

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 39 of 2011

Dated: 16th December, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,

In The Matter Of

M/s. Mula Pravara Electric Co-operative Society Ltd.
Shriampur-413709,
Distt-Ahmednagar,
Maharashtra

... Appellant(s)

Versus

- 1. Maharashtra Electricity Regulatory Commission**
World Trade Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai-400 005
- 2. Maharashtra State Electricity Distribution Co.Ltd.**
Prakashgad, Bandra (East),
Mumbai-400 051
- 3. State of Maharashtra**
Through Secretary,
Department of Co-Operation,
Marketing and Textiles,
Government of Maharashtra,
Mantralaya, Mumbai-400 032

and

**Through Secretary,
Department of Industries,
Energy and Labour,
Government of Maharashtra,
Mantralaya, Mumbai-400 032**

- 4. Mumbai Grahak Panchayat,
Sant Dnyaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (W),
Mumbai-400 056**
- 5. Prayas,
C/O Amrita Clinic,
Athawale Corner,
Karve Road,
Deccan Gymkhana,
Pune-411 004**
- 6. Thane Belapur Industries,
Post: Ghansoli,
Navi Mumbai-400 701,**
- 7. Vidarbha Industries Association,
Civil Lines,
Nagpur-440 001**
- 8. Prof. Dr. Barhate G.H.
Organizer,
Grahak Panchayat,
Shriampur-413 709**

....Respondent(s)

Counsel for Appellant(s): Mr. Ramji Srinivasan, Sr Adv.
Mr. Shaunak J. Thacker
Mr. Bhavesh V. Panjuani
Mr. Hasan Murtaza
Mr. Suresh Sahu
Ms. Gunjan Jayakar
Mr. D.J Kakalia,
Mr. Rakesh Mandavkar

Mr. Saswat Patnaik

Mr. Zeyaul

Mr. Akhil sibal

Counsel for Respondent(s): Mr.Buddy A Ranganadhan for R-1

Mr. Arijit Maitra for R-1

Ms. Richa Bhardwaja for R-1,

Mr. Vikas Singh, Sr. Adv for R-2,

Mr. Varun Pathak for R-2

Ms. Deepa Chawan for R-2,

Mr. Gadre for R-2,

Ms. Puja Priyadarshini for R-2

Mr. Ravi Prakash for R-2

Mr. A S Chandhiok, ASG for R-3,

Mr. Sandeep Bajaj for R-3,

Mr. Gurpreet S Parwanda for R-3

Ms. Asha G. Nair for R-3

Mr. S.R. Nargolkar for R-3

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Mula Pravara Electric Co-operative Society Ltd (Mula Pravara) is the Appellant herein. Maharashtra Electricity Regulatory commission (State Commission) is the 1st Respondent. 2nd Respondent Maharashtra State Electricity Distribution Company Limited (Distribution Company), is the Distribution licensee in the whole state of Maharashtra except suburban areas of Mumbai and area of supply of Mula Pravara. For clarity sake, herein after, the area of supply served by Mula Pravara is being referred to as 'MPECS area of supply and area served by Distribution Company is referred as MSEDCL area of supply. .

2. By the impugned Order dated 27.1.2011, the State Commission (R-1) rejected the application of the Appellant for the grant of distribution license and granted license to the Distribution Company (R-2) and amended the license of Distribution Company by merging MPECS area of Supply with MSEDCL area of supply. It further directed the Appellant to handover the distribution network and allied equipments etc., belonging to the Appellant to the Distribution Company (R-2) without any wheeling charges. Aggrieved by this order, the Appellant has filed this Appeal.

3. The facts of the case are as follows:

(a) The Appellant Mula Pravara Electric Cooperative Society (MPECS) was established as Farmer's Cooperative Society in the year 1969-70. The Appellant was granted a license by the State Government in the year 1971 for a period of 20 years to distribute the power in five specific Talukas (MPECS area) in District of Aurangabad in Maharashtra. The Appellant commenced its functioning w.e.f. 1.3.1971 and took over the electrical distribution network of Maharashtra State Electricity Board. The said license was renewed for another 20 years i.e. from 1991 to 2011. Their term of license was to get expired on 31.1.2011.

On 28.7.2010 the State Commission Published a notice inviting "Expression of Interest ("Eol") from prospective

applicants with expertise in electricity distribution for distribution of electricity in the MPECS area of supply. Six entities including the Appellant submitted their proposals expressing their interest in distributing electricity in the area served by MPECS. The State Commission on 5.10.2010, directed all the entities who had submitted their Expression of Interest to submit an application for grant of Distribution license in MPECS area in accordance with Section 14 and 15 of the EA 2003 read with MERC (General Conditions of Distribution License) Regulations 2006.

- (b) Applications from two parties namely Mula Pravara, the Appellant and the Maharashtra State Electricity Distribution Company (R-2) have been taken by the State Commission for consideration. The technical validation session for consideration of the applications for fresh license was held on 2.12.2010. On 5.12.2010 the Appellant as well as 2nd Respondent Distribution Company published notices in local newspapers inviting objection/comments on their application for license for distribution of electricity in the MPECS' area of supply. On 10.12.2010, the State Commission also published a public notice inviting objections/comments on applications of both the parties for fresh license. The public hearing was held on 14.1.2011. Ultimately, the State Commission after analysing the claims of both the parties by the impugned Order dated 27.1.2011

rejected the application filed by the Mula Pravara, the Appellant and issued license for the distribution of electricity in the MPECS area to the Distribution Company (R-2). The State Commission also amended the existing license of the distribution company (R-2) for distribution in the MSEB area of supply by merging it with the MPECS' area of supply under a new licence. Through this order, the State Commission further directed the Mula Pravara (the Appellant) to handover its distribution network, assets and equipments and consumer security to the Distribution Company (R-2) for its use even without payment of wheeling charges. As against this order, the present appeal has been filed by the Appellant.

4. The Learned Senior Counsel appearing for the Appellant has raised the grounds assailing the impugned order dated 27.1.2011. Those grounds are as under:
 - i) The State Commission through the impugned order acted unreasonably in a discriminatory manner by treating unequals as equals without considering the relevant materials and ignoring the relevant provisions of the Act, 2003 which entitles the Appellant to get a distribution licence.
 - ii) Under proviso to Section 15 (6) of the Act , the State Commission was required to give an opportunity of being heard before rejecting its application for fresh license.

- However, in this case, no such opportunity had been provided to the Appellant and its application for fresh license was rejected without hearing.
- iii) The State Commission has neither considered the relevant criteria and nor applied the procedures contemplated Under Section 18 of the Act and its own General Conditions of Supply Regulation while passing orders merging area of supply of the old license of the Respondent with the Appellant's licensed area. Besides that, the State Commission without jurisdiction has directed the Appellant to handover the distribution network and connected equipments with allied assets to the Respondent (R-2).
 - iv) The State Commission has wrongly passed an order of amendment of the Respondent's old license area so as to merge Appellant's license area with that of Respondent area although the State Commission had proceeded under Section 14 and 15 of the Electricity Act without resorting to the procedure under Section 18 for the amendment of the Respondent's old licence.
 - v) The State Commission has wrongly concluded while rejecting the application filed by the Appellant that the Appellant did not have financial credibility and it had no source of procuring energy without considering the relevant

materials which had been placed before the State Commission.

5. In reply to the above submissions, the Learned Counsel for the State Commission (R-1) as well as the Learned Senior Counsel for the Distribution Licensee (R-2) made elaborate submissions to establish that the grounds urged in the Appeal are not sound and the reasonings given in the impugned order are perfectly valid.
6. In the light of the above rival submissions, the following questions would arise for consideration:
 - (a) Whether the State Commission while granting the license to Distribution Company (R-2) and rejecting the application of Mula Pravara (Appellant) has followed the principles laid down in the Act?
 - (b) Whether the State Commission while amending the license of Distribution Company merging the area of supply of the new licensee with the area of supply of old licensee has followed the provisions of the Act and its own regulations?
 - (c) Whether the State Commission has rightly vested the assets of Mula Pravara (the Appellant) in Distribution Company (R-2) even without any payment of wheeling charges?

7. On these questions elaborate submissions have been made by the parties. We have carefully considered these submissions and we have given our anxious consideration to the questions referred to above.
8. The Learned Counsel appearing for both the parties have cited number of authorities to substantiate their respective plea which we shall see later.
9. The present Appeal arises out of a decision of the State Commission to grant a distribution license to Distribution Company (R-2) to distribute electricity in the area of supply which was so far supplied by Mula Pravara, the Appellant.
10. There were only two applications for grant of license in MPECS area of supply. These two applications were filed by the Appellant and the Distribution Company (R-2). The State Commission analysed and compared these two applications on three criteria and found that the application of Mula Pravara (Appellant) failed in two of three criteria whereas the application of Distribution Company (R-2) satisfied all the three criteria. Accordingly, the State Commission, through the impugned Order dated 27.1.2011, rejected the application of Mula Paravara (Appellant) and issued license for distribution of electricity in MPECS area of supply to the Distribution Company (R-2).

11. The Learned Counsel for the Appellant has raised the following issues:

- (i) The impugned order is in excess of jurisdiction. There is no provision in the Act which empower the State Commission to transfer the assets of a distribution licensee to any other person without suspending or revoking its' license. In this case license of the Appellant was neither suspended under Section 24 nor revoked under section 19 of the Act. The term of license expired on 31.1.2011. Provisions regarding sale or vesting of utility etc., would apply only in cases where license had been revoked. The State Commission, however, passed the impugned order transferring the distribution net work and other assets of the Appellant to the Distribution Company (R-2) without jurisdiction.
- (ii) As per proviso to Section 15 (6) of the Act, the State Commission ought to have given an opportunity of being heard to the Appellant before rejecting its application. However, in this case, no such opportunity had been given to the Appellant. On the other hand, the State Commission straightway rejected the application filed by the Appellant.
- (iii) The State Commission evolved and applied the procedure and criteria not specified in the Act. That apart it did not notify nor informed the Appellant prior to the filing of the

- application that their application would be considered on the basis of such criteria.
- (iv) The provisions governing the existing distribution licensee of an area and new applicant for license in that area are distinctively separate under different clauses of the Act. So, they cannot be treated as equals.
 - (v) Inviting expression of interest for grant of license is not contemplated under the Act. In this case, this new procedure was adopted on a pre-determined opinion formed by the State Commission.
 - (vi) Under Section 14 and Section 15 of the Act, the applicants are required to satisfy the conditions specified in the application form referred to in Section 15 (1) of the Act. No other conditions which are not mentioned are applicable.
 - (vii) The three criteria considered by State Commission for comparing the applications are drawn from sixth proviso to Section 14 . Since the Appellant is an existing licensee for the area, these criteria would not apply to the Appellant. These criteria would apply to the Distribution Company (R-2), who has applied for fresh license. .
 - (viii) The State Commission rejected the application filed by the Appellant by concluding that it did not have financial credibility and had no source of procuring energy. This

- conclusion was based without considering the relevant materials.
- (ix) The State Commission did not apply statutory criteria of its own network provided in the sixth proviso of section 14 of the Act to the application of Distribution Company (R-2). Since the Distribution Licensee (R-2) neither had distribution net work in the area nor submitted any roll out plan for the same, it was not qualified to apply for a distribution license.
 - (x) The three criteria adopted by the State Commission have not been correctly applied to the Appellant as well as the Distribution Company (R-2). Among these applicants the Appellant is a better performer with a consumer satisfaction. Earlier, the State Commission was satisfied with the Appellant's performance and recommended the continuation of the Appellant as a licensee. The said situation has not changed.
 - (xi) The Appellant is an existing licensee with a good track record of distribution of electricity. The contractual dispute between the Appellant and the R-2 Distribution Company, which had been heavily relied upon by the State Commission, is not relevant criteria to be considered for granting a license.

- (xii) Admittedly, the Distribution Company has not been issued a license by the State Commission for MSEDCL area of supply earlier. Therefore, there cannot be any question of merging such existing 'licence' of the Distribution Company (R-2) with new distribution license for MPECS' area of supply. Admittedly, the Distribution Company has not produced any license in the first place of which an amendment is claimed.
- (xiii) The Commission's direction that the Distribution system of the Appellant to be transferred to the Distribution Company (R-2) is without jurisdiction and without following the due process of law. Sections 14 and 15 of the Act do not empower the State Commission to order or to direct for the vesting of all assets of any person or any licensee with another person or licensee.
- (xiv) The proposal of merger contained in application for fresh license under Section 14 of the Act cannot be treated as an application under Section 18 of the Act. No public notice had been issued pursuant to Section 18 of the Act. Without following the procedure prescribed under Section 18 read with MERC (General Conditions of Distribution License) Regulations 2006, the State Commission resorted to Section 18 and passed an order for amendment of license

and also passed the order regarding vesting the distribution system of the Appellant with the Respondent.

12. Before dealing with the questions framed in the light of the various points raised by both the parties, it would be desirable to have the complete background of the case leading to the impugned order which is given below:

- (a) The Appellant's Society was established as a Farmer Cooperative Society in the year 1969. As on 28.1.1971, the Appellant was provided with license to distribute electricity in the village spread over five Talukas in Ahmednagar district of Maharashtra for a period of 20 years. The Appellant Society commenced functioning w.e.f. 1.3.1971 as distribution licensee and took over the electrical net work of the Maharashtra State Electricity Board existing in the area.
- (b) After expiry of the initial license term of 20 years, the Government of Maharashtra on 21.5.1999 extended the license of the Appellant by another 20 years w.e.f. 1.3.1991 up to 31.1.2011. As on 3.3.2003, the Appellant was liable to pay towards the power purchase dues of Rs.381.2 Crores to the erstwhile Maharashtra State Electricity Board. At that stage, Grahak Panchayat Nagpur filed a writ petition before the Bombay High Court, Nagpur Bench. The Bombay High Court, Nagpur Bench disposed of the writ

petition on 30.4.2003 directing Government of Maharashtra to consider whether to revoke the license and take over the network from Mula Pravara Electric Cooperative Society Ltd (Appellant) and hand over to Maharashtra State Electricity Board or initiate liquidation proceedings or the State Commission may be requested to examine as to whether the Mula Pravara should be allowed to continue or wind up and advise the Government of Maharashtra accordingly. On 6.6.2003, Government of Maharashtra requested the State Commission to examine the question as to whether Mula Pravara should be allowed to continue to operate and recommend to the Government after deciding the said issue. On 27.1.2004, the State Commission in response to the Government's request undertook the examination and made following three observation:

- I) The Commission finds that the Mula Pravara's operations are more efficient than the Maharashtra State Electricity Board in comparable distribution areas of key performance and service parameters.
- II) The Commission is also of the view that in the present economic context, the rural power supply requires some form of continuous assistance; Government of Maharashtra may consider providing capital subsidy for installation of decentralized energy supply system.

- III) Considering the superior performance of the Appellant as compared to the operations of the State Electricity Board in similar supply areas, the Commission is of the view that the Appellant should continue to operate in its supply area.
- (c) Accordingly, the State Commission provided three options to the Government of Maharashtra, viz;
- i. Mula Pravara has to continue as a licensee with transparent direct subsidy arrangements..
 - ii. Mula Pravara has to continue as a licensee with creation of Regulatory Assets.
 - iii. The Mula Pravara is to be treated as management contractor/ Franchisee.
- (d) In pursuance of these recommendations, the Government of Maharashtra on 24.8.2004 passed the resolution with regard to two decisions:
- i. The Mula Pravara will continue its operations as a distribution licensee.
 - ii. Government of Maharashtra is to provide revenue and capital subsidy to the Appellant.
- (e) In pursuance to the said resolution, the Government of Maharashtra took the following decisions:

- (i) Mula Pravara has been allowed to continue its operations as a Distribution Licensee.
- (ii) The quantum of revenue subsidy has been fixed as 72 Crores per annum which will be provided by the Government of Maharashtra to the Electricity Board directly.
- (iii) In order to enable Mula Pravara to undertake rural electrification works other capital expenditure scheme in a time bound action plan the Government of Maharashtra would extend capital subsidy support to Mula Pravara of around Rs.4 Crores per annum.
- (iv) The State Electricity Board shall treat the past arrears from Mula Pravara as regulatory assets without charge of interest. The Electricity Board to recover the said regulatory assets from Mula Pravara upon turnaround of operations of Mula Pravara. Mula Pravara has to continue as a licensee with creation of regulatory assets.
- (f) In spite of these decisions taken by the Government, the Government of Maharashtra failed to implement the said resolution dated 24.8.2004 and disburse the revenue and subsidy of 72 Crores per annum and Rs.4 crores capital subsidy to the Mula Pravara. At that stage, the Mula

Pravara in February, 2006 filed its first tariff petition before the State Commission for the financial years for the year from 2004 to 2007. In this Petition, the Mula Pravara requested the Commission to fix a retail supply tariff for consumers at par with retail supply tariff of Maharashtra Distribution Company after recognizing the subsidies to be given by the Government of Maharashtra. It further requested the Commission to reduce the Bulk Supply Tariff (BST) to Rs.0.40 per unit from existing rate of Rs.1.05 per unit.

- (g) On 20.10.2006, the State Commission passed the tariff order for wheeling electricity and for retail sales of Bulk Supply Tariff power to Mula Pravara by Maharashtra Distribution Company.
- (h) On 23.2.2007, the State Commission passed the tariff order for the retail supply tariff to be charged by the Mula Pravara from its consumers. The average retail supply tariff was fixed by the Commission as Rs.8.71 per unit as against the prevailing tariff of Rs.2.39 per unit resulting in the tariff shock.
- (i) On 18.5.2007, the State Commission passed another tariff order for Maharashtra Distribution Company under which one of the components was Bulk Supply Tariff rate to be

- paid by the Appellant to Maharashtra Distribution Company.
- (j) The Maharashtra Distribution Company on 24.5.2007 filed a petition before the State Commission for revocation of Mula Pravara license on the ground of non payment of dues to the tune of Rs.951.49 Crores. In the meantime, the order passed by the Commission on 18.5.2007 was challenged in the Appeal in Appeal No.33 of 2007 and 101 of 2007 before this Tribunal.
- (k) On 28.1.2008, this Tribunal was pleased to dismiss the Appeal and confirm the Commission's orders. Against this judgement, an Appeal was filed by the Appellant before the Hon'ble Supreme Court. The said Appeal was pending.
- (l) On 2.2.2009 the State Commission adjourned the petition filed by the Maharashtra Distribution Company for revocation of Mula Paravara's license sine die due to pendency of Appeal before the Hon'ble Supreme Court. In the meantime, the said Appeal filed before the Supreme Court was dismissed by the Hon'ble Supreme Court on 20.7.2009. In the meantime, the Distribution Company (R-2) preferred Appeal before this Tribunal against the State Commission's order dated 2.2.2009. The Distribution Company was permitted to revive the revocation application proceedings by this Tribunal.

- (m) In Dec, 2009, the Maharashtra Distribution Company issued a disconnection notice to the Mula Pravara for the non payment of the dues. On 8.2.2010, the State Commission resumed proceedings in Distribution Company (R-2) application for revocation/suspension of Mula Paravara's license. On 1.4.2010, the State Commission appointed Administrative Staff College to conduct the enquiry into the affairs of the Mula Pravara. Accordingly, the Administrative Staff College gave a report on 30.7.2010 recommending that the Appellant may continue his license as no financial irregularity was found against him.
- (n) In the meantime, on 27.8.2010, the State Commission before inviting applications for distribution license for MPECS' area of supply, invited interested persons to come forward with their expression of interest with the statement of their experience and capability. Accordingly, on 27.8.2010, the Mula Pravara sent a letter to the State Commission expressing their interest in distribution of electricity in their area of supply. However, the State Commission on 5.10.2010, directed all the applicants to submit their application for grant of distribution license in the Mula Pravara area of supply in accordance with Section 14 and 15 of the Act.

- (o) On 21.10.2010, the Mula Pravara filed a writ petition before the Bombay High Court for implementation of the Government notification dated 24.8.2010 for providing revenue subsidy of 72 crores and capital subsidy of Rs.4 Crores.
- (p) On 3.11.2010, the Mula Pravara submitted its distribution license application in the Mula Pravara area of supply in terms of Section 15 of the Act. On 4.11.2010, the Distribution Licensee (R-2) and few other Applicants submitted their application for grant of license. However, other applicants withdrew their applications thereafter.
- (q) On 2.12.2010, Technical Validation Session was held. Both these Companies namely the Appellant and the Respondent Distribution Company submitted their viability to procure electricity. On 5.12.2010 both the applicants published notice under Section 15(2) of the Act inviting comments/objections on their application for license for MPECS area of supply. The State Commission on 10.12.2010, published a notice under Section 15 (5) of the Act, 2003 inviting public objections or suggestions on its proposal to consider the license application of both the Appellant and Maharashtra Distribution Company.
- (r) At this stage, on 28.12.2010, the State Commission issued 'show cause notice' to the Mula Pravara to show cause as

to why their license should not be revoked. This issuance of show cause notice was in spite of the fact that the application filed by the Appellant Mula Pravara for fresh license was pending. On 4.1.2011, Mula Pravara replied to the show cause notice.

- (s) On 14.1.2011, a public hearing was held in respect of grant of license. In that public hearing large number of consumers expressed satisfaction towards the Mula Pravara and favoured the Mula Pravara for the grant of distribution license. Despite this, on 27.1.2011, the State Commission passed the impugned order (i) rejecting the distribution license application filed by the Appellant (ii) directing the amendment of Maharashtra Distribution Company license to include the Mula Pravara area of supply and (iii) directing Mula Pravara to handover its assets to Maharashtra Distribution Company for its use without payment of any wheeling charges.

13. Aggrieved by this order, the present Appeal has been filed.

14. In the light of the above facts we have to analyze the questions that have been framed. Let us quote the questions here again:

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

- (ii) Whether the amendment of Maharashtra Distribution license to merge the Mula Pravara area is justified or not ?
- (iii) Whether the decision of the Commission to direct the handing over of the Distribution assets of the Mula Pravara to the Maharashtra Distribution Company is justified or not ?

15. The **First Issue** for our consideration is as to whether the State Commission while granting license to the Distribution Company (Respondent) and rejecting the application of the Appellant has followed the provisions contained in the Act.

16. According to the Appellant, the State Commission has acted unreasonably and in a discriminatory manner by treating unequals as equals and not considering the relevant materials and by ignoring the procedure contemplated in the proviso to Section 15(6) of the Act. The main contention of the Appellant is that the impugned order has been passed in violation of proviso to Section 15 (6) of the Act which requires the State Commission to give a hearing to the applicant before the rejection of the application for license and this has not been done in this case. This is a case where the State Commission has rejected the application of the Appellant on applying the three criteria namely:

- (i) Experience and technical capability,
- (ii) Power procurement plan
- (iii) Capital adequacy and credit worthiness

17. According to the Appellant these three eligibility criteria selected by the State Commission were neither notified nor informed to the Appellant so as to ensure the compliance. Further, it is stated that the State Commission erroneously concluded that the Appellant did not have the financial credibility and it had no source of procuring power for distribution in its area of supply. While rendering this finding, the State Commission, has not given reasonable explanation as to how the State Commission has adopted these criteria in the absence of the provisions in the matter.
18. The Appellant further submitted that the impugned order has been passed in favour of the Distribution Company (R-2) without considering the fact that the 2nd Respondent is in fact, disqualified on various aspects.
19. More importantly while rejecting the application filed by the Appellant, the State Commission has not followed the mandatory provisions under proviso to Section 15 (6) of the Act in regard to opportunity to the Appellant before rejecting its application.
20. The Learned Counsel for the State Commission, Per Contra vehemently contended that the requirements of proviso to Section 15 (6) have been fully met in as much as the opportunity of being heard had been given to the Appellant during the public hearing on 14.1.2011 itself. He has also contended that there

was no provision to hold second or third hearings to be given to the parties whose applications are liable to be rejected.

21. Let us now examine this issue. Section 15 (6) reads as under:

“(6) Where a person makes an application under sub-section (1) of Section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application:-

(a) Issue a license subject to the provisions of this Act and the rules and regulations made thereunder, or

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made there under or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard”.

22. The perusal of this Section would make it clear that the State Commission while rejecting the application for the grant of license has to record its reasons in writing after giving opportunity of being heard to the applicant. In other words, it specifically provides that the application cannot be rejected unless the applicant is given an opportunity of being heard with regard to the proposal of the rejection. After the hearing the applicant, the State Commission has to record its reasons as to why the application has been rejected after considering the explanation given by the Appellant in the opportunity of being

heard. In the light of the above aspects, we have to see whether the State Commission gave the opportunity of being heard to the Appellant Mula Pravara while rejecting its application for the license. While considering this aspect, we have to take note of the following aspects:

- (a) Mula Pravara was already a licensee and its license area was expiring on 31.1.2011.
- (b) Before the expiry of the license i.e on 31.1.2011, the State Commission issued public notice on 28.7.2010 inviting expression of interest from the interested persons for grant of license. Three parties including the Appellant and the Respondent Distribution Company had filed their application showing the interest.
- (c) On 30.11.2010, one of the parties withdrew its application for license. Thus, only two other parties namely the Appellant and the Respondent Distribution Company alone remained in the field.
- (d) On 02.12.2010, the Technical Validation Session was held. Both the Appellant and the Respondent Company participated in this session. Thereupon, both the parties were directed to issue public notice under Section 15(2) of the Act inviting suggestions and comments from the general public over the proposal for considering their

applications. Both the applicants published public notices on 5.12.2010 as per the directions of the State Commission.

- (e) The State Commission also published a public notice on 10.12.2010 under Section 15(5) of the Act inviting objections from the public on the applications for fresh distribution license from the applicants in area of supply.
- (f) On 14.1.2011 public hearing was held. In that public hearing, the objections and comments of the public were made. Both the applicants attended this public hearing.

23. In order to decide as to whether the Appellant was given the opportunity of being heard before rejecting its application during the public hearing held on 14.1.2011 it would be desirable to refer to the impugned Order. Relevant portion of the impugned Order is reproduced below:

*“13. Before granting a license under Section 14 of the EA 2003, the Commission is required to publish a notice under Section 15 (5) of the EA 2003, stating the name and address of the person to whom it proposes to issue the Licence. Therefore, the Commission vide its separate Public Notice under Section 15(5) of the EA 2003 in the matter of the applicants published in various Newspapers on 10th December 2010, invited objections / suggestions on its proposal to issue Distribution license to both the applicants. **In the same notice it has been cleared that, final decision on grant of Distribution license will be taken only after considering all the objections /***

suggestions received as per the notice published by the applicant under Section 15(2) of the EA 2003. Further, vide same notice; the Commission scheduled a combined Public Hearing in the matter on 14th January 2011 at Shrirampur.

14. A combined Public Hearing in both the matters, i.e. **Application for fresh Distribution license in MPECS area by MSEDCL (Case No 85 of 2010) and MPECS (Case No. 87 of 2010)** was held on 14th January 2011 at Shrirampur. The list of objectors, who submitted their objections/suggestions and participated in the Public Hearing, is provided in Appendix-1.

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COMMISSION RULING:

24. Having heard and after considering the documents available on the records, the detailed comparative analysis of the Commission for MSEDCL and MPECS Distribution license Applications is given below:” **{Emphasis added. Para 14 to 23 of this order contains only the objections/comments expressed by the participants in the public hearing and have not been reproduced for brevity}**

24. Plain reading of this impugned order would make it clear that the public hearing was held only for hearing comments/objections from the public and the same had been clarified by the State Commission in its public notice dated 10.12.2010 that the final view in the matter would be taken only after hearing objections from the various stake holders.

25. Only after the public hearing, the State Commission started comparing the offer made by the applicants namely the Appellant and the Respondent Company and concluded that the offer of the Appellant did not meet the full requirements on merits. So, before pronouncing their order rejecting the application of the Appellant for grant of license, no opportunity was given to the Appellant of hearing with regard to the proposed decision to reject the application. In other words, the State Commission must have compared the various aspects relating to the competence of the parties for grant of license and only after comparison it could arrive at a conclusion to reject the application of the Appellant. In such an event, the Appellant/Applicant must have been given the opportunity of knowing the proposed conclusion to enable it to convince the State Commission that the proposed conclusion is not correct. Admittedly, this was not done.
26. At this juncture, the Learned Counsel for the Appellant in refuting the contention of the State Commission, that the 2nd opportunity is unnecessary, has brought to our notice of the various orders that have been passed by the State Commission giving such opportunity to the applicants after taking such a decision of rejecting their application for grant of license in the other similar case to enable the applicant to explain the real position. The following are the orders:

- (a) Case No.6 of 2011 passed on 11.8.2011
- (b) Case No.7 of 2011 passed on 11.8.2011
- (c) Case No.8 of 2011 passed on 11.8.2011
- (d) Case No.5 of 2011 passed on 11.8.2011

27. He has also produced copies of those orders. These orders would show that the Commission after coming to the conclusion that the applicant's applications did not conform to the provisions of the Act, informed the same to the respective applicants and opportunity of being heard was granted to these applicants by posting the matter on a particular date. After hearing those applications, the final orders had been passed by the State Commission in those cases. But, such a procedure had not been followed in this case. Let us now quote the relevant portion of the order passed on 11.8.2011 in order to show that such an opportunity was given under Section 15 (b) (6) of the Act. The relevant portion is this:

“58. In terms of the proviso to clause (b) of Section 15 (6) of the 2003 Act, an opportunity of being heard was granted by the Commission to MSEDCL on August 2, 2011 before rejection of its application. During the course of the hearing, the Commission communicated its intention to reject the application of MSEDCL for grant of license after explaining the grounds, as described in the preceding Para No.20, 21, 31, 33 to 35 and Para 54”

28. Thus, it is clear that the State Commission was aware of the requirements of Section 15 (6) and accordingly had provided the opportunity of being heard to all the applicants whose

applications were liable to be rejected. The impugned order had been passed on 27.1.2011 without complying with the provisions of Section 15 (6) but the same had been complied with in the other cases through the subsequent orders dated 11.8.2011. There was no reason as to why the defense put forward by the Learned Counsel for the Commission in the present Appeal in regard to the compliance of Section 15 (6) had not been adopted in the subsequent orders passed by the State Commission wherein the procedure laid down in Section 15 (6) was scrupulously adopted. Therefore, we are unable to accept the contention of the Learned Counsel for the State Commission. On the other hand, we are to state that the scheme of the Section 15 (6) would clearly indicate that the State Commission, before passing a final order in regard to rejection of application for grant of license, has to communicate its intention to reject the application of the applicant for grant of license after explaining the grounds for proposed rejection. Admittedly, in this case, the procedure under Section 15(6) which have been followed later, had not been followed.

29. The Learned Counsel for the State Commission citing the SC Judgement in CESC Vs West Bengal Electricity Regulatory Commission and Others reported in (2002) 8 SCC 715 & AIR 2002 SC 3588 where it is held that the statute prescribes a particular mode of complying with natural justice it is only that method needs to be followed, strenuously contended that there

is nothing in Section 15 (6) to indicate that there must be 2 hearings to be given i.e one to consider the objections and suggestions and the another hearing after the commission comes to a conclusion that the application is liable to be rejected by requiring the applicant to show cause as to why his application be not rejected. According to him, since in the present case the hearing was already given, second hearing becomes unnecessary.

30. The Learned Counsel for the Appellant on the other hand cited the decision in Raj Restaurant Vs. Municipal Corporation, Delhi (AIR 1982 SC 1550) wherein it is held that before refusing to renew the licence, the opportunity of hearing to refute the same is a must and when such opportunity had not been given in violation of the minimum principle of natural justice it would be void. Let us refer to the relevant portion of this judgement:

“Where, in order to carry on business a license is required, obviously refusal to give license or cancellation or revocation of license would be visited with both civil and pecuniary consequences and as the business cannot be carried on without the licence, it would also affect the livelihood of the person. In such a situation before either refusing to renew the license or cancelling or revoking the same, the minimum principle of natural justice of notice and opportunity to represent one’s case is a must”.

31. In addition to above decision, the Learned Counsel for the Appellant also cited number of judgments, holding the same view. They are as follows:

- (a) AIR 1999 SC 1281 Babu Varghese Vs Bar Council of Kerala
- (b) AIR 1974 SC 1868 Mandir Sita Ramji Vs. Governor of Delhi;
- (c) AIR 1991 SC 711 Syed Hasan Rasul Numa V. Union of India

32. So, the principle laid down by the Supreme Court in these judgments would squarely apply to the present case since proviso to Section 15 (6) categorically provided that no application shall be rejected unless the applicant has been given an opportunity of being heard. Thus, it is apparently clear that before exercising its discretionary powers of rejecting the Appellant's application for grant of license, it was incumbent on the part of the State Commission to give Appellant an opportunity of hearing under proviso to section 15 (6). In the present case, the said opportunity has not been given. Therefore, the impugned order of the State Commission, thus suffers from this infirmity. Accordingly, the **First Issue** is decided in the favour of the Appellant.

33. In the light of the above finding on first issue, other two issues would become somewhat irrelevant. However, we would address those issues also for completeness and for future guidance to the Appropriate Commissions.

34. The **Second Issue** for our consideration is whether the amendment of Maharashtra Distribution Company license to merge the area of its supply with Appellant's area is justified while

passing the order merging the area of supply with area of supply of the license without following its regulations and provisions of the Act. According to the Appellant, Section 14 and 15 confer power and prescribe the procedure only for grant of a new license and not for amendment to existing license. It is contended that this is illegal exercise of jurisdiction beyond the powers conferred under Section 14 and 15 of the Act, 2003 as such it violates the Act, 2003. In order to analyze this issue, it would be essential to examine the relevant provisions of the Act as well as the State Commission's Regulations. The relevant Section 14 of the Act as under:

“14. Grant of license- *The Appropriate Commission may, on an application made to its under Section 15, grant a license 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 as may be specified in the license:*

35. This Section 14 provides that the application can be made by a person for grant of license as a transmission licensee, distribution licensee or as an electricity trader in the area as specified in the license.

36. The next relevant Section 15 of the Act is as under:

15. Procedure for grant of licence- (1) *Every application under Section 14 shall be made in such form and in such manner as may be specified by the Appropriate Commission and shall be accompanied by such fee as may be prescribed.*

(2) *Any person who has made an application for grant of a license shall, within seven days after making such application, publish a notice of his application with such particulars and in such manner as may be specified and a license shall not be granted-*

(i) *until the objections, if any, received by the Appropriate Commission in response to publication of the application have been considered by it:*

.....

.....

.....

(5) *Before granting a license under Section 14, the Appropriate Commission shall-*

(a) *publish a notice in two such daily newspapers, as that Commission may consider necessary, stating the name and address of the person to whom it proposes to issue the licence;*

(b) *consider all suggestions or objections and the recommendations, if any, of the Central Transmission Utility or the State Transmission Utility, as the case may be,*

(6) *Where a person makes an application under sub-section (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application-*

(a) *issue a license subject to the provisions of this Act and the rules and regulations made there under, or*

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made there under or the provisions of any other law for the time being in force;

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.

37. Section 15 provides that every application shall be made in such a form as may be specified by the Appropriate Commission. It also provides that after entertaining this application, the State Commission has to follow various procedures while granting or refusing the license.

38. The next relevant Section 18 of the Act is as under:

“18. Amendment of license-(1) Where in its opinion the public interest so permits, the Appropriate Commission, may, on the application of the licensee or otherwise, make such alterations and amendments in the terms and conditions of his license as it thinks fit:

Provided that no such alterations or amendments shall be made except with the consent of the licensee unless such consent has, in the opinion of the Appropriate Commission, been unreasonably withheld.

(2) Before any alterations or amendments in the license are made under this Section, the following provisions shall have effect, namely:-

(a) where the licensee has made an application under sub section (1) proposing any alteration or modifications in his license, the licensee shall publish a notice of such application with such particulars and in such manner as may be specified;

(b) ...;

(c) where any alterations or modifications in a license are proposed to be made otherwise than on the application of the licensee, the Appropriate Commission shall publish the proposed alterations or modifications with such particulars and in such manner as may be specified;

(d) the Appropriate Commission shall not make any alterations or modifications unless all suggestions or objections received within thirty days from the date of the first publication of the notice have been considered.”

39. Under this Section 18, the State Commission may make amendment, alterations in the terms and conditions of the license on the application filed by the licensee only after considering the objections/suggestions received from the public after the publication of public notice of such application for amendment of license with such particulars to as specified by the State Commission.
40. Thus, the bare reading of these Sections would indicate that the publication of a public notice is mandatory in both the cases i.e. either to grant a fresh license or for making amendment in the existing license conditions. In the present case, the public notice for fresh license alone was published by the applicants as per the requirements of Section 15 (2) and not under Section 18 of the Act.
41. The State Commission also published public notice as per the Section 15 (5) of the Act which also relate to the issuance of fresh

license and not for any amendment of the existing license conditions.

42. Publication of public notice for grant of distribution license only under Section 15 is evident from the impugned Order itself. Relevant portion of the impugned Order indicating that the publication of notices were under section 15 of the Act is reproduced below:

“12. Both the applicants i.e. MSEDCL and MPECS, as required under Section 15(2) of the EA 2003, vide their respective Public Notice dated 5th December 2010, published in various Newspapers, invited objections / suggestions on their application for Distribution license in MPECS” area within 30 days from the date of Publication of their Notice.

13. Before granting a license under Section 14 of the EA 2003, the Commission is required to publish a notice under Section 15 (5) of the EA 2003, stating the name and address of the person to whom it proposes to issue the Licence. Therefore, the Commission vide its separate Public Notice under Section 15(5) of the EA 2003 in the matter of the applicants published in various Newspapers on 10th December 2010, invited objections / suggestions on its proposal to issue Distribution license to both the applicants. In the same notice it has been cleared that, final decision on grant of Distribution license will be taken only after considering all the objections / suggestions received as per the notice published by the applicant under Section 15(2) of the EA 2003. Further, vide same notice; the Commission scheduled a combined Public Hearing in the matter on 14th January 2011 at Shrirampur.”

43. Perusal of above would reveal that the notice was given only under Section 15 for granting distribution license. There was no mention of amendment of license under Section 18. Perusal of the impugned Order would also reveal that public hearing was held only for grant of distribution license for MPECS' area of supply and participants gave their comments/objection on this issue only.
44. The Learned Senior Counsel for the Distribution Licensee (R-2) as well as the Learned Counsel for Commission would vehemently submit that since public notice had been published by Respondent Distribution Licensee for the five years business plan indicating that in the five years business plan, a new area would be merged with the existing areas of the Respondent Distribution Company, the requirements of the public notice under Section 18 of the Act had been met with. He also pointed the relevant portion of the impugned order with reference to the provisions of Section 18 as under:

“viii. All the above requirements provided in Section 18 of the EA 2003 stand satisfied during the proceedings leading to this decision of the Commission to grant license, as MSEDCL being the applicant asking for merger had expressed its consent and the application of MSEDCL proposing such merger was considered in the public hearing, consultation etc.”

45. In the light of the above contention of the learned Senior Counsel for the Distribution Company and the Learned Counsel for the

Commission and also the observation made by the State Commission in the impugned order, we would now examine the provisions of the State Commission's General Conditions of license Regulation relating to this aspect:

“1.SHORT TITLE, EXTENT AND COMMENCEMENT

(1) These Regulations may be called the Maharashtra Electricity Regulatory Commission (General Conditions of Distribution License) Regulations, 2006

(2) These Regulations shall extend to the whole of the State of Maharashtra.

(3) These Regulations shall come into force from the date of their publication in the Official Gazette.

5. PROCEDURE FOR GRANT OF LICENCE

5.1 APPLICATION FOR GRANT OF LICENCE

5.1.1 An application for grant of license shall be made in the form and shall be accompanied by documents and information as may be stipulated by the Commission from time to time and which shall be available from the office of the Commission and / or on its internet website.

5.3 NOTICE OF APPLICATION FOR GRANT OF LICENCE

*5.3.1 An applicant shall publish a notice of his application for grant of license within seven (7) days from the date of intimation as provided in Regulation 5.2.2 in not less than two (2) daily English language newspapers and two (2) daily Marathi language **newspapers which are widely circulated in the proposed area of supply.***

5.3.2 A notice of application referred to in Regulation 5.3.1 shall contain the following particulars:

(a) *The applicant's name, and address of registered office and/or principal place of business;*

(b) Nature of license applied for and other salient features of the application;

.....

(d) The proposed area of supply and the number of consumers proposed to be served;

6. AMENDMENT OF LICENCE

6.1 *Where a distribution licensee has made an application under sub-section (1) of Section 18 of the Act proposing any alteration or modifications in his licence, the distribution licensee shall publish a notice of such application in not less than two (2) daily English language newspapers and two (2) daily Marathi language **newspapers which are widely circulated in the area of supply.***

6.2 *The notice as aforesaid shall be published within a period of seven (7) days from the date of submission of application for alteration or modifications and shall contain the following particulars:*

(a) *Name of the Distribution Licensee, and address of registered office and/or principal place of business;*

(b) Description of alteration or modifications for which application has been made to the Commission along with rationale and justifications for the same for such alteration or modifications of license;

(c) Summary details of persons likely to be affected thereby;

(d)

(e) *A notice of application for alteration or modifications shall contain a statement that any person having any*

objection with reference to the application as aforesaid may submit such objections to the Commission by a written intimation (six copies) addressed to the Secretary within thirty (30) days from the date of publication as aforesaid.

.....”

46. The reading of the above regulations would clearly indicate the procedure for invoking Section 18 is quite different from the procedure contemplated under Section 15 of the Act.
47. Firstly, public notice is required to be published in news papers widely circulated in the affected area of supply. Area of supply in case of fresh license is restricted to MPECS's area of supply i.e. five talcuas only. On the other hand, area of supply for amendment of existing license of Distribution Company covers whole of Maharashtra. With the amendment of existing license and merging of old area of supply with new area of supply, the tariff of consumers in the existing area of supply would get affected. Thus objections of the consumers of existing area of supply of Distribution Company were quite essential failing which the requirements of Section 18 cannot be said to have been met with.
48. Secondly, Regulation 6.2 (b) requires publication of **description of alteration or modifications for which application has been made to the Commission along with rationale and justifications for the same for such alteration or modifications of license** in the public notice. Relevant portion of

the Public Notice published by Distribution Company on 5th December, 2010 is reproduced below:

“Notice under Section 15 (2) of Electricity Act, 2003 for grant of distribution license.

.....

A notice is hereby issued under Section 15 (2) of Electricity Act 2003 inviting objections, if any. The particulars in respect of application are as below:

.....

Salient features of the Application:

MSEDCL has applied for the license to distribute electricity in the said area of MPECS supply against the EOL invited by the MERC as the license of MPECS is expiring on 31st January, 2011. MSEDCL has prepared a business plan for 5 years for the area as part of its application for the license and has requested for a license with no takeover of any liability of MPECS. The proposal is to takeover only the Fixed assets and the consumers deposits of MPECS after fair valuation and the same is to be adjusted against outstanding dues of MEPCS”.

49. Simple reading of the above notice would indicate that Distribution Company’s plan to merge the new license for MPECS’ area with old license for MSEB area had not been reflected anywhere in this notice. Mere reference to 5 year business plan as a part of application for fresh license cannot be said to have met the requirements of Regulation 6.2 (b) which categorically states that the notice for application for amendment or modification in the license under Section 18 of the Act shall

contain description of alteration or modifications for which application has been made to the Commission along with rationale and justifications for the same for such alterations or modifications of license.

50. In view of the above, it is evident that the amendment has been carried out in the present proceedings under Section 14 which does not empower amendment. Following factors would show that procedure for Amendment of license under Section 18 which is quite different from procedure for grant of license under Section 14 and 15:

- (a) No proceedings under Section 18 of the Act had been initiated at any time. Hence question of amending old license does not and cannot arise.
- (b) No application for amendment of license had been made by the Distribution Company and no fee for amendment of license specified by the State Commission in its Regulations had been paid.
- (c) No Public Notice under Section 18 of the Act for Amendment of Old license of Distribution Company was published by the Distribution Company.
- (d) Electricity Consumers situated in Distribution Company's OLD Licensed area were not informed of amendment which

entails them to bear burden of subsidizing Agricultural consumers in Mula Pravara's area of supply..

- (e) Affected persons were not heard. Distribution Company consumers were not given any opportunity to object or to be heard.

51. Section 18 of the Act is the only Section which confers powers to amend the license with regard to area. In this case, the same had not been followed. The said procedure is detailed below:

I Amendment by way of "Merger" would contemplate:

- (i) that there are two existing Licensed Areas of supply and Two distinct Licenses. Distribution Company had only one license at the time of merger and that did not relate to licensed area. In regard to second license, the State Commission had only decided to issue license in favour of Distribution Company (R-2) but the same had not been issued at the time of passing of the impugned Order.
- (ii) that Application is to be made by a Licensee seeking Amendment of an existing license in accordance with the State Commission's General Conditions of License.
- (iii) that Procedure prescribed under Section 18 of the Electricity Act 2003 is required to be followed: viz

Application is to be filed setting out facts, reasons including the public interest necessitating amendment, and prayers.

(II) Applicant pays prescribed Fees for instituting proceedings as per State Commission Regulations.

(III) Public Notices are to be issued under Section 18 (2) of the EA 2003.

52. In view of the above prescribed procedure, it is clearly established that the State Commission had not followed the said procedure laid down for the merger or amendment of the license under the provisions of the Act as well as the Regulations.

53. On the above aspect, the Learned Counsel for the Respondent, to substantiate their defence, has cited following two decisions:

(a) J K Steel Ltd Vs Union of India (1969) 2 SCR 481

(b) N.B. Sanjana Vs. Elphistone Spinning and Weaving (1971) (1) SCC 337

54. We have gone through these judgements. These judgements are based on legitimacy of exercise of power having a legitimate source. Section 14 which relates to grant of license and Section 18 which relates to amendments under the Act, 2003 are two separate and distinct jurisdiction relating to different subject matters and involve distinctively separate proceedings and powers exercised by the authority. In this case, the State

Commission has amended the license of the Distribution Company (R-2) under its jurisdiction under the power to grant license under Section 14 of the Act, 2003. This is not permissible under law.

55. On the other hand, the Learned Counsel for the Appellant cited (2009) 13 SCC 758 Swaran Singh Chand Vs. Punjab SEB wherein it is held that it is a settled law that where the statute prescribes a particular procedure, such procedure must be strictly followed. In this case, the State Commission treated the application filed by the R-2 under Section 14 and accordingly the State Commission issued public notice under Section 15 (5) only and not under Section 18 of the Act, 2003.
56. As indicated above, there is no material to substantiate the contention of the Respondent that the procedure under Section 18 had been followed and complied with in this case. Therefore, it has to be concluded that the order regarding the amendment of Distribution license for MSEB area of supply by merging it with MPEC's area of supply is violative of the provisions of the Act and Regulations and therefore liable to be set aside.
57. At this stage we would like to mention another related aspect of this issue which came up for during proceedings of this case. Under Section 14 of the act, the State Commission is empowered to grant distribution license for a specified area of supply. Term "Specified" has been defined in the Act as specified through

Regulations by appropriate Commission. Section 14 and 2(62) of the Act are reproduced below:

“2(62) “specified” means specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act;”

“14. Grant of licence.—The Appropriate Commission may, on an application made to it under section 15, grant a license 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 as may be specified in the licence:

.....”

58. The State Commission amended the existing license of Distribution Company through a quasi-judicial Order. The issue came up before us as to whether Regulations can be amended through a quasi-judicial order. The Learned Counsel for the State Commission and 2nd Respondent were asked to submit copy of license issued to Distribution license by the State Commission. Learned Counsel for R-2 informed that Distribution Company was deemed licensee under 5th proviso to Section 14 of the Act as such no fresh license was required to be issued under Electricity Act, 2003. Upon pointing out that the same State Commission had issued Specific Conditions of license under Section 16 of the Act specifying area of supply for other deemed licensees, under 1st proviso to section 14, viz., RInfra, Tata Power and BEST, why

the State Commission did not issue specific terms of license for Distribution Company specifying its area of license? There was no answer to this query.

59. Learned counsel for 2nd Respondent submitted that Distribution Company is a successor company of erstwhile Maharashtra State Electricity Board and therefore, its area of supply is same as that of the area of supply of MSEB. What was the area of supply of MSEB under the repealed Acts? Section 26 of 1948 Act gave powers of licensee under 1910 Act to the SEBs established under 1948 Act. Section 26 of 1948 Act read as under:

26. Board to have powers and obligations of licensee under Act 9 of 1910.—Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910, and this Act shall be deemed to be the license of the Board for the purposes of that Act:

60. Plain reading of above would reveal that MSEB had powers and obligations of licensee in respect of whole state. In other words, area of supply of MSEB was whole of Maharashtra. Both the learned counsel for the State Commission as well as for 2nd Respondent could not produce any material to show that while granting distribution license to Mula Pravara by state Government in 1971, its area of supply was deleted from the area of supply MSEB. There could be Natural offshoots of this proposition;

Firstly if MSEB's area of supply was not modified then MSEB and, by virtue of being MSEB's successor company, the Distribution Licensee already had license to supply power in MPECS' area of supply. It is to be pointed out there was no bar of having multiple licensees in the same area under 1910 Act. **In fact there was an explicit provision of 2nd license in same area of supply in form of Section 3(e) of 1910 Act which is quoted below:**

“3. Grant of licenses.—(1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any) 1[grant after consulting the State Electricity Board, a license to any person] to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy,

...

(e) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of license to another person within the same area of supply for a like purpose;”

Existing example of two licensees in the same area is Tata Power and Rlnfra supplying power in the same suburban areas of Mumbai.

- (a) Secondly MSEB's area of supply was modified by an executive order of the State Government. Would modifying area of supply of MSEB through an executive order would not amount to amendment of a provision of Act? Section 26 of 1948 Act equipped the State Electricity Boards with all the powers and obligations of a

licensee. Let us reproduce section 26 of 1948 Act for better understanding;

26. Board to have powers and obligations of licensee under Act 9 of 1910.—Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910, and this Act shall be deemed to be the license of the Board for the purposes of that Act:

As per Section 26 of 1948 Act, 1948 Act itself was license for the Boards. Thus any amendment to area of supply of a Board could be done only through amendment of license. Hence, amendment of area of supply by an executive order by the State Government would mean amendment of 1948 Act (license for Board) itself.

61. In view of our above observations, this issue has an important bearing on the case which has to be properly addressed by the State Commission. Accordingly, **the 2nd Issue** is answered in favour of the Appellant.
62. The **Third Issue** for our consideration is as follows: “whether the decision of the State Commission to direct the Appellant to handover its distribution assets to Maharashtra Distribution Company (R-2) thereby vesting the assets of the Appellant with

the Maharashtra Distribution Company (R-2) is legally valid or not?”

63. According to the Appellant, the State Commission's order in directing the distribution system of the Appellant to be transferred or vested to Maharashtra Distribution Company (R-2) is without authority of the law in as much as the distribution assets of a distributor cannot be ordered to be vested in another person except in accordance with the law. It is further contended that Sections 14 and 15 of the Act under which the proceedings were initiated by the State Commission do not empower the State Commission to direct vesting of the assets of any person in any other person.
64. On the other hand, the Learned Counsel for the Commission as well as the Distribution Company (R-2) have submitted that the State Commission have got implied powers under Section 22 of the Act to give such a direction. The Learned Counsel for the State Commission would submit that term “Vest” has wide connotation and does not mean transfer of the assets but State Commission vested these assets to Distribution Company (R-2) for operation only and observed that Appellant would be entitled for compensation for the same in due course of time and as such the said order cannot be said to be legal.
65. In the light of the rival contentions of the Learned Counsel for both the parties, we would now refer to relevant portion of the

impugned order relating to vesting of the assets of the Appellant with the R-2. The same is as follows:

“xii.. The electrical systems and associated assets of MPECS required for the distribution and retail supply of electricity need to be vested in the new licensee to enable it to maintain an uninterrupted supply of power to the electricity consumers. The assets forming part of the distribution system have been funded by the consumers through the tariff/charges paid to MPECS. There are also substantial money outstanding (arrears) from MPECS to MSEDCL.

xiii. In the circumstances it is just and appropriate that a direction is issued to MPECS to vest effective from 1st February 2011, 00:00 Hrs, the entire infrastructure of electricity distribution and “Power System” including the electrical system, sub-stations, overhead lines, service lines, offices and associated facilities like lands, buildings, works, material, stores and plants in the area of its operation, in MSEDCL, pending the adjustments of consideration for the above purpose in terms of orders to be passed by the Commission in due course. All the assets and the distribution network currently belonging to MPECS are permitted to be used by MSEDCL without any wheeling charge for the same.

xiv. Accordingly the MPECS is required to vest the undertaking of distribution to the new licensee.

*xv. Over the period of 40 years, MPECS has expanded the distribution network, it inherited from erstwhile MSEB. Now, as fresh Distribution license to MPECS is rejected by the Commission, there is no use of distribution network for MPECS. Therefore, in the interest of the consumers in MPECS area, the Commission directs MPECS, to hand over their complete distribution network and allied equipments and asset to MSEDCL. **MPECS will however***

be entitled to claim value for the assets handed over. MPECS may file a separate Petition before the Commission for deciding transfer value of their asset, with all relevant documentary evidence.” {Emphasis supplied}

66. The above observation would indicate that the direction had been issued for vesting of the assets with the R-2. The term ‘Vest’ has been defined in the Oxford Dictionary as go give legal right to the property. Thus, the State Commission by vesting the assets of the Appellant to R-2 have given legal right to the property of the assets of the Appellant. However, at the end of the paragraph, the State Commission has observed that Mula Pravara will be entitled to claim value for the assets handed over as compensation. Thus, the order of the State Commission is very clear indicating that the State Commission specifically directed the Appellant to handover its assets to the Distribution Company (R-2) with a liberty to claim compensation. So this is not mere vesting but directing to hand over the properties of the Appellant to the R-2 on payment of compensation.

67. The reading of the impugned order would make it evident that the State Commission intended both transfer and vesting of the property. The use of the term such as “Transfer Value” entitled to claim value of assets handed over and “no wheeling charges” to be paid would make it clear that the order did not contemplate mere vesting for the use but is virtually an order directing transfer of assets including the security deposits paid by the consumers

and this is diametrically opposite to concept of users without transfer of ownership.

68. The only provision for invoking power for acquisition and transfer of assets of a licensee are found in Section 20, 21 and 24 of the Act, 2003. The State Commission, while holding the proceedings under Section 14 and 15 of the Act is not empowered to invoke these Sections which deal with the transfer of assets.
69. Section 20 can be exercised only when a license has been revoked that too after the completion of an inquiry under Section 19 of the Act, 2003. Admittedly no inquiry had been ordered under Section 19 nor notice of revocation has been issued as contemplated under Section 19 (5) of the Act. Therefore, provisions of Section 20 would not apply to this case.
70. Similarly, Section 24 of the Act, 2003 empowers the State Commission to suspend the license and appoint an administrator to discharge the function of licensee. Within one year of appointment of administrator, the State Commission is supposed to either revoke the license or revoke the suspension. In this case neither the license has been suspended nor revoked. Therefore, Section 24 would also not apply in this case. Section 21 would apply only when utility is sold under Section 20 or 24. Provisions of Section 22 would come into play only when utility of a licensee could not be sold under section 20 or 24.

71. Thus, the Plain reading of Sections 20, 21 and 24 would indicate revocation of license under Section 19 is precondition for sale of utility of a licensee. Undisputedly the license of the Appellant had not been revoked. Therefore, its utility cannot be sold or vested on payment of compensation.

72. As correctly pointed out by the Learned Counsel for the Appellant it is a settled law that to hold the property is a constitutional right and a human right and the right to hold the property cannot be taken away except in accordance with the provisions of the statute or law. This preposition has been laid down by the Supreme Court in the following decisions:

- (a) N Padmamma Vs. S. Ramakrishna Reddy (2008) 15 SCC 517;
- (b) Lachhman Das Vs Jagatram & Ors (2007) 10 SCC 448;
- (c) Hindustan Times Vs State of UP (2003) 1 SCC 591;
- (d) Bishan Das & Ors Vs State of Punjab (1962) 2 SCR 69;

73. On the other hand, the Learned Counsel for the State Commission would submit that the word “vest” does not necessarily mean transfer of title and it is a settled law that the meaning of the word “vest” must necessarily take color from the context and the intention of its use. He has cited the following two judgements:

- (a) Fruit And Vegetable Merchant Union Vs. Delhi Improvement Trust...1857 SCR at page 11,15-16 and 17-18;
- (b) Ismail Faruqui Vs Union of India & Ors 1994 6 SCC 360 at 393,404-405,para 21 and 41;

74. The decisions cited by the State Commission would not apply to the present facts since in the present case, the power to vest the transfer of assets with another person are exercisable under Section 19, 20 and 24. As mentioned earlier, those provisions can be invoked only when the license has been suspended and revoked i.e. not the case here as the present proceedings is under Section 14 and 15 of the Act and not Under Section 19 of the Act, 2003.
75. Under these circumstances, the contention of the State Commission that the State Commission has not directed any change of ownership but it has only directed the handing over of the assets giving liberty to the Mula Pravara to file a separate petition before the State Commission for transfer value of the assets cannot be accepted.
76. Therefore, the directions which have been given by the State Commission directing the Appellant to transfer the assets to the Distribution Company (R-2) is not in accordance with the law and the same is liable to be set aside. Thus, the **3rd issue is also decided in favour of the Appellant.**

76. SUMMARY OF OUR FINDINGS

- I. Plain reading of the impugned order would make it clear that the public hearing on 14.1.2011 was held only for hearing comments/objections from the public**

and the same had also been clarified by the State Commission in its public notice dated 10.12.2010 that the final view in the matter would be taken only after hearing objections from the various stake holders. Only after the public hearing, the State Commission started comparing the offer made by the applicants namely the Appellant and the Respondent Company and concluded that the offer of the Appellant did not meet the full requirements on merits. After arriving at the conclusion that Appellant's application is liable to be rejected and before pronouncing their order rejecting the application of the Appellant, no opportunity of hearing was given to the Appellant with regard to the proposed decision to reject the application. Perusal of the State Commission's subsequent Orders on similar issue pronounced on 11.8.2011 would make it clear that the State Commission was aware of the requirements of Section 15 (6) and accordingly had provided the opportunity of being heard to all the applicants whose applications were liable to be rejected. Thus, the impugned order was passed on 27.1.2011 without complying with the provisions of Section 15 (6) but the same had been complied with in the subsequent orders dated 11.8.2011. Therefore, we are unable to accept the

contention of the Learned Counsel for the State Commission that the second hearing is not necessary. On the other hand, we are to state that the provisions of the Section 15 (6) (b) would clearly indicate that the State Commission, before passing a final order in regard to rejection of the State Commission has to communicate its intention to reject the application of the applicant for grant of license after explaining the grounds of the proposed rejection in order to enable the Applicant to establish that those grounds are not valid. Admittedly, in this case, requirements of Section 15 (b) (6) had not been met with. Therefore, the impugned order of the State Commission suffers from this infirmity and the same is liable to be set aside. Accordingly, the first issue is decided in the favour of the Appellant.

II. The reading of the Regulation 5 and 6 of State Commission's General Conditions of Supply Regulations, 2006 would clearly indicate the procedure for invoking Section 18 is quite different from the procedure as contemplated under Section 15 of the Act. Two major differences in these distinct procedures are: Firstly, public notice is required to be published in

news papers widely circulated in the affected area of supply. Area of supply in case of fresh license is restricted to MPECS's area of supply i.e. five talcuas only. On the other hand, area of supply for amendment of existing license of Distribution Company covers whole of Maharashtra. With the amendment of existing license and merging of old area of supply with new area of supply, the tariff of consumers in the existing area of supply could get affected. Thus, the objections of the consumers of existing area of supply of Distribution Company were essential failing which the requirements of Section 18 cannot be said to have been met with. Secondly, Regulation 6.2 (b) requires publication of description of alteration or modifications for which application has been made to the Commission along with rationale and justifications for the same for such alteration or modifications of license in the public notice. Simple reading of the public notice published by Distribution Company on 5.12.2010 would indicate that the Distribution Company's plan to merge the new license for MPECS' area with old license for MSEB area had not been reflected anywhere in this notice. Mere reference to 5 year business plan as a part of application for fresh license cannot be said to have met the requirements of Regulation 6.2 (b) which

categorically states that the notice for application for amendment or modification in the license under Section 18 of the Act shall contain description of alteration or modifications for which application has been made to the Commission along with rationale and justifications for the same for such alterations or modifications of license. It is clearly established that the State Commission had not followed the said procedure laid down for the merger or amendment of the license in the Act as well as the Regulations. There is no material to substantiate the contention of the Respondents that the procedure under Section 18 had been followed in this case. Therefore, it has to be concluded that the order regarding the amendment of Distribution license for MSEB area of supply by merging it with MPEC's area of supply is violative of the provisions of the Act and Regulations and therefore liable to be set aside. Being successor company of erstwhile MSEB, the Distribution Company is a deemed licensee under 5th proviso of Section 14 of the Act. Accordingly it inherited area of supply from MSEB. What was the area of supply of MSEB? Plain reading of Section 26 of 1948 Act would reveal that erstwhile MSEB had powers and obligations of licensee in respect of whole state. In other words, area

of supply of MSEB was whole of Maharashtra. Both the learned counsel for the State Commission as well as for 2nd Respondent could not produce any material to show that while granting distribution license to Mula Pravara by state Government in 1971, its area of supply was deleted from the area of supply MSEB. Natural offshoot of this proposition would be that if MSEB's area of supply was not modified then MSEB and, by virtue of being MSEB's successor company, the Distribution Licensee already had license to supply power in MPECS' area of supply. It is to be pointed out that there was no bar for having multiple licensees in the same area under 1910 Act. In fact there was an explicit provision of 2nd license in same area of supply in form of Section 3(e) of 1910 Act which is quoted below:

3. Grant of licenses.—(1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any) 1[grant after consulting the State Electricity Board, a license to any person] to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy,

...

...

(e) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the

grant of license to another person within the same area of supply for a like purpose;

Existing example of two licensees in the same area is Tata Power and Rlnfra supplying power in the same suburban areas of Mumbai. This issue which has the important bearing on this case has got to be properly addressed by the State Commission. Hence, the Second Issue also is decided in favour of the Appellant.

III. The contention of the State Commission that the State Commission has not directed any change of ownership but it has only directed the handing over of the assets giving liberty to the Mula Pravara to file a separate petition before the State Commission for compensation cannot be accepted. Therefore, the directions which have been given by the State Commission directing the Appellant to transfer the assets to the Distribution Company (R-2) is not in accordance with the law. Hence, this direction also is liable to be set aside. Thus, the 3rd issue is also decided in favour of the Appellant.

77. In view of our above findings we set aside the impugned order dated 27.1.2011 and remanded to the Commission with the direction to reconsider the application for license of the Appellant

and dispose of on merits in accordance with the provisions of the Act and its own General Conditions of Supply Regulations and with a further direction to consider for grant of license to both the parties by allowing them to operate in the same area.

78. The Appeal is allowed. However, there is no order as to Costs.

(V J Talwar)

Technical Member

Dated: 16th Dec, 2011

(Justice M. Karpaga Vinayagam)

Chairperson

REPORTABLE/NON-REPORTABLE

After pronouncement of judgment, the learned Counsel for the parties request for issuing of consequential directions with regard to the existing arrangements and the time frame. Accordingly, we direct the Commission that the process to be completed within three months from today and in the meantime, the existing arrangement may be continued subject to payment of charges to the Appellant to be decided by the Commission after hearing all the parties concerned.

(V J Talwar)

Technical Member

Dated: 16th Dec, 2011

(Justice M. Karpaga Vinayagam)

Chairperson