Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 61 of 2006

Dated this 18th day of August 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

The Municipal Corporation of Gr. Mumbai
Being Corporation and Local authority
Constituted and carrying on its functions
Under the Mumbai Municipal Act, 1888,
through the General Manager, BEST Under-
taking, having its Head Office at
BEST Bhavan, BEST Marg, Colaba Causeway,
Mumbai – 400 001.

... Appellant

Vesus

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

2. Mumbai Grahak Panchayat
Grahak Bhavan, Sant Dhyaneshwar Marg,
Behind Cooper hospital, Vile Parle, (W),
Mumbai – 400 056.

3. The Secretary
Ekta Mitra Mandal (Trust)
349/5, Kanya Sagar Society,
Ekta Vachanalaya Marg,
R.S.C. 36, Sector No. 3,
Charkop, Kandivali (W),
Mumbai – 400 067.

4. Adv. Sonu Shankar Pawar
Nominated Member – BMC
Ankur, 230/1, Sector 2,
Charkop, Kandivali (W)
Mumbai – 400 067.

5. Shri L. Vishwanathan,
Partner,
Amarchand & Mangaldas &

Suresh A. Shroff & Co.,
Peninsula Chambers,
Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400 013.

6. Shri A. R. Bapat
73, Lokmanya C.H.S.
Veer Savarkar Path
Thane (West) – 400062.

7. Shri Rakshpal Abrol,
President,
Bombay Small Scale Industries
Association, Madhu Compound,
2nd Floor, Sonawala Cross Road No.2,
Goregaon (E), Mumbai – 400 063. … Respondents

Counsel for the Appellant : Mr. G. E. Vahanvati, Solicitor General of India,
Mr. Ramji Srinivas, Ms. Shakun Sharma, Ms. Priyabrat Tripathy, Advocates

Counsel for the Respondents : Mr. Jayant Bhushan, Sr. Advocate,
Mr.Buddy A. Ranganadhan,
Mr. Saurabh Mishra

JUDGMENT

1. The above appeal has been preferred by Municipal Corporation of Greater Mumbai, a local authority, challenging the order of Maharashtra Electricity Regulatory Commission (herein after referred as MERC for brevity) dated 09.03.2006 in Case no. 4 of 2004.

2. The appellant has prayed for the following among other reliefs :

a) That this Hon'ble Tribunal be pleased to quash and set aside the impugned tariff order dated 09.03.2006.

b) That this Hon'ble Tribunal be pleased to determine the ARR of the Appellant as per the ARR submitted by the

Appellant to the MERC and issue a fresh tariff order fixing the tariff of the Appellant accordingly.

3. Heard the Learned Solicitor General appearing along with Mr. Ramji Srinivas, advocate for the appellant, Mr. Jayant Bhushan, Sr. Advocate along with Mr. Arijit Maitra and Mr.Buddy A. Ranganadhan Advocates for the first respondent, MERC. The Respondent No. 6 filed written submissions on three different dates, though he has not chosen to appear in person or through advocate.

4. According to the appellant, MERC committed a fundamental error in raising a doubt whether or not the appellant is a local authority, misread Section 51 of The Electricity Act 2003 and the relevant provisions of Mumbai Corporation Act 1888. It is also contended that MERC has come to an erroneous conclusion in concluding that electricity distribution division of the appellant cannot subsidise its transport division and business of transport division cannot be included as expenses in the ARR filed by the appellant. It is contended that in law and as has been the age old practice under the Bombay Municipal Corporation Act, 1888, the appellant is entitled to subsidise its transport business from the revenues of distribution business. It is further contended that MERC erred in disallowing additional depreciation and interest on internal fund claimed by the appellant, and such disallowances is contrary to The Electricity Act 2003 and Municipal Corporation Act 1888. The regulatory asset sought to be created for transport employees has been disallowed, which is an illegality. The direction issued to refund security deposit to the consumer, direction to issue monthly bill and many other miscellaneous items are contrary to the plain wordings of MERC (supply code and other conditions of supply) Regulations 2005 framed by the Commission.

5. It is contended that the directions to include the tax payable under Maharashtra Sale on Electricity in the tariff itself and the same shall not be shown separately in the bill is prima facie illegal. So also the direction to include the electricity duty in tariff is illegal. The direction to the appellant to maintain accounts in terms of The Companies Act 1956 in addition to the maintenance of accounts according to the Municipal Corporation Act is neither warranted nor called for nor it is legal to issue such a direction Apart from the above the learned counsel for the appellant also raised various contentions and grievances with respect to the following matters:

(1) introduction of BPL category,

(2) re-classification of categories consumers from 21 categories to 16 with respect to tariff

(3) direction to install electronic meters

(4) direction issued with respect to billing demand

(5) direction issued with respect to fixed charges to LF 1 & 2 consumer categories

(6) direction issued with respect to prompt payment discount to consumer (7) direction to collect interest at various rates after the due dates

(8) direction to levy delayed payment charges of 2% and

(9) direction to collect fixed demand charge of Rs. 300/= per KVA per month applicable to street lights. These nine items with respect to which the appellant has grievances apart from the appellant experiencing practical difficulties in implementing the same and prayed for appropriate directions or modifications or time extension for implementation.

6. Per contra, on behalf of MERC Mr. Jayant Bhushan, Sr. Advocate contended that none of the contentions advanced by the counsel for the appellant merits consideration, the various contentions advanced with respect to approval of annual revenue of the appellant and determination of tariff are devoid of merits and a total misconception. The interpretation placed on section 51 of Electricity Act by the learned counsel for appellant is erroneous and a total misconception. The foremost contention that the appellant should be allowed to subsidise the transport business from the income or earnings of the distribution business, and that that the appellant in no way be restricted from subsidizing the transport business by its electricity distribution business would mean a total exclusion of The Electricity Act 2003 to the appellant who is licensed to distribute electricity under The Act. Such is not the intention of the legislature. MERC while fixing the annual revenue of electricity distribution cannot take into consideration or include the transport business and such a contention will nugate the provisions of The Electricity Act 2003. It is also contended that if the appellants contentions are to be sustained it would mean that the Regulatory Commission has to fix the distribution tariff by taking into consideration of not only the distribution of electricity but also the running of transport services by the appellant Corporation. There could be no such business subsidy under the provisions of The Electricity Act 2003. The learned counsel placed reliance on the following pronouncements of the Supreme Court (i) 1955(1) SCR 483 Ram Narain Sons Ltd. vs. Asst. Commissioner of Sales Tax (ii) Dwarka Prasad vs. Dwaraka Saraf reported in A 1975 SC 1758 (iii) State of Punjab vs. Kailash Nath AIR 1989 SC 558 (iv) DORMER & others vs. New Castle – upon – Tyne Corporation reported in 1940 (2) K.B. 204 among other Pronouncements with respect to the construction to be placed on a

proviso. If such a contention advanced is to be sustained, it would amount to re-writing The Electricity Act 2003 and in particular section 61 & 62 and the entire provisions of the Act will be rendered nugatory.

7. The contention advanced in respect of direction to include levy of Maharashtra tax on sale of electricity and electricity duty is not sustainable. The contention that Regulatory Commission has imposed a discriminatory tariff is a misreading of the tariff order. The appellant is not entitled to claim additional depreciation nor interest on internal funds or any fund received by way of grant. The appellant is bound to refund the security deposit in terms of the supply code and the contention to the contra is without substance. The appellant is bound to maintain accounts as per the Companies Act for uniformity with other licensees. The appellant has not been rightly permitted to create a regulatory asset in respect of pay revisions for the transport employees alone and not in respect of electricity employees and the appellants' grievance in this respect is a misconception besides being imaginary. There is every justification to issue directions by the Commission and there is no illegality in it. The directions, including the date from which the tariff revision is to come into force are called for.

8. As already stated above the counsel appearing on either side made detailed submissions on two different days. The 6th respondent submitted its counter and written representations. On a consideration of the contents of appeal Memorandum, counter and reply statement and various contentions advanced by the counsel for the appellant and the 1st respondent, during the hearing we frame appropriate points for consideration. Before taking up the points, we

would be justified in expressing ourselves with respect to conduct and approach of the contesting Parties as reflected in the Tariff Order.

9. The following Points are framed for consideration in this appeal:-

I. Whether the appellant, who is a licensee to distribute, is a local authority as defined in Section 2(41) of The Electricity Act, 2003?

II. Whether the construction placed on Section 51 of The Electricity Act, 2003 by the MERC is sustainable?

III. Whether the appellant, a distribution licensee, could seek for fixation of its Annual Revenue Requirement including its transport business carried on by it and seek for fixation of tariff so as to subsidise its transport business in any way from its distribution business?

IV. Whether the approval of the Annual Revenue Requirement of the appellant for its electricity distribution business and determination of tariff by excluding the transport service run by the appellant by MERC is illegal and liable to be interfered?

V. Whether the appellant's claim that Bus transport service operated by it should be included in the Electricity Distribution Annual Revenue Requirement? Whether the business of transport could be subsidised from the revenues of electricity supply undertaken by the appellant?

VI. Whether the appellant is entitled to claim additional depreciation? Whether disallowance of additional depreciation is illegal and liable to be interfered?

VII. Whether the direction issued by MERC to the appellant to include the element of "tax on sale of electricity" as well as "electricity duty" in the tariff schedule is legally sustainable or liable to be interfered?

VIII. Whether the direction issued by the MERC to refund security deposit in excess of a month's average consumption with interest thereon is legally sustainable or liable to be interfered?

IX. Whether MERC has jurisdiction and authority to direct the DISCOM to levy Load Management Charge? Whether the Load Management Charge levied is penal in nature? Whether there could be a better Load Management System that could be implemented?

X. Whether the disallowance of interest by MERC on internal fund and the fund received by way of grant from the Government is illegal?

XI. Whether the direction issued by MERC to the appellant to maintain accounts in terms of the Indian Companies Act, 1956 in addition to maintenance of account under the Mumbai Municipal Corporation Act is warranted? Whether the direction is liable to be interfered?

XII. Whether refusal to allow Regulatory Asset to be created in respect of wage revision for the transport staff is illegal?

XIII. Whether direction to bill monthly as against the present bi-monthly billing is warranted? Whether such a direction is called for in terms of the supply code in force?

XIV. Whether the directions issued by MERC in respect of the following are liable to be interfered? If so, to what extent? To what relief, if any, in this respect?

a. Introduction of BPL category.

b. Re-classification of existing 1997 approved tariff of BEST.

c. Installation of electronic meters.

d. Additional fixed charges at Rs.100 per 10 KWH or part thereof.

e. Prompt payment discount.

f. Interest payment at varying rates after due dates.

g. Belated payment charges at 2% of the monthly bills.

h. Fixed demand charge Rs.300/KVA/month with respect to street lights.

XV. Whether the deficiency in the conduct of appellant and approach of MERC as reflected by the Tariff Order deserve to be commented?

XVI. To what relief the appellant is entitled to?

POINT No.XV

10. Before taking up the points I to XIV for consideration in this appeal, we would like to consider the fifteenth point and express ourselves with respect to recalcitrant attitude of the appellant before the MERC, the latches of MERC and its attempt to hound. The appellant being a distribution licensee is governed by the provisions of The Electricity Act, 2003, with respect to distribution of power within the area of its license. The appellant is bound to act in terms of the statutory provisions of The Electricity Act, 2003, rules framed there under and the Regulations framed by the MERC. Merely because the appellant is a local authority, it could neither claim any impunity nor it could claim any special privilege.

11. It may be that the appellant is not anxious for revision of distribution tariff, yet it is incumbent on the part of the appellant to file its Annual Revenue Requirement by furnishing all the particulars prescribed in part VII of The Electricity Act, 2003 as well as satisfying the requirements of the Tariff Regulations framed by the MERC. Even prior to The Electricity Act, 2003, the Regulatory Commission's Act was in force and, therefore, the appellant, being a local body, can neither plead ignorance nor claim any special privilege.

12. In the case on hand, MERC has called upon the appellant to file its Annual Revenue Requirement and also for determination of tariff in terms of part VII of the Act as well as Tariff Regulations. Yet the appellant was dragging its feet presumably because it was under a misconception that its tariff is to be finalized by the authorities under The Mumbai Municipal Corporation Act, 1888 and not under The Electricity Act, 2003.

13. The provisions of the Mumbai Municipal Corporation Act, only govern various authorities as to how they have to exercise powers including their statutory obligations in respect of duties enjoined upon them by the said Statute. Section 460 Z to 460 NN of The Mumbai Municipal Corporation Act, 1888 provide for Revenue and Expenditure, creation of special fund, disposal of balances, payment to municipal fund, disposal of surplus balance of revenue, maintenance of accounts, preparation of Annual Administration Report and Statement of Accounts relating to Brihan Mumbai Electric Supply and Transport Undertaking.

14. It's true that the Brihan Mumbai Electric Supply and Transport Committee exercise control over the said business of the electricity supply and transport, but that does not mean that the said Committee is the licensing authority or the authority which has to exercise the statutory functions of The Electricity Act, 2003 or under the repealed The Electricity (Supply) Act, 1948 or The Indian Electricity Act, 1910.

15. In terms of Chapter XVI A – "The Brihan Mumbai Electric Supply and Transport Undertaking – the operation of the undertaking and the

construction and maintenance of works", the management of the undertaking is subject to the superintendence of the said Brihan Mumbai Electric Supply and Transport Committee. The above Provisions and Section 460 Y, have been incorporated as to how the General Manager and the Committee has to act with respect to The Electric Supply and Transport Undertaking. The said authorities are to act in terms of that Chapter and are answerable to the Municipal Corporation.

16. Section 460 A(1)(e) mandates that exercise any of the powers of the licensee under The Indian Electricity Act, 1910 or any other enactment, for the time being in force relating to supply of electric energy, are to be carried out in terms of the said provisions of the Act. Section 460 I also provides that the charges for the supply of electrical energy is to be fixed subject to the provisions of any enactment for the time being in force and of any license granted to the Corporation with respect to its Electrical Distribution Undertaking.

17. As of today, the provisions of The Electricity Act, 2003 govern the entire Distribution Undertaking with respect to the distribution business and there is no escape for the appellant except to comply with the statutory requirements prescribed in this behalf.

18. The appellant was under a misconception at the beginning on receipt of notice from the MERC and, therefore, it was recalcitrant and was gaining time under some pretext or other. Tariff fixation is a time-bound action and if there is a delay, the appellant alone has to blame itself. The appellant, being a local body, sought to advance excuses as if it is entitled to a special treatment. On the other hand, the appellant, a public authority, enjoined with the public function having

men and materials at its disposal, should have promptly taken action and set an example to others. The appellant has a sufficient number of engineering staff in its roll, apart from law officer and legal assistants, who cannot plead ignorance of the enactment which govern the electricity supply, distribution and retail sale.

19. We are also at pains to point out that MERC has allowed a long rope to the appellant. Having allowed such a long rope, MERC, presumably to exercise effective control, has sought to introduce measures abruptly and without giving sufficient time for the Corporation. The Corporation may take time to move, but it should not have been allowed to be under slumber. When the Corporation was not extending cooperation, as detailed in the counter, MERC is not without powers. MERC should have initiated action under The Electricity Act, 2003, invoking Section 122, 129 as well as Part IV of the Act, as the licensing authority.

20. These aspects are pointed out so that the appellant as well as the MERC may take a re-look of their functions and act strictly in accordance with the provisions of The Electricity Act, 2003 and the Regulations framed thereunder to keep the time schedule. Though MERC has done the best exercise in the tariff fixation and is progressive in its approach, we have placed on record the above observation without meaning to reflect on MERC or any one but with a desire that MERC may further improve its enforcement Power.

<u>POINT NO.I</u>

21. Taking up the first point for consideration, it is fairly admitted by either side that the license to distribute electricity stands in the name of the Brihan Mumbai Electric Supply and Transport Undertaking of

the Mumbai Municipal Corporation, which is constituted under and governed by the Provisions of The Mumbai Municipal Corporation Act, 1888, as amended from time to time.

Section 2(41) of The Electricity Act, 2003 reads thus:

> *"2(41) "Local authority" means any Nagar Panchayat, Municipal Council, Municipal Corporation, Panchayat constituted at the village, intermediate and district levels, body of port commissioners or other authority legally entitled to, or entrusted by the Union or any State Government with, the control or management of any area or local fund"*

22. The Mumbai Municipal Corporation is a local authority as defined in section 2(41) of The Electricity Act, 2003. Section 4 of the Mumbai Municipal Corporation Act prescribes the municipal authorities charged with carrying out the Provisions of the said Act. Section 4(1)(i) provides that General Manager of the Brihan Mumbai Electricity Supply and Transport Undertaking is one of the municipal authorities charged with carrying out the provisions of the said enactment. The license as already pointed out stands in the name of Brihan Mumbai Electric Supply and Transport Undertaking, which is wholly owned, controlled and carried on by the Mumbai Municipal Corporation. The Regulatory Commission, as complained by the appellant, has not rendered a definite finding in this respect.

23. The learned Solicitor General contended that the appellant, who is the Distribution Licensee, is a local authority, as defined in Section 2(41) of The Electricity Act, 2003, while comfortably referring to the provisions of the Mumbai Municipal Corporation Act, 1988 as well as the distribution license granted in its favour under the repealed enactments and renewed from time to time. At this juncture this Appellate Tribunal posed a question to Mr. Jayant Bhusan, the

learned senior counsel, appearing for the first respondent – MERC. The learned senior counsel appearing for the first respondent fairly admitted that the appellant is a "local authority" as defined in Section 2(41) and the said claim of the appellant is not in controversy. In the light of the fair stand taken by the contesting respondent, it is not necessary to examine this point any further.

24. In the circumstance, we hold that the appellant is a local authority as defined in Section 2(41) of The Electricity Act, 2003 and it is the holder of the license to distribute Electricity within the area set out in the license. The first point is answered accordingly in favour of the appellant.

POINTS II, III, IV & V

25. These four Points could be considered together as the discussions may overlap each other. In fact all the said four points relate to one and the same substantial issue canvassed in this appeal. According to the learned counsel for the appellant, nothing in Section 51 of The Electricity Act, 2003 applies to the appellant, a local body, and, therefore, it is entitled to include its transport business in the Annual Revenue Requirement filed by the appellant before the MERC, that the electricity distribution business could be made to subsidise the transport business, where the appellant is incurring loss continuously. The appellant falling under the last Proviso to Section 51, being local authority, which carried on the business of distribution of electricity even before the commencement of The Electricity Act, 2003, it is contended that there is no impediment for the appellant subsidizing its transport business and clubbing the said two business for all purposes. The learned Solicitor General appearing for the appellant, who argued these points, took us through

the provisions of the Section 51 as well as the provisions of The Mumbai Municipal Corporation Act, 1880. The learned Solicitor General contended that in the light of the last of the Provisos appearing in Section 51, the rigor of Section 51 has no application to the appellant and the appellant could subsidise its transport business from the electricity distribution business carried on by it.

26. Mr. G.E. Wahan Wati, the learned Solicitor General, submitted written arguments which reads thus:-

> *"The scheme of the Act is that distribution companies should not do any other business. Section 51 however, enables the distribution companies to carry on any other business but imposes three restrictions:-"*
>
> *A) That it cannot undertake such transactions without prior intimation of the appropriate commission.*
> *B) That the profits of the other business should be used for wheeling charges (First Proviso).*
> *C) Separate accounts have to be maintained and the losses of the other business cannot be made up from the distribution business. (Second Proviso).*
>
> *Therefore, the Legislature clearly intended to specifically make provisions for distribution companies to carry on another business. If, however, other provisions of the Act (as is sought to be contended by MERC) already contain such prohibitions, then the Second Proviso to Section 51 was unnecessary.*
>
> *Therefore, when Third Proviso exempts a local authority from the application of the whole section, it has the effect of liberating it from all the restrictions, namely, the right of a local authority to carry on other business and the right to subsidise the other business from the distribution business.*
>
> *To subject a local authority to a restriction from which it has been freed from (by the Third Proviso) by resorting to another section, which would operate in general terms and by implication – as against a specific provision, would defeat the purpose of the Third Proviso and render it meaningless.*

It is the submission of the Appellant that the Third Proviso does not only have the effect of exempting the local authority from the rigors of Section 51, the Third Proviso has the effect of enabling a local authority to do what otherwise it could not do by reason of the Second Proviso. The effect of the Third Proviso is not negative. It has positive ramifications namely permitting local authorities, which stand on a special footing, to carry on other businesses and subsidise them through the distribution business.

The fact that this is restricted to local authorities is significant because local authorities are authorities constituted under statutes and for social obligations."

27. Per contra, Mr. Jayant Bhusan, learned senior counsel appearing for MERC, contended that the construction placed on Section 51 and the Provisos appended to the said Section is a misconception and if such an interpretation is placed, as sought to be advanced by the appellant, the very provisions of The Electricity Act, 2003 will be rendered otiose and nugatory. The learned counsel for the first respondent drew the attention of this Appellate Tribunal to the various chapters in the Act and contended that The Electricity Act, 2003, is a regulatory enactment which regulates the generation, transmission and distribution of electricity as well as fixation of tariff for each one of such functions. The appellant being a distribution licensee of electricity has to file its Annual Revenue Requirement of the electricity distribution licensee and Regulatory Commission is to determine the tariff for the distribution by the appellant – licensee. MERC has no jurisdiction with respect to the rate of fares to be paid by the bus passengers. The provisions of The Motor Vehicles Act apply to the fixation of the fare to be paid by the passengers for the transport service operated by the Appellant Corporation.

28. The Appellant Corporation has many functions and with respect to the distribution of electricity, its function or business as a distribution licensee has to be dissociated with any other business or functions of the local body, lest it will not be a fixation of distribution tariff. The provisions of the Act and, in particular, Section 61, 62 and 64 provide for determination of tariff by the Regulations framed under Section 61. The distribution business by a licensee, it is pointed out in terms of 2003 Act, has to be carried on. The licensed business of distribution of electricity is to be conducted on commercial principles and methodologies to encourage competition, efficient, economical use of resource, good performance and optimum investments besides safeguarding the consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner, the said parameters which the appellant as a distribution licensee has to follow. MERC has to follow the said specifications and standards in fixing the tariff and the tariff should progressively reflect the cost of supply of electricity. If the transport service is to be clubbed, as sought to be contended by the appellant, the same will defeat the very provisions of The Electricity Act, 2003 and in particular Section 61, 62 and 64 of the said Act, as well as the Regulations framed there-under.

29. Both the learned counsel sought to advance their contentions while placing reliance on Section 51 and in particular to the Provisos in the said Section. The learned Solicitor General appearing for the appellant while referring to the Mumbai Municipal Corporation Act, 1888 and the age old tradition of the distribution business taking care of the transport business, as both being under the control of the same authority, the budget being approved by the Municipal Corporation Council and both the business serving the residents of Mumbai Corporation area. It is contended that the restrictions, if any,

imposed by Section 51 has no application to the appellant, an existing licensee engaged in the Transport business on the date of commencement of 2003 Act. According to the learned counsel, when Section 51 itself has no application to the appellant in terms of the last of the Provisos to the said Section, it follows that there could be no bar for the electricity distribution business subsidizing the passenger transport business conducted by the Appellant Corporation. The MERC has rejected this contention and the learned counsel appearing for the first respondent, MERC, vehemently contested the arguments advanced by the learned Solicitor General before us by placing reliance on various pronouncements.

30. The counsel on either side, referred to various pronouncements of the Supreme Court as to how the Proviso to Section 51 are to be interpreted.

31. Section 51 relates to the distribution licensees while Section 41 of the Act relates to transmission licensees. Though Section 41 has no application to the present appeal, it will be useful to refer to the said Section 41 apart from Section 51 of the 2003 Act. Section 41 of The Electricity Act, 2003 reads thus:-

> *" 41. Other business of transmission licensee – A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilization of its assets:*
>
> *Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilized for reducing its charges for transmission and wheeling:*
>
> *Provided further that the transmission licensee shall maintain separate accounts for each such business undertaking*

to ensure that transmission business neither subsidies in any way to support such business:

Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity."

Section 51 reads thus:

"51. OTHER BUSINESS OF DISTRIBUTION LICENSEES – A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilized for reducing its charges for wheeling:

Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business:

Provided also that nothing contained in this section shall apply to a local authority engaged, before the commencement of this Act, in the business of distribution of electricity."

32. Section 41 enables a transmission licensee to engage in any business for optimum utilization of its assets with prior intimation to the Appropriate Commission. There are three Provisos appended to Section 41 and the said Provisos impose conditions with respect to other businesses which a transmission licensee may carry on after intimating the Appropriate Commission.

33. Section 51 of the 2003 Act is an enabling provision, which enables a distribution licensee to engage in any other business for optimum utilization of its assets with prior intimation. The only difference between Section 41 and 51 is in respect of the last of the Provisos

appearing in the said two Sections apart from their applicability to "transmission licensee" and "distribution licensee" respectively.

34. Section 51 is just an enabling provision which enables a distribution licensee to engage in any other business for optimum utilization of its assets and such engagement just requires a prior intimation to the Appropriate Commission. For convenience we refer the Provisos as First, Second and Last Proviso to Section 51.

35. Section 51 which enables the distribution licensee to engage in any other business mandates that such licensee shall utilize a proportion of the revenues derived from such business for reducing the charges for wheeling payable by the distribution licensee. That apart, a distribution licensee is mandated to maintain separate accounts for each such business undertaking to ensure that other business neither subsidized in any way by distribution business nor the licensee encumbers its distribution assets in any way to support the business other than distribution. The First and Second Proviso comes into operation when a distribution licensee, after prior intimation to the Appropriate Commission, engages itself in any other business for optimum utilization of its assets and not otherwise. The first two Provisos thus imposed restriction on a distribution licensee, if it opts to carry on or engage in any other business for optimum utilization of its assets. Thus there is no quarrel with respect to the First and Second Proviso appearing in Section 51.

36. The last of the Provisos is the subject matter of controversy in this appeal. It is the contention of the counsel for the appellant that when Section 51 is excluded by the last of the Provisos to a local authority, appellant could continue and always engage in distribution and

transport after the commencement of the 2003 Act. It follows as a corollary that the appellant, a local authority, could very well subsidise the transport by its distribution business as was hitherto done by the appellant Corporation. Per contra, it is contended that after coming into force of the 2003 Act, it is not open to the appellant, a distribution licensee, to subsidise or club any other business with the business of distribution of electricity by the appellant.

37. The last of the Provisos appearing in Section 51, according to the learned counsel for appellant, governs and the appellant is exempted from Section 51 and first two Provisos. In other words, it is contended that the Appellant Corporation could very well subsidise its transport business and club the revenues of transport and electricity business together as has been practiced hitherto before and seek for tariff determination.

38. The Mumbai Municipal Corporation Act, for administrative convenience, has clubbed the transport business as well as electricity distribution business together as one of the municipal authorities under the control of a General Manager. This is because at earlier stage electricity was utilized and connected with tramways. Before the commencement of The Electricity Act, 2003, there was no embargo as provided in Section 51. Neither The Electricity Regulatory Commission's Act nor The Electricity (Supply) Act had identical Provision.

39. It is admitted that the electricity distribution business is confined to the municipal territorial limits of the Appellant Corporation, while the transport undertaking covers a vast area and beyond the territorial limits of the Municipal Corporation. The consumers of electricity who

are served by the appellant is only a section of the travelling public, while the transport service serves not only a section of residents of Bombay Corporation but also Greater Bombay and also travelling public from Suburbs and moufsil areas. There could be no equation with respect to the public who are served by the distribution licensee and who are served by a transport undertaking. All the consumers are not users of the transport undertaking. We need not dwell in this respect any longer.

40. The object of The Electricity Act, 2003 and, in particular, Section 61, 62, 64 is clear and the said provisions provides for fixation of a tariff based on Annual Revenue Requirement of a distribution licensee, who carries on the business of distribution. The criteria, the parameters and the factors which are to be taken into consideration for fixation of consumer tariff are enumerated in Section 61. Section 62 enables the Regulatory Commission to determine the tariff in accordance with the provisions of the Act. Sub Section (2) of Section 62 enables an appropriate Commission to require a licensee to furnish separate details in respect of distribution business, which are factored and go in for determination of tariff. There are certain restrictions on regulatory measures and mechanism which are inbuilt in Section 61 as well as Section 62, based upon which provision, tariff is required to be determined by the Regulatory Commission under Section 64 of the Act.

41. The fundamental misconception which the appellant has been nourishing as to subsidy has to be pointed out here and now. Section 65 of the Electricity Act, 2003 provides for subsidy by State Government to any consumer or class of consumers. A State Government may require grant of subsidy to any consumer or class of

consumers in the tariff to be determined by the Commission under Section 62, which subsidy amount the State Government has to pay in advance in such a manner as may be specified.

42. In contrast, Section 51 of the Act forbids a distribution licensee from subsidizing its other business, which it carries on after intimating The Regulatory Commission, from its electricity distribution business. The subsidy which Second Proviso to Section 51 prohibits is, the electricity distribution business subsidizing any other business of a distribution licensee which it may carry on after intimating the Appropriate Commission. This is not a subsidy by Government contemplated in Section 65 of the Act.

43. Substantive arguments were advanced with respect to the interpretation to be placed on Section 51 and the last of the Provisos to Section 51. Section 51 of the Act runs thus:-

> *"51. OTHER BUSINESSES OF DISTRIBUTION LICENSEES - A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:*
>
> *Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilized for reducing its charges for wheeling:*
>
> *Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business.*
>
> *Provided also that nothing contained in this section shall apply to a local authority engaged, before the commencement of this Act, in the business of distribution of electricity."*

44. It is settled Principle of interpretation that no provision or word in a Statute has to be read in isolation. The Statute has to be read as a whole. The Statute is a edict of Legislature. It is also the settled law, legal Principle, that no words or expressions used in any Statute can be said to be redundant or superfluous. In matters of interpretation of Statutory Provisions one should not concentrate too much on one word and pay too little attention to other words. Every provision and every word must be looked at generally and in the context in which it is used and not in isolation, as has been held in *Grasim Industries vs. Collector of Customs, (2002) 4 SCC 297.*

45. In *CIT vs. Teja Singh reported in AIR 1959 SC 352*, the Supreme Court warned that a construction failing to achieve the legislative object is bad and shall be avoided, on the principle expressed in the maxim, "ut res magis valet quam perate". In the said pronouncement, it has been held thus:-

> *"Ut res magis valeat quam pereat – Construction failing to achieve legislative object is bad*
>
> *A construction signally failing the legislative object must, if that is possible, be avoided, on the principle expressed in the maxim, "ut res magis valet quam pereat." Vide Curtis v. Stovin, (1889) 22 QBD 513 and in particular, the following observations of Fry, L. J. at p. 519:*
>
> *"The only alternative construction offered to us would lead to this result, that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect."*
>
> *Vide also Craies on Statute Law, page 90 and Maxwell on The Interpretation of Statutes, Tenth Edn., p.236-237:*

> *"A statute is designed", observed Lord Dunedin in Whitney v. Commrs. Of Inland Revenue, 1925-10 Tax Cas 88 at p.110, " to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."*

46. On the Last of the Provisos arguments were advanced by either side MUDHOLKAR, J., in Hindustan Ideal Insurance Co. Ltd. vs. LIC of India, AIR 1963 SC 1083 ruled thus:-

> *"There is no doubt that where the main is clear its effect cannot be cut down by the proviso. But where it is not clear, the proviso, which cannot be presumed to be a surplusage can properly be looked into to ascertain the meaning and scope of the main provision."*

47. No court is justified nor it is well founded to read a proviso as provided something by way of an addandum or as dealing with a subject not covered by main enactment or as stating general rule as distinguished from an exception or qualification is ordinarily for into the proper function of a proviso. In *S.M.K.R Meyappa Chetty v. S.n. Subramanian Chetty (1916) 43 IA 113, p.122, 35 IC 323, p.326 (Privy Council) Lord Herschell,* pointed out the when a proviso has been added to allay fears, such proviso has no effect whatsoever on the enactment and cannot be relied on as containing operative areas.

> *"I am satisfied that many instances might be given where provisos could be found in legislation that are meaningless because they have been put in to ally fears when those fears were absolutely unfounded and no proviso at all was necessary to protect the persons at whose instance they were inserted." (West Derby Union v. Metropolitan Life Assurance Society, (1897) AC 647, p.656 (HL). Se further Director of Public Prosecutions v. Good Child, (1978) 2 All ER 161, p.165 (HL). In such cases the proviso has no effect whatsoever on the enactment and "cannot be relied on as controlling the operative words." (S.M.K.R.*

Meyappa Chetty v. S.N. Subramanian Chetty, (1916) 43 IA 113, p. 122: 35 IC 323, p. 326 (PC).”(emphasis supplied)

48. In *Ali M.K. vs. State of Kerala (2003) 11 SCC p.632*, Arjit Pasayat J. speaking for the Bench held thus:-

Vol. XI, (2003) 11 SCC (Page 637):

“10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey [(1880) 5 QBD 170: 42 LT 128] (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha AIR 1961 SC 1596 and Calcutta Tramways Co. Ltd. v. Corpn. Of Calcutta AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. “If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso. …” said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. 1897 AC 647: 66 LJ Ch 726: 77 LT 284 (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See A.N. Sehgal v. Raje Ram Sheoran 1992 Supp (1) SCC 304: 1993 SCC (L&S) 675: (1993) 24 ATC 559: AIR 1991 SC 1406, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal (1991) 3 SCC 442: AIR 1991 SC 1538 and Kerala State Housing Board v. Ramapriya Hotels (P) Ltd. (1994) 5 SCC 672]

“This word (proviso) hath diverse operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant.” (Coke upon Littleton 18th Edn., p. 146.)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails …. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole." (Per Lord Wrenbury in Forbes v. Git (1922) I AC 256: 1921 All ER Rep Ext 770: 126 LT 616 (PC)."

49. In *Balachandra Anantrao Rakvi vs. Ramchandra Tukaram (2001) 8 SCC p.6 616*, the Hon'ble Supreme Court laid down as to how the proviso is to be understand. It is held thus :-

"The correct way to understand a proviso is to read it in the context and not in isolation. We may with advantage refer to the following observations, L.J. in R.v. Dibdin 1910 Probate 57: 79 LJ KB 517: 101 LT 722 (CA).

"The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The courts, as, for instance, in Partington, ex p (1844) 6 QB 649: 115 ER 244), Brocklebank, Re (1889) 23 QBD 461: 58 LJ QB 375: 61 LT 543 (CA) and Hill v. East and West India Dock Co. (1884) 9 AC 448: 53 LJ Ch 842: 51 LT 163 (HL) have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in the proviso."

50. In *Babulal Nagar vs. Shree Synthetics Ltd. (1984) Supplement. SCC p.128*, the Hon'ble Supreme Court held thus:-

"*Proviso does cut down the ambit of the main provision but it cannot be interpreted to denude the main provision of any efficacy and reduce it to a paper provision."*

51. In *A.N. Sehgal vs. Raje Ram Sheoran reported in (1992) Supplement (!) SCC 304*, the Hon'ble Supreme Court held thus:-

> *"14. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms.*
>
> *"15. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect."*

52. In *Kihoto Hollohan vs. Zachillhu reported in (1992) Supplement (2) SCC p.651*, the Hon'ble Supreme Court laid down thus:-

> "*It is settled rule of statutory construction that "the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case" and that where "the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms" [See: Madras & Southern Mahratta Railway Company Ltd. v. Bezwada Municipality (1944) 71 IA 113, 122: AIR 1944 PC 71: 48 CWN 618, CIT v. Indo-Mercantile Bank Ltd. 1959 Supp 2 SCR 256, 266: AIR 1959 SC 713: (1959) 36 ITR 1]"*

53. In *Dwarka Prasad vs. Dwarka Das Saraf (1976) 1 SCC p.651*, the Hon'ble Supreme Court ruled thus:-

> *"The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 AC 544). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.*
>
> *The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.*
>
> *The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (**Maxwell on Interpretation of Statutes, 10th Edn., p. 162**)"*

54. We need not multiply citations though the counsel referred to the other pronouncements.

55. In the light of the above pronouncements, we are of the considered view that the last of the Provisos appearing in Section 51 in no way enables the Appellant Corporation to subsidise its any other business from the electricity business. If such a construction is to be placed, as contended by the counsel for the appellant, then substantive

provisions in The Electricity Act, 2003 including Section 61, 62, 64 will get excluded. As a result of this there could be no fixation of tariff with respect to electricity distribution to the consumers of electricity. If such a contention is to be sustained, the electricity business has to bear the loss of other departments or sections including transport business carried on by the Appellant Corporation. Such is not object of either the enactment as a whole or Section 51 or its Provisions. This will lead to a position as if the entire Act has no application to Bombay Municipal Corporation – electricity distribution business. Thus by a side wind appellant may be allowed to exclude substantive Provisions of the entire Electricity Act, 2003. This is not and cannot be the object and that is not the legislative mandate. The last of the Provisos has to be read and confined to the main Section 51 alone and not to the first two Provisos appearing in Section 51. Even so it follows that the appellant, who is already carrying on the business of transport, may continue to carry on the business. The words " nothing contained in this section apply to a local authority" appearing in the last of the Provisos would take in the main Section 51 and it has to be confined to the main Section alone and not to the other two Provisos which impose certain conditions in respect of new business enabled under Section 51. Concedingly, the appellant, a local authority, has been carrying on the business of transportation apart from distribution and to continue such business, no intimation is required. This is the only effect of last of the Provisos in Section 51 and nothing further or nothing less.

56. In the considered view of this Tribunal, the appellant may continue to carry on the transport business in addition to the distribution of electricity as a local authority engaged in such businesses. Yet that will not enable the appellant or authorize electricity business to

subsidise the transport business nor it could support the said transport business or any other business carried by the appellant. If the contention advanced on behalf of the appellant is to be sustained, it would result in excluding the entire distribution of the Appellant Corporation from the provisions of The Electricity act, 2003, which is not the intendment of the Legislature. The interpretation advanced on behalf of the appellant cannot be sustained.

57. In the light of the above discussions and in the light of the Pronouncements referred, we hold that the construction placed on Section 51 of The Electricity Act by MERC is sustainable. Consequenlty, points 3, 4 and 5 are answered against the appellant and in favour of the first respondent.

58. However, there is no legal impediment for the Appellant Corporation utilizing the profits or surplus income from the electricity distribution business for the purpose of Corporation or for the purpose of any one or more its business including the transport business, which it has been carrying on like any other entrepreneur or a corporate body. It is also not in dispute under the Mumbai City Municipal Corporation Act, the transport business and the electricity business has been considered as one unit for all purposes of finance and management. Hence, any profit or surplus income which the Appellant Corporation could derive from its electricity business could very well be used for transport business. We make it clear that there could be no consolidation of the revenues of electricity business with the transport business and separate accounts have to be maintained for the two businesses.

POINT NO.VI

59. Taking up 6th Point, there is no controversy that depreciation has been allowed by MERC in terms of the Statutory provisions of The Electricity Act, 2003 and the Tariff Regulations framed there under. The grievance of the appellant is MERC ought to have allowed additional depreciation, which the appellant has been claiming and enjoying under the provisions of the Mumbai Municipal Corporation Act, 1888. It may be that the Mumbai Municipal Corporation Act allows additional depreciation with respect to the electricity distribution but MERC Tariff Regulation which governs the tariff fixation as well as approval of Annual Revenue requirement nowhere allows additional depreciation. In terms of Regulation 76.4.1., the distribution licensee shall be permitted to recover depreciation on the value of fixed assets used in the distribution business and compute in the manner prescribed there under. Regulation 76.4.1 nowhere provides for additional depreciation. Therefore, MERC cannot be faulted for disallowing additional depreciation. We do not find any reason to interfere with the conclusion of MERC in this respect. The appellant cannot claim additional depreciation though such additional depreciation it could claim under the Mumbai Municipal Corporation Act. The Electricity Act, 2003 and the Tariff Regulations alone govern and, therefore, disallowance of additional depreciation by MERC is not liable to be interfered. This point is answered against the appellant.

POINT NO.VII

60. Taking up the Point 7, in our view the direction issued by MERC to include the element of tax on sale of electricity as well as electricity duty in the Tariff Schedule is per se illegal and it is nothing but a misconception on the part of the MERC. Though the learned senior counsel appearing for MERC sought to support the direction of MERC, we find there is merit in the submission advanced by Mr. Ramji

Sriniwasan, learned counsel appearing for the appellant. In this respect, we have to take note of the provisions of the two enactments, namely, The Maharashtra Tax on Sale of Electricity Act, 1963 and The Bombay Electricity Duty Act, 1958.

61. The Maharashtra Tax on Sale of Electricity Act, 1963 (Maharashtra Act No.XXI of 1963) is an Act providing for levy of tax on sale of electricity in the said State. In terms of the charging section, tax shall be levied and paid at such rate as may be specified by the State government in respect of sale of electricity to consumer by a power utility. The appellant is a power utility, as defined in Section 2(c) of the said Act. This position is not in dispute. The appellant, in terms of Section 4 of the said Act, is bound to collect and pay to the State Government the amount of tax payable under the Act. The appellant being a utility is required to keep books of accounts and submit returns in the forms prescribed. Section 7A of the Act provides that no tax shall be levied on the consumption or sale of energy which is consumed by the Government of India or sold to the Government of India for consumption, consumed in the construction, maintenance or operation of any railway. Section 11 of the Act provides for 'Penalties', Section 12 of the Act provides for 'Offences'. Under Section 13 rules have been framed. A perusal of the provisions of the Act makes it obligatory on the part of the appellant to collect tax, as notified in respect of sales of electricity to a consumer as specified by the State Government. The Act requires the utility to keep records, books of accounts, file returns. Being a tax on sale of electricity to consumer, this has to be shown as a separate item and it cannot be mixed or clubbed with the tariff, as directed by MERC. The entire tax collected goes to the coffers of the State Government and the amount has to be deposited to the credit of a fund and proceeds to be credited to the

State Electricity Fund. Tax on sale of electricity to consumer being an element of tax has to be levied by the utility, namely, the licensee. Further, as rightly pointed out by the counsel for the appellant, if the element of tax of sale of electricity is to be clubbed with the tariff, then the Railways, Central Government and alike, who are exempted, will be indirectly mulcted with the said tax, which is an illegality. There is force in this submission.

62. The Bombay Electricity Duty Act, 1958, is an Act which provides for levy of duty on the consumption of electricity. In terms of the charging Section 3, duty shall be levied and paid to the State Government on the consumption charges, on the units of the energy consumed at the rate specified in the Schedule. Sub Section (2) of Section 3 exempt from levy of such duty on the Government of Maharashtra, Municipal Corporation, Municipality Statutory University, Charitable Institution, etc. Section 4 of the Act provides that the licensee shall collect and pay to the State Government at the time and in the manner prescribed, the proper electricity duty payable under the Act on the consumption charges of energy supplied by it to consumers. The duty so payable shall be a first charge on the amount recoverable from the licensee for the energy supplied and it is a debt due by the licensee to the State Government. The licensee shall collect and pay the duty at the time and in the manner prescribed, the proper electricity duty payable under the Act on the units of energy consumed by the consumer. If the licensee fails or neglects to pay at the time and in the manner prescribed, the amount of electricity duty due in respect of energy supplied, the licensee is made liable. The licensee has to keep books of accounts and to submit returns.

63. A glance of the provisions of the Act also mandates that the appellant, a licensee, is bound to collect duty at the rate notified by the State Government from the consumer and remit the same. In this Act also there are exceptions. There are exempted consumers, who are not liable to pay duty. Thus this element of duty is totally different and distinct from the tariff, so also tax on sale of electricity. In the light of the two statutory provisions, the appellant, a licensee, being a utility, is enjoined with the duty to collect the tax on duty under the two enactments on the basis of units sold to and consumed by consumer. This would mean that tax and duty are to be shown distinctly in the bill which the appellant issues to the consumers.

64. The elements of tax and duty are distinct and it cannot be clubbed with the tariff and it will definitely lead to complications as pointed out. If the procedure directed by MERC is to be adopted, the appellant may have to face proceedings in the hands of the State authorities including penal proceedings. There is neither any legal requirement nor reason nor rhyme to include the said levies which goes to the coffers of the State Government in the tariff. That apart, Regulation framed under the Supply Code provides for inclusion of taxes and duties payable by the consumer and could be by way specific indication of element of tax and duty. The appellant is well founded in its contentions. In the circumstances, the point No.7 is answered in favour of the appellant and the directions issued by the MERC cannot be sustained.

POINT NO.VIII

65. Taking up the eighth point, which relates to security deposit, which a consumer is required to deposit with the distribution licensee. The MERC proceeded on the assumption that the appellant ought to have

refunded the excess security deposit as per the MERC (Electric Supply Code and other conditions of supply) Regulations, 2005 and the same has to be refunded with the interest at 6% up to 20th of January, 2005 and from thereon at the rate of 12% per annum till date of refund on a reducing balance basis. Interestingly, it is seen that the appellant is also under a misconception as it is stated that it shall abide by the directives of the MERC based on the Supply Code and other conditions of Supply Regulations, 2005. The learned counsel for the appellant challenged the direction issued as not called for and runs counter to the Statutory Regulations. The learned counsel for the first respondent vehemently sought to sustain the direction while drawing our attention to the Statutory Regulations.

66. In this respect, the foremost questions that arise are what is the quantum of security deposit which the appellant as a licensee could collect from the consumer? What are the terms or conditions subject to which such security deposit is collected and retained? Section 47 of the Act provides that a distribution licensee may require any person who requires supply of electricity in pursuance of Section 43 to give him reasonable security as may be determined by regulations, for the payment of all moneys which may become due in respect of electricity supply to such persons etc. In terms of Section 45 read with Section 46, 47, 181, MERC has claimed Electricity Supply Code and other conditions of Supply Regulations, 2005. Regulation 11 provides for collection of security deposit by a distribution licensee. Regulation 11.2 provides that the amount of the security shall be equivalent of the average of three months' billing or the billing cycle period which ever is lesser. Regulation 11.2 reads thus:-

"11.2 The amount of the security referred to in Regulation 11.1 above shall be an equivalent of the average of three months of

billing or the billing cycle period, whichever is lesser. For the purpose of determining the average billing under this Regulation 11.2, the average of the billing to the consumer for the last twelve months, or in cases where supply has been provided for a shorter period, the average of the billing of such shorter period shall be considered:

Provided that in the case of seasonal consumers, the billing for the season for which supply is provided shall be used to calculate the average billing for the purpose of this Regulation 11.2"

67. It follows that the amount of security shall be equivalent of the average of three months' of billing or billing cycle period, whichever is less up till the Tariff Order which is under appeal, the appellant has been adopting bi-monthly billing. Billing cycle being bi-monthly, the appellant is entitled to an amount equivalent to the average of the billing cycle period. That apart, licensee could collect amount of security deposit based on the actual billing of the consumer once in each Financial Year. If it is found to be in excess, the excess amount to be refunded upon request of the consumer or at the option of the consumer, it can be set off or adjusted to the next bill. Refund shall not be required to be made where the amount of refund does not exceed 10% of the amount of security deposit required to be maintained by the consumer. If the security deposit of the consumer is less that the security to be collected in terms of Regulation 11.4, the licensee shall be entitled to raise a demand for additional security on the consumer. The consumer shall have 30 days' time to comply with the demand. In terms of Regulation 11.11, a distribution licensee is liable to pay interest on amount of security deposit to the consumer at a rate equivalent to the bank rate of the Reserve Bank of India.

68. The learned counsel for the appellant referred to Regulation 11.5 and contended that security deposit maintained by the consumer is higher, the same is required to be refunded and at the option of the consumer, it could be adjusted in the next bill. It is also rightly pointed out that by the Impugned Tariff Order, direction has been issued to the appellant to adopt the monthly billing, which is yet to come into force and by the same stretch, the appellant has been directed to refund the excess security deposit, if any, with interest at 12% while the Supply Code provides for payment of interest for the entire deposit at the rate equivalent to the bank rate of the Reserve Bank of India. The direction to pay 12% interest and the further direction to repay the alleged excess security deposit over a period of six months, in our considered view is not called for. It is also not the function of The Regulatory Commission as the authority to enforce the Supply Code at the instance of the consumer. Ombudsman appointed under Section 42(7). The consumer may take up the matter before the Ombudsman designated by the MERC and if still aggrieved, the consumer may approach the Forum for Redressal of the Grievances of the Consumers constituted by the State Commission. Looking at from the angle of Section 86 which enumerated the function of the State Commission do not confer the functions of the Ombudsman or Redressal Grievance Forum on the State Commission. That apart, while fixing the tariff, The Electricity Act, 2003 and in particular referring to Section 61, 62, 64 of The Electricity Act, 2003, the directions issued by the MERC to the appellant do not find a place nor such a general power is conferred on the Commission. It is also settled law that whenever a statutory provision confers power on specified authority, it is that authority which has to exercise the powers and nor any other authority how high so ever it may be.

69. While determining the tariff, the Commission is expected to apply its mind with respect to the approval of Annual Requirement of the distribution licensee and the distribution tariff to be determined, Section 62 provides for determination of tariff. Section 64 prescribe the procedure of determination of Tariff Order. These provisions do not include the present direction which the MERC has issued. That apart it is for the consumer to make a demand or approach Ombudsman or the forum for redressal of grievances. Further liberty is given to the consumer either to seek for refund or seek for adjustment towards the consumption consumption bills. The anxiety with which the Commission has issued the direction in our considered view cannot be appreciated. So also the direction to reduce the billing cycle, assuming that the Commission has the authority or jurisdiction it has overlooked the Regulation framed by it. On these grounds, the directions issued are set aside and this point has to be answered in favour of the appellant. The learned counsel for the appellant meekly submitted with respect to the directions of change of billing cycle and refund of security deposit, it may not be appropriate. Be that so, we set aside the directions issued in this respect and make it clear that depending upon the change in billing cycle, if the security deposit is found to be in excess of the amount required to be deposited, the appellant shall issue notice to the consumer, setting out the details and if the consumer so decides the consumer may get a refund or opt for adjustment towards the consumption charges. Directions of MERC, in this respect are modified and we direct the appellant to strictly follow Regulation 11. It is needless to add that it is open to the consumer to approach Ombudsman or Grievance Forum in case the appellant fails to follow the Regulation 11 of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005.

POINT NO.IX

70. The direction issued by MERC to undertake load management in the distribution of Power by the appellant, is really a laudable one. Though the learned counsel for the appellant sought to contend that It is not load management but it is levy of penal tariff and the tariff sought to be imposed under this head is penal in nature. We will not be justified in sustaining such a contention merely because in one or two places, the Commission has referred it as 'penal charges'. The Commission has attempted to bring in a discipline among the consumers as there has been shortage between generation and distribution demand and, therefore, there is warrant or necessity to introduce load management charge. It's true as on date of hearing, it is admitted that there is no shortage of Power. Yet, during seasons, there is deficit between the generation and demand and a discipline has to be introduced by way of load management charge. The Commission has rightly referred to the system followed in Brazil and has also rightly indicated that such a system is successful.

71. However, it is contended that the system directed to be adopted in this respect is discriminatory, not a fool-proof system and without a study or planning, the Commission has abruptly issued and ordered levy of load management charge. Number of pros and cons were addressed by either side in this respect. The system, as pointed out by the counsel for the appellant, ordered to be adopted as set in the tariff order, has inherent deficiencies or defect but any regulatory measure or a control has to begin and by trial and error alone a fool-proof system could be developed. The collection of load management charge may not arise and may not be warranted at all when there is sufficient power. It is admitted that during the period of scarcity

there were directions not to supply Power to neon signs and advertisement boards in respect of other DISCOMs. But it was relaxed latter. This is also an approach which has to be appreciated. But such a restriction has been lifted and it is represented that there is a huge demand of Power for neon signs, advertisement hoardings, etc., as of today. One other grievance expressed by the appellant is that such a load management levy has not been introduced or a restriction has been introduced with respect to two other DISCOMs, which distribute power in Suburban and Mumbai area. However, a copy of the Order issuing directions to all DISCOMs in this respect has been placed by the counsel for MERC and we do not find any merit in the contention advanced by the counsel for the appellant. The restriction is required to be imposed, when there is scarcity and the load management or power management ought to be introduced by the Regulatory Commission. Such a measure introduced has a sound reason. We have no reason to deprecate the system sought to be introduced or discipline sought to be introduced by the MERC. Such a discipline could either be direct or indirect but the object being that the consumption by consumers are regulated by a proper system, which will ensure load management. Levy of load management charge is one of the well known and acceptable principle to discipline the consumers whenever there is shortage of power. In fact the appellant has no grievance even if a higher slab rate is imposed.

72. In the case on hand, we find that the Commission has merely directed the licensee to take note of the last year's consumption, ordered scaling of such consumption by 20% and in case if the consumer exceeds the parameters so fixed, the consumer has to pay the load management charge. As pointed out by the counsel for the appellant

there are too many loose ends in the system. First new consumers cannot be brought under this. There are consumers who might have gone out of city for a considerable period for reasons beyond their control or other natural reasons and calamities and in these cases practical difficulties may arise. Therefore, fixing the last year's consumption alone as a unit or a parameter may not be appropriate and it will not be a fool-proof system. The Commission is directed to examine in detail for introduction of a better system for load management. Further, when there is surplus or when there is no gap between demand and supply, then there is no warrant at all to levy load management charge. The Commission may consider fixing different slab rates among the same category of consumers and for high end consumers. The Commission may introduce a higher slab which may have an effect on the consumers and discipline the consumers or else the consumer has to pay heavily. The Commission may also examine other better systems in this respect. The load management charge, it is contended, would amount to introducing rationing. However, we can only point out that it borders rationing but not exactly rationing.

73. It would be appropriate to find out the connected load of the consumer, sanctioned load and average monthly consumption within twelve months as stipulated in Regulation 6.4, take the average or 1/3rd of it and depending upon the availability of the power or shortage may by a notification issued from time to time restrict the user by fixing a ceiling and in case if such ceiling is exceeded, the consumer may be liable to pay 1½ times or twice of the normal tariff. This requires a study and fixing of parameters. Till then, while appreciating the approach of the Commission in taking efforts to bring discipline among the consumers by way of load management charge,

we set aside the Order of the Commission in this respect for the tariff periods 2004-05, 2005-06 and the Commission may consider the same afresh in the next tariff period, or as and when the requirement arises but the Commission may undertake a technical study before introducing such load management system. The point is answered in the above terms. Such tariff could very well be fixed by MERC by way of supplemental tariff proceedings.

POINT NO.X

74. Taking up this point, we have to examine as to whether disallowance of interest on internal funds as well as funds granted by the government, is justified. The MERC has disallowed interest claimed and this has given rise to the grievance. The learned counsel for the appellant did not claim return on such internal funds or the Government grant, which has been utilized in the electricity distribution, presumably because of the restriction found in the Regulation. In our view, the appellant has not claimed 'Return On Equity' on those funds. The learned counsel for the first respondent – MERC, contended that no interest is payable on the internal funds drawn from the coffers of the Corporation as well as the Government grant. We are unable to sustain such an argument advanced on behalf of MERC. Internal fund has been drawn and utilized in the electricity distribution business and this is not being disputed by the respondent. So also, a substantial sum has been received by way of grant and utilized by the appellant in the electricity distribution business. In terms of Regulation pointed out by the MERC, the appellant could be denied of return on such internal funds as well as the grant but there is neither justification nor there is any reason to deny interest since those funds have been utilized by the appellant in the electricity business. Internal funds though is drawn from the

coffers of the Corporation for all purposes of this business, viz., electricity distribution, it is from the Corporation though it is the owner of the electricity distribution business yet funds have been drawn and utilized. When the appellant is expected to maintain the entire revenues and expenditure in respect of electricity business in an air tight compartment for the purpose of approval of ARR as well as determination of tariff, we do not find any justification to deny interest on the internal funds drawn by the appellant from sections other that electricity as well as the grant from the Government. There is no provision in the Tariff Regulations with respect to payment of interest on the internal funds received and utilized by the appellant in the electricity business, so also with respect to the grant. It is a grant to the Corporation by the Government and it is not a grant to the consumers. This position is fairly admitted by the learned counsel for MERC. Therefore, it is a flow of funds from sources outside the electricity business. Hence even in respect of grant also, be it a free grant or refundable without interest, in our considered view MERC should have allowed interest. The denial of interest cannot be sustained. When the funds have been utilized it follows that at least interest has to be allowed apart from the fund being returned when sufficient cash/ credit is available. When there is no dispute with respect to the internal flow of funds and the Government grant which were actually utilized on the distribution business, the claim of interest at 7% per annum, which is the minimum, is fair and we do not find any reason for the Commission to reject the same. This point is answered in favour of the appellant holding that for the actual amounts received from internal funds as well as the grant utilised in the Electricity distribution business, the Commission is directed to allow 6% interest, which would be the minimum by all standards.

POINT NO. XI :

75. Taking up the eleventh point, it is noticed that the Commission has issued a direction to the appellant to maintain accounts under the Indian Companies Act of '56 in addition to Mumbai Municipal Corporation Act, 1888. It is contended that the appellant is not a Company registered under '56 Act but it is a local body constituted under the Mumbai Corporation Act of 1888. The Corporation Act and the rules framed there under provides for maintenance of accounts and also prescribes manner and method of maintenance of accounts. Chapter XVI(a) is a complete code with respect to the electrical undertaking of the appellant Corporation and the same prescribes the manner and method of maintenance of accounts. That apart, byelaws framed by the Corporation provide that the appellant shall maintain the accounts as prescribed under The Act. Hitherto accounts maintained by the appellant, in terms of Section 460 (MM).The accounts of electric supply undertaking is required to be maintained and kept in the manner and in such a format as prescribed by the *Briham Mumbai Electric Supply & Transport Committee* from time to time. Such accounts are to be published in the official gazette every year. The appellant not being a Company, it is not obligatory to follow the procedure prescribed by the Indian Companies Act '56 or the rules framed there under with respect to maintenance of accounts. The Commission in its order has directed the appellant to maintain performa account of electricity supply business separately as in the format as applicable to entities under the '56 Act in addition to maintenance of account BEST as a whole as per the Mumbai Municipal Corporation Act 1888. The Commission has just ordered that such system will bring transparency and compatibility in appellants financial position in respect to its electricity business with

other licensees in the Mumbai region / State. There is no provision in The Electricity Act 2003 which mandates that accounts should be maintained in the formats as applicable to the entities under the Companies Act '56. However, MERC has framed rules called, " Terms and Conditions of Tariff 2005". The definition as found in the said regulation, which are relevant reads thus :

> *"(a) "**Accounting Statement"** means for each financial year, the following statements, namely-*
>
> *(i) balance sheet, prepared in accordance with the form contained in Part I of Schedule VI to the Companies Act, 1956;*
> *(ii) profit and loss account, complying with the requirements contained in Part II of Schedule VI to the Companies Act, 1956;*
> *(iii) cash flow statement, prepared in accordance with the Accounting Standard on Cash Flow Statement (AS-3) of the Institute of Chartered Accountants of India;*
> *(iv) report of the statutory auditors';*
> *(v) cost records prescribed by the Central Government under Section 209(1)(d) of the Companies Act, 1956;*
>
> *together with notes thereto, and such other supporting statements and information as the Commission may direct from time to time; Provided that in case of any local authority engaged in the business of distribution of electricity, the Accounting Statement shall mean the items as mentioned above, prepared and maintained in accordance with the relevant Acts or Statutes as applicable to such local authority."*

76. The very regulation 2.1 makes an exception with respect to local authority engaged in the business of distribution of electricity. The said exception has been lost sight of by the MERC. Regulation 60 onwards relates to distribution licensees and regulation 60 prescribes requirements to be complied with by the distribution licensee when it seeks for approval of its ARR and determination of tariff. The said regulation, 60, 61, 62, 63 onwards prescribes the requirement to be

complied. On a consideration of the said regulation it is not absolutely essential to maintain accounts in the formats prescribed for entities governed by the Company Act of 1956. It is well open to the appellant to maintain accounts as hitherto before maintained but it is a requirement as per the statutory regulations the appellant has to comply when approval of ARR is sought for and tariff is to be determined by the Regulatory Commission. It is for the appellant to comply with the requirements or details as prescribed in the regulations which would enable the Commission to approve the ARR and also determine the tariff. This does not mean that the appellant has to maintain accounts as a Company registered under the Companies Act 1956. Therefore, we modify the direction issued by the Commission in this respect as above. It is made clear that the appellant has to maintain accounts relating to electricity business separately as prescribed by The Mumbai Municipal Corporation Act and byelaws framed there under but when the appellant goes before the MERC it has to furnish the particulars prescribed in the prescribed format under the regulations for the purpose of ARR and determination of tariff.

This point is answered accordingly in favour of the appellant.

POINT NO.XII

77. Taking up the twelfth point, namely whether the refusal to allow regulatory asset to be created in respect of wage revision for the Transport staff is illegal, this point has to be answered in the light of our answer to 2, 3, 4 & 5. There is no doubt that in respect of the employees of the electricity distribution business, directions have been issued by MERC while in respect of Transport staff, the request has been rightly negatived. In our view, the MERC is right in its conclusions and once Transport business cannot be clubbed or

subsidized by the distribution business, it follows automatically that there could be no direction to create regulatory asset in respect of Transport employees. We have already considered this aspect in detail while construing Section 51 of The Electricity Act 2003. We have also held that two businesses namely, Electricity business and Transport business cannot be clubbed together either for approval of ARR or for determination of tariff. Transport business is an independent business of the Corporation and it is for the Municipal Corporation to provide funds and take care of its staff. Hence, point 12 is answered against the appellant. On point 12, we hold that no interference is called for with the refusal of MERC to create a regulatory asset for Transport staff.

POINT NO.XIII

78. Taking up thirteenth Point, namely whether the direction to change the billing cycle from bimonthly to monthly is warranted and whether such a direction is called for in terms of Supply Code in force. The learned counsel submitted that the issue of monthly billing is beneficial to the appellant but it involves huge work, requires more staff and stationary and it involves heavy expenditure. Besides, the learned counsel added that time may be given to change the billing cycle at least by a year.

79. At the first blush, we deem it sufficient to grant time. Yet we would like to examine the point with respect to the billing cycle.

80. Section 50 of the Act provides that the Commission shall specify in the Electricity Supply Code for recovery of electricity charges, billing of electricity charges, disconnection of supply of electricity for non payment there of etc. The MERC (Electricity Supply Code and other

conditions of supply) Regulations 2005 had already been notified in the Gazette. The Regulation 3.2 (b) provides that charges for Electricity Supply by a distribution licensee could be recovered in terms of Regulation 3.4. Regulation 3.4 provides for recovery of charges for electricity supplied by licensee in accordance with such tariff as may be fixed from time to time by the Commission. Regulation 14.3 provides for meter reading to be taken by the authorized representative at least once in three months in case of agriculture consumers and at least once in every two months in case of all other consumers, unless specifically approved by the Commission for any consumer or class of consumers. Regulation 15 provides for billing. Regulation 15.1.1 reads thus :

> *"15.1 Intervals for Billing and Presentation of Bill*
> *15.1.1 Except where the consumer receives supply through a prepayment meter, the Distribution Licensee shall issue bills to the consumer at intervals of at least once in every two months in respect of consumers in town and cities and at least once in every three months in respect of all other consumers, unless otherwise specifically approved by the Commission for any consumer or class of consumers."*

81. On a reading of Regulation 15.1.1, it is clear that a distribution licensee shall issue bills to consumers at least once in every two months with respect to consumers in towns and cities. In the light of the said Regulation, the appellant's bi-monthly billing cannot be found fault with nor it runs counter to the code. Yet the Commission issued a direction to the appellant to change the billing cycle from bi-monthly to monthly. A reference is made to Section 61(b) of The Electricity Act by the senior counsel appearing for MERC. There is no doubt in our mind that the said Section 61(b) has no bearing on this point. When Regulation provides for issue of bimonthly bills, there is no justification to reduce or alter the billing cycle.

82. The learned counsel for the appellant submitted that such a change in billing cycle will involve additional manpower, expenses and no advantage could be gained. However, it is fairly stated that as against bi-monthly billing, the flow of funds, namely the collection of charges on a month to month basis is definitely an advantage to the appellant. It may be that the appellant has to incur more expenditure to take reading every month by employing more personal for preparation of bills involving more number of staff and so also preparation and delivery of the bills. Since the consumption charges, to be collected is increasing day by day, the flow of funds by issue of monthly bill will be an advantage to the appellant. It is admitted that already billing has been computerized and therefore the advantage which appellant may gain will out-weigh the expenses the appellant may incur such billing cost.

83. Keeping this in mind, the learned counsel for the appellant also persuaded us to extend the time to change the billing cycle. We find there is justification. The appellant has 10 lac consumers. Necessary infrastructure has to be developed for issuing monthly bills. The appellant has to be given a reasonable time. In the circumstance, we do not propose to interfere with the direction of the Commission directing the appellant to change the billing cycle from bimonthly to monthly but we grant time to the appellant to introduce the monthly billing cycle till 31.03.2007. Except this modification, in other respects on this point, we make it clear that we are not interfering with Commissions directions. The MERC may examine the necessity of revising " Supply Code", if so thought fit by exercise of its power to frame the supply code.

POINT NO.XIV

84. With respect to very many miscellaneous points, certain grievances have been expressed by the appellant and we have to examine whether they called for interference or extension of time or for modification.

POINT NO.XIV (a)

85. Firstly, we take up introduction of BPL Category (Below Poverty Line). With respect to introduction of new BPL category consumers, the Commission has issued a direction as seen from Para (21) of its Tariff Order. We do not find any reason to hold that such an introduction of new BPL category as arbitrary or illegal or not called for. Certain difficulties are expressed but in our view such difficulties have to be managed and overcome and the laudable object has to be achieved. It is represented that there are about 37,000 consumers whose average consumption per month is less than 30 units. When the consumption is below 30 units as reflected by the reading and as per computerized accounts, we do not find any reason to go to the rescue of the appellant. The excuse that customers might have gone out and that a door to door verification has to be undertaken is not acceptable to us. Neither an investigation is required nor any further particulars are required as only parameter fixed by MERC being consumption less than 30 units.

86. This direction in our view being social and poverty alleviation programme should be carried out without delay by the appellant. If one or other exceeds parameter, then the said ceases to be a BPL and cease to be a BPL category. The appellant need not shed crocodile tears in respect of such consumers. The grievance expressed with respect to BPL in our considered view is not called for any

interference. All these days, the appellant has not implemented and there being 37,000 numbers of consumers falling under this category, we order that the directions of MERC introducing BPL shall be implemented commencing from 2nd October, 2006 on wards.

POINT NO.XIV (b)

87. With respect to implementation of Tariff Schedule, two grievances are expressed i.e. :-

(i) Shortage of time

(ii) Difficulties faced in the implementation of billing as per the Schedule of MERC. The appellant, a large local body with manpower and infrastructure should have been ready forthwith to implement the directions issued by the MERC. It is only a change in the software which could be introduced by spending additional man-hours by software system analyst. It is obligatory on the part of the appellant to give effect to the tariff schedules as and when notified. The appellant cannot complain either shortage of time or want of time. In the present case, it is the appellant who delayed and it is not open to the appellant to suggest such reasoning. While deprecating attitude of the appellant, to bring discipline among the staff of the appellant, earnest steps should have been taken and the appellant should have taken earnest steps instead of showing the attitude of a big brother. We have already observed sufficiently while discussing point XIV. Nothing further need to be mentioned in this respect. It's true that operative portion of the Order was communicated at the first instance and thereafter detailed Tariff Order has been communicated. Tariff Order has not been stayed by us and by now the appellant should have implemented the tariff as determined by MERC. In fact, no arguments were advanced in respect of tariff schedule fixed by MERC, namely, categorization. We do not find any valid reason to interfere.

When tariff has been notified, it is obligatory for the appellant to implement the same from the date fixed by the Commission lest it will affect the finances of the appellant itself. We find no ground to interfere with the reclassification of the existing tariff and as notified, it has to be implemented.

POINT NO.XIV (c)

88. With respect to the installation of electronic meters, we do not find any reason to differ from the Commission. However we direct that every month commencing from 1st of September, 1/5th of the static meters shall be replaced with electronic meters and the entire work of replacing of meters shall be completed within a period of six months from the date of this Judgment and this shall be subject to be check by MERC or its officials/ subordinates.

POINT NO.XIV (d)

89. With respect to the additional fixed charges at Rs.100 per 10 KWH or part thereof, we also do not find any illegality or error or reason to modify or interfere. We find there is justification for the same.

POINT NO.XIV (e)

90. With respect to the prompt payment discount, the approach of the Commission is well founded and it is in the interest of the appellant. Such prompt payment discount will encourage early remittances within the first few days of delivery of bills and sufficient funds will flow. Therefore, we do not find any reason to interfere with the direction issued by the Commission in this respect.

POINT NO.XIV (f)

91. With respect to levy of interest on delayed payment or payment at varying rates after the due dates, already there is provision in the Supply Code and the Provision has to be implemented. The Commission has only reiterated the same. We do not find any justification to interfere with the direction issued by the Commission, directing the collection of interest of payment with respect to the payment at varying rates after due dates.

POINT NO.XIV (g)

92. With respect to the belated payment charges ordered to be levied, we do not find any illegality or error or justification to interfere as in fact such a direction is in favour of the appellant. This will bring discipline among the consumers and they will make prompt payment. The belated payment charges ordered to be levied and collected is not liable to be interfered.

POINT NO.XIV (h)

93. With respect to street lighting tariff and fixed demand charge Rs.300/KW/month, and fixation of meters capable of reading maximum demand, it is pointed out that in all about 400 meters of street lighting are to be installed apart from shifting of pillars as well. Be that so, it is the obligation of the Corporation to provide street lights and it is the obligation of this distribution licensee to supply power, both should not be mixed up. The work involved, according to the learned counsel for the appellant, are fixation of 400 meters in street lighting pillars controlling about 40,000 street lighting lamps. For such a huge Corporation like Mumbai, this work will not involve a problem. However, we grant six months' extension of time from the date of this Judgment to fix the meters in street lighting pillars and

we do not propose to interfere with the directions issued by the Commission in other respect.

94. In other respects, there being no challenge it is unnecessary to examine or consider the ARR as approved by the Commission and the tariff determination already undertaken.

POINT NO.XVI

95. We summarise the reliefs granted in this appeal on the basis of findings recorded on various points as well. The reliefs granted are as here under:-

i) On point XVI we have already commented both against the appellant as well as MERC and the said comments, we hope, will set both sides in goodstead and see that the distribution of electricity in the appellant's area gains and the business is controlled effectively in terms of the provisions of The Electricity Act, 2003 and the Regulations framed there under.

ii) On point II, we sustain the interpretation placed by MERC on Section 51 of The Electricity Act, 2003. We answer this point against the appellant.

(iii) We answer points, III, IV & V, against the appellant and as already directed only the profit, if any, which the appellant may earn as a distribution licensee could be utilized by the Corporation, holder of the license, either for transport business or for such other purpose as it deems fit.

(iv) On point VI, we hold that the appellant is not entitled to claim additional depreciation and the disallowance of additional depreciation is not liable to be interfered.

(v) On point VII, we hold that the tax on sale of electricity as well as electricity duty has to be indicated separately in the bills for collection and the direction issued by the Commission to include those two elements in the tariff shall stand modified accordingly.

(vi) Point VIII is answered in favour of the appellant.

(vii) On point IX, we hold that MERC has jurisdiction and authority to direct the DISCOM to levy Load Management charge to bring discipline among the consumers but we have directed MERC to take a fresh look by undertaking a study and implement the same during FY 2006-07 or in the next tariff period.

(viii) On point X, we hold that the disallowance of interest by MERC on internal fund and fund received by way of grant cannot be sustained and we direct MERC to award interest at 6% on such sum and the same shall be given credit while taking up truing up exercise.

(ix) On point XVI, we hold that the appellant is not bound to maintain accounts in terms of Indian Companies Act, but while submitting the ARR and the other connected applications before the MERC, the appellant shall furnish the required details and particulars in the format prescribed by MERC including that Form fixed under the Indian Companies Act, while giving liberty

to the appellant to maintain accounts as per the Bombay Municipal Corporation Act and the byelaws.

(x) On point XII, we hold that there is no illegality in the Commission refusing to allow Regulatory Asset to be created in respect of wage revision of the transport employees.

(xi) Pont XIII is ordered accordingly as set out supra.

(xii) On point XIV, excepting minor modification and grant of extension of time we decline to interfere with the Orders of the Commission in other respect.

96. Before parting with the case, we emphasise that the Commission while approving the ARR and determining the tariff, they confine themselves to what are required and enjoined upon to be carried out in terms of Part VII of The Electricity Act, 2003 as well as the connected Regulations framed by it and in respect of any other general directions, the Commission may initiate independent proceedings and exercise its powers in terms of the provision of The Electricity Act, the Regulations framed there under by MERC or the rules as framed by the Central Government or the State Government, as the case may be and issue suitable directions as to date of implementation.

97. We also place it on record, the enormous work undertaken by the MERC, as reflected by the Tariff Order most of which are based on scientific and well-founded basis.

98. The parties shall bear their respective cost in this appeal.

Pronounced in open court on this 18th day of August 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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