

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

Appeal No. 119 of 2008 & IA No. 151 of 2008

Dated : 15th July, 2009

**Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

IN THE MATTER OF:

Chhattisgarh State Power Transmission Co. Ltd.

Through its Chairman
P.O. Sunder Nagar,
Dangania,
Raipur – 492 013,
Chhattisgarh

... Appellant

Versus

1. Chhattisgarh State Electricity Regulatory Commission

Old Chhattisgarh College Building,
Civil Lines, G.E. Road,
Raipur – 492 001
Chhattisgarh

... Respondent No.1

2. M/s. Jindal Steel & Power Ltd.

Jindal Centre,
12, Bikhaji Cama Place,
New Delhi – 110 066.

Also at:

M/s. Jindal Steel & Power Ltd.
Post Box No. 16, Kharsia Road,

Raigarh,
Chhattisgarh

... Respondent No.2

Counsel for the appellant : Mr. Ravi Shankar Prasad, Sr. Adv.
Ms. Suparna Srivastava

Mr. A. Bhatnagar, SE, CSPTCL

Counsel for the respondents: Mr. Krishnan Venugopal, Sr. Adv.
Mr. Jayant Bhushan, Sr. Adv.
Mr. Sanjeev K. Kapoor
Mr. Avinash Menon
Mr. Vishal Gupta
Mr. Anil Dutt
Mr. Kumar Mihir for Resp. No.2

Mr. M. G. Ramachandran
Ms. Swapna Seshadri and
Mr. Anand K. Ganesan for CSERC

J U D G M E N T

Justice Manju Goel, Judicial Member

The appellant has impugned in this appeal the order dated 22.05.08 passed by Chhattisgarh State Electricity Regulatory Commission, respondent No.1 herein and referred to as the Commission hereinafter, in petition No. 22 (L) of 2007 approving the application of respondent No.2 for grant of transmission licence for two lines viz 220 kV double circuit JSPL – OP Jindal Industrial Park 23.7 kV & 220 kV double circuit OP Jindal Park – Jindal Power Ltd.

19 km. The appellant has also impugned the actual licence dated 20.06.08 issued in pursuance to the impugned order dated 22.05.08. The original appellant, Chhattisgarh State Electricity Board, is a State Electricity Board and successor to the Madhya Pradesh State Electricity Board for the area of the newly constituted State of Chhattisgarh. The original appellant was reorganized vide a transfer scheme notified by the State Government of Chhattisgarh under section 131 of the Electricity Act 2003 (hereinafter referred to as the Act) and was unbundled into several entities. The activity of transmitting stood transferred to Chhattisgarh State Power Transmission Co. Ltd., which is the substituted appellant. Prior to the reorganisation and unbundling the original appellant was performing the function of transmission and distribution in the State of Chhattisgarh.

02) The respondent JSPL held a transmission licence as successor to Jindal Strips Ltd. issued by the Madhya Pradesh Electricity Regulatory Commission vide their order dated 02.02.06 in Petition No. 6 of 1999. In petition No. 22 of 2006 the Chhattisgarh State Electricity Regulatory Commission passed an order on 20.04.07 holding that the lines in question were dedicated lines and did not require a licence. However, JSPL asked for a transmission licence in view of setting up of an independent power project of 1000 MW by Jindal Power Ltd. which needed startup power from the

appellant. The Chhattisgarh State Electricity Board, it appears, declined to give startup power on the ground that it could not avail of open access through the transmission lines of JSPL in view of the provision of section 40(c) of The Electricity Act, 2003. Jindal Power Ltd. signed an agreement on 23.03.07 for supply of 300 MW of power to the appellant from the 1000 MW independent power plant. However, the transmission lines of the appellant connecting Jindal Power Ltd. were not ready and in the circumstances the power to the appellant could be supplied only through transmission lines of JSPL provided the licence was extended to the line upto Jindal Power Ltd. premises in Village Tamnar, District Raigarh. JSPL itself proposed to take 110 MW of power from JPL to supply to its consumers in the Jindal Industrial Park, Punjipatra and Tumidih Village in District Raigarh for which it held a distribution licence. The applicant accordingly asked for transmission licence for the afore mentioned lines vide an application dated 25.08.07 which was registered as petition No. 22(L) of 2007. It may be mentioned here that JSPL which held an inter State trading licence offered to surrender the same in view of the provision of section 41 prohibiting a transmission licensee from undertaking trading. The appellant as the State Transmission Utility (STU) raised objections to the application of the respondent No.2. The Commission vide the impugned order dated 22.05.08 overruled the objections and decided to grant the licence prayed for. Hence the appeal.

03) The appellant has challenged the impugned order on the following grounds:

- (i) The licence granted is with respect to specific lines and not to specific area as prescribed under section 14 of the Act.
- (ii) A transmission licence cannot be granted to a distribution licensee in view of the bar contained in the last proviso to section 41 of the Act.
- (iii) The impugned grant of licence violates the scheme of restructuring of integrated utilities like the appellant Board contained in Part-III of the Act requiring segregation of the transmission activities from other activities particularly distribution activity while the licence permits integrating distribution, transmission, trading and generation in one hand.
- (iv) The scheme of restructuring is aimed at bringing to an end the then existing monopoly of the Boards and ushering in competition so that a competitive regime is established for the benefit of the consumers. This scheme cannot be disturbed by permitting the respondent No.2 to distribute as well as transmit electricity.

- (v) The impugned licence is discriminatory towards the integrated utilities like the appellant Board which has been asked to unbundle while allowing respondent No.2 to combine several activities.
- (vi) The licence has been granted to the respondent No.2 who is not the owner of the transmission lines. The actual owner of the transmission lines is M/s. JPL and the respondent No.2 is only managing the lines and not entitled to a licence for transmission.

04) The appellant prays for setting aside the impugned order dated 22.05.08 in petition No. 22/2007 (L) and the transmission licence dated 20.06.08 granted pursuant to the impugned order.

05) The appeal is contested by respondent No.2. We have heard the counsel on both the sides who have also filed their written submissions

Decision with reasons:

Grounds (ii) (iii) (iv) & (v)

06) By virtue of section 12, transmission, distribution and trading are three distinct licensed activities. Section 15 allows an appropriate Commission to grant licence to “any person” to “transmit electricity” or to “distribute electricity” or to undertake “trading in electricity”. According to the appellant, no one can ask

for grant of licence for more than one activity. Only exception to these licensing provision is that a distribution licensee does not require a licence to trade. The position is refuted by the respondent. Section 12 which makes the activities of transmission, distribution and trading licensed activity is as under:

“12. Authorised persons to transmit supply, etc., electricity – No person shall –
(a) transmit electricity; or
(b) distribute electricity; or
(c) undertake trading in electricity,
unless he is authorized to do so by a licence issued under section 14, or is exempt under section 13.”

07) The main provision of section 14, governing grants of licence is as under.

“14. Grant of licence:

The appropriate Commission may, on an application made under section 15, grant a 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 as may be specified in the licence:”

08) Of several provisos to the principal part of section 14, the last one is relevant which is as under:

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

09) The first submission of the appellant as per Mr. Ravi Shankar Prasad counsel for the appellant is that as per the provision of section 14 a “licence” can be granted to “any person” to either “transmit electricity”, or to “distribute electricity” or to “undertake trading “in electricity. It is argued that this provision does not allow any person to apply for more than one kind of licence and does not permit any Commission to grant more than one licence. It is not possible to accept this interpretation. If the Parliament had intended to put a restriction on anyone from undertaking more than one of the licensed activities the intention could have been made categorical by inserting specific words to indicate that only one licence could be issued to one person or that no one could be granted more than one licence. The Parliament could have added the words “provided that no person shall hold a transmission licence and a distribution licence at the same time.” The

Parliament could alternatively say “provided that appropriate Commission shall not grant more than one of the above types of licences at the same time”. In the last proviso the Parliament had said that a distribution licensee shall not require a licence to undertake trading in electricity. This indicates that Parliament was conscious that a distribution licensee may undertake the other licensed activities. Distribution licensee is exempted from taking a separate licence for undertaking trading. The last proviso itself suggests that a distribution licensee, if it wants to undertake the activity of transmission it will need a licence. Section 41 prohibits a transmission licensee from entering into any contract or otherwise engage in the business of trading electricity. Section 41 is extracted below:

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

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

Provided further that the transmission licensee shall maintain separate accounts for each such business undertaking to ensure that transmission business neither subsidies in any way 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.”

10) In case the Parliament intended to prevent a transmission licensee from undertaking distribution it could conveniently add here the words “and distribution”.

11) Thus section 41 prohibits the transmission licensee from engaging in the business of trading in electricity by inserting a special proviso but consciously omits to include the function of distribution in that proviso. This indicates that the Parliament did not intend to prohibit a person from undertaking both the activities of transmission and distribution. It is not possible to accept the interpretation given by Mr. Prasad that by virtue of section 14 the Commission can grant a person only one of the three kinds of licences namely for transmission, for distribution or for trading.

12) Mr. Prasad submits that only a special indulgence has been given for the distribution licensee to trade in view of the peculiar business of distribution but no such indulgence is given to transmission licensee for other kind of businesses. Trading is defined in section 2(71), as under:

“2 (71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;”

13) Thus trading primarily means purchase of electricity but the purpose of such purchase has to be re-sale. Thus every purchase of electricity is not trading. Only when electricity is purchased for further re-sale it would amount to trading. Any distribution licensee, who does not generate electricity it distributes, has necessarily to purchase electricity from a generator. Thus the business of a distribution licensee inheres in it the business of trading. Accordingly the Act exempts a distribution licensee from obtaining a licence for trading. We must, however, remember that this exemption from obtaining a licence for trading is only to facilitate the function of distribution and cannot be a source for enabling a distribution licensee to trade in electricity in areas beyond the area of its distribution licence.

14) The learned counsel for the appellant submits that a distribution licensee does not need licence to trade and no licence is required for generating and therefore the activities of distribution, generation and trading can be simultaneously done by one person but transmission has been kept distinct and separate indicating the intention of the legislature of keeping transmission as a distinct activity which could not be combined with any other activity. This plea is difficult to accept in view of analysis of different provisions. There is no specific bar in the Act which prevents a transmission licensee from undertaking the activity of distribution. Nor is there any specific provision which bars a distribution licensee from applying for a licence for transmission. Therefore it is not possible to read such a bar in the Act.

15) Mr. Ravi Shankar Prasad appearing for the appellant made further efforts to argue the same point by bringing in the rule of purposive construction. He submitted that the Act read with the National Electricity Policy framed under it has imposed a bar on the transmission licensee from undertaking distribution. He draws the attention of this Tribunal to clause 4(V) of the statement of objects and reasons which says that “*distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licensees.*” He says that the statement of the

objects and reasons does not indicate that transmission licensee is free to take up the business of distribution. Further he says that the transmission line as defined in section 2(72) cannot be an essential part of distribution system of a licensee which also indicates that a transmission licensee could not become a distribution licensee. A transmission licensee, as per section 2 (73) was authorized to only establish and operate transmission lines. He also draws our attention to Rule 4 of the Electricity Act 2005 which says as under:

“The distribution system of a distribution licensee in terms of sub-section (19) of section 2 of the Act shall also include electric line, sub-section and electrical plant that are primarily maintained for the purpose of distributing electricity in the area of supply of such distribution licensee notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others.”

16) It is submitted that the portion of the transmission system which becomes an essential part of the distribution system has to be excluded from the transmission lines operated by the

transmission licensee. It is submitted that the legislature has categorically distinguished the activity of distribution and transmission and that the only purpose of doing so is to prevent a transmission licensee from carrying on any activity of distribution. Further he submits that the very proviso of section 41 which prohibits a transmission licensee from engaging in any business or trading automatically means that a transmission licensee is also prohibited from carrying out the activity of distribution as distribution is also a trading in as much as it involves purchase and sale of electricity.

17) Having carefully gone through all the provisions mentioned above we are unable to read any prohibition on a distribution licensee from applying for a transmission licence. Distribution and trading had been distinguished as two distinct terms in the Act. Therefore, when the Act prohibits the transmission licensee from entering into any contract or otherwise engage in the business of trading it has to be read as meaning only trading as defined in the Act and as being distinct from the function of distribution. It is not possible to accept the interpretation that the last provision of section 41 of the Act prohibits a transmission licensee from engaging in the activity of distribution. Similarly, only because definition of 'distribution lines' and 'transmission lines' are so precise that the transmission lines and distribution lines can be

distinguished without difficulty it cannot be said that such distinction between transmission line and distribution line is only made to prevent the distribution licensee from applying for a transmission licence.

18) It is further submitted by Mr. Prasad that a transmission licensee is required to provide nondiscriminatory open access and in case a transmission licensee is permitted to undertake the function of distribution his commercial interest in supplying to its consumers will become a hindrance in providing nondiscriminatory open access to others trying to avail the benefit of a transmission lines. There is not much force in his submission. Even a distribution licensee is required to provide non-discriminatory open access. In any case mere provision that transmission licensee has to provide non-discriminatory open access cannot be read as a bar for him also getting distribution licence.

19) According to Mr. Prasad the statement of objects and reasons appended to the Act indicates that the purpose of bringing in the Act was to bring into the field of electricity competition by breaking down the monopoly of the State Electricity Boards and therefore, the Act has to be so interpreted as to prevent the same person from doing more than one kind of activity so that monopolies are reduced and competition is achieved.

20) Let us look at the statement of objects and reasons:

“STATEMENT OF OBJECTS AND REASONS

The Electricity Supply Industry in India is presently governed by three enactments namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998.

1.1 The Indian Electricity Act, 1910 created the basic framework for electric supply industry in India which was then in its infancy. The Act envisaged growth of the electricity industry through private licensees. Accordingly, it provided for licensees who could supply electricity in a specified area. It created the legal framework for laying down of wires and other works relating to the supply of electricity.

1.2 The Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The State Electricity Board has the responsibility of arranging the supply of electricity in the State. It was felt that electrification which was limited to cities needed to be extended rapidly and the State should step in to shoulder this responsibility

through the State Electricity Boards. Accordingly the State Electricity Boards through the successive Five Year Plans undertook rapid growth expansion by utilizing Plan funds.

1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State Governments can create a State Electricity Regulatory Commission. 16 States have so far notified / created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.

2. Starting with Orissa, some State Governments have been undertaking reforms through their own Reform Acts.

These reforms have involved unbundling of the State Electricity Boards into separate Generation, Transmission and Distribution Companies through transfer schemes for the transfer of the assets and staff into successor Companies. Orissa, Haryana, Andhra Pradesh, Karnataka, Rajasthan and Uttar Pradesh have passed their Reform Acts and unbundled their State Electricity Boards into separate companies. Delhi and Madhya Pradesh have also enacted their Reforms Acts which, inter alia, envisage unbundling/corporatisation of SEBs.

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State

Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalized after extensive discussions and consultations with the States and all other stake holders and experts.

4. *The main features of the Bill are as follows:-*

(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

- (ii) *There would be a Transmission Utility at the Central as well as State level, which would be a Government company and have the responsibility of ensuring that the transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The load dispatch function could be kept with the Transmission Utility or separated. In the case of separation the load dispatch function would have to remain with a State Government organization/company*
- (iii) *There is provision for private transmission licensees.*
- (iv) *There would be open access in transmission from the outset with provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out.*
- (v) *Distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licensees.*

- (vi) *The State Electricity Regulatory Commissions may permit open access in distribution in phases with surcharge for –*
- (a) *current level of cross subsidy to be gradually phased out along with cross subsidies; and*
 - (b) *obligation to supply.*
- (vii) *For rural and remote areas stand alone systems for generation and distribution would be permitted.*
- (viii) *For rural areas decentralized management of distribution through Panchayats, Users Associations, Cooperatives or Franchisees would be permitted.*
- (ix) *Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary.*
- (x) *Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and*

only the transmission and wheeling charges with surcharge would be regulated.

(xi) There is provision for a transfer scheme by which company/companies can be created by the State Governments from the State Electricity Boards. The State Governments have the option of continuing with the State Electricity Boards which under the new scheme of things would be a distribution licensee and the State Transmission Utility which would also be owning generation assets. The service conditions of the employees would as a result of restructuring not be inferior.

(xii) An Appellate Tribunal has been created for disposal of appeals against the decision of the CERC and State Electricity Regulatory Commissions so that there is speedy disposal of such matters. The State Electricity Regulatory Commission is a mandatory requirement.

(xiii) Provisions relating to theft of electricity have a revenue focus.

5. *The Bill seeks to replace the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998.*

6. *The Bill seeks to achieve the above objects.”*

21) According to Mr. Prasad the mischief that the Act intended to correct was the poor performance of the State Electricity Boards and lack of competition in the industry. According to him, the Act in order to overcome the mischief and with a view to bring in competition provided for unbundling of the State Electricity Boards and making the activities of generation, transmission and distribution distinct and separate from each other. Applying the doctrine of suppression of mischief he says that the mischief of monopoly of the State Electricity Board, which the Act intended to correct, will continue if the activities are combined in a single hand. Further he says that the purpose of the Act to bring in competition will be defeated if the activities of distribution, transmission and generation are integrated in one hand. Continuing this line of argument he further says that the State Electricity Boards which are unbundled to separate the activities will be treated discriminately in case others are allowed to combine these activities. According to him if the respondent No.2 is allowed to perform the function of generation, transmission and distribution

while the appellant Board is asked to unbundle itself would amount to denying level playing field to the appellant and therefore the same should not be allowed. Mr. Krishnan Venugopal has strongly differed with Mr. Prasad on these points. Mr. Krishnan Venugopal contends that Mr. Prasad's views of objects of the Act and the mischief addressed by it itself are incorrect.

22) Read carefully, the statement of objects and reasons indicate the mischief that the Act intended to correct which are :

- (a) Deterioration of the functioning of State Electricity Boards
- (b) Inability of the Boards to determine tariff in a professional and independent manner which lead to cross subsidies reaching unsustainable levels
- (c) Involvement of the Government in determination of tariff.

23) The objectives of the Act can similarly be identified as under:

- (a) In encouraging private sector participation in the electricity industry
- (b) Tariff fixation by Regulatory Commissions independently of the Government

- (c) Harmonising and rationalizing the provisions of the earlier Acts, namely the Indian Electricity Act 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commissions Act 1998
- (d) Core features other than those relating to mandatory existence of State Electricity Boards be preserved
- (e) Provide for newer concepts of power trading and open access and to provide progressive features while giving the States enough flexibility to develop their power sector in the manner they considered appropriate.

24) The main objective of the Act does not seem to be elimination of State Electricity Boards or their unbundling into separate entities of generation, transmission and trading. Unbundling of the State Electricity Boards is only an enabling provision in the Act as the Statement of Objectives and Reasons itself says that the core features of the previous Acts have to be maintained except for “mandatory existence” of the State Electricity Boards. Thus the State Electricity Boards may continue but it would not be mandatory for the entire electricity business to be handled by the State Electricity Board. Since the private sector is allowed entry into the business the primacy of the State Electricity Boards would

naturally come to an end. However, unbundling of the State Electricity Board cannot be read as one of the objectives or purposes of the Act. In fact, if we read section 131 of the Act, we find that the State Governments have not been given the mandate for unbundling the State Electricity Boards, although the steps to be taken, if such unbundling is undertaken, have been provided for. Sub-section (1) of 131 is extracted below:

“131. Vesting of property of Board in State Government.- (1) With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereinafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

25) The provisions of 131, which deal with reorganisation of Board, come to effect only if and when the Government introduces a transfer scheme. The provision does not provide Government to

mandatorily bring in a transfer scheme. This is in consonance with the statement of objectives and reasons where it says in so many words that the State Governments have the option of continuing with the State Electricity Boards which under the new scheme of things would be distribution licensee and State Transmission Utility. (Refer Para 4 (ix) of statement of objects and reasons). Thus the intention of the Legislature has been made clear namely that while it is not mandatory for the State Electricity Boards to exist or continue, the State Governments have the option of continuing or unbundling them and in case the State Government intends to continue with the State Electricity Boards they would function like the licensees under the Act. The mischief, as we see it, was not the existence of State Electricity Boards but the poor performance of these Boards. If a Board was competent and efficient it was not required to be unbundled. Further the entry of private capital into the electricity sector cannot be assumed to be automatic or natural phenomenon. Unless a State Government finds signs of private capital being attracted towards the electricity sector or unless the conditions were conducive to hand over the business conducted by the Boards into the hands of Government companies it would not be wise to unbundle the State Electricity Boards. The sole aim of providing the scheme of unbundling the State Electricity Boards was to replace inefficiency by efficiency.

26) Unbundling of the State Electricity Boards does not naturally lead to competition. If the State Electricity Boards are unbundled into three or four companies performing different functions without there being other players in the market, the newly formed companies would again become monopolies in their own fields. In other words, if there is only one distribution company in the whole State and one transmission licensee and one generator they would have monopolistic positions in respect of distribution, transmission and generation respectively. Competition is possible only when in the field of distribution itself there is more than one player. Similarly, in transmission and generation if there is more than one player there can be competition. Competition has to be understood in the context of private sector entering the market. Only when the private sector participates in generation, transmission and distribution is the concept of competition relevant. Private sector is allowed by the Act to undertake the activities of generation, transmission and distribution although for transmission, distribution and trading licence is required.

27) It cannot be said, therefore, that the existence of State Electricity Boards itself was the mischief and that if other vertically integrated entities are allowed to come into existence we would fail the Act in achieving the purpose of suppressing the mischief.

28) As analysed above, the Act does not prevent different functions to be performed by the same person. Nonetheless the Act also enables the States to unbundle the State Electricity Boards. If the State Electricity Boards are unbundled the functions may be distributed into two or more hands depending upon the scheme notified by the Government. In our opinion the question whether level playing field is disturbed is dependant upon live factual situations rather than the mere legal provisions. It is not the case of the appellant that in the present factual situation in the State the level playing field has been disturbed. As stated above, the entire stress of the Act is replacing inefficiency with efficiency. Allowing the private sector or promoting competitions are also to achieve the same objective of efficiency. It is not the case of the appellant that the appellant Board which has been functioning over the entire State of Chhattisgarh or the newly constituted Government companies to replace the Board are facing any unfair competition from the respondent No.2 who is a distribution licensee in respect of only two villages and a transmission licensee in respect of a few lines. This is in our opinion not an appropriate case to examine whether the legal provisions, as above, deprive the appellant of a level playing field.

29) The whole intention of the above exercise is not to find what the law should have been but to find what the law is. The above

analysis of various sections of the Act as well as the statement of objectives and reasons do not show that there is any bar in the Act for the distribution licensee to obtain a transmission licence. We cannot read the bar which does not exist in the Act. We have also found that there is no inconsistency of any kind in one person holding both distribution and transmission licence. The plea that the respondent No.2 cannot be granted a transmission licence because he holds a distribution licence clearly does not hold any water.

Ground (vi)

30) One of the grounds of the appellant is that the respondent No.2 does not own the line for which it has been granted a transmission licence. The respondent No.2 explains that the plea is based on incorrect view of facts. The respondent No.2 has placed on record a letter dated 05.09.07 written by respondent No.2 to the Principal Secretary, Ministry of Energy whereby the respondent No.2 has informed the Ministry that JPL has been granted the job of construction of 220 kV line connecting Jindal Industrial Park to location No. 64 of JSPL line. Similarly, a letter dated 10.09.07 addressed by the respondent No.2 to the Principal Secretary, Ministry of Energy, informs the Ministry, inter alia, that the line is being constructed by JPL for JSPL / respondent No.2 and that JSPL would eventually own the line. The ground taken by the appellant is thus misconceived.

Ground (i)

31) The last objection of the appellant is that the licence has been granted for a specific line and not for an area. Reference is made to section 14 of the Act, extracted in paragraph 09 above. During the hearing the respondent No.2 placed a few examples of transmission licences granted by Central Electricity Regulatory Commission which were in respect of specific transmission lines rather than for specific areas. The transmission licence in question identifies the lines for which licence has been granted. The licence was asked for only for these two lines and the licence has been accordingly so granted. There is nothing in the Act or Rules that requires a transmission licensee to undertake the work of transmission in a specified area unlike the distribution licensee. The distribution licensee is given an area in which he is required to fulfill the universal supply obligation and has to provide electricity connection to anyone in that area requiring such connection. Rules have been framed providing minimum areas that can be given to a distribution licensee. There is no Rule which requires a transmission licensee with similar obligation in respect of a specific area. In fact if the respondent No.2 is granted a licence not in respect of specific lines but in respect of area over which the lines run it would amount to permitting the respondent No.2 to construct more lines in those villages/districts through which the lines run without obtaining any further permission. This certainly is not the intention of the

appellant. In our opinion although the licence mentioned only two specific lines the same is not bad because it does not mention a specific area.

32) In view of the above discussion we find that the appeal is without any force. The impugned order and the impugned licence do not call for any interference. Accordingly the appeal is dismissed with costs.

33) The IA also stands disposed of.

33) Pronounced in open court on this ***15th day of July, 2009.***

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member