

**Before The Appellate Tribunal For Electricity  
Appellate Jurisdiction, New Delhi**

Appeal No. 75 of 2005

Dated this 13<sup>th</sup> day of December 2006

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

Reliance Energy Limited  
Reliance Energy Center, Santacruz East,  
Mumbai – 400 055

... Appellant

Versus

1.   The Grid Corporation of Orissa Ltd.  
      Janpath,  
      At/PO: Bhubaneswar
  
2.   Government of Orissa  
      Department of Energy  
      At/PO: Bhubaneswar
  
3.   Western Electricity Supply Co. of Orissa Ltd.  
      Plot No.123, Section A, Zone A,  
      Mancheswar Industrial Estate,  
      Bhubaneswar, Dist. Khurda,  
      Orissa
  
4.   The North-East Electricity Supply Co. of Orissa Ltd.  
      P.O. Januganj, Dist. Balasore
  
5.   The Southern Electricity Co. of Orissa Ltd.  
      Courtpetta, Berhampur, Dist. Ganjam

6. Orissa Electricity Regulatory Commission  
Bidyut, Niyamak Bhawan, Unit VIII,  
Bhubaneswar – 751 012, Dist. Khurda,  
Orissa.

...Respondents

Counsel for the Appellant : Mr. J.J.Bhatt, Sr. Advcoate,  
Mr.D.J.Kakalia, Advocate,  
Mr. Syed Naqvi, Advocate,  
Ms. Smieeta Inna, Advocate and  
Ms. Anjali Chandurkar, Advocate

Counsel for the Respondents: Mr. R. K. Mehta, Advocate along  
with Mr. L.N. Mohapatra,  
Advocate for the 1<sup>st</sup> respondent,  
GRIDCO

Mr. S. Ganesh, Sr. Advocate for  
respondents 3 to 5

Mr.M.G.Ramachandran, Advocate  
along with Ms. Taruna Singh  
Baghel, and Ms. Saumya Sharma,  
Advocates for 6<sup>th</sup> respondent

Mr. Sanjay Sen, Advocate for  
Govt. of Orissa

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

1. The appellant M/s Reliance Energy Limited has preferred this appeal seeking to set aside the directions and observations made against the appellants by the Orissa Electricity Regulatory Commission in its order bearing No. 283 dated 28.02.2005 (wrongly set out as 01<sup>st</sup> March, 2005) in Case No. 115 of 2004 in so far as the same is against the appellant.
  
2. Heard Mr. J.J.Bhatt, Senior Advocate appearing along with Ms. Anjali Chandurkar & Mr. Syed Naqvi for the appellant, Mr. R.K.Mehta for respondent No.1, Mr. Sanjay Sen, advocate for the 2<sup>nd</sup> respondent, Mr. S.Ganesh, Sr. advocate for respondents 3 to 5 and Mr.M.G.Ramachandran advocate appearing for the 6<sup>th</sup> respondent, Orissa Electricity Regulatory Commission (OERC).
  
3. The appellants mainly challenged that portion of the order, Para 'DC' of the order dated 01<sup>st</sup> March, 2005 in so far as the same is against the appellant. For immediate reference the portion of the order which is

challenged in this appeal is extracted here under for ready reference:

**“(DC) Shareholders agreement:**

- (i) *The Commission agrees with the views of the Government of Orissa that the shareholders agreement should be extended for a further period to be mutually agreed between GRIDCO and the DISTCOS to ensure continued interest of the investors in this business.*
- (ii) *As a sequel to such a comprehensive financial restructuring proposal, designed and approved by the Commission, the licensees should take effective measures to infuse necessary funds to rejuvenate the power sector in Orissa by dint of achieving targeted milestones fixed by the Commission. The investors must take appropriate steps for provide requisite financial support in this regard to the companies.*
- (iii) *DISTOCs should also infuse additional share capital to improve upon the debt equity ratio that will go a long way in instilling confidence about their continued interest in the business.*

*Finally, the Commission would like to conclude that the principles set forth in the order will be binding on the concerned parties in all respect.”*

4. It is also brought to our notice that WP (C) No. 106 48 of 2003 is pending on the file of Hon’ble Orissa High Court and it is also a fact that certain interim orders and directions have been passed by the said High Court in MC No. 10352 of 2003 commencing from 21.11.2003 onwards on various days uptill 17.02.2004. The Writ Petition relates to an earlier order of OERC dated 04.09.2003 and interim orders of stay granted is in force.
  
5. We shall now summarise the facts leading to the present appeal for better appreciation. The appellant herein in terms of three independent share holders’ agreements dated 01<sup>st</sup> April, 1999, invested as an investor 51% of the share capital in three distribution companies in Orissa, namely Western Electricity Supply Company of Orissa Ltd., North Eastern Electricity Supply Company of Orissa Ltd. and Southern Electricity Supply Co. of Orissa Ltd. hereinafter referred as Discoms. In the present appeal M/s Reliance

Energy Limited, a public company challenges the directions issued by the Regulatory Commission as one without jurisdiction and no order or direction could be issued to the appellant in terms of the provisions of The Orissa Electricity Reform Act 1995 by the OERC. It is also contended that the appellant Reliance Energy Ltd. is not a distribution licensee but it only holds shares in the three Discoms, which are the licensees. It is contended that the direction issued to the appellant to extend the share holders' agreement is without jurisdiction.

6. It is pointed out on behalf of appellant that the three Discoms are independent companies, while the appellant is also an independent company. The DISCOM as well as the appellant are independent and separate legal entities. If at all the OERC could issue directions it could be to the Discoms, in respect of the distribution license and such other direction as may fall within the provisions of The Electricity Act 2003. No direction could be issued to the appellant herein much less the directions issued in Para 'DC'. It is also contended that the share holders'

agreements entered by GRIDCO lapsed by a efflux of time on 01<sup>st</sup> April, 2004 and the consequence as provided in the agreement shall flow or follow and there could be no direction to the appellant nor there could be a compulsion to continue the share holders' agreement or renewal of the same.

7. It is further contended that the appellant being a separate corporate legal entity, is distinct from the three Discoms and the appellant is not amenable to the jurisdiction of OERC and direction insofar as the OERC has issued against the appellant is without jurisdiction. The contention that the appellant was a party to the business plan, it is pointed out is factually incorrect and in any event no jurisdiction could be conferred by consent of party, which is the settled legal position.
8. The appellant also stated that order dated 04<sup>th</sup> September, 2003 in particular Para 46 thereof passed by OERC is the subject matter of Writ Petition No. 10648 of 2003 on the file of Hon'ble High Court of judicature of Orissa and interim

order of Stay has been passed by Hon'ble High Court. Therefore, the stand taken by the respondent is devoid of merits. The interpretation placed on Clause 25 of the share holders' agreement by the contesting respondents is untenable and unsustainable both on facts and in law and at any rate the directions issued against appellant are liable to be set aside.

9. The Grid Corporation of Orissa submitted that the appeal is without substance and question of jurisdiction should not be allowed to be raised in this appeal, as the appellant has submitted to the jurisdiction (OERC). It is further contended by Grid Corporation of Orissa (GRIDCO) that the (i)direction to extend the share holders' agreement, (ii)to infuse necessary funds etc. are just and warranted on the facts of the case. The contesting respondents further contended that the impugned order dated 28.02.2005 is a composite order under which certain concessions were given to the Discoms by relaxing the escrow-account and securitization of the dues of GRIDCO.



10. It is further contended on behalf of the respondents that the appellant was a party to the proceedings before the OERC and it is incorrect to contend that the appellant was not a party or that it has not submitted to the jurisdiction of OERC. In fact the Director (Finance) of the appellant company appeared before the OERC and made submissions. It is also pointed out that REL has been impleaded as one of the respondents in Petition Nos. 54, 55 & 56 of 2004 and Case no. 115 of 2004 is an offshoot. The contention that OERC did not have jurisdiction to issue the impugned directions is a misreading of the provisions of The Orissa Electricity Reform Act and in particular Section 11 of the said Act.

11. Mr. R.K.Mehta, advocate appearing for the contesting respondent contended that OERC has all the incidental and ancillary power as are necessary to discharge its functions. The learned counsel in this respect relied upon the following pronouncements :

1. *Grindlays Bank Ltd. v. The Central Government Industrial Tribunal and Others as reported in AIR 1981 SC 606*
  2. *D.K.V. Prasada Rao & Others v. Govt. of Andhra Pradesh as reported in AIR 1984 Andhra Pradesh 75 and*
  3. *K. Ramanathan v. State of Tamil Nadu and Another reported in 1985 Vol.2 SCC 116.*
12. Mr. R. K. Mehta, learned counsel further contended that the directions issued by the Regulatory Commission fall within the ambit and scope of share holders' agreement and in particular Clauses 2.14, 2.15, 8.1 etc. It is pointed out by Mr.R.K.Mehta learned counsel appearing for the appellant that Clause 25 of the share holder's agreement still continue to be in force and effective by virtue of Clause 25 and there is no escape for the appellant. The various legal contentions, advanced by the appellant, according to Mr.R.K.Mehta are without substance, devoid of merits and untenable. A reference was also made to minutes of certain

meetings attended on behalf of the appellant and on that premise respondents to sustain the impugned orders.

13. We are called upon to decide the question of jurisdiction of OERC in issuing the directions against the appellant herein and we may not be justified in examining the merits and correctness of it in so far as the directions issued by OERC as well as other connected orders passed with respect to the three Discoms in this appeal. The three Discoms have not preferred appeal against the order bearing No. 283 dated 28.02.2005, and it is only the REL, which is the appellant before us.

14. The points that arise for consideration in this appeal are :

- A. Whether OERC has jurisdiction to issue the impugned directions to the appellant ?
- B. Whether the plea that the appellant has submitted to the jurisdiction of OERC is sustainable ?

C. Whether the OERC has incidental and ancillary powers to issue directions to the appellant herein as contended by Respondents ?

15. All three points could be considered together. The Orissa Electricity Reform Act 1995, is a legislation of the Orissa State legislature enacted to provide for restructuring of the electricity industry, for the rationalization of the generation, transmission, distribution and supply of electricity, for avenues for participation of private sector entrepreneurs in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in the state in an efficient, economic and competitive manner including the constitution of an electricity regulatory commission for the state and for matters connected therewith or incidental thereto.

16. Chapter II of the Act provides for establishment and constitution of Orissa Electricity Regulatory Commission. Section 10 of the Act prescribes the powers of the

Commission. Section 11 of the Act enumerates the functions of the Commission.

17. As certain clauses of Section 11(1) are relied upon by Mr.R.K.Mehta, it is essential to set out those Clauses for immediate reference :

**“11. FUNCTIONS OF THE COMMISSION :**

*(1) Subject to the provision of this Act, the Commission shall be responsible to discharge, amongst others, the following functions namely:-*

*(a) ... ..*

*(b) to regulate the working of licencees and to promote their working in an efficient, economical and equitable manner:*

*(c) ... ..*

*(d) ... ..*

*(e) ... ..*

- (f) to promote competitiveness and progressively involve the participation of the private sector while ensuring a fair deal to the customers;*
- (g) ... ..*
- (h) to require the licensees to formulate perspective plans and schemes in coordination with **others** for the promotion of generation, transmission, distribution and supply of electricity; and*
- (i) to undertake all incidental or ancillary things”*

18. Chapter VI of the Act provides for licensing of Transmission and supply. Chapter VII provides for re-organization of the electricity industry and Chapter VIII provides for Tariffs.

19. The Electricity Act 2003 (Central Act 36 of 2003) came into force on 10.06.03. In terms of Sub Section (3) of Section 185 The Orissa Electricity Reform Act 1995, not inconsistent with the provisions of The Electricity Act 2003 shall apply to the state of Orissa, where The Orissa Electricity Reform Act 1995 is in force. Here and now it is to be pointed out that the contesting respondents have not

rightly placed reliance on the provisions of The Electricity Act 2003 but relied upon The Orissa Electricity Reform Act 1995. We have already extracted the relevant statutory provision relied upon by Mr.R.K.Mehta appearing for contesting respondent. The construction to be placed on the said clause of Section 11 extracted above is one of the contentions advanced by Mr.R.K.Mehta, learned counsel appearing for GRIDCO.

20. With respect to CESCO, the 4<sup>th</sup> Discom, we are not concerned since the entrepreneur had abandoned the contract and its license has been cancelled and the said Discom is under a direct control of an authority appointed by OERC.

21. In this appeal we are concerned the shareholders agreements entered with three Discoms namely, NESCO, SOUTHCO and WESCO. The three Discoms are licensed by OERC to distribute power under Orissa Electricity Reform Act 1995 and thereafter the said three Discoms continue to be the licensees by virtue of deemed provisions contained in

The Electricity Act 2003. In other words, the three Discoms are licensed to distribute electricity as the distribution licensee under Section 14 of the Electricity Act 2003 within their respective area of license. Suffice to state that each one of the three Discoms is independently licensed to distribute power as an independent company registered under the Companies Act 1956.

22. There is no dispute that the three Discoms are separate and independent legal entities distinct from the appellant REL, which is also an independent company and all of them are independent corporate bodies. However, we may hasten to add that 51% shares in the three Discoms is held by appellant herein. The appellant just holds 51% of the shares in the three Discoms but the three Discoms are three independent corporate entities. Being three independent corporate entities they are to act as per license and they are governed by provisions of Indian Companies Act with respect to their corporate structure or affairs and act within the four corners of their Memorandum and Articles of Association. However, insofar as the distribution licenses



are concerned, the three Discoms are to act in terms of the license conditions granted in their favour by OERC and in terms of the provisions of The Electricity Act 2003 and the relevant Regulations.

23. We are to point out that directions with respect to the distribution license could be issued only to the Discoms and there could be no direction as against the appellant herein, which is an independent legal entity. The share holders' agreement referred to by Mr. R.K.Mehta, share acquisition agreement is in fact an agreement between GRIDCO and the three Discoms in which the appellant is an investor. Certain stipulations contained in the share acquisitions agreement dated 31<sup>st</sup> March 1999 would show that the GRIDCO and the concerned Discoms namely SOUTHCO or WESCO or NESCO as the case may be is to enter into connected contract with respect to matters provided in Schedule IV appended to the said agreement. Schedule IV provides for entering into agreement for bulk supply, escrow agreement, loan agreement and other appropriate

agreement to be signed between GRIDCO and concerned Discoms.

24. In other words, we are to point out that the Discoms, being independent corporate entities, alone are the licensees and with respect to their operations and activities connected with distribution licenses, the Discoms could be preceded or could be held responsible and / or actionable for omissions or commissions. Appellant being a share holder of the Discoms and the remaining share holders being GRIDCO and employees of the Discoms, it is obviously clear that as against the appellant herein, OERC has no jurisdiction as rightly contended by the learned counsel for the appellant.
25. Concedingly, the appellant is merely a share holder of the Discoms among others and not a licensee as defined or as provided in The Orissa Electricity Reform Act or for that matter The Electricity Act 2003. It may be that the appellant holds 51% shares but it makes no difference with respect to issues involved in the present appeal. With respect to the breach, if any, on the part of the appellant, in

respect of agreement entered, we are of the considered view that OERC has no jurisdiction nor it is the competent forum to enforce the agreement entered between the appellant or other agencies of State of Orissa.

26. Further the share holders' agreement expired by efflux of time on 01<sup>st</sup> April 2004 in terms of Clause 15.1 of the share holders' agreement. It is an automatic termination. Be that so, after 01<sup>st</sup> April, 2004 the share holder of the three Discoms or for that matter the appellant or GRIDCO and other employee share holders excepting holding shares, no other consequence flows by virtue of the earlier arrangement or agreement. Even now the appellant is a 51% share holder in three Discoms, GRIDCO being the other major share holder.
  
27. Appellant being separate legal entity established under the Companies Act 1956 and being distinct from Discoms in every respect it is obviously clear that OERC has no jurisdiction to issue directions against the appellant.

28. Assuming that the appellant has failed to implement the obligations which it has undertaken in terms of the shareholders agreement and/or other connected contracts entered between the parties, it is for the parties to the said instruments to enforce the stipulations in the contract before competent forum or invoke the jurisdiction of the Company Court under The Indian Companies Act or such other statutory provisions, which may govern the contract. We are clear in our mind that OERC has no jurisdiction to issue the impugned directions to the appellant, in respect of which direction the present appeal has been preferred by REL and not by three Discoms.

29. Section 11 of the Orissa Electricity Reform Act 1995 is heavily relied upon by Mr.R.K.Mehta the learned counsel for GRIDCO and in particular Section 11, (1)(b), (f), (h), to sustain the directions. It is rightly pointed out by the learned counsel for the appellant that those clauses do refer to the licensees only not to the share holders of the Discoms. Direction, if any, could be issued to the licensees by exercise of power conferred by Section 10 or 11 or other

provisions of The Orissa Electricity Reform Act and /or The Electricity Act 2003. The OERC Act in no way confers jurisdiction or power on the OERC to issue directions to the appellant.

30. It is settled law that the basic rule of interpretation of any statutory provision is that the plain words of the statute must be given effect. In special reference *No. 1 of 2002, reported in 2002 (8) SCC.237* the Hon'ble Supreme Court, held thus :-

*“In providing key to the meaning of any word or expression the context in which it is said has significance. Colour and content emanating from context may permit sense being preferred to mere meaning depending on what is sought to be achieved and what is sought to be prevented by the legislative scheme surrounding the expression. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context by the word*

*“context”. It means in its widest sense as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia and the mischief which the statute intended to remedy. While making such interpretation, the roots of the past, the foliage of the present and the seeds of the future cannot be lost sight of. Judicial interpretation should not be imprisoned in verbalism and words lose their thrust when read in vacuo. Context would quite often provide the key to the meaning of the word and the sense it should carry. Its setting would give colour to it and provide a cue to the intention of the legislature in using it.”*

31. In the light of the above pronouncement, the interpretation sought to be advanced by Mr. R.K.Mehta cannot be sustained and it cannot be accepted. Hence, on the point of jurisdiction, we hold that the directions issued by OERC against the appellant herein is concerned is without jurisdiction or authority. All the other contentions advanced as to necessity or merits of the direction sought to

be advanced on behalf of the respondents or as to correctness need not be considered in the present appeal.

32. Incidentally, it was contended by Mr. R.K.Mehta that the appellant has submitted to the jurisdiction of OERC by taking part in the proceedings, namely the Director of the appellant company appeared before the OERC and submitted himself. In this respect it is to be pointed that right from the inception the jurisdictional objection was raised by the appellant and it has not been given up as seen from the order and objections raised. This is also clear from the proceedings of OERC.

33. We are unable to sustain the contention advanced on behalf of the respondents. That apart there could be no conferment of jurisdiction by consent or waiver as it is a case of total lack of jurisdiction of OERC against the appellant. It is needless to add that OERC could enforce license conditions and statutory provisions against the three Discoms but the same will not confer jurisdiction on the OERC to issue directions to share holders' simpliciter.

OERC could very well enforce licence condition as against the licensee only not against the third party. In respect of shareholders agreements, if at all action if any against REL could be before other competent forum and not before OERC.

34. It may be that the action against the licence or licensee may ultimately have an effect and consequence on the shareholders' of the DISCOM, but that will not confer jurisdiction on OERC to issue directions to the appellant. It is settled law that every statutory authority has to act within the four corners of the enactment under which it acts and it cannot usurp jurisdiction or exceed its authority in purported exercise of statutory powers.

35. In *Nautam Prakash DGSVC v. K.K.Thakkar* reported in 2006(5) SCC.330 it has been laid down that a statutory authority must exercise its jurisdiction within the four corners of the statute, it cannot act beyond the statutory powers conferred and any order passed by such authority which lacked inherent jurisdiction would be *ultra vires*.



36. Mr. R.K. Mehta, learned counsel contended that OERC has the ancillary and incidental powers to carry out the objects of the Act by issue of directions. Mr. R.K.Mehta contended that OERC has the power to regulate which include the ancillary and incidental power as are necessary to discharge its statutory functions effectively to achieve the object and to render justice between the parties. The regulatory measure, if any, or action, if any, that could be taken or initiated or enforced or the exercise of ancillary and incidental power if any by OERC, the licensed authority, could be only against the three licensees and not against REL a third party, just because it holds shares in the three distribution companies. The regulatory power, if any, OERC could have only as against the licensee and not against shareholders. The reliance placed upon the three pronouncements referred to above by Mr.R.K.Mehta is of little assistance to the case on hand. There is no quarrel with the proposition of law laid down in the said three pronouncements but it has no application to the case on hand.

37. The appellant is not the licensee to distribute power nor it is amenable to the jurisdiction and authority of OERC. The learned counsel is unable to point out any express provision either in The Orissa Electricity Reform Act 1995 or in The Electricity Act 2003 which confer jurisdiction on the OERC to issue the impugned directions to the appellant herein. The power to Regulate, if any could be exercised against the licensee/s or alike acting or operating under the said two enactments like Discom and not against third party like the share holder of Discoms in the case on hand. In our considered view, the OERC has neither the authority nor jurisdiction to issue the directions to the appellant herein and it has exceeded its authority on a misconception and out of over enthusiasm to assert its power. Hence, the contention advanced by Mr.R.K.Mehta learned counsel for respondent No.1 deserves to be rejected.

38. We hold that insofar as the appellant is concerned OERC has acted without jurisdiction and the direction issued by OERC against the appellant are liable to be set aside and

accordingly they are set aside. However, we make it clear that with respect to the orders passed by OERC against the Discoms, we are not called upon to examine the correctness or validity on merits as the Discoms have not preferred appeals. Points 'A' to 'C' are answered in favour of the appellant and against respondents. The content of minutes of meetings referred to by Mr.R.K.Mehta is of no assistance at all nor it could confer jurisdiction on OERC. That apart OERC is not the competent forum to enforce the agreements or stipulations agreed therein.

39. Electricity distribution business involves not merely bilateral contract but also far reaching consequence on large number of consumers in the area of distribution licences and such distribution contracts are to be treated on a different pedestal as has been observed by Hon'ble Supreme Court in *Raymonds Ltd. V. Madhya Pradesh Electricity Board reported in 2001, 1 SCC, 134.*

40. We expect not only the Discoms but also the share holders of the Discoms namely the appellant, GRIDCO and others

will evolve and arrive at an amicable solution for effective functioning of the three Discoms to serve the consumers at large, which is expected of the appellant. With respect to the matter which is the subject matter of pending Writ Petition, it is for the parties to work out their remedies and it shall not be taken that we have expressed ourselves on merits of the said matter nor are we could have taken up the matter to discuss the said dispute here.

41. Before parting with this appeal we would like to point out that the appellant as well as respondents have taken up the responsibility of serving the consumers and they shall take every effort to see that the privatization in the State of Orissa is not defeated on hyper-technicalities and every effort should be made to continue the distribution of power effectively to the satisfaction of everyone, while avoiding friction and mutual misunderstandings and suspicions. We do expect that the appellant REL and contesting respondents continue to strive for the common purpose of serving consumers and the discussions, now being held in

this behalf may be utilized to settle the disputes in the interest of Reform in the State of Orissa.

42. In the result the appeal is allowed but without cost and the directions issued to the appellant, REL by OERC are set aside.

Pronounced in open Court on this 13<sup>th</sup> day of December, 2006.

**( Mr. H. L. Bajaj )**  
**Technical Member**

**(Mr. Justice E Padmanabhan)**  
**Judicial Member**

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