

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.206 of 2012**

**Dated: 3<sup>rd</sup> May, 2013**

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**M/s Vedanta Aluminium Limited.,  
A Company incorporated under the  
Companies Act, 1956, having its  
Office at SIPCOT Industrial Complex,  
Madurai Bypass Raod,  
T.V.Puram,  
Tuticorin-628002  
and having its  
Aluminium Smelter which is a SEZ Unit,  
At Village Bharkamunda,  
P.O.Jharsuguda-768 202, Orissa**

**...Appellant**

**Versus**

- 1. Odisha Electricity Regulatory Commission  
Bidyut Niyamak Bhawan,  
Unit-III  
Bhubaneswar-400051.**

- 2. Sterlite Energy Limited**  
A Company incorporated under the Companies Act, 1956, having its Office at SIPCOT Industrial Complex,  
Madurai Bypass Road, T.V.puram,  
Tuticorin-628002 and having its Power generating plant at Village Banjari,  
P.S & P.O. Jharsuguda-768202, Orissa.
- 3. Grid Corporation of Orissa Limited**  
Janpath, 4<sup>th</sup> Floor, Bidyut Bhawan,  
Bhubanesar-751022.
- 4. Orissa Power Transmission Corporation Limited,**  
Janpath,  
Bhubaneswar-751022.
- 5. Department of Energy,**  
Government of Orissa  
Through its Commissioner-cum-Secretary,  
Bhubaneshwar-751022.
- 6. The Development Commissioner,**  
FALTA, Special Economic zone,  
2<sup>nd</sup> M.S.O. Building, 4<sup>th</sup> Floor,  
Nizam Place, Kolkatta-700020.
- 7. Department of Industries,**  
Government of Orissa  
Through its Commissioner-cum-Secretary  
Bhubaneshwar-751022.

**8. WESCO**  
**At P/O, Burla, Dist.Sambalpur**  
**C/o Central Service Office**  
**IRC Village, Nayapalli, Bhubaneshwar-751022**  
**Through Managing Director.**

**.....Respondent(s)**

Counsel for the Appellant(s) : Mr.C.S. Vaidyanathan, Sr.Adv.  
Mr. Prashanto Chandra Sen  
Ms.Sara Sundaram

Counsel for the Respondent(s):Mr.J.J. Bhatt, Sr.Adv.  
Mr. Jaideep Dhankhar, Sr.Adv.  
Mr.Sanjay Sen,  
Mr. R.k. Mehta,  
Mr. David  
Mr. Rutwik Panda for R-1.  
Mr. B.K.Nayak  
Mr. Hemant Singh for R-2  
Mr. Hemant Singh for R-2  
Mr. Buddy A. Ranganadhan  
Mr. Loknath Mohapatro  
for R-3 & R-4.  
Mr. Antaryami Upadhyay  
for R-3 & R-4.  
Mr.Hasan Murtaza for R-8

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON**

1. M/s Vedanta Aluminium Ltd., is the Appellant.

2. The Appellant, in its capacity as deemed Distribution Licensee, executed a Power Purchase Agreement dated 18.8.2011 with M/s Sterlite Energy Ltd., Respondent-2 for supply of 2050 MW of power for a term of 25 of years.
3. For getting approval of the PPA, the Appellant filed an application before the Odisha State Commission. However, the State Commission after hearing the parties rejected the said application by the order dated 17.9.2012. Hence, this Appeal.
4. The short facts are as follows:-
  - i) The Appellant is engaged in the business of production and export of aluminium. The Appellant has set up a 1.25 MTPA capacity aluminium smelter project in a sector specific Special Economic Zone.
  - ii) The Appellant applied for an in-principle approval from the Government of India on 30.3.2006. On 23.8.2006, the Appellant received the said approval.
  - iii) Thereupon, in pursuant to the said approval from the Government of India, the Appellant accepted the terms and conditions set out therein.
  - iv) Thereupon on 13.11.2006, the Appellant applied to the Government of India for a formal approval for the development of Special Economic Zone for manufacture

and export of aluminium along with the captive power plant.

- v) The Government of India granted such a formal approval on 23.5.2007 to the Appellant's proposal for the development, operation and maintenance of sector specific Special Economic Zone at a district in Orissa.
- vi) On 27.2.2009, the Ministry of Commerce and Industry, Government of India, issued a notification declaring the unit of the Appellant to be Special Economic Zone.
- vii) The Ministry of Commerce and Industry, Government of India, issued notification dated 3.3.2010 in exercise of the powers conferred under Section 49(1) of the Special Economic Zone Act,2005.
- viii) By the said notification, the Central Government for promoting the objects of Special Economic Zone and in terms of powers delegated under the Special Economic Zone Act, introduced a proviso to the provisions of Section 14(b) of the Electricity Act, 2003.
- ix) By the said introduction, a developer of a Special Economic Zone was declared as a deemed licensee authorised to distribute electricity within the Special Economic zone area.

- x) The Appellant, being a deemed distribution licensee by virtue of the above notification, executed a Power Purchase Agreement on 18.8.2011 with Sterlite Energy Ltd., the 2<sup>nd</sup> Respondent, for purchase of 2050 MW of power.
- xi) Since the supply of power by a generating company to distribution company is regulated under the provisions of Electricity Act,2003, the Appellant on 30th August,2011 filed a petition before the Orissa State Commission for approval of the said PPA.
- xii) Subsequently, the State Commission at the preliminary hearing sought some clarifications with regard to the factual aspects. The Appellant, thereafter filed two amendment petitions one was on 08.12.2011 and another was on 27.3.2012 seeking for the additional prayer requesting the State Commission to grant deemed distribution licence in favour of the Appellant on the strength of the Government of India notification issued dated 3.3.2010 with effect from the date of the said notification.
- xiii) The State Commission, after hearing the Appellant as well as the parties concerned, passed the impugned order dated 17.9.2012, rejecting the application for the grant of

deemed distribution licence and consequently rejected the prayer for approval of the PPA also.

- xiv) Challenging the same, the present Appeal has been filed by the Appellant.
5. The learned Senior Counsel for the Appellant has submitted the following grounds as against the impugned order dated 17.9.2012:-
- a) The Central Government, pursuant to the powers conferred under Section 49(1) of the Special Economic Zone Act,2005 issued a notification dated 3.3.2010, thereby seeking to amend the provisions of Section 14(b) of the Electricity Act,2003.
  - b) With the said amendment, the developer of Special Economic Zone was declared as a deemed licensee for distribution of electricity within the Special Economic Zone area. Thus, the status of deemed distribution licensee stands granted to the Appellant by virtue of the said notification.
  - c) The State Commission while passing the impugned order rejecting the grant of distribution licence has failed to appreciate that as long as statutory notification dated

3.3.2010 is subsisting, the status of the licensee is deemed to be vested on an SEZ developer by operation of law.

- d) Once, the Appellant has been granted the deemed distribution licensee's status under the provisions of the Electricity Act, 2003 read with notification dated 3.3.2010, the same carries a statutory force. Then the State Commission has no authority whatsoever to again go into the question of grant of the deemed licensee status which was automatic. Therefore, the jurisdiction of the State Commission was limited to pass the consequential orders of the approval of PPA, under the powers conferred under Section 86(1)(b) of the Electricity Act.
- e) The Central Government issued notification to the effect that the provisions of clause 14(b) of the Electricity Act,2003 shall apply to all Special Economic Zones and to add proviso to the said clause to the effect that the developer of the Special Economic Zone shall be deemed to be a distribution licensee for the purpose of this clause with effect from the date of notification. Thus, the Central Government issued notification conferring the status of deemed distribution licensee to the SEZ developer, notified under Section 4(1) of SEZ Act,2005 which is absolute and without any qualification.



- f) Once the Appellant has been granted a deemed distribution licensee status, it is only a formality for the State Commission to confer the Appellant with distribution licensee status for supply of power in SEZ area. A deemed licensee status can not be denied to a distribution licence by the State Commission. The status had already been granted to the Appellant on account of operation of law. What has been conferred to the Appellant by a statute can not be taken away by the State Commission in an arbitrary manner. Once it is established that a proviso has been introduced under Section 14(b) of the Electricity Act, 2003 it is a settled law that the statutory authority can not go beyond the statute.
- g) It is a settled position of law that the definition clause does not necessarily, in any statute, apply in all possible contexts in which the word which is defined may be found therein . It is necessary to appreciate that the provisions which define certain expressions occurred in the Act opens with the words “in this Act, unless the context, otherwise requires” which shows that wherever the word so defined occurred in an Act, it is not mandatory that one should mechanically attribute to the said expression, the meaning assigned to it in the definition clause. The definition is not to be read in

isolation. It must be read in the context of the phrase which defines it.

- h) The State Commission is wrong to have proceeded with a notion that the consumers must be in existence on the date of the grant of license or on the date of conferment of deemed licensee status. The observations made by the State Commission under reliance placed on the definition of the term “consumer” and “supply” would defeat the very purpose of the grant of distribution licence.
  - i) In view of the amendment of Electricity Act,2003 by virtue of the notification, the Appellant is deemed to be distribution licensee by way of deeming fiction . The very purpose of a deeming fiction is to confer upon an entity the status which would, otherwise, not have in view of the facts actually existing. Even if the Appellant has no consumers, that would not detract from the fact that the Appellant is a deemed distribution licensee.
6. In reply to the above grounds, the learned Counsel for the contesting Respondents would make the elaborate submissions in justification of the impugned order.
7. The crux of the submissions of all the Respondents is as follows:-

a) Section 49(1) of the Special Economic Zone Act,2005 provides the power to modify the provision of this Act as well as other Central Acts by giving direction through the notification as to which provision shall not apply to the Special Economic Zone and which provision shall apply to the Special Economic Zone. Therefore, under the scheme of this Special Economic Zone Act, Central Government have to first notify to what extent the provision of the other Acts to be made applicable or not applicable for the Special Economic Zone area. The Central Government under Ministry of Commerce and Industry issued its notification dated 21.3.2012 on the guidelines for Power generation in Special Economic Zone. With this notification it has been clarified that all the provisions of the Electricity Act,2003 and rules will be applicable to generation, transmission and distribution of power whether stand alone or captive power. Accordingly, there is no inconsistency between the Special Economic Zone Act and the Electricity Act,2003. Therefore, Special Economic Zone Act,2005 has no overriding effect on the Electricity Act,2003. Thus the status of deemed distribution licensee granted to the Appellant by operation of law can not be said to be unfettered.

b) In view of the above provision of the Special Economic Zone Act and consequent notification by the Ministry of

Commerce, the deemed licensee status, as claimed by the Appellant, should be decided through other provisions of the Electricity Act,2003 for certifying its validity.

c) By filing the petition before the State Commission for grant of distribution licence and for approval of the PPA, the Appellant has, in fact, accepted the jurisdiction of the State Commission in this regard. Having submitted to the jurisdiction of the State Commission, the Appellant before this Tribunal has been challenging the authority of scrutiny by the State Commission for the maintainability of the application for regular distribution licence. In fact, the State Commission is fully within its jurisdiction to scrutinise the application for regular distribution license, in view of the notification of the Central Government dated 21.3.2012.

d) The State Commission has framed OERC (Conduct of Business) Regulation,2004 providing elaborate procedure to grant distribution licence. The State Commission has, in fact, exempted the Appellant from the rigours of the procedure under Section 15 of the Electricity Act,2003. Merely, because the Appellant is a deemed distribution licensee by the fiction of law by virtue of the notification, it does not mean that the grant of distribution licence by the State Commission as prayed for by the Appellant is

automatic. The fiction is to be converted into reality by analysing the application to find out the eligibility. This requires to ensure that the licence is not misused to bypass other provisions of the Electricity Act,2003.

- e) In this case, both the buyer and seller belong to the same group of company. As a matter of fact, 2<sup>nd</sup> Respondent, the seller is the sister concern of the buyer, the Appellant. The proposed consumer and the licensee are one and the same. The Appellant wants to arrogate the power of the licensee to consume electricity for self-consumption thereby making various provisions such as 42(6), 55, 56 and 57 of the Electricity Act inapplicable.
- f) This is contrary to the notification of the Government of India dated 21.3.2012. The definition of the term “Distribution licensee” provides that “Distribution licensee” means a licensee authorised to operate and maintain a distribution system for supply electricity to the consumers in its area of supply. In the present case, the operation and maintenance of the distribution system is not possible, as admittedly there are no associated consumers.
- g) As per the provision of 14(b) of the Electricity Act,2003, the developer of SEZ is a deemed distribution licensee and not the person who develops and operates SEZ simultaneously.

If the Developer and Operator is allowed to hold a distribution licence which otherwise means, the licensee and consumer is one , then it will contradict Electricity Act and the notification issued by the Government of India.

- h) A deemed Licensee by operation of law does not absolve the Appellant from discharging the other responsibilities in its capacity as a distribution licensee under the Act. Therefore, the contention of the Appellant that the terms like “consumer” , “distribution licensee” and “supply” as defined under Section 2 of the Electricity Act,2003 have no application to the Appellant, is misplaced. The non-existence of the consumer in a distribution licensee area makes the licence inoperative and nonest in the eyes of law.
- i) On the Appellant’s own showing, the Appellant will utilize power purchased from Sterlite Energy Limited, R-2 for self consumption for various processing and non processing uses in the SEZ. Admittedly, there are no other consumers and therefore, the power will not be distributed and supplied to any other consumer. Since there is no element of supply or distribution in the entire area of transaction, the question of the Appellant becoming deemed licensee does not arise. In exercise of jurisdiction for issuing notification, the discretion of the State Commission can not be curtailed or

trammelled. If such a notification transgresses the parliamentary legislation, it shall be ignored.

- j) It has already been laid down that even this Tribunal could not question the vires of the regulations but if the said subordinate legislation is contrary to the Act, it may be ignored. Ignoring the subordinate legislation through a process of interpretation is similar to reading down a provision. Therefore, the notification relied upon by the Appellant can not prevail over the main provision of the Act which confers power to the State Commission to issue distribution licence after verifying the compliance of the conditions.
- k) In the present matter, the Appellant has voluntarily and willingly applied for grant of Distribution licence by submitting to its jurisdiction. Therefore, the State Commission under the Electricity Act, 2003 is required to consider the same uninfluenced by the trappings of a notification which is relied upon by the Appellant to curtail the statutory powers of the State Commission.
8. The learned Senior Counsel appearing for Sterlite Energy Limited, Respondent-2 who was a party to the PPA also made submissions in support of the grounds urged by the Appellant challenging the impugned order.

9. On the basis of the rival contentions urged by the learned Counsel for the parties, the question that may arise for consideration is framed as follows:-

**a) Whether the State Commission has the jurisdiction to go into the question of deemed distribution licensee status of the Appellant and to reject the status even when the Central Government by virtue of notification dated 3.3.2010 has accorded the said status to the Appellant?.**

10. Before analysing this question it would be appropriate to refer to the findings rendered by the State Commission with the reasons for rejecting the prayer of the Appellant. The findings are as follows:-

#### **Findings and order of the Commission**

*12. Having gone through the Written Submissions of M/s. VAL, WESCO, GRIDCO, OPTCL and Development Commissioner, FALTA and also oral submissions made during hearings on different dates, we summarise the prayer of the petitioner as follows:*

*a) To grant a distribution license to M/s VAL for its SEZ on exclusive basis.*

*b) To permit the procurement of power by M/s. VAL-SEZ from M/s. SEL by approving PPA once a distribution license is granted.*



13. A stated earlier the applicant furnished on application on 30.08.2011 for approving its PPA with M/s. SEL. While this application was under consideration of the Commission, another application in partial modification of the earlier application was filed on 28.3.2012 by M/s. VAL for grant of distribution license. The main response of M/s. VAL to the plethora of objections raised by GRIDCO and WESCO has been a standard assertion that because of the order of the competent authority with regard to SEZ, the applicant is a deemed licensee by "operation of law". The applicant has taken a stand that once Val SEZ is given the status of a deemed licensee by the SEZ authorities, grant of license by OERC is only a formality. According to the applicant OERC is only to put its stamp of approval and convert deemed distribution license to a formal distribution license. Before proceeding to adjudicate the issue on merit it is considered appropriate to state the correct legal position on this matter at the outset. Grant of deemed license by SEZ authorities is only an in-principle approval which only helps the applicant to get out of the rigours of Section 15 of the Electricity Act, 2003. However, conversion of deemed licensee into a regular formal license under Electricity Act, 2003 is not automatic nor is it a ritualistic exercise. The Commission has to ensure that deemed licensee complies with the statute, rules and also the regulations framed by OERC with regard to grant of distribution license in letter and spirit. In fact the SEZ authorities while granting deemed license are not expected to look into other compliance aspect under Electricity Act, 2003 and it is only the Commission which has to look into this aspect in detail. It has been clearly stated by the Ministry of Commerce and Industry, SEZ (SEZ Division) in their Notification No. P.6/3/2006-SEZ dated 21<sup>st</sup> March, 2012 that "all the provisions of the Electricity Act, 2003 and Electricity Rules, 2005 as amended from time to time by the Ministry of Power

*along with various power resolution issued by the Ministry of Power will be applicable”.*

*We may now refer to Sections 2(15), 2(17), and 2(70) of electricity Act, 2003 which defines the ‘Consumer’, ‘Distribution Licensee’ and ‘Supply’ respectively as follows:*

*“2(15) ‘consumer’ means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other, as the case may be’.*

*2(17) ‘distribution licensee’ means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;*

*2(70) ‘supply’ in relation to electricity, means the sale of electricity to a licensee or consumer;”*

*14. (i) By harmonious reading of the above provisions of the Act it can be concluded that consumers are legal entitles supplied with electrical energy by a distribution licensee using the distribution system. This pre-supposes separate existence of the distribution*

*licensee and consumer. The licensee shall supply electricity to consumers apart from consuming electricity himself also a consumer. In this particular case it has been found by the inspection team deputed by the Commission and also pointed out in their written and oral submissions by GRIDCO and WESCO that in the VAL SEZ there is no other consumer except the applicant. The applicant contended in their concluding written submissions filed on 21.08.2012 that the Aluminium smelter plant house inside SEZ area has a number of consuming units such as pot lines, carbon plants etc and each are treated as separate cost centers if not separate legal entitles. Consumption of electricity by each of these, processing units is separately metered. The applicant has also stated in the present case, there are various consuming units within a SEZ having a single owner. According to the applicant there is no law to suggest that in order to have a distribution license one needs to have consuming units having multiple owners. The applicant in a way has agreed with the objection of WESCO and GRIDCO that carbon plants, pot lines, cast house etc. are not separate legal entitles and are part and parcel of the Aluminium smelter plant located in M/s. VAL SEZ and owned by M/s. VAL. It is a settled principle of law that words and expressions used in the Act have to be understood in terms of their ordinary everyday meaning and not in an esoteric manner. The word distribution means that a particular asset or facility has to be distributed among various entities and therefore distribution and the consumer cannot be one and same person. In this case there is no other consumer except M/s. VAL who is claiming to be a distribution licensee. The fact that separate meters have been installed and cost centers have been established for carbon plants, pot lines, cast house etc. do not make these units separate consumers. Can a company owning steel plant claim that different units under the steel plant like cold rolling mill, blast*

*furnace, coke oven plant etc. are independent consumers. The consumer is a legal entity having its own legal rights and obligations under the Electricity Act, 2003. Unless it is a distinct separate legal entity, the legal provisions contained under Sections 42(6), 55, 56 and 57 will be made inapplicable. This will lead to an absurd situation wherein any EHT industrial consumer having separate processing units inside its main plant will claim to be distributor by designating these processing units as independent consumers.*

*(ii)Section 43(1) of the Electricity Act, 2003 stipulates that every distribution licensee shall on an application by the owner or occupier of any premises give supply of electricity to such premises within a prescribed time. This pre-supposes a distinction between the distributor and the consumer and the duty of the distribution licensee to supply the electricity to a consumer on request. This condition cannot be satisfied when the licensee utilizes the entire power for self consumption.*

15. *The context in which a deemed license is granted to the M/s. SEL authorities has to be properly understood. The authorities declare the particular applicant as a developer which means that the M/s. SEZ has a number of independent legal units operating in that area and the developer has to provide them all infrastructure facilities including in that area and the developer has to provide them all infrastructure facilities including power. This is true of all 100% export oriented units like textile or software parks where there are large number of utilities working inside the SEZ and developer is granted deemed licensee status to provide power to these consumers. In the present case,*

*however, there are no such independent entities or industries inside the SEZ are, the only industry inside the SEZ area is Aluminium smelter plant of Vedanta SEZ. The so called consumers like pot lines, carbon plants and cast house etc. are part and parcel of the main plant and they have no independent legal identity of their own. Therefore, the Commission is of the view that the primary purpose of granting a distribution license i.e. supply of electricity to consumers under approved licensing conditions is not satisfied in this case.*

*16. it has been stated earlier that much before the application for PPA with M/s. SEL and the present application for grant of distribution license were filed, the applicant has been enjoying power in an illegal and unauthorized manner from M/s. SEL through a 400KV double circuit transmission line. For availing such facility the applicant has to pay open access charges to WESCO. The present application for grant of distribution license is a ploy by which the consumer wants to escape from payment of open access charges. This is a matter where the substance should prevail over form – the applicant cannot take shelter under a web of technicalities to subvert the purpose of the Act. This is not a genuine application for taking a distribution license for giving supply of electricity to genuine consumers in a particular area to increase competition and efficiency. This is an attempt to avoid payment of open access charges for unauthorized drawl of power from M/s. SEL for a number of years.*

*17. Grant of distribution license to the applicant will no way lead to greater competition or efficiency in the*



system. Since the applicant is applying for an exclusive license by carving out SEZ area from the operating zone of the existing licensee i.e. WESCO, it cannot promote competition which pre-supposes two or more players in the distribution business in the same area. Hon'ble APTEL in Appeal No. 3 of 2011 date 23.03.2012 in Torrent Energy Ltd. Vrs. Dakshin Gujarat Viz. Company Ltd.(DGVCL) on the question of "whether the Appellant is entitled in law to an exclusive license in the SEZ area of supply to the exclusion of the incumbent distribution licensee, DGVCL by delimiting and reducing its existing area of supply"? has held in Para 61 (b) that "XXXXXX one of the major cornerstones of the 2003 Act is to promote competition which permeates through various provisions which requires the State Commission to act accordingly. The apart, the State Commissions are required to be guided by the factors while notifying the tariff Regulations which would encourage competition". Hon'ble APTEL further held that in Para 61 (a) that "if the SEZ Act does not contemplate an exclusive right, an approval under such Act can't confer any such Exclusive right." Therefore, the payer of the Appellant in this case would virtually demote competition by not allowing anybody other than the Appellant to supply in the Special Economic Zone. As stated earlier the applicant has taken unauthorized connection of power from M/s. SEL through a 400 Kv line without involving WESCO in the open access arrangement which will inevitably entail payment of cross subsidy charge. This illegality has been made possible because both M/s. SEL and M/s. VAL are controlled by the same management and the companies belong to the same corporate group. Thus instead of encouraging competition, approval of PPA and grant of distribution license will only lead to cartelization because of the nexus between the companies belonging to the same group.

18. Some of the queries and objections raised by GRIDCO and WESCO have not yet been addressed at all by the applicant. In their application in the prescribed form, the applicant claimed ownership over the 400 KV line connecting M/s. SEL and M/s. VAL SEZ through which it has done unauthorized drawl of power. However in their written submission later during the course of hearing this asset is shown to be owned by M/s. SEI. This discrepancy has not been explained with any evidence. WESCO has also contested that the authority who has extended the validity of EZ status with modification of the first approval granted by Ministry of Commerce is not empowered to do so. It is worth mentioning here that the original sanction granting SEZ status with a deemed license was granted with the condition that the applicant shall construct a captive power plant with a capacity of 1215 MW. Later while granting extension of time, validity of approval to M/s. VAL-SEZ is extended up to 07.04.2013 even though the developer has not set up its own CPP inside the SEZ as stipulated in the first letter of approval. It is not clear from the submission of the Development Commissioner, FALTA whether the condition of constructing the CPP has been totally waived or it can be again re-examined after the expiry of the validity period i.e. 07.04.2013.

19. In view of the above, the request of the applicant for grant of Distribution License and approval of PPA with M/s. SEL are rejected on the following grounds:

(i) In spite of a deemed licensee status granted to the M/s. Vedant Aluminium Ltd-SEZ, the Commission has

*to look into all the issues relating to the Compliance of the application to licensing conditions.*

*(ii) The Commission is not satisfied that this a genuine application for getting distribution license to distribute electricity to consumers as envisaged under Section 2(15), 2(17) and 2(70) and Section 42,55,56 & 57 of the EA, 2003.*

*(iii) The Commission is of the view that this application for licensee is not intended for supply of electricity to consumers but is meant for self utilization and self consumption only.*

*20. Consequent upon the rejection of this application the applicant is be treated as consumer of WESCO, the existing DISCOM of the area. As a result M/s. VAL-SEZ has to pay cross-subsidy surcharge to WESCO for open Access drawl of power from M/s. SEL.*

*21. Since the application for grant of Distribution License is rejected it is not considered necessary to go into issues relating to PPA.*

*22. Accordingly, the petition of M/s. Vedant Aluminium Limited is dismissed.*

11. The contents of the reasonings and findings given in the impugned order are given below:-



- a) M/s Vedanta Aluminium Ltd, the Applicant filed a petition to grant a distribution licence for its Special Economic Zone and to approve the PPA entered into between M/s Vedanata Aluminium Ltd and the Sterlite Energy Ltd for the purchase of power by the M/s Vedanta Aluminium Ltd from Sterlite Energy Ltd.
- b) The Applicant pleaded that it has been given the status of deemed licensee by virtue of notification by Special Economic Zone authorities and therefore the State Commission may put its stamp of approval and convert the deemed distribution licence to a formal distribution licence.
- c) The grant of deemed licence by the authorities is only an in-principle approval which only helps the Applicant to get out of the rigours of Section 15 of the Electricity Act,2003. Therefore, issuance of distribution licensee by the State Commission is neither automatic nor it is ritualistic exercise.
- d) The State Commission while considering the issuance of deemed licence has to verify whether a deemed licensee has complied with the statute as well as the rules and regulations framed by the State Commission with regard to grant of distribution licence. The authority who has

granted deemed licence is not expected go into the verification of the compliance of the provisions of the Electricity Act,2003. It is only the State Commission who has to look into these aspects.

- e) Ministry of Commerce and Industry(SEZ Division) issued a notification dated 21.3.2012 to the effect that all the provisions of Electricity Act,2003 and Electricity Rules, 2005 would be applicable. In view of this, the State Commission has to verify whether the deemed distribution licensee will fall under various definitions/provisions of the Act,2003 with regard to term “consumer”, “distribution licensee” and “supply”. This provision would show that the distribution licensee shall supply electricity to the consumers apart from consuming electricity itself as a consumer. In the present case, it has been found by the inspection team that there is no other consumer except the Applicant.
  
- f) Though it is stated that the Aluminium plant has a number of consuming units having separate meters, these units, as admitted by the Applicant, are not separate legal entities. These are the part and parcel of the aluminium plant owned by the Applicant.

- g) The word “distribution” means that a particular facility has to be distributed among various consumers. Therefore, the distributor and the consumer can not be one and same person. In this case, there is no other consumer except the Applicant who is claiming to be a deemed distribution licensee.
- h) Section-43(1) of the Electricity Act, 2003 stipulates that every distribution licensee, on an application by the consumer, shall give supply to consumer within the prescribed time. This shows that there is a distinction between distributor and consumer. As per this Section, duty of the distribution licensee is to supply electricity to the consumer on request.
- i) The context, in which the deemed licence status had been granted to the Applicant has to be properly understood. In the present case, there are no independent entities or industries inside the SEZ Area. The only industry inside the SEZ area is Aluminium plant of the Applicant. Therefore, primary purpose of granting distribution licence i.e. supply of electricity to consumers under approved licensee conditions is not satisfied in this case.

- j) It is noticed that in the original sanction granting SEZ status to the Applicant, the deemed licence was granted with the conditions that the Applicant shall construct a captive power plant within the time frame. The time had been periodically extended but till now the developer, the Applicant has not set up its own captive power plant inside the SEZ area.
- k) Despite the deemed distribution licensee status being granted to the Applicant, the State Commission is bound to look into all the issues relating to the compliance of various provisions as well as the licence conditions.
- l) The State Commission is not satisfied that this is genuine application for getting distribution licence to distribute electricity to consumers as envisaged under Section 2(15), 2(17) and 2(70) and Sections 42(6),55,56 and 57 of the Electricity Act,2003.
- m) The State Commission finds that this application for grant of distribution licence is not intended for supply to electricity to consumers but it is meant only for self utilization and self-consumption. Therefore, the Applicant is not entitled to the grant of distribution license by the State Commission. Consequently, the Applicant shall be treated as consumer of the existing distribution licensee

namely Sterlite Energy Ltd. Therefore, it has to pay surcharge to WESCO for the drawal of power from the Sterlite Energy Limited. Since the Application for grant distribution licence is rejected, the approval of the PPA need not be considered.

12. The crux of the impugned order would show that even though the deemed distribution licensee status had been granted to the Appellant by virtue of the notification under the Special Economic Zone Act, the State Commission is required and empowered to look into the other aspects with regard to the compliance of the basic conditions as provided in the Electricity Act, 2003. The State Commission has concluded after scrutiny that the Appellant is not entitled to the grant of distribution licence even though Applicant was granted the deemed licensee status by virtue of the notification issued by the authority concerned.
13. Let us now go into the relevant facts to understand the background of the case as well as the core of the issue.
14. The Appellant is engaged in the business of production and export of aluminium. The Appellant in terms of Section 3(2) of the Special Economic Zone Act,2005 made a representation dated 30.3.2006 seeking for the approval, to the Government of Orissa for setting up of sector specific Special Economic Zone

along with a captive power plant. On receipt of the said representation, the State Government recommended to the Government of India for allotment of the said Special Economic Zone to the Appellant. Pursuant to its proposal for setting up of a sector Special Economic Zone for manufacture and export of aluminium along with captive power plant, the Central Government granted in-principle approval on 23.8.2006.

15. Further, on 13.11.2006, the Appellant applied to the Government of India for a formal approval for development of Special Economic Zone for manufacture and export of aluminium along with captive power plant. Based on the application of the Appellant, the Government of India on 23.5.2007 granted formal approval to the Appellant's proposal for development, operation and maintenance of sector specific Special Economic Zone at Jharsuguda, Orissa for manufacture and export of aluminium along with 1215 MW of captive power plant .

16. Further, on 27.2.2009, the Ministry of Commerce and Industry, Government of India issued a notification declaring the unit of the Appellant to be a Special Economic Zone under the powers conferred under Section 4(1) of Special Economic Zone Act, 2005 read with Rule 8 of Special Economic Zone Rules,2006.

17. On 26.5.2009, the Appellant requested for approval of the operations of Special Economic Zone to the Board of Approval for Special Economic Zones, Central Government. Thereafter, on 5.6.2009, the said Board of Approval approved the operations to be carried out in the Special Economic Zone. Pursuant to the said approval, the Appellant proceeded with the business plan and commenced operations besides filing returns as applicable under the Special Economic Zone Rules from time to time.
18. The Central Government, thereupon in exercise of the powers conferred under Section 49(1) of the Special Economic Zone Act,2005 issued notification dated 3.3.2010. By this notification, the Central Government has introduced and inserted another proviso to the provisions under Section 14(b) of the Electricity Act,2003. By inserting this proviso, the developer of an SEZ was conferred the status of deemed distribution licensee to distribute electricity within the SEZ area with effect from the date of notification i.e. 3.3.2010.
19. The Appellant being the developer of SEZ in the capacity as deemed licensee executed a Power Purchase Agreement on 18.8.2011 with Sterlite Energy Ltd.(R-2) for purchase of power upto to 2050 MW.
20. Since the supply of power by generating company to a distribution company is regulated under the provisions of

Electricity Act, the Appellant on 22.8.2011 filed a petition before the State Commission for approval of the said PPA under Section 86 of the Electricity Act,2003 read with Section 21 of Orissa Electricity Reform Act, 1995 for the approval of the PPA signed on 18.8.2011 for the purchase of power from Sterlite Energy Ltd for the period of 25 years. In this petition, the Appellant claimed that it is a deemed distribution licensee under Special Economic Zone Act, 2005 in terms of the Government of India Gazette notification dated 3.3.2010. On that basis, the Appellant filed a petition for approval of the PPA.

21. The State Commission after perusal of the records found that the Applicant was an existing industrial consumer of WESCO, the distribution licensee. Therefore, the State Commission put queries to the Applicant asking for clarification as to whether the Applicant can execute PPA with the generating company before approaching the State Commission praying for the distribution licence and whether it can purchase power from the generator for self-consumption, if so, the Applicant would continue as a consumer only. On receipt of these queries, the Applicant, thereafter filed written submissions on 18.12.2011 giving clarification and also filed amendment petition on 27.3.2012 adding the prayer to grant distribution licence in favour of the Appellant with effect from the date of notification and



consequently for approval of the PPA between the Appellant and the Sterlite Energy Ltd.

22. According to the Appellant before the State Commission, the Appellant had already been declared as deemed distribution licensee and as such the grant of licence by the State Commission is only a formality i.e. merely to put a stamp of approval and convert deemed distribution licence to formal distribution licence. Rejecting this contention, the State Commission held in the impugned order that it has got a duty to verify whether the said deemed licensee complies with all the provisions of the Act as well as the Rules and the Regulations framed by the State Commission with regard to grant of distribution licence in letter and spirit and as such the grant of licence is not automatic nor it is a ritualistic exercise. On that basis, the State Commission after referring to the various provisions of the Electricity Act dismissed the Petition holding that even though, the Appellant was granted deemed distribution licensee status by virtue of the notification under SEZ Act, unless the other provisions are complied with, the State Commission could not grant the distribution licence merely on the strength of the said notification dated 3.3.2010.

23. In the light of the above factual situation as well as the finding of the State Commission, we shall now analyse the question framed above.
24. The main contention raised by the Appellant is that the notification dated 3.3.2010 which confers the deemed distribution licensee status to the Appellant would be sufficient and on the strength of that notification, the State Commission ought to have granted the distribution licence and it should not go into the other questions with regard to the compliance of the other provisions of the Act.
25. At the outset, it shall be stated that originally the Appellant has merely filed an application seeking for the approval of the PPA dated 18.8.2011 entered into between the Appellant and Sterlite Energy Ltd. At the initial stage, the Appellant had not thought of requesting for the grant of distribution licence from the State Commission. Only on the queries made by the State Commission, the Appellant thereafter filed additional application for amendment adding to the fresh prayer seeking for the grant of distribution licence and for the approval of PPA.
26. The only weapon which the Appellant is armed with is the Government of India notification dated 3.3.2010. On the basis of which, the grant of distribution licence is sought for. We shall now see as to whether the said notification would curtail the

powers of the State Commission to go into the question as to whether the Appellant is entitled to the distribution licence in the context of the compliance of the other provisions of the Act. The present Appeal has been filed by the Appellant raising the point that the State Commission has no jurisdiction to declare that the Appellant is not a deemed distribution licensee when by operation of law through notification of the Central Government, the Appellant had already been conferred with the said status. This notification had been issued under Section 49(1) of the Special Economic Zone Act,2005.

27. Let us now refer to the said provision, which is as follows:-

*Section 49 of the Special Economic Zone Act provides asunder:*

*“Power to modify provisions of this Act or other enactments in relation to Special Economic Zones*

*(1) the Central Government may, by notification, direct that any of the provision of this Act(other than Section 54 and 56) or any other Central Act or any rules or regulations made thereunder or any notification or Order issued or direction given thereunder(other than the provisions relating to making of the rules or regulations) specified in the notification-*

*a) shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones;  
or*

*b) shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modifications and adaptation, as may be specified in the notifications.”*

28. The above provision would reveal that the Central Government has got the authority to direct that any of the provisions of a Central Act and rules and regulations made thereunder would not apply or to declare that some of the provisions of the Central shall apply with exceptions, modifications and adaptation to the Special Economic Zone. So, under the scheme of Special Economic Zone Act, Central Government has to first notify as to what extent the provision of the other Acts to be made applicable or applicable with modification or not applicable for the Special Economic Zone area.

29. Accordingly, the Government of India, Ministry of Commerce and Industry through their notification dated 21.3.2012 with regard to power generation in Special Economic Zone has declared that all the provisions of the Electricity Act,2003 and Electricity Rule,2005 shall be applicable to the generation, transmission and distribution of power, whether stand alone or

captive power. This notification would clarify that there is no inconsistency between Special Economic Zone Act,2005 and Electricity Act,2003. As such, the Special Economic Zone Act,2005 can not have any overriding effect on Electricity Act,2003.

30. In the light of the above legal situation let us now refer to the notification dated 3.3.2010.

*“ NOTIFICATION*

*S.O. No.528(E). In exercise of the powers conferred by clause(b) of sub-section(1) of section 49 of the Special Economic zones Act, 2005(28 of 2005), the Central Government hereby notifies that the provisions of clause(b) of section 14 of the Electricity Act, 2003(36 of 2003), shall apply to all Special Economic Zones notified under sub-section(1) of section 4 of the Special Economic Zones Act, 2005, subject to the following modification, namely:-*

*In clause (b) of section 14 of the electricity Act,2003(36 of 2003), the following proviso shall be inserted, namely:-*

*“Provided that the Developer of a Special Economic Zone notified under sub section (1) of section 4 of the special Economic zones Act,2005, shall be deemed to be a licensee for*

the purpose of this clause, with effect from the date of notification of such Special Economic Zone.”

31. So, by virtue of the notification one other proviso has been added to the other provisos contained in Section 14(b) of the Electricity Act, 2003. Since one more proviso has been added in the main Act,2003 it is contended by the Appellant that as per this proviso, the Appellant has already been declared as deemed distribution licensee by Central Government by virtue of the powers conferred under Section 49(1) of the SEZ Act,2005 and therefore he need not apply for the deemed distribution licence from the State Commission before entering into the PPA but when the Appellant filed the application for the grant of deemed distribution licence, the State Commission is bound to grant the licence on the strength of the notification and the State Commission is not expected to go into the verification of the compliance of other provisions of the Electricity Act.

32. This contention in our view is not tenable. As mentioned above, the notification issued by the Central Government on 21.3.2012 by the Ministry of Commerce and Industry(SEZ Division) has clarified that all the provisions of the Electricity Act as well as the Electricity Rules would be applicable to the generation, transmission and distribution of power in the SEZ area.

33. The Appellant submitted that Section 51 of SEZ has got overriding effect on the Electricity Act. But, as pointed out by the learned Counsel appearing for the State Commission that this Tribunal in Appeal No.3 of 2011 dated 20.3.2012 while dealing with similar question has observed that “harmonious construction of both SEZ Act,2005 and Electricity Act,2003 means to give effect to the provisions of both the Acts so long as they are not inconsistent with each other”. The provisions of Section 51 of SEZ Act, 2005 are to be considered along with the provisions of Section 49 of the said Act. Accordingly, in view of the provision of the SEZ Act,2005 and consequent notification by the Ministry of Commerce and Industry, the deemed distribution licensee status as claimed by the Appellant should also be tested through other provisions of the Electricity Act,2003 and Electricity Rules, 2005, for certifying its validity and converting it into a formal distribution licensee. In fact, the Appellant has submitted in the jurisdiction of the State Commission, by filing a petition before the State Commission seeking for approval of the PPA and also for grant of distribution licence. How could the Appellant now question the jurisdiction? There is no answer for this.

34. This aspect can be viewed from yet another angle. The Section 14(b) of the Electricity Act,2003 contains several

provisos under Section 14 of the Electricity Act, which is as follows:-

*“14. Grant of License*

*The Appropriate Commission may, on application made to it under section 15, grant any person licence to any person –*

- (a) To transmit electricity as a transmission licensee; or*
- (b) To distribute electricity as a distribution licensee; or*
- (c) To undertake trading in electricity as an electricity trader, in any area which may be specified in the licence:*

*Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:*



*Provided further that the Central transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:*

*Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:*

*Provided also that the Damodar Valley Corporation, established under sub-section(1) of section 3 of the Damodar Valley Corporation Act,1948, shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act,1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation:*

*Provided also that the Government Company or the Company referred to in sub-section(2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act.*

*Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements(including the capital adequacy, credit-worthiness, or code of conduct) as may be prescribed by the Central Government, and no such applicant who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:*

*Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:*

*Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:*

*Provided also that a distribution licensee shall not require a licence to undertake trading in electricity.”*

35. There are totally 9 provisos. One more proviso to Section 14 of the Electricity Act,2003 has been added through the notification dated 3.3.2010. There are some provisos which declare a party as a deemed distribution licensee status who is not required to obtain separate licence from the State Commission under this Act. There are some other provisos which merely declare the party as a deemed distribution licensee.

36. Proviso 4 refers to Damodar Valley Corporation. It is declared that Damodar Valley Corporation shall be deemed to be a licensee but it shall not be required to obtain a licence under this Act as well as under the provisions of Damodar Valley Corporation Act, 1948.

37. Similarly, proviso-8 provides that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not be required to obtain licence for such generation and distribution of electricity and such distribution licensee shall not be required to obtain licence to undertake trading in electricity.
38. The 3rd proviso provides that if appropriate Government transmits or distributions electricity, it shall be deemed to be a licensee but shall not be required to obtain licence unde this Act. Similarly, the 2nd proviso provides that a particular State company or Central Company shall be declared to be a deemed licensee but they do not require to obtain licence under this Act.
39. But other provisos as referred to above do not confer the said privilege to the effect that they shall not be required to obtain licence. This means that those companies which were not conferred with the said privilege, shall obtain the distribution licence from the State Commission.
40. Now, the proviso referred to in notification dated 3.3.2010 also merely says that the developer of the SEZ shall be a deemed licensee. It does not provide that it is not required to obtain separate licence under this Act. So, this would make it clear that it is necessary for the Appellant, though declared as deemed distribution licensee through the notification dated 3.3.2010,is

bound to approach the State Commission seeking the distribution licence by placing the materials to satisfy that he is entitled to the grant of distribution licence along with the material namely notification under which the Appellant was treated as deemed distribution licensee. In other words, the notification can be placed before the State Commission as one of the materials seeking for grant of licence but that notification alone would not be sufficient to compel the State Commission to grant such licence.

41. As per this proviso, the developer of SEZ is a deemed distribution licensee and not the person who develops and operates SEZ simultaneously. If the developer and operator is allowed to hold a distribution licence which otherwise means that both the licensee and consumer is one and the same. If it is so, then it will contradict the Electricity Act and the notification of the Government of India making the whole affairs nonest in the eyes of law.
42. Keeping this in mind, the statute makers by the notification dated 3.3.2010 have inserted the additional proviso to Section 14(b) of the electricity Act. Admittedly, the development and operation of the SEZ are two distinct activities. Thus, the jurisdiction of the State Commission to scrutinise the deemed distribution licensee status of the Appellant is well established

in view of the Section 49(1) of SEZ, Act,2005 and the notification of the Central Government dated 21.3.2012. Therefore, the contention of the Appellant that the State Commission dealt with the matter relating to the grant of distribution licence by going beyond its jurisdiction is misplaced.

43. It is noticed that the Ministry of Commerce and Industry(Department of SEZ Section) has accorded SEZ status to the Appellant for development and operation and maintenance of sector specific Special Economic Zone for manufacture and export of aluminium on the condition that the Appellant should establish captive generating plant as stipulated in the approval letter of Ministry of Commerce and Industry but it is pointed out that still the plant has not been established for various reasons. If Captive generating plant of 1215 MW had been established as per the condition inside the SEZ area, the question of power purchase from Sterlite Energy Limited under the pretext of distribution licensee status would not have arisen. That apart, the State Commission has framed Orissa Electricity Regulatory Commission(conduct of business) Regulation,2004 under the powers conferred under Section 181 of the Electricity Act,2003. The distribution of electricity Licence(Additional requirement of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules,2005 framed by the

Central Government also would apply to the Appellant for distribution licence in addition to the requirements of State Commission's Regulations.

44. In view of the above, the State Commission is bound to ensure the compliance of both the Rules and Regulations. That being the case, deemed distribution licensee status granted to the Appellant by operation of law does not absolve the Appellant from discharging other responsibilities in its capacity as distribution licensee under the Act.
45. Section 174 of the Electricity Act provides that the provisions of the Electricity Act shall have the overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than Electricity Act. That apart, Section 175 also provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force.
46. As per the Ministry of Commerce and Industry(SEZ Division) letter dated 23.5.2007, the Government of India granted formal approval to the Appellant for its proposal for development, operation and maintenance of sector specific Special Economic Zone for manufacture and export of aluminium along with 1215 MW captive power plant.

47. The perusal of the notification dated 3.3.2010 would make it evident that the legislation's intention for declaring the developer in SEZ area as deemed distribution licence, is confined only to clause-b of Section 14 of electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity. The said notification has not curtailed the power of State Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of deemed distribution licence by the State Commission. Therefore, the State Commission rightly acted upon those provisions. As a matter of fact, by the said amendment by inserting another proviso to Section14(b), the context has not been changed as claimed by the Appellant.
48. The State Commission, being the apex State Regulatory Authority, has got every power to examine whether the Appellant is adequately equipped to act as a distribution licensee in consonance with other provisions of law.
49. As correctly indicated by the State Commission, the definition of term "distribution licensee" as enumerated under Section 2(17) of Electricity Act,2003, emphasises upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers. Considering the definition



of 'supply' in Section 2(70), the supply here means sale of electricity to consumers. By merely being authorised to operate and maintain a distribution system as a deemed licensee, would not confer the status of distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence at all since admittedly, the entire power purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.

50. An entity which utilises the entire quantum of electricity for its own consumption and does not have any other consumers, can not, by such a notification, be deemed to be distribution licensee, even by a legal fiction. By virtue of the legal fiction created by the notification dated 3.3.2010, the Developer of SEZ notified under the SEZ Act, who distributes electricity can be deemed to be a distribution licensee. Thus, this legal fiction can not go further and make a person who does not distribute electricity to the consumers as a distribution licensee. Therefore there is no merit in the contention of the Appellant.

51. **Summary of our findings.**

- i) Govt.of India notification dated 3.3.2010 by modifying clause(b) of Section 14 of the Electricity Act by inserting a proviso that Developer of SEZ notified under the SEZ Act,2005 shall be deemed to be licensee for the purpose of this clause. This notification does not exempt the Developer of SEZ to obtain licence from the State Commission.**
- ii) Notification dated 21.3.2012 by the Ministry of Commerce and Industry has clarified that all provisions of the Electricity Act,2003 and electricity Rules,2005 will be applicable to generation, transmission and distribution of power in the Special Economic Zones.**
- iii) This Tribunal in Appeal No. 3 of 2011 dated 23.3.2012 has observed that harmonious construction of both SEZ Act 2005 and Electricity Act,2003 means to give effect to the provisions of both the Acts so long as these are not inconsistent with each other. Accordingly, in view of the provision of SEZ Act,2005 and consequent notification dated 21.3.2012 by Ministry of Commerce and Industry, the deemed distribution licensee status as claimed by the Appellant shall also be tested through other**

provisions of the Electricity Act, 2003 and Electricity Rules, 2005 for certifying its validity and converting it into a formal distribution licensee. The Appellant by filing a petition before the State Commission for approval of PPA and grant of distribution licence has submitted to the jurisdiction of the State Commission. Therefore, the contention of the Appellant that the State Commission, beyond its jurisdiction, dealt with the matter of granting distribution licence is misplaced.

- iv) As correctly indicated by the State Commission, the definition of term “distribution licensee” as enumerated under Section 2(17) of the Electricity Act,2003 emphasises upon the distribution licensee to operate and maintain a distribution system and supply electricity to the consumers. Considering the definition of ‘supply’ in Section 2(70) here supply means sale of electricity to consumers. By merely authorised to operate and maintain a distribution system as a deemed licensee, would not confer the status of a distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the Appellant claims to be a deemed distribution licensee is of no

consequence since admittedly the entire power is purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.

52. **Conclusion:**

In view of our above findings, we conclude that there is no merit in this Appeal. Accordingly, the Appeal is dismissed. However, there is no order as to cost.

*(Rakesh Nath)*

*Technical Member*

Dated: 03<sup>rd</sup> May, 2013

*(Justice M. KarpagaVinayagam)*

*Chairperson*

√REPORTABLE/~~NON-REPORTABLE~~