer being the Railways itself.

C.ANALYSIS:

Before examining the submissions, urged on behalf of the Railways under this head, one of the submissions, urged on behalf of the Respondents, must be considered at the outset. Relying on the definition of "person" under Section 2(49) of the Electricity Act, it is contended, on behalf of the Respondents, that Indian Railways does not fall among any of the entities referred to in the said definition; and, since only a person can be a licensee under Section 2(39), they cannot claim the status of a deemed licensee. Reliance is placed in this regard on **S.KIREETENDRANATH REDDY vs. A.P. TRANSCO (1999 (5) ALD 398)**. It is necessary therefore to take note of the law declared in the said judgment.

In **S. Kireetendranath Reddy v. A.P. Transco: 1999 SCC OnLine AP 843,** it was held that legal rights and legal duties cannot be conceived without the holder of the rights; the duties and the holder, in legal theory, is the 'person'; in *Salmond on Jurisprudence* (11th Edition) at pages 350-351, it is stated that, so far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties; any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man; persons are the substances of which rights and duties are the attributes; it is only in this

respect that persons possess juridical significance, and this is the exclusive point of view from which the personality receives legal recognition; persons as so defined are of two kinds, distinguishable as natural and legal; a natural person is a human being; and legal persons are beings, real or imaginary, who, for the purpose of legal reasoning, are treated in greater or less degree in the same way as human beings.

The law declared in **S. Kireetendranath Reddy** is that legal rights can be exercised, and legal duties can be fastened, only on a person. Section 2(39) of the Electricity Act defines “licensee” to mean a person who has been granted a license under Section 14. Section 2(49) of the Electricity Act defines “person” to include any company or body corporate or association of body of individuals, whether incorporated or not, or an artificial juridical person. Reliance placed by the respondents, on **S. Kireetendranath Reddy**, is of no avail since the definition of “Person” in Section 2(49) of the Electricity Act is an inclusive definition. By use of the word ‘includes’ therein, Parliament has made it clear that a person would not only mean (1) a company (2) a body corporate (3) an association or body of individuals, whether incorporated or not, and (4) an artificial juridical person, others, not falling within any of the aforesaid categories, may also be held to be “persons”. We see no reason, in such circumstances, to hold that the Indian Railways is not a “person” and cannot, therefore, claim the right of being a distribution licensee.

The words used in the third proviso to Section 14 of the Electricity Act is the “appropriate government” and, as has been explained earlier in this order, Indian Railways forms part of the Central Government, and would fall

within the definition of an “Appropriate Government” under Section 2 (5)(a)(ii) of the 2003 Act.

D. SECTION 2(31) & 11 OF THE RAILWAYS ACT: ITS SCOPE:

As the dispute under this head relates mainly to whether the activities of the Railways under Section 11(g) and (h) read with Section 2(31) of the Railways Act,1989, of conveying electricity from its traction sub-station/non-traction substation/switch-yard to the various points of consumption, including locomotives etc, constitutes ‘distribution of electricity’, as contemplated under the Electricity Act, 2003, it is useful to note the provisions relevant thereto, both under the Railways Act, 1989 and the Electricity Act, 2003.

Section 2(31) of the Railways Act, 1989 defines the term “Railways” to mean a railway, or any portion of a railway, for the public carriage of passengers or goods, and to include, among others, (a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway; (c) all electric traction equipment, power supply and distribution installation used for the purposes of, or in connection with, a railway; and (d) all rolling stock, stations, offices, ware houses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, the railway.

Chapter IV of the Railways Act 1989 bears the heading ‘***construction and maintenance of works***’. Under Chapter IV is Section 11 which, in turn, bears the heading ***‘power of railway administration to execute all necessary works’.*** Section 11 relates to the power of the

railway administrations to execute all necessary works and stipulates that, notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of the Railways Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway, among others, (g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and (h) do all other acts necessary for making, maintaining, altering or repairing and using the railway.

E. THE HEADING OF A CHAPTER IS A GENERAL INDICATOR OF ITS SUBJECT MATTER:

Chapter headings are parts of the statute enacted by Parliament. Chapter heading is a permitted tool of interpretation. It is considered to be a preamble of that Section to which it pertains. **(Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659).** The “heading” of Chapter-IV or the “heading” or “title” prefixed to Section 11 of the Railways Act, 1989 may be taken as broad and general indicators of the nature of the subject-matter dealt with thereunder. **(Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62).** The heading or title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject-matter dealt with by the enactment underneath, though the name would always be brief having its own

limitations. (**Raichurmatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 : 2004 SCC OnLine SC 465).**

The headings, prefixed to Sections or sets of Sections in some modern statutes, are regarded as preambles to those Sections. **(Maxwell on the *Interpretation of Statutes*. (12th edn page 11); Monopol Chemicals Pvt. Ltd. v. Municipal Corporation of Greater Bombay, 1984 SCC OnLine Bom 284).** They can be referred to in construing an Act of the legislature. While they cannot control the meaning of the plain words of a statute, they may explain ambiguities. (***Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004, pp. 152 and 155**; **Raichurmatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 : 2004 SCC OnLine SC 465; Frick India Ltd. v. Union of India, (1990) 1 SCC 400).** They may also be a useful and effective tool of interpretation in harmonizing the Section and the other provisions of the statute. **(Amar Nath Gupta v. Kolkata Municipal Corporation, 2017 SCC OnLine Cal 5212).**

Black's Law Dictionary defines *'construction'* to mean the act of building by binding or arranging parts of elements, the thing so built, and *'maintain'* to mean engage in general repair or upkeep. The Concise Oxford English Dictionary defines *'construct'* to mean build or erect and *'construction'* to mean the action or process of constructing; *'maintain'* to mean keep in good condition by checking or repairing it regularly; and *'work'* to mean the activities involving construction or repair, a thing or things done or made, denoting things or parts made of a specified material or with specified tools. As the heading, ie '*construction and maintenance of works*', must be understood as the condensed name assigned to indicate

collectively the characteristics of the subject-matter dealt with in Chapter IV of the Railways Act, what the provisions (including Section 11) must be understood as providing for, generally, is building and engaging in the repair and upkeep of the things specified thereunder.

F. 'MEANS' and 'INCLUDES': ITS SCOPE:

The word 'railway', is defined under Section 2(31) of the Railways Act, to mean a railway, or any portion of a railway, for the public carriage of passengers or goods and includes clauses (a) to (f) there-under. The word 'means' in Section 2(31) is intended to exhaustively define the said provision, make the definition a hard and fast definition, and prevent any other meaning to be assigned to the said expression, than that is put down in the definition. **(P.Kasilingam & Ors. Vs. P.S.G. College of Technnology (AIR 1995 SC 1395: 1995 SCC Supl. (2) page 348; Gough v. Gough: (1891) 2 QB 665; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court: (1990) 3 SCC 682)**.

Craies on Statute Law (7th Edn., 1.214) states that an interpretation clause which extends the meaning of a word does not take away its ordinary meaning, and is *not meant to prevent* the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act to be applied to something to which it would not ordinarily be applicable. Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning. The first part of the definition of "Railway" in Section 2(31) must, therefore, be given its ordinary, popular or natural meaning. **(*Black Diamond Beverages v. CTO*, (1998) 1 SCC 458).**

Interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things/aspects in the definition. The definition of 'railway' in the first limb of Section 2(31) would therefore mean a Railway or a portion of a railway which is used for the public carriage of passengers or goods.

The second limb of Section 2(31) brings within its ambit clauses (a) to (f) there-under and, by the use of the word 'includes', conveys an extensive meaning. The word "include" is generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute and, when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. **(*ESI Corpn.* v. *High Land Coffee Works*, (1991) 3 SCC 617**;***Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728; Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd., 1991 Supp (2) SCC 18 : AIR 1991 SC 686; Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607;*CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).**The word "include", a word of extension, is used in an interpretation clause when it seeks to expand and enlarge the meaning of the words or phrases occurring in the body of the statute. **(Forest Range Officer v. P. Mohammed Ali, 1993 Supp (3) SCC 627; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *CTO* v. *Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124).** It gives extension and expansion to the meaning and import of the preceding words or expressions. When the word "include" is used, it must be construed as

comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In using the word “includes”, the legislature does not intend to restrict the definition. it makes the definition enumerative, but not exhaustive. The term defined will retain its ordinary meaning but its scope would be extended to bring within it matters which its ordinary meaning may or may not comprise. (***Mamta Surgical Cotton Industries* v. *Commr. (Anti-Evasion)*, (2014) 4 SCC 87).**

The word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to “mean and include” and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to those words or expressions. **(*Oswal Fats & Oils Ltd.* v. *Commr. (Admn.)*, (2010) 4 SCC 728).** The word “includes” is also used in interpretation clauses in the normal standard sense, to mean “comprises” or “consists of” or “means and includes”, depending on the context. **(*N.D.P. Namboodripad* v. *Union of India*, (2007) 4 SCC 502).**

Section 2(31) uses both the expressions ‘means’ and ‘includes’. The words “means” and “includes” indicate “an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions”. (**Dilworth v. Commissioner of Stamps [1899 AC 99, 105-106:(1895-9) All ER Rep Ext 1576); Mahalakshmi Oil Mills v. State of A.P. (1989) 1 SCC 164, 169).** The use of these words, in Section 2(31) of the Railways Act, suggests that the definition of ‘Railway’ is intended to cover only those categories

specified therein. **(P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) SCC 348).** It must be understood to be an extensive explanation of the meaning which, for the purpose of the Railways Act, must invariably be attached to these words or expressions. Consequently, the definition of 'railway' under Section 2(31) would, besides the main part of the provision, be confined only to clauses (a) to (f) there-under, and not anything else.

Section 2(31)(c) defines railway to include all electric traction equipment, power supply and distribution installation used for the purposes of, or in connection with, a railway. Black's Law Dictionary defines "purpose" to mean an objective, goal or end. The Concise Oxford English dictionary defines "purpose" to mean the reason for which something is done; to have as one's objective. It is only the power supply and distribution installation which are used for the object of the railway, which falls within the definition of "railway". Power supply and distribution installation used for any other object or reason, apart from that of the railway, would not fall within the ambit of Section 2(31)(c) of the Railways Act.

As the power conferred on the railway administration under Section 11(g) is in connection with the working of the Railway, it is also necessary to understand what the expression "in connection with" means. The word "connected" means intimately connected or connected in a manner so as to be unable to act independently. **(Kashi Nath Misra v. University of Allahabad, 1965 SCC OnLine All 416).** The words "connected with" are also used in the sense that they are really "incidental to". **(STRONG & CO., OF ROMSEY, LIMITED vs WOODIFIELD (SURVEYOR OF TAXES): [1906] A.C. 448).** The connection contemplated must be real and proximate, and not far-fetched or problematical. **(Rex v.**

Basudev, 1949 SCC OnLine FC 26). To fall within the ambit of Section 11(g), the power to erect, operate, maintain or repair any power supply and distribution installation can be exercised only if there is an intimate or proximate connection thereto with the working of the Railway, or its objective/ reason is the working of the railway.

As the expression *"in connection with the working of the railway"* is used both in clauses (f) and (g) of Section 11, it must bear the same meaning in both these provisions. The power conferred on a railway administration, under Section 11(f), is to erect, operate, maintain or repair any telegraph and telephone lines in connection with the working of the railway, and not for any other purpose (such as, for instance, for providing telephone connections to the public at large). Similar to that of telegraph and telephone lines, the power to erect, operate, maintain or repair a power supply and distribution installation can be exercised by the Railway Administration only if its object is the working of the railway, and the erection, operation, maintenance and repair is closely connected with the working of the railway ie only if its connection with the working of the railway is intimate or proximate and is not remote.

G. IN THE ABSENCE OF ANY DEFINITION, THE MEANING OF WORDS USED IN A STATUTE CAN BE GATHERED FROM DICTIONARIES:

Several words used in Section 2(31) which defines a "Railway", and in Section 11 of Chapter IV of the Railways Act which relates to the *power of railway administration to execute all necessary works,* are not defined under the Railways Act. While it may be hazardous to interpret a word in accordance with its definition in another statute or statutory instrument,

more so when such statute or statutory instrument is not dealing with a cognate subject **(MSCO. (P) Ltd. v. Union of India, (1985) 1 SCC 51),** in the absence of any definition in that very document, a word which occurs in a statute or a statutory instrument should be construed giving it the same meaning which it receives in ordinary parlance or is understood in the sense in which people conversant with the subject-matter of the statute or statutory instrument understand it. **(MSCO. (P) Ltd. v. Union of India, (1985) 1 SCC 51).**

In the absence of its definition under the said Act, it is open to the Court/Tribunal, while interpreting those words, to assist themselves by any literary help they can find, including the consultation of standard authors and reference to well-known authoritative dictionaries. (**Camden (Marquis) v. I.R.C :(1914) 1 KB 641; CIT v. Raja Benoy Kumar Sahas Roy: AIR 1957 SC 768; Mohinder Singh v. State of Haryana, (1989) 3 SCC 93; Star Paper Mills Ltd. v. Collector of Central Excise, (1989) 4 SCC 724; R. v. Peters:(1886) 16 QBD 636),** and to take its aid to ascertain the meaning of a word in common parlance. **(State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280)**

As a dictionary gives all the meanings of a word, the court should select the particular meaning which would be relevant to the context in which it has to interpret that word. **(State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280).** The shade of meaning of a word, its different connotations and collocations, which one finds in a dictionary does not relieve the Court/Tribunal of the responsibility of having to make the ultimate choice of selecting the right meaning. The meaning which is most apt in the context, the colour and diction in which the word is used should

be chosen from the dictionaries. **(Bolani Ores Ltd. v. State of Orissa, (1974) 2 SCC 777).**

Neither is the expression “distribution installation”, nor are the words “erect”, ‘distribution’, ‘installation’ ‘construction’, ‘operation’, ‘maintenance’, “repair” etc defined under the Railways Act. As they are not defined words or expressions, the meaning of these words must be ascertained from dictionaries. The Concise Oxford English Dictionary defines ‘erect’ to mean “construct”; the word ‘operate’, with reference to a machine, to mean the function or control the functioning of. In the context of Section 11(g), the word ‘operate’ would mean controlling the functioning of the power supply and distribution installation. The Concise Oxford English Dictionary defines the word ‘repair’ to mean restore something damaged, worn, or faulty to a good condition, and the word ‘installation’ to mean the action or process of installing or being installed; a large piece of equipment installed for use.

The equipment through which electricity can be distributed is a distribution installation. What is permissible for a railway administration to do, for the purpose of constructing or maintaining a railway, is to erect, operate, maintain or repair a power supply and distribution installation i.e. the equipment through which power is supplied and distributed.

Webster's Dictionary gives several meanings of the word “distribute” as follows: (1) to divide among several or many; to deal out; apportion; allot; (2) to spread out so as to cover a surface or a space; (3) to divide or separate, as into classes, orders, kinds, or species; to classify; assort, as specimens, letters, etc. The same meaning is found in the *Oxford Concise Dictionary*. *Murry's Standard Dictionary* gives a somewhat better definition.

The second meaning attached to the word is “to spread or disperse abroad, through a whole space or over a whole surface; properly, so that each part of the space or surface receives a portion; less definitely, to spread generally, scatter”. Halsbury’s Laws of England, 5th Edition, referring to the English Act on Electricity, defines the term ‘*distribute'* in relation to electricity, to mean *distribute by means of a ‘distribution system’.* **P Ramanathan Aiyar, 6th Edition** states that the term ‘distribute’ would, in its natural sense, mean spreading of goods anywhere by whatever means that may be employed. The ordinary and general meaning of the word “distribute” is conveying/spreading of goods anywhere by whatever means that may be employed. **(State v. Nathumal Damumal : AIR 1962 Bom 21).**

H. ELECTRICITY IS “GOODS”:

Though it is not tangible, “Electricity” is movable property, and a commodity like other goods, as it can be manufactured, transmitted and sold. It falls within the definition of “goods” under the provisions of the Sale of Goods Act. (**Kartar Singh v. Punjab State Electricity Board, 2014 SCC OnLine P&H 5917; Commissioner of Income Tax v. The Hutti Gold Mines Co. Ltd: Judgment of the Karnataka High Court in ITA No. 08/2014 dated 16.09.2014; CIT v. NTPC SAIL POWER CO. (P) Ltd: (2020) 428 ITR 535)** as well as under the Electricity Act, 2003. (**State of A.P. v. National Thermal Power Corpn. Ltd. AIR 2002 SC 1895, (2002) 5 SCC 203; Commissioner of Sales Act, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur (1969) 1 SCC 200, Kartar Singh v. Punjab State Electricity Board, 2014 SCC OnLine P&H 5917; Sukhwinder Singh v. Raj Kaur, 2014 SCC OnLine P&H**

9003). As “electricity” is also “goods”, the words “distribution installation”, used in Section 2(31)(c) and 11(g) of the Railways Act can be understood to mean an installation, through which electricity is spread or disbursed and power is supplied, in connection with the working of the railway.

I. RELIANCE SHOULD NOT BE PLACED ON DICTIONARIES, WHERE A WORD OR EXPRESSION IS STATUTORILY DEFINED:

The submission urged, on behalf of the Railways, is that, since the Railways maintains a distribution installation through which power is supplied for the purpose of or in connection with the working of the railway, such a distribution installation, referred to in Section 2(31)(c) and Section 11(g) of the Railways Act, is the “*Distribution System*” referred to in Section 2(19) of the 2003 Act; and operation and maintenance of a distribution installation would suffice for the Railways to be held to be a distribution licensee even if the power supplied, through such a distribution installation, is to itself and to no other.

While it is true that neither the Railways Act nor the Electricity Act defines the words “distribute” or “installation”, that does not, by itself, require the expression “distribution installation” used in Section 2(31)(c) and Section 11(g) of the Railways Act to be given the same meaning as a “distribution system” which is a defined expression under Section 2(19) of the 2003 Act. Besides the expression “distribution system”, the words “distribution licensee” and “supply” are defined under Sections 2(17) and 2(70) of the Electricity Act. In order to understand what the expression “deemed distribution licensee”, as has been used in the third proviso to Section 14 of the Electricity Act means, reliance can only be placed on the definition of these words and expressions in the Electricity Act, and not on dictionaries, for it is well settled that the

dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted **(State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280).** Where the definition has been given in the statute itself, it is neither proper nor desirable to look to dictionaries to find out the meaning of the expression. The definition given in the statute is the determinative factor. **(S. Gopal Reddy v. State of A.P., (1996) 4 SCC 596).**

The words *"distribution installation",* used in Sections 2(31)(c) and 11(g) of the Railways Act, should also not be equated to the expression *"distribution system"* as defined in Section 2(19) of the Electricity Act for the definition of a word or expression in other enactments should not be blindly applied while interpreting a word or expression in the enactment in question. **(P.C. Cheriyan v. Barfi Devi, (1980) 2 SCC 461; Bangalore Turf Club Ltd. v. ESI Corpn., (2009) 15 SCC 33).** One cannot read provisions of one Act into another Act unless the Legislature, by specific provision made to that effect, has stated that the provisions of one Act can be read into the other Act. **(Thane Janta Sahakari Bank v. Election Commission of India, 2009 SCC OnLine Bom 1517).**

In construing a word in an Act, caution is necessary in adopting the meaning ascribed to the word in other Acts. "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act, which is not incorporated or referred to, such an interpretation is given to it for the purposes of that Act alone. (**Craies on Statute Law, Sixth Edn p. 164; Macbeth & Co. v. Chislett [1910 AC 220, 223 (HL); MSCO. (P) Ltd. v. Union of India, (1985) 1 SCC 51).** The meaning of a word may vary with the setting or context. **(*R.L. Arora v. State of U.P*: AIR 1964 SC 1230),** and the objects to be achieved not only as set out in the Preamble but also as gatherable from the antecedent history of the

legislation may be widely different. Even the same words may mean one thing in one context and another in a different context. This is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value when a specific statute has to be dealt with. **(D.N. Banerji v. P.R. Mukherjee : 1952 SCC OnLine SC 136).**

It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act. **(Pandit Ram Narain v. State of U.P: AIR 1957 SC 18).** It is well settled that observations made with reference to the construction of one statute cannot be applied with reference to the provisions of another statute which is not in pari-materia with the statute which forms the subject-matter of the previous decision. **(Lila Vati Bai v. State of Bombay: AIR 1957 SC 521).** Expression in an Act should not be construed in the light of the construction placed on a similar expression. **(State of Maharashtra v. Mishrilal Tarachand Lodha: AIR 1964 SC 457).** Further, when there is no ambiguity in the statute, it may not be permissible to refer to, for purposes of its construction, any previous legislation or decisions rendered thereon. **(Board of Muslim Wakfs v. Radha Kishan, (1979) 2 SCC 468;*S. Mohan Lal v. R. Kondiah*, (1979) 2 SCC 616; Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests, 1990 Supp SCC 785).**

It is not as if, in the present case, the words used in both the Statutes are the same. As different words are used, and it is not a sound principle of construction to interpret expressions defined in one Act with reference to their use in another Act or to gather its meaning from dictionaries, the expression “Distribution System” as defined in Section 2(19) of the 2003 Act ought not to be given the same meaning as is given to the undefined expression

“distribution installation” used in Section 2(31)(c) and Section 11(g) of the Railways Act,

Even if we were to proceed on the premise that the system of wires and associated facilities (which words find place in the definition of a “distribution system” under Section 2(19) of the 2003 Act) is what the words “distribution installation” mean, that, by itself, would not suffice to equate the expression “distribution installation”, referred to in Section 2(31)(c) and Section 11(g) of the Railways Act, to a “distribution system” as defined under Section 2(19) of the 2003 Act, for Section 2(19) does not confine a “distribution system” only to a system of wires and associated facilities, but also requires such a system of wires and associated facilities to exist between the delivery points on the transmission lines or the generating station connection, and the point of connection to the installation of the consumers. The definition of the term “distribution licensee”, under Section 2(17) of the Electricity Act, 2003, emphasises upon the distribution licensee operating and maintaining a distribution system, for supply of power to consumers ie sale of electricity to consumers. **(*Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission*, (2014) 8 SCC 444).** In short, it is only if the system of wires and associated facilities connects the end point of the transmission lines or the generation station with the point of connection to the consumer’s installation, would it fall within the definition of a “distribution system” under Section 2(19) of the 2003 Act.

Even if the distribution installation, through which power is supplied to different consumption points of the Railways, is held to be a system of electric wires and installations and, from the overhead equipment running along the electric traction, the locomotives use/consume electricity at different points for

running of trains and for end use/consumption for signalling, communication, equipment etc, the test of *"supply"* of electricity" under Section 2(70) of the Electricity Act is not satisfied for Railways to be held to be a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act.

While it may be possible to contend that the "distribution installation" of the Railways is connected from the generating station, through its own transmission lines, what must also be satisfied, for such a "distribution installation" to be held to be a "distribution system" under Section 2(19) of the 2003 Act, is for it to also be connected to the point of installation of the consumer. If it does not, then the words "distribution installation", as referred to in the Railways Act, cannot be understood to have the same meaning as a "distribution system" under Section 2(19) of the 2003 Act.

J. "AND" / "OR": ITS MEANING:

The words "***power supply and distribution installation"*** are used both in Section 2(31)(c) and Section 11(g) of the Railways Act. What is urged before us, on behalf of the Railways, is that the words "*power supply*" and "*distribution installation*" should be treated as two distinct and separate activities, and should not be understood either as being inseparable or as being integrally connected with each other ie the words "power supply" should be read disjunctively and separate from the words "distribution installation".

In this context, it is useful to note that, in *Stroud's Judicial Dictionary*, 3rd Edn it is stated at p. 135 that "*and*" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of "*or*". **(Ishwar Singh Bindra v. State of U.P., (1969) 1 SCR 219).** The expression '*and*' has generally a cumulative effect, requiring the fulfillment of all the conditions that it joins together. (**M.**

Satyanarayana v. State of Karnataka(1986) 2 SCC 512; A.K. Gopalan v. The State of Madras 1950 SCC 228 ; Ishwar Singh Bindra v. The State of U.P. (196) 1 SCR 219). In *Maxwell on Interpretation of Statutes*, 11th Edn., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions '*or*' and *'and'* one for the other". **(Ishwar Singh Bindra v. State of U.P., (1969) 1 SCR 219).** The word *'or'* is normally disjunctive, and *'and'* is normally conjunctive, but at times they are read as vice versa. We do sometimes read *'and'* as *'or'* in a Statute. But we do not do it unless we are obliged, because *'or'* does not generally mean *'and'*, and *'and'* does not generally mean *'or'*. (**Municipal Corporation of Delhi v. Tek Chand Bhatia(1980) 1 SCC 158; Maxwell on Interpretation of Statutes, 11th Edn., p. 229-30; Competition Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744; Green v. Premier Glynrhonwy State Co. (1928) 1 KB 561**). One will find it said in some cases that *'and'* means *'or'*; but *'and'* never does mean *'or'*. (**Tek Chand Bhatia(1980) 1 SCC 158; Stroud's Judicial Dictionary, 3rd Edn., Vol. 1 and 3).** Reading of *'and'* as *'or'* is not to be resorted to unless some other part of the same statute, or the clear intention of it, requires that to be done. (**Tek Chand Bhatia(1980) 1 SCC 158; Marsey Docks & Harbour Board v. Henderson L.R. (1888) 13 A.C. 603; Competition Commission of India (2010) 10 SCC 744; Commissioner Central Excise and Customs v. Dujodwala Resins and Terpenes Ltd., 2019 SCC OnLine Utt 577).**

Yet another reason why *"and"* should not be read as *"or"* is that the duty of the Court is to interpret the word that the legislature has used. Even if these words are found ambiguous, the power and duty of the Court to travel outside them, on a voyage of discovery, are strictly limited. To do so, is a naked usurpation of legislative function under the thin disguise of interpretation.

(**Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530; Magor & St. Mellons R.D.C. v. Newport Corporation (1951) 2 All ER 839 (HL); Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court(1990) 3 SCC 682).** Use of the conjunction "*and*", in Sections 2(31)(c) and 11(g), between the words "power supply" on the one hand, and "distribution installation" on the other, makes it clear that reference therein is to the installation through which power is supplied and distributed, and not independently to a distribution installation through which supply of power may or may not take place.

K. "REDDENDO SINGULA SINGULIS" RULE:

The submission urged before us, on behalf of the Respondents, is that the *Reddendo Singula Singulis* rule would require the word 'erect' in Section 11(g) to be understood with reference to the power supply and distribution installation which requires erection; the word 'operate' as referring to the power supply and distribution installation which requires to be operated regularly; the word 'maintain', with reference to the power supply and distribution installation which is required to be maintained regularly; 'repair' as referring to the power supply and distribution installation, which is required to be repaired from time to time; and all the above activities are with reference to the working of the Railways.

The rule of *"Reddendo Singula Singulis"* is applicable where a sentence in a statue contains several antecedents and several consequences. In such a case, they are to be read distributively, ie each phrase or expression should be referred to its appropriate object **(Koteswar Vittal Kamath vs. K. Rngapa Baliga & Co (1969 SCR (3) 40 : AIR 1969 504)**. **Francis Bennion — Statutory Interpretation [1984 Edition]** explains the rule of *Reddendo Singula Singulis* as "where a complex sentence has more than one subject,

and more than one object, it may be the right construction to render each to each, by reading the provision distributively and applying each object to its appropriate subject."

Applying the said rule of *Reddendo Singula Singulis* to the case on hand, would show that, if the words *'power supply'* and *'distribution installation',* used in Section 2(31)(c) and Section 11(g) of the Railways Act, are read disjunctively, Section 11(g) would be rendered meaningless. When so read, the words 'erect', 'operate', 'maintain', or 'repair' would apply separately to the expressions *'power supply'* and *'distribution installation'*. The word 'repair', as noted hereinabove, means to restore something, which is damaged or worn or faulty, to a good condition and the word 'erect' means "construct". While a distribution installation can no doubt be repaired or erected, it would make no sense to state that power supply can be repaired or that power supply can be erected. As Parliament cannot be said to have undertaken a meaningless exercise of legislation, the words 'power supply' and 'distribution installation' should not be read disjunctively and, on being read conjunctively, would only mean an installation through which power is supplied and distributed. Further, operation, maintenance, and repair of the power supply and distribution installation can only be in connection with the working of the railway and, consequently, such activities would be confined for the use of the railways alone, and not for any other purpose.

What is conferred by Section 11 of the Railways Act is the power to execute works which, as noted hereinabove, means to execute the activity of construction or repair. Such a power to execute works is to be exercised for the purposes of constructing or maintaining a railway. In effect, the power conferred by Section 11 is the power to undertake the activity of constructing, keeping in good condition and to repair those things mentioned in clauses (a)

to (h) of Section 11. Consequently, the installation, through which power is supplied and distributed, is required to be constructed and kept in a good condition only for the purpose of the Railways, and not for any other purpose including the purpose of distributing and supplying electricity to consumers (ie the public), which a “distribution licensee’ is obligated to do under the provisions of the Electricity Act.

L. IS THE AREA COVERED BY SECTION 2(31) READ WITH SECTION 18 OF THE RAILWAYS ACT, THE “AREA OF SUPPLY” AS DEFINED UNDER SECTION 2(3) OF THE ELECTRICITY ACT?

The submission, urged on behalf of the Railways, is that, on a conjoint reading of clauses (a), (b) and (d) of Section 2(31) with Section 18 of the Railways Act, the area falling within the boundary marks and fences provided for a railway or part thereof, as also within the gates, chains, bars, stiles or handrails to be erected at level crossings, is the area of operations of the Railways within which it has the power to exclusively distribute electricity, notwithstanding what the Electricity Act, 2003 stipulates.

It is useful therefore to consider what these provisions stipulate. Section 2(31) of the Railways Act, 1989 defines "railway" to mean a railway, or any portion of a railway, for the public carriage of passengers or goods, and to include, among others, (a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway; (b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway; and (d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water

supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway.

Section 18 of the Railways Act, 1989, which relates to fences, gates and bars, enables the Central Government, within such time as may be specified by it or within such further time, as it may grant, to require that (a) boundary marks or fences be provided or renewed by a railway administration for a railway or any part thereof and for roads constructed in connection therewith; (b) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at level crossings; and (c) persons be employed by a railway administration to open and shut gates, chains or bars.

What clauses (a), (b) and (d) of Section 2(31) stipulate are that all lands within fences and boundaries are the limits of the land of the Railways, and all railway lines and sidings, roads and streets etc, as referred to in the aforesaid clauses, form part of the Railways. Section 18 is a statutory power conferred on the Central Govt to direct the Railway Administration to put up fences etc to earmark the railway boundaries. The Railway administration would undoubtedly exercise exclusive jurisdiction, within the areas falling within these boundaries, with respect to matters falling within clauses (a) to (h) of Section 11 of the Railways Act, including, under Section 11(h), to erect, maintain, operate or repair a power supply and distribution installation.

The fact, however, remains that the aforesaid provisions do not even use the expression *"area of operations"* which is then sought to be equated, by the Learned Senior Counsel appearing on behalf of the Railways, to the expression *"area of supply"*. The expression used in the Electricity Act is not *"area of operations",* but *"area of supply"* - an expression defined under Section 2(3) of the Electricity Act. As noted hereinabove, it is not a sound

principle of construction to draw meaning of words, used in one Act, with reference to similar but not identical words used in another Act.

Section 2(3) of the Electricity Act,2003 defines *"area of supply"* to mean the area within which a distribution licensee is authorised by his licence to supply electricity, and Section 2(70) defines *"supply"*, in relation to electricity, to mean the sale of electricity to a licensee or consumer. To fall within the definition of *"area of supply"* under Section 2(3) of the Electricity Act, 2003 the following conditions must be fulfilled (a) the area must be one which is authorised in favour of a distribution license; (b) such an authorisation must be by way of a license; and (c) the license must relate to the sale of electricity to another licensee or consumer.

The power to grant a license, for distribution of electricity, is conferred by Section 14(b) of the Electricity Act, only on a State Commission. By way of a license so granted, the State Commission confers power on the distribution licensee to exclusively sell electricity within the prescribed area ie the area of supply stipulated by the Commission. Sale of electricity, to constitute *"supply"*, must be to another licensee or consumer.

In terms of the provisions of the Sale of Goods Act, (as shall be detailed later in this order), one cannot sell goods to oneself. Consequently, electricity consumed by the licensee itself would not constitute either sale or supply. Self-consumption of electricity by the Railways would not constitute *"supply"*, and the areas within which such consumption takes place would not constitute *"area of supply"* under Section 2(3) of the Electricity Act.

M. SECTIONS 2(72) AND 2(74) OF THE ELECTRICITY ACT : ITS SCOPE:

Section 2(73) defines "transmission licensee" to mean a licensee authorised to establish or operate transmission lines, and Section 2(74) defines "transmit" to mean conveyance of electricity by means of transmission

lines and the expression "transmission" to be construed accordingly. Section 2(72) of the Electricity Act,2003 defines *"transmission lines"* as not being an essential part of the distribution system of a licensee. While such an issue does not arise for consideration in this batch of appeals, even if we were to proceed on the premise that Railways is a transmission licensee, neither does it flow therefrom nor does it automatically make Railways a distribution licensee also, as a transmission licensee is authorised to establish or operate transmission lines which, as noted hereinabove, is not an essential part of the distribution system of a licensee.

While conveyance of electricity, in the Railway system, may not be from point to point in terms of Sections 2(72) and 2(74) of the Electricity Act, the fact remains that, for the Railways to be deemed to be a distribution licensee, they must satisfy the requirements of Section 2(17) of the Electricity Act, and must be operating or maintaining a distribution system, i.e., the system of wires and associated facilities between the delivery point of the transmission line or the generating station connection and the point of connection to the installation of the consumers, for the sale of electricity to a licensee or consumer in the area within which the distribution licensee is authorised by his license to sell electricity to another licensee or consumer.

N. CONVEYANCE OF ELECTRICITY THROUGH THE DISTRIBUTION INSTALLATION DOES NOT, BY ITSELF, AMOUNT TO SUPPLY:

Even though the word ‘distribute” is not defined in the Electricity Act, the word “distribution licensee” is defined in Section 2(17) thereof, and each of the words used therein i.e. (i) “distribution system”, (ii) “supply”, (iii) “consumer” and (iv) area of supply” are again defined expressions under clauses (19), (70), (15) and (3) of Section 2 of the said Act. It would not be possible for us, therefore, to hold that, by mere conveyance of electricity from the traction sub-

station/sub-station/switchyard of the Railways to different points of end use of electricity, namely where electricity gets consumed within its geographical area, the Railways should be understood as discharging the functions of a deemed distribution licensee falling within the ambit of the third proviso to Section 14 of the Electricity Act, more so as neither Section 11(g) nor 11(h) of the Railways Act empower Railways to supply electricity, by way of sale, to consumers (ie the general public).

The mere fact that the electricity, received at the traction sub-station/non-traction sub-station/switchyard of the Railways, is distributed for consumption by the Railways including the Railway locomotive, would not suffice for the Railways to be held to be a deemed distribution licensee since Railways, as a distribution licensee, could not have sold electricity to itself as a consumer much less for a consideration. Sale of electricity necessarily involves a seller, a buyer and the price; and, in the present case, this distinction is completely obliterated. In the absence of sale of electricity to a consumer at a price, the test of “supply of electricity” under Section 2(70) is not satisfied for Railways to be held to be a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, even if the overhead equipment running along the electric traction, and locomotives, are held to use electricity at different points for running of trains and for end use for signalling, communication, equipment etc.

On their own showing, the traction substation/non-traction substation/switchyard of the Railways, which receive electricity from outside their area, is the starting point, with each section running into around 30 KMs and meeting their requirement of electricity at different places of its consumption. It is at the traction sub-station point that Railways receives electricity from outside its area as specified in Section 18 of the Railways Act.

The electricity received by the Railways at this point is as a consumer and not as a distribution licensee, since the electricity so received is consumed by the Railways itself and is not sold to third parties, much less at the point of connection to the installation of the consumer.

As distribution of electricity, through the system of wires and associated facilities, is undertaken by them for the specific purpose of supplying electricity to their consumers, mere operation and maintenance of the system of wires and associated facilities would not suffice to hold the person discharging such functions to be a distribution licensee. Not only should such a system of wires and associated facilities exist between the delivery point on the transmission line or generating station on the one hand and the point of connection to the installation of the consumer on the other, the said system must also be operated and maintained for the purpose of supplying electricity to consumers in the area of supply of such a licensee.

As rightly contended on behalf of the Respondents, the activities of the Railways, of transferring electricity from its traction sub-station/non-traction sub-station/switchyard, to various points of consumption, would not constitute ‘distribution of electricity’ as (a) if the traction sub-station (the point of delivery of power) is construed as the delivery point of the transmission lines/generating station connection under Section 2(19), it also becomes the second point mentioned in Section 2(19), ie the point of installation of the consumer, since consumption of power is also at the very same place, leaving no scope for any system of wires to exist between them. On the other hand, if the traction sub-station/non-traction sub-station/switchyard is presumed not to be the point of installation of the consumer, and the point of consumption by various entities located within the Railway premises are considered as the point of installation of the consumer, it would then mean that the entities are

different/distinct from Railways which would run contrary to Section 2(31)(d) of the Railways Act, which bring all these entities within the definition of "Railways". Anything beyond the said point, ie the power supply and distribution installation being maintained by the Railways, cannot be construed as a "distribution system" under Section 2(19) of the Electricity Act. It is difficult for us, therefore, to disagree with the submission, urged on behalf of the Respondents, that the traction sub-station/non-traction sub-station/switchyard is the installation of the consumer within the meaning of Section 2(19) of the Electricity Act.

O. JURISDICTION EXERCISED BY REGULATORY COMMISSIONS OVER DISTRIBUTION LICENSEES ABSENT IN THE CASE OF RAILWAYS:

In this context, it is useful to note that the proviso to Section 16 of the Electricity Act requires the Appropriate Commission to specify the conditions of license for a deemed licensee under the third proviso to Section 14. The area of supply of any such licensee is among the conditions to be stipulated by the State Commissions, under the proviso to Section 16. The power to alter or amend the terms and conditions of the license is conferred by Section 18 only on the Appropriate Commission. There is nothing in the Railways Act which makes the right of Railways, to exercise its powers and discharge its functions, subject to the jurisdiction of the Regulatory Commissions under the Electricity Act, nor is there any provision therein making the powers, conferred on the Regulatory Commissions under the Electricity Act, inapplicable to the Railways.

P. DOES A CONSUMER'S RIGHT TO SEEK OPEN ACCESS DISCHARGE A DISTRIBUTION LICENSEE OF ITS OBLIGATION TO SUPPLY ELECTRICITY TO OTHER CONSUMERS?

While it is true that the Electricity Act, 2003 has relaxed the rigour of the previous laws, and has given freedom to a consumer to procure electricity through open access from sources of its choice, the fact remains that a distribution licensee has no such freedom to refuse supply to its consumers as it is obligated by law not only to operate and maintain a distribution system but also to supply electricity to consumers, in its area of supply, through such a system.

Q. PROVISIONS OF THE ELECTRICITY ACT APPLICABLE TO DISTRIBUTION LICENSEES:

The Electricity Act is a consolidating statute. It brings within its purview generation, transmission, distribution, trade and use of electricity. Whereas generation of electricity has been brought outside the purview of the licensing regime, transmission, distribution and trading are subject to grant of licence and are kept within the regulatory regime. The statute provides for measures to be taken which would be conducive to development of the electricity industry, for promoting competition and for protection of interest of consumers and supply of electricity to all areas. **(Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659).**

Section 16 of the Electricity Act, 2003 relates to the conditions of licence. The proviso to Section 16 requires the Appropriate Commission to specify any general or specific conditions of licence applicable to licensees referred to in the first, second, third, fourth and fifth provisos to Section 14 ie to several categories of deemed licensees. Section 17, which prohibits a licensee from doing certain things except with the approval of the Appropriate Commission, would apply to a deemed licensee also.

Part VI of the Electricity Act deals with the distribution of electricity and contains provisions with respect to distribution licensees. Section 42

thereunder relates to duties and open access. The duties of a distribution licensee under Section 42(1) is not only to develop and maintain the distribution system in its area of supply, but also to supply electricity in accordance with the provisions of the Electricity Act. No power is conferred on the Railways, by Section 2(31)(c) and 11(f) of the Railways Act, to *"supply"* electricity, in terms of Section 2(70), which is a statutory duty cast on a distribution licensee under Section 42(1) of the Electricity Act.

Section 42(2) requires a State Commission to introduce open access in phases, subject to such conditions (including cross subsidies, and other operational constraints) as may be specified by it. In specifying the extent of open access in successive phases, and in determining the charges for wheeling, the State Commission is required to have due regard to all relevant factors including cross subsidies, and other operational constraints. The first proviso to Section 42(2) requires open access to be allowed by a distribution licensee on payment of a surcharge, in addition to the charges of wheeling, as may be determined by the State Commission. Under the second proviso, such surcharge shall be utilised to meet the requirements of the current level of cross subsidy within the area of supply of the distribution licensee. Under the third proviso such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission. Under the fourth proviso such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. Under the fifth proviso the State Commission shall, by regulations, provide such open access to all consumers who require supply of electricity where the maximum power to be made available at any time exceeds one megawatt. Section 42(3) stipulates that where any person whose premises are situated within the area of supply

of a distribution licensee, other than a local authority, requires supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee to allow for wheeling of such electricity in accordance with regulations made by the State Commission, and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access. Section 42(4) stipulates that, where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of the distribution licensee arising out of his obligation to supply.

Section 42(2) and its provisos, read with sub-sections (3) & (4) of Section 42, make it clear that a consumer, located within the area of supply of a distribution licensee, is free to seek open access to procure electricity either from a generating company, or any licensee other than the distribution licensee within whose area of supply the said consumer falls. Open access, which the distribution licensee is obligated to provide at the request of its consumers, is only on payment of a surcharge which also includes the cross-subsidy requirements of a distribution licensee. While a consumer is free to procure electricity from elsewhere, and cannot be denied open access by the concerned distribution licensee, the obligation placed on such a consumer, who has sought such open access, is to pay surcharge, including cross subsidy surcharge, to the distribution licensee in whose area of supply the consumer is located, and from whom he no longer procures electricity. As this obligation to pay cross subsidy surcharge is fastened by Section 42 only on a consumer, and not on a distribution licensee, accepting the claim of the

Railways to be a distribution licensee would enable them to avoid payment of cross subsidy surcharge, which they would otherwise have been obligated to pay in case they choose to procure power directly from a generator

Section 43 of the Electricity Act is the duty to supply on request and Section 43(1) stipulates that, save as otherwise provided in this Act, every distribution licensee shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply. Section 43(3) provides that, if a distribution licensee fails to supply the electricity within the period specified in Section 43(1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default. While the consumer has been conferred the right to demand supply of electricity to its premises from the distribution licensee, a corresponding obligation is cast on the distribution licensee to supply electricity to such a consumer at the latter's request. The mere fact that one or some of its consumers seek open access, and thereby cease to receive supply from them, does not discharge the distribution licensee of its obligations to supply electricity to other "consumers" in its "area of supply" in view of its universal supply obligation in terms of the aforesaid provisions of the Electricity Act.

Section 50 obligates the State Commission to specify an electricity supply code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity; measures for preventing tampering, distress or damage to electrical plant, or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter; entry for replacing, altering or maintaining electric lines or electrical plants or meter and such other matters. The afore-

said provisions of Chapter VI of the Electricity Act are incapable of compliance by the Railways under the provisions the Railways Act.

The obligation cast on a distribution licensee, by Section 43 to supply electricity to the owner or occupier of any premises (consumer), would also apply to a deemed distribution licensee. The submission urged on behalf of the Indian Railways, however, is that this obligation is confined only to a consumer within its area of supply, and it is not even the case of the Respondents that any such consumer has been denied supply by Railways though he had sought for it. The fallacy in this submission is that the area falling within the boundaries of the Railways is sought to be projected as the "area of supply" under Section 2(3) of the Electricity Act, which it is not. The areas, falling within the boundaries under Section 18 of the Railways Act, form part of the Railways itself. As the entities located within the said areas are integrally connected with and function for the benefit of the Railways, they cannot be equated to "consumers" falling within the "area of supply" of a distribution licensee in terms of the Electricity Act.

It is not even contended before us that the power conferred on the Railways, with respect to erection, operation, maintenance and repair of electric traction equipment and power supply and distribution installations, has been restricted or impaired by any of the provisions of the Electricity Act. While no provision of the Electricity Act, in view of Section 173 thereof, can impinge on such powers statutorily conferred on the Railways, that does not mean that such powers can be extended to include the non-existent power to distribute electricity, which a distribution/deemed distribution licensee is empowered to do only in view of Section14 of the Electricity Act and its third proviso.

Part VII of the Railways Act relates to Tariff. Section 61 thereunder requires the Appropriate Commission, subject to the provisions of the Electricity Act, to specify the terms and conditions for the determination of tariff and, in doing so, to be guided by the aspects referred to in clauses (a) to (i) thereunder. Section 62 relates to determination of tariff and, under sub-section (1)(d) thereof, the Appropriate Commission shall determine the tariff, in accordance with the provisions of the Electricity Act for retail sale of electricity (ie sale of electricity by a distribution licensee to a consumer). Section 62(2) confers power on the Appropriate Commission to require a licensee to furnish separate details, as may be specified, in respect of distribution. Section 64 prescribes the procedure for determination of tariff under Section 62, and requires an application to be made by a licensee. It is not in dispute that, in the case of Railways, no such exercise of determination of tariff is undertaken by the Regulatory Commissions.

The submission of Mr. M.G. Ramachandran, Learned Senior Counsel, that the provisions of tariff under Part VII of the Electricity Act have no application to the Railways as a deemed distribution licensee in view of Section 30 of the Railways Act, and in view of Section 173 of the Electricity Act the provisions in Part VII, which are inconsistent with Section 30 of the Railways Act, are inapplicable, shall be examined later in this order.

R. PARLIAMENT IS PRESUMED TO BE AWARE OF OTHER LAWS IN EXISTENCE WHEN THE RAILWAYS ACT WAS ENACTED:

It is not even the case of the Railways that Section 2(31)(c) and Section 11(g) was either introduced or amended after the Electricity Act, 2003 came into force. When the Railways Act was enacted in 1989, it was the Indian Electricity Act 1910 and the Electricity Supply Act, 1948 which

were then in force. Under these enactments, supply of electricity was a licensed activity. When any law is enacted, the legislature is presumed to be aware of all existing laws. It must be so presumed, even in absence of any specific provision in the subject enactment, that Parliament was aware of all statutes which had been enacted prior thereto. **(KSL and Industries Ltd. v. Arihant Threads Ltd., (2008) 9 SCC 763).** Since Parliament is presumed to be aware of the laws then in force, (which required a license to be obtained for supply of electricity), when it undertook the exercise of enacting the Railways Act, a specific provision would have made in the Railways Act, exempting the Railways from obtaining a license for supply of electricity, if it intended to confer on them the power to supply electricity. It is also evident that, when the Railways Act including Sections 2(31)(c) and 11(g) thereof was made in 1989, Parliament could not have intended to make any provision therein to exempt Railways from the rigours of the Electricity Act which was enacted 14 years thereafter in 2003.

The end point of the “distribution system” (as defined in Section 2(19) of the Electricity Act), ie the system of wires and associated facilities, must be the point of connection to the installation of a “consumer” ie the person who is *“supplied”* with electricity (Section 2(15) of the Electricity Act). As “Supply” is defined in Section 2(70) to mean sale of electricity, it is only a person to whom electricity is sold who can be called a consumer. Further, “distribution” is not mere maintenance or operation of the distribution installation (even if it be held to be the system of wires and associated facilities), but also involves “supply” of electricity, through such a system, to consumers in the area of supply of a distribution licensee ie sale of electricity to consumers in the area earmarked in the distribution license by the appropriate Commission. The Electricity Act does not envisage “Distribution” dehors “Supply”. While

electricity can be supplied by others also, a distribution license is granted to a licensee not merely to maintain and operate a distribution system but in addition to supply electricity, through such a system, to consumers in the area of supply of such a licensee. The Electricity Act does not provide for grant of license only to operate a distribution installation without the concomitant obligation of supply (sale) of electricity to consumers.

The claim of the Railways to be supplying electricity to third parties, such as book shops, canteens, vendors etc. in the railway stations and at other places, shall be examined later in this order under Issue No.8.

S. CONCLUSION:

Issues 1(A) &(B) are answered holding that the activities of the Railways as provided under Section 11(g) and (h) read with Section 2(31)(c) of the Railways Act, 1989, and its activity of conveying electricity from its traction sub-station/non-traction sub-stations/switch-yards to various points of consumption including locomotives, do not constitute 'distribution of electricity' as, among others, there is no supply (ie sale of electricity for a price) by Railways in terms of Section 2(70) of the Electricity Act.

VI. ISSUE 2:

Whether the 'non-obstante clause' in Section 11 of the Railways Act, 1989 and Section 173 of the Electricity Act, 2003, providing for non-application of Electricity Act, 2003 to the extent of inconsistency with the Railways Act, 1989 vest in Railways the right to undertake distribution and use of electricity in the area of operation of Railways unhindered by the provisions of the Electricity Act, 2003?

A. SUBMISSIONS ON BEHALF OF RAILWAYS:

Sri M. G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that Section 11 of the Railways Act, 1989 begins with a 'non-obstante clause' namely "*Notwithstanding anything contained in any other law…"*; this non obstante clause is absolute in nature; it does not stipulate the requirement of 'anything to the contrary**'** contained in any other law; the non obstante clause is specific to the matters enumerated in Section 11 which include electricity distribution aspects in sub clause (g), and further to *do all other acts necessary for making, maintaining, altering or repairing and using the railway* in sub clause (h); the implication and overriding effect of the non obstante clause in Section 11 of the Railways Act, 1989, vis-à-vis Electricity Laws, has been specifically considered by the Supreme Court in **General Manager, Northern Railways represented by Union of India -v- Chairman, Uttar Pradesh State Electricity Board and Others, (2012) 3 SCC 329;** while this case was under the electricity laws existing prior to the coming into force of the Electricity Act, 2003 on 10.06.2003, by the time the matter was considered and decided on 09.02.2012, the 2003 Act had been enacted; the Supreme Court had also considered the same in paras 15 to 17 of the said judgement; the ratio or the principles laid down in this decision is clear and unambiguous; firstly, the said decision cannot be restricted only to the laying of the transmission line as claimed by the opposite side; the words used in Para 17 are *"This will certainly include construction of transmission lines"* and not that it is only in regard to transmission lines; the said decision has comprehensively dealt with sourcing of electricity by Railways from a generating company, and not from the distribution licensee in the adjoining area of supply; it relates to transmission of electricity from the generating station to the Railway periphery, and thereafter distribution to places of end use/consumption; in the

said decision, the Supreme Court was considering the aspect of a transmission line being constructed by Railways outside the area of operation of the Railways, namely from the Dadri generating station of NTPC to the traction sub-station of Railways at Ghaziabad, and the 220 KV lines along the traction till Naini near Allahabad; in terms of the said judgement, the Railways is entitled to source electricity directly from the generating company, and not from the distribution licensee of the adjoining area, and construct its own transmission line up to the Railways periphery without being affected by the licence requirements under the Electricity laws; if so, it will be anomalous to state that the Railways cannot distribute and use electricity in the area of its operation without the grant of a licence under the provisions of the electricity laws; as a natural consequence, the electricity, sourced from outside and transmitted by Railways up to its area of operation, is necessarily for distribution and use in the area of operation of the Railways; the ratio decidendi of the decision of the Supreme Court is clear, namely, that the Railways Act, 1989 authorises Railways to undertake all things in connection with those specified in Section 11 of the Railways Act, 1989 without, in any manner, being affected by the provisions of the Electricity Laws; in this regard, the Supreme Court had, in Para 15, taken note of Sections 12 and 14 of the Electricity Act, 2003; this decision is a law laid down by the Supreme Court under Article 141 of the Constitution of India; the afore-said decision, holding that transmission of electricity (which is in fact outside the area of operation of the Railways) is governed by the provisions of a special enactment i.e., the Railways Act, 1989 and not by the enactments governing electricity, (para 15, should be applied with equal force, rather with higher force, in regard to the distribution of electricity within the area of operations of the Railways).

Sri M. G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the Division Bench of the Bombay High Court, in **Ganv Bhavancho Ekvott -v- South Western Railway, 2022 SCC Online Bom 7184**, has analysed the entire law on the non obstante clause with reference to Section 11 of the Railways Act, 1989; in the said judgement, the Bombay High Court held that, by virtue of the non-obstante clause in Section 11 of the Railways Act, 1989, the Indian Railways cannot be required to obtain environmental clearance under the Environment Protection Act, 1986, a fortiori, under the 2011 Costal Regulation Zone Notification, building permissions from the village panchayat under the Panchayat Act or other permissions under the other stated State legislation, and licences and fees, for putting up hoardings by the concerned railways, is not required under the Mumbai Municipal Corporation Act*;* the argument that Section 11 does not, either expressly or by necessary implication, exempt a railway administration from obtaining environmental clearance under the EP Act, a fortiori, under the 2011 CRZ Notification was rejected as not valid; the Bombay High Court has based its decision on Section 11 of the Railways Act which confers wide ranging powers with a non-obstante overriding clause; and under Section 11, the Railways Act *shall have its full operation, other laws should not be an impediment for operation of the Railways Act, and the provisions of other laws* shall *yield place to Railways Act;* and these principles equally apply to the provisions of the Electricity Act, 2003. while considering Section 11 of the Railways Act, 1989.

Reliance is placed by the Learned Senior Counsel on the judgement of the Bombay High Court in **Union of India, Through General Manager, Western Railway -v- Municipal Corporation of Greater Mumbai, (2018) 2 AIR Bom R 227; Goa Foundation & Another -v- The Konkan Railway**

Corporation, AIR 1992 Bom 471; **Subhas Dutta -v- Union of India, (2001) 3 Cal LT 36**; **Geologist, District Geologist Office -v- Sunil Kumar, 2015 4 KLCK 0134 (Kerala); and Village Panchayat of Velsao – v. Ministry of Railways, 2022 SCC OnLine Bom 3526.**

With regards interpretation of the non obstante clause, reliance is placed by the Learned Senior Counsel on (1) Interpretation of Statutes, Vepa P. Sarathi, 4th Edition pages 578 to 582; (2) **Chandavarkar Sita Ratna Rao -v- Ashalatha S Guram, (1986) 4 SCC 447**; (3) **Vivek Narian Sharma -v- Union of India, (2023) 3 SCC 1;** and (4) **A. Navinchandra Steels (P) Ltd. -v- SREI Equipment Finance Ltd., (2021) 4 SCC 435.**

On repugnancy, inconsistency and the extent to which the Railways Act can be harmoniously construed with Section 173 of the Electricity Act, 2003**,** Sri M.G. Ramachandran Learned Senior Counsel appearing on behalf of the Railways, would submit that repugnancy is generally with regards consideration of legislative competence under Article 254 and Schedule VII to the Constitution; inconsistency is with respected to the provisions of two different Acts, State or Central as the case may be, or between two different provisions in the same Act; in case of repugnancy of a State Act to a Central Act, the State is held to have no legislative competence; in the case of inconsistency, the entire act is not considered to be invalid, some provisions may be held not applicable to certain situations to the extent of the inconsistency; however, the test to determine existence of repugnancy is not exclusively when the two acts collude with each other, or one has to disobey one in order to obey the other; even, in the absence of such collision, there can be inconsistency, if the scheme of the Act, containing the non obstante clause, is seen, and if the intention of the legislature/Parliament is to occupy the entire field, in which case the provisions of the other Act should yield to

allow full effect to the overriding Act; and, in this regard, reference may be made to (1) **State of Orissa -v- M.A. Tulloch & Co., (1964) 4 SCR 461**; and (2) **Forum for People's Collective Efforts -v- State of W.B., (2021) 8 SCC 599.**

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would then submit that, besides the non obstante clause in Section 11, the Railways Act, 1989 is also a special law with regard to all matters of Railways, including sourcing of electricity, transmission, distribution and use of electricity within the area of operation of the Railways. In this regard reliance is placed on the following decisions: (1) **State of Orissa -v- M.A. Tulloch & Co., (1964) 4 SCR 461**; (2) **Forum for People's Collective Efforts -v- State of W.B., (2021) 8 SCC 599; (3) Commercial Tax Officer, Rajasthan -v- Binani Cements Ltd. and Another, (2014) 8 SCC 319**; and (4) **Parmar Samantsinh Umedsinh -v- State of Gujarat: 2021 SCC OnLine SC 138.**

Learned Senior Counsel would further state that, while the Electricity Act, 2003 is a special law compared to commercial laws such as the Indian Contract Act, 1872 and the Arbitration and Conciliation Act, 1996, the Railways Act, 1989 has a higher status of a special law even with regard to electricity in so far as operation of Railways, in its area of operation, is concerned. Reference is made in this regard to (1) **Gujarat Urja Vikas Nigam Ltd. -v- Essar Power Ltd., (2008) 4 SCC 755**; and (2) **Commercial Tax Officer, Rajasthan -v- Binani Cements Ltd. and Another, (2014) 8 SCC 319.**

According to the Learned Senior Counsel, on different legal considerations namely non obstante clause, overriding effect, the scheme and objective of Railways Act, the Railways Act being a special Law, the

inconsistency principles, etc, there can be no two views that Section 11 of the Railways Act, 1989 should be given full effect, and the Electricity Act, 2003 should yield to the provisions of the Railways Act, 1989. Reliance is placed in this regard on **SKL Company -v- Chief Commercial Officer, Southern Railways (2015) 16 SCC 509**.

Learned Senior Counsel would submit that, applying the afore said principles in the present case also, the provisions of the Electricity Act, 2003 with regards distribution and supply of electricity, including Sections dealing with cross subsidy surcharge or additional surcharge, cannot be applied to consumption or use of electricity either by the Railways or any other person in the area of operation of the Railways, as it would hinder implementation of the works and functioning of the Railways; various decisions of the Supreme Court and the High Courts have consistently laid down that Railways would neither be required to follow nor would they be affected by the conditions specified in other laws, including environmental laws, municipal laws, etc, and authorities under such laws cannot require Railways to comply with the same as in the case of others.

B.SUBMISSIONS ON BEHALF OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that there is no contradiction between the two statutes; the Railways Act can only supersede the Electricity Act if any of the provisions of the two statutes are mutually repugnant and contradictory; else, the two statutes should be harmoniously construed; the term “inconsistent” means mutually repugnant and contradictory; it must therefore be shown that the Railways cannot perform its obligations and functions under both the Statutes simultaneously, for the Railways Act to prevail over the Electricity Act; no

such inconsistency has been shown, as Section 11 of the Railways Act and the Electricity Act are applicable in different spheres, and relate to different subjects; in **Parmar Samantsinh Umedsinh v. State of Gujarat & Ors. (2021 SCC OnLine SC 138)** the Supreme Court held that things are inconsistent when they cannot stand together at the same time, and one law is inconsistent with another law, when the command or power or provision in the law conflicts directly with the command or power or provision in the other law." (**M. Karunanidhi v. Union of India:(1979) 3 SCC 431);** no repugnancy exists between the Electricity Act and the Railways Act and, therefore, Section 173 of the Electricity Act has no applicability; the onus to show inconsistency is upon the Railways, which it has completely failed to do, either before the SERCs or before this Tribunal; the Electricity Act does not envisage a scenario wherein a 'distribution licensee' can cherry pick their own rights and obligations, as has been sought to be interpreted on behalf of the Railways; the rights and obligations of a 'distribution licensee' are to be strictly read in terms of the provisions of the Electricity Act; not only is there no inconsistency between the Railways Act and the Electricity Act, the two statutes are applicable in completely different areas in so far as 'distribution of electricity' is concerned; the Railways Act does not provide for 'distribution of electricity'; and the Electricity Act can alone be referred to and relied upon for the purpose of distribution of electricity.

It is submitted, on behalf of the Respondents, that Railways have claimed the status of a deemed licensee under the Electricity Act, and not under the Railways Act, which is an admission that the Electricity Act is applicable; for a claim of inconsistency between the two Acts, with respect

to ‘distribution of electricity’, to be accepted, it must be shown that the status of a deemed distribution licensee can be claimed under the Railways Act; there is no dispute that the Railways Act contains no such provision; even otherwise, Section 11 of Railways Act was introduced during the regime of the 1910 Act; it could not have been contemplated, when the Railways Act was enacted, that Section 11 thereof would include within its ambit the power to distribute electricity, as supply of electricity was a licenced activity under the 1910 Act; there is no overriding provision in the Railways Act over other laws; Railways is only entitled to run locomotives for public carriage of passengers or goods; and the unique activity of conveying electricity for self-consumption by various locomotives of Railways as consumers, that too at every point of the entire traction line, cannot be equated to the point of connection from the delivery points of the transmission lines or the generating station and the point of connection to the installation of consumers, as provided in the definition of “distribution system” under Section 2(19) of the Electricity Act.

It is submitted, on behalf of the Respondents, that reliance placed by the Railways on the judgement of the Supreme Court, in **General Manager, Northern Railways v. Uttar Pradesh State Electricity Board: (2012) 3 SCC 329;** is erroneous in as much as it only deals with a particular transmission line; the Central Electricity Regulatory Commission has also relied on the said judgement in its Order in Petition No. 197/MP/2015 dated 05.11.2015; the issue before the Supreme Court, in ***Northern Railways*** **Judgment,** was limited to the legality of construction of the transmission lines by the Northern Railways to draw power from the power plants of the National Thermal Power Corporation Limited (“**NTPC**”),

and no longer from the lines of the Uttar Pradesh State Electricity Board ("**UPSEB**") through which the Northern Railways was drawing power earlier; the ***Northern Railways*** Judgment was based on the 1910 Act, wherein Section 27D provided for grant of transmission license by the SERCs or the State Government as the case may be; in such circumstances, the Supreme Court noted that, in the case of Railways, the transmission of electricity is governed by the provisions of the Railways Act; under the 1910 Act, certain powers were granted to the Governments, which was also duly considered by the Supreme Court as both Northern Railways and NTPC had obtained permission from their ministries; no such power has been granted to any Government under the extant statutory framework; the Supreme Court in fact noted that, even under the Electricity Act, a direct sale of power by a generating company to a "consumer" is specifically permitted under Section 10(2) of the Electricity Act; Para 19 of the said judgement makes it clear that distribution of electricity, which is the subject matter of the Appeals herein, was not being considered by the Supreme Court in the ***Northern Railways*** Judgment; the Supreme Court was not even considering the issue of license; it is apparent that, even in the ***Northern Railways*** Judgment, the Railways were being considered as a 'consumer' only, and not a licensee, which is evident from Para 19 thereof; the ***Northern Railways*** Judgment in fact supports the case of the Respondents; reliance placed by the Railways, as well as the CERC, on the said judgement is wholly misplaced; and it is settled law that a judgment is an authority for what it decides, and not what follows from it.

C. ANALYSIS:

D. NON OBSTANTE CLAUSE: ITS SCOPE:

Section 11 of the Railways Act, 1989 begins with a non-obstante clause and also contains the words ‘subject to’. A non-obstante clause is a legislative device to give effect to the enacting part of the Section in case of conflict over the provisions mentioned in the non-obstante clause. **(State (NCT of Delhi) v. Narender, (2014) 13 SCC 100; State of Karnataka v. K.A. Kunchindammed : (2002) 9 SCC 90)** A clause beginning with the expression ‘notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force’ is more often than not appended to a Section in the beginning with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision of any other law. It is equivalent to saying that, inspite of the provisions of the Act or any other law as stated therein, the non-obstante clause, mentioned in the enactment following it, will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment. **(Ganv Bhavancho Ekvott vs 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. Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207**).

Normally the use of the phrase ‘notwithstanding anything contained in any other law’ is equivalent to saying that the other law shall be no impediment to the measure. Use of such an expression is another way of saying that the provision, in which the *non obstante* clause occurs, would usually prevail over the other law. **(State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129; Ganv Bhavancho Ekvott**

vs South Western Railways : 2022 SCC OnLine Bom 7184). It is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. **(Union of India v. G.M. Kokil, 1984 Supp SCC 196*).***

It is equivalent to saying that, inspite of the laws mentioned in the non-obstante clause, the provision following it will have full operation, or the laws embraced in the non-obstante clause will nt be an impediment for the operation of the enactment or the provision in which the non obstante clause occurs. **(*State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129*; *South India Corpn. (P) Ltd. v. Secy., Board of Revenue, (1964) 4 SCR 280).*** Use of such an expression is another way of saying that the provision, in which the non-obstante clause occurs, would wholly prevail over the other provisions of the Act. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. **(*State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129*; *South India Corpn. (P) Ltd. v. Secy., Board of Revenue, (1964) 4 SCR 280*; *Iridium India Telecom Ltd. v. Motorola Inc., (2005) 2 SCC 145).***

In view of the non obstante clause used therein, Section 11 of the Railways Act would prevail over any other law for the time being in force, and the other law would not be an impediment for the operation of Section 11. However, the power available to be exercised, by the railway

administration under Section 11, is subject to the provisions of the Railways Act.

E. "SUBJECT TO" ITS SCOPE:

The expression 'notwithstanding' is in contra-distinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. **(Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184; Chandavarkar Sita Ratna Rao v. Ashalata S. Guram: (1986) 4 SCC 447 : AIR 1987 SC 117).** By use of the words *'subject to'* therein, the power available to be exercised under Section 11 is subject to the other provisions of the Railways Act. Consequently, while exercising the power under Section 11, the railway administration cannot act contrary to any of the other provisions of the Railways Act. In short, while the railway administration is entitled to exercise the powers conferred under different clauses of Section 11 without being restricted by any other law for the time being in force, such exercise of power under Section 11 cannot fall foul of or run contrary to any other provision of the Railways Act.

F. JUDGEMENT RELATING TO SECTION 11 OF RAILWAYS ACT:

Bearing the afore-mentioned principles in mind, let us take note of the judgements relied on behalf of the Railways on the interpretation of a non obstante clause, and in support of their submission that, in view of the non-obstante clause in Section 11, the provisions of clauses (g) and (h) of Section 11 of the Railways Act would prevail notwithstanding anything contained in the Electricity Act.

While the judgement, in **A. Navinchandra Steels (P) Ltd. v. Srei Equipment Finance Ltd., (2021) 4 SCC 435,** did not arise under the Railways Act, reliance was placed thereupon by the Railways to explain the scope of a non-obstante clause. In the said judgement, the Supreme Court held that, given the object of the IBC, it was clear that IBC is a special statute dealing with revival of companies that are in the red; vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non obstante clause contained in Section 238, which makes it even clearer that, in case of conflict, the provisions of the IBC will prevail.

In **Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184)**, the PIL was filed aggrieved by the South Western Railways making large scale construction, for doubling of the railway track in the State of Goa, without obtaining requisite permissions under the Goa Panchayat Raj Act, 1994, the Goa Town And Country Planning Act, the Goa Irrigation Act, 1973, the Goa, Daman & Diu Land Revenue Code, 1968, and the Coastal Regulation Zone Notification, 2011 issued by the Ministry of Environment And Forests, Government of India.

Paraphrasing Section 11 of the Railways Act, and its relevant clauses, the Bombay High Court held that the said provisions must be read as mandating that, in spite of any provisions contained in any other law for the time being in force except the provisions of the Railways Act and the provisions of any law in relation to acquisition of land for public purpose or for companies, a railway administration may, for the purpose of constructing or maintaining a railway, (i) make or construct in or upon,

across, under or over any lands such temporary or permanent inclined-planes, bridges, tunnels, culverts, lines of railways, etc. [clause (a)]; (ii) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them [clause (b)]; (iii) erect and construct such houses, warehouses, offices and other buildings, etc., and other works and conveniences as the railway administration thinks proper [clause (d)]; (iv) alter, repair or discontinue such buildings, works and conveniences [clause (e)]; and (v) do all other acts necessary for making, maintaining altering or repairing and using the railway [clause (h)]; given these wide ranging powers conferred by Parliament on a railway administration, and bearing in mind the impact that the *non-obstante* clause, at the beginning of Section 11 of the Railways Act, had on other enactments, it could not be contended that, notwithstanding Section 11 of the Railways Act conferring such wide ranging powers with overriding effect, the railway authorities are required to obtain building permissions from the village panchayat under the Panchayat Act or other permissions under the other stated State legislations; accepting such a contention would require the provisions contained in Section 11 to be totally ignored or to render Section 11 completely ineffective; and the Panchayat Act must yield to Section 11 of the Railways Act when a railway administration proceeds to execute the work of construction or maintenance of a railway in accordance with the provisions of the Railways Act, and the laws relating to land acquisition.

In **Union of India represented through General Manager, Western Railway *vs* Municipal Corporation of Greater Mumbai: 2017 SCC OnLine Bom 9424 : (2018) 2 AIR Bom R 227,** petitions were filed seeking

an order restraining the Respondent - Municipal Corporation of Greater Mumbai (“MCGM”) and its authorities from applying the provisions of Sections 328 and 328A of the Mumbai Municipal Corporation Act, in respect of hoardings belonging to the Union of India (Railways); and for a declaration that the activities of Railways on the Railway properties, including commercial activities permissible under the provisions of the Railways Act, 1989, were not subject to the jurisdiction of the Municipal Authorities under the provisions of the MMC Act.

After referring to Section 11 of the Railways Act which relates to the power of the railway administrations to execute all necessary works, to Section 184 which relates to taxation on railways by local authorities, and Section 185 which relates to taxation on railways for advertisement, the Division Bench of the Bombay High Court referred to Sections 328, 328 A and 479 of the MMC Act, and observed that there was no dispute between the parties that, in so far as advertisements within the railway station or upon any wall or other property of the railway, except the one which are fronting any street, no permission was required under Section 328A; the dispute was with regard to advertisements situated on the property of railways, and which had frontage against the street; Section 11 begins with a non-obstante clause; under clause (a) of Section 11, the railway administration is empowered to develop any railway land for commercial use, and under clause (d) it is empowered to erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper; hoardings erected by the railways on its land would not require permission of the Corporation either

under Section 328 or 328A of the MMC Act, and consequently no license would be required under Section 479; and in view of Section 185 of the Railways Act, 1989, which begins with a non-obstante clause, no advertisement tax could be levied by any local authority unless the Central Government issues a notification declaring the railway administration to be liable to pay tax.

The Division Bench of the Bombay High Court held and declared that (a) the provisions of Sections 328 and 328A of the Mumbai Municipal Corporation Act would not be applicable to the hoardings erected by Railways on the railway as defined in Clause (31) of Section 2 read with section 197 of the Railways Act, 1989; and (b) the Railway Administration or its agents would not be liable to pay any tax to the Mumbai Municipal Corporation in respect of any advertisement made on any part of the Railways, unless a notification to that effect is issued by the Central Government under Section 185 of the Railways Act, 1989.

In **Goa Foundation v. Konkan Railway Corporation, 1992 SCC OnLine Bom 205 : (1994) 1 Mah LJ 21 : AIR 1992 Bom 471,** the petitioners had approached the Bombay High Court praying that the Konkan Railway Corporation should be compelled to procure environment clearance, for the alignment passing through the State of Goa, from the Ministry of Environment and Forests, Government of India, and until such clearance is secured all the work in respect of providing the railway line should be withheld.

The Bombay High Court held that the Konkan Railway Corporation was justified in contending that the provisions of the Environment Act had no application in respect of works undertaken in exercise of the powers

conferred under Section 11 of the Railways Act, 1989; Section 11, *inter alia*, provides that notwithstanding anything contained in any other law, the Railway Administration may, for the purposes of constructing or maintaining a railway, make or construct in or upon, across, under or over any lands, or any streets, hills, valleys, roads, streams, or other waters, rivers as it thinks proper; the wide ambit of the provisions of Section 2(31), and the non-obstante clause in Section 11, made it extremely clear that the provisions of the Environment Act did not bind construction or maintenance of a railway line; the Railways Act was a legislation enacted subsequent to the Environment Act; and the Konkan Railway Corporation was right in claiming that, for the purpose of providing a railway line, clearance was not required even though the line passes over the railways, rivers, creeks, etc, in view of the specific provisions of Section 11 of the Railways Act.

In **Subhas Dutta v. Union of India, 2001 SCC OnLine Cal 178,** a Public Interest Litigation was filed before the Division Bench of the Calcutta High Court to restrain the Respondents from extending the project of Metro Rail through the river bed of Adi Ganga, and to recall and rescind extension of the Metro Rail project for protection of the environment. After referring to Section 11 of the Railways Act, 1989, and to clauses (a) to (h) thereof, the Division Bench held that Section 11 starts with a non-obstante clause; thereby the provisions of any other enactment will not come in the way of the construction undertaken by the railways, be it on any line or any streets, hills, valleys, roads, rivers, canals, brooks, streams or other waters and drains; in view of the overriding provisions of this Act, all other provisions stand superseded by virtue of this non-obstante clause; the Environment (Protection) Act, 1986 is an earlier legislation than that of the Indian

Railways Act, 1989; therefore the Indian Railways Act, 1989 will supersede the Environment (Protection) Act, 1986; Section 24 of the Environment (Protection) Act, 1986 also has a non-obstante clause; these two non-obstante Clauses appear in two different enactments; but the Railways Act is an Act subsequent to that of the Environment Act; in case of two non-obstante clauses appearing in two different enactments, when the subsequent enactment says that notwithstanding anything contained in any law for the time being in force, it supersedes all the enactments prior to coming into force of this enactment; a non-obstante Clause is normally used as a legislative device to modify the ambit of the provisions of the existing law and to have overriding effect; and therefore, in view of this statutory provision, no effect can be given to the Environment Protection Act.

After referring to the Notification issued under the Environment (Protection) Rules, 1986, whereby the Central Government had directed that expansion or modernization of any activity if pollution load is to exceed the existing one or new project listed in Schedule I to the notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government, the Division Bench of the Calcutta High Court observed that Schedule-I appended to the Notification did not include Railway Projects; the State Pollution Board had also informed that they had issued an Order extending permission to the Metro Railway Authorities for cutting of trees for the project as per the recommendation of the Forest Department, Government of West Bengal; so far as railway projects are concerned, there is no requirement of environment clearance under the statutory provisions, and the Railways

Act, 1989 has overriding effect; that did not mean that there should be complete go by to environmental impact; and, though no direction could be given in so far as the Project was concerned as there was no statutory bar, however the Metro Railway Authorities had already appointed an expert body to undertake assessment of the environmental impact.

The Division Bench referred with approval to ***Goa Foundation* v. *The Konkan Railway Corporation* : AIR 1992 Bombay 471** wherein a Division Bench of the Bombay High Court, after considering the matter, declined to exercise writ Jurisdiction over construction of the Railway Project. It also noted that, in the Special Leave Petition filed there against, the Supreme Court had, by Order dated 7.12.89, affirmed the judgement and had only set aside the costs awarded by the Bombay High Court, and certain remarks made in that Judgment.

The Division Bench of the Calcutta High Court concluded by holding that, in view of these statutory provisions, it was not possible to interfere in the Public Interest Litigation, but they hoped that the Railway Administration would abide by the advice given by M/s. M.N. Dastur & Company on their Study and Assessment of the Environmental Impact of this Project.

In **The Geologist, District Geologist Office vs Sunil Kumar : 2015 SCC ONLINE KER 13635,** the Division Bench of the Kerala High Court held that Section 11 of the Railways Act, 1989 enumerated the power of the Railway administration to execute all necessary works; all the petitioners, who had filed the Writ Petitions, claimed to be sub-contractors from a Railway contractor, who had been granted contract to supply red earth for the Railway line/doubling of the Railway line; Section 11

empowered the Railway administrations to carry out any work as enumerated in Section 11; the present was a case where the petitioners were claiming the right to mine/extract red earth from the survey numbers owned by private persons; no work as enumerated in Section 11 was being done in the re-survey numbers involved in the Writ Petition; Section 11 was wholly inapplicable; the key words under Section 11(a) were “make or construct in or upon, across, under or over any lands, or any streets”; Section 11 empowered the Railway administration, notwithstanding anything contained in any other law for the time being in force, to do various acts “for the purpose of constructing or maintaining a railway”; the act, which is empowered by the above provision, is to make or construct in or upon, under or over any lands; thus the act, which is envisaged under Section 11(a), must be comprised in the words “make or construct”; the word ‘make’ has been defined in **P. Ramanatha Aiyar's Law Lexicon 3rd Edition** in the following words: “TO MAKE”. In itself it involves a conscious act on the part of the maker.” (per COLLINS, J., ***Dickins* v. *Gill*, (1896) 2 QB 310**); “To make”, in the mechanical sense, does not signify to create out of nothing, for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw, but generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process”; the word “make” includes also the power to amend, alter or rescind; the plain meaning of the word ‘make’ does not include a mining activity, i.e., the activity of excavation of red earth; the second word used in Section 11(a) is ‘construct’; the word ‘construct’ has been defined in **P. Ramanatha Aiyar's Law Lexicon 3rd Edition** as follows: “Construct”, with its grammatical variations, in relation to a building, means to construct,

reconstruct, erect, re-erect, extend or alter structurally a building; ‘Construction’ includes construction of building as well as alteration or repairs; Construction of a road as contemplated under Section 11(a) has to be understood as carrying out any work by the Railway administration on the lines of the railways; the activity, which is being claimed by the petitioners of extraction of red earth, cannot be said to be covered by Section 11(a); a plain reading of Section 11 of the Railways Act, 1989 clearly indicates that no work is being carried out in the survey numbers owned by private persons or by the Railways, nor in any of the contracts; and, hence, Section 11 on its plain reading is not attracted in the present case.

The Division Bench further held that, in ***Goa Foundation***, the Railway administrations was proceeding to carry out the work on land which was acquired by the Railway; the said case was not a case of carrying out any work in any private land, nor was the said case of carrying out any mining operation in a private land for extraction of sand; the said case was clearly distinguishable; the provisions of Section 14 of the Railways Act, 1989 indicated that, even for owners and occupiers of land adjoining the Railway, “accommodation works” was contemplated by the Railway under Section 16, which are affected by any railway work; it is clear that any act cannot contemplate carrying out any work in the land of any private owners without any compensation or accommodation work; and, there being no such contemplation of carrying out any work in the survey/re-survey numbers in which the petitioners are claiming right of excavation of land, it is clear that the provisions of Section 11 or any other provisions of the Railways Act, 1989 are not attracted in the present case.

In **Village Panchayat of Velsao - Pale - Issorcim, *Vs* Ministry of Railways: 2022 SCC ONLine Bom 3526,** the Petitioner, a Village Panchayat, objected to Respondent Nos. 1 to 3 undertaking works concerning the railway track doubling project within the Panchayat jurisdiction contending that permission from the Panchayat was necessary before the railways could undertake any such works, particularly because the Panchayats have been conferred constitutional status by the 73rd Amendment to the Constitution of India.

The Division Bench of the Bombay High Court observed that the issue raised in the petition was covered against the Petitioner in **Ganv Bhavancho Ekvott v. South Western Railways;** and even if it were to be assumed that the District Planning Committees were constituted in terms of the Panchayat Raj Act, 1994, any action of such planning authorities might have to yield to the acts of the railways if permitted under Section 11 of the Railways Act, 1989.

G. TO WHAT EXTENT ARE THE AFORE-SAID JUDGEMENTS APPLICABLE TO THE PRESENT BATCH OF CASES?

In **Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184)**, the challenge, to the South Western Railways making large scale construction for doubling of the railway track, was on the ground that such construction was being made without obtaining requisite permissions under the Panchayat Act, the Town And Country Planning Act, the Irrigation Act, the Land Revenue Code, 1968, and the Coastal Regulation Zone Notification, This challenge was rejected by the Bombay High Court holding that the requirement of compliance with the provisions of these Acts must yield to Section 11 of the Railways Act when a railway

administration proceeds to execute the work of construction or maintenance of a railway in accordance with the provisions of the Railways Act. Doubling of the railway track, is construction of railway lines over land, which specifically falls within the ambit of Section 11(a) of the Railways Act.

In **Union of India represented through General Manager, Western Railway *vs* Municipal Corporation of Greater Mumbai: 2017 SCC OnLine Bom 9424 : (2018) 2 AIR Bom R 227,** an order was sought to restrain application of Sections 328 and 328A of the Mumbai Municipal Corporation Act, in respect of hoardings belonging to the Railways. Section 184(1) of the Railways Act provides that the railway administration is not liable to pay any tax in aid of the funds of a local authority unless the Govt of India declares it to be liable. Likewise, under Section 185(1), the Railway administration is not liable to pay any tax to any local authority in respect of any advertisement made on any part of the Railway, unless the Govt of India declares it to be liable. As Section 11 of the Railways Act is subject to the other provisions of the Railways Act, including Section 184 and Section 185 thereof, the Division Bench of the Bombay High Court held that no permission was required under Section 328A in so far as advertisements within the railway station or upon any wall or other property of the Railway was concerned unless a notification to that effect was issued by the Central Government.

In **Goa Foundation v. Konkan Railway Corporation, 1992 SCC OnLine Bom 205: (1994) 1 Mah LJ 21 : AIR 1992 Bom 471,** the Bombay High Court held that the Konkan Railway Corporation was justified in claiming that, for the purpose of providing a railway line, environmental

clearance was not required as the line passes over the railways, rivers, creeks, etc. which is covered under Section 11(a) of the Railways Act.

In **Subhas Dutta v. Union of India, 2001 SCC OnLine Cal 178 : (2001) 3 Cal LT 36,** the relief sought was to restrain the Railways from extending the project of Metro Rail through the river bed of Adi Ganga, for protection of the environment. The Division Bench of the Calcutta High Court held that, so far as railway projects are concerned, there is no requirement of environment clearance under the statutory provisions, and the Railways Act, 1989 has overriding effect. This again relates to construction of a railway project falling under Section 11(a) of the Railways Act.

In **The Geologist, District Geologist Office vs Sunil Kumar : 2015 SCC ONLINE KER 13635,** all the petitioners claimed to be sub-contractors of a Railway contractor, who had been granted contract to supply red earth for the Railway line/doubling of the Railway line. They claimed a right to mine/extract red earth from the survey numbers owned by private persons. The Division Bench of the Kerala High Court held that the key words under Section 11(a) were “make or construct in or upon, across, under or over any lands, or any streets”; in ***Goa Foundation***, the Railway administration was proceeding to carry out the work on land which was acquired by the Railway; no work, as enumerated in Section 11, was being done in the re-survey numbers involved in the Writ Petition; and, hence, Section 11 was not attracted in the present case.

In **Village Panchayat of Velsao - Pale - Issorcim, *Vs* Ministry of Railways: 2022 SCC ONLine Bom 3526,** the Village Panchayat objected to the Railways undertaking works concerning the railway track doubling project without obtaining permission from the Panchayat. The Division

Bench of the Bombay High Court observed that the issue raised in the petition was covered against the Petitioner in **Ganv Bhavancho Ekvott v. South Western Railways;** and any action of planning authorities under the Panchayat Raj Act may have to yield to the acts of the railways if permitted under Section 11 of the Railways Act, 1989.

The common thread, running through all the aforesaid judgements, is that the activities undertaken by the Railways therein was in terms of either Section 11 or some other specific provision of the Railways Act. In the light of the law declared in the said judgements, it is only if the Sections 2(31)(c) and Section 11(g) & (h) of the Railways Act are attracted, and it is held that the power to erect, operate, maintain or repair a power supply and distribution installation, in connection with the working of the railways, would suffice for the Railways to be held to be a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, can the Railways then be held entitled to seek open access without having to pay cross subsidy surcharge and additional surcharge under Section 42 of the Electricity Act.

H. NON OBSTANTE CLAUSE MUST BE STRICLY CONSTRUED:

In must be borne in mind that, while interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning. **(*Aswini Kumar* v. *Arabinda Bose**; *A.V. Fernandez v. State of Kerala, 1957 SCR 837*).** The court must then try to find out the extent to which the legislature had

intended to give such a provision overriding effect. The non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from another statute but for that reason alone, the scope of that provision must be determined strictly. When the Section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute (or other statutes) generally, it is not permissible to hold that it excludes the whole Act (or other laws) and stands all alone by itself. **(Madhav Rao Scindia v. Union of India: (1971) 1 SCC 85; A.G. Varadarajulu v. State of T.N., (1998) 4 SCC 231).**

Under the scheme of modern legislations, a non obstante clause has a contextual and limited application. The impact of a "non obstante clause" on the Act must be kept measured by the legislative policy and should be limited to the extent it is intended by Parliament and not beyond that. (***ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.*** **[(2006) 10 SCC 452**; **JIK Industries Ltd. v. Amarlal V. Jumani, (2012) 3 SCC 255; Ganv Bhavancho Ekvott vs South Western Railways: 2022 SCC OnLine Bom 7184).** Even if the non obstante nature of a provision is of wide amplitude, its interpretation must be confined to the legislative policy. **(ICICI Bank Ltd. v. SIDCO Leathers Ltd., (2006) 10 SCC 452)** A *non obstante* clauses is not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the *non obstante* clause is attached. **(State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC**

129; Ganv Bhavancho Ekvott vs South Western Railways : 2022 SCC OnLine Bom 7184).

Since the non-obstante clause in Section 11 is with respect to any other law in force, but is subject to the provisions of the Railways Act, its scope must be construed strictly. When so construed, Section 11(g) & (h) would prevail over any other law in force only to the extent it so specifically provides, and not beyond.

The *non-obstante* clause in Section 11 of the Railways Act should be confined to the purposes referred to in clause (a) to (h) thereunder, to achieve the object of the legislation. While constructing or maintaining a railway, the railway administration cannot be heard to say that it enjoys immunity from adhering to other legislations, be it plenary or subordinate, which has no relation to the enacting part of Section 11. As the power conferred by Section 11 is the power to undertake the activity of constructing, keeping in good condition and to repair those things mentioned in clauses (a) to (h) of Section 11, the non-obstante clause, in Section 11 of the Railways Act, can neither be expanded beyond what clauses (a) to (h) thereunder provide, nor can it be so read as to confer on the railways the power to distribute electricity to persons other than the railways.

I. JUDGEMENT OF SUPREME COURT IN "NORTHERN RAILWAY VS UPSEB":

As great stress is placed, on behalf of the Railways, on the judgement of the Supreme Court, in **General Manager, Northern Railways represented by Union of India -v- Chairman, Uttar Pradesh**

State Electricity Board and Others, (2012) 3 SCC 329, it is useful to take note of the law declared therein.

The dispute, in the said judgement, related to the legality of construction of the transmission lines by Northern Railways, to draw power from the power plants of NTPC and to stop using the transmission lines of the Uttar Pradesh State Electricity Board through which they were drawing power earlier. UPSEB was purchasing power from NTPC and supplying it to the Northern Railways through its transmission lines. Finding the tariff of UPSEB to be excessive, Railways decided to construct their own transmission lines. They obtained approval of the Central Government, and then entered into a power purchase agreement with NTPC.

When Railways started constructing the transmission lines from the Power Plants of NTPC up to the sub-station of Railways at Dadri, District Ghaziabad, U.P, the UPSEB issued a notice calling upon them to immediately stop construction of the distribution/service lines, failing which the said lines would be demolished. This notice was challenged by the Railways before the Delhi High Court which allowed them to carry on their work of construction. After the construction of transmission lines was completed, the Railways started drawing power from the NTPC power plants through those lines. That led UPSEB to file Writ Petition No. 3588 of 2001 in the Allahabad High Court to challenge the action of the Railways in drawing electrical energy from NTPC through the Railway's own service lines. At the request of the Railways, both these writ petitions were transferred to the Supreme Court.

It was submitted, before the Supreme Court, that Sections 11(*a*) and 11(*g*) of the Railways Act, 1989 empowered Railways to carry out all such

necessary works for the purposes of constructing or maintaining a railway; NTPC had also the authority to sell power to the Railways in its capacity as a generating company under Section 43-A of the Electricity (Supply) Act, 1948; as NTPC was a wholly-owned company of the Central Government, It had to obtain permission from the Central Government, which it had; Railways had also obtained necessary permission from the Government of India and had, thereafter, entered into necessary agreements with NTPC; and the authority of the Railways, to act as above, was left unhindered under Section 173 of the Electricity Act, 2003 (which Act replaced the Electricity (Supply) Act, 1948).

It was however contended, on behalf of the UPSEB, that the Central government was not competent to grant permission to the Railways to buy power from NTPC, or to construct transmission lines; and such activity ought to have been sanctioned by the U.P. State Electricity Commission/State Government under Section 27-D of the 1910 Act; Sections 11(*a*) & (*g*) of the Railways Act, 1989 can be read to authorise the Railways to have their electricity supply lines only for working and maintenance of the Railways, and not for transmitting energy from generating stations; if transmitting lines were to be constructed, a licence was necessary to be obtained; and Section 27-D of the 1910 Act cannot be ignored while reading Sections 11(*a*) & (*g*) of the Railways Act, 1989.

The Supreme Court held that Section 27-D of the Electricity Act, 1910 came into force on 31-12-1998; the agreements between the Railways and NTPC was signed prior thereto in March, 1998; in terms of Section 27-D of the Electricity Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorised or otherwise exempted by an appropriate Government or the appropriate Commission shall be entitled to

engage in the activities of transmission or distribution of electricity; however, in the case of the Railways, transmission of electricity was governed by the provisions of a special enactment i.e. the Railways Act, 1989, and not by the enactments governing electricity; Sections 11(*a*) and (*g*) of the Railways Act, 1989 authorised Railways to construct necessary transmission lines, dedicated for their own purpose; it was not possible to read this Section in a restricted manner in which it was sought to be conveyed; this was because the principal part of Section 11 authorised the railway administration to execute all necessary works for the purpose of constructing or maintaining railways; Section 11(*a*) authorised Railways to make or construct in or upon, across, under or over any lands electric supply lines; Section 11(*g*), which authorised the Railways to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with the working of the Railways, clearly empowered them to erect any electric traction equipment, and power supply and distribution installation which is in connection with the work of the Railways; this would include construction of transmission lines; Section 26-A(1) of the Electricity (Supply) Act, 1948 exempted the generating company from the requirement of taking a licence under the Electricity Act, 1910; the generating company had the necessary authority to enter into a power purchase agreement under Section 43-A of the Electricity (Supply) Act, 1948; NTPC had been permitted by the Central Government to enter into an agreement; and both Railways and NTPC had obtained permission, from the ministries concerned, prior to entering into this agreement.

The Supreme Court further observed that, in the instant case, Railways found the tariff of UPSEB to be excessive and, therefore, decided

to construct their own transmission lines; this being so, the action on the part of the Railways of constructing the transmission lines, and drawing power from thermal power plants of NTPC, was perfectly legal; even under Section 10(2) of the Electricity Act, 2003, a direct sale of power by a generating company to a consumer is specifically permitted; and, in the circumstances, the notice given by the UPSEB was totally uncalled for, and was required to be quashed and set aside.

Section 27-D of the Electricity Act, 1910 related to the grant of transmission licence by the State Government, and sub-section (1) thereof stipulated that, until the State Commission is established, the State Government and thereafter the State Commission may, subject to the provisions of sub-section (4), grant a transmission licence to any person. Section 26-A (1) of the Electricity Supply Act, 1948 stipulated that nothing in the Indian Electricity Act, 1910 shall be deemed to require a generating Company to take out a license under the 1910 Act, or to obtain sanction of the State Government for the purpose of carrying on any of its activities. As a result of Section 26-A (1), a generating company, in the afore-said case - NTPC, was no longer required to obtain a license under the 1910 Act or to obtain sanction of the State Government for carrying on its activities of generation of electricity.

Section 43-A of the 1948 Act related to the terms, conditions and tariff for the sale of electricity by a generating company. Section 43-A(1)(c) enabled a generating company to enter into a contract, for the sale of electricity generated by it, with any other person with the consent of the competent Government. Section 2(3-A) of the 1948 Act defined ‘competent government’ to mean the Central Government in respect of a generating

company wholly or partly owned by it. Consequently, as far as sale of electricity by a generating company was concerned, NTPC was entitled to enter into a contract, for the sale of electricity generated by it, with any person (in the present case the Railways) with the consent of the Central Government.

It is in such circumstances that the Supreme Court, in **Northern Railway vs. UPSEB,** held that, for the purpose of sale of electricity generated by it, NTPC could enter into a contract with the Indian Railways with the approval of the Central Government; since the said Power Purchase agreement was entered into in March 1998, before Section 27-D was inserted into the Indian Electricity Act, 1910 on 31-12-1998, Section 27-D, which required a transmission license to be obtained, had no application; and Sections 11(a) & (*g*) of the Railways Act empowered Railways to erect any electric traction equipment, and power supply and distribution installation which is in connection with the work of the Railways; and this would include construction of transmission lines.

Since Section 11 of the Railways Act would prevail, notwithstanding anything contained in any other law, the Supreme Court, in **Northern Railway vs. UPSEB,** held that such a power to make or construct electric supply lines, as also the power to erect, operate, maintain or repair any electric traction equipment, would enable it to erect transmission lines for supply of the electricity by the generating company (NTPC) to it, without being forced to procure electricity at a far higher tariff from the U.P. State Electricity Board.

Though, the case before it related to a period prior to the 2003 Act coming into force, Section 10(2) of the Electricity Act, 2003 was noted by the Supreme Court in the afore-said Judgment. Among the main features of the Electricity Act, 2003 is to freely permit generation, which activity has been de-licensed under the said Act. Section 10(2) thereof enables a generating company to supply electricity to any licensee in accordance with the 2003 Act and the rules and regulations made thereunder and, subject to the Regulations made under Section 42(2), to supply electricity to any consumer.

While the first limb of Section 10(2) enables it to supply electricity to any licensee in accordance with the provisions of the 2003 Act, the second limb enables the said generating company to supply electricity to any consumer, subject to the Regulations made under Section 42(2) of the 2003 Act. It is evident, therefore, that the power conferred on the generating company by Section 10(2), to supply electricity to any consumer, is specifically made subject to the requirements of Section 42(2) of the Electricity Act in terms of which different State Commissions have framed regulations for providing open access to a consumer (other than a distribution licensee), on payment by the said consumer of cross subsidy surcharge to the distribution licensee within whose area of supply the consumer falls.

While the provisions of Section 10(2) of the 2003 Act was no doubt noted by the Supreme Court in **Northern Railway vs. UPSEB**, the dispute therein related to erection, operation and maintenance of a transmission line by the Railways during the period when the governing laws were the Electricity Supply Act, 1948 and the Indian Electricity Act, 1910. Unlike the

aforesaid judgement, what we are required to examine in this batch of appeals is whether the Indian Railways can claim to be a deemed distribution licensee under the third proviso to Section 14 of the 2003 Act or whether it is merely a “consumer” which is entitled to procure electricity directly from generators, by way of open access, on payment of cross subsidy surcharge to the concerned licensees under Section 42 of the Electricity Act.

J. WHEN IS A PRECEDENT BINDING?

It is only the principle found out 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. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. The law which is binding would, therefore, extend to all observations of points raised and decided by the Court in a given case. (**Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638).**

The submissions, urged on behalf of the railways, is that (1) the said decision cannot be restricted only to the laying of the transmission line as claimed by the opposite side; (2) the words used in Para 17 of the judgement are ***“This will certainly include construction of transmission lines”,*** and not that it is only in regard to transmission lines; (3) the said decision dealt with sourcing of electricity by Railways from a generating company, and not from the distribution licensee in the adjoining area of supply; (4) it relates to transmission of electricity from the generating station to Railways periphery, and thereafter distribution to places of end

use/consumption; (6) in terms of the said judgement, the Railways is entitled to source electricity directly from the generating company, without being affected by the licence requirements under the Electricity laws; (7) the electricity, sourced from outside and transmitted by Railways up to its area of operation, is necessarily for distribution and use in the area of operation of the Railways; and (8) the said judgement should also be applied in regard to the distribution of electricity within the area of operations of the Railways.

These conclusions which the Learned Senior Counsel appearing for the Railways seeks to draw from the judgement of the Supreme Court, in **Northern Railway vs. UPSEB**, and which he claims are consequences arising therefrom, are not the conclusions which the Supreme Court had arrived at in the said judgement, but what, according to the Learned Senior Counsel, flows as a consequence of the law declared in the said judgement. As what is of the essence in a decision is its ratio, and not every observation found therein nor what logically follows from the various observations made in the judgment, the aforesaid submissions need only to be noted to be rejected.

It is also not a profitable task to extract a sentence here and there from a judgment and to build up on it. (**State of Orissa v. Sudhansu Sekhar Misra; AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).** A stray sentence in a judgement cannot be read out of context. **(GUVNL V. GERC: (Order of APTEL in Appeal No. 371 of 2023 dated 09.11.2023).**

As that is what the Learned Senior Counsel seeks to do, from a reading of the judgement of the Supreme Court in **Northern Railway vs. UPSEB**, the aforesaid submissions of his, necessitate rejection also on this score.

K. DOES THE DOCTRINE OF REPUGNANCY APPLY?

On the submission, urged on behalf of the Railways, that, since the Railways Act occupies the entire field on all aspects of the Railways, the provisions of the Electricity Act should yield to allow full effect to the Railways Act, it must be borne in mind that Article 254 of the Constitution relates to inconsistency between laws made by Parliament and laws made by the Legislature of the States. Under Article 254(1), if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

L. JUDGEMENTS RELIED ON BY LEARNED COUNSEL ON BOTH SIDES:

We shall now examine the judgements, relied by Learned Senior Counsel and Learned Counsel on both sides, to ascertain whether the doctrine of repugnancy has any application to the facts of the present case.

In ***State of Orissa v. M.A. Tulloch & Co*****: AIR 1964 SC 1284,** the respondent worked a manganese mine in the State of Orissa under a lease granted by that State under the provisions of the Mines and Minerals

(Development and Regulation) Act, 1948. While the respondent was working the mines, the State legislature of Orissa passed an Act called the Orissa Mining Areas Development Fund Act, 1952 (for short “the Orissa Act)” whereunder certain areas were constituted as “mining areas”; and, under the powers conferred under that enactment, the State Government was empowered to levy a fee on a percentage of the value of the mined ore at the pit's mouth.

When a demand was raised, the respondent questioned the legality of the demand before the High Court which held that the Orissa Act had been rendered ineffective or suppressed by a Central enactment — The Mines and Minerals (Regulation and Development) Act, 1957; on the coming into force of the Central Act, the Orissa Act ceased to be operative by reason of the withdrawal of legislative competence by force of the entry in the State List being subject to the parliamentary declaration and the law enacted by Parliament; and the Orissa Act should be deemed to be non-existent, and there was lack of power to enforce and realise the demand for payment of the fee.

Aggrieved thereby, the State filed an appeal, and the Supreme Court held that, to the extent to which the Union Government had taken under “its control” “the regulation and development of minerals”, so much was withdrawn from the ambit of the power of the State legislature under Entry 23 of List-II, and the legislation of the State which had rested on the existence of power under that entry would, to the extent of that “control”, be superseded or be rendered ineffective, not merely because of repugnancy between the provisions of the two enactments, but of a denudation or deprivation of the State legislative power by the declaration which Parliament was empowered to make and had made; the State would

however lose legislative competence only to the "*extent to which* regulation and development under the control of the Union has been declared by Parliament to be expedient in the public interest"; the crucial enquiry was regarding this "extent" for, beyond it, the legislative power of the State remained unimpaired; as the legislation by the State was earlier in point of time, the purpose, width and scope of the State Act and the area of its operation was required to be examined first; and then the "extent" to which the Central Act cut into it or trenched on it was required to be considered.

In **Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599,** the Supreme Court held that an exclusive power has been entrusted to Parliament to legislate on matters enumerated in List I; on matters which have been enumerated in List III, Parliament has the power to make laws notwithstanding clause (3); the State Legislature has the exclusive powers to make laws for the State or any part of it with respect to matters in List II, but this power is subject to clauses (1) and (2); Parliament, under Article 248, has been entrusted with the residuary powers of legislation (subject to Article 246-A) to make any law with respect to any matter which is not enumerated in the Concurrent or State Lists; Article 254(1) embodies the concept of repugnancy on subjects within the Concurrent List on which both the State Legislatures and Parliament are entrusted with the power to enact laws; a law made by the legislature of a State which is repugnant to parliamentary legislation on a matter enumerated in the Concurrent List has to yield to a parliamentary law whether enacted before or after the law made by the State Legislature; in the event of repugnancy, the parliamentary legislation shall prevail and the State law shall "to the extent of the repugnancy" be void; the consequence

of a repugnancy between the State legislation with a law enacted by Parliament within the ambit of List III can be cured if the State legislation receives the assent of the President; and the grant of Presidential assent under clause (2) of Article 254 will not preclude Parliament from enacting a law on the subject-matter, as stipulated in the proviso to clause (2).

The Supreme Court further held that the doctrine of repugnancy under Article 254(1) operates within the fold of the Concurrent List; Article 254(1) deals with a repugnancy between a law enacted by the State Legislature with (*i*) a provision of a law made by Parliament which it is competent to enact; or(*ii*) to any provision of an existing law; and (*iii*) with respect to one of the matters enumerated in the Concurrent List; three types of repugnancy are contemplated, the *first* envisages a situation of an absolute or irreconcilable conflict or inconsistency between a provision contained in a State legislative enactment with a parliamentary law with reference to a matter in the Concurrent List; such a conflict brings both the statutes into a state of direct collision; this may arise, for instance, where the two statutes adopt norms or standards of behaviour or provide consequences for breach which stand opposed in direct and immediate terms, and the conflict arises because it is impossible to comply with one of the two statutes without disobeying the other; the *second* situation involving a conflict between State and Central legislations may arise in a situation where Parliament has evinced an intent to occupy the whole field; the notion of occupying a field emerges when a parliamentary legislation is so complete and exhaustive as a Code as to preclude the existence of any other legislation by the State; the State law in this context has to give way to a parliamentary enactment not because of an actual conflict with the absolute terms of a parliamentary law but because the nature of the

legislation enacted by Parliament is such as to constitute a complete and exhaustive Code on the subject; the *third* test of repugnancy is where the law enacted by Parliament and by the State Legislature regulate the same subject; in such a case, the repugnancy does not arise because of a conflict between the fields covered by the two enactments, but because the subject which is sought to be covered by the State legislation is identical to and overlaps with the Central legislation on the subject; the distinction between the first test on the one hand with the second and third tests on the other lies in the fact that the first is grounded in an irreconcilable conflict between the provisions of the two statutes each of which operates in the Concurrent List; the conflict between the two statutes gives rise to a repugnancy, the consequence of which is that the State legislation will be void to the extent of the repugnancy; the expression “to the extent of the repugnancy” postulates that those elements or portions of the State law which run into conflict with the Central legislation shall be excised on the ground that they are void; the second and third tests, on the other hand, are not grounded in a conflict borne out of a comparative evaluation of the text of the two provisions; where a law enacted by Parliament is an exhaustive code, the second test may come into being; the exhaustive nature of the parliamentary code is then an indicator of the exercise of the State's power to legislate being repugnant on the same subject; the third test of repugnancy may arise where both Parliament and the State legislation cover the same subject-matter; allowing the exercise of power over the same subject-matter would trigger the application of the concept of repugnancy; this may implicate the doctrine of implied repeal in that the State legislation cannot co-exist with a legislation enacted by Parliament; but even here, if the legislation by the State covers distinct subject-matters,

no repugnancy would exist; and, in deciding whether a case of repugnancy arises on the application of the second and third tests, both the text and the context of the parliamentary legislation should be borne in mind.

The Supreme Court also held that, in cases where the legislation provides that the said Act shall be in addition to and not in derogation of other laws, and the competing statutes are not of the same legislature, it then becomes necessary to apply the concept of repugnancy; the primary effort in the exercise of judicial review must be an endeavour to harmonise; and repugnancy is not an option of first choice but something which can be drawn where a clear case arises for determination.

While examining the questions (*1*) whether there was any inconsistency between the Central notification on the one hand and the State notification on the other, and (*2*) whether the inconsistency was irreconcilable or intolerable, the Supreme Court, in **Ram Chandra Mawa Lal v. State of U.P., 1984 Supp SCC 28,** stated the principle thus:

"The Centre and the State both cannot speak on the same channel and create disharmony. If both speak, the voice of the Centre will drown the voice of the State. The State has to remain "silent" or it will be "silenced". But the State has the right to "speak" and can "speak" (with unquestionable authority) where the Centre is "silent, without introducing disharmony. If the Centre sits only on a portion of the Chair, the State can sit on the rest of the portion with arms thrown on the shoulders of each other. While the State cannot sit on the lap or on the shoulders of the Centre, both can certainly walk hand-in-hand, lending support to each other, in a friendly manner, towards the same destination. If the Centre has built a wall, and has left a gap from which intruders can infiltrate, the State can fill the gap in the wall, and thus make its own contribution to the Common Cause. What is more, each in theory and principle must be presumed to be conscious of the need for accord and need for accommodating each other in the interest of "National Harmony".

"*The Centre can object to the State speaking on the same channel, or sitting on its shoulders, and perhaps, even override the State. But the Centre and the State can certainly accommodate each other in a friendly spirit in the overall National Interest when both of them are trying to supplement each other. In the present case both notifications can safely be construed as supplementary and friendly rather than inconsistent or hostile. The Centre does not question the authority of the State, and, evidently, the Centre does not object to the State speaking on the nuance on which the Centre has maintained silence. There is therefore no real element of inconsistency in the two notifications"*

The Supreme Court further observed that, on principle, every apparent inconsistency cannot be presumed to be hostile or intolerable. more so when the Centre does not even raise a whisper of discord; one of the tests for ascertaining whether the inconsistency is an irreconcilable or intolerable, is to pose the question: Can the State law be obeyed or respected without flouting or violating the Central law in letter and spirit?; and if the answer is in the affirmative, the State law cannot be invalidated; if both laws can be obeyed without disobeying any, there is no conflict; an endeavour must be made to place a harmonious interpretation which would avoid a collision between the two; Repugnancy arises under Article 254 when both the laws are fully inconsistent or are absolutely irreconcilable and when it is impossible to obey one without disobeying the other; repugnancy would arise when conflicting results are produced when both the statutes covering the same field are applied to a given set of facts; but the court has to make every attempt to reconcile the provisions of the apparently conflicting laws and court would endeavour to give harmonious construction; the proper test would be whether effect can be given to the provisions of both the laws or whether both the laws can stand together.

On the principles governing repugnancy, the Supreme Court, in **M. Karunanidhi v. Union of India, (1979) 3 SCC 431,** held that, where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy; where, however, a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254; where a law passed by the State Legislature, while being substantially within the scope of the entries in the State List, entrenches upon any of the entries in the Central List, the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if, on an analysis of the provisions of the Act, it appears that, by and large, the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential; where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution; the result of obtaining the assent of the President would be that, so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only; and such a state of affairs will exist only until Parliament, at any time, makes a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles: (1) Whether there is direct conflict between the two provisions; (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State legislature; and (3) Whether the law made by Parliament and the law made by the State legislature occupy the same field."; the test of two legislations containing contradictory provisions is not the only criterion of repugnance; Repugnancy may arise between two enactments even though obedience to each of them is possible without disobeying the other if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field.(***Thirumuruga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Educational & Charitable Trust v. State of T.N.*****, (1996) 3 SCC 15; Deep Chand v. State of U.P: AIR 1959 SC 648).**

M. DOES THIS DOCTRINE APPLY IN THE PRESENT CASE:

Repugnancy, under Article 254(1) of the Constitution, would arise only where laws made by Parliament, and the laws made by the State Legislature, are inconsistent with each other. In the present case, however, both the Railways Act, 1989 and the Electricity Act, 2003 were enacted by Parliament, the former under Entries 22 and 30 of List-I and the latter under Entry 38 of List-III of Schedule VII to the Constitution of India. Consequently, the doctrine of repugnancy, under Article 254(1) of the Constitution, has no application to the present case. The contention that Parliament, by enacting the Railways Act, 1989, intended to cover the whole field and, consequently, the provisions of the Electricity Act, 2003

must yield thereto, does not also merit acceptance since both these laws were enacted by Parliament and, if Parliament intended the whole field to be covered by the Railways Act, 1989, it would not have, subsequent thereto, enacted the Electricity Act, 2003 or, in the alternative, would have included the Railway Board, along with the departments of defence and atomic energy, under Section 184 which stipulates that the provisions of the Electricity Act shall not apply thereto.

N. ARE THE PROVISIONS OF THE ELECTRICITY ACT, RELATING TO DISTRIBUTION OF ELECTRICITY, INCONSISTENT WITH THE PROVISIONS OF THE RAILWAYS ACT?

While the repugnancy test may be inapplicable, what must however be examined is whether the provisions of the Railways Act and Electricity Act are inconsistent with each other, and whether the said provisions of the Electricity Act should yield to the extent of such inconsistency if any. Black's law Dictionary defines "inconsistent" to mean lacking consistency; not compatible with another fact or claim. **(State of U.P. v. Daulat Ram Gupta, (2002) 4 SCC 98). "Inconsistent",** according to *Black's Legal Dictionary*, means "mutually repugnant or contradictory; contrary, the one to the other so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other". One of the meanings of the expression "inconsistent" is mutually repugnant or contradictory. In Article 254, the Constitution itself has used the words inconsistency and repugnancy interchangeably. Things are inconsistent when they cannot stand together at the same time and one law is inconsistent with another law, when the command or power or provision in the law conflicts directly with the command or power or provision in the other law. (**Basti Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2**

SCC 88; Parmar Samantsinh Umedsinh vs State of Gujarat: 2021 SCCONLINE SC138). Things are said to be inconsistent when they are contrary to one another. (**Premchand Jain vs Regional Transport Authority: 1967 Jab LJ 885).**

In ***S. Satyapal Reddy v. Govt. of A.P.*****, (1994) 4 SCC 391,** the Supreme Court held that where both the Central and the State rules operate harmoniously and effect can be given to both the rules, the question of inconsistency or repugnancy under Article 254 of the Constitution does not arise. What has to be seen is whether mutual co-existence between the Sections of the Electricity Act and the Sections of the Railways Act is impossible. If they relate to the same subject-matter, to the same situation, and both substantially overlap and are co-extensive and at the same time so contrary and repugnant in their terms and impact that one must perish wholly if the other were to prevail at all — then, only then, are they inconsistent. It is in this sense that the two provisions should be examined. **(Basti Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 88; Parmar Samantsinh Umedsinh vs State of Gujarat: 2021 SCCONLine SC138).** It must also be borne in mind that there is always a presumption that the Legislature does not exceed its jurisdiction, and the Court should make every attempt to reconcile the provisions of apparently conflicting enactments. (**Basti Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 88; Parmar Samantsinh Umedsinh vs State of Gujarat: 2021 SCCONLINE SC138).**

O. SECTIONS 173 TO 175 OF THE ELECTRICITY ACT: ITS SCOPE:

It is useful in this context to note what Sections 173 to 175 of the Electricity Act provide. Section 173 relates to inconsistency in laws, and

thereunder nothing contained in the Electricity Act or any rule or regulation made thereunder or any instrument having effect by virtue of the Electricity Act, rule or regulation, shall have effect in so far as it is inconsistent with any other provisions of (i) the Consumer Protection Act, 1986 (ii) the Atomic Energy Act, 1962, or (iii) the Railways Act, 1989. In case of inconsistency between any of the provisions of the Railways Act and the Electricity Act, the provisions of the Railways Act would prevail and the provisions inconsistent therewith in the Electricity Act must yield in view of what Section 173 stipulates.

Section 174 gives the Electricity Act overriding effect and thereunder, save as otherwise provided in Section 168, the provisions of Electricity Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, or in any instrument having effect by virtue of any law other than the Electricity Act. While Section 11 of the Railways Act gives it overriding effect over the provisions of any other law for the time being in force, Section 174 gives the Electricity Act overriding effect over anything inconsistent therewith contained in any other law for the time being in force. It is unnecessary for us to examine the consequences of competing non-obstante clauses in the two enactments, since Section 173 specifically provides that the provisions of the Railways Act would prevail in case of an inconsistency between any of its provisions and the provisions of the Electricity Act.

Section 175 stipulates that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force. **(*Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission*, (2014) 8 SCC 444).** Section 175 must be read along with Section 174 and

not in isolation. The inconsistency, referred to in Section 174, may be express or implied. Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by holding that when there is any express or implied conflict, between the provisions of the Electricity Act, 2003 and any other Act, then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together. (***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*, (2008) 4 SCC 755).**

Parliament may provide, (as in Section 175 of the Electricity Act), that its legislation shall be in addition to and not in derogation of other laws without elucidating specifically any other legislation; in such cases, where the competent legislation has been enacted by the same legislature, techniques such as a harmonious construction can be resorted to in order to ensure that the operation of both the statutes can co-exist. (**Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599).** As both the Railways Act,1989 and the Electricity Act,2003 have been enacted by Parliament, save inconsistency, both the afore-said Statutes can co-exist.

On a conjoint reading of Sections 173, 174 and 175 of the Electricity Act, it is clear that, while the provisions of the Railways Act would prevail in case of any inconsistency with respect to the provision of the Electricity Act, in the absence of any such inconsistency, the provisions of both the enactments would apply. As noted hereinabove, the non-obstante clause in Section 11 of the Railways Act, 1989 must be confined only to what is stipulated in clauses (a) to (h) thereunder. It is only if the power exercised by the Railway administration, to execute necessary works for the purpose of constructing or maintaining the Railway, specifically fall under any one of

clauses (a) to (h) thereunder, would the non-obstante clause apply and, consequently, exercise of power by the Railway administration to execute such works would not suffer any impediment on account of a corresponding obligation under any of the provisions of the Electricity Act. As “supply” of electricity by a distribution licensee, to consumers within its area of supply, does not fall within any of clauses (a) to (h) of Section 11, and falls exclusively within the scope of the relevant provisions of the Electricity Act, the submission that latter Act is inconsistent with the former, necessitates rejection.

P. GENERALIA SPECIALIBUS NON DEROGANT:

With regards the submission that the Railways Act has a higher status of a special law vis-à-vis the Electricity Act in so far as operation of the Railways in its area is concerned, it is useful to note what the rule of *generalia specialibus non derogant* stipulates.

When a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the Latin maxim of *generalia specialibus non derogant* i.e. general law yields to special law should they operate in the same field on the same subject. ***(CTO v. Binani Cements Ltd.*, (2014) 8 SCC 319).**

This principle has found vast application in cases of there being two statutes: general or specific with the latter treating the common subject-matter more specifically or minutely than the former. *Corpus Juris Secundum*, 82 C.J.S. Statutes § 482 states that, when construing a general

and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy ***(CTO v. Binani Cements Ltd.*, (2014) 8 SCC 319).**

This rule of construction resolves the conflict between the general provision in one statute and the special provision in another. **(J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170; *CTO v. Binani Cements Ltd.*, (2014) 8 SCC 319)**. In case of conflict, the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision. **(J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170; *CTO v. Binani Cements Ltd.*, (2014) 8 SCC 319).**

The well-known rule, which has application, is that a subsequent general Act does not affect a prior special Act by implication. In the third edition of Maxwell, the principle of *generalia specialibus non derogant* i.e. general provisions will not abrogate special provisions is stated thus" *When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect*

according to its own subject-matter and its own terms.' (***Craies on Statute Law*** **(6th Edn., 1963) pp. 376-77; LIC v. D.J. Bahadur [(1981) 1 SCC 315;** ***CTO v. Binani Cements Ltd.*****, (2014) 8 SCC 319).**

In **UPSEB v. Hari Shankar Jain: (1978) 4 SCC 16,** the Supreme Court concluded that, if Section 79(*c*) of the Electricity (Supply) Act generally provides for the making of regulations providing for the conditions of service of the employees of the Board, it can only be regarded as a general provision which must yield to the special provisions of the Industrial Employment (Standing Orders) Act in respect of matters covered by the latter Act.

While determining the question whether a statute is general or special, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then effort should be made to ascertain whether the legislature had intended to accord a special treatment vis-à-vis the general entries and a further endeavour should be made to find out whether the specific provision excludes the applicability of the general. Once it is concluded that the intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted. **(Gobind Sugar Mills Ltd. v. State of Bihar: (1999) 7 SCC 76;** ***CTO v. Binani Cements Ltd.*****, (2014) 8 SCC 319).**

The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other

direction. This rule is particularly applicable where the legislature has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject-specific provision relating to a specific and defined subject is regarded as an exception to, and would prevail over a general provision relating to a broad subject. (***CTO v. Binani Cements Ltd.*****, (2014) 8 SCC 319).**

In view of Section 173 of the Electricity Act, we shall proceed on the premise, that the Railways Act, 1989 is a prior special law and the Electricity Act, 2003 is a subsequent general law. As noted hereinabove, when construing a general and a specific statute, it is necessary to consider the statutes as consistent with one another and for such statutes to be harmonized, if possible, with the objective of giving effect to a consistent legislative policy. Each enactment must be construed in that respect according to its own subject-matter and its own terms. As we are satisfied that, save erection, maintenance, operation and repair of "*electric traction equipment*" and *"power supply and distribution installation"*, both the Railways Act and the Electricity Act operate in different and distinct fields**,** atleast in so far as distribution of electricity is concerned, there is no reason why they cannot co-exist or be harmoniously construed.

The submissions, urged on behalf of the Railways, regarding the Parliamentary Standing Committee Report shall be examined later in this Order under Issue Nos.6, 7, and 11.

Q. CONCLUSION:

Issue No. 2 is answered holding that, since the provisions of the Electricity Act are not inconsistent with the provisions of the Railways Act,

1989, with respect to distribution of electricity by a distribution licensee, neither the 'non-obstante clause' in Section 11 of the Railways Act, 1989 nor Section 173 of the Electricity Act, 2003, vest in the Railways the right to undertake distribution of electricity as a distribution licensee in terms of the provisions of the Electricity Act, 2003.

VII. ISSUE 3:

Whether the Railways Act, 1989 is a complete code and a special law occupying the entire field in regard to working and operation of Railways in its area of operation, in excluding the powers and jurisdiction of the Regulatory Commissions and Bodies under the Electricity Act, 2003, on matters regarding tariff, standard of performance, payment of compensatory surcharges under Section 42 of the Electricity Act, 2003 to the extent they relate to distribution, supply, use etc. of electricity in the area of operation of Railways?

A. SUBMISSIONS ON BEHALF OF THE RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the Railways Act, 1989 is a complete code with regard to matters dealt with in the Railways Act; such an effect has been specifically recognized and held even with regard to environment and other matters dealt with under Issue 2 above; the Railways Act, 1989 is a self-contained code, and comprehensively covers all aspects including the issue of rate circulars by the Central Government; the expression "*in connection with or for the purposes of*" used in Sections 11 and 2(31) of the Railways Act, 1989, dealing with the scope of the powers, denotes wider amplitude of the activities so long as there is nexus

to the main activity; and, in the present case, it is the nexus to the working of the Railways. Reliance is placed in this regard on **Royal Talkies, Hyderabad -v- Employees State Insurance Corporation, (1978) 4 SCC 204; and Renusagar Power Limited -v- General Electric Company, (1984) 4 SCC 679.**

Learned Senior Counsel would further submit that, in addition, it is also necessary to give full effect to Section 11(h) of the Railways Act, 1989 which speaks of to '*do all other acts necessary for making, maintaining, altering or repairing and using the railway*'; Sections 30, 31 etc. of the Railways Act, 1989 empowers the Railways to fix not only the rates for carriage of passengers and goods as defined in Section 2(35) of the Railways Act, 1989 but also, and in addition thereto, any other charges; Section 30 of the Railways Act, 1989, read with the other applicable provisions of the Railways Act, empowers the Central Government (Railways) to determine, from time to time, the rates for the transportation of passengers and goods, as well as any other charges, incidental to or connected with, such carriage; the power to impose any other charges is not restricted to the term 'rate' as defined in Section 2(35) as held by the Supreme Court and the High Courts in (1) **S. S. Light Railway Co. Ltd. -v- Upper Doab Sugar Mills Ltd., (1960) 2 SCR 926**; (2) **Union of India -v- Motilal Padampat Sugar Mills Co. (P) Ltd., (1969) 1 SCC 320**; (3) **Union of India -v- Gangeshwar Ltd., 1995 Supp (1) SCC 554 ;** (4) **NBK Trade Linker Pvt. Ltd. -v- Railway Board, Ministry of Railways, 2013 SCC OnLine All 13599**; and (5) **Ultra Tech Cement Limited -v- The Union of India 2014 (4) KHC 190;** consumption/end use of electricity in the area of operation of Railways, by itself or by vendors, contractors or others, are not

in any manner undertaken by the supply of electricity through the distribution system of any other person namely, other than by the Railways; the distribution licensee of the adjoining area cannot lay down the electric supply line or distribution system for affecting supply either to the Railways or others at the different end use/consumption points in the area of operation of the Railways; for example, a distribution licensee of the adjoining area cannot say that it will extend its electric supply line in the form of over-head line along the traction to allow the locomotive to draw power or to provide electric supply at the signaling points or railway yards or railway sidings or to the vendors in the Station or any other service providers or contractors in the area of the operation of the Railways; the provision of electricity at each point of consumption, in the area of operation of the Railways, can only made by the Railways, and not by the distribution licensee of the adjoining area; there cannot also be two parallel licensees in the area of operation of the Railways; in other words, the area of operation of the Railways, and more particularly the different places where electricity is delivered for end use/consumption, cannot be said to be a part of the area of supply of the distribution licensee adjoining the area of operation of the Railways; and the distribution licensee of the adjoining area supplies electricity, if so required by the Railways, at the periphery and not beyond.

Learned Senior Counsel would submit that, in this context, Railways, being authorised to undertake distribution of electricity under the Railways Act, 1989, cannot be burdened with obligations, applicable to ‘consumers’ under Section 42(2) or Section 42(4) read with Sections 38(2)(d)(ii), Section 39(2)(d)(ii) and 40(c)(ii) of the Electricity Act, 2003; these

provisions, which apply only to consumers, cannot be made applicable to Railways, when Railways source electricity from third parties for self-consumption or makes available electricity to others within its area of operation; consumption, with regard to which cross subsidy surcharge or additional surcharge can be claimed by the distribution licensee, is where the end use or consumption is within the area of his license, and not when it is outside the area of his license such as in the area of operation of the Railways which, in the present case, is governed by the Special Law; in the premise, the appropriate State Commission cannot have any jurisdiction with regards operation of the Railways' within its area of operation, namely from the traction sub-station or non-traction sub-station or switchyard to different consumption or end use points; the provisions of the Electricity Act, 2003 has, necessarily, to yield to the provisions of the Railways Act, 1989 in so far as electricity usage by the Railways is concerned; accordingly, the tariff aspects, standards of performance, payment of compensatory surcharge, the conditions of operating the license within the area of operation of Railways, cannot be subjected to the jurisdiction of the appropriate Commission under the Electricity Act, 2003; similarly, the obligation of the Railways, as a distribution licensee to supply electricity/universal supply obligations under Sections 42(1) and 43(1) of the Electricity Act, 2003 within its area of operation, is essentially controlled by the Railways Act, 1989 which is a superior Act and has overriding effect and not by the Electricity Act, 2003; however, if Railways seek open access to the grid system, outside the area of operation of the Railways, it is required to, and shall be governed by the orders and Regulations of the appropriate Commission; these include scheduling and despatch, DSM Regulations, inter-connectivity standards to be maintained etc; and the

Railways did not object to the license conditions, to be notified under Section 16 proviso, to a Deemed Licensee under Section 14- Third Proviso on such matters as referred to hereinabove, other than those related to the area of operations of the Railways.

Summarising his submissions under Issue Nos.1 to 3, Learned Senior Counsel would submit that each of the power/authority of the Railways, enumerated in Section 11 of the Railways Act, 1989, should be allowed to be implemented in an absolute manner, unhindered or unaffected or otherwise burdened by any provision of any other law in regard to conveyance of electricity, use of electricity, etc within the area of operation of the Railways; and, as a sequitur, such interference by orders passed under the Electricity Act, 2003, imposing cross subsidy surcharge or additional surcharge for consumption within the area of operation of Railways, cannot also be allowed.

Learned Senior Counsel would state that the clear position, emerging on consideration of the interpretation of Section 11 of the Railways Act, 1989 as per the law laid down by the Supreme Court and the High Courts, and the principles of construction of statutes are (1) as per the scheme, objective, nature and purpose of the Railways Act, 1989, Section 11 thereof is a superior and special law. It should be given wider application, and not be read in a restricted manner; (2) the activities of Railways, with regards electricity for the purposes of or in connection with the Railways or its working including transmission, distribution, use and consumption of electricity, are primarily governed by the provisions of the Railways Act, 1989; its authorisation is provided in Section 11 of the said Act, and not by the Electricity Act, 2003; (3) the non obstante clause in Section 11 has

been construed and applied as removing all impediments and obstructions provided in other laws, the other laws to yield to the application of Section 11 of the Railways Act, 1989 to its full effect, and as mandating enforcement of the powers provided therein inspite of any provision contained in any other law; (4) Section 11 of the Railways Act, 1989 cannot be construed as requiring Railways to additionally obtain licenses, permissions, approvals, sanctions etc. or otherwise with regards payment of fees, charges etc under other laws, including the Electricity Act, 2003, for undertaking activities duly authorised under the said Section, and the provisions of any other law cannot come in the way of the activities authorised under Section 11 of the Railways Act, 1989; (5) any action of the authorities under other laws must yield to the acts of Railways if permitted under Section 11 of the Railways Act, 1989; and (6) the Railways Act, 1989 intends to cover and occupy the entire field of Railway activities including electrification, transmission, distribution, end use, consumption and also provision of electricity to others in the area of operation of the Railways.

B. SUBMISSIONS OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the source of power to enact the Railways Act is referable to the Union List of Schedule VII of the Constitution of India especially Entry 22 (Railways) and Entry 30 (Carriage of Passenger and Goods by Railways); the jurisdiction under Section 11 of the Railways Act is only in respect of carrying passengers and goods, and not any other activity including distribution of electricity, which is found under Entry 38 of the concurrent list; the provisions of the Electricity Act, in matters of determination of tariff for retail sale of

electricity, payment of surcharge under Section 42 etc, cannot therefore be said to be inconsistent with Section 11(g) of the Railways Act; these provisions are applicable even in areas of operation of the Railways; the Railways Act excludes the provisions of the Land Acquisition Act, 1894 (Section 20-N of the Railways Act), provisions of the Local Acts for Transportation by Road or Waterways, provisions of the Local Acts for taxation on Railways for advertisements; further, Section 131 of the Railways Act is not applicable in areas occupied by the Mines Act, Factories Act etc; no such exclusion is made for the provisions of Telegraph Act or the 1910 Act, or the Electricity Act, 2003, despite numerous amendments being brought to the Railways Act post 2003; Section 6 of the Indian Telegraph Act enters the domain of the Railways Act, though Railways have been given authority under Section 11(f) to undertake activities provided for under the Telegraph Act; similarly, the provisions of the Electricity Act can enter the domain of the Railways Act, and the above referred provisions of the Electricity Act, 2003 can be made applicable to the Railways even in their premises, though the Railways have been given authority under Section 11(g) to undertake activities of public carriage of passenger and goods using electric traction; similarly, no provision in the Railways Act relates to determination of tariff for alleged distribution of electricity; thus, tariff must be determined strictly in terms of the Electricity Act; such determination of tariff falls strictly within the domain of the SERCs under Part VII of the Electricity Act; it is an admitted position that no SERC has determined the tariff applicable for the alleged consumers of the Railways; in Haryana, Regulations have been framed for grant of open access ie the HERC (Terms and Conditions for grant of Connectivity and open access for intra-state transmission and distribution

system) Regulations, 2012 wherein an applicant is defined to mean a licensee or a consumer (Regulation 3(2)), and open access consumer is defined to mean a licensee or a consumer (Regulation 3 (22)); and the HERC (Terms and Conditions of License for Deemed Licensee) Regulations, 2020 stipulates, under Regulation 13, that, in case deemed licensees utilise the entire quantum of electricity for its own consumption, it shall then be liable to pay all charges including cross subsidy surcharge ("**CSS**") and additional surcharge (Regulation 13***).***

It is submitted on behalf of the Respondents that, alternatively, the Railways Act cannot be said to be a complete code in respect of the working of the Railways, as: (a) the Railways Act does not define 'Area of Supply' of the Railways; (b) while Section 11 of the Railways Act authorises the Railways to undertake certain activities, including erecting, operating, and maintaining electric traction equipment, power supply and distribution installation, for the purpose of constructing and maintaining a railway, it does not provide for the manner in which the Railways is required to take supply of electricity for the said purposes; it is not the case of the Railways that it is generating its own electricity for works mentioned under Section 11 of the Railways Act, and is thus necessarily taking electricity from external sources, i.e. distribution licensees; the Railways Act does not extend to the said distribution licensees, which are supplying electricity to the Railways, and which are governed by the Electricity Act; therefore, it is only the acts mentioned under Section 11 which are governed by Section 11 of the Railways Act, and not the act of the Railways in taking supply of electricity; such supply is therefore governed by the provisions of the Electricity Act only; (b) Section 11 of the Railways Act gives it an overriding effect over

other laws only to the extent of any inconsistency if present; while the facility of open access is granted under the provisions of the Electricity Act, there is no corresponding provision under the Railways Act providing for any such facility; Railways has not disputed that open access is governed by the provisions of the Electricity Act; even if the Railways Act is considered a special legislation in terms of Section 173 of the Electricity Act, in so far as Open Access is considered, the Railways fall squarely under the provisions of the Electricity Act; (c) while the Electricity Act, under Section 184, provides that it shall not apply to certain Ministries and Departments as may be notified by the Central Government, the Railways is not a part of the said Ministries or Departments; in fact, no notification was produced by the Railways in this regard either before the Maharashtra Electricity Regulatory Commission ("**MERC**") or before this Tribunal; thus, while taking supply of electricity through open access, the Railways is squarely governed by the provisions of the Electricity Act, and not the Railways Act; and therefore, as a logical sequitur, if open access is availed under the Electricity Act, then the necessary consequences of open access under the Electricity Act are applicable upon the Railways.

C.ANALYSIS:

Before examining the rival submissions under this head it is useful to take note of the provisions of the Railways Act and the Electricity Act to the extent relevant.

D. RELEVANT STATUTORY PROVISIONS:

Chapter VI of the Railways Act relates to fixation of rates. Section 30 relates to the power to fix rates and, under sub-section (1) thereof, the

Central Government may, from time to time by general or special order, fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify, in such order, the conditions subject to which such rates shall apply. Section 2(2) defines “carriage” to mean the carriage of passengers or goods by a railway administration. Section 2(19) defines “goods” to include (i) containers, pallets or similar articles of transport used to consolidate goods; and (ii) animals. Section 2(29) defines “passenger” to mean a person travelling with a valid pass or ticket. Section 2(35) of the Railways Act defines “rate” to include any fare, freight or any other charge for the carriage of any passenger or goods.

Section 31 confers powers on the Central Government to (a) classify or reclassify any commodity for the purpose of determining the rates to be charged for the carriage of such commodities; and (b) increase or reduce the class rates and other charges. Section 2(5) defines “class rates” to mean the rate fixed for a class of commodity in the classification. Section 2(4) defines “classification” to mean the classification of commodities made under Section 31 for the purpose of determining the rates to be charged for carriage of such commodities. Section 2(7) defines “commodity” to mean a specific item of goods.

Section 32 stipulates that, notwithstanding anything contained in Chapter VI, a railway administration may, in respect of the carriage of any commodity and subject to such conditions as may be specified, (a) quote a station to station rate; (b) increase or reduce or cancel, after due notice in the manner determined by the Central Government, a station to station rate, not being a station to station rate introduced in compliance with an

order made by the Tribunal; (c) withdraw, alter or amend the conditions attached to a station to station rate other than conditions introduced in compliance with an order made by the Tribunal; and (d) charge any lump sum rate. Section 2 (38) defines "station to station rate" to mean a special reduced rate applicable to a specific commodity booked between specified stations.

Chapter VII relates to the Railway Claims Tribunal. Section 33(1) thereunder stipulates that there shall be a Tribunal called the Railways Claims Tribunal for the purpose of discharging the functions specified in the Act. Section 36 stipulates that any complaint that a railway administration (a) is contravening the provisions of Section 70; or (b) is charging for the carriage of any commodity between two stations a rate which is unreasonable; or (c) is levying any other charge which is unreasonable, may be made to the Tribunal, and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this Chapter. Section 44 stipulates that, in the case of any complaint made under clause (b) or clause (c) of Section 36, the Tribunal may (i) fix such rate or charge as it considers reasonable from any date as it may deem proper, not being a date earlier to the date of the filing of the complaint; (ii) direct a refund of amount, if any, as being the excess of the rate or charge fixed by the Tribunal under clause (i). Section 70 stipulates that a railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or any particular description of traffic in the carriage of goods.

Section 183(1) provides that a railway administration may, for the purpose of facilitating the carriage of passengers or goods or to provide

integrated service for such carriage, provide any other mode of transport. Section 183(2) stipulates that, notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to the carriage of passengers or goods by the mode of transport referred to in Section 183(1). Section 185 relates to taxation on railways for advertisement. Section 185(1) stipulates that, notwithstanding anything to the contrary contained in any other law, a railway administration shall not be liable to pay any tax to any local authority in respect of any advertisement made on any part of the railway unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification.

Section 45(1) of the Electricity Act, 2003 stipulates that the price to be charged by a distribution licensee for the supply of electricity by him, in pursuance of Section 43, shall be in accordance with such tariff fixed from time to time and the conditions of his license. Section 45(2)(a) stipulates that the charges for electricity supply by a distribution licensee shall be fixed in accordance with the methods and the principles as may be specified by the concerned State Commission. Section 45(3) stipulates that the charges for electricity supplied by a distribution licensee may include (a) a fixed charge in addition to the charge for the actual electricity supplied, and (b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee**.**

E. IS THE RAILWAYS ACT A COMPLETE CODE?

On the question whether the Railways Act is a complete code covering all aspects of the Railways including fixation of electricity rates for

Railways, it is clear that the railways seek conferment of the status of a deemed distribution licensee, and for grant of open access as a deemed distribution licensee, only in terms of the Electricity Act, 2003. It is not their case that even the provisions of the Electricity Act, relating thereto, are inapplicable to them. On the other hand, they admit that, when they seek open access to the grid, they are governed by the orders and regulations of the appropriate commission including with respect to scheduling and dispatch, DSM Regulations, inter-connectivity standards to be maintained, license conditions to be notified under the proviso to Section 16 of the Electricity Act, etc. Since it is not even their case that the Electricity Act has no application, or that all these matters are governed only by the Railways Act, their contention that the Railways Act is a complete code, to which the Electricity Act should yield, does not merit acceptance.

It is also not in dispute that Railways does not discharge any of the duties and functions of a distribution licensee as stipulated under Part VI of the Electricity Act. A deemed distribution licensee is required not only to operate and maintain a distribution system (system of wires and associated facilities), it is also obligated to supply power to its consumers through such a distribution system. The Electricity Act does not provide for the grant of a distribution license to a person who only maintains a distribution system without the concomitant obligation to supply electricity to consumers through it. As the Electricity Act is independent of the provisions of the Railways Act, and both enactments can be harmoniously read with each other, the question of inconsistency between these two enactments does not arise.

F. SECTION 11(h) OF THE RAILWAYS ACT: ITS SCOPE:

We find it difficult to agree with the contention, urged on behalf of the Railways, that fixation of electricity rates for Railways, falls within the ambit of Section 11(h) of the Railways Act. Section 11(h) confers on the Railways the power to do all other acts necessary for making, maintaining, altering or repairing and using the Railway. with regards matters specifically dealt with in the Railways Act, 1989, more so matters falling within the ambit of Section 11 in view of the non obstante clause therein. The fact, however, remains that use of the words “all other acts” in clause (h) of Section 11 makes it clear, that the acts referred to therein are other than those referred to in clauses (a) to (g) of Section 11. Section 11(h) is a residuary provision, and the power there-under to do all other acts as are necessary for making, maintaining, altering or repairing or using the railway can only relate to acts incidental to clauses (a) to (g) of Section 11, and not to bring within its ambit matters alien thereto, and matters which do not even form part of the Railways Act. The words “acts necessary for making, maintaining, altering or repairing or using the railway”, used in Section 11(h), does not bring within its fold supply of electricity to consumers in its area of supply by a distribution licensee, the conditions relating to which are to be determined by the appropriate commissions under the Electricity Act.

While railways would undoubtedly have the power to erect “electric traction equipment” and “power supply & distribution installation”, and to maintain and operate them to the exclusion of all others, the said provisions do not confer on the Railway Administration the power to sell electricity, through such an installation, to others. Such a power can only be claimed by the railways, if it is held to be a deemed distribution licensee which

status can only be claimed under the third proviso to Section 14 of the Electricity Act, and not under the Railways Act.

Railways would fall within the area of supply of a distribution licensee only for the purpose of supply of electricity, as the power conferred on a distribution licensee, under the Electricity Act, is only to supply electricity to the installation of the consumer, in the present case - the railways. Once electricity is so supplied by the distribution licensee at the Railway traction substation/non-traction substation/switchyard, its redistribution thereafter to various points of consumption, by the Railways as a consumer of such a distribution licensee, falls within its exclusive domain in view of Sections 11(d), 11(h) and 18 of the Railways Act, and can only be undertaken by the Railways, and no other. No distribution licensee can claim the right to enter into such area of the railways (as a consumer) in view of Section 11(d), 11(h) and Section 18 of the Railways Act, since unrestricted entry of others into this area is prohibited. On its receipt from the distribution licensee at the traction substation/non-traction sub-station/switchyard, redistribution of electricity, within the area covered in terms of Section 18 of the Railways Act, can only be undertaken by the Railways. However, such exercise of redistribution of electricity by the railways is as a consumer, and not as a deemed distribution licensee.

The extent of applicability of the non-obstante clause, under Section 11 of the Railways Act, has already been considered earlier in this order, and does not bear repetition. The Railway electric traction equipment, and the Railway power supply and distribution installation, can only be erected, operated, maintained and repaired by the Railways, and no distribution licensee can claim any right to do so in the light of the non-obstante clause

in Section 11. The area covered by Section 18 of the Railways Act is the area falling within the exclusive jurisdiction of the Railways, but as a consumer of electricity under the Electricity Act, and not as a deemed distribution licensee. Unlike in the case of other consumers, (within its area of supply as determined by the appropriate Commission under the Electricity Act), a distribution licensee cannot interfere with the power conferred on the Railways under Section 11(g) and (h) to erect, maintain, operate, repair etc its electric traction equipment and its power supply and distribution installation. The jurisdiction conferred on a distribution licensee is confined only to supply power to the railways as its consumer, and nothing more.

While the area of supply of a distribution licensee is, ordinarily, the area in which it establishes the distribution system and supplies electricity through such a system, in so far as Railways are concerned, a distribution licensee is only entitled to supply electricity at the traction substation/non-traction substations/switchyards of the Railways, and not to operate, maintain or repair any electric traction equipment or power supply and distribution installation within the area of the Railways covered by Section 18 of the Electricity Act. Each Railway Locomotive is not an independent consumer by itself, It is the concerned Railways which is the consumer of the concerned distribution licensee, and it is on them that a bill is raised for the electricity supplied to them. The distribution licensee has the obligation to supply electricity, to the Railways as its consumer, in view of Section 43(1) of the Electricity Act. On any such request made by the Railways, it is impermissible for the concerned distribution licensee to refuse to supply electricity to them.

G. STATEMENT OF OBJECTS AND REASONS:

With regards the submission that the Central Government/Railways have the power to determine electricity charges within its area of operations, to the exclusion of the appropriate Commissions under the Electricity Act, it is relevant to note that that the Statement of Objects and Reasons for introduction of a bill can be usefully referred to for the limited purpose of ascertaining the conditions prevailing at the time the bill was introduced, and the purpose for which the provision was made. **(Kavalappara Kottarathil Kochuni v. States of Madras and Kerala: AIR 1960 SC 1080).** The statement of objects and reasons can be legitimately used for ascertaining the object which the legislature had in mind. (**Sanghvi Jeevraj Ghewar Chand v. Secy., Madras Chillies, Grains and Kirana Merchants Workers Union, : AIR 1969 SC 530).**The Objects and Reasons of the Act may be taken into consideration in interpreting the provisions of the statute in case of doubt. (**Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299).**

Reference to the Statement of objects and reasons, for introduction of the Railway Bill, is necessary to understand the purpose for which the Railways Act was enacted, and the object sought to be achieved thereby. The Statement of Objects and Reasons, for introduction of the Railways Bill, states that the Bill was to provide, among others, (i) for constitution of the railway zones, abolition of existing zones, and appointment of General Managers as heads of these railways administrations; (ii) power had been given to the Central Government to fix the rates for the carriage of passengers and goods by the railways; (iii) statutory recognition of the railway receipt as a negotiable instrument; (iv) provision for limiting the

monetary liability of railway administrations in respect of payment of compensation for loss, damage, etc. of goods; and (v) the offences included in the Act had been rationalized and a few offences had also been included therein. Among the objects sought to be achieved by enacting the Railways Act was conferment of power on the Central Government to fix the rates for carriage of passengers and goods by the railways.

Para 4 of the Statement of Objects and Reasons, for introduction of the bill relating to the Electricity Act, 2003, details the main feature of the Bill which, among others, are for the State Electricity Regulatory Commissions to permit open access in distribution in phases with surcharge for—(a) current level of cross subsidy to be gradually phased out along with cross subsidies and (b) obligation to supply.

While among the objects, of enacting the Railways Act, was to confer power on the Central Government to fix the rates for carriage of passengers and goods by the railways, such a power does not include fixation of electricity tariff, as the power to determine retail supply tariff, to be charged on its consumers by a distribution licensee, falls exclusively within the jurisdiction of the appropriate Commission under Part VII of the Electricity Act.

H. FIXATION OF RATES UNDER THE RAILWAYS ACT: ITS SCOPE:

Chapter VI of the Railways Act bears the heading “Fixation of Rates”. While Section 30(1) confers power on the Central Government to fix rates for the carriage of passengers and goods for the whole or any part of the railway, what Section 30(2) enables the Government to do is to pass orders fixing rates for all other charges incidental to or connected with the carriage

of passengers and goods including demurrage and wharfage, as also the conditions subject to which the rates will apply. Section 2(2) defines *"carriage"* to mean the carriage of passengers or goods by a railway administration. Section 2(11) defines "demurrage" to mean the charge levied for the detention of any rolling stock after the expiry of free time, if any, allowed for such detention. Section 2(19) defines "goods" to include (i) containers, pallets or similar articles of transport used to consolidate goods; and (ii) animals. Section 2(29) defines *"passenger"* to mean a person travelling with a valid pass or ticket. Section 2(35) of the Railways Act defines "rate" to include any fare, freight or any other charge for the carriage of any passenger or goods. Section 2(37) defines "rolling stock" to include locomotives, lenders, carriages, wagons, rail-cars, containers, trucks, trolleys and vehicles of all kinds moving on rails. Section 2(41) defines "wharfage" to mean the charge levied on goods for not removing them from the railway after expiry of the free time prescribed for such removal.

The power conferred on the Central Government under Section 30(1) is to fix the fare, freight or any charge on the carriage of passengers or goods, for the whole or any part of the railway, by a railway administration. While Section 30(2) confers on the Central Government the power to fix any other charges also, it is only rates with respect to charges which are incidental to or connected with the carriage of passengers and goods, including demurrage and wharfage, which the Central Government is empowered to fix rates for, and not others.

The next question which arises for consideration is what the words *"incidental to or connected with"* mean? .

I. JUDGEMENTS RELIED ON BEHALF OF THE RAILWAYS ON THE MEANING OF "INCIDENTAL TO":

Before considering what the words "incidental to" and "connected with" used in Section 30(2) of the Railways Act mean, we shall note of the judgements relied on behalf of the Railways in this regard.

In ***Royal Talkies v. ESI Corpn.*****, (1978) 4 SCC 204**, the Supreme Court held that the expression "*in connection with the work of an establishment",* used in Section 2(9) of the ESI Act, roped in a wide variety of workmen who may not be employed in the establishment but may be engaged only in *connection with* the work of the establishment; some nexus must exist between the establishment and the work of the employee, but it may be a loose connection; a canteen service, a toilet service, a car park or a cycle stand, a booth for sale of catchy film literature on actors etc had connection with the cinema theatre; on the other hand, a bookstall where scientific works or tools were sold or a stall where religious propaganda was done, may not have anything to do with the cinema establishment and may, therefore, be excluded on the score that the employees do not do any work *in connection with* the establishment, that is the theatre; and keeping a cycle stand and running a canteen were incidental or adjuncts to the primary purpose of the theatre.

In *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679, the Supreme Court held that expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract were of the

widest amplitude and content, and included even questions as to the existence, validity and effect (scope) of the arbitration agreement.

The law declared in ***Renusagar Power Co. Ltd.*** is that the words *"in connection with"* are of wide amplitude. The expression "*in connection with the work of an establishment"* used in Section 2(9) of the ESI Act, (a beneficial legislation where the provisions of the enactment necessitates a liberal construction), arose for consideration in ***Royal Talkies.***

J. "INCIDENTAL TO" and "CONNECTED WITH" : MEANING:

As noted earlier in this order, the word *"connected"* means intimately connected or connected in a manner so as to be unable to act independently; these words are also used in the sense that they are really *"incidental to"*; and the connection contemplated must be real and proximate, and not far-fetched.

Black's Law Dictionary defines "*Incidental"* to mean**: "**dependant upon, subordinate to, arising out of, or otherwise connected with (something else, of greater importance) or consequential part (of something else)". The word ***"incidental"***, according to *Webster's New World Dictionary*, means *"happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated";* It means something which is a result of or in connection with another. **(Delhi Cloth & General Mills Co. Ltd. v. Workmen, (1967) 1 SCR 882: AIR 1967 SC 469).**

According to *Stroud's Judicial dictionary*, a thing is said to be incidental to another when it pertains to the principal thing. According to the ordinary dictionary meaning, it signifies a subordinate action.

(Hukumchand Jute Mills Ltd. v. Labour Appellate Tribunal, 1957 SCC OnLine Cal 102; LIC of India v. Retired LIC Officers Assn., (2008) 3 SCC 321). The expression "incidental" means necessary in certain contexts which does not mean a matter of casual nature only. **(Shroff and Co. v. Municipal Corpn. of Greater Bombay, 1989 Supp (1) SCC 347).** A thing is incidental to another if it merely appertains to something else as primary. It should not be extraneous or contrary to the purpose of the thing it is incidental to. **(State of T.N. v. Binny Ltd., 1980 Supp SCC 686)**

The word *'incidental'* does not imply any casual or fortuitous connection. In a legal sense, as applied to powers, it means a power which is subsidiary to that which has been expressed, and of an instrumental nature in relation thereto, which is both necessary and proper for the carrying into execution of the main power which has been expressly conferred. (***Dunichand and Co.* v. *Narain Das and Co.*** **[(1947) 17 Comp Cas 195 (FB); LIC of India v. Retired LIC Officers Assn., (2008) 3 SCC 321).**

As reliance is placed on behalf of the Railways on certain judgements, on the nature of charges which fall within the ambit of Section 30(2) of the Railways Act, it is useful to consider if, and to what extent, these judgements have any bearing on the case on hand.

K. JUDGEMENTS RELIED ON BEHALF OF THE RAILWAYS ON THE SCOPE OF SECTION 30(2) OF THE ELECTRICITY ACT:

In ***Union of India v. Gangeshwar Ltd.*****, 1995 Supp (1) SCC 554,** the appeal before the Supreme Court was directed against the judgment of the Railway Rates Tribunal on a complaint made by the respondents that

the maintenance charges, that were being levied for the private railway siding provided by the railways for the sugar mill of the Respondent were unreasonable. The maintenance charges for the said private siding were regulated by agreements.

Agreeing with the contention that the finding recorded by the Tribunal, that the charges that were levied were unreasonable, was not sustainable, the Supreme Court expressed its inability to uphold the order passed by the Tribunal reducing the amount of maintenance charges from the date of the complaint, and remitted the matter to the Tribunal for fresh determination.

Imposition of penal demurrage/wharfage charges, by way of Rates Circular Nos. 74 of 2005 and 21 of 2007, was subjected to challenge before the Allahabad High Court, in **NBK Trade Linker Pvt. Ltd. v. Railway Board, Ministry of Railways, 2013 SCC OnLine All 13599**, on the ground that it was beyond the jurisdiction of the Railway Board, and was *ultra vires* the Railways Act, 1989, there being no specific provision thereunder for levy of penalty for demurrage/wharfage charges; and the Railway Board could not prescribe any penal demurrage/wharfage by fixing rates of demurrage/wharfage charges.

Section 30 of the Railways Act, 1989 authorised the Railway Board to notify rates of demurrage and wharfage from time to time, and to revise the same. Rates Circular No. 74 of 2005 dated 19/12/2005 was issued by the Railway Board on the subject “free time and rates of demurrage, wharfage and stacking charges”. Paragraph 3.3 of the said Circular provided that, in case excessive congestion takes place at any terminal/steel plant, the demurrage rates could be increased even at

progressively increasing rate subject to a maximum of six times of the prevalent rate.

It is in this context that the Allahabad High Court held that Section 30(2) of the 1989 Act itself contemplates that "the conditions subject to which such rates shall apply" could also be laid down by the Central Government while fixing the rates; there could be different rates subject to different conditions; Para 3.3 of the Rates Circular No. 74 of 2005 was in two parts; the first part stipulated that, in case excessive congestion took place at any terminal/steel plant, the demurrage rates could be increased even at a progressively increasing rate subject to a maximum of six times the prevalent rate; the second part, which began with the word "this penal demurrage rates", referred to the progressively increasing rate subject to a maximum of six times the prevalent rate; when a statute empowers an authority to fix rates, the power has to be interpreted in a wide manner so as to meet different situations which may arise; the definition of the word "rate", in Section 2(35) of the Act, was a wide definition; the definition was an inclusive definition which had to be interpreted in a wide manner; while fixing rates, a scale can be fixed containing different rates applicable on fulfilment of different conditions; rates providing for progressive increase, subject to a maximum of six times the prevalent rate, was within the scope of Section 30(2); the penal charges, under paragraph 3.3 of the Rates Circular, was leviable where excessive congestion takes place at any terminal (Railway Station); the penal rates as contemplated under paragraph 3.3 was nothing but a progressively increasing rate subject to a maximum of six times the prevalent rate; merely because the said rates had been termed as penal rates, they could not be held to go beyond the

scope of Section 30(2); the scale of rates, prescribed by the Railway Board under Section 30(2), may also contain a rate which can be termed as penal rates; the object and purpose of prescribing progressively increasing rate was to release the rolling stock within the stipulated time to save economic loss to the railways; such prescription acted as a deterrent to the consignee to immediately unload their goods from their rolling stock or to remove their goods from wharfage; and the immediate removal of goods from rolling stocks and wharfage became more necessary and imminent when the terminal was congested, and could not be said to be unreasonable.

In ***Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. Upper Doab Sugar Mills Ltd*** **: AIR 1960 SC 695,** the question which arose for consideration was whether the Railway Rates Tribunal had jurisdiction to investigate the reasonableness of the increase, in total charges payable in respect of goods traffic carried by a railway, on the basis of terminals fixed by the Central Government. The main contention, raised on behalf of the railway company, was that as, in increasing the charges, the Railway Administration had merely applied standardized terminal charges, no complaint lay in respect of the same to the Railway Tribunal.

It is in this context that the Supreme Court held that there was nothing to prevent the railway company and the consignor from entering into an agreement as to what should be accepted as weight without actual weighment; once such a fixation is agreed upon, the amount calculated on that figure, at the rate fixed by the Government, must be deemed to be the amount properly payable in accordance with the rate fixed by the Government; there was a clear distinction between the rate and terminal charge; two classes of charges were included in the definition of

“Terminals”; the first was “charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters”; the second was “charges in respect of any services rendered thereat”; whether or not any services had been rendered at the stations, sidings, wharves, depots, warehouses, cranes and other similar matters, the other class of terminals in respect of these stations, sidings, wharves, depots, warehouses, cranes and similar other matters remained; when the legislature authorised the Central Government to fix terminals, the intention must have been that the terminals leviable would not depend on how many of these things would be used; the sensible way was to make a charge leviable for the mere provision of these things, irrespective of whether any use was made thereof; that was the reason why such wide words “in respect of” were used; and, irrespective of the fact of the actual user by any particular consignor of the stations, sidings and other things, “terminal charges” were leviable by reason of the mere fact that these things had been provided by the Railway Administration.

Following the judgement of the Allahabad High Court, in **NBK Trade Linker Pvt. Ltd. v. Railway Board, Ministry of Railways, 2013 SCC OnLine All 13599,** the Division Bench of the Kerala High Court, in **Ultra Tech Cement Limited Little Mount v. Union of India, 2014 SCC OnLine Ker 16571,** observed that the power to fix penal rates, i.e., progressively increasing rate upto a maximum 6 times of the prevalent rate had been upheld by the Division Bench of the Allahabad High Court in ***Nbk Trade Linker Pvt. Ltd***; the prescription of such rates as a deterrent was with the object and purpose which could not be said to be unreasonable; the objects and purpose for fixing rates for demurrage charges is justified in the context

of a Railway Station where also there is necessity for removal of goods with utmost expedition; Section 30(2) of the 1989 Act uses the phrase “fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage”; in addition to fixing rates for demurrage and wharfage, the Central Government is fully empowered to fix the rates of “any other charges incidental to or connected with”; penal rates, connected with demurrage charges, can be statutorily fixed; the mere fact that the progressively increasing demurrage charges, to a maximum of six times, are also referred to as penal charges does not make the charge beyond the authority of Section 30 of the 1989 Act or as unreasonable; the CCM, COM and DRM, as authorised under paragraph 3.3 of the Circular, were the only statutory authorities indicated in the rate circular who were to implement the rate circular as per the conditions therein; the power given to these authorities was a statutory power to be exercised on conditions as enumerated in the rate circular, and was not sub-delegation of any of legislative power of the Central Government under Section 30 of the 1989 Act.

In **SKL Co. v. Southern Railways, (2015) 16 SCC 509,** the respondent-railways issued notice inviting sealed tenders from traders and other interested parties for leasing of the front second class luggage rake of 4 or 8 tonnes and ventilated parcel van of 18 tonne capacity on the broad gauge on payment of lump sum rate for loading of parcels by certain trains for a period of two years. The respondents had noticed that in some trains, most of the time, the available luggage capacity was not being fully utilised resulting in loss of revenue; it was decided by the Government of India, as a matter of policy, to lease the luggage space to traders and other

interested persons after inviting tenders from them. The appellants filed a Writ Petition challenging the impugned notice, and to restrain the respondent Railways from charging tariff other than that specified in Coaching Tariff No. 24 Part III.

It was contended, among others, placing reliance on the maxim delegatus non potest delegare, that, under Sections 30 to 32 of the Railways Act, the power to fix the tariff rate is conferred only on the Central Government and the respondent Railways; and, by further delegating their authority, they violate the established legal principle that a delegatee cannot sub-delegate.

The Supreme Court held that the appeal could be disposed of, by directing the respondent-railways to fix the outer or upper limit of rates chargeable by contractors for different trains; the respondent-railways were bound to follow and implement the ethos and parameters set by the Railways Act; the intendment behind a statute can be diluted by Parliament, but not by a sub-delegate, as has been reiterated in ***Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137** wherein it was held that the legislature cannot efface itself; it cannot delegate the plenary or essential legislative function; and even if there is delegation, the delegate must function under its supervision otherwise "if the delegate is free to switch policy it may be usurpation of legislative power itself"; the Railway tariff should be realistic; and the respondents were entitled to auction the space for a particular period, provided the auction contractor adhered to the prescribed tariff. The appeal was disposed of directing the respondents to ensure that the successful tenderer did not charge carriage prices in

excess of those prescribed by the respondents in Coaching Tariff No. 24 Part III.

In ***Union of India v. Gangeshwar Ltd.*****, 1995 Supp (1) SCC 554,** the dispute related to the maintenance charges levied for the private railway sidings provided by the Railways which were regulated by agreements. Imposition of penal demurrage/wharfage charges, by way of Rates circulars, was in issue before the Allahabad High Court in **NBK Trade Linker Pvt. Ltd. v. Railway Board, Ministry of Railways, 2013 SCC OnLine All 13599**. In ***Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. Upper Doab Sugar Mills Ltd*** **: AIR 1960 SC 695,** the reasonableness of the increase, in total charges payable in respect of goods traffic carried by a railway, on the basis of terminals fixed by the Central Government, was in issue. In **Ultra Tech Cement Limited Little Mount v. Union of India, 2014 SCC OnLine Ker 16571,** (like in ***Nbk Trade Linker Pvt. Ltd),*** the power to fix penal rates, i.e., progressively increasing rate up to a maximum 6 times of the prevalent rate, was in issue. In **SKL Co. v. Southern Railways,** the issue was whether the power conferred on the Central Government and the Railways, under Sections 30 to 32 of the Railways Act to fix the tariff rate, could be further delegated.

All these cases related to charges payable for transportation (carriage) of goods by the Railways, or charges connected with or incidental thereto. Unlike in the present case, none of the afore-said judgements related to charges falling outside the ambit of the Railways Act.

L. ELECTRICITY TARIFF DOES NOT FALL WITHIN THE AMBIT OF SECTION 30(2) OF THE RAILWAYS ACT:

Section 30(2) of the Railways Act does not empower the Central Government to fix rates for any other charges un-connected with, or completely independent of, the carriage of passengers and for transportation of goods. Section 2(35) of the Railways Act defines rate to include any fare, freight or any other charge for the carriage of any passenger or goods. The words 'demurrage' and 'wharfage', used in Section 30(2), show that the charges, which can be imposed under Section 30(2) by the Central Government, include charges levied for detention of rolling stock after the period for such detention by the railways, and on goods not removed from the railways after expiry of the time stipulated for such removal. It is evident therefore that what is contemplated by Section 30(2), are charges which are connected with the transportation (carriage) of passengers and goods by the railways, and not matters independent thereof, such as electricity tariff, which a distribution licensee is permitted, by the appropriate commission under the Electricity Act, 2003, to charge its consumers.

Accepting the submission, urged on behalf of the Railways, that Section 30(2) confers power on the Central Government to also fix electricity tariff which a Railway Administration is entitled to charge, would result in startling and absurd consequences. Section 36 of the Railways Act enables a complaint to be made before the Railway Rates Tribunal against the Railway Administration levying unreasonable charges. What is excluded from the jurisdiction of the Railway Tribunal, by Section 37 of the Railways Act, are (i) classification or re-classification of any commodity, (b) fixation of wharfage and demurrage charges; (c) fixation of fares levied for the carriage of passengers and freight; and (d) fixation of a lump sum rate.

If the submission urged on behalf of the railways, that Section 30(2) enables the Central Government to fix electricity tariff, were to be accepted, then, since such matters would evidently not fall within the ambit of Section 37, a complaint can be filed under Section 36(1)(c) before the Railway Rates Tribunal contending that the levy of such a charge is unreasonable. In short, electricity tariff which the appropriate commission is entitled to determine, and against which an appeal would lie to this Tribunal, must, with respect to the Railways alone, be determined by the Central Government, the unreasonableness of which can be the subject matter of a complaint only before the Railway Rates Tribunal. Such a warped construction of Section 30(2) of the Railways Act does not merit acceptance.

M. OPEN ACCESS UNDER THE ELECTRICITY ACT:

What is claimed by the Railways, in this batch of appeals, is the status of a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act which would enable them to seek open access to the transmission systems, under Section 38(2)(d)(i), 39(2)(d)(i) and Section 40(c)(i), as a *"licensee"*. On the other hand, if it is held not to be a licensee, then its entitlement to seek open access would only be as a *"consumer"* under clauses (ii) of Section 38(2)(d), 39(2)(d) and 40(c), in which event such open access would only be required to be provided on payment of surcharge on the transmission charges ie additional surcharge/cross-subsidy surcharge.

While the provision for open access, under different Sections of the Electricity Act, no doubt enables power to be supplied by others, such as generators etc, also through the said distribution system, that does not absolve the distribution licensee of its obligation to supply electricity to its consumers. Section 14 of the Electricity Act does not provide for grant of license to a person who only maintains a distribution installation (ie a system of wires and associated facilities) without using the said system to supply electricity to consumers within the area of supply as determined by the appropriate commission.

As noted hereinabove, the Railways Act was enacted by Parliament under Entries 20 and 32 of List 1 of Schedule VII to the Constitution of India. Entry 30 specifically relates to carriage of passengers and goods by the Railways. On the other hand, the Electricity Act, 2003 was enacted by Parliament under Entry 38 of List III of Schedule VII to the Constitution of India. As the Railways Act was enacted long prior to the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003, It is difficult to accept the submission that the power conferred on the appropriate Commissions, to determine tariff, stands excluded only in respect of the Railways, or that such a power is incidental to fixing rates for the carriage of passengers and goods by the Railways. It is clear therefore that Chapter VI of the Railways Act, relating to fixation of rates, has no application with respect to determination of electricity tariff, which power falls exclusively within the domain of the regulatory Commissions under Part VII of the Electricity Act, 2003 i.e. under Sections 61, 62 and 64 thereof. There is no provision in the Railways Act stipulating to the contrary, and the power conferred under Section 11(g) of the Railways Act, to erect,

operate, maintain and repair the “electric traction equipment” or “the power supply and distribution installation”, does not bring within its ambit supply of electricity, either for the purpose of such erection, operation, maintenance and repair or through such an installation to consumers.

As noted hereinabove, Section 184 of the Electricity Act make the said Act inapplicable to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or undertakings or Boards or institutions under the control of such Ministries or Departments as may be notified by the Central Government. Since Railways does not fall within the Ministry of Defence or a department related to Atomic Energy, it is only on a notification, being issued by the Central Government under Section 184, could it be possibly held that the provisions of the Electricity Act, 2003 are inapplicable to the Indian Railways. No such notification has been issued by the Central Government.

N.CONCLUSION:

Issue No.3 is answered holding that the Railways Act, 1989 neither covers the entire field with respect to the Railways within its area, nor does it exclude the powers and jurisdiction of the Regulatory Commissions under the Electricity Act, 2003, on matters regarding tariff, payment of compensatory surcharge under Section 42 of the Electricity Act, 2003 etc, and for distribution and supply of electricity to the Railways for its use.

VIII. ISSUE 4:

Whether the Railways is a Deemed Distribution Licensee under the third proviso to Section 14 of the Electricity Act, 2003 by virtue of it being an

Appropriate Government and undertaking distribution of electricity within its area of operation as provided under Section 11(g) and (h) read with Section 2(31) of the Railways Act, 1989?

A. SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the third proviso to Section 14 of the Electricity Act, 2003 provides a deemed licensee status (for transmission, distribution and trading) to the Appropriate Government '*in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act';* Section 2(5) defines the term Appropriate Government as meaning the *Central Government, amongst others, Railways';* the Railways, being a department of the Central Government, is eligible to be considered as a deemed licensee including for distribution of electricity, if Railways is undertaking transmission or distribution of electricity or otherwise intends to do so; the submissions, under Issue No. 1, clearly establish that the Railways undertake distribution of electricity in its area of operation, and therefore satisfies the requirements specified under the third proviso to Section 14 that '*in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act';* since the 'Appropriate Government' is deemed to be a Distribution Licensee, Indian Railways has acquired the status of a deemed distribution licensee under Section 14 of the Electricity Act, 2003, ipso facto by virtue of the plenary Act/statutory provision, without any need for any declaration under the Electricity Act, 2003; as mentioned hereinabove, Railways has

been undertaking transmission and/or distribution of electricity, and intends to continue to expand the same with aggressive electrification program of its activities; such a position, in the case of Railways, existed by operation of law on the date of the coming into force of the Electricity Act, 2003 on 10.06.2003, without any declaration or recognition to be made by any authority, much less the regulatory commissions or any other act, thing or deed to be done by any other authority; however, as an internal control, it is entirely for the Central Government, under its Rules of Business, to decide as to which department be allowed to implement such status, and the same is an issue of indoor management; and it is like the Board of Directors of a company deciding on exercising a right which already exists.

Learned Senior Counsel would submit that the Central Government's decision dated 06.05.2014, in the case of Railways, as also the decision dated 26.07.2004 in the case of Military Engineering Services (MES) are under such rules of indoor management, and not an act done by the Central Government *de hors* the provisions of the Electricity Act, 2003; the Railways, having activities of distribution of electricity including distribution system up to the point of end use/consumption, squarely complies with the conditions relating to a Distribution Licensee, namely, to operate and maintain a distribution system; this is besides the transmission licensees' activities, also being undertaken by the Railways; accordingly, the conditions provided in the 3rd proviso to Section 14 of the Electricity Act, 2003 stands satisfied in the case of Railways. for the Railways to enforce its status as a deemed licensee statutorily provided for, without the necessity of any declaration, confirmation, grant or approval by any authority or agency under the Electricity Act, 2003.

B. SUBMISSIONS URGED ON BEHALF OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the Railways does not undertake ‘distribution of electricity’; Section 14 of the Electricity Act provides for ‘Grant of Licence’, *inter alia,* to *distribute electricity as a distribution licensee in any area as may be specified in the licence*; it is the forefront requirement, of Section 14 of the Electricity Act, that electricity should be distributed as a distribution licensee, i.e., in compliance of all requirements of being a Distribution Licensee; the following aspects are stipulated under the third proviso to Section 14 of the Electricity Act (a) the entity must be an Appropriate Government; (b) the entity must transmit electricity or distribute electricity or undertake trading in electricity; (c) the above activity could have commenced either before or after the commencement of the Electricity Act, but must continue on the date on which such status is being sought; Railways have contended that the activities described under Section 11(g) constitute ‘distribution of electricity’; it is important to test whether the following essential criteria are being met by the Railways under Section 11(g): (a) whether Railways has been authorised to operate and maintain a distribution system?; (b) whether Railways has been authorised to supply electricity to consumers in its area of supply?; this condition pre-supposes existence of ‘consumers’, ‘area of supply’ and sale of electricity; Railways does not fulfil any of the above criteria; Railways neither maintains nor operates a ‘distribution system’, nor does the Railways have any ‘consumer’ or ‘area of supply’ for sale of electricity to qualify as supply of electricity; and the Railways do not have a distribution system within the meaning of the Electricity Act as

‘power supply and distribution installation’, provided under Section 11(g) and 2(31) of the Railways Act, is not akin to a distribution system.

It is submitted, on behalf of the respondents, that the Railways do not have an ‘area of supply’; their contention is that Section 11(a) of the Railways Act provides for ‘area of operation’ of the Railways, which is akin to ‘area of supply’, which is a defined term under the Electricity Act; Section 11(a) merely states that the existence of such structures, as given thereunder, will not prevent the Railways from constructing or maintaining a Railway; ‘Area of supply’, on the other hand, is a geographically defined area which is specifically determined and not assumed; the distribution licensee does not determine its ‘area of supply’ by itself; ‘Area of supply’ is determined by the SERC along with the licence conditions of the licensee; for instance, the ‘area of supply’ of TP Central Odisha Distribution Limited is provided under Condition No. 2 of Part I of the Licence Conditions which provides that “*the Area of operation of licensed activity of the Licensee shall comprise the Electricity Distribution Circles of Bhubaneswar-I, Bhubaneswar-II, Cuttack, Dhenkanal and Paradeep existing as on date, excluding any cantonment, aerodrome, fortress, arsenal, dockyard or camp or any building or place in occupation of the Central Government for defence purposes*”; this definition shows that the alleged ‘area of operation’ of the Appellant is not excluded from the ‘area of supply’ of TPCODL; furthermore, Condition 3.3(e) of the Licence Conditions defines area of distribution or area of supply to mean “*the area of Distribution stated in Condition No.2 of these within which the distribution licensee is authorised to establish, operate and maintain the Distribution System and supply electricity*”; and therefore, as per the above two conditions, TPCODL has

the right to supply electricity to the alleged ‘area of operation’ of the Railways located in the ‘area of supply’ of TPCODL, whereas no such right has been granted to the Railways either under the Railways Act or the Electricity Act.

It is submitted, on behalf of the respondents, that the Railways does not have consumers; the sale of electricity is an essential component of ‘supply’ of electricity, which, *inter alia,* is a necessary ingredient of distribution of electricity as per the scheme of the Electricity Act; one of the important aspects, of being a distribution licensee as contemplated under the Electricity Act, is to supply electricity to a consumer by virtue of a ‘distribution system’; the term ‘supply’ has been defined under Section 2(70) of the Electricity Act which, in relation to electricity, means the sale of electricity to a licensee or consumer; supply of electricity would only be completed when there is a sale of electricity to a third party (i.e., a licensee or a consumer); one of the requisites of the ‘supply’ of electricity is that it must be sold to the other party; ‘sale’ of electricity to a third party is essential for discharging the activity of ‘supply’ of electricity; it is requisite that there should be a seller (distribution licensee herein), buyer (consumer herein) and price (tariff herein) for the sale of electricity; mere movement, of power from one point to another, cannot be construed as sale of electricity, as has been contended; the Railways has, in fact, admitted that it does not supply electricity to any third-party consumers; contrary to the submissions made by them before this Tribunal, the Railways have repeatedly admitted before the OERC that they do not supply electricity to the public unlike distribution licensees such as TPCODL; they also admitted that the procured power is consumed by them in connection with the working of the

Railways; this shows that no ‘sale’ takes place from the Railways to any consumer to qualify such activity as ‘supply’ under the Electricity Act; the act of re-distribution of power, inside the railway premises to bookshops, canteens, vendors, etc, cannot be construed as distribution of electricity to a third party, for the reason that it is being provided as a service by the Railways, in the railway premises, for the purposes of Railways or in connection with the working of the Railways, as contemplated in Section 2(31) of the Railways Act; Railways supply electricity to the aforementioned entities in view of a jural relationship as the above entities are carrying out important functions of the Railways for the purpose of and in connection with the Railways; electricity to such establishments situated on the Platform, for the purpose of and in connection with the Railways, is in fact an act of re-distribution by the Railways, after obtaining bulk supply from a distribution company, or a generating company, as the case may be; Railways obtain electricity in bulk, which is then internally branched out by them for their own purposes; the activity of branching out of electricity, within the premises of the Railways for its own consumption, can be done internally by the Railways; and the mere act of installation of equipment does not amount to sale of electricity under the Electricity Act.

It is submitted, on behalf of the respondents, that the contention urged on behalf of the Railways, that the phrase “*in connection with the working of the railway*” given under Section 11(g) of the Railways Act, has a wide meaning and it covers multiple activities which also includes the services of restrooms, bookshops, canteens, restaurants, etc, is not tenable; consumption of electricity, for carrying out such activity, is nothing but self-consumption by the Railways, and does not amount to sale of electricity;

the second component of sale, being ‘price/ consideration’, is also absent in the case of Railways, as the consideration for supply of electricity is the tariff payable by the ‘consumer’; determination of tariff falls strictly within the domain of the SERC under Part VII of the Electricity Act; it is an admitted position that no SERC has determined the tariff applicable for the alleged consumers of the Railways; what is charged by the Railways is merely a service fee from its alleged consumers, which is over and above the price at which the Railways obtain bulk supply of electricity from a generating company or a distribution company, as the case maybe; as long as Railways is not discharging any duties, assigned to a distribution licensee under the law, Railways is not eligible for any rights accruing to such licensees.

It is submitted, on behalf of the respondents, that reliance placed by the Railways on the letter dated 06.05.2014 issued by the Ministry of Power is misplaced and incorrect in law; under the extant statutory framework, the government does not have the power to grant exemption from procuring license; it is only the relevant SERC which has the power to grant license (Section 14 of the Electricity Act) or grant exemption (Section 13 of the Electricity Act) under the Electricity Act; the letter dated 06.05.2014 is, *ex facie,* inconsistent and contrary to Sections 12, 13, 14 and 15 of the Electricity Act; even otherwise, the letter dated 06.05.2014 is merely clarificatory in nature, and should be read with other applicable provisions of the Electricity Act and policies made thereunder; and, further, it is settled position of law that clarification by ministries do not have binding effect **(Bengal Iron Corporation & Anr. v. Commercial Officer and Ors :(1994) Supp (1) SCC 310; Kamal Kumar Dutta v. Ruby General Hospital Ltd :**

(2006) 7 SCC 613; and Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd: (1983) 1 SCC 147.

Drawing a parallel with the Damodar Valley Corporation Act, 1948, it is submitted, on behalf of the Respondents, that similar to an SEZ, in sharp contrast to express deeming *qua* Damodar Valley Corporation ("**DVC**") in the fourth *proviso* to Section 14, no such indication is provided in so far as the Railways is concerned; the Railways Act is subsequent to the Damodar Valley Corporation Act, 1948 ("**DVC Act**"); had it been the legislative intent of the Electricity Act, to confer upon the Railways the status of a deemed licensee, a similar deeming provision would have been included for the Railways as well; looking at the issue from another angle, the scheme of the Railways Act and the DVC Act may be juxtaposed; whilst multiple Sections of the DVC Act provide clear and explicit indications that the DVC is entitled to, or is otherwise required to, undertake distribution activities, there is no such indication in the Railways Act; the relevant Sections of the DVC Act, 1948 in this regard are Sections 4(1)(e), 12 and 20; and accordingly, whilst the deeming of the DVC is demonstrably justified, no such justification exists *qua* the Railways.

On the Legislative intent behind the third proviso to Section 14, **(State of Travancore –Cochin and Ors. v. Shanmugha Vilas Cashewnut Factory Quilon: AIR 1953 SC 333),** it is submitted, on behalf of the Respondents, that the legal fiction created under the provisos to Section 14 recognize the statutory existence of a distribution licensee at the time of coming into the force of the Electricity Act or thereafter with respect to such an entity and not beyond; the legislative intent behind the 3rd proviso is necessarily to be seen from the context of such Appropriate Governments

which have, in fact, been in the business of distribution of electricity; in India, there exist several State Governments which, through their Energy Departments, have been involved in the business of distribution of electricity within their States, and are the only utilities performing such functions; some of these are referred to in the table; since the aforesaid State Governments, through their respective Energy Departments, have been undertaking the functions of distribution of electricity within their States, the same were necessarily required to be given the status of a licensee (similar to DVC), and therefore such State Governments, by virtue of the 3rd proviso to Section 14, were granted the status of a deemed licensee under the Electricity Act; importantly, all the entities under the provisos to Section 14 have the characteristic of a distribution licensee in as much as all entities are involved in the business of distribution of electricity, and have a defined area of supply; while recognizing the nature of operations of the DVC, and the State Governments involved in the business of distribution of electricity, the legislation provides for their status as a deemed licensee; being fully aware of the nature of the operations of the Railways, the Electricity Act consciously omits to provide for such a status to the Railways; the same falls under the well-recognized principle of *onession unius est exclusion alterius* for statutory interpretation (i.e., expression of one thing excludes others); even otherwise, a legal fiction cannot go beyond the purpose for which it has been created; Section 11(g) of the Railways Act cannot be read in isolation, and its interpretation must depend on the text and the context. (**Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd and Anr: (1987) 1 SCC 424; Poppatlal Shah, Partner Of Messrs Indo malayan Trading Company v. State Of Madras, Represented By The Deputy Commercial Tax Officer,**

Sowcarpet: AIR 1953 SC 274; Union of India v. Elphinstone Spinning and weaving Co. Ltd. & Ors: (2001) 4 SCC 139); it is a cardinal rule of interpretation that statutes must be read as a whole in its context; when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context; the context here means the statutes as a whole, the general scope of the statutes and the mischief that it was intended to remedy; the mischief that the Railways Act intended to remedy are found in its Statements of objects and reasons; and the purpose and object of Section 11 of the Railways Act has been elaborated in several precedents, some of which are **(a) *Goa foundation* v. *Konkan Railways (AIR 1992 Bom 471)*; (b) Ganv Bhavancho Ekvott A society registered under the Societies Registration Act v. South Western Railways: 2022 SCC Online Bom 7184).**

On the applicable rules of Interpretation, it is submitted on behalf of the Respondents, that the same word may be used in different statutes giving different meanings; mere use of the word 'distribution', in the Railways Act, will not result in a right being conferred on the Railways to act as a distribution licensee; it is well settled that, in construing a word in an Act, caution must be exercised in adopting a meaning ascribed to that word in other statutes **(Commissioner of Sales Tax, Madhya Pradesh Indore v. Jaswant Singh Charan Singh: AIR 1967 SC 1454);** facts may be deemed and therefrom legal consequences would flow; legal consequences cannot be deemed; a legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it (**Delhi Cloth & General Mills Co. Ltd. and Anr. v. State of Rajasthan and Ors: (1996) 2 SCC 449);** and, in

this light, the Railways should fulfil the conditions precedent to become a 'deemed distribution licensee' as stipulated under the Electricity Act.

C. ANALYSIS:

Part IV of the Electricity Act, 2003 relates to licensing, and Section 12(b) thereunder stipulates that no person shall distribution electricity unless he is authorized to do so by a license issued under Section 14, or is exempt under Section 13. It is not even the case of the Railways that they have been exempted from obtaining a license for distribution of electricity and, consequently, reference to what Section 13 stipulates is un-necessary.

Section 14 relates to the grant of license. Section 14(b) enables the appropriate Commission, on an application made to it under Section 15, to grant a license to any person to distribute electricity as a distribution licensee. Both the expressions used in Section 14(b), ie "to distribute electricity" and "as a distribution licensee", are significant. The license granted under Section 14(b) not only makes the grantee a distribution licensee, but also authorizes it, by way of a license, to distribute electricity. Under the third proviso to Section 14, in case an Appropriate Government distributes electricity, whether before or after the commencement of the Act, such Government shall be deemed to be a licensee under the Act, but shall not be required to obtain a license under the Act.

D. OPINION OF THE APPROPRIATE GOVT THAT IT IS A DEEMED DISTRIBUTION LICENSEE IS NOT CONCLUSIVE:

While the submission of Mr. M. G. Ramachandran, learned Senior Counsel, that a declaration by the Appropriate Commission, that the appropriate Government (in the present case, the Central Govt of which the Indian Railways forms part of) is a deemed distribution licensee, is not a pre-requisite for application of the third proviso, cannot be said to be without merit, that does not mean that the presumption of an Appropriate Government, that it is a deemed distribution licensee in terms of the third proviso to Section 14, is conclusive. It is always open to the concerned Regulatory Commission, when the claim of the concerned Appropriate Government to be a deemed distribution licensee under the third proviso to Section 14 is put in issue, to decide this question.

E. LEGAL FICTION CREATED BY THE THIRD PROVISO TO SECTION 14: ITS SCOPE:

By use of the word “deemed”, in the third proviso to Section 14, 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, ex p Walton. Hill v. East and West India Dock Co: 1884 (9) AC 448; Shanmugha Vilas Cashewnut Factory: 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 Kanapravan 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)**, for 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 and, having done so, you must not 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: 1951 (2) ALL ER 587 (HL); DIT v. Schlumberger Asia Services Ltd., 2019 SCC OnLine Utt 274).** When the law creates a legal fiction, such fiction should be carried to its logical end. (**Builders' Assn. of India: (1989) 2 SCC 645 = AIR 1989 SC 1371; DIT v. Schlumberger Asia Services Ltd., 2019 SCC OnLine Utt 274).** 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 have to be worked out to their logical extent. (**Bengal Immunity Co. v. State of Bihar, AIR 1955 SC 661**).

In interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this,

the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. (**Mancheri Puthusseri Ahmed: (1996) 6 SCC 185; CIT v. Shakuntala: AIR 1966 SC 719; CIT v. Moon Mills Ltd: AIR 1966 SC 870; Sadan K. Bormal: (2004) 5 SUPREME 29; DIT v. Schlumberger Asia Services Ltd., 2019 SCC OnLine Utt 274).** When the law creates a legal fiction, such fiction should be carried to its logical end. **(State of Andhra Pradesh v. Bharat Sanchar Nigam Limited, 2011 SCC OnLine AP 107).** In interpreting a provision creating a legal fiction, the Court is required to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. (***Mancheri Puthusseri Ahmed* v. *Kuthiravattam Estate Receiver*, (1996) 6 SCC 185; *CIT* v. *Shakuntala*, AIR 1966 SC 719; *CIT* v. *Moon Mills Ltd.*, AIR 1966 SC 870; *State of West Bengal* v. *Sadan K. Bonnal*, 2004 (5) Supreme 29**; **Tirupati Udyog Ltd. v. Union of India, 2010 SCC OnLine AP 591).**

P Ramanatha Aiyar's Advanced Law Lexicon states that a legal fiction should be strictly confined to the area in which it operates. The legal fiction must be limited to the purposes indicated by the context, and cannot be given a larger effect. A legal fiction is created only for some definite purpose. The fiction is to be limited to the purpose for which it was created, and should not be extended beyond that legitimate field. A legal fiction pre-supposes the existence of the state of facts which may not exist, and then works out the consequences which flow from that state of facts. Such consequences have to be worked out only to their logical extent having due

regard to the purpose for which the legal fiction has been created. Stretching the consequences beyond what logically follows, amounts to an illegitimate extension of the purpose of the legal fiction. (**Bengal Immunity Company Limited v. State of Bihar, [1955] 6 STC 446 (SC); AIR 1955 SC 661, K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754**). A deeming provision cannot be pushed too far so as to result in an anomalous or absurd situation. (**Maruti Udyog Ltd. v. Ram Lai, (2005) 2 SCC 638**). The fiction enacted by the Legislature must be restricted by the plain terms of the statute (**Commissioner of Income-tax v. Shakuntala: AIR 1966 SC 719; Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver, (1996) 6 SCC 185**), and should not to be extended beyond the purpose for which, or the language of the Section by which, it is created. (**State of Maharashtra v. Laljit Rajshi Shdh, (2000) 2 SCC 699, Mancheri Puthusseri Ahmed, (1996) 6 SCC 185, State of W.B. v. Sadan K. Bormal, (2004) 6 SCC 59**). A legal fiction cannot be extended by the court on analogy or by addition or deletion of words not contemplated by the Legislature. (***Mancheri Puthusseri Ahmed*, (1996) 6 SCC 185) (State of Andhra Pradesh v. Seven Hills Constructions, 2011 SCC OnLine AP 064).** If the legal fiction is for a specified purpose, one cannot travel beyond the scope of that purpose. (**Bengal Immunity Co. v. State of Bihar, AIR 1955 SC 661**). The fiction is not to be extended beyond the purpose for which it is created, or beyond the language of the Section by which it is created. It cannot also be extended by importing another fiction. (***Mancheri Puthusseri Ahmed* v. *Kuthiravattam Estate Receiver*, (1996) 6 SCC 185; *CIT* v. *Shakuntala*, AIR 1966 SC 719; *CIT* v. *Moon Mills Ltd.*, AIR 1966 SC 870; *State of West Bengal* v. *Sadan K. Bonnal*, 2004 (5)**

Supreme 29; **Tirupati Udyog Ltd. v. Union of India, 2010 SCC OnLine AP 591).**

For the legal fiction to be attracted, and for the Appropriate Government to be deemed to be a distribution licensee without being required to obtain a license, the test prescribed therefor must be satisfied. The Electricity Act does not place a deemed distribution licensee on a higher pedestal than a distribution licensee. Except for the requirement of obtaining a license, a deemed distribution licensee is akin to a distribution licensee, and is likewise governed by all the provisions of the Electricity Act, except in the case of inconsistency falling within the ambit of Section 173 thereof. For the legal fiction in the third proviso to Section 14 to apply, the Railways must, like any other distribution licensee under the Electricity Act, be actually distributing electricity.

F. APPROPRIATE GOVERNMENTS ENGAGED IN DISTRIBUTION OF ELECTRICITY:

The Respondents have, in their written submissions, furnished a table in support of their contention that several State Governments, through their respective energy departments, are involved in exclusive distribution of electricity within their States; it is only such State Governments which have been granted the status of a deemed licensee by virtue of the 3rd proviso to Section 14 of the Electricity Act; and the table refers to some of them.

State	Department	Functions
Arunachal Pradesh	Department of Power, Arunachal Pradesh, Government of Arunachal	Generation, Transmission, Distribution, State Load Despatch Centre (SLDC)

	Pradesh	
Goa	Electricity Department of Goa	Transmission and Distribution
Jammu and Kashmir	Jammu & Kashmir Power Development Department	Transmission and Distribution
Manipur	Electricity Department, Government of Manipur	Generation, Transmission and Distribution
Mizoram	Electricity Department, Government of Mizoram	Generation, Transmission, Distribution and SLDC
Nagaland	Electricity Department, Government of Nagaland	Generation, Transmission, Distribution and SLDC
Sikkim	Energy & Power Department	Generation, Transmission, Distribution and SLDC

The appropriate Governments, referred to in the aforesaid table, would undoubtedly fall within the ambit of the third proviso to Section 14, as they have actually been distributing electricity both before and after the commencement of the Electricity Act. It is to enable the aforesaid State Governments, through their respective departments of Energy, to continue distributing electricity as a deemed licensee, without the corresponding obligation of obtaining a license under Section 14 of the Electricity Act, that the third proviso to Section 14 of the Electricity Act appears to have been inserted.

In view of Section 2(5)(a)(ii) of the Electricity Act, the Appropriate Government, in relation to the Railways, is the Central Government and, in

case Railways is also held to be distributing electricity either before or after commencement of the Electricity Act, it must be deemed to be a distribution licensee under the said Act. In this context, it is useful to refer to the Order of the CERC in Petition No. 197/MP/2015 dated 05.11.2015, and the letter of the Ministry of Power, Government of India dated 06.05.2014, since reliance is placed thereupon, on behalf of the Railways, to contend that they certify that Railways is a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act.

G. ORDER OF CERC IN PETITION NO. 197/MP/2015 DATED 05.11.2015:

Appeal No.276 of 2015 is preferred against the Order passed by the Central Regulatory Commission ("CERC" for short) in *"Indian Railways vs Power Grid Corporation of India and others"* (Order in Petition No. 197/MP/2015 dated 05.11.2015. The first three issues which arose for consideration before the CERC were: (1) Whether the petition was maintainable before the Commission? (2) Whether the petitioner's claim as an authorized entity under the provisions of the Railways Act to undertake distribution of electricity in connection with the working of the railways can be sustained in law. If so, whether the petitioner is entitled for grant of connectivity and open access as a distribution licensee in connection with the working of the railways? and (3) Whether the petitioner can be treated as a deemed licensee under the Electricity Act?

On issue No.1, the CERC observed that, since the issue had arisen in the context of grant of connectivity to Indian Railways for the purpose of

availing inter-State Open Access, the petition, filed before it, was maintainable.

On issue No.2, the CERC opined that, in view of Section 173 of the Electricity Act, it had to be seen whether the provisions of the Electricity Act are inconsistent with the provisions of the Railways Act in so far as distribution business is concerned; to the extent of inconsistency, Railways Act will prevail and in case of consistency, provisions of both Acts will prevail; Section 11(g) of the Railways Act authorized the Railway Administration "to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway"; the words *"power supply and distribution installation"* have not been defined in the Railways Act; however, these words need to be understood in the light of the purpose which they seek to serve i.e. in connection with the working of the railways; considering these words in the context of the definition of railways, it appears that the Railway Administration is entrusted with the works to lay down the distribution network for supply of power to various railway installations; from the judgement in **Union of India through General Manager Northern Railway Vs Chairman UPSEB & Others (judgement of the Supreme Court in Transfer Case No. 37 and 38 of 2001 dated 9.2.2012),** it was clear that Indian Railways were governed by the provisions of the Railways Act for constructing transmission lines and distribution installations for the purpose of supply of power to the railways without having to take any licence from the appropriate Commission for transmission or distribution of electricity; in other words, the Indian Railways can be treated as an authorized entity under the Railways Act for carrying out transmission and

distribution activities for ensuring supply of power in connection with the working of the railways; that being the case, the requirement of MSETCL for declaration regarding the area of operation, other terms and conditions of licence and Standard of Performance as required in case of a distribution licensee under the Electricity Act, will not be applicable in case of Railways; since the TSS of Railways are already connected with MSETCL network for drawing power, the petitioner was entitled for grant of inter-State Open Access through the MSETCL network for the purpose of supply of power in connection with the working of the railways; MSETCL had submitted that, presently, the petitioner was connected to the grid as a consumer of MSEDCL and was seeking connectivity as a distribution licensee; as per Regulation 3.2 of the Maharashtra Electricity Regulatory Commission (Transmission Open Access Regulations), 2014, connectivity with the grid is a pre-condition for grant of open access; therefore, the petitioner was required to apply and had rightly applied to MERC, in Case No. 194 of 2014, to take on record the deemed distribution licensee status of the Indian Railways for issuing specific conditions of the licence; the ruling given by MERC in order dated 11.4.2012 in Case No. 157 of 2011 (M/s Serene Properties Private Ltd) has been relied upon regarding the requirement of issue of specific conditions for distribution licensees; in the light of the special status of Indian Railways under the Railways Act, as interpreted by the Supreme Court in **UOI through General Manager Indian Railways Vs UPSEB,** the ruling of MERC, in the case of M/s Serene Properties Private Limited, will not be applicable in case of the Indian Railways; and, since the Indian Railways is an authorized entity to distribute and supply electricity in connection with the working of the Railways under the Railways Act, the petitioner shall be entitled for grant of

Open Access in connection with the working of the Railways as per the provisions applicable to a distribution licensee.

On Issue No.3, the CERC observed that the third proviso to Section 14 permits the Central Government or State Governments to undertake any of the licensed activities of transmission, distribution and trading whether before or after the commencement of the Act without having to take a licence; the Ministry of Power, vide letter dated 6.5.2014, has issued the following clarification regarding the status of a deemed licensee; WBSEDCL and MSETCL had objected that this clarification was not a judicial pronouncement, and therefore cannot be accepted as conclusive proof of the deemed status of Indian Railways, and MSETCL had advised the petitioner to get an order from the appropriate Commission in this regard; a plain reading of the third proviso to Section 14 does not reveal that a judicial pronouncement is required for determining the status of the appropriate Government as a licensee under the said provision; in exercise of the powers under clause (3) of Article 77 of the Constitution of India, the Hon'ble President of India had made the Government of India (Allocation of Business) Rules, 1961; Rule 2 of the AoB Rules provides that the business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule to these rules; administration of the Electricity Act, 2003 is the responsibility of the Ministry of Power; being the nodal Ministry, Ministry of Power had examined the proposal of the Ministry of Railways with regard to its deemed status as a licensee under the Electricity Act in consultation with the Ministry of Law and Justice which has been vested with the power to render "advice to Ministries on legal matters including interpretation of

the Constitution and the laws"; moreover, the clarification had been issued with the approval of the Hon'ble Minister of Power (Independent Charge); therefore, the clarification issued by the Ministry of Power with regard to the deemed licensee status of the Indian Railways meets the requirement of Law; and there was no requirement for a declaration to that effect to be issued by an Appropriate Commission.

After noting, the submission of WBSETCL, that Indian Railways, in order to be considered as a deemed licensee under the Electricity Act, must first comply with the requirements of Section 14 read with Section 15 of the Electricity Act, the CERC observed that the Appropriate Government is not required to take a licence in terms of the third proviso to Section 14 of the Act in order to transmit or distribute or undertake trading in electricity; the provisions of Section 15, Sections 17 to 24 will not be applicable in case of deemed licensees under the third proviso to Section 14 of the Act; however, the proviso to Section 16 requires the Appropriate Commission to specify the general or specific conditions to be applicable to deemed licensees covered under first, second, third, fourth and fifth provisos to Section 14 of the Electricity Act; therefore, the Central Commission and State Commissions are required to specify the general or specific conditions of licence applicable to deemed licensees; as and when Indian Railways decides to undertake transmission, distribution or trading in electricity as a deemed licensee under the third proviso to 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 the proviso to Section

16 of the Act; the petitioner is a deemed licensee under third proviso to Section 14 of the Electricity Act; and there was no requirement for declaration to that effect by the Appropriate Commission.

H. MINISTRY OF POWER LETTER REGARDING DEEMED LICENSEE STATUS OF INDIAN RAILWAYS:

As reliance has been placed, in the aforesaid order of the CERC, on the contents of the letter of the Ministry of Power dated 06.05.2014, it is useful to note its contents. In its letter No-25/19/2004-R&R dated 06.05.2014, addressed to the Secretaries of the State Commissions/JERCs, and the Secretaries in charge of Energy/Power Deptt. Of States/UTs, the Ministry of Power, Govt of India, issued clarification on the subject-Railways as deemed licensee under the Electricity Act, 2003.

After referring to the Ministry of Railways (Railway Board) letters dated 13 March, 2014 and 27th March, 2014 seeking clarification for deemed licensee status to the Indian Railways, the Ministry of Power stated that the issue of granting deemed licensee status to Railways, under the Electricity Act. 2003, had been examined by the Ministry in consultation with the Dept. of Legal Affairs, Ministry of Law and Justice; it was clarified that Railways was a deemed licensee under the third proviso to Section 14 of the Electricity Act, 2003; and this clarification may be read with other applicable provisions of the Electricity Act, 2003 and policies made thereunder.

The letter dated 06.05.2014, issued by the Ministry of Power, is neither a directive under Section 107 of the Electricity Act nor does it state

that it has been issued under the said provision. The said letter, in fact, makes no reference to any provision of the Electricity Act in terms of which such a letter was issued. It would hardly make any difference even if it were to be presumed that the source of power to issue such a letter is traceable to Section 107 of the Electricity Act, since such directions are also not binding on the Central Commission.

Before examining the scope of Section 107 of the Electricity Act, it is necessary to take note of the judgements relied on behalf of the Respondents on the effect of such letters/circulars/guidelines.

I.JUDGEMENTS RELIED ON BEHALF OF THE RESPONDENTS:

Relying on **Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. [(1983) 1 SCC 147**, the Supreme Court, in ***Bengal Iron Corpn. v. CTO*****, 1994 Supp (1) SCC 310,** held that clarifications/circulars issued by the Central Government and/or State Government represented merely their understanding of the statutory provisions; they are not binding upon the courts; there can be no estoppel against the statute; the understanding of the Government was nothing more than its understanding and opinion; it was doubtful whether such clarifications and circulars bound the quasi-judicial functioning of the authorities under the Act; while acting in a quasi-judicial capacity, they were bound by law and not by any administrative instructions, opinions, clarifications or circulars; law is what was declared by the Supreme Court and the High Court; and Parliament/Legislature never speak or explain what does a provision enacted by it means.

In ***Kamal Kumar Dutta v. Ruby General Hospital Ltd.*****, (2006) 7 SCC 613,** the Supreme Court held that the letter from the then Law Minister could not override the statutory provision; when the statute is clear, whatever be the statement made by the Law Minister on the floor of the House, cannot change the words and intendment which is borne out from the words; the letter of the Law Minister cannot be read to interpret the provisions of a Section in an enactment; the intendment of the legislature should be given its natural meaning and cannot be subject to any statement made by the Law Minister in any communication; the words speak for themselves; and it did not require any further interpretation by any statement made in any manner.

J. DIRECTIVES UNDER SECTION 107 ARE NOT BINDING:

Section 107 of the Electricity Act relates to directions by the Central Government and under sub-section (1) thereof, in the discharge of its functions, the Central Commission shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing. Section 107(2) provides that, if any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final. Section 108 of the Electricity Act is in pari-materia with Section 107 of the said Act, except that Section 108 relates to 'Direction by the State Government to the State Commission', and Section 107 relates to 'Direction by the Central Government to the Central Commission'.

Section 78A of the Electricity Supply Act, 1948, was worded similarly to that of Section 107 and 108 of the Electricity Act,2003, and provided that

the “the Board shall be guided by such directions on questions of policy as may be given to it by the State Government”. In **Real Food Products Ltd. v. A.P. SEB, (1995) 3 SCC 295,** the Supreme Court held that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates; in the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Electricity Supply Act,1948, the Board is to be guided by any such direction of the State Government; the direction of the State Government was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P which relate to a question of policy which the Board must follow; however, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by; but where the Board considers even the rate suggested by the State Government, and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate; in such a case, the Board accepts the suggested rate because that appears to be appropriate on its own view; and, if the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself.

This judgement in **Real Food Products Ltd,** rendered in the context of the Electricity Supply Act, 1948, may not be applicable in the context of Sections 107/108 of the Electricity Act, 2003, by which Act the 1948 Act

was repealed. In this context it is useful to note that the Statement of objects and reasons for introducing the Electricity Bill, 2001 records, among others, that, over a period of time, the performance of State Electricity Boards had deteriorated substantially on account of various factors; for instance, though power to fix tariffs vested with the State Electricity Boards, they had generally been unable to take decisions on tariffs in a professional and independent manner, and tariff determination in practise had been done by the State Governments; cross-subsidies had reached unsustainable levels; to address this issue, and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act was enacted in 1998; and it created the Central Electricity Regulatory Commission and had an enabling provision through which the State Governments could create a State Electricity Regulatory Commission.

The said Statement of objects and reasons further records that, with the policy of encouraging private sector participation, generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the regulatory commissions, the need for harmonising and rationalsing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose; accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Boards and the

responsibilities of the State Governments and the State Electricity Boards with respect to regulating licensees.

The law declared by the Supreme Court, in **Real Food Products Ltd.**, is that, in discharging its functions of fixing the tariffs, the State Electricity Board is to be guided by the direction of the State Government. As noted hereinabove, the aforesaid judgement was passed interpreting the scope of Section 78-A of the Electricity (Supply) Act, 1948. It is with a view to provide for distancing of the government, from determination of tariffs, that the Electricity Regulatory Commissions Act,1998 was enacted, and the Central Electricity Regulatory Commission was created thereby. The enabling provisions under the 1998 Act are now mandatory provisions under the Electricity Act, 2003 with Part X thereof obligating the constitution of State Electricity Regulatory Commissions. Detailed provisions have also been made in Part IX of the 2003 Act regarding tariff, and the power to determine tariff now vests exclusively with the appropriate Regulatory Commissions. The judgement of the Supreme Court, in **Real Food Products Ltd**, rendered in the context of Section 78-A of the Electricity Act, 1948 would have no application since Regulatory Commissions- both Central and State- have been constituted, with a view to distance tariff determination by these Commissions from the Government, under the subsequent enactments ie the Electricity Regulatory Commissions Act,1998 and the Electricity Act, 2003. The law laid down in the said judgement may no longer apply in the changed context.

While the Central Commission, constituted under Part X of the Electricity Act, 2003, is required to be guided by the directions issued under Section 107 of the Electricity Act, 2003, in the matters of public interest, the

said directions of the Central Government, are not binding on them. **(Fatehgarh Bhadla Transmission Co. Ltd. v. CERC: 2023 SCC OnLine APTEL 16).** In **Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Regulatory Commission (Order in Appeal No. 92 of 2013 & IA No. 151 of 2013 dated 21.01.2014),** this Tribunal was called upon to consider whether the directions issued under Section 108 were binding on the State Commission. Relying on the judgment of the Supreme Court in **APTRANSCO v. Sai Renewable Energy Pvt. Ltd., (2011) 11 SCC 34,** and the judgment of this Tribunal, in ***Polyplex*** **(Order in Appeal No. 41, 42 and 43 of 2010 dated 31.01.2011),** this Tribunal held that the following inferences could be made : (1) the Commissions are independent statutory authorities and are not bound by any policy or direction which hamper its statutory functions; (2) the term 'shall be guided' is not mandatory, and its character would depend upon a case to case basis; the State Commission, in discharge of its functions under the Act, has to be guided by the directions of the State Government, but the same are not mandatory; and the State Commission being an independent statutory authority is not bound by any policy directions which hampers its statutory functions.

This Tribunal then summarized its findings as under: **(i)** the State Commission in discharge of its functions under the Electricity Act, 2003 has to be guided by the directions of the State Government u/s 108 of the 2003 Act, but the same are not mandatory and binding. The State Commission being an independent statutory authority is not bound by any policy directions which hamper its statutory functions (ii) the State Commission has to be guided by the directions of the State Government u/s 108 of the

Act only in the discharge of the functions assigned to it under the 2003 Act; and such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act.

In **Steel City Furnace Association v. Punjab State Electricity Regulatory Commission (Order in APPEAL No. 189 of 2022, 369 of 2022 and 4 of 2021 dated 31.10.2022),** this Tribunal observed that the directions of the State Government, under Section 108 of the Electricity Act, would not bind the State Commission; the law only said that the State Commission '*shall be guided*' by such directions as may be issued by the State Government in matters of public interest'; the provision contained in Section 108 could be contrasted with Section 11 of the Electricity Act, 2003 wherein an appropriate government is vested with the power '*in extraordinary circumstances*' to specify that the generating companies shall operate and maintain their generating stations '*in accordance with the directions*' of the government; the expression "*extraordinary circumstances*" was defined by the explanation to mean such circumstances as may arise out of threat to the security of the State, public order or a natural calamity or "*such other circumstances arising in the public interest*"; given the language employed in Section 11, there could be no debate that the generating companies were *bound* to act '*in accordance with*' the directions of the government issued to deal with the situation arising out of such extraordinary circumstances, the caution being - as provided by sub-section (2) - for such measures also to be adopted as would "*offset the adverse financial impact of the directions*" for the generating companies; and, in contrast, Section 108 of the Electricity Act only expected the State Commission to "*be guided by*" the directions of the State Government.

For the CERC to be guided by the directions issued under Section 107(1) of the 2003 Act, such directions should have been issued by the Central Govt, in writing, on a policy matter involving public interest. Firstly, not every direction issued by the Central Govt would fall within the ambit of Section 107(1). The directions in writing must relate to a matter of policy. Again not all matters of policy, but only those policy directives which involve public interest fall within the ambit of the said provision. Further Section 107(1) only requires the CERC, in the discharge of its functions, to be guided by such directives. The words “guided by” means to be “assisted by in reaching a conclusion”. The directives of the Central Govt, under Section 107(1), can only be of assistance to the CERC in taking a decision and, while the CERC should take such directives into consideration while discharging its functions, it is not bound by such guidance. **(Fatehgarh Bhadla Transmission Co. Ltd. v. CERC: 2023 SCCOnLine APTEL 16).**

While the respective Commissions are no doubt obligated to take into consideration the directives issued under Section 107 and 108, as they are entitled to great weight, the said directives are not binding on the respective Commissions which may, for just and valid reasons, take a view different therefrom.

It is relevant to note that the letter dated 06.05.2014, issued by the Ministry of Power, does not record reasons as to how it was concluded that Railways was a deemed licensee under Section 14 of the Electricity Act. The said letter does not even state whether the deemed licensee status, that the Railways was supposed to enjoy, was either as a transmission licensee or as a distribution licensee or both. In any event the Central Commission (even assuming it could have exercised jurisdiction on this

issue), ought to have considered whether Railways was in fact distributing electricity, either before or after the commencement of the Electricity Act, for it to be deemed to be a distribution licensee under the 3rd proviso to Section 14 of the Electricity Act. The CERC has merely followed what the Ministry of Power has stated in its letter dated 06.05.2014, after holding that such a power was conferred on the Ministry of Power.

The rules of business, under Article 77(3) of the Constitution, are made for the convenient transaction of the business of the government, and allocation among the Ministries of the business of the Government of India. What we are required to examine, in this batch of appeals, is not the allocation of business among different Ministries of the Central Government, but whether or not Railways is a deemed distribution licensee in terms of the third proviso to Section 14 of the Electricity Act. Both the Central/State Commissions, as well as this Tribunal, are creations of the Electricity Act and are required to exercise jurisdiction strictly in terms thereof. Any directives, dehors the provisions of the said Act, does not bind the Appropriate Commission. Since the CERC has not recorded any independent conclusion, as to whether or not Railways was in fact distributing electricity either before or after the commencement of the Electricity Act, 2003, this Tribunal is required to consider this aspect for it is only if the Railways is held to satisfy this requirement, would they then be a deemed distribution licensee in terms of the 3rd proviso to Section 14 of the Electricity Act.

K. THE QUESTION WHETHER MES IS A DEEMED DISTRIBUTION LICENSEE DOES NOT NECESSITATE EXAMINATION IN THIS BATCH OF APPEALS:

As reliance is also placed on behalf of the Railways on the letter of the Ministry of Power dated 26.07.2004, it is necessary to note its contents. On the subject of Military Engineering Services, (a Subordinate Organisation under the Ministry of Defence), being a deemed licensee under the Electricity Act, 2003, the Ministry of Power, Government of India, by its letter dated 26.07.2004, informed the Secretaries of the State Commissions, the Secretaries in charge of Energy/Power Deptt. of States that the Electricity Act, 2003 had been enacted and brought into force and 10th June, 2003; since the enactment of the Act, requests were received from various stakeholders for issuing necessary clarifications on certain issues; one of such issues related to recognition of Military Engineering Services, a subordinate organisation of the Ministry of Defence, as a deemed licensee under the Electricity Act, 2003; issue of MES as a deemed licensee under the Act has been considered in consultation with the Ministry of Law; and accordingly it is clarified that MES, which is a subordinate organisation of the Ministry of Defence entrusted with and consequently engaging in supply of electric power, met the requirement as provided in the third proviso to section 14 of the Electricity Act, 2003, of an Appropriate Government engaging in distribution of electricity; and as such qualified to be a deemed licensee under the said provision of the Act.

It would be wholly inappropriate for us to express any opinion on the scope and purport of the aforesaid letter, or regarding its applicability, since Military Engineering Services is not a party to this batch of appeals; and no finding ought to be recorded, or any conclusion arrived at, behind their back. Suffice it, therefore, to make it clear that we have not examined whether or not the Military Engineering Services is a deemed distribution

licensee under the third proviso to Section 14 of the Electricity Act, more so as the said issue is wholly extraneous to the adjudication of this batch of appeals.

As reliance is placed, on behalf of the Respondents, on the observations of the OERC in Case No.55/2016 Dated 25.02.2020 in support of their submissions, it is useful to note the contents of the said Order.

L.ORDER OF OERC IN "*OPTCL v. EAST COAST RAILWAY AND OTHERS*" (ORDER IN CASE NO.55/2016 DATED 25.02.2020)

Appeal No. 114 of 2020 is filed against the Order passed by the Orissa Electricity Regulatory Commission ("OERC" for short) in "OPTCL vs East Coast Railway & others" (Order in case No. 55/2016 dated 07.08.2018). In the Order under appeal, the OERC held that Railways can transmit electricity through traction wires which is more than 250 watts and 100 volts in rating without obtaining a transmission licence or related licence conditions; in fact Railways have been carrying on these transmission activities without a licence even after enactment of Electricity Act, 2003 which requires a licence for carrying on such activity for others; in that context, Railways is a deemed transmission licensee under proviso three of Section 14 of the Electricity Act; since Railways are a transmission licensee by operation of law, they are not required to obtain licence from the Commission; since the Commission has not granted any licence to the Railways, it cannot impose on them any condition under Section 16 of the Electricity Act to operate that licence; and distribution activities are clearly distinct from transmission activities.

After referring to the definitions of a "transmission licensee" under Section 2(73), "transmit" under Section 2(74), "distribution licensee" under Section 2(17), and "distribution system" under Section 2**(1**9), the OERC observed that there was no definition available in the Railways Act regarding transmission and distribution activities; it was only available in the Electricity Act, 2003 which is a special Act in the electricity sector; as per Section 175 of the Electricity Act, 2003, the provisions of this Act are in addition to and not in derogation of any other law for the time being in force; therefore, from the harmonious reading of Section 11 of the Railways Act which deals with construction and maintenance of work of Railways, and the definition of activities, mentioned as 'transmission' and 'distribution', in the Electricity Act it was crystal clear that Railways was engaged in transmission activity in addition to self- consumption of electricity; railways had admitted in their Petition that they were not distributing electricity to the public; therefore, no licence condition was required for them; the contention of Railways that transmission activities can be stretched to distribution activity was misplaced; if at all Railway is recognised as a deemed distribution licensee under the Electricity Act, 2003, several other provisions in the Electricity Act which relate to distribution licensee such as Sections 2, 12, 13, 14, 15, 16, 17, 42, 50, 61 to 65 etc. shall be inoperative, create a chaotic situation in the sector, and render deemed distribution licensee status meaningless; it would also not be sustainable under the Electricity Act under which they seek such declaration; these provisions are not in contradiction to any provision in the Railways Act, and therefore, valid under Section 175 of the Electricity Act; Licence concept in the electricity sector is as old as Indian Electricity Act, 1910; Section 3(1) of the Indian Electricity Act, 1910 dealt with the matter

of grant of licence; licence under Indian Electricity Act, 1910 covered both supply and transmission activity; when the Railways Act, 1989 was enacted, the Indian Electricity Act, 1910 was in force; inspite of that, the Railway Act allowed Railways only to transmit energy which is also confirmed by the Supreme Court considering the nature of handling of energy by Railways; the Railways Act, 1989 does not allow Railways to supply electricity; and the report of Parliamentary Standing Committee on Energy (2002) 31st Report on the Electricity Bill, 2001 clarifies the intention of the Legislature.

After extracting paras 6.42 and 20.32 of the report of the Committee, the OERC observed that, from the said observation in the Parliamentary Standing Committee Report, it was clear that Parliament never accepted Railway's Stand as a deemed distribution licensee, rather they have recognised Railways as a deemed licensee as far as transmission of electricity is concerned; conferment of the Deemed distribution licensee status, without licence condition under Section 16 of the Electricity Act, was not tenable; a licence must contain rights and obligation of a licensee such as the area of operation, nature of consumers, distribution or transmission voltage etc, otherwise the licence shall be incomplete, and shall stand inoperative; the contention of Railways that they should be granted licence without licence condition could not be accepted, because it would remain in designation only without having any traction to be implemented; regarding transmission licence, the Railways Act had superior applicability; as such they have been carrying out that business without a licence or licence conditions in view of their superior position by virtue of the Railways Act, 1989 and Section 54 of the Electricity Act; there was no mention of the

Railways carrying out distribution activity in the Railways Act, 1989; and they were only authorised to erect, operate, maintain or repair the network and the installation in connection with the working of the Railways.

After referring to Section 11(g) of the Railway Act, the OERC observed that, if Railways were interested in distribution activity, they must seek exemption from obtaining licence from the State Regulatory Commission under relevant Regulations; further, on the issue of exemption of obtaining distribution licence by any Government Department for carrying out distribution activity, there was another provision in the Electricity Act under Section 184 which empowered the Central Government to notify the Ministry or Department of the Central Government, similar in nature with that of the Department dealing with Defence and Atomic Energy, to whom the provisions of the Electricity Act shall not apply; at the time of enactment, the Electricity Act had granted such exemption to the Department of Defence and Atomic Energy and not to Railways; no such notification had been made by the Central Government in respect of Railways under this provision till date; this was because this Section dealt with complete exemption from the Act as was the case with the Ministry of Defence and Atomic Energy and not for Railways which seeks partial exemption from the Act for licence only, and accordingly has been suitably dealt with under Section 54 of the Electricity Act, 2003; Section 54 of the Electricity Act, 2003, considering the provisions of Railways Act, 1989 which has superior applicability, has empowered Railways to transmit and use electricity without obtaining a transmission licence; and whatever Ministry of Power has done is a

clarification only on the third proviso of Section 14 of the Act to be read with other provisions of the Electricity Act as per such clarification.

The OERC concluded holding that they were not agreeable to declare Railways as a 'deemed distribution licensee' either under the provisions of the Railways Act, 1989 or under the Electricity Act, 2003; the Ministry of Power had declared Railways a 'Deemed Licensee' not a 'Deemed Distribution Licensee'; they were 'deemed licensee' for the purpose of transmission licence, and not for distribution licence; they could carry on transmission activity without obtaining a transmission licence in addition to consuming power like a normal consumer due to their special and superior status under the Railways Act, 1989 in contrast to the provisions of the Electricity Act, 2003; and, as a consumer under the Electricity Act, 2003 they had full right to avail open access under the relevant Regulation made under the Electricity Act, 2003.

As observed in the concluding part of this Order, we have dismissed the appeal preferred by the Indian Railways against the order of the OERC. However, as we examined all the issues raised in this batch of appeals independently, we refrain from analysing the contents of the said order.

M.RAILWAYS CAN CLAIM OPEN ACCESS ONLY AS A CONSUMER:

The words "distribution licensee" is defined under Section 2(17) of the 2003 Act to mean a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Each of the words "licensee", "distribution system", "consumers", and "area of supply" used in Section 2(17) are again expressions defined under the 2003 Act. Section 2(39) defines "licensee" to mean a person

who has been granted a license under Section 14. We shall, for the purpose of this batch of appeals, proceed on the premise that such a licensee would also include a deemed licensee under the third proviso to Section 14.

A distribution system, as noted hereinabove, is the system of wires and associated facilities, which is connected at one end to the end point of the transmission line or the generation station connection, and is connected at the other end to the point of connection to the installation of the consumer. A distribution installation, which does not end at the point of connection of the installation of the consumer, would not fall within the definition of a "distribution system" under Section 2(19). The expression "area of supply" is defined in Section 2(3) of the 2003 Act to mean the area within which a distribution licensee is authorized by his license to supply electricity.

The contention urged on behalf of the Indian Railways is that supply of electricity is not a licensed activity under the 2003 Act, and the various sub-clauses of Section 2(31) of the Railways Act would constitute the area of supply wherein Railways are entitled to supply electricity through its distribution installation.

Section 2(17) of the 2003 Act defines "distribution licensee" to mean one who is authorized (including deemed authorization) to – (1) operate and (2) maintain such a distribution system which would supply electricity to the area of supply of such a licensee/distribution licensee, Section 2(15) defines 'consumer' to mean any person who is supplied with electricity for his own use by a licensee or the Government or by any other person

engaged in the business of supplying electricity to the public under the 2003 Act or any other law for the time being in force, and to include a person whose premises is, for the time being, connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be, and Section 2(49) of the 2003 Act defines a “person” to include any company or body corporate or association or body of individuals, whether incorporated or not, or an artificial juridical person.

A “consumer” under Section 2(15) is one who is supplied electricity for his own use, among others, by the Government. Section 2(70) defines “supply”, in relation to electricity, to mean the sale of electricity to a licensee or consumer. While the recipient of supply of electricity, to fall within the definition of a “consumer” under Section 2(15) should be one who is receiving electricity for his own use, he must also be a person to whom a deemed licensee sells electricity. “Sale” of goods, (which would include ‘electricity’) involves two distinct persons or entities, ie the seller and the buyer, besides payment of consideration (price) for such sale by the buyer to the seller. Railways cannot be both a “distribution licensee” and a “consumer” at the same time, since one cannot sell goods to oneself.

Unlike the State Governments referred to in the afore-extracted table, which have been distributing electricity both before and after the commencement of the Electricity Act, Railways neither carries on any activity of sale of electricity to third party consumers, nor discharges the obligations of a distribution licensee under Part VI of the Electricity Act. Railways does not also satisfy the requirements of being a *“distribution licensee”* as it does not maintain a *“distribution system”* to *“supply”*

electricity to *"consumers"* within his *"area of supply"* as defined in Section 2(3) of the Electricity Act. Consequently, Railways cannot claim the status of a deemed distribution licensee under the third proviso to Section 14 of the 2003 Act, or to be treated as such, for the purposes of obtaining open access under clause (i) of Sections 38(2)(d), 39(2)(d) and 40(c) of the Electricity Act. Their entitlement, for open access, is only as a "consumer" in terms of clause (ii) of the afore-said provisions.

N. FOURTH PROVISO TO SECTION 14 OF THE ELECTRICITY ACT: ITS SIGNIFICANCE IN THE CONTEXT OF THE THIRD PROVISO:

Similar to the third proviso to Section 14 of the Electricity Act, which relates to cases where the Appropriate Government distributes electricity, before or after the commencement of the Act, the fourth proviso to Section 14 of the Electricity Act stipulates that the Damodar Valley Corporation, established under sub-section (1) of Section 3 of the Damodar Valley Corporation Act, 1948, shall be deemed to be a licensee under the Electricity Act, but shall not be required to obtain a license under the Electricity Act, and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of the Electricity Act, shall continue to apply to that Corporation.

The Damodar Valley Corporation Act, 1948 is an Act to provide for the establishment and regulation of a Corporation for the development of the Damodar Valley. Section 2(1) of the said Act defines "Corporation" to mean the Damodar Valley Corporation. Section 2(2) defines "Damodar Valley" to include all the basins of the Damodar River and its tributaries. Section 3(1) provides that, with effect from such date as the Central

Government may, by notification in the official Gazette, appoint in this behalf, there shall be established a Corporation by the name of the Damodar Valley Corporation. Section 3(2) stipulates that the said Corporation shall be a body corporate having perpetual succession and a common seal, and shall by the said name sue and be sued.

The functions of the Corporation, under Section 12(b) of the DVC Act, includes promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydro-electric and thermal. Section 18 (ii) enables the Corporation to sell electrical energy to any consumer in the Damodar Valley but no such sale shall, except with the permission of the State Government concerned, be made to any consumer requiring supply at a pressure of less than 30,000 volts. Section 18(iii) enables the Corporation, with the permission of the Provincial Government concerned, to extend its transmission system to any area beyond the Damodar Valley and sell electrical energy in such areas.

Section 20 relates to the charges for supply of electrical energy and, there-under, the Corporation shall fix the schedule of charges for the supply of electrical energy, including the rates for bulk supply and retail distribution, and specify the manner of recovery of such charges. The proviso thereto enables the Corporation, in any contract for bulk supply of electrical energy, to impose such terms and conditions, including a retail rate schedule, as it may deem necessary or desirable to encourage the use of electrical energy. Section 60(2)(c) enables the Corporation, by way of Regulations, to specify, among others, the manner in which charges for electrical energy shall be recovered.

As Section 18(ii) of the DVC Act enables the Corporation to sell electrical energy to any consumer in the Damodar Valley, Section 18 (iii) enables the Corporation, with the permission of the Provincial Government concerned, to extend its transmission system to any area beyond the Damodar Valley and sell electrical energy in such area, and Section 20 confers power on the Corporation to fix the schedule of charges for the supply of electrical energy, including the rates for bulk supply and retail distribution and to specify the manner of recovery of such charges, the fourth proviso to Section 14 of the Electricity Act specifically names the Damodar Valley Corporation to be a deemed licensee under the Electricity Act without being required to obtain a license under Section 14(b) thereof.

Unlike the fourth proviso which specifically names the Damodar Valley Corporation, the third proviso to Section 14 of the Electricity Act does not name any particular State Government or department of the Central Government. Yet another distinction is that, while the third proviso requires only an appropriate Government, which has been distributing electricity before or after commencement of the Electricity Act, to be deemed to be a distribution licensee without being required to obtain a license, there is no such stipulation in the fourth proviso in as much as the provisions of the DVC Act make it amply clear that the Damodar Valley Corporation has been distributing (selling) electricity to its consumers in terms of the provisions of the said Act.

The distinction between the third and fourth provisos to Section 14 is that the former applies only to an Appropriate Government which is distributing electricity either before or after the commencement of the Electricity Act, and requires such Governments to be deemed to be a

distribution licensee under the Electricity Act without being required to obtain a license. On the other hand, the fourth proviso does not specifically provide that the DVC should be distributing electricity before or after the commencement of the Electricity Act, evidently because the DVC Act, unlike the Railways Act, confers power on the Damodar Valley Corporation to distribute (supply) electricity to its consumers. It is evident that sale of electricity by the said Corporation has been equated to distribution of electricity, and it is only because they sell electricity to their consumers have they been deemed to be a distribution licensee. The deemed licensee status has not been conferred on the said Corporation only for maintaining a distribution installation, but because they also sell electricity to their consumers.

O. CONCLUSION:

We answer Issue No. 4 holding that while the Railways, as part of the Central Government, is also the appropriate government, it is not a Deemed Distribution Licensee under the third proviso to Section 14 of the Electricity Act, 2003 as it does not undertake distribution of electricity (ie its sale to consumers) in terms of the provisions of the Electricity Act.

IX. ISSUE 5:

A. *Whether the electric traction equipment, power supply and distribution installation referred to in Section 11(g) and Section 2(31)(c) of the Railways Act, 1989 constitute 'Distribution System' within the scope of Section 2(19) of the Electricity Act, 2003?*

B. Whether the establishment of a 'distribution installation' contemplated under the Railways Act, 1989 qualifies as the establishment of a 'distribution system' for the purpose of supplying electricity to a consumer, under the Electricity Act, 2003?

A. SUBMISSIONS ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the Railways, carrying on activities of distribution of electricity including the distribution system from the traction sub-station and non-traction sub-station at the periphery up to the point of end use/consumption, complies with the conditions related to a Distribution Licensee, namely, to operate and maintain a distribution system; this is besides the transmission licensee's activities, also being undertaken by Railways; distribution of electricity, in the context of its being a licensed activity under Sections 12, 14 and 15 etc, of the Electricity Act, 2003, needs to be considered as licensed activities independent of the aspect of supply of electricity; this has been one of the significant changes brought about by the Electricity Act, 2003; distribution is a licensed activity under the above provisions; supply, which was a licensed activity under the earlier electricity laws, has ceased to be a licensed activity; the activities undertaken by Railways constitutes distribution of electricity within the area of operation of the Railways, and further in connection with or for the purposes of the Railways as defined in Section 2(31) of the Railways Act, 1989; and the distinguishing features of the three terms, namely,

‘distribute’, ‘supply’, and ‘transmission’ has been succinctly pointed out in the Halsbury’s Law of England, 5th edition, dealing with the definitions under English Acts with respect to Electricity as under: (1) *“'distribute', in relation to electricity, means distribute by means of a `distribution system' (that is to say, a system[2] which consists (wholly or mainly) of low voltage lines[3] and electrical plant[4] and is used for conveying electricity to any premises or to any other distribution system);* (2) *'supply', in relation to electricity, means its supply to premises in cases where: (a) it is conveyed to the premises wholly or partly by means of a distribution system (see head (1) above); or (b) (without being so conveyed) it is supplied to the premises from a substation to which it has been conveyed by means of a transmission system (see head (3) below), but does not include-its supply to premises occupied by a licence holder[6] for the purpose of carrying on activities which he is authorised by his licence to carry on; (3) 'transmission', in relation to electricity, mean transmission by means of a transmission system; and 'transmission system' means a system which: (a) consists (wholly or mainly) of high voltage lines and electrical plant; and (b) is used for conveying electricity from a generating station to a substation, from one generating station to another or from one substation to another.”*

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that conveyance of electricity, in the area of operation of Railways, is for consumption at different and diverse points, and is through a distribution system within the scope of Section 2(19) of the Electricity Act, 2003; the commencement point of such a distribution system, in the case of Railways, is the TSS and non TSS sub-stations/switchyard receiving electricity from the Grid; the downstream end

is connected to the installations where electricity is consumed/ put to end use; the entire electricity system, in the area of operation of the Railways, is an ‘essential part of the distribution system’ as provided in Section 2(72) of the Electricity Act, 2003, notwithstanding whether or not a transmission line is used; conveyance on such a system amounts to wheeling of electricity as provided in Section 2(76) of the Electricity Act, 2003; electric traction equipment, power supply and distribution installations dealt in Sections 2(31) and 11(g) of the Railways Act, 1989, by the very nature of the activities carried on therein, also involve what are dealt in the Electricity Act, 2003 namely in Section 2(20) as ‘Electric Line’; in Section 2(22) as Electric Plant; in Section 2(25) as ‘Electricity System’; in Section 2(40) as ‘line’; in Section 2(42) as ‘main’; in Section 2(48) as ‘Overhead Line’; in Section 2(50) as ‘power system’; in Section 2(61) as ‘service line’; and in Section 2(69) as ‘sub-station’; accordingly, Railways has been undertaking activities of distribution of electricity, as dealt with in the Electricity Act, 2003, having an identified area of operation; as mentioned above, the only implication to be considered is the use of the expression ‘for supplying electricity to the consumers in his area of supply’ in Section 2(17), and ‘installation of consumers’ in Section 2 (19); and the submissions in this regard have been made in the submissions under Issues 6 & 7.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that, as an alternative and additional plea, Railways is also a deemed distribution licensee (as also deemed transmission licensee) under the 3rd proviso to Section 14 of the Electricity Act, 2003; this is because Railways is a department of the Central Government, and therefore an Appropriate Government as referred to in

the 3rd proviso to Section 14; the Railways, in carrying on activities of distribution of electricity including distribution system up to the point of end use/consumption, complies with the conditions relating to a Distribution Licensee, namely, to operate and maintain a distribution system; this is besides the transmission licensees activities which are also being undertaken by the Railways; in terms of the above, activities undertaken by the Railways in the area of its operation, namely, taking/conveying electricity and conveying it from the traction sub-station and non-traction sub-station through wires and electricity system to the point of end use/consumption (which are at different and diverse points) (as dealt under Issue No. 1) constitutes distribution of electricity even under the Electricity Act, 2003; electricity traction equipment, and power supply and distribution installation, when read together as described under Section 11(g) and 2(31) of the Railways Act, 1989, is nothing but a 'distribution system' as provided in Section 2(19) of the Electricity Act, 2003; the functions, activities etc. associated with a distribution system as defined under Section 2(19) and other applicable provisions of the Electricity Act, 2003, is for the purpose of making available electricity for end user/consumption at different and diverse points in the area of operation of the Railways; the activities undertaken by Railways constitutes distribution of electricity within the area of operation of the Railways, and further in connection with or for the purposes of Railways as defined in Section 2(31) of the Railways Act, 1989; and the submissions to the contrary made on behalf of the respondents, on the nature of distribution of electricity under the Railways Act, 1989, is misconceived and misplaced.

B.SUBMISSIONS ON BEHALF OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that a Distribution Installation is not akin to a Distribution System; establishment of a ‘distribution installation’, as contemplated under the Railways Act, does not qualify as the establishment of a ‘distribution system’ under the Electricity Act; a ‘distribution system’ is operated and maintained by a ‘distribution licensee’ specifically for the purpose of last-mile connectivity, i.e., point of connection to the installation of the consumers; however, in the case of Railways, the ‘power supply and distribution installation’ is not for the purpose of ‘supply’ of electricity to any consumer, but is used for providing electricity at every point of the traction sub-station for the purpose of, and in connection with, the Railways; Section 11(g) of the Railways Act specifically provides for ‘power supply and distribution installation’ in connection with the working of the railway; it is undeniable, and in fact admitted by the Appellant, that no electricity is transferred by the Railways for any purpose other than for the purpose of the Railways itself; therefore, ‘power supply and distribution installation’ cannot be equated to ‘distribution system’ under the Electricity Act, which is specifically for the purpose of supplying electricity to consumers; the contention, urged on behalf of the Railways, that the transmission lines maintained by the Railways also act as ‘distribution system’, and both are one and the same, is not tenable; this argument is inherently flawed in as much as the definition of transmission lines itself provides for it not being an essential part of the distribution system of a licensee; furthermore, transmission lines as well as transmission activity do not pre-suppose existence of consumers, which is the *sine qua non* of a distribution activity; transmission of electricity could be to oneself or to another; however, distribution of electricity (*as envisaged under the scheme of the Electricity Act*) is to another person

only, being the consumer; under Section 11(g) of the Railways Act, “railway” includes electric traction equipment, power supply and distribution installations which are used by the Railways in connection with any railway; the Railways is also empowered to construct, operate and maintain the same; these equipment are necessarily to be seen in the context of their use by the Railways and, for that purpose, reference may be made to the Railways Handbook which describes the electricity “supply system” for the Railways as a system of 25 kV single-phase conventional system, which uses duplicate feeders running from the nearest sub-station of the supply authority used for stepping down of 220/132/110/66 kV extra high voltage three-phase power, into a single-phase 50 Hz power that can be utilized for electric traction; power for electric traction is derived from the *“nearest sub-station of the supply authority”* to the traction sub-station of the Railways via duplicate twin phase feeders; the aforesaid system, apart from being totally different from a *“distribution system”* as defined under Section 2(19) of the Electricity Act as not being between the two points mentioned therein, is also not a system built for the purpose of distribution of electricity, but is rather a system built for the purpose of converting extra high voltage power supplied at the traction sub-station to consumable power by a consumer of electricity which, in the present case, is the Railways utilizing the said electricity for electric traction; in the process of such consumption, conveyance of electricity by the Railways, to different locations within the Railway premises using its internal supply system, can never be regarded as a distribution system within the scope of Section 2(19) of the Electricity Act; and, for any system to qualify as a distribution system, there has to be a point of connection to the installation of the consumer at one end and the delivery point on the transmission line or the

generating station on the other side, which is not the case of the Railways; and the Railway Electrification System consists of many constituent elements to enable electrical power to be transferred from where it is generated to the trains.

C.ANALYSIS:

Part IV of the Electricity Act relates to licensing. Section 12, thereunder, relates to the person authorised to transmit, supply etc. of electricity. Thereunder no person shall (a) transmit electricity, or (b) distribute electricity, or (c) undertake trading in electricity, unless it is authorised to do so by a licence issued under Section 14, or is exempt under Section 13 of the Act. As it is not even the case of the Railways that they have been exempted under Section 13, from the requirement of obtaining a licence under Section 14, it is unnecessary to take note of what Section 13 provides.

Section 14 relates to grant of licence and, thereunder, the Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person-(a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area which may be specified in the licence.

Section 14 of the Electricity Act contains nine provisos. The third proviso to Section 14 stipulates that, in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of the Electricity Act, such Government shall be deemed to be a licensee under the said Act, but

shall not be required to obtain a licence under the Act. Section 2(5) (a)(ii) defines “Appropriate Government” to mean the Central Govt in relation to any inter-state generation, transmission, trading or supply of electricity and with respect to, among others, the railways. As Railways has no independent legal status, and forms part of the Central Govt, it would undoubtedly fall within the definition of an “Appropriate Government”. While the third proviso to Section 14 is applicable only to the Appropriate Government, its application, even with respect to the Appropriate Govt, is limited. For the Railways to be held to be a deemed distribution licensee, under the third proviso to Section 14, it must also satisfy the requirement of being an Appropriate Government which is, in fact, distributing electricity either before or after the commencement of the Electricity Act, for it is only then can it be deemed to be a licensee under the Act, and not be required to obtain a license under Section 14(b) thereof.

We find force in the submission of Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of Railways, that it is not necessary for the Railways to seek a specific declaration from the Appropriate Commission that it is a deemed distribution licensee and it would suffice if, whenever any such dispute arises, for it to show that it distributes electricity; and the moment it is able to so establish, it must be held to satisfy the requirement, of the third proviso to Section 14, of being deemed to be a distribution licensee under the Electricity Act, without being required to obtain a license under the said Act. The crux of the dispute is whether or not the Railways, while carrying on its activities under the Railways Act,1989, also carries on the activity of “distribution of electricity” in terms of the provisions of the Electricity Act, 2003.

The expression “distribution licensee”, used in the third proviso to Section 14, is defined, under Section 2(17) of the Electricity Act, to mean a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Consequently, a deemed distribution licensee would mean a deemed licensee which is operating and maintaining a distribution system for supplying electricity to the consumers in its area of supply. The words “distribution system”, “supply”, “consumer”, and “area of supply”, used in Section 2(17), are again defined expressions.

Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Indian Railways, wants us to read the words “operate and maintain a distribution system” in the definition of “distribution licensee” under Section 2(17) of the Electricity Act, distinct from the words “for supplying electricity to the consumers in his area of supply” used therein. The construction placed on Section 2(17), by the Learned Senior Counsel, is that it would suffice if a distribution system is operated and maintained by a person in his area of supply, for such a person to be deemed to be a distribution licensee, and it is unnecessary for such a person to also supply electricity to consumers, more so as “supply of electricity” is not a licensed activity under the Electricity Act, 2003. Reliance is placed by the Learned Senior Counsel on the definition of “distribution system” under Section 2(19) in this regard.

The expression “electric traction equipment”, and “power supply and distribution installation”, as referred to in Section 2(31)(c) and 11(g), are not expressions defined in the Railways Act. However, the expression "distribution system" is defined under Section 2(19) of the Electricity Act to

mean the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers. To be said to be a “distribution system”, it should be (a) system of wires and associated facilities; and (b) this system of wires and associated facilities must exist between (i) the delivery point on the transmission lines or the generating station connection; and (ii) the point of connection to the installation of the consumer. In short, the starting point of the distribution system is the delivery point of the transmission lines or the generating station connection, and the ending point is the point of connection to the installation of the consumer.

The first limb of the definition of a “distribution system”, ie the system of wires and associated facilities, may possibly bring within its fold the “electric traction equipment” as also the “power supply and distribution installation” referred to in Section 2(31)(c) and 11(g) of the Railways Act. However that, by itself, would not suffice for such a system of wires and associated facilities to constitute a “distribution system” under the second limb of Section 2(19) of the Electricity Act, as the said provision does not bring within its ambit every system of wires and associated facilities but only those which exist between (i) the delivery points on the transmission lines or the generating station connection on the one hand and (ii) the point of connection to the installation of the consumer on the other. What is contemplated by the said definition is only a system of wires and associated facilities which is established to receive electricity from the delivery points of either the transmission line or the generating station, which is then supplied to the

installation of the consumer. This distinction is significant, since a system of wires and associated facilities can exist even at a generating station or in a transmission system. A “distribution system”, under Section 2(19) of the Electricity Act, does not bring such systems within its fold. While the end point of the delivery system of a transmission line/generating station is the point at which the distribution system commences, the end point of such a distribution system is the point of connection to the consumer’s installation.

As noted hereinabove, the question, whether or not the Indian Railways is a deemed transmission licensee, does not arise for consideration in this batch of appeals. In order to decide the issues under this head, we shall proceed on the premise that the “distribution installation”, which it operates, satisfies the first limb of Section 2(19) ie it is a system of wires and associated facilities at the commencing point of the distribution system/the delivery point on the transmission line. While the Respondents’ claim that this, by itself, would not suffice and the end point of such a system must be the point of connection to the installation of the consumer, the response thereto, put forth on behalf of Railways, is that Railways is also a “consumer”, and the provisions of the Electricity Act do not disable the same entity to be a deemed transmission licensee, a deemed distribution licensee, and a consumer.

Under the Electricity Act, 2003, a consumer can receive electricity for his own use either from (i) a licensee which would include a distribution licensee or (ii) the Government, some of whom, as noted earlier in this order, also carry on the activity of distribution of electricity in several States or (iii) by any other person engaged in the business of supplying electricity, for instance a generating station.

What is of relevance, in the definition of “consumer”, is that a person should (a) for his own use (b) be “*supplied*” electricity (c) by either (i) a licensee (ii) the government or (iii) any other person engaged in the business of supplying electricity. While a “consumer”, as defined under Section 2(15), no doubt consumes the electricity supplied to him, the word "Supply" used therein is again a defined expression under the Electricity Act. Section 2(70) defines “supply” in relation to electricity, to mean the sale of electricity to a licensee or consumer.

Under the provisions of the Electricity Act, 2003 and the Sale of Goods Act, 1930, Electricity is movable property, though it is not tangible. It falls within the definition of “goods” as provided under the Sale of Goods Act, 1930. (**State of A.P. v. National Thermal Power Corpn. Ltd. AIR 2002 SC 1895, (2002) 5 SCC 203; Commissioner of Sales Act, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur (1969) 1 SCC 200, Kartar Singh v. Punjab State Electricity Board, 2014 SCC OnLine P&H 5917; Sukhwinder Singh v. Raj Kaur, 2014 SCC OnLine P&H 9003**). Electricity is generated, transmitted and sold under a contract to the consumer. It is moved to its ultimate destination where it is consumed. (**Kartar Singh v. Punjab State Electricity Board, 2014 SCC OnLine P&H 5917)**.

Section 4(1) of the Sale of Goods Act, 1930 stipulates that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer property in the goods to the buyer for a price. Section 4(3) provides that where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale.

Section 5(1) stipulates that a contract of sale is made by an offer, to buy or sell goods for a price, and the acceptance of such offer. Section 9(1) stipulates that the price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealings between the parties. Section 31 relates to duties of seller and buyer and, thereunder, it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

It is clear, from the afore-said provisions of the Sale of Goods Act, that sale of goods is only for a price which the buyer is required to pay to the seller. As "supply" is the sale of electricity to a licensee or a consumer, it is only if it is established that the Indian Railways sells electricity at a price either to a distribution licensee (as defined in Section 2(17)) or to a consumer (as defined in Section 2(15)), can it then held to be a deemed distribution licensee.

Supply (ie sale) of electricity would necessarily require a seller, a buyer and the price at which such goods are sold or purchased. It is only a person who purchases electricity for his own use, at a price, who falls within the definition of a "consumer". In the present case while the Railways no doubt purchases electricity at the delivery point on the transmission lines of the generating station connection on payment of consideration to the person from whom it procures electricity, its claim to be a distribution licensee is belied by the fact that, while Railways conveys the electricity so procured by it to its various consumption units, there is no element of sale (ie consideration in the form of a price for such conveyance) involved in the process. Consequently, such act of conveyance can, at best, constitute re-

distribution of electricity by a consumer among its various units, and nothing more. The electric traction equipment, and power supply and distribution installation, referred to in Section 2(31)(c) and Section 11(g) of the Railways Act cannot therefore be equated to a “distribution system” under Section 2(19) of the Electricity Act.

Reliance placed by the Railways, on the meaning of the words ‘distribute’, ‘supply’ and ‘transmission’ as defined in the Halsbury's Laws of England is misplaced since, as noted hereinabove, resort to dictionaries or other texts is permissible only where such expressions are not defined under the Act in question. In the present case the word ‘supply’ is defined under Section 2(70) of the Electricity Act, and it is impermissible to rely on its definition in dictionaries or other texts which convey a meaning contrary to, or different from, what is defined in the Electricity Act.

While the “electric traction equipment”, and “the power supply and distribution installation” are no doubt used in connection with or for the purposes of the Railways, it cannot be said that Railways is selling electricity to itself, for that does not satisfy the ingredients of a “sale”. In the absence of a “sale”, consumption of electricity by various units of the Railways cannot be understood as a “sale” by the Railways as a distribution licence to itself as a consumer.

Section 2(72) of the Electricity Act defines “transmission lines" to mean all high pressure cables and overhead lines transmitting electricity from a generating station to another generating station or a sub-station, together with all equipment and buildings referred to thereunder. The definition, however, explicitly provides that, for such high-pressure cables

and overhead lines to fall within the definition of “transmission line”, it should not be an essential part of the distribution system of a licensee. Once such cables or overhead lines are held to be an essential part of a distribution system of a distribution licensee, they would fall outside the definition of a “transmission line under Section 2(72).

Section 2(76) of the Electricity Act defines "wheeling" to mean the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62. What Section 2(76) provides is for the use by a person, of the system referred to in Section 2(76), for open access in terms of Sections 38(2)(d), 39(2)(d) and 40(c) of the Electricity Act. The definition of “wheeling” in Section 2(76) also requires the person, who uses the said system, to pay charges to be determined under Section 62. Section 62(1) confers power exclusively on the Appropriate Commission to determine the tariff ie wheeling charges in terms of Section 2(76) towards open access.

Let us now take note of how certain words/expressions, on which reliance is placed on behalf of the Railways, are defined in the Electricity Act. Section 2(20) defines "electric line" to mean any line which is used for carrying electricity for any purpose through a line would bring such line within the definition of a electric line. Section 2(22) defines "electrical plant" to mean any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or suppl of electricity, other than those which fall within the excluded categories under clauses (a) to (c) thereunder. Any plant, equipment or

apparatus used, among others, for distribution and supply of electricity would fall within the definition of “electric plant” under Section 2(22). Section 2(25) defines "electricity system” to mean a system under the control of a generating company or a licensee, as the case may be, having one or more (a) generating stations, or (b) transmission lines, or (c) electric lines and sub-stations. A system under the control of a distribution licensee, having electric lines and sub-stations, would also fall within the definition of an electricity system.

Section 2(40) of the Electricity Act defines “line” to mean any wire, cable, tube, pipe, insulator, conductor or other similar thing which is designed or adapted for use in carrying electricity. "Main” is defined, under Section 2(42), to mean any electric supply- line through which electricity is, or is intended to be, supplied. Section 2(48) defines “overhead line” to mean an electric line which is placed above the ground and in the open air but does not include live rails of a traction system.

Section 2(50) defines "power system" to mean all aspects of generation, transmission, distribution and supply of electricity and includes any one or more equipment referred to in clauses (a) to (j) thereunder. It is relevant to note that the said definition refers to distribution and supply of electricity as distinct from transmission and generation, and does not disassociate distribution from supply. “Service line” is defined, in Section 2(61), to mean any electric supply-line through which electricity is, or is intended to be, supplied - (a) to a single consumer either from a distributing main or immediately from the Distribution Licensee's premises; or (b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main.

None of the above referred expressions, which are defined expressions under the Electricity Act, disassociate the activity of supply from those of distribution. While electricity can no doubt be supplied by others including generating companies, and can be procured from them by any consumer, there is no provision in the Electricity Act for grant of licence to a person only for operating and maintaining a distribution installation, or a system of wires and associated facilities, without also carrying on the activity of supply of electricity ie sale of electricity to consumers through such a system of wires and associated facilities. Accepting this submission, urged on behalf of the Railways, would discharge all distribution licensees of their obligations under the Electricity Act, including its universal supply obligation to supply electricity to its consumers on demand. While Railways is no doubt operating and maintaining a “power supply and distribution installation”, it is not carrying on the activity of distribution of electricity, since it does not sell electricity to consumers (third parties), and consumes it itself.

As noted hereinabove, Section 18 of the Railways Act which enables the Central Government to require boundary marks or fences to be provided, and Section 2(31)(a) thereof which brings all lands located inside those boundaries within the definition of a “Railway”, relate only to the area within which Railways is entitled to carry on its activities under the Railways Act to the exclusion of all others. This area is not the “area of supply” defined under Section 2(3) of the Electricity Act, which is the area within which a distribution licensee operates, by its license, to supply electricity (ie sale of electricity to consumers). In the absence of the activity of supplying electricity, in terms of Section 2(70) of the Electricity

Act, being carried out by the Railways, the said area, within which railways operates to the exclusion of all others, cannot be equated to the “area of supply under Section 2(3) of the Electricity Act.

It is therefore not possible to hold that mere conveyance of electricity from the traction sub-station/non-traction sub-station/switchyard, through the “electric traction equipment” and “power supply and distribution installation”, to different points where electricity is consumed by the constituent units of the Railways, would constitute distribution of electricity, since a distribution system of a distribution licensee can only be used for sale of electricity to its consumers within the area of supply, other than those who have availed open access on payment of cross subsidy surcharge. Self-consumption of electricity cannot be equated to the activity of “distribution of electricity” under the Electricity Act. Mere provision of electricity at every point of the traction sub-station, in connection with the Railways, would also not suffice as there is no element of “supply” (sale) of electricity, to any consumer, involved in the process. While transmission of electricity can be to oneself or to another, distribution of electricity can only be to another person ie another licensee or the consumer that too by way of sale.

While copious reference is made to the manner in which electricity is conveyed from the traction sub-station/non-traction sub-station/switchyard to different end points of use within the Railways system, it is unnecessary for us to burden this order with those details since, admittedly, the electricity conveyed, through the “electric traction equipment” and “power supply and distribution installation”, is consumed by the Railways itself. Even otherwise, it is evident from the handbook that the electric supply

system of the Railways is for the purpose of converting extra high voltage power supplied at the traction sub-station to consumable power by the Railways as a consumer of electricity.

D. CONCLUSION:

We answer Issue No.5 holding that the "*electric traction equipment"* and the "*power supply and distribution installation"* referred to in Section 11(g) and Section 2(31)(c) of the Railways Act, 1989 do not constitute the '*Distribution System'* defined in, and falling within the scope of, Section 2(19) of the Electricity Act, 2003; and establishment of a '*distribution installation'* contemplated under the Railways Act, 1989 does not qualify as the establishment of a '*distribution system'* as, through the former, electricity is not supplied to consumers, as stipulated under the Electricity Act, 2003.

X. ISSUES NO. 6, 7 AND 11:

While Railways have filed their written submissions on Issues No. 6 & 7 together, and on Issue No.11 separately, the Respondents have filed their written submissions on Issue No. 6 separately, but have filed common written submissions on Issues No. 7 & 11. We have, therefore, dealt with all the three issues, ie Issues No. 6, 7, and 11, together.

<u>ISSUE 6:</u>

A. Whether the supply of electricity is a licensed activity under Section 12 read with Section 14 of the Electricity Act, 2003?

B. *Whether establishment of a distribution system by an Appropriate Government/Indian Railways, is by itself adequate to qualify as a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003?*

C. *Whether sale of electricity to a consumer is sine qua non for the distribution of electricity by a distribution licensee, deemed or otherwise, under the Electricity Act?*

AND

ISSUE 7:

A. *Whether in terms of the provisions of the Electricity Act, 2003 the status of a Distribution Licensee cannot be claimed when the electricity is primarily or otherwise consumed by the Licensee itself?*

B. *Whether self-consumption of electricity, albeit upon conveying the same to multiple locations, constitutes distribution of electricity contemplated under Electricity Act, 2003?*

C. *Whether actual distribution of electricity by an Appropriate Government, in addition to establishment of a distribution system is sine qua non for*

qualifying as a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003?

A. SUBMISSIONS OF RAILWAYS ON ISSUES 6 AND 7:

Sri M.G.Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that, since issues 6 and 7 overlap, common submissions are made in respect thereof; supply of electricity, namely, sale of electricity to consumers is no longer a licensed activity after the coming into force of the Electricity Act, 2003 on 10.06.2003; supply of electricity, as per Section 3 of the Indian Electricity Act, 1910, was also not conditioned as sale of electricity; supply of electricity was read as provision of electricity for end use or consumption; the primary contentions raised by the Respondents are: (a) Section 2(17) provides for the distribution licensee laying down lines "*for supplying electricity to consumers in the area of supply*"; (b) the terms 'supply', 'area of supply' and 'consumer' are defined terms in the Electricity Act involving sale of electricity by the licensee to another entity or person and not self or own consumption; (c) the term 'installation of consumer' in Section 2(19) provides for the distribution to be connected at the end to the consumer as defined, and not any other person; and (d) the Electricity Act, 2003 provides for the requirement of a composite and integrated licence for distribution and supply of electricity, and not only for distribution of electricity, that too only in order to consider the holder to be a distribution licensee.

Learned Senior Counsel would submit that the aforesaid contentions of the respondents are not correct in law, and under the scheme and

provisions of the Electricity Act, 2003, as: (a) licensing means prohibiting an activity to be carried by any person other than the licensee who has been granted a licence or person specifically exempted from the requirement to obtain a licence; (b) “supply of electricity” was a licensed activity till 10.06.2003, when the Electricity Act, 2003 came into effect, namely under Section 3 of the Indian Electricity Act, 1910; each of the State electricity laws, listed in the Schedule to the Electricity Act, 2003, also provided for licensing of supply of electricity and not for licensing of distribution of electricity; neither in the Indian Electricity Act, 1910, nor in the Electricity (Supply) Act, 1948, has the term “supply” been defined, particularly not with reference to sale of electricity; (c) distribution of electricity was considered only as an enabling part under the previous Electricity Laws (ie Section 3 of the Indian Electricity Act, 1910); (d) there has been a conscious shift to make ‘distribution’, in the place of ‘supply’, as a licensed activity under the Electricity Act, 2003; the rationale is writ large, as the activity of supply of electricity has been consciously freed from the requirement of taking a licence; ‘supply’ can be undertaken by any person, viz. a generating company, a captive generating plant, an electricity trader, the distribution licensee of another area of supply, as specifically covered in Section 49, and further through collective transactions in power exchanges, and other power market development as envisaged in Section 60 of the Electricity Act, 2003; the prohibition contained in Section 12 of the Electricity Act, 2003, of no person undertaking the activity specified therein, has no application to supply; supply, being a de-licensed activity, is necessary to give effect to the concept of Open Access which has been introduced by the Electricity Act, 2003 as an important and significant aspect of departure from earlier dispensation; and (f) if supply of electricity

is treated as a part of the licensed activity, then Open Access will be rendered redundant, and it would mean that only a person licensed can supply electricity; and this will be a misreading of the scheme, objective and provisions of the Electricity Act, 2003.

Learned Senior Counsel would submit that supply of electricity is only a commercial activity of sale of electricity, and not a part of the wire business for which the distribution license is given; as mentioned hereinabove, the supply license, under the earlier laws, is no longer retained; accordingly, a contextual interpretation of Section 2(17), stating *'for supplying electricity to the consumers in his area of supply',* would only require that the distribution system enables supply of electricity to consumers by any means, and not necessarily only by the distribution licensee; further, when read with Section 42(1) and 43(1) of the Electricity Act, 2003, it means the obligation of the distribution licensee to supply if demanded by the person, owner or occupier of the premises including the consumer; if such person desires to take electricity, entirely from other sources, the distribution licensee cannot compel him to take electricity only from him; while the distribution system is laid down, operated or maintained for supply of electricity to the consumers, it does not mean that the same cannot be used for other purposes such as to provide open access to others where the sale or supply of electricity is by others or conveyance of electricity is for own consumption of others; similarly, *'the installation of the consumers'*, used in Section 2(19), should be given a contextual meaning of being a place where the consumption or end use of electricity occurs; as mentioned above, the expression *'supply'* used in Section 2(17) of the Electricity Act, 2003, in the context of '*for supplying electricity to the*

consumers in the area of supply', cannot be interpreted as a part of the licensed activity to be undertaken; this is clear from a reading of various provisions of the Act, particularly providing for open access and ability of the consumers to source electricity from a person other than the distribution licensee of the area where the premises of the person is situated; if *'supply'* is considered a licensed activity, it would mean that a Generator, a Trader, a Licensee other than the Licensee of the area of supply where the premises is situated, a captive generator with excess capacity to sell etc, will not be authorised to effect such supply without obtaining a license; and this would lead to an anomalous and absurd situation.

Learned Senior Counsel would submit that Section 43 (dealing with duty to supply – Universal Service Obligation), as also Sections 44 to 48 and 50 of the Electricity Act, 2003, are not restricted to supply of electricity to consumers; Section 42(1) does not use the expression *'consumer*'; the expressions used in Section 43 and in Sections 44 to 48 are also *'owner or occupier of any premises"* or *person,* which is much wider in scope than only consumer, and includes others such as Railways, MES connected to the distribution licensee, and the distribution licensee has the duty and obligation to supply; supply of electricity by one distribution licensee in bulk (called bulk licensee) to another distribution licensee has always been a recognised concept; in this regard, reference be made to clause IX of the Schedule to the Indian Electricity Act, 1910, Section 19 of the Electricity (Supply) Act, 1948 defining the term Bulk Licensee, Section 86(1)(a) which uses the term Bulk, and Sections 43, 44 to 48 and 50 of the Electricity Act, 2003 providing for supply of electricity to owner or occupier of any premises, and Section 86(1)(a) for determination of tariff for bulk supply; in

terms of Sections 42(1) and 43(1) of the Electricity Act, 2003, a Distribution Licensee has a legal and binding obligation and a duty to supply electricity at the traction sub-station of the Railways, even though Railways is not a consumer within the scope of Section 2(15) of the Electricity Act, 2003, particularly the first part; supply of electricity, by another Distribution Licensee under the Electricity Act to Railways, is not a supply to Railways as a consumer, but a supply to Railways as a Distribution Licensee i.e. a person or owner or occupier of the premises other than a consumer as defined under Section 2(15) of the Electricity Act, 2003; and the respondents are also misreading the obligation/duty to supply, under 43(1) of the Electricity Act, 2003 (without any corresponding obligation on the part of the consumer to take electricity from the distribution licensee), with a licensed activity.

Learned Senior Counsel would submit that the concept of distribution, under the Electricity Act, 2003, is the laying down, development and operation of the distribution system, and not the sale of electricity; Section 62(2) of the Electricity Act, 2003 requires the petition, for determination of tariff, to be segregated between generation, transmission and distribution, and not with reference to supply; the revenue requirements are always calculated with respect to generation, transmission and distribution, and not retail supply of electricity undertaken by the licensee; therefore, establishment of a distribution system is adequate to qualify the Railways to claim the status of a deemed distribution licensee statutorily provided for under Section 14- 3rd proviso of the Electricity Act; sale of electricity to a consumer is not the *sine qua non* for distribution of electricity by a distribution licensee, deemed or otherwise,

under the scheme of the Electricity Act, 2003; it is therefore not necessary for Railways to show that there is, in fact, sale of electricity to another person in its area of operation; and, even if the entire consumption of electricity is considered to be of the Railways, the conditions specified in the 3rd proviso to Section 14 stands satisfied for treating Railways as a deemed distribution licensee.

Learned Senior Counsel would submit that, without prejudice to the above, Railways has third parties to whom electricity is supplied/sold by Railways as detailed in IA No. 654 of 2023 dated 03.04.2023, and the Annexures therewith, which is further discussed in Issue No. 8; reliance placed by one of the respondents on the decision of the Calcutta High Court, in **Srijan Realty (P) Ltd. -v- Commissioner of Service Tax, Kolkata, 2019 SCC Online Cal 9139 [Pages 1205 to 1211, Vol – IV C, CC],** to claim that the Railways, making available electricity to contractors/vendors/etc, is akin to services rendered under a principal and an agent relationship, or as landlord and tenant leasing spaces, and not as sale of electricity, is misplaced; the decision of the Calcutta High Court relates to service tax, and has nothing to do with interpretation of the provisions of the Electricity Act, 2003; in any case, Railways are exempt from tax liabilities under Sections 184 and 185 of the Railways Act, 1989; and under the scheme of the Electricity Act, 2003, supply of electricity by the owner of a mall to the shops or owner of a commercial complex to different units has been held to be distribution of electricity, and cannot be undertaken as a business without a license. Reliance is placed in this regard on the following decisions of this Tribunal (1) **K. Raheja Corporation Private Limited -v- Maharashtra Electricity Regulatory**

Commission and Others: (Order in Appeal No. 156 of 2010 dated 11.07.2021); and **M/s DLF Utilities Limited -v- Haryana Electricity Regulatory Commission and Another:** (Order in Appeal No 193 of 2011 dated 03.10.2012); however, if supply of electricity within such places is undertaken as a part of the distribution licensee's business, and at the tariff terms and conditions determined by the Appropriate Commission, the same has been recognised by the Electricity Supply Code notified under Section 50 of the Electricity Act, 2003 read with the 7th proviso to Section 14, as one point supply; reference in this regard may be made to the relevant Electricity Supply Codes of the States of (i) Haryana, (ii) Delhi, (iii) Rajasthan, (iv) Kerala, and (v) Punjab; in the above, the Distribution Licensee retains total control, including providing electricity directly if the end user/consumer so decides; and the distribution of electricity, by Railways in its area of operation, cannot be equated to such one point supply as the exclusivity and monopoly in such distribution is of Railways, and no other Distribution Licensee can interfere in the matter.

ISSUE 11:

Whether as per Sesa Sterlite Limited -v- Orrisa Electricity Regulatory Commission & Others, (2014) 8 SCC 444, the deemed distribution licensee status cannot be claimed when there is no sale of electricity to consumers/end users and the electricity is predominantly consumed by the Distribution Licensee itself?

B. SUBMISSIONS OF RAILWAYS ON ISSUE 11:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the judgement in **Sesa Sterlite Limited -v- Orrisa Electricity Regulatory Commission & Others, (2014) 8 SCC 444** does not decide that a deemed distribution licensee cannot be a primary end user of the electricity being distributed by it; the facts of the case, as noted in para 2 of the decision, is that Sesa Sterlite was both the aluminium plant/ manufacturing unit and a developer of the SEZ; Sesa Sterlite itself was to supply electricity to itself as a developer; this itself establishes that supply of electricity to a third party is not a necessary condition for deemed distribution licensee status; similar is the case of Military Engineering Services ('**MES**') where primary consumption is by the defence department itself; MES has been a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003; the law laid down by the Supreme Court, in **SESA Sterlite,** is to be considered as per the contents of Paras 46 and 47 thereof; the decision of this Tribunal, against which the appeal was filed before the Supreme Court in **SESA Sterlite, (**reproduced in para 45) quoted Paras 42 to 50 of the Appellate Tribunal's decision; this should be considered as circumscribed by the decision in Paras 46 and 47 of the Supreme Court decision; the quoted paras of this Tribunal's decision cannot be independently applied; in the first sentence of para 46, the Supreme Court has expressed its agreement in regard to the manner in which the two Acts, namely the Special Economic Zones Act, 2005 and the Electricity Act, 2003 are to be harmoniously construed as was done by this Tribunal in the quoted paras 42 to 50; a perusal of the SEZ Act would show that there are two types of participants in the SEZ; they are **(a)** the developer of the SEZ; and **(b)** entrepreneurs other than the developers who established their units in the

SEZ; the developer of the SEZ also establishes manufacturing/service/industries etc within the SEZ Area and, in addition thereto, the entrepreneurs, as defined under Section 2(j) of the SEZ Act, 2005, establish the industrial/services and other units; Section 15 of the SEZ Act deals with setting up of a unit; the persons, who set up units for carrying on authorised operations in the SEZ, get necessary approval from the development commissioners which approval vests the entrepreneur status on such person as provided in Section 2(j) of the SEZ Act, 2005; the provisions of the SEZ Act, and the Rules framed thereunder, therefore clearly envisage both the developer and the entrepreneur establishing plant /units in the SEZ Area, and the developer providing for infrastructural facilities including provision of electricity to all such units whether it is the developer's unit or the unit of the entrepreneur, i.e., other than the developer's various service providers; it is therefore inherent, in the above, that the developer has to establish the distribution system connecting the multiple units within the SEZ Area for supplying electricity to all of them; this has been specifically considered in para 46 of the decision of the Supreme Court by stating that SESA Sterlite was required to develop the system for providing electricity to multiple units; in the above context, while the notification dated 03.03.2010 under the SEZ Act, incorporating a proviso into Section 14 of the Electricity Act, 2003, recognize the Deemed Licensee Status to a SEZ, but such a status can become effective only when the developer takes steps to establish the distribution system to connect all the units (the developer's as well as entrepreneurs other than the developer) in the SEZ Area; non-consideration of SESA Sterlite, for release from the payment of cross-subsidy surcharge in the above decision of the Supreme Court, was on account of SESA Sterlite not laying down the

distribution system to supply electricity to all the units; for the SESA Sterlite Decision, to be considered in the context of Indian Railways, it is necessary to ascertain whether Indian Railways have developed the distribution installation and system for getting electricity conveyed to different points of end use/consumption; in issue No.1 these aspects have been dealt with; indisputably, the Indian Railways had established the necessary distribution system; the ratio of SESA Sterlite decision is clear, namely, that SESA Sterlite was not granted the relief because it had not developed the distribution system to service all the units envisaged in the SEZ Area; conversely, if SESA Sterlite had developed the distribution system for supplying electricity to all the units, and there are multiple units functioning in the SEZ, the Supreme Court's decision would have been to the contrary; in such a case, the unit of SESA Sterlite, i.e., the developer, would also have had the benefit of Deemed Licensee Status; and the above decision cannot be interpreted to mean that, in no event, the developer of a SEZ can claim the benefit of the Deemed Licensee status.

Learned Senior Counsel would submit that the summary of the decision of the Supreme Court, in Para 46 of SESA Sterlite which is the operative part on the levy of Cross Subsidy Surcharge, is as under: (a) the Appellant, SESA Sterlite Ltd, was declared as the developer of the Special Economic Zone (SEZ) under the Special Economic Act, 2005; (b) by virtue of being a developer of the SEZ, in terms of the amendment brought about by notification dated 03.03.2010 under Section 49 of the SEZ Act, a proviso has to be read in Section 14 of the Electricity Act, 2003 to the effect that a developer of the SEZ notified under the SEZ Act, 2005 shall be deemed to be a licensee; (c) the Developer becomes a Deemed Licensee for the

specific purpose as envisaged under the SEZ Act, and the Developer can implement its status as a Deemed Licensee only for such purpose, and in fulfillment of the conditions requiring the Deemed Licensee status; (d) in the context of the provisions of the SEZ Act, the .notification dated 03.03.2010 issued under the SEZ Act, and considering the nature of the SEZ to be developed by them, it was incumbent on SESA Sterlite to develop a distribution system for supply of electricity to several units to be set up in the SEZ Area; and (e) the Deemed Licensee status which authorized SESA Sterlite to be implemented required development of several units, i.e., as described by the Supreme Court at *placitum 'e'* —***will apply to such cases in which the developer is supplying the power to multiple units in the SEZ and cannot apply to the developer establishing a unit in the SEZ only for itself***; the conclusion of the Supreme Court is not that, in no event, the Deemed Licensee Status cannot be applied in regard to the units established by the developer himself in the SEZ; the use of the expression ***"only for itself",*** used in 'para 46 – end', cannot be read to the effect that the SEZ developer himself will never have the benefit of the deemed distribution licensee status, and will have to pay cross subsidy in all situations, i.e., even if multiple units had come as envisaged and the distribution system had been laid down for supply of electricity to such multiple units; if the above was the conclusion of the Supreme Court, it would have been simple for the Supreme Court to state that the Deemed Licensee Status cannot be availed to supply electricity to itself; a reading of Para 46 of the SESA Sterlite decision, excluding the first sentence, shows that the Supreme Court had clarified the position in the quoted paras 42 to 50 of this Tribunal's decision, including the portion quoted in para 49 placitum 'g'; it only means that a Developer of the SEZ cannot, without

laying down the distribution system and supplying power to various units, claim implementation of the Deemed Licensee status by only getting the power and consuming such power for its own use; this is further made clear in the quoted para 50 placitum ‘a’ to the effect that the legal fiction cannot go further, and make a person who does not distribute electricity to the consumer as a distribution licensee; these observations cannot be interpreted to mean that, in no event, a developer of SEZ cannot consume power on its own, when the distribution system has been laid down, and power has been made available to units in the SEZ as envisaged under the SEZ Act, and the notification issued thereunder; if so interpreted, it would lead to anomalous results; in such a type of SEZ, the developer is the one who establishes the main industry, and other units are mostly ancillary units; it would then mean that the Developer would be treated as liable to pay cross subsidy surcharge on the specific ground that it cannot be a distribution licensee for supplying to itself whereas other units will not be liable to pay cross subsidy surcharge; this was never the intention of the decision of this Tribunal in quoted paras 42 to 50, and in any event not the decision of the Supreme Court in Para 46; in addition, in quoted para 43, this Tribunal had also observed that the developer had not established the captive power plant which was also envisaged in the approval; in comparison to the above, in the case of Railways, the entire Railway network, on the length and breadth of the country, stands established for the purposes of Section 11 of the Railways Act, 1989, and individual units, in addition to Indian Railways, have come up at various places to whom electricity is supplied besides consumption by Railways itself; and the Indian Railways therefore fulfils the conditions provided under Section 11

read with Section 2(31) of the Railways Act, 1989, unlike SESA Sterlite which did not fulfil conditions as per the SEZ Act.

Learned Senior Counsel, would further submit that the respondents have misread the Report of the Standing Committee dealing with Railways vis a vis the Electricity Bill leading to the enactment of the Electricity Act, 2003; the Standing Committee on Energy (2002) of the Thirteenth Lok Sabha, in its thirty first report, found that the Railways were empowered to erect, maintain, and operate transmission lines needed for the working of the Railways, in terms of Section 11(g) of the Railways Act, 1989; the Committee did not find any justification for the requirement of a license for Railways for transmitting electricity, provided under Section 12 of the Bill, if such transmission lines were not connected to the grid, and erected for their own use of supply; the Committee, therefore, desired that the Railways should be given exemption from licensing as required under clause 12 of the Bill; the committee desired that suitable amendments be made in the Bill; pursuant to the suggestions of the Standing Committee in its report, Parliament, on 08.04.2003, adopted the motion of inserting the term “or the Railways Act, 1989” after “Atomic Energy Act, 1962” in Clause 168 of the Bill dealing with inconsistency in laws (Section 173 in the present Act)**;** reference by the Respondents to the decision of the Supreme Court, in **Kalpana Mehta and Others -v- Union of India and Others,(2018) 7 SCC 1,** is misplaced**;** Parliamentary Reports can be looked into for the purposes of taking into consideration legislative history for interpreting a statute as well as to refer the statements made by the Minister**;** Parliamentary Reports are only an aid to interpretation of statutes, and are not binding on courts; and, in any event, the contention of

the Respondents, based on the Standing Committee Report, is without any basis.

C.SUBMISSIONS OF RESPONDENTS ON ISSUE No.6:

It is submitted, on behalf of the Respondents, that supply of electricity is an integral part of 'distribution of electricity'; supply of electricity to consumers falls exclusively within the scope of distribution, which is performed by a distribution licensee, barring the following three statutory exceptions: (a) supply of electricity to a consumer from a captive generating plant, through dedicated transmission lines, as provided under Section 9(1) of the Electricity Act. 'Captive generating plant' is defined under Section 2(8) of the Electricity Act as "*a power plant set up by any person to generate electricity primarily for his own use …*"; (b) supply of electricity by a generating company to any licensee through dedicated transmission lines as provided under Section 10 of the Electricity Act; 'Dedicated Transmission Line' is defined by Section 2(16) of the Electricity Act, and are operated and maintained by generating companies as per Section 10(1) of the Electricity Act; (c) supply of electricity by a generating company to a consumer availing open access as provided by the second proviso to Section 9 of the Electricity Act and by Section 10(2) of the Electricity Act; barring the above statutory exceptions, the distribution licensee is exclusively in charge of maintaining and operating the last mile connectivity to the consumer; this is further corroborated by Section 46 of the Electricity Act which provides that it is only a distribution licensee that is entitled to charge for expenses incurred for providing an electric line for supply of electricity to a consumer; there is no similar provision allowing a transmission licensee to recover the expenses incurred for maintaining

lines used for the 'supply' of electricity; it is envisaged, within the scheme of the Electricity Act, that, if a consumer secures supply of electricity from a generating company or any licensee other than the distribution licensee in whose licensed area the consumer is located, then such consumer must pay open access charges to the distribution licensee of the licensed area where the consumer is located (*Section 42(3) and 42(4)*); even such mode of supply would require distribution of electricity through a distribution licensee's distribution system. (**Sesa Sterlite Ltd. v OERC., (2014) 8 SCC 444, Para 37**; **Orissa Power Transmission Corporation Limited v OERC, (2012) SCC Online APTEL 206, Para 37, 41**); the Electricity Act does not contemplate distribution of electricity outside the distribution system. (**Orissa Power Transmission Corporation Limited v Orissa Electricity Regulatory Commission, (2012) SCC Online APTEL 206, Para 35 – 38)** (APTEL held that any line connecting a transmission system or generating station to a consumer's premises, primarily used for distribution, forms part of the distribution system) (**Sesa Sterlite Ltd. v Orissa Electricity Regulatory Commission & Ors., (2014) 8 SCC 444,** Para 37; **Jindal Steel and Power Limited v Chhattisgarh Electricity Regulatory Commission & Ors.,(Order of APTEL in Appeal No. 27 of 2006 dated 7 May 2008, Para 49, 50**); under the Electricity Act, there is a clear divide between the functions of a transmission licensee and a distribution licensee; the distribution licensee is tasked with the function of distribution of electricity to consumers (i.e., last mile connectivity), along with the ancillary functions of maintaining all lines and cables used for distribution; the transmission licensee is only tasked with the responsibility to maintain transmission lines which are lines and cables not used for distribution; it is thus not adequate to have a distribution system to qualify

as a deemed distribution licensee; the entity claiming such status must fulfil all requirements of being a distribution licensee, which have been described herein above; and, further, sale of electricity is the *sine qua non* for supply of electricity as the definition of supply itself defines it as *sale of electricity*. (***Chandu Khamaru* v. *Nayan Malik & Others*, (2011) 12 SCC 314*).***

It is submitted, on behalf of the Respondents, that the term 'supply' has been defined under Section 2(70) of the Electricity Act which, in relation to electricity, means the sale of electricity to a licensee or a consumer; supply of electricity would only be completed when there is a sale of electricity to a third party (i.e., a licensee or a consumer); one of the requisites of 'supply' of electricity is that it must be sold to the other party; 'sale' of electricity to a third party is essential for dispensing the activity of 'supply' of electricity; there should be a seller (distribution licensee herein), buyer (consumer herein) and price (tariff herein) for the sale of electricity; mere movement of power from one point to another cannot be construed as sale of electricity, as has been contended; and Railways has, in fact, admitted that it does not supply electricity to any third-party consumers.

It is submitted, on behalf of the Respondents, that, alternatively, supply of electricity was a licensed activity under the provisions of the 1910 Act; generation of electricity was also a licenced activity under the provisions of the 1910 Act; at the time of enactment of the Electricity Act, generation of electricity became delicensed, and the same is very clearly mentioned in Section 7 thereof, that no licence is required for generating electricity; however, generation is regulated under the Electricity Act; the second proviso to Section 9 of the Electricity Act, dealing with captive generation,

specifically states that no licence is required for supply of electricity generated from the captive generation plant to any licensee or to any consumer subject to Regulations made under Section 42(2) of the Electricity Act; nowhere in the Electricity Act, is it mentioned that no license is required for supply of electricity; further, Section 2(3) of the Electricity Act states that “area of supply” means the area within which a distribution licensee is authorized by its licence to supply electricity; the definition of distribution licensee, under Section 2(17) of the Electricity Act, also lays emphasis on supplying electricity to consumers in its area of supply; therefore, unlike the provisions for generation which clearly indicates that no licence is required, and that of captive generation wherein also such a declaration is given that no license is required, no such positive assertion or declaration is provided for in the Electricity Act that no licence is required for supply of electricity, which was also a licensed activity like generation under the provisions of the 1910 Act; on the contrary, Section 2(3) read with Section 2(17) of the Electricity Act, 2003 leads to the conclusion that a licence is required for authorizing supply of electricity in a particular area of supply of a distribution licensee; Part IV of the Electricity Act pertains to licensing, the heading of Section 12 reads as “Authorized Persons to transmit, supply, etc., electricity”; therefore, the word “distribute electricity” under Section 12(b) should take colour from “supply” as transmitting electricity under Section 12(a) takes colour from the word “transmit” used in the heading; Section 24(a) of the Electricity Act provides for suspension of distribution licence in case the licensee fails to maintain uninterrupted supply of electricity conforming to standards regarding quality of electricity to the consumers; further, Rule 3 of the Distribution of Electricity License (Additional Requirements of Capital Adequacy,

Creditworthiness and Code of Conduct) Rules, 2005, which relates to requirement of capital adequacy and creditworthiness, also mandates that, prior to giving a licence to a second licensee in a particular area, the ability for capital investment, for distribution network as well as service obligation within that area in terms of Section 43 must be seen; this clearly indicates that supply of electricity is an integral part of the distribution license and, therefore, it is a licensed activity which is clubbed with the laying of the distribution network under the Electricity Act; and, therefore, sale of electricity to a consumer is the sine qua non for distribution of electricity by a distribution licensee, deemed or otherwise, under the Electricity Act and such supply is also a licensed activity under the Electricity Act.

It is submitted, on behalf of the Respondents, that the Airport Authority also procures electricity on a single point delivery method in a similar manner; Airports also consist of various shops and establishments, to whom electricity is internally allotted by the administration; this function of the Airports Authority does not amount to being a distribution licensee; similarly, Rourkela Steel Plant also collects electricity on a single point delivery method from the area distribution licensee (TPCODL) in the State of Orissa, and thereafter branches out the same to various establishment within its premises; this act of RSP does not constitute distribution of electricity; and a similar contention was dealt with by the High Court of Calcutta in ***Srijan Realty (P) Ltd.*** **v.** ***Commissioner of Service Tax, Kolkata*** **(2019 SCC OnLine Cal 9139).**

D.SUBMISSIONS OF RESPONDENTS ON ISSUE Nos.7 AND 11:

It is submitted, on behalf of the Respondents, that issues 7 and 11 have been dealt together as they are substantially similar; these issues are squarely covered by the judgment of the Supreme Court in ***Sesa Sterlite*****;** in ***Sesa Sterlite***, the Supreme Court decided the issue whether the Appellant therein was still liable to pay CSS to the distribution licensee of the area in question; the Appellant therein had its unit in a special economic zone, and it was also the developer in the said SEZ area; the Appellant had entered into a Power Purchase Agreement with a generator, and was not drawing power from the distribution licensee in that area; they claimed to be a deemed distribution licensee, for the purpose of the Electricity Act by virtue of being a "developer", as its unit was in the SEZ area, and such a recognition was statutorily given to them under the provisions of the Special Economic Zones Act, 2005; the Ministry of Commerce and Industry, Government of India had issued Notification dated 27.02.2009 declaring the unit of the Appellant therein as an SEZ; the said Notification was followed by a Notification dated 03.03.2010 under Section 49(1) of the SEZ Act; by the said notification, the GOI, for promoting the objects of the SEZ and under the powers delegated under the SEZ Act, introduced a proviso to Section 14(b) of the Electricity Act in terms of which a developer of a SEZ was declared as a deemed licensee authorised to distribute electricity within the special economic zone area; in the Order impugned in the *Sesa Sterlite* Judgment, this Tribunal had appropriately held that "*By merely being authorised to operate and maintain a distribution system as a deemed licensee, would not confer the status of distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the appellant claims to be deemed distribution licensee is of no consequence at all since admittedly, the entire*

power purchased by the appellant is for its own use and consumption and not for the purpose of distribution and supply/ sale to consumers.". (Ref. Para 49 of ***Vedanta Aluminium Limited* v. *OERC & Ors.*** **[2013 SCC OnLine APTEL 76)**; the Supreme Court agreed with the above findings of this Tribunal, and further held that, in order to avail benefits under the Electricity Act, the appellant was required to show that it is in fact having a distribution system, and has a number of consumers to whom it is supplying electricity; similar to the Railways herein, the Appellant in the *Sesa Sterlite* Judgment had also claimed to be a deemed distribution licensee; in such a scenario, this Tribunal as well as the Apex Court agreed that, in order to avail benefits under the Electricity Act, it is necessary that such person also performs the duties of a distribution licensee; despite there being an explicit proviso inserted in Section 14(b) of the Electricity Act for SEZ, the Supreme Court held that fulfilling the various requirements of a 'distribution licensee' under the Electricity Act is crucial, and no benefits can be availed without the same. (Ref. Para 46**);** unlike the Railways Act, the SEZ Act, *vide* Rule 5A of SEZ Rules, 2006, provides that twenty-four hours uninterrupted power supply at stable frequency in SEZ should be ensured in case of a SEZ relating to information technology, Biotechnology, Research and Development Facilities etc; Rule 5A was inserted to the SEZ Rules, 2006, *vide* SEZ (Amendment) Rules, 2016; there is no similar obligation put on the Railways under the Railways Act; Railways is not required to supply electricity to any of its alleged consumers in its alleged area of supply; furthermore, an express deeming provision has been provided in the Electricity Act for SEZ, however no such deeming provision has been provided for Railways; thus, in the present case, Railways is in no better position than the Appellant in the *Sesa Sterlite* Judgment;

therefore, the findings in the said case are squarely applicable in the present case; and as the entire power, being supplied to the Railways, is consumed for its own use and consumption, it cannot avail the benefits of being a distribution licensee.

It is further submitted, on behalf of the Respondents, that, when the Bill was being discussed in the Standing Committee of Parliament, it was clearly mentioned that the deeming provisions, provided for in Section 14, are transitory in nature for the purposes of smooth transition from the 1910 Act (Clause 6.2 of the Standing Committee Report) to the Electricity Act as given at Chapter VI (Licensing) (**Clause 6.4(ii)**); it is, therefore, clear that the third proviso pertaining to “distribute electricity” has to be read as supply of electricity under the 1910 Act and laying of the distribution network and supply of electricity to consumers under the Electricity Act; for being considered a distribution line, there should be conveyance of electricity from the distribution line to the point of installation of the consumer; there is no such point of installation and, on the contrary, it is a continuous line of installation, if one may describe it as such, extending to wherever the traction lines are connected in India; on perusal of the Railway Handbook, it is clear that, once power from the nearest sub-station of the supply authority, is delivered at the traction sub-stations of the Railways, the same is carried forward through the *electric traction equipment, power supply and distribution installations* which finds mention in Section 2(31) of the Railways Act; these *power supply and distribution installations*, installed, operated, and maintained by the Railways, are used for the purpose of onward conveyance of power within the system of the Railways, after delivery of power at the traction sub-station by an area

distribution licensee or through open access; as such, “distribution” of electricity, carried on by the Railways, is only for internal supply and distribution within its own system, which begins after power is delivered at its traction sub-station; such distribution cannot be regarded as *“distribution of electricity as a distribution licensee”* within the meaning of the Electricity Act; it is for this reason that the Railways has always been considered as a “consumer” of electricity, rather than a “distributor” of electricity, as it is not involved in any form of distribution of electricity to any entity other than to itself; and power consumption by the Railways is for operating its own railways through a system of electric traction equipment and power lines, through which power delivered at its traction sub-station is passed for use in the railways.

It is submitted, on behalf of the respondents, that the fact that Railways is not a deemed distribution licensee, and was never intended to be so, is also apparent from a perusal of the Standing Committee on Energy (2002), (Ref. 31st Report of the Standing Committee on Energy – Ministry of Power on Electricity Bill, 2001 which prepared a report on the Electricity Bill, 2001); taking into consideration, the public importance of the Bill, the Committee invited suggestions from the public at large who may be interested in the subject matter of the Bill; the Committee received written submissions from various quarters including the Railways; even before the above-mentioned standing committee, the Railways sought exemption only for transmission activity and not for distribution activities; the relevant para is Para 6.8 of the report of the Standing Committee on Energy (2002)**;** the Committee also agreed with the suggestion of the Railways, and found that the Railways are empowered to erect, maintain and operate transmission

lines needed for the working of the Railways in terms of Section 11(g) of the Railways Act; the Committee therefore suggested that the Railways should be given exemption from licensing as required under Clause 12 of the Bill (Para 6.42 of the report of the Standing Committee on Energy (2002); Railways also suggested that, along with Defense and Atomic Energy, Railways should also be inserted in Clause 179; Railways claimed that the provisions of the Electricity Act should not be applicable to the Railways (Para 20.12 of the Standing Committee on Energy (2002); Ministry of Railways also requested for exemption/ concession under Clauses 12, 42, 47, 67, 68 and 169 of the Bill (Para 20.13 of the Standing Committee on Energy (2002); the Committee took note of the request of the Ministry of Railways for exemption from the provisions contained in Clauses 12, 42, 47, 67, 68 and 179 of the Bill, and suggested that the Ministry of Railways be exempted from licensing for erecting, maintaining and transmission of electricity, subject to the condition that the transmission network is outside the grid and is erected for their own use, the licence would be insisted upon for grid operation (Para 20.32 of the Standing Committee on Energy (2002)); and, thus, it can be seen even from the Standing Committee Report that exemption was given to the Railways for transmission activities only, and not for distribution activities as has been alleged by the Railways in the present Appeal. Reliance is placed on the judgment of the Supreme Court, in **Kalpana Mehta & ors. v. Union of India & Ors :(2018) 7 SCC 1**.

E.ANALYSIS:

The question, we must pose to ourselves, is not whether electricity can be supplied by a person other than a distribution licensee, but whether

a person is entitled for grant of a distribution licence only to maintain an *"electric traction equipment"* or a *"power supply and distribution installation"* without having to discharge the concomitant obligation of supplying electricity, through such an installation/ equipment, to the consumers in the area of supply earmarked by the Commission in favour of such a licensee. Supply of electricity, which was a licenced activity under Section 3 of the Indian Electricity Act, 1910, has now been relaxed under the Electricity Act, 2003 and, besides captive generating plants, electricity traders, distribution licensees of other areas of supply, and through collective transactions in the power exchange, even companies which generate electricity (which is a delicenced activity under the Electricity Act, 2003) can supply the electricity so generated by them to others. That does not detract from the fact that various provisions of the Electricity Act obligate a person, to whom a distribution licence is granted, not only to install and operate a distribution system (ie the system of wires and associated facilities) but also to supply electricity through such a system to the consumer's installation.

F. DISTRIBUTION IS INTEGRALLY CONNECTED WITH SUPPLY OF ELECTRICITY:

It matters little that the term "supply" is not defined in the Indian Electricity Act, 1910 or the Electricity Supply Act, 1948, since the said term is defined under Section 2(70) of the Electricity Act,2003 as sale of electricity either to a licensee or to a consumer. While such a system of wires and associated facilities installed by a distribution licensee can also be used, by way of open access by others, the person in whose favour a distribution licence is granted is obligated to utilise such a system of wires and associated facilities to supply electricity (ie sell electricity) to

consumers. Unlike generation which has been specifically delicenced, the rigour placed by earlier enactments, with respect to supply of electricity, has been considerably relaxed under the Electricity Act, 2003, and freedom is given thereby to a consumer to procure electricity not only from the distribution licensee in whose area of supply the consumer is located, but also from any other distribution licensee or a generating company etc. While the 2003 Act gives a wider choice of procurement of electricity to a consumer, it does not free a distribution licensee of its obligation to supply electricity to the consumers, in its area of supply, who seek supply of electricity from them. The distribution licensee, within whose area of supply a consumer is located, has no choice but to supply electricity to such consumers.

Supply of electricity is part of the licensed activity of a distribution licensee, while supply by a generator is not. A distribution licensee can no doubt supply electricity to another distribution licensee. That does not absolve the former of its obligation to also supply electricity to the consumers in its area of supply. Besides the duty to develop and maintain an efficient distribution system in its area of supply, Section 42(1) also obligates a distribution licensee to supply electricity in accordance with the provisions of the Electricity Act. The word “supply”, used in Section 42(1), when read with Section 2(70) of the Electricity Act, undoubtedly places on the distribution licensee the duty to supply electricity to its consumers. Absence of the specific word, “consumer”, in Section 42(1) matters little.

Section 44 provides for exceptions discharging a distribution licence of its obligation to supply electricity. Section 45 relates to the power to recover charges. Under sub-section (1) thereof, the price which a

distribution licensee is entitled to charge for supply of electricity can only be in terms of the tariff fixed by the concerned State Commission. Section 46 relates to the power to recover expenditure, and thereunder any reasonable expenditure incurred by a distribution licensee in providing electricity may be permitted by the State Commission to be recovered by it. Section 47 relates to the power to require security. Section 48 confers power on the distribution license to require any person, who seeks supply of electricity, to fulfil certain conditions and Section 50 requires an Electricity Supply Code to be made to provide for recovery of electricity charges etc. These provisions require the distribution licensee to fulfil certain obligations, but does not discharge them of their duty to supply electricity to consumers within their area of supply. While Railways contend that Military Engineering Services has been held to be a deemed distribution licensee without any obligation to supply electricity to its consumers, reference is made on behalf of the Respondents to instances such as bulk supply being taken by Roorkela steel plant or the Airports Authority which, in turn, distributes electricity to its different constituents located within its area of operations. It may not be appropriate for us to consider the instances/illustrations given by both sides, since the parties with respect to whom the illustrations relate, are not before this Tribunal. Supply of electricity by various distribution licensees to Railways is supply of electricity to a consumer, and is not supply of electricity to another distribution licensee, since Railways does not fulfil the requirements of being a distribution licensee/deemed distribution licensee as it does not supply electricity by way of sale to third parties other than to itself or to its constituents.

G. OPEN ACCESS SOUGHT BY A DISTRIBUTION LICENSEE AND A CONSUMER: DISTINCTION:

Grant of open access frees a consumer from having to procure electricity from the distribution licensee within whose area of supply it is carrying on its activities and not vice versa, as a distribution licensee cannot avoid its obligation to supply electricity to consumers seeking it. Reliance placed by the Railways on Section 60 of the Electricity Act is misplaced. Section 60 confers power on the Appropriate Commission to issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry. It is evident from Section 60 that, while generation is longer a licensed activity, it is an activity which can be regulated under the provisions of the Electricity Act. Supply per se is not a licenced activity, since electricity can also be supplied by a generating company or by a captive generating plant. However, the Electricity Act does not disassociate supply from distribution, and a distribution licensee has the obligation both to operate and maintain a distribution system, as also to supply electricity by way of sale through the said system.

There is nothing in the context of the Electricity Act which requires the word “supply” to be given a meaning other than what is contained in its definition under Section 2(70). As the freedom to procure electricity, from a source other than the distribution licensee in whose area of supply they are located, is given to a consumer, Railways, as a consumer, also has the choice to procure electricity from anyone other than the concerned

distribution licensee. However, when such a right is exercised by the Railways as a consumer, it is obligated to pay additional surcharge/cross subsidy surcharge to its distribution licensee under Sections 42(2) and (4) of the Electricity Act. In the present batch of appeals the Railways does not seek to exercise its right, as a consumer of electricity, to procure electricity from a source other than the distribution licensee, but claims to be a deemed distribution licensee itself. The distinction between a distribution licensee/deemed distribution licensee on the one hand, and a consumer on the other, is that, while the former is governed by clause (i) of Sections 38(2)(d), 39(2)(d) and 40(c), the latter falls within the clause (ii) of the aforesaid provisions. While a distribution licensee is entitled, in view of clause (i) of the aforesaid provisions, to seek open access without discharging the corresponding obligation to pay additional surcharge/cross subsidy surcharge, a consumer falls within clause (ii) of the aforesaid provisions, and is obligated thereby to pay to its distribution licensee, (from whom it no longer procures electricity), additional surcharge and cross subsidy surcharge.

H. SECTION 62 OF THE ELECTRICITY ACT : ITS SCOPE:

Section 62(2) of the Electricity Act should not be read dehors Section 62(1)(d) thereof. The power conferred on an Appropriate Commission, under Section 62(1)(d), is to determine the tariff for retail sale of electricity ie sale of electricity by a distribution licensee to consumers within its area of supply. It is such a distribution licensee which is required under Section 62(2) to furnish details in respect of distribution for determination of tariff. Since tariff is determined for retail sale of electricity under Section 62(1)(d), the words “distribution for determination of tariff”, used in Section 62(2),

would relate only to such retail sale by the distribution licensee to its consumers.

As reliance is placed, on behalf of the Respondents, on the judgement of the Supreme Court, in **Sesa Sterlite Ltd. v Orissa Electricity Regulatory Commission & Ors., (2014) 8 SCC 444,** and the said judgement is sought to be distinguished by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, it is necessary to take note of both the order of this Tribunal in **Vedanta Aluminium Ltd**, as well as the judgement of the Supreme Court in **Sesa Sterlite Ltd,** since the former judgement was affirmed in the latter.

I.ORDER OF APTEL IN *"VEDANTA ALUMINIUM LTD VS OERC"* (ORDER IN APPEAL NO.206 of 2012 DATED 03.05.2013)

The appeal before this Tribunal, in **M/s Vedanta Aluminium Ltd vs OERC and others** (Order in Appeal No.206 of 2012 dated 03.05.2013), was filed by the appellant which, in its capacity as a deemed Distribution Licensee, had executed a Power Purchase Agreement with M/s Sterlite Energy Ltd for supply of 2050 MW of power for 25 years; and the petition filed seeking approval of the said PPA had been rejected by the Orissa Electricity Regulatory Commission ("OERC" for short).

The Appellant, which had set up a 1.25 MTPA capacity aluminium smelter project in a sector specific Special Economic Zone, was granted approval by the Government of India for the development, operation and maintenance of a sector specific Special Economic Zone in Orissa. Thereafter, the Ministry of Commerce and Industry, Government of India issued a notification, under Section 49(1) of the Special Economic Zones

Act, 2005, introducing a proviso to Section 14(b) of the Electricity Act, 2003 whereby a developer of a Special Economic Zone was declared a deemed licensee authorised to distribute electricity within the Special Economic zone area.

In the order, impugned in the appeal before this Tribunal, the OERC had observed that, even though deemed distribution licensee status had been granted to the Appellant by virtue of the notification under the Special Economic Zones Act, the State Commission was required and empowered to look into the other aspects with regard to compliance of the basic conditions provided in the Electricity Act, 2003; it was not satisfied that the application was for getting distribution licence to distribute electricity to consumers as envisaged under Section 2(15), 2(17) and 2(70) read with Sections 42(6), 55, 56 and 57 of the Electricity Act,2003, and the application for grant of distribution licence was not intended for supply of electricity to consumers, but was meant only for self-utilization and self-consumption; the Applicant was not entitled to the grant of distribution license even though it was granted deemed licensee status by virtue of the notification issued by the authority concerned; they should be treated as a consumer of the existing distribution licensee, and should pay surcharge to WESCO for drawal of power from Sterlite Energy Limited; and, since the Application for grant of distribution licence was rejected, the application filed by the appellant seeking approval of the PPA need not be considered.

On the question whether the State Commission lacked jurisdiction to declare that the Appellant is not a deemed distribution licensee when, by operation of law through notification of the Central Government, the Appellant had already been conferred with the said status, this Tribunal

observed that the notification had been issued under Section 49(1) of the Special Economic Zone Act, 2005 which conferred authority on the Central Government to direct that any of the provisions of a Central Act and rules and regulations made thereunder would not apply or to declare that some of the provisions of the Central Act shall apply with exceptions, modifications and adaptation to the Special Economic Zone; under the scheme of the Special Economic Zones Act, the Central Government had to first notify as to what extent the provisions of the other Acts should be made applicable, or applicable with modification, or not applicable for the Special Economic Zone area; accordingly, the Government of India, Ministry of Commerce and Industry, through their notification dated 21.3.2012 with regard to power generation in Special Economic Zone, had declared that all the provisions of the Electricity Act, 2003 and Electricity Rule,2005 shall be applicable to the generation, transmission and distribution of power; the notification clarified that there was no inconsistency between the Special Economic Zones Act, 2005 and the Electricity Act, 2003; and, as such, the Special Economic Zones Act, 2005 cannot have any overriding effect on the Electricity Act, 2003.

This Tribunal observed that a harmonious construction of both the SEZ Act, 2005 and the Electricity Act, 2003 required the provisions of both the Acts to be given effect to, so long as they were not inconsistent with each other; the provisions of Section 51 of the SEZ Act, 2005 should be considered along with the provisions of Section 49 of the said Act; accordingly, in view of the provisions of the SEZ Act, 2005 and the consequent notification by the Ministry of Commerce and Industry, the deemed distribution licensee status as claimed by the Appellant should also be tested through the other provisions of the Electricity Act, 2003 and

Electricity Rules, 2005, for certifying its validity and converting it into a formal distribution licensee; Section 14 of the Electricity Act, 2003 contained 9 provisos; one more proviso to Section 14 of the Electricity Act,2003 had been added through the notification dated 3.3.2010; there were some provisos which declared a party as a deemed distribution licensee who was not required to obtain separate licence from the State Commission under the Act; there were some other provisos which merely declared the party as a deemed distribution licensee; proviso 4 declared that the Damodar Valley Corporation shall be deemed to be a licensee but it shall not be required to obtain a licence under the Act as well as under the provisions of the Damodar Valley Corporation Act, 1948; the 3rd proviso provided that, if an appropriate Government transmits or distributes electricity, it shall be deemed to be a licensee but shall not be required to obtain licence under this Act; some of the other provisos did not confer the said privilege to the effect that they shall not be required to obtain licence; this meant that those companies, which were not conferred with the said privilege, shall obtain the distribution licence from the State Commission; the proviso, referred to in the notification dated 3.3.2010, merely stated that the developer of the SEZ shall be a deemed licensee; it did not provide that it was not required to obtain separate licence under this Act; the Appellant, though declared as a deemed distribution licensee through the notification dated 3.3.2010, was bound to approach the State Commission seeking the distribution licence by placing material to satisfy that he is entitled to the grant of distribution licence along with the material namely notification under which the Appellant was treated as deemed distribution licensee; in other words, the notification can be placed before the State Commission as one of the material for grant of licence, but that notification

alone would not be sufficient to compel the State Commission to grant such licence; as per this proviso, the developer of an SEZ is a deemed distribution licensee and not the person who develops and operates the SEZ simultaneously; if the developer and operator is allowed to hold a distribution licence, it means that both the licensee and the consumer is one and the same; if it is so, then it will contradict the Electricity Act and the notification of the Government of India making the whole affair non-est in the eyes of law; development and operation of the SEZ are two distinct activities; the jurisdiction of the State Commission to scrutinise the deemed distribution licensee status of the Appellant is well established in view of Section 49(1) of SEZ, Act,2005, and the notification of the Central Government dated 21.3.2012; and, therefore, the contention of the Appellant that the State Commission dealt with the matter, relating to the grant of distribution licence, by going beyond its jurisdiction is misplaced.

This Tribunal further observed that a perusal of the notification dated 3.3.2010 would make it evident that the legislation's intention, in declaring the developer in the SEZ area as a deemed distribution licencee, is confined only to clause (b) of Section 14 of the Electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity; the said notification has not curtailed the power of the State Commission so far as applicability of other provisions are concerned; as correctly indicated by the State Commission, the definition of the term "distribution licensee", as enumerated in Section 2(17) of Electricity Act,2003, emphasises upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers; considering the definition of 'supply' in Section 2(70), supply here means sale of electricity to consumers; merely being authorised to

operate and maintain a distribution system, as a deemed licensee, would not confer the status of a distribution licensee to any person; the purpose of such establishment is for supply of power to consumers; the mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence, since the entire power purchased by the Appellant is for its own use and consumption, and not for the purpose of distribution and supply/sale to consumers; an entity which utilises the entire quantum of electricity for its own consumption, and does not have any other consumers, cannot, by such a notification, be deemed to be a distribution licensee even by legal fiction; by virtue of the legal fiction created by the notification dated 3.3.2010, the Developer of the SEZ notified under the SEZ Act, who distributes electricity, can be deemed to be a distribution licensee; and this legal fiction cannot go further and make a person, who does not distribute electricity to the consumers, as a distribution licensee.

This Tribunal concluded by summarising its findings thus: (1) Govt.of India notification dated 3.3.2010, by modifying clause(b) of Section 14 of the Electricity Act by inserting a proviso that Developer of SEZ notified under the SEZ Act,2005 shall be deemed to be licensee for the purpose of this clause, does not exempt the Developer of the SEZ to obtain licence from the State Commission, (2) the notification dated 21.3.2012, issued by the Ministry of Commerce and Industry, has clarified that all the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 will be applicable to generation, transmission and distribution of power in the Special Economic Zone, (3) This Tribunal, in Appeal No. 3 of 2011 dated 23.3.2012, has observed that, on a harmonious construction of both the SEZ Act, 2005 and the Electricity Act, 2003, effect should be given to the provisions of both the Acts, so long as they are not inconsistent with each

other; in view of the provisions of the SEZ Act, 2005 and the consequent notification dated 21.3.2012 by the Ministry of Commerce and Industry, the deemed distribution licensee status, as claimed by the Appellant, shall also be tested, through the other provisions of the Electricity Act, 2003 and the Electricity Rules, 2005, for certifying its validity and converting it into a formal distribution licensee; the Appellant, by filing a petition before the State Commission for approval of PPA and grant of distribution licence, has submitted to the jurisdiction of the State Commission; therefore, the contention of the Appellant that the State Commission has dealt with the matter of granting distribution licence, which is beyond its jurisdiction, is misplaced, (4) the definition of the term "distribution licensee" as enumerated under Section 2(17) of the Electricity Act, 2003 emphasises upon the distribution licensee to operate and maintain a distribution system and supply electricity to the consumers; considering the definition of 'supply' in Section 2(70), 'supply' here means sale of electricity to consumers; by merely being authorized, to operate and maintain a distribution system as a deemed licensee, would not confer the status of a distribution licensee on any person; the purpose of such establishment is for supply of power to consumers; and the mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence since, admittedly, the entire power is purchased by the Appellant for its own use and consumption, and not for the purpose of distribution and supply/sale to consumers.

J. SESA STERLITE JUDGEMENT:

The judgement of the Supreme Court, in **Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission, (2014) 8 SCC 444,** was passed in a statutory appeal filed under Section 125 of the Electricity Act, 2003 against

the above referred order of APTEL in **Vedanta Aluminium Ltd. v. Odisha Electricity Regulatory Commission (**Order in Appeal No. 206 of 2012 dated 3-5-2013). By the said judgment, APTEL had, while affirming the order of the Odisha Electricity Regulatory Commission, held that, even though the appellant was a "deemed distribution licensee" for the purpose of the Electricity Act, it was nonetheless a "consumer" liable to pay cross-subsidy surcharge (CSS) to WESCO which was the distribution licensee for the subject area.

The units of the appellant were divided into two broad areas, one the domestic tariff area (DTA) where it had established one of its units, and the other, the VAL-SEZ unit which was in the SEZ. The DTA unit drew power from open access, and duly paid cross-subsidy surcharge. The appeal was confined to the VAL-SEZ unit in the SEZ area. For supply of energy to this unit, the appellant had entered into a PPA with Sterlite Energy Ltd which, soon thereafter, stood merged with the appellant.

Since supply of power by a generating company to a distribution licensee is regulated under the provisions of the Electricity Act, 2003, the appellant filed a petition before the OERC for approval of the said PPA. Subsequently the OERC, at the preliminary hearing, sought some clarifications with regard to certain factual aspects. The appellant, thereafter, filed two amendment petitions seeking additional prayers to grant them a deemed distribution licence on the strength of the Government of India Notification dated 3-3-2010. The OERC rejected this application, for grant of deemed distribution license, holding that VAL is to be treated as a consumer of WESCO.

The question of law, which arose for the consideration of the Supreme Court, was whether a developer of a notified special economic zone, who was deemed by law to be a licensee for distribution of electricity, was required, once again, to apply to the Regulatory Commission under the Electricity Act for grant of a licence, or the deeming fiction carved out in Section 14 of the Electricity Act automatically dispensed with this requirement, and ipso facto made such an SEZ developer a distribution licensee.

In answering this question, the Supreme Court observed that the primary dispute related to cross subsidy surcharge, which the appellant was called upon to pay to WESCO; it was necessary to conceptually understand the rationale for payment of such CSS to the distribution company under the scheme of the Electricity Act; open access implied freedom to procure power from any source; the expression “open access” has been defined in the Act to mean “the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the appropriate Commission”; the Act mandated that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company; open access in transmission enabled the licensees (distribution licensees and traders) and generating companies to use the transmission system without any discrimination; this would facilitate sale of electricity directly to the distribution companies; this would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement;

while open access in transmission implied freedom to the licensee to procure power from any source of his choice, open access in distribution meant freedom to the consumer to get supply from any source of his choice, and conferred on them the right to get supply from a person, other than the distribution licensee of his area of supply, by using the distribution system of such a distribution licensee; unlike in transmission, open access in distribution had not been allowed from the outset primarily because of the consideration of cross-subsidy; the law provided that open access in distribution would be allowed by the State Commission in phases; for this purpose, the State Commissions were required to specify the phases and conditions for introduction of open access; however, open access could be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirement of the current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply; and consequent to the enactment of the Electricity (Amendment) Act, 2003, it had been mandated that the State Commission shall, within five years, necessarily allow open access to consumers having demand exceeding one megawatt.

On the rationale of cross-subsidy surcharge (CSS), the Supreme Court observed that there were two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply; the presumption, normally, was that, generally, bulk consumers would avail open access, who also pay at relatively higher rates; as such, their exit would necessarily have adverse

effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society, and the other, in terms of recovery of the fixed cost which such licensee may have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs); the mechanism of surcharge was meant to compensate the licensee for both these aspects; through this provision of open access, the law balanced the right of the consumers to procure power from a source of his choice, and the legitimate claims/interests of the existing licensees; apart from ensuring freedom to the consumers, the provision of open access was expected to encourage competition amongst suppliers, and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that consumers did not go out of their fold to get supply from some other sources; with this open access policy, the consumer was given a choice to take electricity from any distribution licensee; however, at the same time, the Act made provision for surcharge for taking care of the current level of cross-subsidy; thus, the State Electricity Regulatory Commissions were authorised to frame open access in distribution in phases with surcharge, for the current levels of cross-subsidy, to be gradually phased out along with cross-subsidies, and obligation to supply; in the aforesaid circumstances, CSS is payable by the consumer to the distribution licensee of the area in question, when it decides not to take supply from them but to avail it from another distribution licensee; in a nutshell, CSS is a compensation to the distribution licensee irrespective of whether its line is used or not, in view of the fact that, but for open access, the consumer would pay the tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers; a

consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of a subsidising consumer; once cross-subsidy surcharge is fixed for an area, it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area; afortiori, even a licensee, which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access", would be liable to pay cross-subsidy surcharge under the Act; thus cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opts to avail power supply through open access from someone other than such distribution licensee in whose area it is situated; and such surcharge is meant to compensate such distribution licensee for the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

On application of the principle of cross-subsidy surcharge to the case before it, the Supreme Court observed that, in the present case, the appellant (which was the operator of an SEZ) was situated within the area of supply of WESCO; it was seeking to procure its entire requirement of electricity from Sterlite (an independent power producer (IPP) - which at the relevant time was a sister concern under the same management), and was thereby seeking to denude WESCO of the cross-subsidy which WESCO would otherwise have got from it, if WESCO were to supply electricity to the appellant; in order to be liable to pay cross-subsidy surcharge to a distribution licensee, it was necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated, and it is not necessary that such consumer should be

connected only to such distribution licensee; it would suffice if it was a "consumer" within the aforesaid definition; having regard to the aforesaid scheme, in the normal course when the appellant had entered into a PPA with Sterlite-another electricity generating company, and was purchasing electricity from the said company, it was liable to pay CSS to WESCO; admittedly under the PPA, the appellant was purchasing electricity from the said generating station, and it was consumed by the single integrated unit of the appellant; the appellant, therefore, qualified to be a "consumer" under Section 2(15) of the Electricity Act; and it was also not in dispute that the unit of the appellant was in the area which was covered by the licences granted to WESCO as a distribution licensee.

The Supreme Court noted the contention of the appellant that, in a scenario where the VAL-SEZ unit of the appellant was situated in an SEZ area, and the appellant was declared as the developer for that area under the SEZ Act, it was not liable to pay any CSS to WESCO in view of the notification issued under the proviso to Section 49 of the SEZ Act, and the appellant itself being treated as a deemed distribution licensee as per the provisions of Section 14 of the Electricity Act; as the appellant is deemed to be a licensee, it cannot be treated as a "consumer" under the Electricity Act; since the supply-line of VAL-SEZ was not connected to WESCO, and it was getting electricity directly from Sterlite under the PPA, there was no question of payment of CSS to WESCO; and it was not even the case of WESCO that the supply-line of SEL-VAL was a part of the WESCO distribution system.

On the effect of the appellant's claim to be a deemed distribution licensee, and whether this would take them away from the clutches of the

CSS liability, the Supreme Court referred to Section 49 of the Special Economic Zones Act, Section 14 of the Electricity Act and its provisos, and to the Notification dated 3-3-2010, and then observed that, under the scheme of the Special Economic Zones Act, the Central Government had to first notify as to what extent the provisions of other Acts were to be made applicable or applicable with modification or not applicable for the special economic zone area; in furtherance thereto, the Government of India, Ministry of Commerce and Industry, through its Notification dated 21-3-2012, with regard to power generation in special economic zones, had declared that all the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 shall be applicable to generation, transmission and distribution of power, whether stand-alone or captive power; this notification clarified that there was no inconsistency between the Special Economic Zones Act, 2005 and the Electricity Act, 2003; and, vide Notification dated 3-3-2010, the Central Government added an additional proviso to clause (*b*) of Section 14 of the Electricity Act viz. the appellant shall be deemed to be a licensee for the purpose of the said clause w.e.f. the date of notification of such SEZ.

The Supreme Court noted that the appellant's contention, that as it is already a deemed distribution licensee it need not apply for this licence to the said Commission before entering into the PPA and the State Commission was bound to grant the licence, was negated by the Appellate Tribunal on two grounds. The Supreme Court then observed that they were in agreement with the rationale in the impugned order passed by this Tribunal as that was the only manner in which the two Acts can be harmoniously construed; in the present case, by virtue of the status of a

developer in the SEZ area, the appellant was also treated as a deemed distribution licensee; however with this, it only got exemption from specifically applying for a licence under Section 14 of the Act; in order to avail further benefits under the Act, the appellant was also required to show that it was in fact having a distribution system and had a number of consumers to whom it was supplying electricity; that was not the case here; the appellant was getting electricity from Sterlite Ltd for its own plant only, for which it had entered into a PPA; the object and scheme of the SEZ Act envisaged several units being set up in an SEZ area; there could be a sector specific SEZ with several units i.e. for IT, mineral based industries, etc. but instances of single unit SEZ, like in the present case of the appellant, may be rare; the Notification dated 3-3-2010 providing for the "developer" of SEZ being deemed as a "distribution licensee" was issued keeping in view the concept of multi-unit SEZs and would apply only to such cases in which the developer was supplying power to multiple units in the SEZ; the said notification would not apply to a developer like the appellant which had established SEZ only for itself; and having regard to the aforesaid factual and legal aspects, and keeping in mind the purpose for which CSS was payable, they were of the view that, on the facts of this case. it was not possible for the appellant to avoid payment of CSS to WESCO. The appeal was dismissed.

K. JUDGEMENT OF SUPREME COURT IN *"SESA STERLITE"* IS BINDING:

The law declared by the Supreme Court, in **Sesa Sterlite,** governs the field and is binding on this Tribunal. In the hierarchical system of Courts, it is necessary for each lower tier to accept loyally the decisions of

the higher tiers. The judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted. The wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system. Under Article 141 of the Constitution the law declared by the Supreme Court shall bind all Courts (and Tribunals) within the territory of India and, under Article 144, all authorities, civil and judicial in the territory of India, shall act in the aid of the Supreme Court. (**CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Cassell & Co. Ltd. v. Broome, (1972) AC 1027; Siliguri Municipality v. Amalendu Das, (1984) 2 SCC 436; Rajeswar Prasad Misra v. State of W.B., AIR 1965 SC 1887; Yelamarthi Sarath Kumar Versus State of Andhra Pradesh and others, 2011 SCC OnLine AP 201).**

It is well to remember that, on the law having been declared by the Supreme Court, it is the duty of the Courts below, whatever be its view, to act in accordance with Article 141 of the Constitution of India and to apply the law laid down by the Supreme Court. Judicial discipline to abide by the declaration of law of the Supreme Court cannot be forsaken by any Court (or Tribunal) oblivious of Article 141 of the Constitution of India. (**Chandra Prakash v. State of U.P., (2002) 4 SCC 234; State of Orissa v. Dhaniram Luhar, (2004) 5 SCC 568**). Decisions of the Supreme Court are of significance not merely because they constitute an adjudication on the rights of the parties, and resolve the disputes between them, but also because, in doing so, they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent promotes certainty and consistency in judicial decisions. (**Chandra Prakash v. State of U.P., (2002) 4 SCC 234**). A judgment which refuses to

follow the decision and directions of the Supreme Court, or seeks to revive a decision which had been set aside by the Supreme Court, is a nullity. *(***Narinder Singh v. Surjit Singh, (1984) 2 SCC 402) and (Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324***).*

As noted hereinabove, in **Sesa Sterlite Limited**, the Supreme Court observed that, in order to be liable to pay cross subsidy surcharge to a distribution licensee, it was not necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated; it is not necessary that such a consumer should be connected only to such distribution licensees; and it would suffice if it is a consumer within the definition under the Electricity Act.

While the consumer has the freedom to procure electricity from any available source and not necessarily only from the distribution licensee in whose area of supply the consumer is located, the distribution licensee, in view of its universal supply obligation, does not have any such freedom, and must supply electricity to all consumers, in its area of supply, on demand. Merely establishing a distribution installation, through which electricity can be supplied by others to consumers, would not suffice for the person operating such a distribution installation (i.e. the system of wires and associated facilities) to be held to be a deemed distribution licensee.

In Para 45 of its judgment in **Sesa Sterlite Limited vs. Orissa Electricity Regulatory Commission and Others**, the Supreme Court noted Paragraphs 42, 43, 45, 47, 49 & 50 of the judgment of this Tribunal in **M/s Vedanta Aluminium Limited vs. Odisha Electricity Regulatory Commission and Others (judgment in Appeal No. 206 of 2012 dated**

03.05.2013). Thereafter, in Para 46, the Supreme Court expressed its agreement, with the aforesaid rationale in the impugned order of this Tribunal, holding that it was the only manner in which the two Acts (ie the Electricity Act and the SEZ Act) could be harmoniously construed; in order to avail further benefits under the Electricity Act, the appellant was also required to show that it was in fact having a distribution system and had a number of consumers to whom it was supplying electricity; and this was not the case there.

It is clear from the aforesaid observations of the Supreme Court, that, in order to be a deemed distribution licensee, it is not sufficient for the person concerned merely to erect, operate and maintain a distribution installation (a system of wires and associated facilities), but he should also be supplying (selling) electricity to the consumers in his area of supply; and, since the appellant therein was the sole consumer, the Supreme Court, in **Sesa Sterlite Limited**, held that the appellant before it could not be deemed to be a distribution licensee.

L. A JUDGEMENT IS AN AUTHORITY FOR WHAT IT DECIDES AND NOT WHAT MAY POSSIBLY FOLLOW THEREFROM:

The submission of Mr. M. G. Ramachandran, learned Senior Counsel, is that it would suffice for the developer, to be held to be a distribution licensee, to establish a distribution system which connects multiple units; so long as the distribution system is capable of supplying electricity to multiple units, it matters little who supplies electricity through such a system; and it is not necessary for the developer to also supply

electricity to them. These submissions of the Learned Senior Counsel do not merit acceptance.

Nowhere in the judgment, in **Sesa Sterlite Limited,** has the Supreme Court held that it would suffice for a person to be held to be a distribution licensee merely by establishing a distribution installation through which electricity can be supplied by others to their respective consumers. On the contrary, the Supreme Court has categorically held that, to avail the benefits under the Electricity Act, a deemed distribution licensee is required to show that it is, in fact, (1) having a distribution system; and (2) it has a number of consumers to whom it is supplying electricity. To fulfil the requirements of a distribution licensee, both the requirements of having a distribution system and to be supplying electricity to consumers must be satisfied. The mere fact that a distribution installation has been erected, maintained or is being operated would not suffice for the person, who undertook such activities, to be deemed to be a distribution licensee.

The first line in Paragraph 46, of the judgement in **Sesa Sterlite Limited,** clearly records the agreement of the Supreme Court with the rationale in the extracted portion of the judgment of APTEL in Paragraph 45. The Supreme Court has nowhere held that it is taking a view different from the one taken by APTEL and has, in fact, dismissed the appeal preferred against the said judgment. The law laid down, in **Sesa Sterlite Limited,** is not that a deemed distribution licensee cannot, along with other consumers, also consume a part of such supply itself. What is held therein is that, while it can be one among several consumers to whom electricity is supplied, it cannot be the sole consumer. Mere establishment of a distribution installation would not suffice since a distribution system

contemplates not just a system of wires and associated facilities, but for such a system to be connected to the installation of a consumer. In the present case, Railways, on its own admission before the State Regulatory Commissions, consumes the entire electricity, received by it at the traction substation/non-traction substation/ switchyards, itself. It does not, therefore, satisfy the requirements of being deemed to be a distribution licensee under the Electricity Act.

We find it difficult to agree either with the understanding of the Learned Senior Counsel for the Railways regarding the law declared in the judgement of the Supreme Court in **Sesa Sterlite**. Suffice it to observe that It is impermissible for a judgment to be read as implying something which it does not explicitly hold, and we may not be justified in drawing any inference therefrom to presume that, in a different fact situation, the Supreme Court would have held otherwise, for it is well settled that a judgment is only an authority for what it actually decides. What is of the essence in a decision is its ratio, and not every observation found therein nor what logically follows from the various observations made in it. (**State of Orissa v. Sudhansu Sekhar Mistra, AIR 1968 SC 647; Quinn v. Leathem, 1901 AC 495**).

A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case, or is put in issue, would alone constitute a precedent. What is of the essence in a decision 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] A.C. 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). 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] A.C. 495; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447).**

As Sri M.G. Ramachandran, Learned Senior Counsel for the Railways has only extracted a part of the last two sentences in Para 46 of the judgement in **Sesa Sterlite Limited**, It is useful to read it in its entirety:

"the Notification dated 3-3-2010 providing for the "developer" of SEZ being deemed as a "distribution licensee" was issued keeping in view the concept of multi-unit SEZs and will apply only to such cases in which the developer is supplying the power to multiple units in the SEZ. The said notification will not apply to a developer like the appellant who has established SEZ only for itself."

The first sentence, in the afore-extracted passage, makes it clear that the notification, requiring a developer of SEZ to be deemed as a distribution licensee, was issued for multi-units in the SEZ and would apply only to cases where the developer was supplying power to multiple units in the

SEZ and not solely to itself. It is the admitted case of Railways, before the State Commissions, that Railways is conveying electricity, from the traction substation/non-traction substation/switchyards only to itself. Mere establishment of a distribution installation would not suffice since a distribution system contemplates not just a system of wires and associated facilities, but for such a system to be connected to the installation of a consumer.

It is for this reason that placitum *e,* in Paragraph 46 of the judgment, in **Sesa Sterlite Limited,** should not be read out of context, more so as it is settled law that observations in a judgment should not be read in isolation. A judgment should not be read as Euclid's theorems or as provisions of a statute. (**Goan Real Estate & Construction Ltd. v. Union of India, (2010) 5 SCC 388; Amar Nath Om Prakash v. State of Punjab, (1985) 1 SCC 345; CCE v. Alnoori Tobacco Products, (2004) 6 SCC 186; London Graving Dock Co. Ltd. v. Horton; [1951] A.C. 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).** 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).**

It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. (**Quinn v. Leathern, [1901] A.C. 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. Ditia v. Appropriate Authority, Income-Tax Department, 2008 SCC OnLine AP 904; **Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand, 2018 SCC OnLine UTT 1026).** Neither should Judgments be read as statutes. (**Sri Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026),** nor should a stray sentence in a judgement be read out of context. **(GUVNL V. GERC: APPEAL NO. 371 OF 2023 DATED 09.11.2023).** 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)**.

M. CROSS SUBSIDY SURCHARGE IS LIABLE TO BE PAID EVEN WHERE ELECTRICITY IS SUPPLIED BY A GENERATOR TO A CONSUMER:

Section 2(8) of the Electricity Act defines a “Captive generating plant” to mean a power plant set up by any person to generate electricity primarily for his own use. Section 9 (1) relates to captive generation and, under sub section (1) thereof, notwithstanding anything contained in the Electricity Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Section 2(16) defines “dedicated

transmission lines" to mean any electric supply-line for point-to-point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9, or a generating station referred to in Section 10, to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be. Section 10 relates to the duties of generating companies and, under sub section (1) thereof, subject to the provisions of the Electricity Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of the Electricity Act or the rules or regulations made thereunder. Section 10(2) enables a generating company to supply electricity to any licensee in accordance with the Electricity Act and the rules and regulations made thereunder and may, subject to the regulations made under Section 42(2), supply electricity to any consumer.

While supply of electricity by a captive generating plant to its constituent units is, in terms of Section 9, notwithstanding anything contained in the Electricity Act, Section 10(2) makes supply of electricity, by a generating company to a consumer, subject to regulations made under Section 42(2) which, as noted hereinabove, also includes provisions for cross subsidy surcharge. Even in cases where electricity is supplied by a generating company to a consumer, payment of cross subsidy surcharge cannot be avoided.

N.OBLIGATIONS OF A DISTRIBUTION LICENSEE:

Rule 4 of the Electricity Rules, 2005 defines "*Distribution system*" to mean the distribution system of a distribution licensee in terms of sub-section (19) of Section 2 of the Act, and shall also include electric line, sub-station and electrical plant that are primarily maintained for the purpose of distributing electricity in the area of supply of such distribution licensee notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others.

In **Orissa Power Transmission Corporation Limited v. Orissa Electricity Regulatory Commission, 2012 SCC OnLine APTEL 206,** this Tribunal held that the last mile connection is a line in between the delivery point on the transmission line and point of connection on the consumer's premises and is primarily used for distribution of electricity to such consumer; it, therefore, qualifies to be part of the distribution network; for a line to be a transmission line, that line must be transmitting electricity; supply to a consumer cannot be treated as transmission of electricity; supply of electricity to a consumer is a universal service obligation cast upon the distribution licensee under Section 43 of the Act; accordingly, supply to a consumer is distribution; it cannot be termed as transmission of electricity; the last mile connection is part of the distribution network; unlike a transmission licensee which is obligated under the Electricity Act only to maintain transmission lines (lines other than those used for distribution), the obligation of a distribution licensee is not only to operate and maintain a system or wires and associated facilities, but also to supply electricity, through such a system, to the consumers within its area of supply.

In **Chandu Khamaru v. Nayan Malik, (2011) 12 SCC 314,** the Supreme Court held Sections 42(1) and 43(1) of the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee; and the Electricity Act, 2003 contains provisions to enable the distribution licensee to carry out works for the purpose of supplying electricity to the owners or the occupiers of premises in his area of supply ie Section 67 of the Electricity Act, 2003.

In the absence of sale, mere conveyance of electricity cannot be treated as supply of electricity. While supply of electricity was no doubt a licenced activity under the 1910 Act, the Electricity Act, 2003 has specifically made generation a de-licenced activity. Unlike a specific provision under Section 7 of the Electricity Act, 2003 making generation a de-licenced activity, there is no specific provision in the said Act treating supply of electricity as a delicenced activity. What is specifically granted by the said Act is the freedom to a consumer to procure electricity, from its chosen source through open access, subject however to the condition that additional surcharge/cross subsidy surcharge is paid by them to their distribution licensee.

Part IV of the Electricity Act relates to licensees. The heading of Section 12 is *"Authorised persons to transmit, supply, etc., electricity"*. While the word 'transmit' in the heading is referable to Section 12(a) which relates to transmission of electricity, the word 'supply' in the heading of

Section 12 relates to distribution of electricity referred to in clause (b) of Section 12. Distribution of electricity cannot be undertaken dehors supply. Section 24(1)(a) confers power on the Appropriate Commission, if it is of the opinion that a distribution licensee has persistently failed to maintain uninterrupted supply of electricity conforming to standards regarding quality of electricity to the consumers, to suspend for a period of one year the licence of a distribution licensee. This provision also shows that a distribution licensee has an obligation to maintain interrupted supply of electricity to its consumers.

O. JUDGEMENT RELIED UPON BY BOTH SIDES:

In **Srijan Realty (P) Ltd. v. CCE, 2019 SCC OnLine Cal 9139,** on which reliance is placed on behalf of the Respondents, the petitioner had sought a declaration that, supply of electricity by them to the occupiers of "Galaxy Mall", a commercial complex, was not a service exigible to tax under the Finance Act, 1994; the Commercial Complex had various occupants; to effect electric supply to the commercial complex, the petitioner had entered into an agreement with the distribution licensee to provide electric supply through an 11KV sub-station installed at the commercial premises; the licensee raises a single consolidated electricity bill upon the petitioner; the petitioner on receipt of electric supply re-distributes the same to the occupiers of the commercial complex; the petitioner had installed sub-meters for the respective occupiers; based on the readings of such sub-meters, the petitioner raised bills upon such occupiers. Upon objections being raised by the some of the occupiers, the

petitioner consulted the Superintendent of Service Tax, S.T. II Commissionerate for determining whether such re-distribution of electricity was exigible to Service Tax. The Superintendent of Service Tax held that such a service is exigible to tax.

Before the Calcutta High Court, the petitioner contended that the entire transaction of supplying electricity, from the point of its generation to the point of its consumption, should be treated as being part of a sale of goods; absence of any authorisation to supply electricity does not change the nature and character of the sale; at best, unauthorised supply of electricity may invite penalties under the Electricity Act, 2003; however, even if such penalties are imposed, the transaction will not lose the character of a sale; re-distribution of electricity, such as that undertaken by the petitioner, fell within the scope of sale/trading activity; and such a transaction is not exigible to Service Tax.

It is in this context that the Calcutta High Court held that, under the definitions as obtaining in the Electricity Act, 2003, the petitioner cannot be said to be a generating company; it cannot also be said that the petitioner is engaged in the supply or trading of electricity as the definition of 'supply' and 'trading' do not allow the petitioner to come within the same; the petitioner is not a person authorised to transmit, supply, distribute or undertake trading in electricity in view of the definitions as obtaining in the Electricity Act, 2003; therefore, the petitioner cannot be said to be distributing or selling or trading in electricity, when it is receiving high-tension supply from Indian Power Corporation Ltd and providing low-tension electricity to the occupants of the commercial complex; sale, trading and distribution being taken out of the contention, the only other

thing that remained to describe the activity, undertaken by the petitioner, was service; any other interpretation would render the steps taken by the petitioner in receiving high-tension electric supply and making over low-tension electric supply to the occupants, violative of the provisions of the Electricity Act, 2003; and such an interpretation should be avoided.

As reliance is placed on behalf of the Railways, on **K. Raheja Corporation Pvt. Ltd.v. Maharashtra Electricity Regulatory Commission & Anr (*2011 ELR (APTEL) 1170*),** and **DLF Utilities Ltd Vs Haryana Electricity Regulatory Commission & Anr., (Order in Appeal No.193 of 2011 dated 03.10. 2012)**, to contend to the contrary, it is necessary to consider these judgements also.

In **K. Raheja Corporation Pvt. Ltd,** this Tribunal held that, if a consumer charges different amounts from different end users according to the nature of consumption for such users residing in a complex either as tenants, occupier or lessee or in any other capacity whatsoever to the exclusion of being a consumer within the definition of the Act, then such realization of the amount which is not accounted for before a distribution licensee, and such consumption by different occupiers at the behest of a consumer behind the knowledge of the distribution licensee, are unknown to law; a consumer may mean a person, and a person may mean a company or a body corporate or association or body of individuals whether incorporated or not or artificial juridical person, but the concept of consumer does not extend to a situation where number of end users each living separately in a building and connected to consumer or owner of a building are conjoined together; a body of individuals is comprised within the definition of ‘person’, but such body of individuals cannot be construed to

mean a countless number of independent end users who do not form a body of individuals; a consumer does not include a group of consumers in terms of the definition; if a consumer, upon receipt of electrical energy, distributes such energy to different end users according to their need, and if such end users are not consumers within the meaning of the Act and they are charged tariff or fee for such consumption of electrical energy with which a distribution licensee is not concerned, then the question may arise whether such distribution of power to different end users within a complex in lieu of a tariff or fee charged by a consumer would amount to unauthorized sale of electricity; a consumer receives electricity only “for his own use”, and this excludes a situation where a consumer can, on receipt of electrical energy, sell a part of that energy or the entire energy itself to different people for their respective consumption; it is only for HT VI category consumers, namely, Group Housing Society where perhaps such single point supply is permitted; a consumer cannot have his own distribution system for distribution of electrical energy in turn to his tenants/occupiers/users etc; and single point supply, in the context in which the parties have understood the matter, should be done away with for all times to come by making proper arrangements.

On the question whether the building owners can, in turn, supply electricity to individual occupants/owners of the apartments in that building without any license or a franchise to distribute or supply electricity, this Tribunal, in **DLF Utilities Ltd,** held that it is the individual occupants of the buildings who occupy different spaces in the apartments to promote their commercial ventures, and they receive electricity from the building owners in lieu of payment made to them, who in turn have entered into the

agreements with the appellant for the purpose; this is distribution beyond the load centre which does not come within the purview of a dedicated transmission line; and what is objected to is supply to numerous persons in the name of dedicated transmission line, but beyond the same in furtherance of commercial interest of the building owners who let out their spaces to their tenants / lessees.

It is un-necessary for us to delve into the aspects, referred to in the afore-said judgements, since Railways, (apart from certain associated services - which shall be examined later in this Order), uses the distribution installations, erected, maintained and operated by it, only to convey electricity from the traction sub-stations/non-traction substations/switchyards (where it receives electricity from the grid) to its different units of consumption, including the Railway locomotives. In view of the non-obstante clause in Section 11(g) & (h) of the Electricity Act, such conveyance/redistribution of electricity, by Railways to its different consumption points, may not attract the bar, laid down in **K. Raheja Corporation Pvt. Ltd** and **DLF Utilities Ltd,** of a consumer having its own distribution installation for re-distribution of electrical energy to its consumption points/constituent units. However as no “supply”, ie sale of electricity, is involved in this process, such act of conveyance/ re-distribution of electricity would not constitute distribution of electricity under the Electricity Act, much less as distribution by a distribution licensee.

P. PARLIAMENTARY STANDING COMMITTEE REPORT: ITS RELEVANCE:

As reliance is placed on behalf of the Respondents, on the 31st Report of the Standing Committee on Energy, Ministry of Power, on Electricity produced, to the Lok Sabha and Rajya Sabha on 19.12.2002, to submit that it is apparent therefrom that Railways is not a deemed distribution licensee, and was never intended to be so, it is useful to note its contents, more so as the Parliamentary Standing Committee report, or any Parliamentary Committee report, can be taken judicial notice of and regarded as admissible in evidence; aid can be take of such reports for the purpose of interpretation of a statutory provision wherever it is so necessary; and such reports can be taken note of, as existence of a historical fact. Judicial notice can be taken of the Parliamentary Standing Committee report under Section 57(4) of the Evidence Act and it is admissible- as evidence under Section 74 of the said Act. In a litigation, the Court can take on record the report of the Parliamentary Standing Committee. However, the report cannot be impinged or challenged in a court of law. **(*Kalpana Mehta v. Union of India*, (2018) 7 SCC 1).**

Q. CONTENTS OF THE 31ST REPORT OF THE PARLIAMENTARY STANDING COMMITTEE ON ENERGY:

Chapter –XX, of the 31st Report of the Standing Committee on Energy dated 19.12.2002, relates to exemption from the Electricity Act. It is stated thereunder that Clauses 168 and 179 of the Electricity Bill, 2001 provide for exemption of some Acts/Ministries/Departments from the purview of the Bill; Clause 169 of the Bill gives an overriding authority to the Bill over the provisions in other Acts/Laws except those provided in Clause 168 viz. the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962; Clauses 168 and 169 are based on the provisions contained in

Clauses 49 and 52 of the Electricity Regulatory Commissions Act, 1998 respectively; Clause 168 of the Bill provides that " Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962; Clause 179 of the Electricity Bill, 2001 is a new provision incorporated in the Bill without any corresponding provision in the Acts of 1910, 1948 and 1998; and Clause 179 of the Bill stipulates that " The provisions of this act shall not apply to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or undertakings or Boards or institutions under the control of such Ministries or Departments as may be notified by the Central Government.

The report then records that some organisations/Ministries like the Ministry of Railways, and the Damodar Valley Corporation (DVC), had requested for exemption from the Act citing peculiar/sensitive/specialised jobs they are carrying out on the ground; the Ministry of Railways (Railway Board) had suggested that, along with Defence and Atomic Energy, Railways should also be inserted in Clause 179; they had stated that the Railways had an important role to perform during the time of war for the security and defence of the country and, as such, the provisions of this Act should not be applicable to the Ministry of Railways; the Ministry of Railways (Railway Board) had also requested for exemption/concession under Clauses 12, 42, 47, 67, 68 and 169 of the Bill; and when asked to give their views on the request of the Ministry of Railways for exemption

under Clause 179, the Ministry of Power, in a post-evidence reply, had stated that the provision contained in the Clause is adequate.

The report thereafter records that the Damodar Valley Corporation (DVC) had stated that their activities in the non-power area were statutorily mandated objectives of the Corporation; the activities in the non-power area had, therefore, to be cross-subsidized by the power surplus on year to year basis; a special responsibility had also been cast on the Corporation to supply bulk power to the major core sector industries in the Damodar Valley area such as Coal, Mines & Minerals, Steel and Railways, etc; by meeting its commitment of supplying quality power to the core sector industries, DVC has contributed substantially to industrial growth and general development of the Valley as well as of the country; concurrent with the special responsibility attached to the DVC with regard to the general development of the Valley, its industries and the socio-economic conditions, the DVC Act, in recognition of such onerous responsibility has assigned special statutory protection through Section 58 of the DVC Act; so far, no legislation has overlooked this special status and statutory protection; the impact of Clause 169 of the Electricity Bill, 2001 would be to do away with the special status; this will go against the mandated role of the DVC; DVC had therefore proposed to the Ministry of Power that the status and responsibility be protected as per the already assigned role and responsibility through inclusion of DVC in the saving provision of Section 168 of the Electricity Bill, 2001; and DVC had also stated that the Indian Electricity Acts enacted so far had not been allowed to be passed in derogation of or to override the special provisions of the DVC Act in due consideration of the special responsibilities attached to the DVC.

The report then states that Section 169 provides that the provision of the Electricity Bill, 2001 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than the Electricity Bill, 2001; on the other hand, Section 58 of the DVC Act, 1948 gives effect to the provisions of this Act "notwithstanding anything contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act"; thus, DVC has argued that the provision of Section 58 of the DVC Act and Section 169 of the Electricity Bill, 2001 are contradictory to each other; DVC had also stated that the provisions of the proposed Electricity Bill, 2001 would, if passed in its present shape without reconciliation, have serious repercussion on the functioning of DVC; the special status of DVC, as accorded by the DVC Act, 1948 by virtue of Section 58, needed to be protected so that the Corporation can fulfil its statutory mandate in the valley area; and DVC had suggested that the DVC Act, 1948 should be included in Clause 168 of the Electricity Bill, 2001 along with the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962 in order to avoid any confusion regarding the effect of the proposed Bill on the provisions of the DVC Act, 1948.

The Committee then noted that Clauses 168 and 179 of the Electricity Bill, 2001 granted exemption to certain Acts viz. the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962 and the Ministry, Department, undertaking, etc. dealing with Defence and Atomic Energy; they had been requested by the Ministry of Railways and the Damodar Valley Corporation (DVC) for exemption from the scope of the Bill; the Ministry of Railways had

argued that as they had an important role to perform during the time of national emergencies, they may be exempted under Clause 179 of the Bill; DVC had argued that the Bill, if passed in its present shape, would have serious repercussion on the functioning of the Corporation; and DVC had suggested that the DVC Act, 1948 should be included in Clause 168 of the Bill. After considering the arguments of these organisations, the Committee felt that DVC has a strong case for exemption from the Bill and, accordingly, recommended that DVC should be exempted from the Bill under Clause 168 or any other similar Clause.

The report further states that the Committee had taken note of the request of the Ministry of Railways for exemption from the provisions contained in Clauses 12, 42, 47, 67, 68 and 179; the Committee desired that the Ministry of Railways be exempted from licensing for erecting, maintaining and transmission of electricity, subject to the condition that the transmission network was outside the grid and erected for their own use, and the licence would be insisted upon for grid operation.

Consequently they recommended that amendments be made to Clause 168, which related to Inconsistency in laws, by inserting, after the words ”Atomic Energy Act, 1952”, the words “or the Railways Act, 1989”. After the motion was adopted, Clause 168, as amended, was added to the Bill.

To understand which provisions of the Electricity Act, Railways had sought exemption from, it is useful to compare clauses 12, 42, 47, 67, 68, 168, 169 and 179 of the Electricity Bill, 2001 with the corresponding provisions of the Electricity Act, 2003. The relevant clauses and the corresponding provisions are detailed hereunder in a tabular form:

Electricity Bill, 2001	Electricity Act, 2003
12. Authorised persons to transmit, supply, etc., electricity.-- No person shall-- transmit electricity; or distribute electricity; or undertake trading in electricity, unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13	**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.
42. Duties of distribution licensees.— (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act. (2) Where any person, whose premises are situated within the area of supply of a distribution licensee, requires a supply of electricity from a generating company or any licensee other	**42. Duties of distribution licensees and open access-** (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act. (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross

than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access to its distribution system: **Provided** that the open access shall be introduced in such phases and subject to such conditions, including the cross subsidies, and other operational constraints, as may be specified by the State Commission and in specifying the extent of open access in successive phases and in determining the charge for wheeling, the State Commission shall have due regard to all relevant factors including such cross subsidies, and other operational constraints: **Provided further** that such open access may be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be	subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints: _____ _____ Provided that[1][such open access shall be allowed on payment of a surcharge in addition to the charges] for wheeling as may be determined by the State Commission: _____ Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution license _____ Provided also that such surcharge and cross subsidies shall be progressively reduced[2]*** in the manner as may be specified by the State

determined by the State Commission: **Provided also** that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee: **Provided also** that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission, **(3)** Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. (4) Every distribution licensee shall, within six months from the	Commission: Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use: [3][Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.] (3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other

appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.	than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access. (4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. (5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal

	of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission. (6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section*(5)*, may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission. (7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission. (8) The provisions of sub-sections*(5)*,*(6)*and*(7)*shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.
47. Power to require security.--(1) Subject to the provisions of this section, a distribution licensee may require any person, who	**47. Power to require security.—** (1) Subject to the provisions of this section, a distribution

requires a supply of electricity in pursuance of section 43, to give him reasonable security, as may be determined by regulations, for the payment to him of all monies which may become due to him-- (a) in respect of the electricity supplied to such person; or (b) where any electric line or electrical plant or electric meter is to be provided for supplying electricity to such person, in respect of the provision of such line or plant or meter, and if that person fails to give such security, the distribution licensee may, if he thinks fit, refuse to give the supply of electricity or to provide the line or plant or meter for the period during which the failure continues. (2) Where any person has not given such security as is mentioned in sub- section (7) or the security given by any person has become invalid or insufficient, the distribution licensee may, by notice, require that person, within thirty days after the service of the notice, to give him reasonable security for the payment of all	licensee may require any person, who requires a supply of electricity in pursuance of section 43, to give him reasonable security, as may be determined by regulations, for the payment to him of all monies which may become due to him-- (a) in respect of the electricity supplied to such persons; or (b) where any electric line or electrical plant or electric meter is to be provided for supplying electricity to such person, in respect of the provision of such line or plant or meter, and if that person fails to give such security, the distribution licensee may, if he thinks fit, refuse to give the supply of electricity or to provide the line or plant or meter for the period during which the failure continues. (2) Where any person has not given such security as is mentioned in sub-section*(1)*or the security given by any person has become invalid or insufficient, the distribution

monies which may become due to him in respect of the supply of electricity or provision of such line or plant or meter. (3) If the person referred to in sub-section (2) fails to give such security, the distribution licensee may, if he thinks fit, discontinue the supply of electricity for the period during which the failure continues. (4) The distribution licensee shall pay interest equivalent to the bank rale or more, as may be specified by the concerned State Commission, on the security referred to in subsection (1) and refund such security on the request of the person who gave such security. (5) A distribution licensee shall not be enlitled to require security in pursuance of clause (a) of sub-section (1) if the person requiring the supply is prepared to take the supply through a pre-payment meter.	licensee may, by notice, require that person, within thirty days after the service of the notice, to give him reasonable security for the payment of all monies which may become due to him in respect of the supply of electricity or provision of such line or plant or meter. (3) If the person referred to in sub-section*(2)*fails to give such security, the distribution licensee may, if he thinks fit, discontinue the supply of electricity for the period during which the failure continues. (4) The distribution licensee shall pay interest equivalent to the bank rate or more, as may be specified by the concerned State Commission, on the security referred to in sub-section*(1)*and refund such security on the request of the person who gave such security. (5) A distribution licensee shall not be entitled to require security in pursuance of clause*(a)*of sub-section*(1)*if the person requiring the supply is prepared to take the supply

	through a pre-payment meter.
67. Provision as to opening up of streets, railways etc.-- (1) A licensee may. from time to time but subject always to the terms and conditions of his licence, within his area of supply or transmission or when permitted by the terms of his licence to lay down or place electric supply lines without the area of supply, without that area carry out works such as --	**67. Provision as to opening up of streets, railways etc.—** (1) A licensee may, from time to time but subject always to the terms and conditions of his licence, within his area of supply or transmission or when permitted by the terms of his licence to lay down or place electric supply lines without the area of supply, without that area carry out works such as--
to open and break up the soil and pavemenl of any street, railway or tram way;	(a) to open and break up the soil and pavement of any street, railway or tramway;
to open and break up any sewer, drain or lunnel in or under any street, railway or tramway;	(b) to open and break up any sewer, drain or tunnel in or under any street, railway or tramway;
to alter the position of any line or works or pipes, other than a main sewer pipe:	(c) to alter the position of any line or works or pipes, other than a main sewer pipe;
to lay down and place electric lines, electrical plant and other works:	(d) to lay down and place electric lines, electrical plant

to repair, alter or remove the same; to do all other acts necessary for transmission or supply of electricity. (2) The Appropriate Government may, by rules made by it in this behalf, specify,--) the cases and circumstances in which the consent in writing of the appropriate Government, local authority, owner or occupier, as the case may be, shall be required forcarrying out works;) the authority which may grant permission in the circumstances where the owner or occupier objects to the carrying out of works;) the nature and period of notice to be given by the licensee before carrying out works:) the procedure and manner of consideration of objections and suggestions received in accordance with the notice referred to in clause (c);) the determination and payment of	and other works; (e) to repair, alter or remove the same; (f) to do all other acts necessary for transmission or supply of electricity. (2) The Appropriate Government may, by rules made by it in this behalf, specify,-- (a) the cases and circumstances in which the consent in writing of the appropriate Government, local authority, owner or occupier, as the case may be, shall be required for carrying out works; (b) the authority which may grant permission in the circumstances where the owner or occupier objects to the carrying out of works; (c) the nature and period of notice to be given by the licensee before carrying out works;

compensation or rent to the persons affected by works under this section; the repairs and works to be carried out when emergency exists;) the right of the owner or occupier to carry out certain works under this section and the payment of penses therefor;) the procedure for carrying out other works near sewers, pipes or other electric lines or works; the procedure for alteration of the position of pipes, electric lines, electrical plant, telegraph lines, sewer lines, tunnels, drains, etc.; the procedure for fencing, guarding, lighting and other safety measures relating to works on streets, railways, tramways, sewers, drains or tunnels and immediate reinstatemenl thereof;) the avoidance of public nuisance, environmental damage and	(d) the procedure and manner of consideration of objections and suggestion received in accordance with the notice referred to in clause*(c)*; (e) the determination and payment of compensation or rent to the persons affected by works under this section; (f) the repairs and works to be carried out when emergency exists; (g) the right of the owner or occupier to carry out certain works under this section and the payment of expenses therefor; (h) the procedure for carrying out other works near sewers, pipes or other electric lines or works; (i) the procedure for alteration of the position of pipes, electric lines, electrical plant, telegraph lines, sewer lines, tunnels, drains, etc.;

unnecessary damage to the public and private property by such works; the procedure for undertaking works which are not reparable by the Appropriate Government, licensee or local authority;) the manner of deposit of amount required for restoration of any railways, Iramways. waterways, etc.;) the manner of restoration of property affected by such works and maintenance thereof;) the procedure for deposit of compensation payable by the licensee and furnishing of security; and) such other matters as are incidental or consequential to the construction and maintenance of works under this section. (3) A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for	(j) the procedure for fencing, guarding, lighting and other safety measures relating to works on streets, railways, tramways, sewers, drains or tunnels and immediate reinstatement thereof; (k) the avoidance of public nuisance, environmental damage and unnecessary damage to the public and private property by such works; (l) the procedure for undertaking works which are not reparable by the Appropriate Government, licensee or local authority; (m) the manner of deposit of amount required for restoration of any railways, tramways, waterways, etc.; (n) the manner of restoration of property affected by such works and maintenance thereof; (o) the procedure for deposit of compensation payable by the licensee and furnishing of security; and

any damage, detriment or inconvenience caused by him or by any one employed by him. (4) Where any difference or dispute arises under this section, the matter shall be determined by the Appropriate Commission.	(p) such other matters as are incidental or consequential to the construction and maintenance of works under this section. (3) A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him. (4) Where any difference or dispute [including amount of compensation under sub-section*(3)*] arises under this section, the matter shall be determined by the Appropriate Commission. (5) The Appropriate Commission, while determining any difference or dispute arising under this section in addition to any compensation under sub-section*(3)*, may impose a penalty not exceeding the

	amount of compensation payable under that sub-section.
68. Overhead lines.-- (1) An overhead line shall, with prior approval of the Appropriate Government, be installed or kept installed above ground in accordance with the provisions of sub-section (2).	**68. Overhead lines.—** (1) An overhead line shall, with prior approval of the Appropriate Government, be installed or kept installed above ground in accordance with the provisions of sub-section *(2)*.
) The provisions contained in sub-section (1) shall not apply--	(2) The provisions contained in sub-section *(1)* shall not apply--
(a) in relation to an electric line which has a nominal voltage not exceeding 11 kilovolts and is used or intended to be used for supplying to a single consumer;	(a) in relation to an electric line which has a nominal voltage not exceeding 11 kilovolts and is used or intended to be used for supplying to a single consumer;
(b) in relation to so much of an electric line as is or will be within premises in the occupation or control of the person responsible for its installation; or	(b) in relation to so much of an electric line as is or will be within premises in the occupation or control of the person responsible for its installation; or
) in such other cases, as may be prescribed.	(c) in such other cases, as may be prescribed.
(3) The Appropriate Government shall, while granting	(3) The Appropriate

approval under sub- section (1), impose such conditions (including conditions as to the ownership and operation of the line) as appear to it to be necessary.	Government shall, while granting approval under sub-section *(1)*, impose such conditions (including conditions as to the ownership and operation of the line) as appear to it to be necessary.
(4) The Appropriate Government may vary or revoke the approval at any time after the end of such period as may be stipulated in the approval granted byit.	(4) The Appropriate Government may vary or revoke the approval at any time after the end of such period as may be stipulated in the approval granted by it.
(5) Where any tree standing or lying near an overhead line or where any structure or other object which has been placed or has fallen near an overhead line subsequent to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of electricity or the accessibility of any works, an Executive Magistrale or authority specified by the Appropriate Government may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with as he or il thinks fit. (6) When disposing of an application under sub-section (5), an Executive Magistrale or	(5) Where any tree standing or lying near an overhead line or where any structure or other object which has been placed or has fallen near an overhead line subsequent to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of electricity or the accessibility of any works, an Executive Magistrate or authority specified by the Appropriate Government may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with

authority specified under that sub-section shall, in the case of any tree in existence before the placing of the overhead line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee. **Explanation.**--For the purposes of this section, the expression "tree" shall be deemed to include any shrub, hedge, jungle growth or other plant.	as he or it thinks fit. (6) When disposing of an application under sub-section*(5)*, an Executive Magistrate or authority specified under that sub-section shall, in the case of any tree in existence before the placing of the overhead line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee. *Explanation*.--For the purposes of this section, the expression "tree" shall be deemed to include any shrub, hedge, jungle growth or other plant.
168. Inconsistency in laws.--Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962).	**173. Inconsistency in laws.**--Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the

	Railways Act, 1989 (24 of 1989)
169. Act to have overriding effect.-- Save as otherwise provided in section 168, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.	**174. Act to have overriding effect.—** Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
179. Provisions of Act not to apply in certain cases.-- The provisions of this Act shall not apply to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or undertakings or Boards or institutions under the control of such Ministries or Departments as may be notified by the Central Government.	**184. Provisions of Act not to apply in certain cases.—** The provisions of this Act shall not apply to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or undertakings or Boards or institutions under the control of such Ministries or Departments as may be notified by the Central Government.

Clause 12 of the Electricity Bill related to Authorised persons to transmit, supply, etc. of electricity, and corresponds to Section 12 of the Electricity

Act, 2003. Clause 42 of the Electricity Bill related to duties of distribution licensees, and largely corresponds to Section 42 of the Electricity Act. Clause 47 of the Electricity Bill, 2001 related to the power to require security, and corresponds to Section 47 of the Electricity Act, 2003. Clause 67 of the Electricity Bill related to provision as to opening up of streets, railways etc and corresponds to Section 67 of the Electricity Act. Clause 68, which related to Overhead lines, corresponds to Section 68.

Clause 168 of the Bill related to Inconsistency in laws and, thereunder, nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962). Section 173 of the Electricity Act is in pari-materia with Clause 168 except that, in addition to the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962), the Railways Act, 1989 (Act 24 of 1989) has been included in the said provision. Clause 169 of the Electricity Bill, 2001 provided for the Act to have overriding effect, and corresponds to Section 173 of the Electricity Act. Clause 179, which made the provisions of Act not to apply in certain cases, corresponds to Section 184 of the Electricity Act.

In effect, Railways sought to be exempted from the obligations of distribution licensees not only under Sections 42 and 47, but also of obtaining a license under Section 12, of the Electricity Act. After taking note of such a request from the Ministry of Railways (which as noted hereinabove did not find favour with the Ministry of Power), the Parliamentary Standing Committee Report records that the Committee desired that the Ministry of Railways be exempted from licensing for

erecting, maintaining and transmission of electricity, subject to the condition that the transmission network was outside the grid and erected for their own use, and licence would be insisted upon for grid operation.

The request of the Railways to be exempted from certain provisions of the Electricity Act, relating to distribution licensees, was not acceded to by the Parliamentary Standing Committee, and they were only exempted from obtaining a transmission license provided the transmission network was outside the grid and was erected for their own use. While making it clear that Railways would require a licence for grid operations, the Committee included the Railways Act, 1989 as, one among the three enactments, which would prevail notwithstanding anything contained in the Electricity Act.

That Railways sought to be exempted, from the aforesaid provisions of the Electricity Act, would itself go to show that they were themselves of the view that Sections 2(31)(c) read with 11(g) & (h) of the Railways Act, 1989 did not enable them to avoid obtaining a distribution license, and from discharging the obligations placed on a distribution licensee under the Electricity Act. Their request for exemption from the aforesaid provisions, including to be exempted under Section 184 from the applicability of the Electricity Act, was neither acceded to by the Parliamentary Standing Committee, nor did Parliament, in enacting the law, exempt them from the rigours of the aforesaid provisions. The submission, urged on behalf of the Railways, that the provisions of the Electricity Act, relating to distribution licensees and their obligations, does not apply to them, therefore, necessitates rejection.

R. CONCLUSION:

On issues 6, 7 and 11, we conclude holding that (1) distribution, which is a licensed activity under Section 12 read with Section 14 of the Electricity Act, 2003, is not confined just to the operation and maintenance of a distribution installation (ie the system of wires and associated facilities), but also includes supply of electricity to consumers; (2) establishment of a distribution installation by the Indian Railways, without supply (ie sale) of electricity to consumers, is not sufficient to qualify them as a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003; (3) sale of electricity to a consumer is the sine qua non for distribution of electricity by a distribution licensee, deemed or otherwise, under the Electricity Act; (4) in terms of the provisions of the Electricity Act, 2003, the status of a Distribution Licensee cannot be claimed when electricity is primarily or otherwise consumed by the Licensee itself without its being supplied (sold) to consumers; (5) self-consumption of electricity, albeit upon conveying the same to multiple locations, does not constitute distribution of electricity as contemplated under the Electricity Act, 2003; (6) actual supply (ie sale) of electricity by an Appropriate Government to consumers, in addition to establishment of a distribution installation (ie the system of wires and associated facilities), is the sine qua non for qualifying as a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003; and (7) the law laid down by the Supreme Court, in **Sesa Sterlite Limited -v- Orrisa Electricity Regulatory Commission & Others, (2014) 8 SCC 444,** is that a deemed distribution licensee status cannot be claimed when there is no sale of electricity to consumers/end users, and electricity is predominantly consumed by the Distribution Licensee itself.

XI. ISSUE 8:

A. *Whether the electricity provided by Railways to vendors, contractors, agencies and other entities in the area of operation of Railways is not supply of electricity but is only use of electricity by Railway Administration itself?*

B. *Whether supply of electricity by Indian Railways to parties in jural relationships, illustratively agents, sub-contractors, service providers, lessees and vendors etc. constitutes 'distribution' of electricity and consequently, qualifies as distribution for the purposes of the deeming provision in the third proviso to Section 14 of the Electricity Act, 2003?*

A. SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that there are third parties to whom electricity is supplied/sold by Railways as detailed in IA No. 654 of 2023 dated 03.04.2023, and the Annexures enclosed therewith; the contention of the respondents, that there is only a 'jural relationship', and there is therefore no sale to such consumers to whom electricity is made available within the area of operation of the Railways, is misplaced; 'jural relationship' means the legal relationship between two entities, i.e., any relationship that can be created by agreement between the parties; the contract between the Railways and contractors/vendors are on a principal-to-principal basis with regards activities undertaken by the contractors/vendors, and not as an agent of the Railways; the businesses carried on in such bookstalls, restaurants, or even by IRCTC are accounted

as their respective businesses, and not in the business of Railways/Railway Administration; the statement of revenue and expenditure, incurred by such businesses of the contractors/vendors, are independently accounted for, for all purposes; supply of electricity, by Railways to such contractors/vendors, is supply to such contractors/vendors within the scope of Section 2(70) of the Electricity Act, 2003; the charges paid by them (irrespective of the method of calculation) is the consideration paid by such contractors/vendors to the Railways; the consumption/end use of electricity, in the area of operation of Railways, by itself or by vendors, contractors or others, are not in any manner undertaken by the supply of electricity through the Distribution System of any other person, other than the distribution system of the Railways itself; the distribution licensee of the adjoining area cannot lay down the electric supply line or distribution system for effecting supply either to the Railways or others at the different end use/consumption points in the area of operations of the Railways; for example, a distribution licensee of the adjoining area cannot say that it will extend its electric supply line in the form of overhead line along the railway traction to allow the locomotives to draw power or to provide electric supply at the signaling points or railway yards or railways sidings or to the vendors in the Station or any other service providers or contractors in the area of the operation of the Railways; and the provision of electricity, at each of the points of consumption in the area of operations of the Railways, can only be by the Railways, and not by the Distribution Licensee of the adjoining area.

B.SUBMISSIONS OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that conveyance/ internal branching out of electricity to agents, sub-contractors, service providers, lessees and vendors etc does not constitute 'distribution of electricity', and does not constitute 'distribution' for the purposes of the deeming provision in the third proviso to Section 14 of the Electricity Act; the said activity does not even constitute 'supply of electricity' due to absence of both sale and consumer; such entities are only an alter ego of the Railways itself, that work strictly for the purpose of and in connection with the Railways; they provide a service on behalf of the Railways to the passengers of the Railways; in I.A. No. 654/2023, filed by the Railways to place additional documents, it has been contended that, in some of the stations, electricity is also received as separate connection through a single point supply maintained by the Railways, thereafter such electricity is 'distributed' for various purposes for maintaining the station and facilities therein, and the entire distribution of electricity within the area of operation of the Railways, throughout the country, is mostly undertaken by the distribution system owned, operated and maintained by the Railways, and not any other distribution licensee; Railways has admitted that the extent of its authorization, and authority of undertaking the activities, is principally governed by the activities being undertaken "*for the purposes of, or in connection with, a Railway*"; they have contended that these include distribution of electricity from the traction sub-stations and other one point supply to various places in the operation of Railways, and consumers of such distribution services being provided by the Railways include the station, conveniences in the station, railways sidings, maintenance services, Railways Catering and Tourism Company Limited ("**IRCTC**"), RailTel Corporation of India Limited ("**RailTel**"), Kendriya Vidyalaya,

Railway Quarters, social welfare organizations for Railways, Railway institutes, community halls, clubs, hospitals owned and managed by Railways etc; the above contention of the Railways is flawed for the following reasons: (a) Railways has admitted that the distribution licensees operate the system of 11KV/ 33KV etc and not at 25 KV voltage; this is because 25 KV voltage is exclusive to the usage of traction overhead lines of Railways; no other system can operate on 25 KV voltage; such a line cannot be used to supply electricity to any other consumer, as none of the equipment, except those relating to the traction overhead lines, operate at 25 KV voltage; (b) admittedly, Railways has constructed traction sub-stations ("**TSS**") at several places along the traction lines to source electricity from others; electricity is delivered at such TSS at the voltage at which the grid system in the area operates; electricity is then stepped down by the Railways to 25 KV voltage on which their operations are carried out through overhead wires for traction purposes; this electricity cannot be used anywhere else except Railway overhead lines; this cannot be used for any other purpose including offices, warehouses, workshops, running rooms, rest houses, institutes, hospitals, water works, water supply installations, conveniences etc; (c) further, on a perusal of the terms of the bilateral agreement for procurement of temporary electrical connection, it is clear that the terms and conditions of the contract are decided exclusively by the Railways, i.e., the use of such electricity as determined in the contract awarded, the energy consumption charges, and the service connection charges, continuity of supply are all determined by the Railways; Clause 6 of the Terms & Conditions shows that the Railways are entitled to cut off supply at any time without any reason; all the above conditions for connection are against Section 42 of the Electricity Act,

which provides for the duties of a distribution licensee and includes that the distribution licensee shall have a universal supply obligation towards its consumers; executing such bilateral agreements, and cutting-off supply at any point of time without any reason, is in clear violation of Section 42 of the Electricity Act; and, apart from availing the rights of the DISCOMs, the Railways are not distributing electricity as a distribution licensee as contemplated in Section 14 of the Electricity Act.

On the contention, that the electricity being conveyed by the Railways to the vendors and service providers of the Railways is not due to existence of a jural relationship, it is submitted on behalf of the Respondents that the act of re-distribution of electricity inside the railway premises, to bookshops, canteens, vendors, etc, cannot be construed as distribution of electricity to a third party as it is being provided as a service by the Railways in the railway premises for the purposes of Railways or in connection with the working of the Railways as contemplated under Section 2(31) of the Railways Act; Railways convey electricity to the aforementioned entities in view of a jural relationship, as the above entities are carrying out important functions of Railways *for the purpose of and in connection with the Railways*; electricity to such establishments situated on the railway platform, for the purpose of and in connection with the Railways, is in fact an act of re-distribution by Railways, after obtaining bulk supply from a distribution company or a generating company as the case may be; Railways obtain electricity in bulk, which is internally branched out by them for their own purposes; and the activity of branching out electricity within the premises of the Railways, for its own consumption, is not ‘distribution of electricity’ within the meaning of the Electricity Act.

It is further submitted, on behalf of the Respondents, that the provision of electricity, electricity consumption and related items for catering units etc managed by IRCTC (Annexure 7 of I.A. No. 654/2023) states that only electrical energy cost shall be charged to IRCTC for static units managed by IRCTC (not by their licensees); the expenses, if any, incurred on security deposit, augmentation charges and connection charges, etc by the Railways should be provided from passenger amenity plan head; the Railways charge 10% service charge to IRCTC apart from the cost of power; there is also a provision for obtaining a No Objection Certificate ("**NOC**") for availing supply directly from the DISCOM; further, electricity is provided by the Railways to IRCTC for fixed purposes only ie for the services being availed by the Railways from the IRCTC; such power cannot be used for any other purpose other than '*for the purposes of and in connection with the Railways*'; none of the above conditions can be dictated by a distribution licensee for supplying electricity to a consumer under the Electricity Act; all the other charges to be levied on IRCTC are being funded from the Railway budget, as the services being provided by such establishments are for the purposes of Railways only; such establishments, as long as they provide the concerned services being availed by the Railways, are covered within the definition of 'Railways' and are not distinct from it; similarly, for the food plazas or the open-air restaurants where the load requirement of electricity is not met by the Railways, an NOC is given by the Railways to procure electricity from the distribution companies; there are multiple instances in I.A. No. 654/2023 itself, where the activities are controlled by the Railways and are for the purposes of the Railways or in connection therewith; Railways has formulated a uniform policy in respect of recovery of electricity charges

from teachers, staff of Kendriya Vidyalayas, Railway Institutes, Community Halls, etc. (Annexure 10 of I.A. No. 654/2023) which has only extended the employer-employee relationship i.e., a jural relationship to the teachers who are availing the Railway quarters; the teachers are merely occupiers of the Railway premises, and are paying service charges for the use of such premises and the electricity therein; such establishments are once again being maintained and operated by the Railways for its own purpose, and in connection with the Railways; such establishments are also undeniably covered within the ambit and scope of Railways, and are not distinct from it; electricity to such establishments situated on the Platform, for the purpose of and in connection with the Railways, are supplied electricity by way of a single point delivery by obtaining the same from the distribution companies; the electricity provider provides electricity to the Railways, which is internally branched out by the Railways for its own purposes, and in connection with the Railways; electricity is distributed to the Railways at its meter in the General-Purpose Service Category, which is then extended by the Railways within its premises on an internal arrangement; the above activity, of branching out of electricity within the premises of the Railways for its own consumption, can be done internally by the Railways; the mere act of installation of equipment does not amount to carrying on distribution activities under the Electricity Act; no electricity is being distributed by the Railways as envisaged under the Electricity Act; the above activities can, at best, be considered as provision of service for fulfilment of the jural relationship existing between the mentioned establishments and the Railways for the purposes of and in connection with the Railways; such activities cannot be deemed to be ‘distribution of electricity’ to a consumer as provided in the Electricity Act; and there is also

no sale of electricity in any of the above circumstances for the same to qualify as ‘supply’ under the Electricity Act.

It is submitted, on behalf of the Respondents, that provision of electricity to the Railway Station premises, including various service providers like vendors, shopkeepers etc., is self-consumption by the Railways as the said vendors have a jural relationship with the Railways, and are providing services for and on behalf of the Railways for the benefit of passengers; this position is amply clear from Regulation 28 of the “Rail Land Development Authority (Development of Land and other works) Regulations, 2012” which relates to the purposes of use of Land; similar provisions, indicating the control of Railways on all such activities of the Lessees, can be found in Sub Regulations (1), (2) and (3) of Regulation 29; Regulation 33, which relates to the rights of a sub-lessee on termination or expiry of Lease, also indicates such a jural relationship; therefore, such vendors and service providers cannot be equated to a consumer as understood under the provisions of the Electricity Act (Section 2(15)) in whose case, the Distribution Licensee has no say in the business or other activities of the consumers; Section 21 to 23 of the Railways Act deals with opening of Railways after sanction by the Central Government, and such sanction is to be given after considering the report of the Commissioner; Section 23(d) provides for applicability of those provisions to the introduction of electric traction, thereby considering distribution installation to be part of the electric traction; and, therefore, one cannot read into Section 11(g) or 11(h) anything beyond the same, including authorization for distribution of electricity to vendors, service providers etc.

C. ANALYSIS:

The definition of “railway”, under Section 2(31)(b) and (d) of the Railways Act, brings within its ambit railway lines, sidings, yards, branches used for the purposes of, or in connection with, a railway; all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, the railway. Since rest houses, hospitals etc also fall within the definition of railway, conveyance of electricity, through the “electric traction equipment” and “power supply and distribution installation”, to these places is conveyance of electricity by the railways to itself, and not to a third-party consumer. Further, any other works would also fall within the definition of the railway, so long as construction of such works, and its maintenance and operation are for the purpose of or in connection with the Railway, which means the Railway or any portion of the Railway for the public carriage of passengers and goods.

Section 11(d) of the Railways Act confers power on the railway administration, for the purposes of construction or maintenance of the railway, to erect and construct such houses, ware houses, offices and other buildings and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper. “*Convenience*” means to make easy, facility. Erection and construction of *“conveniences*”, for the purpose of construction or maintaining a railway, also falls within the ambit of Section 11 with respect to which the railway administration has exclusive power, notwithstanding anything contained in any other law for the time being in force. All the

entities to whom Railways claim to be supplying electricity are those entities which exist for the convenience, ie ease of or to facilitate the public carriage of passengers and goods by the Railways, and are therefore *'conveniences*' provided to the Railways itself. Conveyance of electricity, from the "electric traction equipment" and "power supply and distribution installation" of the Railways, to the entities established for the convenience of public carriage of passengers and goods must be held to be conveyance of electricity to the railways itself, and not to third party consumers attracting the definition of a *"distribution licensee"* under Section 2(17) of the Electricity Act. Even otherwise, Railways has a jural relationship with each of these entities.

D. DOES PROVIDING ELECTRICITY TO VENDORS IN STATIONS MAKE RAILWAYS A DEEMED DISTRIBUTION LICENSEE?

The contention, urged before the Regulatory Commissions on behalf of the Railways, was that consumption of electricity, distributed by the railways to itself, would not come in the way of their being held to be a deemed distribution licensee. The plea, regarding electricity being supplied by Railways to its vendors etc constituting the activity undertaken by a distribution licensee, has been raised for the first time during the course of final hearing of these appeals, and was not urged in the original proceedings before the Regulatory Commissions against whose orders the appeals, forming part of this batch, were filed.

In examining these aspects, it is useful to take note of certain provisions of the Railways Act, 1989 and the Regulations made thereunder.

E.RELEVANT PROVISIONS OF THE RAILWAYS ACT:

Chapter II-A of the Railways Act relates to the Rail Land Development Authority. Section 4-A enables the Central Government, by notification, to establish an authority to be called the Rail Land Development Authority to exercise the powers and discharge the functions conferred on it by or under the Railways Act. Under Section 4-D(1) thereof, the Authority shall discharge such functions and exercise such powers of the Central Government in relation to the development of railway land, and as are specifically assigned to it by the Central Government. Section 4-D(2) enables the Central Government to assign to the Authority all or any of the following functions, namely, (i) to prepare scheme or schemes for use of railway land in conformity with the provisions of the Act; (ii) to develop railway land for commercial use as may be entrusted by the Central Government for the purpose of generating revenue by non-tariff measures; (iii) to develop and provide consultancy, construction or management services, and undertake operations in India in relation to the development of land and property; (iv) to carry out any other work or function as may be entrusted to it by the Central Government, by order in writing.

Section 4-E stipulates that, subject to such directions as may be given to it by the Central Government, the Authority shall be empowered to enter into agreements on behalf of the Central Government and execute contracts. Section 4-F provides that the Authority shall have power to regulate, by means of Regulations made by it, its own procedure, and the conduct of all business to be transacted by it, and to perform the duties of the Authority. Section 4-I relates to the power of the Authority to make regulations and, under sub-section (1) thereof, the Authority may, with the previous approval of the Central Government, make regulations, consistent

with the Act and the rules made there-under, for carrying out the provisions of this Chapter.

Section 21 of the Railways Act stipulates that no railway shall be opened for the public carriage of passengers until the Central Government has, by order, sanctioned the opening thereof for that purpose. Section 22(1) obligates the Central Government, before giving its sanction to the opening of a railway under Section 21, to obtain a report from the Commissioner that – (a) he has made a careful inspection of the railway and the rolling stock that may be used thereon; (b) the moving and fixed dimensions as laid down by the Central Government have not been infringed; (c) the structure of lines of rails, strength of bridges, general structural character of the works and the size of, and maximum gross load upon the axles of any rolling stock, comply with the requirements laid down by the Central Government; and (d) in his opinion, the railway can be opened for the public carriage of passengers without any danger to the public using it.

Section 22(3) enables the Central Government, after considering the report of the Commissioner, to sanction the opening of a railway under Section 21 as such, or subject to such conditions as may be considered necessary by it, for the safety of the public. Section 23 makes the provisions of Sections 21 and 22 applicable to the opening of the works mentioned thereunder i.e. (a) opening of additional lines of railway and deviation lines; (b) opening of stations, junctions and level crossings; (c) re-modelling of yards and rebuilding of bridges; (d) introduction of electric traction; and (e) any alteration or reconstruction materially affecting the

structural character of any work to which the provisions of Sections 21 and 22 apply or are extended by this Section.

F. RAIL LAND DEVELOPMENT AUTHORITY REGULATIONS, 2012:

In exercise of the powers conferred by Section 4-I (1) read with Section 4-F of the Railways Act, the Rail Land Development Authority, with the previous approval of the Central Government, made the Rail Land Development Authority (Development of Land and Other Works) Regulations, 2012 ("the 2012 Regulations" for short). Regulation 3 provides for the manner of development of Railway Land, and stipulates that, subject to directions as may be given by the Central Government in this behalf from time to time, the development of any railway land shall be effected by (a) grant of lease of the railway land to developers who shall bear the cost of the development; or (b) developing built-up area at the Authority's own cost and leasing the same.

Chapter-II of the 2012 Regulations relates to identification and entrustment of Railway Land. Regulation 5 stipulates that vacant railway land, with potential for development, shall be entrusted by the Central Government to the Authority. Under the proviso thereto, the Authority may from time to time, in consultation with the concerned Railway Administration, identify railway land and send a proposal to the Central Government for considering its entrustment to the Authority in terms of the Act.

Chapter-III relates to the terms and conditions of development of Railway Land. Regulation 7 stipulates that the usage of railway land, under these Regulations, shall be permitted only after a written agreement is

executed between the Authority and the lessee, on the terms and conditions as determined by the Authority under these regulations. Regulation 8(1) stipulates that the ownership or title of the railway land shall continue to vest with the Railway Administration at all times, and only the lease rights for the use of the land or the structures built on it shall be transferred by the Authority. Regulation 8(2) provides that mortgage of railway land shall not be permitted at any time, and the land shall be incapable of conversion from leasehold to freehold. Regulation 8(3) provides that the transfer of ownership of railway land shall not be allowed at any time unless it is specifically instructed by the Central Government. Regulation 12 relates to the period of lease, and provides that, based on the feasibility study and market survey, the Authority may decide the period of lease for each railway land, subject to the direction issued by the Central Government in this regard.

Regulation 13 relates to return of railway land to the Railway Administration and thereunder, unless the Authority decides to offer the railway land and the buildings or structures existing on it on a fresh lease, on expiry or termination of the lease period, as the case may be, the entire railway land together with the buildings or structures existing thereon shall revert and vest upon the Railway Administration. Regulation 14 provides for the types of development. Regulation 14(1) stipulates that, subject to directions from the Central Government, railway land can be developed for any purpose including but not limited to residential, commercial, institutional, hospitality, entertainment consisting of developments including but not limited to offices, shops, hotels, shopping malls, theatres, etc. as may be decided by the Authority based on the feasibility and market study.

Regulation 19 relates to the manner of payment. Regulation 19(1) provides that the selected developer or lessee or sub-lessee should make payments to the Authority in consideration of the lease rights on the land as may be specified in the payment schedule in the tender documents or incorporated in the agreement with the Authority, as the case may be. Regulation 19(2) prescribes different modes of payments. Regulation 20(2) provides that each lessee, for the due fulfillment of its obligations contained in the agreement, shall deposit a performance guarantee towards fulfillment of obligations of the agreement including successful completion of the development and payment of all dues. Regulation 20(4) requires each lessee or sub-lessee, for the due fulfillment of its obligations contained in the agreement, to deposit a security deposit towards payment of annual rent or percentage revenue share as may be determined by the Authority.

Regulation 28 relates to the purposes of use of land, and stipulates that the lessee or sub-lessee shall not use the railway land and the built-up area on the railway land for any purpose not permitted in the agreement or lease agreement and, if at any time the lessee or sub-lessee is found violating this, the agreement or lease agreement shall be liable to be terminated by the Authority. Regulation 29 relates to usage within the railway station premises and, under Regulation 29(1), the lessees and sub-lessees of a railway land, situated within a railway station premises, shall comply with the extant policies of the Central Government and Railway Administration with regard to maintaining cleanliness, hygiene, quality of food or beverages being sold, crowd control and public order. Regulation 29(2) enables the authorized representatives of the Railway Administration, from time to time, to inspect the areas under the control of the lessee or

sub-lessee, and issue instructions if any violation is observed. Regulation 29(3) requires the lessee or sub-lessee concerned to comply with such instructions within a reasonable time, and advise the Railway Administration of the action taken and refusal to comply with such instructions, or repeated violations, shall be considered as a default on the part of the lessee or sub-lessee, and action may be initiated by the Authority for termination of the lease or sub-lease.

Regulation 30(1) provides that the lessee shall be responsible for maintenance and upkeep of the railway land, and the buildings or structures developed on it, at all times during the period of lease. Section 31 relates to termination of lease. Section 31(1)(a) provides that a lease agreement may be terminated by the Authority (i) in case of default by the lessee in fulfilling the specified obligations as provided in the Agreement; or (ii) if the Railway Land is required by the Railway Administration for operational purposes. Regulation 33 relates to the rights of sub-lessee on termination or expiry of lease. Regulation 33(1) stipulates that all sub-lease agreements shall be co-terminus with the lease agreement. Regulation 33(2) stipulates that, unless otherwise specified by the Authority, in the event of termination of the lease agreement by the Authority, all sub-lease agreements shall stand terminated. Regulation 33(3) provides that, in case of termination of lease agreement resulting in premature termination of the sub-lease, a sub-lessee shall be entitled to refund of payment of rent made to the lessee in terms of the lease agreement for the period of sub-lease not availed by it.

G. CONTENTS OF IA NO. 654 of 2023 FILED BY THE RAILWAYS:

In IA No. 654 of 2023, filed by them on 03.04.2023, Railways have given particulars of entities to whom they supply electricity other than themselves. They include lighting and other electricity requirements on the 7308 stations maintained by the Railways; for conveyance of electricity on station platforms namely restaurants/snack bars, food courts, book stalls, Banks/ATMs, booths for sale of goods including food items, milk booth and other packaged food vendors, retiring rooms, lounges, advertisement sites and hoardings, booths for taxis, state tourism desks etc. It is stated that Indian Railways raises regular bills on such persons, and a sample copy of such a bill is enclosed along with the IA.

Reference is made in the said I.A. to the railway sidings to which electricity is provided by the Railways from the distribution installations erected, operated and maintained by the Railways, and a list of private sidings in the State of Maharashtra is attached. Reference is also made to the agreements entered into by the Railways for procurement cum maintenance services by third parties, to the electricity bill raised by the Railways on Madhepura Electric Locomotive Private Limited, a Joint Venture of Indian Railways and M/s. Alstom.

It is stated that IRCTC, a Government of India entity, has been authorised to undertake catering services, ticketing, supply of packaged drinking water and to manage hospitality services such as retiring rooms and lounges; RailTel Corporation of India Limited is also a Government of India undertaking which is an ICT provider, and one of the largest neutral telecom infrastructure providers in the country owning a Pan-India optic fibre network with operations in the area of operation of the Indian Railways, and undertaking communication facilities through the Indian

Railway lines and systems; the communication requirements of Indian Railways are also undertaken by RailTel; the electricity requirement of RailTel's activities, in the area of operation of the Railways, is provided by the Railways; Indian Railways also supplies electricity to its Kendriya Vidyalas, Railway Quarters, Social Welfare organisations of Railways, Railways Institutes, Community Halls, Clubs, etc; Railways also supplies electricity to hospitals operated and managed by Indian Railways, as also to facilities provided for the convenience of such hospitals which are outsourced activity such as canteens, chemists, etc; and these activities constitute supply of electricity to others which would make the Railways a deemed distribution licensee.

H.DOCUMENTS ENCLOSED TO THE I.A. :

Along with IA No. 654 of 2023, Railways have enclosed the Railway Year Book of 2021-2022 which contains data on various aspects. Details of vendors at the New Delhi Railway Station and the type of connection provided to each of them (three phase or single phase), the list of vendors at Chatrapati Shivaji Maharaj Terminal with the load in respect of each of such vendors, and the list of vendors at certain other places, is enclosed. Also enclosed with the I.A. is Bill dated 30.03.2023 issued to M/s. Vyoma Technologies Pvt. Ltd. which is a bill for temporary electricity connection to outside parties. The purpose, referred to therein, is for augmentation of LCD screens for dual display system at CSTM booking office. While the meter reading as well as the amount charged is detailed therein, the basis on which such electricity charges were determined, or the source of power to fix such charges, is not reflected therein.

Also enclosed is the allotment letter issued to M/s. Amey Vikrama Industries Pvt. Ltd. on 12.12.2022 by the Northern Railway; and the correspondence between the Railways and M/s Amey Vikrama Industries Pvt. Ltd on 12.01.2023, 17.01.2023, and 23.01.2023. The said allotment letter dated 12.12.2022 records that the Railway Administration was allotting the contract for “creation and operation of Gaming Zone at New Delhi, Hazrat Nizamuddin and Anand Vihar Terminal Railway Station over Delhi Division” for a period of one year at Rs.37,00,000/- per annum plus GST on the license fee, and the advance license fee for the first year stands accepted by the competent authority as license fee for one year. The terms and conditions, referred to therein, include security deposit of 10% of the annual license fee.

By its letter dated 12.01.2023, Amey Vikrama Industries furnished details of the electric load requirements of gaming machines and air conditioners to operate the Gaming Zone at the New Delhi Railway Station. The letter of Railways dated 17.01.2023 shows that the temporary electric connection given to M/s Amey Vikrama Industries Pvt. Ltd. was at the ground floor of the station building at New Delhi Railway Station. The letter of the Railways dated 23.01.2023 relates to provision of temporary electric connection of 25 KW Load three phase to M/s Amey Vikrama Industries Pvt. Ltd for creation and operation of a Gaming Zone at New Delhi at THRD. The said letter records that the said company had deposited certain amounts towards three phase 25 KW connection.

A copy of the bilateral agreement entered into between the Railways and M/s Amey Vikrama Industries Pvt. Ltd. is also enclosed. The said bilateral agreement is for temporary electrical connection. Clause 2 of the

terms and conditions requires all wiring to be carried out by the party concerned at its own cost, and that connection will be given only after inspection, of the installation and its connection, by the representative of the electricity department; and it complies with the provision of the Indian Electricity Act & Indian Electricity Rules. Clause 3 stipulates that the party shall pay energy consumption charges as well as service connection charges at the rate fixed by the Railways. Clause 4 requires the party to observe all rules and regulations as per the Indian Electricity Act & Indian Electricity Rules. Clause 5 stipulates that the supply so given should be utilized only in connection with the particular contract awarded by the Railways. Clause 6 confers power on the Railways to cut off electric supply at any time without assigning any reason. Clause 7 makes it clear that continuity of supply is not guaranteed, and the party shall indemnify the Railway against any claims arising out of interruptions thereto. Clause 8 stipulates, among others, that Railways have all the rights to disconnect supply after the specified period.

The letter addressed by the Railway Board to the General Managers of all Indian Railways on 02.11.2006 is on the subject of provision of electricity, electrical consumption charges and related items for catering units etc managed by IRCTC. Clause 3 thereof stipulates that only electrical energy cost plus 10% service charge shall be charged to IRCTC for static units managed by their licensees. Clause 5 stipulates that for stand-alone units, like budget hotels, mega-base kitchens, launderettes, Yatri Niwas, administrative offices of IRCTC etc., NOC may be given by the Railways on a case-to-case basis to avail direct power supply from DISCOMs, otherwise connection charges, augmentation charges and

security deposit would be leviable as per the extant rules and electricity consumption charges would be as per Paras 2 and 3 of the said letter. Clause 5 stipulates that stand alone units are those units which are not embedded in the railway system, these are not located in restricted areas for bona fide railway passengers/ customers, and they do not endanger their safety. Clause 6 provides that, for food plazas and open-air restaurants, which are embedded in the station building / circulating area, electricity supply would be normally arranged by Railway, however, wherever the electric load requirement is substantial and cannot be met by Railway, NOC would be given by the Railways.

The letter addressed by the Railway Board to the General Managers on 13.12.1993 refers to recovery of electricity charges from teachers/ staff of Kendriya Vidyalayas/ Government schools/ Departments etc. It is stated therein that the staff/ teachers of Kendriya Vidyalayas, Govt. Schools/Departments/Undertakings occupying Railway quarters authorizedly may be charged at the rates applicable to Railway employees; Social Welfare Organizations of Railways such as Railway Institutes, Community Hall etc may also be charged at the rates applicable to Railway employees subject to the maximum limit of consumption decided by the Chief Electrical Engineers; and excess consumption, over the limit fixed, may be charged at outsiders' rates. It is also stated that these rates should be charged with the stipulation that, if the rates on the Railways are revised upwards retrospectively, the same would also be payable by the said staff and institutions.

Thereafter, by letter dated 11.02.1994, the General Managers were informed that Kendriya Vidyalaya buildings/premises located at Rail Coach

Factory premises, Kapurthala may be charged for the electricity consumption at the same rate as charged by the respective State Electricity Boards for similar buildings/premises, in the vicinity subject to an upper limit of consumption fixed by the Chief Electrical Engineer; and excess consumption, over the limit, may be charged at Government Department rates.

I.REPLY FILED BY THE RESPONDENTS TO I.A.NO.654 OF 2023:

In the reply, filed to IA No. 654 of 2023, the Respondents submit that, while permission was granted by this Tribunal on 28.03.2023 to file an additional affidavit to place on record certain facts which did not form part of the pleadings before the Commission, no permission was granted to file additional documents; the additional documents filed along with the said I.A. cannot be received by this Tribunal unless the tests prescribed in Order 41 Rule 27 CPC are fulfilled; and the additional documents filed along with the IA should, therefore, not be taken into consideration.

It is stated that, while the distribution licensees operate the distribution system at 11 kV/33kV, Railways use 25 kV voltage at the traction overhead lines; such lines cannot be used to supply electricity to any other consumer, as no other equipment operates at 25 kV voltage; Railways have constructed traction substations, at several places along the traction lines, to source electricity from others; the electricity, delivered at such traction sub-stations, is then stepped down by the Railways to 25kV voltage; this electricity cannot be used for any other purpose including at the offices, warehouses, workshops, rest rooms, institutes, hospitals etc; distribution licensees have entered into separate agreements with the Railways for supply of electricity at the platform and at the traction sub-

station; two separate lines are availed by the Railways; the 25 kV voltage maintained by the Railways cannot be used for distribution purposes, much less by a third party consumer; establishments, located on the railway platforms, are supplied electricity by way of a single point delivery, obtaining the same from distribution licensees; the electricity so provided, by the DISCOMs to the Railways, is then internally branched out by the Railways for its own purposes, and in connection with the railways; the electricity distributed to the railways, at its meter in the general purpose service category, is then extended by the Railways within its premises by way of an internal arrangement; the rate charged by the Railways from such entities is not the rate approved/determined by the appropriate Commission; and Railways has not provided details of deposit of duty charges collected by it.

It is further stated that this methodology is not independent to Railways; the airport authority also procures electricity on a single point delivery method in a similar manner; airports also consist of various shops and establishments to whom electricity is internally allotted by the administration; this activity undertaken by the airport authority does not make it a distribution licensee; Rourkela Steel Plant also collects electricity on a single point delivery method from the distribution licensee, and thereafter branches out the same to various establishments within its premises; and this act of the Rourkela Steel Plant does not also constitute distribution of electricity.

It is submitted that a sample copy of the documents signed at the time of grant of connection by the Railways at New Delhi Railway Station, and a copy of the bilateral Agreement Form for temporary electricity

connection with the contractor notarised on 14.01.2023, are enclosed along with the IA; Para 2 of the Agreement states that connection will be given only after inspection, of the installation and its connection, by representatives of the Electricity Department to ensure that it complies with the Indian Electricity Act and the Indian Electricity Rules; this letter is an acknowledgement that, even in January 2023, Railways required inspection, of its installation and its connection, by representatives of the State Electricity Department/Boards; no such inspection is required from the Electricity Department with respect to a distribution licensee; and the Electricity Act does not recognize the Electricity Department of the Railways; Para 3 of the letter dated 02.11.2006 states that electricity plus 10% service charge will be charged to IRCTC for static units managed by their licensees; the electrical energy cost is the cost of obtaining the electricity from DISCOMs; Para 5 of the said letter records that stand-alone units have the option of availing direct power supply from DISCOMs; Para 6 states that, for food plazas and open air restaurants which are embedded in the station building/circulating area, electricity supply would normally be arranged by Railways; however, wherever the electric load requirement is substantial and cannot be met by the Railways, NOC will be given by the Railways; Railways has itself used the word ‘arranged’, in Para 6 of the letter dated 02.11.2006, and not distribute; this letter also falls foul of the Universal Supply Obligation under Section 43 of the Electricity Act in terms of which a distribution licensee has a duty to supply electricity at request; the electricity rates, charged for teachers/staff relate to Kendriya Vidyalayas/ Government schools/ Departments/ Undertakings/ Railway Quarters/ Social Welfare Organizations etc, which were all set up on railway land; no details have been furnished disclosing the basis on which

such rates are charged; there is no provision for determination of the tariff to be charged by the Railways from its consumers; Railways has not approached the Appropriate Commission seeking adoption/fixation of the rates; and the rates to be charged by distribution licensees is determined by the concerned State Regulatory Commissions.

J. JURAL RELATIONSHIP: ITS SCOPE:

The term “jural” means “legal” or “pertaining to rights and obligations”. “Jural relationship between parties” means legal relationship between parties with reference to their rights and obligations. **(Prabhakaran v. M. Azhagiri Pillai, (2006) 4 SCC 484).**

In **Umesh Chand Vinod Kumar v. Krishi Utpadan Mandi Samiti, 1983 SCC OnLine All 638 : AIR 1984 All 46,** a Full Bench of the Allahabad High Court held that a joint writ petition is maintainable if there is a legally subsisting jural relationship, of association of persons, between the parties. In **Prabhakaran v. M. Azhagiri Pillai, (2006) 4 SCC 484,** the Supreme Court held that, in a mortgage, both the mortgagor and the mortgagee have a jural relationship ie certain rights and obligations against each other; and the mortgagor's right of redemption is co-extensive with the mortgagee's right of sale or foreclosure (where such right is recognized in law).

In the context of Section 18 of the Limitation Act, the Supreme Court, in ***Food Corpn. of India v. Assam State Coop. Marketing & Consumer Federation Ltd.*, (2004) 12 SCC 360,** observed that the words used in the acknowledgement must indicate the existence of jural relationship between the parties such as that of debtor and creditor; the intention to attempt such

jural relationship must be apparent; a clear statement containing acknowledgement of liability can imply the intention to admit jural relationship of debtor and creditor; so long as the statement amounts to an admission, acknowledging the jural relationship and existence of liability, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission; the letters, indicating that the amount of two crores was by way of advance or deposit against paddy procurement, was an admission of jural relationship of buyer and seller which stood converted into a relationship of creditor and debtor on the failure of the principal transaction.

A similar view was taken in **J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd., (2008) 2 SCC 444; Lakshmirattan Cotton Mills Co. Ltd. v. Aluminium Corpn. of India Ltd., (1971) 1 SCC 67l; Agni Aviation Consultants v. State of Telangana, 2020 SCC OnLine TS 1462; and Shapoor Freedom Mazda v. Durga Prosad Chamaria :AIR 1961 SC 1236.**

The Railways receives electricity at its traction substation/non-traction substation/switchyard and, in turn, makes available the electricity so received to the book shops, canteens, vendors on the Railway Platforms etc. Such activity would, at best, constitute conveyance / re-distribution of electricity within the Railways, and to entities with which it has a jural relationship, and would not constitute distribution of electricity to third party consumers.

All the entities referred to in the afore-said I.A, to whom electricity is provided, are those with whom Railways have entered into agreements in

terms of the provisions of the Railways Act and the 2012 Regulations. As detailed hereinabove, while Regulation 14(1) of the 2012 Regulations enables railway land to be developed for any purpose, including residential, commercial, institutional, hospitality, entertainment, offices, shops, hotels, shopping malls, theatres, etc, Regulation 7 permits usage of railway land only after a written agreement is executed between the authority and the lessee, on the terms and conditions as determined by the Authority. Under Regulation 8(1), ownership of railway land continues to vest with the Railway Administration, and only the lease rights, for use of the land or the structures built on it, is transferred. Unless a fresh lease is offered, Regulation 13 requires the entire railway land together with the buildings or structures existing thereon to revert and vest upon the Railway Administration on completion of the period of lease. Regulation 19(1) requires the selected developer or lessee or sub-lessee to make payment as specified in the tender documents or incorporated in the agreement. Regulations 20(2) & (4) require each lessee, for the due fulfillment of its obligations under the agreement, to deposit a performance guarantee and a security deposit towards fulfillment of the obligations under the agreement including successful completion of the development, payment of all dues and annual rent.

Regulation 28 of the 2012 Regulations prohibits the lessee or sub-lessee from using railway land, and the built-up area thereon, for any purpose not permitted in the agreement or lease agreement and, if the lessee or sub-lessee is found to have violated them, the agreement or lease agreement can be terminated. Regulation 29(1) requires such lessees and sub-lessees to comply with the policies of the Central

Government and Railway Administration with regard to maintaining cleanliness, hygiene, quality of food or beverages being sold, crowd control and public order. Regulation 29(2) confers power on the Railway Administration to inspect and issue instructions if any violation is observed. Regulation 29(3) confers power on the authority to terminate the lease or sub-lease in case of refusal to comply with such instructions, or for repeated violations.

The aforesaid provisions of the 2012 Regulations emphasise the jural relationship between Railways and the various entities to whom electricity is made available by the Railways. These provisions also show that Railways exercises over-arching control over such entities which provide facilities for carriage of passengers and goods in connection with and for the purposes of the Railways. Conveyance of electricity by the Railways to them is only to enable these entities to discharge their obligations under the agreement with the Railways. It is also relevant to note that the tariff, for such provision of electricity by the Railways to these entities, is not determined by the Regulatory Commissions in terms of Section 45(2)(a) read with Section 62(1)(d) and Section 62(2) of the Electricity Act.

It is evident therefore that, unlike consumers falling within the area of supply of a distribution licensee, Railways has a jural relationship with the aforesaid entities in terms of the Railways Act,1989 and the 2012 Regulations, and such entities are permitted to carry on their activities only in connection with and to facilitate carriage of passengers and goods by the

Railways and, unlike consumers of electricity under the Electricity Act, function under the overall control and supervision of the Railway Administration.

While the business carried on by these entities, and the revenue they generate, may not be monitored by the Railways, the fact remains that such entities are permitted to carry on business either in terms of a licence or under an agreement which they have entered into with the Railways under the provisions of the Railways Act,1989 and the 2012 Regulations. These contractors and vendors undertake activities and carry on business only in connection with and for the purposes of the Railways, and not otherwise. Since they carry on activities only to facilitate carriage of passengers and goods by the Railways, these entities do not function independent of the Railways. The contracts entered into by the Railways with these entities is not on a principal-to-principal basis. While it is true that no other distribution licensee can supply electricity within the Railway area covered under Section 11(a) read with Section 18 of the Railways Act, that, by itself, does not make the Railways a deemed distribution licensee, more so since the electricity provided by the Railways to these entities does not constitute supply (ie sale) of electricity as defined in Section 2(70) of the Electricity Act.

As the power to erect, operate, maintain or repair "*electric traction equipment*" and "*power supply and distribution installation*", in connection with the working of the Railways, is conferred exclusively on the Railway administration under Section 11(g) of the Railways Act which provision would prevail notwithstanding anything contained in any other law, conveyance of electricity, through these equipment and installations, falls

within the exclusive domain of the Railways. After power is supplied by the distribution licensees at the Railway traction sub-station/non-traction sub-station/switchyard, delivery of electricity from there onwards, to its various consumption points, is undertaken by the Railways to the exclusion of all others including distribution licensees. As no element of sale is involved in this process, such conveyance would not constitute distribution of electricity by the Railways.

The bilateral agreements, enclosed along with the IA, establish that the terms and conditions stipulated therein are determined exclusively by the Railways. The energy consumption charges, the service connection charges, continuous supply provided to such entities are all determined by the Railways, and the stipulated terms and conditions confer power on the Railways to cut off supply at any time without assigning reasons. Such conditions are contrary to the obligations of a distribution licensee under Part VI of the Electricity Act including Sections 42, 43 and 45 thereof. The power conferred on a distribution licensee to recover expenditure and require security from the consumer under Section 46 and 47 of the Electricity Act, which are subject to the regulations made by the State Commission, are also not adhered to by the Railways while providing electricity to these entities.

In addition to the actual cost of electricity provided to them, Railways also collects an additional sum of 10% as service charges from these entities including IRCTC, all of which are alien to what is stipulated under the Electricity Act. The bilateral agreements also contain provisions requiring these entities to obtain no objection certificates from the Railways for availing supply directly from the Discoms, which again falls foul of the

freedom extended to a consumer, under the Electricity Act, to procure electricity from whichever source it chooses. The electricity provided to these entities is only because these entities provide services which are availed by the Railways for transportation (ie carriage) of passengers and goods by the Railway trains. All these services fall within the definition of "Railways" under Section 2(31), and form part of the powers of a railway administration under Section 11 of the Railways Act. Such activities do not constitute distribution of electricity to a consumer under the Electricity Act.

K. CONCLUSION:

On Issue No.8, we conclude holding that electricity provided by the Railways within its area, to vendors, contractors, agencies and other entities, is not "supply" of electricity but is only use of electricity by or on behalf of the Railway Administration; and supply of electricity by Indian Railways to parties in jural relationships, illustratively agents, sub-contractors, service providers, lessees and vendors etc neither constitutes 'distribution' of electricity nor does it qualify as "distribution" for the purposes of the deeming provision in the third proviso to Section 14 of the Electricity Act, 2003.

XII. ISSUE 9:

Whether the expressions 'supply' of electricity, 'consumers' and other expressions connected thereto used in different provisions of the Electricity Act, 2003 is to be a given the meaning defined in Section 2 or can be given contextual meaning in different provisions based on the scheme, objective and purpose?

A. SUBMISSIONS ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the Electricity Act, 2003 uses the expression 'supply' at different places, and in different contexts; applying the definition in Section 2(17), defining supply, to all provisions of the Act would lead to anomalous results; it is therefore necessary to give effect to the opening part of Section 2 of the Electricity Act, 2003 providing for '*unless the context otherwise requires'*; this position has been recognised by the Supreme Court in **Tata Power Co. Ltd**. **-v- Reliance Energy Limited,** (**2009) 16 SCC 659;** even with regards the 1st proviso to Section 14 of the Electricity Act, 2003 (dealing with licensees who were in operation before the enactment of the Electricity Act, 2003), the decision of the Supreme Court is that the term 'supply' therein should be read as 'distribution of electricity'; similarly, the Supreme Court, in **Jiyajeerao Cotton Mills v. State of Madhya Pradesh AIR 1963 SC 414,** considered the item "*Taxes on the consumption or sale of electricity*" in Entry 53 of List II of the Constitution; the Supreme Court did not accept the contention regarding consumption of electricity by persons other than producers, and held that, both in the Government of India Act and under the Constitution, the word "consumption" must be deemed to have been used in the same sense; it was held that the Acts in question dealt only with a certain aspect of the topic "electricity", and not with all of them; therefore, in those Acts, the word "consumption" may have a limited meaning; but the word "consumption" has a wider meaning; it also means "use up", "spend" etc; the mere fact that a series of laws were concerned only with a certain kind of use of electricity, that is consumption of electricity by persons other than producers, cannot justify the conclusion that British Parliament, in using the word "consumption" in Entry 48-B and the Constituent Assembly in Entry

53 of List II, wanted to limit the meaning of “consumption” in the same way; the contextual interpretation of Section 2(17) stating ***“for supplying electricity to the consumers in his area of supply”*** means that the distribution system enables the supply of electricity to consumers by any means, and not necessarily only by the distribution licensee; further, when read with Sections 42(1) and 43(1), it means the obligation of the distribution licensee to supply if demanded by the consumer; and, if the consumer wishes to take electricity entirely from other sources, the distribution licensee cannot compel him to take electricity only from him.

B.SUBMISSIONS ON BEHALF OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the terms and phrases defined under a law must be given the assigned meaning unless the context suggests otherwise; while it cannot be denied that a particular word can have different meanings under a statute as per the context in which it has been incorporated, the said contextual meaning cannot be ascribed to defeat the overall purpose and object of the governing legislation; in so far as the definitions of ‘consumer’, ‘distribution licensee’ and ‘supply’ under Section 2(15), 2(17) and 2(70) are concerned, the following arises for consideration: (a) a person/entity which is supplied with electricity is necessarily a ‘consumer’; for the purpose of receiving such supply, a consumer is connected to a licensee, including a distribution licensee; (b) only a distribution licensee maintains a distribution system for the purpose of supplying power to consumers within its ‘area of supply’; (c) while a ‘consumer’ can ‘avail’ open access from a distribution licensee,

such a distribution licensee is under an obligation to provide open access, as well as to supply electricity to the consumers upon request; in order to appreciate the intent of the Electricity Act as a whole to decipher the role of 'consumer', *viz.* 'licensee' has been provided; it can be seen that the dominant characteristics of both a consumer and a distribution licensee enshrined under the Electricity Act, are as follows: (a) predominantly, the person who receives supply of electricity, i.e., the recipient of supply, is a consumer; whereas, the dominant nature of a licensee, i.e., to be a service provider, is to supply electricity to such a consumer, within its area of supply; (b) furthermore, to achieve the intended purpose by nature, a distribution licensee is statutorily obligated to maintain a distribution system; (c) a distribution licensee is obligated to provide open access, whereas a consumer avails the same; this open access is subject to the Regulations framed by Appropriate SERCs; (d) further, a distribution licensee is under a mandatory obligation to supply electricity to a consumer upon request, and failure to supply on request may lead to suspension of the license in terms of Section 24 of Electricity Act; juxtaposing the above position, with the position of the Appellant in the instant case, the inevitable conclusion is that the Railways, by nature, has the predominant characteristics of a 'consumer' rather than a distribution licensee, in as much as: (a) Railways is admittedly taking supply of electricity from the distribution licensees, (b) Railways is, admittedly, consuming electricity at various consumption points within its area of supply, (c) the said consumption of electricity, within the area of supply of Railways, cannot, in any manner, constitute 'supply' within the meaning of Section 2(70) of the Act since there is no 'sale' of electricity to consumers by the Railways; (d) Railways is seeking to avail open access in the capacity of a deemed

distribution licensee, which can only be granted under the Electricity Act since no such corresponding provision is present under the Railways Act, (e.) the Railways, unlike a Licensee, does not discharge any obligation to the consumers within its so-called area of supply; (f) when, factually, complex activities are being undertaken, or mixed or composite functions/activities are being carried out, it is the predominant nature of the said activities that is required to be considered for the purpose of examination as to under which classification, under the governing statute, will such activities be covered; in other words, it is not the ancillary or incidental actions, but the main action which must be considered in case of complex or mixed or composite activities in terms of the scheme of the governing statute; the said test of ascertaining the main activity or predominant nature of activities being carried out, is referred to as the *'Predominant Nature Test'* and has been applied by the Supreme Court in a catena of cases. In this regard, reliance is placed on behalf of the Respondents upon the following Judgments: (a) ***Precision Steel & Engineering Works & Anr.*** **v.** ***Prem Deva Niranjan Deva Tayal,*** **[(2003) 2 SCC 236],** wherein the Supreme Court has held that, in case of composite or mixed activities, it is the main or dominant purpose of the activities that is to be considered and not the incidental or ancillary activities; (b) in ***Bangalore Water Supply & Sewage Board*** **v.** ***A. Rajappa & Ors.,*** **[(1978) 2 SCC 213],** the Supreme Court again considered the Predominant Nature Test, to distinguish between an 'institution' and an 'industry', and held that, in case of complex activities some of which qualify for exemption under law and others do not, the predominant nature of the activities will have to be seen; and therefore even though the Railways, by virtue of its existing operation, maintains an analytical system akin to a distribution main,

however, by virtue of its inherent activity, it is not a distribution licensee but is a consumer who is consuming electricity either from existing licensees or through Open Access.

C.ANALYSIS:

It is true that the definition clause, in Section 2 of the Electricity Act, commences with the words *"In this Act, unless the context otherwise requires"*. The definitions of various words and expressions, in clauses (1) to (77) of Section 2, must be given the meaning in terms of the definition, unless a meaning contrary thereto arises in the context of the provision under consideration.

D.CONTEXTUAL INTERPRETATION:

While the golden rule of interpretation of statutes is to give the words in a Statute a literal meaning, other aids of construction, including a contextual interpretation, can be resorted to where the words used in a statute are capable of bearing more than one meaning. What is contextual interpretation?

Interpretation must depend on the text and the context. They are the basis of interpretation. The text is the texture, and context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. **(*RBI v. Peerless General Finance & Investment Co. Ltd.*, (1987) 1 SCC 424).** When a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its

context. The context means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy. **(Union of India v. Elphinstone Spg. and Wvg. Co. Ltd., (2001) 4 SCC 139).** To ascertain the legislative intent, all the constituent parts of a statute should be taken together and each word, phrase or sentence should be considered in the light of the general purpose and object of the Act itself. **(*Poppatlal Shah v. State of Madras*, (1953) 1 SCC 492).**

In examining the question whether a different meaning should be given to the word "supply" in the context of certain provisions of the Electricity Act, it is necessary to understand what the words *"unless the context otherwise requires"* used in Section 2 of the Electricity Act mean.

E.'UNLESS THE CONTEXT OTHERWISE REQUIRES' IN THE DEFINITION CLAUSE OF A STATUTE: ITS MEANING:

A definition clause, in any statute, does not necessarily apply in all possible contexts in which the word, which is defined, may be found therein. The opening clause of Section 2 of the principal Act itself, by the use of the words ***"in this Act, unless the context otherwise requires"*,** suggests that any expression defined in that Section should be given the meaning assigned to it therein unless the context otherwise requires. (**K. Balakrishna Rao v. Haji Abdulla Sait, (1980) 1 SCC 321; K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).** 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. Where the definition or expression is preceded by the words

"unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule, may be departed from if there be something in the context to show that the definition could not be applied. **(K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).**

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. A construction which would defeat or is likely to defeat the purpose of the Act has to be ignored and not accepted. **(K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).** The phrase "*Unless the context otherwise requires*" is meant to prevent a person from falling into the whirlpool of "definitions", and not to look to other provisions of the Act which, necessarily, has to be done as the meaning ascribed to a "definition" can be adopted only if the context does not otherwise require. **(Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1).** The test to be ordinarily applied is that the meaning given in the definition should be considered as the meaning of the said word or expression wherever it is used in the Electricity Act. It is only as an exception that a contrary meaning can be given to the said words and expressions, that too only if it is so required in the context of the provision under interpretation.

As reliance is placed on behalf of Railways, on ***Jiyajeerao Cotton Mills Ltd. v. State of M.P.*****, 1962 Supp (1) SCR 282: AIR 1963 SC 414,** and **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659**, to contend that a different meaning should be given to the word "supply",

other than in terms of its definition under Section 2(70) of the Electricity Act, it is useful to take note of the law declared in the said judgements.

F.JUDGEMENTS RELIED ON BEHALF OF THE RAILWAYS:

The appellant, in ***Jiyajeerao Cotton Mills Ltd. v. State of M.P.*****, 1962 Supp (1) SCR 282 : AIR 1963 SC 414,** was a textile mill at Gwalior generating electricity for the purpose of running its mills and for other purposes connected therewith; it did not sell electrical energy to any person; under the provisions of the Central Provinces and Berar Electricity Duty Act, 1949, as amended by the Madhya Pradesh Taxation Law Amendment Act, 1956, the Government of Madhya Pradesh levied upon the appellant electricity duty for a certain period which was challenged on two grounds, the first of which was that, upon a proper construction of Section 3 of the 1949 Act as amended, the appellant would not be liable to pay any duty.

It is in this context that the Supreme Court, after referring to Section 2(*a*) of the Act which defines "consumer", and 'producer' as defined in Section 2 (d-1) of the Act, held that Section 3 was the charging section; 'Consumer' means any person who consumes electrical energy sold or supplied by a distributor of electrical energy or a producer…", and "a person who generates electrical energy at a voltage exceeding hundred volts for his own consumption or for supplying to others"; if the two definitions were read together, 'consumer' would include "any person who consumes electrical energy supplied by a person who generates electrical energy for his own consumption"; under Section 3, a person who generates electrical energy over hundred volts for his own consumption is liable to

pay duty on the units of electrical energy consumed by himself; a producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself; the table prescribes rates of duty payable with respect to electrical energy supplied for consumption; and, therefore, the levy on the appellant fell squarely within the table under Section 3 of the Act.

The law laid down by the Supreme Court, in ***Jiyajeerao Cotton Mills Ltd. v. State of M.P.*****, 1962 Supp (1) SCR 282 : AIR 1963 SC 414,** was in the context of the Central Provinces and Berar Electricity Duty Act, 1949, as amended by the Madhya Pradesh Taxation Law Amendment Act, 1956, and ought not to be applied while interpreting the provisions of the Electricity Act, 2003. Even otherwise the Supreme Court has, in the said judgement, held that 'Consumer' means any person who consumes electrical energy sold or supplied by a distributor of electrical energy or a producer"; and a producer, consuming the electrical energy generated by him, is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. Irrespective of whether supply of electrical energy is by a distributor or a producer, the person who consumes energy, so sold or supplied to him, is a consumer. In the present case, Railways does not sell electricity to others. On the other hand, it consumes the electricity supplied/sold to it by the Distribution Licensees at the traction sub-station/non-traction substation/switchyard. Reliance placed, on behalf of the Railways, on the judgement of the Supreme Court, in ***Jiyajeerao Cotton Mills Ltd***, is therefore of no avail.

Section 23 of the Electricity Act, which bears the heading "*Directions to licensees*", stipulates that, if the appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

While examining the scope of Section 23, the Supreme Court, in **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659** observed that, although a broad meaning may be assigned to the word "supply", the same must be held to be "subject to the context"; the word "supply" used in Section 23, for bringing in efficient supply, would mean regulate and, consequently, licensing in respect of the generating company; for the aforementioned purpose it cannot be given a general or popular meaning denoting supplier and receiver; once it is held that, by reason thereof, Parliament aimed at ensuring supply, the purported object it sought to achieve by enacting Section 7 would lose its purpose; it does not mean that Section 23 itself becomes unworkable as it would not be possible to secure equitable distribution and supply; as the distribution agreement (PPA) is subject to approval, the Commission would have the power to approve an MoU which subserves public interest; while granting such approval, the Commission may also take into consideration the question as to whether the terms to be agreed are fair and just; by its very nature, supply would have a supplier and a receiver and any direction, which is aimed at ensuring or regulating supply, by its very nature would have to be directed to both the supplier and the receiver; however, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but

proper to read that provision in its context; the legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the. definition clause which created them; 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 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 "unless there is anything repugnant to the subject or context" (***Whirlpool Corpn.* v. *Registrar of Trade Marks*: (1998) 8 SCC 1, *Garhwal Mandal Vikas Nigam Ltd.* v. *Krishna Travel Agency*: (2008) 6 SCC 741; and *National Insurance Co. Ltd.* v. *Deepa Devi* [(2008) 1 SCC 414);** the word "supply" refers to "supply to consumers only" in the context of Section 23, and not to supply to licensees; on the other hand, in Section 86(1)(*a*) "supply" refers to both consumers and licensees; in Section 10(2) the word "supply" is used in two parts of the said Section to mean two different things; in the first part it means "supply to a licensee only", and in the second part "supply to a consumer only"; in the first proviso to Section 14, the word "supply" has been used specifically to mean "distribution of electricity"; and in Section 62(2) the word "supply" has been used to refer to "supply of electricity by a trader"; and to assign the same meaning to the word "supply" in Section 23 of the Act, as is assigned in the interpretation section, it would be necessary to take recourse to the doctrine of harmonious construction and read the statute as a whole.

The Supreme Court concluded holding that, as almost all the Sections preceding Section 23 as also Section 24, talk about licensees nd licensees alone, the word "supply", if given its statutorily defined meaning

as contained in Section 2(70) of the Act, would lead to an anomalous situation as, by reason thereof, supply of electrical energy by the generating company to consumers directly in terms of Section 12(2) of the Act, as also by transmission companies to consumers, would also come within its purview; in a case of this nature the principle of exclusion of the definition of a Section by resorting to "unless the context otherwise requires" should be resorted to; Section 86(1)(*a*) of the 2003 Act clearly shows the parameters of supply for the purpose of regulation viz. supply of electricity by the distribution company to the consumer; generating companies have the freedom to enter into contract and in particular long-term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act; and Section 86(1)(*b*) of the 2003 Act clearly shows that the generating company indirectly comes within the purview of the regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission, but the same would not mean that, while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance of separate directions.

In **Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659,** the Supreme Court has held that, in the first proviso to Section 14, the word "supply" has been used specifically to mean "distribution of electricity"; and Section 86(1)(*a*) of the 2003 Act shows the parameters of supply for the purpose of regulation viz. supply of electricity by the distribution company to the consumer. The first proviso to Section 14 of the Electricity Act stipulates that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed

laws, or any Act specified in the schedule, on or before the appointed date, shall be deemed to be a licensee under the Electricity Act for such period as may be stipulated in the license.

G.FIRST AND THIRD PROVISOS TO SECTION 14: ITS SCOPE:

The first proviso to Section 14 of the Electricity Act is applicable to a peson engaged in the business of transmission or supply of electricity under the provisions of the laws (i.e. the Indian Electricity Act 1910, the Electricity Supply Act, 1948 and the Electricity Regulatory Commission Act, 1998) which stood repealed by Section 185 of the Electricity Act, 2003. The enactments, referred to in the Schedule to the Electricity Act, are various Electricity Reforms Acts hitherto enacted by different State Legislatures. Such a person, referred to in the first proviso to Section 14, which is engaged in the business of transmission or supply of electricity on or before the appointed date (which, in terms of Section 2(2) means such date as the Central Government may, by notification, appoint i.e. 10.06.2003) shall be deemed to be a licensee under the Electricity Act, 2003 for such period as may be stipulated in the license.

The first proviso makes a distinction between a person engaged in the business of transmission of electricity and a person engaged in the business of supply of electricity. Reference to the repealed laws, or to the laws in the Schedule, in the first proviso to Section 14 is because such persons were engaged in the afore-said activities in terms of those enactments. In effect, the first proviso to Section 14 requires the person, hitherto engaged in the supply of electricity, to be deemed, under the Electricity Act, 2003, to be a licensee distributing electricity.

Like in the first proviso to Section 14, the deemed distribution licensee status, under the third proviso to Section 14, can only be conferred on the appropriate government which is supplying (selling) electricity to consumers alone, and not merely by maintaining and operating a distribution installation (a system of wires and associated facilities) through which electricity can be supplied by others. Further, as held in **Tata Power Co. Ltd**, **"**supply of electricity by the distribution company to the consumer" is regulated by the State Commissions under Section 86(1)(*a*) of the Electricity Act. As conveyance of electricity, by the Railways to its various consumption units, is not regulated by the State Commissions, such conveyance cannot be equated to distribution of electricity by a distribution licensee under the Electricity Act.

As noted hereinabove, in **Tata Power Company Limited vs. Reliance Energy Limited [2009 16 SCC 659]**, the term 'supply' in the first proviso to Section 14 has been construed as distribution of electricity. Since supply of electricity is defined in Section 2(70) to mean the sale of electricity to a licensee or a consumer, there is no reason why the word 'supply', used in the definition of a "distribution licensee" under Section 2(17), should be given a different meaning under the third proviso to Section 14 of the Electricity Act.

Sri M.G. Ramachandran, Learned Senior Counsel, has not been able to show why the word 'supply' in Section 2(70) should be construed as a "distribution installation", that too one which any person can use to supply electricity to others, and not necessarily only by the distribution licensee.

In this context it is necessary to note that Railways sought open access claiming to be a deemed distribution licensee under the third proviso to Section 14, in terms of which a deemed distribution licensee is a person which is required, in view of the legal fiction created by the third proviso, to be presumed to be a distribution licensee. All that a deemed licensee can claim is a status similar to that of a distribution licensee under Section 14 without the concomitant obligation of having to obtain a license, and nothing more. Since what is defined in Section 2(17) is a "distribution licensee", and the third proviso to Section 14 does not required a deemed distribution licensee to obtain a license, a deemed distribution licensee must be understood to be one who is authorised to operate and maintain a distribution system (a system of wires and associated facilities) between the delivery points on the transmission lines of the generating station connection on the one hand and the point of connection to the installation of the consumer on the other, in order to supply electricity (sale of electricity) to the consumer (a person who is supplied electricity for his own use) in his area of supply (the area within which a distribution licensee is authorised to supply electricity).

While the Appropriate Commission is required, under Section 16, to specify the general or special conditions which shall apply to a licensee or class of licensees, which shall be deemed to be the conditions of such license, the proviso to Section 16 requires the Appropriate Commission to specify general or specific conditions applicable to deemed licensees, among others, those which also fall under the third proviso to Section 14. Even with respect to deemed licensees, the conditions (general or specific)

applicable to them is required to be prescribed by the Appropriate Commission.

While it is true that a consumer is free to procure electricity from any source, and the distribution licensee cannot compel him to obtain electricity only from them, the choice so exercised by the consumer to procure electricity from a person other than its distribution licensee, is subject to payment of cross subsidy surcharge/additional surcharge under Sections 42(2) and (4) of the Electricity Act. Unlike a consumer who has the freedom to procure electricity from any available source subject to fulfilment of the conditions stipulated, for grant of open access, under the provisions of the Electricity Act, the distribution licensee has no choice but to supply electricity to consumers within its area of supply as and when such supply is sought by them.

The Electricity Act does not provide for a license to be granted merely for erection, operation, maintenance, and repair of a distribution installation which is capable of supplying electricity. A license is granted to a person to operate and maintain a distribution system as also to supply electricity to consumers in his area of supply, and not just the former. Since the Indian Railways does not satisfy the requirements of being a deemed distribution licensee, the electricity procured by it, from whatever be the source, can only be as a *"consumer"* and not as a "licensee".

While the submission urged on behalf of the Respondents, that on application of the predominant nature test, Railways must be held to be a consumer and not a distribution licensee, cannot be said to be without merit, it is unnecessary for us to delve any further into this aspect, since,

even on a literal reading of the applicable provisions of the Electricity Act, it is evident that the Appellant does not satisfy the requirements of being a deemed distribution licensee since it does not sell electricity to consumers (third parties), much less does it fulfil any of the obligations fastened on a distribution licensee under Part VI of the Electricity Act. It is unnecessary for us, therefore, to examine the judgments relied on behalf of the Respondents on the application of the "predominant nature test".

H.CONCLUSION:

On Issue No. 9, we conclude holding that the expressions '*supply*' of electricity, '*consumer*' and other expressions connected thereto used in the provisions of the Electricity Act, 2003, applicable to the case on hand, should be given the same meaning as is defined in Section 2(70) of the Electricity Act, and no other meaning need be given thereto in the context of the third proviso to Section 14 of the Electricity Act.

XIII. ISSUE 10:

Whether Railways is entitled to seek open access in terms of Sections 2(47), 38(2)(d)(i), 39(2)(d)(i), 40(c)(i) and 42(2) of the Electricity Act, 2003 for sourcing its electricity requirements from entities other than the Distribution Licensee of area adjacent to the Railways' area of operation for the working of Railways under Section 11(g) and (h) of the Railways Act, 1989?

A. SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G.Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that Sections 38(2)(d), 39(2)(d), and 40(c) of the Electricity Act, 2003 deal with open access to the transmission system of the CTU, STU and the transmission licensees respectively; the said provisions are in two parts; open access can be sought by a licensee or a generating company as per sub-clause (i), or by a consumer as per sub-clause (ii) of the respective provisions; if the person is seeking open access in the status of a licensee- he would fall under the first part, and if open access is sought by a consumer- he would fall under the second part; if Railways is authorised to distribute electricity or even transmit electricity within the area of operation of the Railways, as specified under Section 11(g) of the Railways Act, 1989, open access is to be taken to have been sought by Railways as a licensee, and not as a consumer; as mentioned hereinabove, Railways is sourcing power from generating companies as well as licensees, (such as a distribution licensee of the adjoining area of supply), as a licensee and not as a consumer; Railways is therefore entitled to seek open access in terms of Sections 2(47), 38(2)(d)(i), 39(2)(d)(i), 40(c)(i) of the Electricity Act, 2003 as a licensee; the said provisions are not restricted to open access sought by the Distribution Licensee only; they apply when open access is sought even by a transmission licensee or a trading licensee; assuming for the sake of argument, but not admitting, that Indian Railways is only a transmission licensee as contended by the Respondents, and as held in impugned order dated 25.02.2020 passed by the Orissa State Commission in Case No.55 of 2016 (impugned in Appeal No.114 of 2020), even then Railways would fall under the above provisions of open access being sought by a licensee; similarly, in the circumstances where Railways require open access through the distribution system of the

distribution licensee of the adjoining area, Railways is entitled to such open access as a licensee under Section 42(2) of the Electricity Act, 2003; the provisions of Sections 38(2)(d)(ii), 39(2)(d)(ii), 40(c)(ii) of the Electricity Act, 2003, dealing with open access by consumers, would apply if open access is sought, for supplying electricity to a consumer of the area of supply of the distribution licensee; these provisions will not apply, if the end use or consumption of electricity is at a place outside the purview of the area of supply of the distribution licensee; in other words, in the case of Railways, the end use or consumption, being in the area of operation of the Railways under Section 11(g) of the Railways Act, 1989, i.e. the end use or consumption being not at a place within the area of supply of any distribution licensee (other than Railways), such other distribution licensee cannot claim that its consumer is seeking to get electricity from any other source for consumption in its area of supply; and this fundamental aspect is necessary to decide on the aspect of payment of cross subsidy surcharge and additional surcharge under Sections 42(2) and (4) of the Electricity Act, 2003.

B.SUBMISSIONS OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the Railways is entitled to seek open access under various provisions of the Electricity Act from sources other than the distribution licensees in whose area the Railway premises falls; however, the said open access has to be in terms of the applicable regulations as may be prescribed by SERC for a consumer of electricity under the Electricity Act; even in the ***Northern Railways*** Judgment, the Supreme Court held that direct sale of power by a generating company to a "*consumer"* is specifically permitted under the

Electricity Act; alternatively, till date, Railways has been availing supply from KSEB Ltd. at 110 KV for traction purposes as a bulk consumer; 'bulk consumer' has been defined under Regulation 2(8) ("Bulk Consumer" means a consumer who avails supply at voltage of 33 KV or above) of the CEA (Technical Standards for Connectivity in the Grid) Regulations, 2007; the term 'open access customer' is defined under Regulation 3(26) ("open access customer" means a consumer, trader, distribution licensee or a generating company who has been granted open access under these regulations) of the KSERC (Connectivity and Intra-state Open Access) Regulations, 2013 as stated above, a consumer granted open access under KSERC Regulations is also an 'open access customer' under the said Regulations; and thus, as per the provisions of the Electricity Act and KSERC Regulations, for the purpose of open access, Railways is a consumer situated in the distribution licensee's area.

C.ANALYSIS:

Section 2(47) of the Electricity Act defines "open access" to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the Regulations specified by the appropriate Commission. Section 38(2)(d) of the Electricity Act stipulates that the functions of the Central Transmission Utility shall be to provide non-discriminatory open access to its transmission system for use by (*i*) any licensee or generating company on payment of the transmission charges; or (*ii*) any consumer as and when such open access is provided by the State Commission under sub-section

(2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission.

Section 39(2)(d) of the Electricity Act provides that the functions of the State Transmission Utility shall be to provide non-discriminatory open access to its transmission system for use by (*i*) any licensee or generating company on payment of the transmission charges; or (*ii*) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. Section 40(c) of the Electricity Act stipulates that it shall be the duty of a transmission licensee to provide non-discriminatory open access to its transmission system for use by (*i*) any licensee or generating company on payment of the transmission charges; or (*ii*) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

It is no doubt true that, if Railways is held to be a deemed distribution licensee, it is then entitled to seek open access under clause (i) of Sections 38(2)(d), 39(2)(d) and 40(c) of the Electricity Act, without having to pay additional surcharge/cross subsidy surcharge under Sections 42(2) and (4) of the Electricity Act. If, on the other hand, they are held to be a consumer, then they fall within the ambit of clause (ii) of Sections 38(2)(d), 39(2)(d) and 40(c), in which event their entitlement for open access is only on payment of transmission charges and, in addition, surcharge thereon.

We are not concerned, in the present batch of appeals, with the question whether Railways is entitled to seek open access as a deemed

transmission licensee, since the claim of the Railways herein is that they are a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act. Since we are satisfied that the Railways cannot be held to be a deemed distribution licensee under the third proviso to Section 14, their entitlement to seek open access is only as a "consumer", under clause (ii) of Sections 38(2)(d), 39(2)(d) and 40(c), on payment of surcharge in addition to transmission charges.

The end use or consumption of electricity by different constituents of Railways is within the area of the Railways as a consumer. The *"area of supply"* as defined in Section 2(3) is distinct from the area covered by Sections 11(a) and 18 of the Railways Act, since the traction substation/non-traction substation/switchyard of the Railways, which is the point at which electricity is received by the Railways, is the point which falls within the *"area of supply"* of the concerned distribution licensee. The power conferred on the Railways under Section 11(g) of the Railways Act is only to erect, maintain, operate and repair *"electric traction equipment"* and *"power supply and distribution installation",* that too in connection with the working of the Railway. The power conferred by Section 11(h) to do all other acts necessary for making, maintaining, altering or repairing and using the Railway, does not bring with in its ambit the power to "supply" electricity to "consumers" which is part of the obligation of a distribution licensee under the provisions of the Electricity Act. At the cost of repetition, it is reiterated that the *"power supply and distribution installation",* referred to in Section 2(31)(c) and Section 11(g) of the Railways Act, is not the *"distribution system"* as defined in Section 2(19) of the Electricity Act, nor

does Railways fall within the definition of *"distribution Licensee"* under Section 2(17) of the Electricity Act.

In this light, it is unnecessary for us to examine whether a bulk consumer of electricity is similar to that of an open access customer under the Regulations framed by certain Regulatory Commissions. Suffice it to hold that, as Railways is a consumer situated in the concerned distribution licensee's area of supply, their claim to fall within the third proviso to Section 14 of the Electricity Act, and to be a deemed distribution licensee, necessitates rejection.

D.CONCLUSION:

On Issue No. 10, we conclude holding that Railways is not entitled to seek open access in terms of Sections 2(47), 38(2)(d)(i), 39(2)(d)(i), and 40(c)(i) of the Electricity Act, 2003 for sourcing its electricity requirements from entities other than the Distribution Licensee of the area adjacent to the area of working of the Railways under Section 11(g) and (h) of the Railways Act, 1989 as it is not a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act. Its entitlement to source electricity under open access is only as a consumer under Sections 38(2)(d)(ii), 39(2)(d)(ii) and 40(c)(ii) of the Electricity Act, 2003.

XIV. ISSUE 12:

Whether as per Sesa Sterlite Limited -v- Orrisa Electricity Regulatory Commission & Others, (2014) 8 SCC 444, even a licensee is required to pay the cross subsidy surcharge or additional surcharge in regard to the electricity sourced through open access to the extent of own consumption?

A.SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that reliance placed by the respondents on the decision of the Supreme Court, in **SESA Sterlite,** to claim that Railways, consuming electricity for its own purposes, cannot seek exemption/exclusion from payment of cross subsidy surcharge, is misplaced for the following reasons: (i) **SESA Sterlite** Decision does not decide that a deemed distribution licensee cannot be a primary end user of the electricity being distributed by it; the facts of the case, as noted in para 2 of the decision, is that Sesa Sterlite is both the aluminium plant/manufacturing unit and a developer of the SEZ; Sesa Sterlite itself was to supply electricity to itself as developer; this itself establishes that supply of electricity to a third party is not a necessary condition for deemed distribution licensee status; similar is the case of Military Engineering Services ('**MES**') where primary consumption is by the defence department itself; MES has been a deemed distribution licensee under the third proviso to Section 14 of the Electricity Act, 2003; (ii) besides the above, there are important differentiation between a SEZ developer claiming Deemed Licensee status as per the proviso to Section 14 of the Electricity Act, 2003 introduced in exercise of the powers conferred under Section 49 of SEZ Act, 2005, and the Railways Act, 1989 applicable to Indian Railways; in the case of SEZ, it is bound by the terms of the Electricity Act, 2003 and it has not been exempted from the Electricity Act, 2003 nor has the SEZ Act, 2005 been given the status of superior law except to declare the developer as a deemed licensee, whereas the Railways Act, 1989 has been given a superior status by virtue of Section 11 of the Railways Act, 1989, and also

by virtue of Section 173 of the Electricity Act, 2003; (iii) it is also relevant that, while the decision of this Tribunal, referred to in Para 44.2 states that, inspite of the Deemed Licensee status, the SEZ Developer has to apply for grant of license, in Para 46 the Supreme Court specifically states that the SEZ developer is exempted from applying for grant of licence; (iv) in the context of the above, the decision in SESA Sterlite supports the case of Indian Railways, and it is not against them as contented by the respondents; and this aspect has also been considered by this Tribunal in the interim order at paras 17 and 18 in Appeal No. 276 of 2015 dated 16.12.2015.

B.SUBMISSIONS OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the legislature, in its wisdom, has not limited the scope of open access to consumption of electricity; this is evident from a bare reading of the definition of Open Access contained in Section 2(47) of the Electricity Act; from the phrase 'use' in Section 2(47) of the Electricity Act, it is clear that open access can be availed for the purpose of consumption as well as effecting supply from a generating company to a licensee; Sections 38(2)(d), 39(2)(d) and 40(c) of the Electricity Act reveal that there are only the following scenarios contemplated in respect of open access, which are as follows: (a) electricity being transmitted by licensees; and (b) electricity being consumed by end consumers; in terms of Section 38(2)(d) or 39(2)(d) or 40(c) of the Electricity Act, non-discriminatory open access to its transmission system can be granted either when: (a) the power is being sourced by a licensee or

a generating company on payment of transmission charges under Section 38 (2)(d)(i), Section 39(2)(d)(i) and Section 40(c)(i) or (b) a consumer under Section 38(2)(d)(ii), Section 39(2)(d)(ii) and Section 40(c)(ii) can avail transmission open access after payment of charges under Section 42(2); therefore, consumption is only related to Section 38(2)(d)(ii), Section 39 (2)(d)(ii) and Section 40(c)(ii); similarly, in so far as distribution open access is concerned under Section 42 of the Act, the same can be availed subject to payment of CSS in addition to the charges for wheeling, and such levy of CSS is only exempted for CGPs in terms of Section 42(2) & (4); in other words, the moment open access is availed for the purpose of supply to consumers, the liability of CSS is triggered; in fact, even if the dedicated transmission line is being utilized by a licensee, such as the Appellant, for its own consumption through open access, CSS is payable; this is for the reason that, if open access is availed under Section 38(2)(d)(i), 39(2)(d)(i) and 40(c)(i) of the Electricity Act, then there is no need for compensating the incumbent licensee, in as much as the incumbent licensee, in such a scenario, would avail open access to bring electricity to its distribution area and effect supply to the end consumer; thereby meaning that the existing consumer base is not affected when open access under the aforesaid provisions is being sought; as opposed to this, when open access for consumption is being sought under Section 38(2)(d)(ii), 39(2)(d)(ii) and 40(c)(ii) of Electricity Act, then admittedly the consumer of the existing licensee is availing such an open access, and hence is stepping out of the existing consumer mix of the incumbent licensee; it is for this activity, wherein the end consumer steps out or leaves the existing consumer base of the incumbent distribution licensee, is CSS then paid to compensate for such loss being suffered by the incumbent distribution licensee; in this

regard, reliance is placed on para 31 and 36 of *Sesa Sterlite* Judgment; the Supreme Court, in *Sesa Sterlite* Judgment, considered a situation where a distribution licensee avails open access to take supply of electricity, and such electricity is being used for its own consumption; in fact, at *para 30* of *Sesa Sterlite* Judgment, the Supreme Court specifically dealt with such a scenario and held that, even if a distribution licensee is taking power through open access and is using the same for its own consumption, it will be liable to pay CSS; from a reading of the aforesaid paras of *Sesa Sterlite* Judgment, it follows: (a) in terms of para 31 and 36, even a Deemed Distribution Licensee connected to a transmission Licensee is liable to pay CSS; (b) Railways, in its submissions, relies upon Section 39(2) and 42(2) of Electricity Act to build a case that it will source power and pay the necessary transmission charges; (c) this interpretation is fundamentally flawed, because Railways is not a conventional licensee who supplies power to end consumers, and hence does not fall under Section 39(2)(d)(i) of the Electricity Act; the Railways is availing open access to transmit power to its own area; further, consumption through open access is relatable only to Section 39(2)(d)(ii) of the Electricity Act which necessarily entails payment of CSS; (d) if the argument of the Railways is to be accepted, then consumption would be required to be read into Section 39(2)(d)(i) of the Electricity Act, which is impermissible; (e) it is an admitted fact that the Railways is procuring power for self-consumption; and, therefore, the *Sesa Sterlite* Judgment is squarely applicable to the case at hand.

It is submitted, on behalf of the Respondents, that the intent of imposition of CSS, which has been duly recognized by the Supreme Court,

in *Sesa Sterlite* Judgment, can be summarized as under: (a) open access is the freedom to procure power from any source; as per the Electricity Act, it is the duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee (including distribution licensee) and generating company; this would gradually reduce the cost of generation/procurement and would generate competition amongst sellers; (b) open access in distribution implies freedom given to the consumer to obtain supply from any source of his choice; through open access, the right of consumer to get supply of electricity from a person other than the distribution licensee of his area of supply, by using the distribution system of such distribution licensee, is ensured; for the said purpose, the SERCs are required to specify conditions; (c) the intent behind imposition of CSS is to compensate the distribution licensee, who is bound to face adverse financial impact as a consequence of a consumer opting to exit from its system and to avail power through open access; this is due to the fact that such an exit will hamper recovery of the fixed cost which such a licensee may have incurred as part of his obligation to supply electricity; and (d) while providing freedom of choice to the consumer, the provision for CSS creates a balance with legitimate expectations/ interests of existing licensees.

It is further submitted, on behalf of the Respondents, that, in addition to the above, Railways has, historically, been a consumer of TPCL-D; the position has not changed even after MERC passed the Order dated 05.09.2019, and as on the date of filing the instant written submissions; the Railways, in the present case, is attempting to take the benefit of the open access system under the Electricity Act, while trying to evade the

necessary obligations associated with it, claiming purported protection under the Railways Act; the same is nothing but cherry picking of the incentives given by legislature under both statutes as per its own convenience; when historically there has been no change in the predominant character of the Railways, there arises no occasion to exempt them from the obligations that are associated with the said dominant nature, being liability to pay CSS for open access being availed by the Railways; additionally, the present issue has already been dealt with by MERC in the impugned Judgment dated 05.09.2019 in Petition No. 145 of 2019; the Railways had contended before the MERC that the Railways Act had overriding effect over the Electricity Act, and the distribution activity of the Railways is governed by the Railways Act; the said contention of the Railways has been dealt with by the MERC at Paras (6), (7), (8), (9), (10) & (13) of the impugned order; thus MERC, while acknowledging the authorization of Railways to undertake distribution of electricity under the Railways Act, held that the Railways had to adhere to the various requirements of the Electricity Act; for it to be considered as a deemed distribution licensee under the Electricity Act, the licensee must undertake distribution of electricity and power must be supplied to the consumers; since it is an admitted fact that the Railways is consuming power for its own use, and is not supplying/distributing electricity to consumers, it cannot be considered as a deemed distribution licensee for seeking exemption of CSS; MERC relied upon *Sesa Sterlite* Judgment, a perusal of which shows that CSS is compensation payable to the distribution licensee irrespective of the fact whether its line is used; open access consumers would pay tariff applicable for supply which would include an element of CSS on certain other categories; in terms of the 4th Proviso to Sections 38(2)(d), 39 (2)(d),

40(c) and 42(2) of the Electricity Act, the only exemption granted from levying CSS is where open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use; admittedly, in the present case, Railways is not a captive user and is procuring power for self- consumption; from the various provisions of the Railways Act and the Electricity Act, referred above, it can be inferred as follows: (a) that Section 11 and 12 of the Railways Act permits the Railways to undertake supply of electricity (*without prejudice and in alternate to other submissions*); (b) the provisions of the Electricity Act, in so far as it relates to distribution and supply of electricity, is not in conflict with the provisions of the Railways Act; and (c) Railways is procuring power for self-consumption, and self-consumption of electricity cannot be said to be supply of electricity.

C.ANALYSIS:

As noted earlier in this order, we may not be justified in examining whether Military Engineering Services is a deemed distribution licensee under the 3rd proviso to Section 14, without sufficient material on record, and that too behind their back. As the law declared by the Supreme Court, in ***Sesa Sterlite***, has also been extensively referred to earlier in this Order, it is unnecessary to refer to them again under this head. Suffice it to note that the Supreme Court, in ***Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission*****, (2014) 8 SCC 444,** had affirmed the order of this Tribunal, in ***"VEDANTA ALUMINIUM LTD VS OERC"*** **(ORDER IN APPEAL NO.206 of 2012 DATED 03.05.2013)**, holding that cross subsidy surcharge is payable by the consumer to the distribution licensee of the area, when it decides not to take supply from that licensee, but chooses to

avail it from another distribution licensee; cross subsidy surcharge is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access, the consumer would pay the tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers; a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer; once cross-subsidy surcharge is fixed for an area it is liable to be paid, and such payment will be used for meeting the current levels of cross-subsidy within the area; a fortiori, even a licensee which purchases electricity for its own consumption, either through a “dedicated transmission line” or through “open access”, would be liable to pay cross-subsidy surcharge under the Electricity Act; cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opts to avail power supply through open access from someone other than such distribution licensee in whose area it is situated; and such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

In holding that it was the only manner in which the two Acts (ie the Electricity Act and the SEZ Act) could be harmoniously construed, the Supreme Court, in ***Sesa Sterlite Ltd,*** expressed its agreement with the rationale in the order of APTEL, in **Vedanta Aluminium Ltd,** that an entity which utilises the entire quantum of electricity for its own consumption, and does not have any other consumers, cannot be deemed to be a distribution licensee, even by legal fiction; and the legal fiction cannot go further and

make a person who does not distribute electricity to the consumers as a distribution licensee.

While it is true that the SEZ has not been exempted from the application of the Electricity Act, the fact remains that neither has the Railways been exempted under Section 184 from the purview of the Electricity Act. Since the Railways Act, 1989 is among the enactment referred to in Section 173, it is only in case of inconsistency would the provisions of the Railways Act prevail over provisions inconsistent therewith under the Electricity Act, that too only to the extent of inconsistency and not beyond.

The non obstante clause, used in Section 11 of the Railways Act, would apply only in case of inconsistency between Section 11 of the Railways Act and some provision of the Electricity Act, 2003. As the Railways Act does not confer power on the Railways to distribute electricity (ie sell electricity to consumers for a price), it cannot be said that the provisions of the Electricity Act 2003, relating to distribution of electricity and the obligations of distribution licensees, are contrary to and inconsistent with any of the provisions of the Railways Act. It bears no repetition that Section 2(31)(c) and clauses (a) to (h) of Section 11 of the Railways Act do not deal with any matter distinct from and inconsistent with what is provided in the Electricity Act. In the absence of any inconsistency, Section 175 of the Electricity Act would require the provisions of the Electricity Act to also apply to the Railways, in addition to the provisions of the Railways Act, 1989.

In the light of the law declared in the aforesaid judgements of this Tribunal in **Vedanta Aluminium Ltd,** and the Supreme Court in ***Sesa Sterlite Ltd***, and as Railways does not supply electricity to consumers, (ie it does not sell electricity to unrelated third parties for a price), it needs no re-iteration that the test of being a "distribution licensee" under Section 2(17) of the Electricity Act, as also the requirement of distributing electricity, is not fulfilled by the Railways.

It is only a captive generation plant which is exempt from payment of cross subsidy surcharge under Section 42 of the Electricity Act. While a consumer can also avail distribution open access, it is subject to payment of additional surcharge / cross subsidy surcharge under Sections 42(2) and (4) of the Electricity Act, in addition to the charges for wheeling. It is unnecessary for us to examine the question, whether a transmission licensee is liable to pay cross subsidy surcharge on being granted open access, in this batch of appeals, since what arises for consideration is only whether Railways is a deemed distribution licensee and is entitled thereby to seek open access without payment of additional surcharge / cross subsidy surcharge.

As Railways does not supply electricity to consumers (ie sale of electricity to 3rd parties), and consumes it itself, it cannot be held to be a distribution licensee or a deemed distribution licensee under the 3rd proviso to Section 14 of the Electricity Act.

D.INTERIM ORDERS ARE NOT BINDING:

It does not stand to reason that an order passed at the interlocutory stage of an appeal would bind the Court/Tribunal when the main appeal, (in

which the interlocutory order was passed earlier), is finally heard. An interim order is passed by a Court on a *prima facie* appraisal of the facts and circumstances of a particular case, and an interim order cannot therefore be regarded as a precedent. **(Bharat Coking Coal Limited v. Chandrama Hard Coke Mfg. Co., 2005 SCC OnLine Cal 398).** In order to constitute a binding precedent, the decision to that effect must lay down some ratio and, in that view of the matter, mere interim orders need not be followed as a precedent. **(Khattar & Company (Pvt.) Ltd. v. State of U.P., 2001 SCC OnLine All 592).**

The law declared by this Tribunal, in ***Vedanta Aluminium Limited* v. *OERC & Ors.* (2013 SCC OnLine APTEL 76),** as affirmed by the Supreme Court in **Sesa Sterlite**, is binding on this Tribunal. The interim order passed by this Tribunal, in Appeal No. 276 of 2015 dated 16.12.2015, does not have any finality attached to it and cannot be said to constitute a precedent binding on this Tribunal when the main appeal No. 276 of 2015 (in which the interim order was passed earlier) is taken up for hearing.

E.CONCLUSION:

On Issue No,12 we conclude holding that, in the light of the law declared by the Supreme Court, in **Sesa Sterlite Limited -v- Orrisa Electricity Regulatory Commission & Others, (2014) 8 SCC 444**, and as Railways consumes the entire electricity supplied to it (either directly or by entities with which it has a jural relationship), it is obligated to pay cross subsidy surcharge / additional surcharge for the electricity sourced by it through open access.

XV.ISSUE 13:

Whether the Central Commission has rightly exercised jurisdiction to decide the Deemed Distribution Licensee status of Railways, for adjudicating the aspects on the entitlement of Railways to seek open access for the use of inter-state transmission system as defined under Section 2(36) of the Electricity Act, 2003?

A.SUBMISSION ON BEHALF OF RAILWAYS:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Railways, would submit that the petition filed by Railways before the CERC was not for grant of distribution license, or that Indian Railways be declared as a Deemed Licensee; a perusal of the petition, being Petition No.197/MP/2015 before the CERC, would show that the petition was filed in the context of the State Transmission Utility not being clear as to the Deemed Licensee status of Railways/Appropriate Government statutorily provided for in Section 14- Third Proviso of the Electricity Act, 2003; the requirement to approach the CERC arose because the state utilities were raising issues on the grant of open access of the inter-state transmission system to the Railways; in terms of Section 2(36) of the Electricity Act, 2003 read with Section 79(1)(c) and the statutory Regulations, namely the Indian Electricity Grid Code notified under Section 79(1)(h) and the Open Access Regulation to the inter-state transmission system, wherein the CERC alone has jurisdiction to deal with the matter; in this regard, the following Regulations have been notified by the CERC, namely, (a) Indian Electricity Grid Code 2010 and (b) Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in inter-state transmission and related matters) Regulations, 2009 (Open Access Regulations); Regulation

2(1)(b) of the Open Access Regulations provide that the applicant for grant of open access can be a licensee or a consumer; accordingly, while applying for open access, it is necessary to state whether the application is by a licensee or by a consumer; in the context of the above, the Central Commission has the authority to deal and settle the above aspect; and, further, Regulation 32 of the Open Access Regulations provides for redressal mechanism.

B.SUBMISSION OF RESPONDENTS:

It is submitted, on behalf of the Respondents, that the legislature, in its wisdom, has not limited the scope of Open Access to consumption of electricity; this is evident from a bare reading of the definition of Open Access contained in Section 2(47) of the Electricity Act; therefore, by the phrase 'use' under Section 2(47) of the Electricity Act, the concept of Open Access can be availed for the purpose of consumption as well as effecting supply from a generating company to a licensee; Sections 38(2)(d), 39(2)(d) and 40(c) of the Electricity Act reveal that there are only the following scenarios contemplated in respect of Open Access, which are: (a) electricity being transmitted by licensees; and (b) electricity being consumed by end consumers; in terms of Section 38(2)(d) or 39(2)(d) or 40(c) of the Electricity Act, non-discriminatory Open Access to its transmission system can be granted either when: (a) the power is being sourced by a licensee or a generating company on payment of transmission charges under Section 38(2)(d)(i), Section 39(2)(d)(i) and Section 40(c)(i) or (b) a consumer under Section 38(2)(d)(ii), Section 39(2)(d)(ii) and Section 40(c)(ii) can avail transmission Open Access after payment of charges under Section 42(2); therefore, consumption is only

related to Section 38(2)(d)(ii), Section 39(2)(d)(ii) and Section 40(c)(ii); similarly, in so far as Distribution Open Access is concerned under Section 42 of the Act, the same can be availed subject to payment of CSS in addition to the charges for wheeling, and such levy of CSS is only exempted for CGPs in terms of Section 42(2) & (4); in other words, the moment Open Access is availed for the purpose of supply to consumers, the liability of CSS is triggered; in fact, even if the dedicated transmission line is being utilized by a licensee, such as the Appellant, for its own consumption though open Access, CSS is payable; this is for the reason that, if Open access is being availed under Section 38(2)(d)(i), 39(2)(d)(i) and 40(c)(i) of the Electricity Act, then there is no need for compensating the incumbent licensee, in as much as the incumbent licensee, in such a scenario, would avail open access to bring electricity to its distribution area and effect supply to the end consumer; thereby meaning that the existing consumer base is not getting affected when open access under the aforesaid provisions is being sought; as opposed to this, when open access for consumption is being sought under Section 38(2)(d)(ii), 39(2)(d)(ii) and 40(c)(ii) of the Electricity Act, then admittedly the consumer of the existing licensee is availing such an open access, and hence is stepping out of the existing consumer mix of the incumbent licensee; it is for this activity, wherein the end consumer steps out or leaves the existing consumer base of the incumbent distribution licensee, is CSS then paid to compensate for such loss being suffered by the incumbent distribution licensee; in this regard, reliance is placed on para 31 and 36 of the *Sesa Sterlite* Judgment; the Supreme Court, in *Sesa Sterlite* Judgment, considered a situation where a distribution licensee avails open access to take supply of electricity, and such electricity is being used for its own consumption; in

fact, at para 30 of *Sesa Sterlite* Judgment, the Supreme Court specifically dealt with such a scenario and held that, even if a distribution licensee is taking power through open access and is using the same for its own consumption, it will be liable to pay CSS; from a reading of the aforesaid paras of *Sesa Sterlite* Judgment, it follows: (a) in terms of para 31 and 36, even a Deemed Distribution Licensee, connected to a transmission Licensee, is liable to pay CSS; (b) Railways, in its submissions, relies upon Section 39(2) and 42(2) of Electricity Act to build a case that it will source power and pay the necessary transmission charges; (c) this interpretation is fundamentally flawed, because Railways is not a conventional licensee who supplies power to end consumers, and hence does not fall under Section 39(2)(d)(i) of the Electricity Act; the Railways is availing open access to transmit power to its own area of supply; further, consumption through open access is relatable only to Section 39(2)(d)(ii) of the Electricity Act which necessarily entails payment of CSS; (d) if the argument of the Railways is to be accepted, then consumption would be required to be read into Section 39(2)(d)(i) of the Electricity Act, which is impermissible; (e) it is an admitted fact that the Railways is procuring power for self-consumption; and, therefore, the *Sesa Sterlite* Judgment is squarely applicable to the case at hand.

It is submitted, on behalf of the Respondents, that the intent of imposition of CSS, which has been duly recognized by the Supreme Court in *Sesa Sterlite* Judgment, can be summarized as under: (a) open access is the freedom to procure power from any source; as per the Electricity Act, it is the duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee

(including distribution licensee) and generating company; this would gradually reduce the cost of generation/procurement and would generate competition amongst sellers; (b) open access in distribution implies freedom given to the consumer to obtain supply from any source of his choice; through open access, the right of consumer to get supply of electricity from a person other than the distribution licensee of his area of supply, by using distribution system of such distribution licensee, is ensured; for the said purpose, the SERCs are required to specify conditions; (c) the intent behind imposition of CSS is to compensate the distribution licensee, who is bound to face adverse financial impact as a consequence of a consumer opting to exit from its system and to avail power through open access; this is due to the fact that such an exit will hamper recovery of the fixed cost which such a licensee may have incurred as part of his obligation to supply electricity; and (d) while providing freedom of choice to the consumer, the provision for CSS creates a balance with legitimate expectations/ interests of existing licensees.

It is submitted, on behalf of the Respondents, that, in addition to the above, the Railways, historically, has been a consumer of TPCL-D; the position has not changed even after MERC passed the Order dated 05.09.2019, and as on the date of filing the instant written submissions; the Railways, in the present case, is attempting to take the benefit of the open access system under the Electricity Act, while trying to evade the necessary obligations associated with it, claiming purported protection under the Railways Act; the same is nothing but cherry picking of the incentives given by legislature under both statutes as per its own convenience; when historically there has been no change in the

predominant character of the Railways, there arises no occasion to exempt them from the obligations that are associated with the said dominant nature, being liability to pay CSS for open access being availed by the Railways; additionally, the present issue has already been dealt with by MERC in the impugned Judgment dated 05.09.2019 in Petition No. 145 of 2019; the Railways had contended before the MERC that the Railways Act had overriding effect over the Electricity Act, and the distribution activity of the Railways is governed by the Railways Act; the said contention of the Railways has been dealt with by the MERC at Paras (6), (7), (8), (9), (10) & (13) of the impugned order; thus MERC, while acknowledging the authorization of Railways to undertake distribution of electricity under the Railways Act, held that the Railways had to adhere to the various requirements of the Electricity Act; for it to be considered as a deemed distribution licensee under the Electricity Act, the licensee must undertake distribution of electricity and power must be supplied to the consumers' since it is an admitted fact that the Railways is consuming power for its own use, and is not supplying/distributing electricity to consumers, it cannot be considered as a deemed distribution licensee for seeking exemption of CSS; the MERC relied upon *Sesa Sterlite* Judgment, a perusal of which shows that CSS is the compensation payable to the distribution licensee irrespective of the fact whether its line is used; open access consumers would pay the tariff, applicable for supply, which would include an element of CSS on certain other categories; in terms of the 4th Proviso to Sections 38(2)(d), 39 (2)(d), 40(c) and 42(2) of the Electricity Act, the only exemption granted from levying CSS is where open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use; admittedly, in the present case, Railways is not

a captive user and is procuring power for self- consumption; from the various provisions of the Railways Act and the Electricity Act, referred above, it can be inferred as follows: (a) that Section 11 and 12 of the Railways Act permits the Railways to undertake supply of electricity (*without prejudice and in alternate to other submissions*); (b) the provisions of the Electricity Act, in so far as it relates to distribution and supply of electricity, is not in conflict with the provisions of the Railways Act; and (c) Railways is procuring power for self-consumption, and self-consumption of electricity cannot be said to be supply of electricity.

C. ANALYSIS:

It is true that the petition filed by the Railways before the CERC was not for grant of a distribution licence or for them to be declared a distribution license, and their petition was necessitated since their entitlement for open access, without discharging their corresponding obligation to pay cross subsidy surcharge, was doubted by the State Transmission Utility. While Railways contend that the grant of open access to the inter-State transmission system falls within the jurisdiction of the CERC alone, necessitating their having to invoke its jurisdiction, the submission, urged on behalf of the Respondents, is that, since open access was sought by them as a deemed distribution licensee, it is only if their status as a deemed distribution licensee is determined in the first instance can it then seek to avail open access as a deemed distribution licensee without having to pay cross subsidy surcharge; and the question, whether or not Railways is a deemed distribution licensee, could only have been examined by the State Commission under Section 86 of the Electricity Act, and not the CERC.

It is unnecessary for us to examine this particular issue since we have, ourselves, considered the issue whether or not the Railways is a deemed distribution licensee, and have held that it does not; and that Railways, as a consumer, can avail open access under clause (ii) of Sections 38(2)(d), 39(2)(d) and 40(c) only on payment of cross subsidy surcharge / additional surcharge.

The object sought to be achieved by Section 42, in imposing cross subsidy surcharge where a consumer, within the area of supply of a distribution licensee, seeks open access is to compensate the concerned distribution licensee for the adverse financial impact caused to them as a consequence of a consumer opting to avail electricity through a source other than the said distribution licensee. The exit of a consumer, from within its consumer base, would undoubtedly disable the distribution licensee from recovering a part of its fixed cost which it was hitherto recovering from the said consumer. It is evidently with a view to protect the interests of the consumer in exercising his choice to procure electricity from any source he chooses, while at the same time ensuring that the distribution licensee does not suffer financial loss in the process, that this requirement of payment of additional surcharge/cross subsidy surcharge has been stipulated under Sections 42(2) and (4) of the Electricity Act.

D. CONCLUSION:

On Issue No. 13, we conclude holding that, since we have considered the question whether or not Railways is a deemed distribution licensee, and have held that it does not, it is unnecessary for us to examine this particular issue as to whether or not the CERC had the jurisdiction to decide the

Deemed Distribution Licensee status of the Railways, for adjudicating the aspects on the entitlement of Railways to seek open access for the use of inter-state transmission system as defined under Section 2(36) of the Electricity Act, 2003.

XVI.CONCLUSION:

For the reasons afore-mentioned, it is held that Indian Railways is not a deemed distribution licensee falling within the ambit of the third proviso to Section 14 of the Electricity Act as it does not distribute/ supply electricity (ie sell electricity to consumers for a price) as required of a distribution licensee under the Electricity Act; and, even otherwise, as the entire electricity which it receives from the Grid is completely consumed by it and its constituents, it is required to pay additional/cross-subsidy surcharge to different distribution licenses under Section 42 of the Electricity Act, if it chooses to procure electricity from sources other than the concerned distribution licensees within whose area of supply it is situated.

Appeal No. 276 of 2015, filed by the West Bengal State Electricity Distribution Company Ltd against the Order passed by the Central Electricity Regulatory Commission in Petition No. 197/MP/2015 dated 05.11.2015, and (2) Appeal No. 320 OF 2018 filed by the Punjab State Power Corporation Ltd against the Order passed by the Punjab State Electricity Regulatory Commission in Petition No. 3 of 2017 dated 28.02.2018, are allowed to the extent indicated in this Order.

Appeal No. 114 OF 2020 filed by Indian Railways against the Order passed by the Odisha Electricity Regulatory Commission in Petition No. 55 of 2016 dated 25.02.2020, (2) Appeal No. 73 of 221 filed by Indian

Railways against the Order passed by the Kerela State Electricity Regulatory Commission in OP.No. 31/19 dated 12.12.2019, (3) Appeal No. 213 of 2021 filed by Indian Railways against the order passed by the Madhya Pradesh Electricity Regulatory Commission in Petition No. 11 of 2020 dated 05.05.2021, (4) Appeal No. 170 of 2019 filed by Indian Railways against the order passed by the Rajasthan Electricity Regulatory Commission in Petition No. RERC-1452/19 dated 23.04.2019, (5) Appeal No. 343 of 2019 filed by Indian Railways against the order passed by the Maharashtra Electricity Regulatory Commission in Petition No. 154 of 2019 dated 05.04.2019, and (6) Appeal No. 133 of 2020 filed by Indian Railways against the order passed by the Haryana Electricity Regulatory Commission in Petition No. HERC/PRO-11 of 2017 dated 17.06.2020, are however dismissed to the extent indicated in this Order.

All the Appeals and other pending IAs are disposed of accordingly.

Pronounced in the open court on this ***12th day of February, 2024.***

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

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REPORTABLE/NON-REPORTABLE

tpd/mk