

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

Appeal No. 182 of 2008

Dated: 29th April, 2009.

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

IN THE MATTER OF :

Maharashtra State Electricity
Power Trading Corporation Pvt. Ltd.Appellant
Versus

1. Central Electricity Regulatory Commission,
36, Chanderlok Building,
Janpath, New Delhi-110001.
2. Shri Chandrakante G. Barbole,
2, Makarand Plot No. 152, Sector 3,
Charkop, Mumbai- 400067. Respondents

Counsel for the Appellant : Mr. Amit Kapur
Mr. Mansoor Ali
Mr. Shreshth Sharma
Counsel for the Respondents : Mr. Nikhil Nayyar,
Mr. A. Aggarwal for Resp. No. 1
Mr. T. Rout, Joit Chief (L), CERC
Mr. B. Sreekumatr, A(L)., CERC.

JUDGMENT

Per Hon'ble Mr. A.A. Khan, Technical Member

The Appellant, Maharashtra State Electricity Power Trading Corporation (for brevity to be called as 'Maha Trading'), a private limited company which is wholly owned by MSEB Holding Company has challenged the impugned order dated 17.6.2008 passed by the Central Electricity Regulatory Commission

(hereinafter referred to as 'the Central Commission') in Petition No. 8 of 2008 whereby the application of the Appellant seeking grant of Category 'D' license for inter-state trading in electricity is rejected.

Facts of the Case

2. MSEB Holding Company Limited is one of the four companies incorporated on 31.05.2005 as a result of unbundling of the erstwhile Maharashtra State Electricity Board ('MSEB') on 24.01.2005. The remaining three companies incorporated are namely Maharashtra State Power Generation Company Limited ("Maha Genco"), Maharashtra State Transmission Company Limited ("Maha Transco") and Maharashtra State Distribution Company Limited ('Maha Discom').

3. Government of Maharashtra had notified Maharashtra Electricity Reforms Transfer Scheme, 2005 on 04.06.2006. In accordance with the said transfer scheme, all properties, interest on properties, rights, obligations, liabilities, proceeding and personnel of MSEB were transferred to the aforesaid four companies viz. MSEB Holding Company; Maha Genco; Maha Transco; and Maha Discom. In consideration of the said transfer scheme each of the three companies namely Maha Genco; Maha Transco and Maha Discom shall vest all shares, debentures or any other acceptable securities in MSEB Holding Company Limited, which in turn shall issue all shares and securities held by it in favour of the Government of Maharashtra.

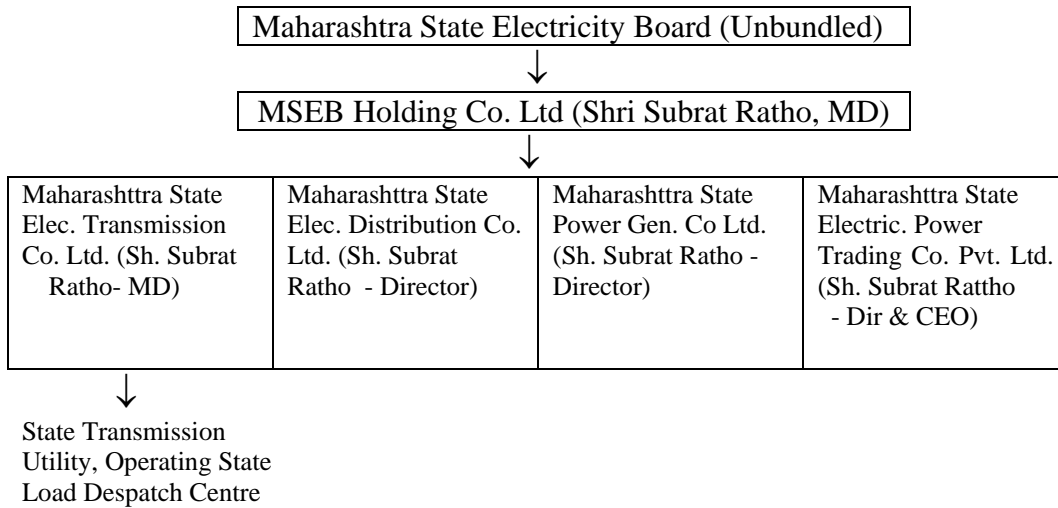
4. In terms of Section 39 (1) of Electricity Act, 2003 Maha Transco was notified to be State Transmission Utility ('STU') on 06.06.2005 and was also entrusted to operate State Load Despatch Centre ('SLDC').

5. MSEB Holding Company Ltd. beside having three government owned subsidiary companies in Maha Genco, Maha Transco and Maha Discom is also the sole promoter and principal shareholder (with paid up share capital of Rs. 1 lakh against authorized share capital of Rs. 20 crores) of a private limited company, Maha Trading, the Appellant herein which was incorporated on 29.11.2007 under the Companies Act. The Appellant company is established with the main objective to carry on the business of purchase and resale of all forms of electric power, both conventional and non-conventional. The status of the Appellant being a private ltd. Subsidiary company, thus, is not at par with other government owned subsidiaries of MSEB Holding Company Ltd.

6. The Board of the Appellant company is constituted with the Directors namely Shri Subrat Ratho, IAS as CEO, Shri Vinayak Rao, IRAS as Director (Fin.) and Shri P.V. Page as an independent Director. However, Shri Subrat Ratho, before passing of the impugned order by the Central Commission had resigned on 29.03.2008 from the Board of Directors of the Appellant company.

7. The relationship between utilities of Maharashtra State Power Sector post-unbundling of erstwhile MSEB as depicted in para 10 of the impugned order has recorded thus;

“10. From the fact placed on record, the ’s relationship with other companies formed as a result of re-organization of Maharashtra State Electricity Board can be depicted as under:



8. From the above, the pervasive presence of Shri Subrat Ratho in MSEB Holding Company Ltd. and its subsidiaries are evident. Maha Transco, the transmission company has also been notified by the State Government as State Transmission Utility (STU) under section 39 (1) of the Electricity Act, 2003 ('the Act' hereinafter) and functions as such and operates the State Load Despatch Centre (SLDC) under section 31 (2) of the Act. STU is mandated to ensure non-discriminatory open-access to licensees and generating companies. Even though Shri Subrat Ratho ceased to be the CEO of the Appellant company w.e.f. 29.03.2008, in order to ensure establishment of non-discriminatory open-access regime, the Central Commission considered it appropriate to lift the Corporate veil to examine the extent to which the MSEB Holding Company

limited wields control over the decision making process of the STU and the Appellant Company.

9. The Memorandum of Association of the Appellant Trading Company provides the following:

(a) **Article 73:** *Subject to the provisions of Section 252 of the Act, the number of Directors of the company shall not be less than three and not more than twelve.*

(b) **Article 76:** *Subject to articles 75 & 82, the CMD and other Directors shall be appointed by MSEB Holding Company Ltd and shall hold office at the pleasure of MSEB Holding Company Ltd.. The procedure and necessary qualifications for directors shall be prescribed by the MSEB Holding Company Ltd.*

(c) **Article 80:** *The CMD and the functional Directors shall be paid such salary as may be determined by the MSEB Holding Company Ltd.....*

10. Pursuant to filing of the application by the Appellant Company before the Central Commission for seeking license for inter-state trading in electricity on 29.01.2008 under section 15 of the Act and Central Electricity Regulatory Commission (procedure, terms and conditions for grant of trading license and other related matters), Regulations, 2004, public notices were published as per the requirement of the Electricity Act. On 20.02.2008, respondent No. 2, Shri Chandrakant G. Barbole raised objection stating that granting of trading license

to 'Maha Trading' may contradict provisions of section 31(2), 39(1) and 41 of the Electricity Act, 2003 which, inter alia, provide that no SLDC, STU and transmission licensee shall engage in business of trading in electricity. The statutory provisions as contained in the Act and relevant for the instant case are extracted below:

“Section 31. Constitution of State Load Despatch Centres:-

1. *The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.*
2. *The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government.*

Provided that until a Government Company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity

.....

Section 39. State Transmission Utility and functions:

1. *The State Government may notify the Board or a Government company as the State Transmission Utility:*

Provided that the State Transmission Utility shall not engage in the business of trading in electricity.

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

.....

Section 41, Other business of transmission licensee:

A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilization of its assets:

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

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

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

11. The objections raised by Respondent No. 2, on the basis of the above provisions of the Act, were forwarded by the Central Commission to the Appellant company seeking its response.

12. Ultimately, the Central Commission by applying the doctrine of 'lifting of Veil' has found that the control of MSEB Holding Company Ltd. Over the Appellant company and the transmission licensee is pervasive as both the companies are wholly owned subsidiaries of the MSEB Holding Company Ltd. It also felt that there is every likelihood of the holding company influencing the decisions of its subsidiary company. So, the Commission concluded that granting of trading license to the Appellant company will be violative of the

spirit of the Act. Accordingly, the Commission rejected the application for inter-state license of Category 'D' for trading in electricity.

Basis of Rejecting Application for Trading License given in the order of the Commission.

13. The impugned order that has rejected the application of the Appellant, Maha Trading for inter-state license for trading in electricity has based it on the following:-

- (a) The Applicant before the Commission has stated that the Appellant company shall purchase the power from a number of the captive power plants in the state and sell the same to the Distribution Company i.e. 'Maha Discom' but could not clarify as to why the Discom cannot perform that function by itself.
- (b) MSEB holding company which besides owning the State Transmission Utility controlling the State Load Dispatch Center also wholly own the Appellant company and thus could be considered as single entity violating Sections 31, 39 and 41 of the Act.
- (c) Notwithstanding the established principle laid down by the House of Lords in **Aron Salomon Vs Salomon & Company limited**, specifying that the corporation in law is treated like a natural person and is a legal entity of its own and the entity of the corporation is entirely separate from that of its shareholders bearing its own name and seal and own assets separate and distinct from those of its

shareholders, there are also well-recognized several exception to it recommending the application of doctrine of lifting of the Veil to examine its face in substance. The, impugned order has derived support from 'Modern Company Law' by Gower and Pennington in his book 'Company Law'. In order to re-enforce it, the impugned order has referred to following case laws:

- (i) **Delhi Development Authority Vs Skipper Construction Private Limited (1988) 4 SCC 59.**
- (ii) **State of UP & others Vs Renusagar Power Company & others (1988) 4 SCC 59.**
- (iii) **Life Insurance Corporation of India Vs Escorts Ltd. & others.**

(d) The Appellant, 'Maha Trading' and STU/SLDC are the wholly owned subsidiaries of MSEB Holding Company. The control of MSEB Holding Company over its subsidiaries is pervasive and there is every likelihood of the holding company influencing the independence of the Subsidiary Company in decision-making.

(e) The statutory provisions of Sections 31, 39 and 41 of the Act categorically prohibit STU/SLDCs from engaging in the business of trading in electricity, *inter alia*, insulating these entities from the business of trading in electricity to ensure impartiality in making

facility of non-discriminatory open access available to licensees and generating companies under the Act.

- (f) When the Appellant company and the STU/SLDC are the integrated organs of MSEB Holding Co. Ltd., the grant of license for trading to the Appellant will be violative of the spirit of law.

14. The Submissions made by the Learned Counsel for the Appellant.

- (a) The Act and the CERC Trading License Regulations do not restrict cross holding for a Trader and Transmission licensee to be a part of a common ownership of a separate legal entity. Standing Committee of Parliament (Energy), in its report on Electricity Bill to the Parliament had recommended prohibition of cross holding, by Central/State Transmission Utilities, from having ownership interests in other licensed activities but the same was not incorporated in the final enactment of Electricity Act, 2003. Thus, following the well-settled principle of law, to give true meaning of ambiguous words in statute, the recommendations of the Standing Committee of Parliament are to be referred to. The Central Commission has provided *casus omisus* by imposing the restrictions in grant of trading license.
- (b) MSEB Holding Company which is a Government Company under Companies Act, 1956 is a deemed licensee as per sections 14 and 131 (2) of the Act and is entitled to carry out transmission,

distribution and trading of electricity and, thus, it is inappropriate to hold that the Appellant and other subsidiaries are inextricably intertwined and such that they shall act in violation of law.

- (c) There is complete transparency in the conduct of SLDC as also the fact that the decisions of STU are open to scrutiny by all concerned parties and the Appropriate Commission. The Appropriate Commission is empowered under Section 19 of the Act and Regulations 15 of the CERC Trading License Regulations to suspend or revoke the license of a trader and takes any other penal action under Sections 57, 142 and 146 of the Act. The apprehension of possibility of violation of any statutory provision of the Act cannot be a justifiable basis to decline grant of license.
- (d) Since bilateral transaction of electricity on the transmission network requires prior concurrence of SLDC as envisaged in Regulation 8 (1) of CERC (Open Access Inter-state Transmission) Regulations, 2008, the finding of the Central Commission that the pervasive control of Holding Company over Transmission, Trading and Distribution entities will lead to impermissible horizontal integration is devoid of merit.
- (e) The impugned order is contrary to the concept of Holding and Subsidiary Company and Board of Directors under the Companies Act, 1956 since the Appellant Company and other subsidiary company namely Transmission Company cannot be considered as

the single entity. The Appellant is managed by the Board of Directors, which is neither controlled by nor in any way influenced by the Holding Company.

- (f) The finding of the Central Commission that the Memorandum of Association of the Appellant (Articles 72, 74, 76, 78, 80 & 82) makes it obvious that it shall be controlled by the MSEB Holding Company is wrong.
- (g) The Central Commission has misapplied the law relating to lifting of Corporate Veil which is not applicable to the facts and circumstances of the present case. No ground for lifting of Corporate Veil was pleaded before the Central Commission. In this connection para 17 of the impugned order states thus;

“17. However, there are also well-recognized several exceptions to the doctrine that the corporation of the fiction that the veil of the corporation can be lifted and its face examined in substance. One of the exceptions noted by Gower in his book Modern Company Law is that “when the corporate personality is being bluntly used as a cloak for fraud or improper conduct”. Pennington in his book, Company Law, has also stated “where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law”, the court will disregard the corporate veil. Professor L. Maurice Warner has stated that “when the conception of corporate entity is employed to defraud the creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate entity as an association of live, up-and-doing, men and women share-holders, and will do justice between real persons”.

(h) The Central Commission has misguided itself by relying upon the following judgments.

- **LIC of India & ors Vs Escorts Limited co. & ors. (1985) Suppl 3 SCR 909.**
- **States of UP Vs Renusagar Power Co (1988) 4 SCC 59.**

(i) Since no fraud, improper conduct or intention to defeat the purpose of the Act is intended by the Appellant, MSEB Holding Company and other subsidiaries, no impugned conduct or abuse of the process of law is attributed against the Appellant. Further, the Appellant has also not commenced the business of trading. Therefore, the judgments cited above are not applicable to the present case.

15. **Submission of the Learned Counsel for the Respondent No. 1, the Central Commission in reply:**

(A) The Clause 7.58 of Chapter VII of the 31st Report of the Standing Committee of Parliament (Energy) shows that the Electricity Bill, 2001 originally introduced in the Parliament had provided that the State Governments were empowered to notify STU under clause 39 of the Bill. The Committee opined that the Bill did not provide for any check on the part of the Government to

prohibit private companies from having ownership interest in generation and distribution companies. Therefore, the Committee recommended that these companies (meaning private companies) should not be allowed to undertake generation, distribution and trading business, as it will lead to collusion between transmission and generation/distribution/trading thereby abusing the market power. The Parliament, however, did not accept the recommendation and the enactment of the Act was done without it. The Appellant's reliance on the said Report is misconceived and the view taken by the Central Commission does not conflict with the Report. Moreover, in the present case the language of Sections 31,39 and 41 of the Act is clear and unambiguous and does not need any support of the Committee Report for interpretation. It is the Appellant misconception about *casus omissus*, as the Commission has not supplied any *casus omissus* to any of the provisions of the Act. The Commission has only interpreted the provisions of the Act and concluded that the Act envisages establishment of a non-discriminatory open-access regime.

- (B). The Appellant was not created as a result of unbundling of erstwhile MSEB under Section 131 of the Act. Under Section 131 (2), the company or companies to be formed are the State

Transmission Utility or the generating company or transmission licensee or Distribution Company, as the case may be, and not the Trading Company. The erstwhile MSEB was unbundled and re-organized on 4.6.2005, and the Appellant company was incorporated on 29.11.2007.

- (C) In order to give effect to the statutory policy, CERC (Open Access in Inter-State Transmission) Regulations, 2008 have been framed. Regulation 8(1) is reproduced below:

“Concurrence of State Load Despatch Centre for bilateral and collective transactions.”

8.(1) Wherever the proposed bilateral transaction has a State Utility or an intra-State entity as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such a form as may be provided in the detailed procedure”.

If the trading license is granted following the above Regulation to the Appellant and agreement for bilateral transaction were entered into by it with the Maha Transco (which is STU and operates SLDC) for using the transmission network, the concurrence of SLDC as envisaged under the above Regulation would be mere futile exercise as there would neither be an independent application of mind nor transparency since the Appellant along with other siblings, beside being wholly owned by MSEB Holding Company are also subjected

to 'Controlling interest' of the Holding Company. The Appellant, in such a situation will be prone to get influenced by the parent company and lose its autonomy of decision-making. If the Appellant is granted the trading license, the purpose of the above mentioned regulation would be negated. Despite unbundling of the erstwhile vertically integrated MSEB, the subsidiary companies are stitched together and horizontally integrated by all pervasive CEO, Directors under MSEB Holding Company necessitating lifting of veil.

(D) Further, the Act under Section 39 (2) (d) (i) provides that the STU shall provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges. In order to establish non-discriminatory regime the STU shall not engage in business of trading in electricity. If the Appellant is granted trading license, and the entity along with STU being wholly owned subsidiary of MSEB Holding, is likely to pursue actions either benefiting the Appellant or Maha Transco defeating the spirit and intention of the Act.

(E) The Appellant, Maha Trading and the Maha Transco are the wholly owned subsidiaries of the MSEB Holding Company incorporated admittedly under Companies Act, 1956. MSEB Holding Company

holds 'controlling interest' in the subsidiaries and it is a clear case of applying doctrine of lifting the corporate veil. The Article 76 makes it abundantly clear that the actions of the Appellant Company would always be guided by the interests of MSEB Holding Company as all the Directors of the Appellant would not only be appointed but also would hold office at the pleasure of the MSEB Holding Company. The resignation of Mr. Subrat Ratho from the Board of the Appellant Company is of no consequence, as the degree and extent of control of the Holding Company is quite evident from the Articles of Memorandum of Association.

(F) The doctrine of lifting of corporate veil is validly applied in the present case to give effect to the provisions and true spirit of the Act which besides imposing the requirement of providing non-discriminatory open access to any licensee or generating company on payment of transmission charges, specifically provide that the SLDC and STU and the transmission licensees shall not engage in the business of trading in electricity, under Sections 31, 39 and 41 of the Act. The Appellant as well as 'Maha Transco' are controlled by the same entity namely MSEB Holding Company.

(G). Palmer's Company Law, 24th Edition (page 215) has recognized that the doctrine of lifting of corporate veil can be applied, inter alia, in cases

where companies are in relationship of holding and subsidiary company and in matters where the 'controlling interest' is in issue.

(H). Further, Gower's book on Company Law, propounds that the general tendency to look at a group of companies as a single economic unit arises especially when a parent company owns all the shares of the subsidiaries, so much so, that it can control every movement of the subsidiaries. Such subsidiaries in the words of Lord Denning "are bound hand and foot" to the parent company. The aforesaid principle was referred to by the Madras High Court in Hackbridge- Hewittic and Easun Ltd. Vs G.E.C. Distribution Transformers Ltd. 1992 (74) Com. Case 543. It was held that merely because the subsidiary company has a legal and distinct personality does not suffice to dispose of the possibility that its behaviours might be imputed to the parent company. It was further held:

"....The fact that the subsidiary company has a distinct legal personality does not suffice to dispose of the possibility that its behavior might be imputed to the parent company. Such may be the case in particular when the subsidiary, although being a distinct legal personality, does not determine its behavior on the market in an autonomous manner but essentially carries out the instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the

termination of its course of action on the market, it is possible to say that it has no personality of its own and that it has one and the same as the parent company” (emphasis supplied) (@ p.555).

16. We have heard the arguments and contentions with reference to the various provisions. We have given our anxious consideration to the submissions made by the learned counsel for the parties. The following is our discussion and findings.

Findings & Conclusion

17. Considering the contentions of the learned counsel of the Appellant and respondent No. 1, the Central Commission, documents submitted and written submissions made, we find that:

- (a) It is not disputed that the scheme of the Act is to ensure that ‘Maha Transco’ is a Government owned company which is conferred the status of the State Transmission Utility (STU) and mandated to administer the functioning of State Load Despatch Centre (SLDC). The underline objective of the aforesaid arrangement is to mandatorily provide non-discriminatory open access to the transmission capacity of ‘Maha Transco’ to any licensee and generating companies on payment of transmission

charges. The competing demands on limited resources of 'transmission capacity' by a number of licensees (viz. traders; distribution companies, transmission licensees) and generating companies for commercial transactions of electricity is also to be recognized.

- (b) It is also not disputed that in order to ensure establishment of non-discriminatory, non-partisan, unbiased and independent decision making system uninfluenced by any commercial interest, the Act prohibits the STU, SLDC and transmission licensees from engaging in the business of trading in electricity. It is not enough for the decision making to be non-partisan and unbiased but should be so perceived by the competing s for sharing of limited resource of transmission capacity. The Appellant necessarily has to compete with other traders, licensees, generating companies for allocation of transmission capacity. The Appellant's organizational relationship with the entities controlling the transmission capacity should not give perception to its competitors that the Appellant will receive a preferential treatment.
- (c) In the instant case, MSEB Holding Company is not only having 'controlling interests' but wholly owns the Appellant, 'Maha Trading' thereby holding the absolute control over it. Also as per Articles of Memorandum of Association of the Appellant company, the CMD and Directors of the company are appointed by the MSEB,

Holding Company and shall hold office at the pleasure of the Holding Company. We are of the opinion that even if Mr. Surbat Ratho, CMD of MSEB Holding Company ceases to be the CMD of the Appellant company, it will not have any significance impact on the degree of control the holding company exercises over the Appellant company. It is also noted that 'Maha Transco' (STU) which controls the functioning of SLDC is also wholly owned by MSEB Holding Company. Thus, MSEB Holding Company has absolute control over all subsidiaries including the Appellant company which is to be engaged in the business of trading in electricity. Since the business of trading in electricity is inevitably linked to the availability of transmission capacity, it is quite likely that discretion available with STU may be used in favour of the Appellant as it has significant pecuniary benefit. The wholly owned shareholder, MSEB Holding Company is bound to have an interest in ensuring that the business of Appellant company increases.

- (d) In view of the foregoing it is within the realm of possibilities that the commercial performance of the Appellant Company could perhaps be enhanced by giving it preferential treatment over its competitors by the STU through MSEB Holding Company. This perception itself obviously vitiates the mandatory non-discriminatory open access that STU/SLDC is required to provide under the Act.

(e) We are of the opinion that the doctrine of lifting of corporate veil in the instant case by the Central Commission is justifiably applied.

18. .In view of the above, we are not inclined to interfere with the impugned order of the Central Commission rejecting the grant of inter-state license for trading in electricity to Appellant company, Maha Trading. The appeal is, therefore, dismissed with no costs.

(A.A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 29th April, 2009.

Reportable/Non-reportable.