

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 03 OF 2017**

**AND**

**IA NOS. 03 of 2017 & 253 of 2018**

**Dated : 27<sup>th</sup> September, 2019**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**IN THE MATTER OF :**

**M/s Sundew Properties Limited**

Through its authorized Representative,  
MindSpace, Cyberabad, Sy.No.64(P),  
APIIC Software Layout,  
1<sup>st</sup> Floor, Titus Tower, Bldg. No.10,  
Madhapur,  
Hyderabad – 500081

...Appellant

**VERSUS**

**1. Telangana State Electricity Regulatory Commission,**

Through its authorized Representative,  
5th Floor, 11-4-660, Singarenu Bhavan,  
Red Hills, Hyderabad – 500004.

**2. Southern Power Distribution Company of Telangana Limited,**

Through its authorized Representative,  
6-1-50, Mint Compound,  
Hyderabad – 500 006

...Respondent(s)

Counsel for the Appellant (s) : Mr. Amit Kapur  
Mr. Akshat Jain  
Mr. Abhishek Munot  
Mr. Malcolm Desai

Counsel for the Respondent(s) : Mr. D. Abhinav Rao  
Ms. D. Bharathi Reddy  
Ms. Monalisa Kosaria  
Ms. Vidyottma  
Ms. Gitanjali N. Sharma for R-1  
  
Mr. Nishant Sharma  
Mr. Rakesh K. Sharma for R-2

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

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The present Appeal has been filed by M/s Sundew Properties Limited (hereinafter referred to as the “Appellant”) under Section 111 of the Electricity Act, 2003 and is challenging the legality, validity and propriety of the Order dated 15.02.2016 (“**Impugned Order**”) passed by Telangana State Electricity Regulatory Commission in O.P. No. 10 of 2015.
- 1.1 The Appellant is a developer of sector specific Special Economic Zone (“**SEZ**”) [for Information Technology (“**IT**”) / Information Technology Enabled Services (“**ITES**”)], notified under Sections 3 and 4 of the Special Economic Zones Act, 2005 (“**SEZ Act**”). The Appellant is a Deemed distribution licensee in terms of Proviso to

Section 14(b) of the Electricity Act, 2003 ("**Electricity Act**"). The said Proviso was inserted in the Electricity Act in terms of the Ministry of Commerce and Industry, Government of India's ("**Ministry of Commerce and Industry**") Notification dated 03.03.2010.

**2. Brief facts of the case :-**

**2.1** The Appellant, M/s. Sundew Properties Limited is a company incorporated under the Companies Act, 1956 having its registered office at Sy.No.64 (P), Mind Space, Cyberabad, Hi-Tech City, Madhapur, Hyderabad. The Appellant is a deemed distribution licensee under Section 14(b) of the Electricity Act, as recognized by Telangana Commission vide the Impugned Order, in terms of the Notification No. F-2/25/2006-SEZ dated 30.06.2006 read with the Notification No.S.O.528(E) dated 03.03.2010 issued by the Ministry of Commerce and Industry.

**2.2** Respondent No.1, Telangana Commission is a statutory authority constituted under the Electricity Act with specific powers vested in terms of Sections 86 and 181 of the Electricity Act. Telangana Commission came into existence on 03.11.2014, as a result of the

bifurcation of the erstwhile State of Andhra Pradesh into the States of Andhra Pradesh and Telangana on 02.06.2014.

- 2.3** Respondent No.2, TSSPDCL is a company incorporated under the provisions of the Companies Act, 1956 having its headquarters at 6-1-50, Mint Compound, Hyderabad – 500 063 and carries out electricity distribution business, as part of the unbundling of erstwhile Andhra Pradesh State Electricity Board (APSEB).

**3. Questions of law :-**

The Appellant has raised following questions of law:-

- 3.1** Whether Telangana Commission has erred in holding that fulfilment of conditions stipulated in:-

(i) Rule 3(2) of the Capital Adequacy Rules read with Section 14 of the Electricity Act; and

(ii) Rule 12 of the AP Distribution Licence Regulations;

is a mandatory pre-requisite for the Appellant, a Developer of a notified SEZ, to be recognized as a deemed distribution licensee under Proviso to Section 14(b) of the Electricity Act?

- 3.2** Whether a deemed distribution licensee is required to seek grant of licence in terms of Sections 14 and 15 of the Electricity Act read with Regulations 4-12 of the AP Distribution Licence Regulations?
- 3.3** Whether Telangana Commission failed to appreciate that the express language of Sixth Proviso to Section 14 of the Electricity Act, Rule 3(2) of the Capital Adequacy Rules and Regulation 12 of the AP Distribution Licence Regulations clearly state that the same are only applicable to a person seeking a grant of licence and not to deemed distribution licensee?
- 3.4** Whether the principles laid down by the Hon'ble Supreme Court in the Sesa Sterlite Judgment, being:-
- (i) A developer of a notified SEZ is automatically deemed to be a distribution licensee in the SEZ area, the moment the SEZ is notified under Sections 3 and 4 of the SEZ Act and upon the insertion of Proviso to Section 14(b) of the Electricity Act;
  - (ii) A deemed distribution licensee is not required to make an application for grant of a licence under Section 14 and 15 of the Electricity Act;

are negated by Telangana Commission in the Impugned Order?

- 3.5** Whether Telangana Commission has erred in holding that Regulation 12 of the AP Distribution Licence Regulations, which is

applicable to a person seeking grant of licence under Regulations 4-11, is also applicable to a deemed distribution licensee, making an application under Regulation 13 for recognizing its status as a deemed distribution licensee?

**3.6** Whether, after having held that the Appellant and its promoters have complied with the requirements of Rule 3(2) of the Capital Adequacy Rules, Telangana Commission erred in directing the promoters of the Appellant to infuse additional equity into the Appellant's business to the tune of Rs.26.9 Crores?

**3.7** Whether Telangana Commission, while passing the Impugned Order, erred in treating the Appellant as an entity primarily engaged in distribution of electricity *per se* and not as a Developer of an SEZ by virtue of which it is also authorized to supply electricity [deemed distribution licensee in terms of Proviso to Section 14(b) of the Electricity Act], thereby requiring the Appellant to alter its primary business as also meet all conditions qua an applicant seeking grant of licence?

**4. Shri Amit Kapur, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-**

**4.1** Sundew Properties Limited ("**SPL**" / "**Appellant**") is a group company of the K Raheja Corp.(a leading real estate developer for

over six decades). SPL has been notified as a “Developer” of a sector specific Information Technology and Information Technology Enabled Services (“**IT/ITES**”) Special Economic Zone (“**SEZ**”), admeasuring 14.72 hectares located at Madhapur - Hyderabad in the State of Telangana by Ministry of Commerce & Industry’s (“**MoCI**”) Notifications dated 16.10.2006, 18.05.2007 and 06.08.2010 issued under Sections 3 and 4 of the Special Economic Zones Act, 2005 (“**SEZ Act**”).

**4.2** Accordingly, SPL is a Deemed Distribution Licensee in terms of:

- (a) Proviso to Section 14(b) of the Electricity Act, 2003 (“**Electricity Act**”), read with
- (b) MoCI’s Notification dated 03.03.2010 issued under Section 49(1)(b) of the SEZ Act ; and
- (c) The Hon’ble Supreme Court of India’s Judgement dated 25.04.2014 passed in *M/s. Sesa Sterlite v. Orissa Electricity Regulatory Commission &Ors.* reported as (2014) 8 SCC 444 (“**Sesa Sterlite Judgement**”).

**4.3** SPL has filed the present Appeal challenging the Impugned Order dated 15.02.2016 passed by Telangana State Electricity Regulatory Commission (“**Telangana Commission**”/ “**Respondent No.1**”) in O.P. No.10 of 2015. In the Impugned

Order Telangana Commission has, contrary to the extant statutory and regulatory framework, held that:-

- (a) For SPL to qualify as a Deemed Distribution Licensee, it must fulfil the provisions of:
  - (i) Rule 3(2) of the Distribution of Electricity Licence (Additional requirement of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 ("**Capital Adequacy Rules**"); read with
  - (ii) Regulation 12 and 49 of the APERC (Distribution Licence) Regulations, 2013 ("**AP Distribution Licence Regulations**"), a copy of which was tendered during the hearing before this Hon'ble Tribunal; and
  - (iii) Sixth Proviso to Section 14 of the Electricity Act.
- (b) Although SPL fulfils the requirements of Rule 3(2) of the Capital Adequacy Rules, in terms of the Equity already infused (on account of the Net Worth of its Promoters taken along with SPL's Net Worth), SPL has to infuse additional Equity to the tune of Rs.26.9 Crores (being 30% of the total *anticipated investment* of Rs.89.53 Crores) as Equity Share Capital contribution from the Promoters, by way of Account Payee Cheques, to demonstrate its *bona fide* as a Distribution Licensee.



**4.4** In the instant Appeal SPL has sought the following reliefs:

- (a) *Allow the Appeal and set aside the Impugned Order dated 15.02.2016 passed by Telangana Commission, to the extent that it:-*
  - (i) *Requires M/s. Sundew Properties Limited, a deemed distribution licensee, to comply with the conditions stipulated in Rule 3 of the Capital Adequacy Rules read with Sixth Proviso to Section 14 of the Electricity Act; and/or*
  - (ii) *Holds that Regulation 12 read with Regulation 49 of the Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013 is applicable to a deemed distribution licensee.*
- (b) *In the alternative, hold that the Appellant has complied with the requirements of Rule 3 of the Capital Adequacy Rules read with Sixth Proviso to Section 14 of the Electricity Act in the manner as had set out in paragraph 9.18 to 9.19 above; and/or*
- (c) *Pass such other or further order or orders as to this Hon'ble Tribunal may deem fit and proper in the interest of justice."*

**4.5** Having heard counsel for the parties extensively on 15.01.2019, 31.01.2019 and 25.04.2019, this Tribunal directed the parties to file their respective Written Submissions. Accordingly, SPL is filing the present Written Submissions.

**4.6** The following issues are before this Tribunal for its due consideration:-

- (a) Whether SPL being a Deemed Distribution Licensee in terms of the Proviso to Section 14(b) of the Electricity Act, is required to meet the additional requirements prescribed under Rule 3(2) of the

Capital Adequacy Rules (applicable to a person seeking grant of a parallel licence in terms of the 6<sup>th</sup> Proviso of the Electricity Act read with Regulation 12 of the AP Distribution Licence Regulations), for it to be recognized as a Deemed Distribution Licensee?

- (b) Without prejudice to the above and in the alternative, whether Telangana Commission was right in directing SPL to infuse additional Equity after having concluded that SPL fulfils the requirements of Rule 3(2) of the Capital Adequacy Rules in terms of Equity already infused by it?

### **Issue wise SPL's Submissions**

#### **Non-applicability of the Capital Adequacy Rules**

**4.7** It is an admitted position that:-

- (a) SPL is a Developer in terms of Sections 3 & 4 of the SEZ Act from 16.10.2006.
- (b) Proviso to Section 14(b) of the Electricity Act provides that a Developer of a SEZ is a Deemed Distribution Licensee under the Electricity Act.

After admitting to the same Telangana Commission has in the Impugned Order imposed extraneous conditions (of additional equity infusion in terms of Rule 3(2) of the Capital Adequacy

Rules) for SPL to be recognized as a Deemed Distribution Licensee in terms of the Electricity Act. The Impugned Order is in contravention to the provisions of the SEZ Act, Electricity Act and the Notifications issued by the MoCI.

**4.8** Telangana Commission has failed to appreciate that:

- (a) **Recognition of the status of a Deemed Distribution Licensee is not contingent** upon fulfillment of Rule 3(2) of the Capital Adequacy Rules read with Regulation 12 of the AP Distribution Licence Regulations.
- (b) The Hon'ble Supreme Court in the *Sesa Sterlite* Judgement **has on analyzing the provisions of the SEZ and Electricity Acts, carved out a distinction between a Deemed Distribution Licensee and an Applicant seeking grant of licence**, in as much as it holds that:
  - (i) Unlike a person making an application for grant of licence, a Developer of an SEZ is automatically deemed to be a Distribution Licensee in the SEZ area, the moment the SEZ is notified under Sections 3 and 4 of the SEZ Act.
  - (ii) A Deemed Distribution Licensee is not required to make an Application for grant of licence under Sections 14 and 15 of the Electricity Act.

- (c) The express language of the 6<sup>th</sup> Proviso to Section 14 of the Electricity Act, Rule 3(2) of the Capital Adequacy Rules and Regulation 12 of the AP Distribution Licence Regulations clearly states that, the same are only applicable to a person making an application for grant of licence and not to Deemed Distribution Licensee.
- (d) Imposing of any further qualifications (additional equity infusion) for recognition as a Deemed Distribution Licensee is without any statutory sanction.
- (e) Without prejudice to the lack of authority vested with Telangana Commission, even otherwise Telangana Commission could not have directed SPL to infuse additional equity after having concluded that it meets the Equity requirements in terms of Rule 3(2) of the Capital Adequacy Rules.

**4.9** In terms of the powers conferred under Section 49(1) of the SEZ Act, MoCI issued Notification dated 03.03.2010, thereby introducing Proviso to Section 14(b) of the Electricity Act. Accordingly, the Developer of a SEZ is '*deemed*' to be a Distribution Licensee with effect from the date of notification of such SEZ.

**4.10** SPL is statutorily deemed to be a Distribution Licensee, for the purpose of distributing electricity within its SEZ area. Thus, **the status of Deemed Distribution Licensee stands bestowed upon SPL by virtue of the said Notifications and the resultant deeming fiction.**

**4.11** The very purpose of a deeming fiction is to confer upon an entity the status which would otherwise not have been, in view of the existing facts. In other words, as an effect of the aforesaid Notification dated 03.03.2010 inserting Proviso to Section 14(b), **SPL (a SEZ Developer) is entitled to a privilege, one being designated as a Deemed Distribution Licensee under the Electricity Act, for supply of power within its SEZ area.**

**4.12** Once SPL is a Deemed Distribution Licensee by virtue of the Electricity Act, the same carries statutory force. SPL is not required to specifically apply again for '**grant**' of a licence in terms of Section 14 of the Electricity Act. SPL is '**authorized**' to operate and maintain a distribution system for supply of electricity to its consumers in its area of supply (SEZ area). This is in consonance with the Hon'ble Supreme Court's decision in the case of *Sesa Sterlite(supra)*.

**4.13** Section 14(b) of the Electricity Act provides that, the Appropriate Commission may, on an Application made to it under Section 15 grant a licence to any person to distribute electricity as a distribution licensee. ***However, in view of the Proviso to Section 14(b)*** inserted by way of MoCI's Notification dated 03.03.2010, ***there is no requirement for the Developer of an SEZ to make an application seeking grant of a licence for distributing electricity in its area of supply.*** It is settled principle of interpretation of statutes that, a Proviso is an exception to the rule provided in a Section. In this regard, the Hon'ble Supreme Court's Judgments in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*, reported as AIR 1961 SC 1596 and *S. Sundaram Pillai and Ors. v. V.R. Pattabiraman and Ors.*, reported as (1985) 1 SCC 591 are noteworthy.

#### **AP Distribution Licence Regulations, 2013**

**4.14** It is pertinent to note that AP Distribution License Regulations also recognizes the difference between a person making an Application for grant of a Distribution Licence and a Deemed Licensee making an application for getting identified as a Deemed Distribution Licensee. In this regard, following provisions of the AP Distribution License Regulations are highlighted :-

- (a) **Regulation 2(d):** *“Applicant means a person who has made an application to the Commission for grant of Distribution Licence”;*
- (b) **Regulation 2(h):** *“Deemed licensee means a person authorised under sub-section (b) of Section 14 and also under the first, second, third, and fifth provisos to section 14 of the Act to operate and · maintain a distribution system for supply of electricity to the consumers in his area of supply”;*
- (c) **Regulation 12:** *“Application for grant of Distribution Licence in the area of supply of an existing Distribution Licensee*  
*A person applying for grant of a licence for distribution of electricity through his own distribution system within the same area of supply of an existing Distribution Licensee shall, in addition to the provisions of Regulation 4 to 11, comply with" Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005" issued by the Central Government.”*
- (d) **Regulation 13:** *“The deemed licensees shall make application in the form specified in Schedule-2 to the Commission to get identified as the deemed Licensee. Provided that nothing in Regulations 4 to 11 shall apply to deemed licensees.”*

**4.15** Evidently, even under the AP Distribution Licence Regulations, there are two categories of licensees, being:

- (a) One where a person makes an Application for **grant** of a Distribution Licence [Regulations 2(d) and 12 of the AP Distribution Licence Regulations]; and
- (b) The other, where the person is already a deemed licensee by operation of law and only seeks **recognition** by the Appropriate

Commission. [Regulations 2(h) and 13 of the AP Distribution Licence Regulations]

**4.16** SPL falls under the latter category, as set out in Regulation 2(h) of the AP Distribution Licence Regulations.

**4.17** Regulation 12 which is linked to Regulation 2(d) of the AP Distribution Licence Regulations provides that, a person (Applicant) applying for grant of a licence for distribution of electricity through his own distribution system within the same area of supply of an existing Distribution Licensee shall, in addition to the provisions of Regulation 4 to 11 of the AP Distribution Licence Regulations (which are akin to the procedure for grant of licence laid down under Section 15 of the Electricity Act), comply with the Capital Adequacy Rules.

**4.18** In contrast, Regulation 13 of the AP Distribution Licence Regulations provides that, Deemed Licensees shall make an application in the form specified in Schedule-2 of the said Regulations to the Commission, to get identified as a Deemed Licensee. Provided that, nothing in Regulations 4 to 11 (procedure for grant of licence) shall apply to deemed licensees. SPL does not need to do anything, apart from being recognized/ identified as a Deemed Distribution Licensee.



**4.19** Therefore, the question that needs to be addressed is whether Regulations 12 of the AP Distribution Licence Regulations can also be made applicable to a person who is statutorily deemed to be a licensee.

**4.20** Admittedly, SPL has filed its Application before Telangana Commission under Section 14(b) of the Electricity Act read with Schedule 2 of the AP Distribution Licence Regulations, seeking recognition of its Deemed Distribution Licence. SPL had not made any application under the 6<sup>th</sup> Proviso to Section 14 of the Electricity Act, which is for grant of a second licence.

**4.21** The Telangana Commission in Para 18 of the Impugned Order has rightly held that, SPL is not required to make an application seeking grant of a licence and follow/ comply with the procedure specified in Section 15 (2) to (6) of the Electricity Act read with Rules 4 to 11 of the AP Distribution License Regulations. However, contrary to the same, it has wrongly held that the Capital Adequacy Rules are applicable to SPL in terms of Regulations 12 and 49 of the AP Distribution Licence Regulations. In effect, Telangana Commission has wrongly applied pre-requisites for a person making an application for grant of a parallel licence, to a

statutorily Deemed Distribution Licensee, thereby overriding the provisions of the SEZ Act and Electricity Act.

**4.22** The Capital Adequacy Rules have been framed by the Central Government in terms of its rule making powers under Section 176(2)(b) read with the 6<sup>th</sup> Proviso to Section 14 of the Electricity Act. In this regard, it is submitted that Telangana Commission in para 16 of the Impugned Order has held that:

*“16. ... On a close reading of the provisions of section 14, **we are of the view that the ‘provisos’ to section 14 are not applicable to a deemed licensee.** The status of a deemed licence to a person under Section 14(b) of the Electricity Act, 2003 (The Act) emanates from the Notification given under Section 49(1) of the SEZ Act to a developer of SEZ provided the deemed Licensee satisfies the other provisions of the Act.” [Emphasis supplied]*

**4.23** It is submitted that, after the aforesaid categorical finding in Para 16 of the Impugned Order that the **‘Provisos’** to Section 14 of the Electricity Act are not applicable to a Deemed Distribution Licensee, Telangana Commission could not have come to a conclusion that a Deemed Licensee needs to fulfill the conditions stipulated under the Capital Adequacy Rules, as a pre-condition to being recognized as a Deemed Licensee. It is submitted that, the fallacy in the Impugned Order is at Paragraph 19 where Telangana Commission has stated that **“By Implication”**

Regulation 12 of the AP Distribution Licence Regulations (which is the same as the 6<sup>th</sup> Proviso of Section 14) is applicable to a Deemed Distribution Licensee, since Regulation 13 only exempts a Deemed Distribution Licensee from following what is stipulated under Regulations 4 -11 and not Regulation 12. It is submitted that, if the Parliament wanted to include these conditions for a Deemed Distribution Licensee, it would have done the same while amending Section 14 of the Electricity Act.

**4.24** Since the Capital Adequacy Rules have been framed under Section 176(2)(b) to give effect to the 6<sup>th</sup> Proviso to Section 14, the same cannot override Section 14 of the Electricity Act. It is settled law that a Rule cannot go beyond the parent statute. Therefore, Telangana Commission's interpretation of the Rules and Regulations are ultra vires and the impugned findings are contrary to law.

**4.25** Further, the Capital Adequacy Rules in clear and unambiguous terms state that the Appropriate Commission shall on **receipt of an application under Section 15(1)** of the Electricity Act, decide the requirements of capital investment for distribution network. Rules 3 and 4 of the Capital Adequacy Rules much like the 6<sup>th</sup> Proviso to Section 14 and Regulation 12 of the AP Distribution

Licence Regulations use the phraseology, '**applicant for grant of licence**', '**application for grant of licence**' and '**applying for grant of licence**'.

**4.26** Clearly, what the aforesaid provisions contemplate are **pre-requisites for grant of a licence**. Therefore, by no stretch of imagination can the same be made applicable to a Deemed Distribution Licensee enjoying special considerations under the provisions of the Electricity and SEZ Acts.

**4.27** This distinction cast under the Electricity Act between a Deemed Distribution Licensee and an Applicant having been granted a Distribution Licence is the process of / requirements for grant/ being recognized as a distribution licensee. However, post grant of Licence (in both cases) all the licensees are mandated to follow the provisions of the Electricity Act like obligations to develop, operate and maintain a distribution system for supplying electricity to its consumers, Universal Service Obligations, granting Open Access, supply power at determined tariff, etc. **It is not SPL's case that it does not have to meet or can give a by-pass to provisions prescribed under the Electricity Act post identification as a Deemed Distribution Licensee.** The Respondents contention that SPL seeks exemption from fulfilling

the criteria/ requirements laid down under the Electricity Act and Rules are false and misleading.

**4.28** It is pertinent to note that other State Electricity Regulatory Commissions such as Tamil Nadu Electricity Regulatory Commission, Gujarat Electricity Regulatory Commission, Maharashtra Electricity Regulatory Commission (**“Maharashtra Commission”**), etc. have passed multiple Orders taking on record the Deemed Distribution Licence Status of numerous SEZ Developers in their respective States. It is submitted that, nowhere has Maharashtra Commission made compliance of the Capital Adequacy Rules as a pre-condition for being recognized as a Deemed Distribution License, while recognizing the following three group companies of the K Raheja Corp, (Promoters of SPL) as Deemed Distribution Licensees (being developers of SEZs):-

- (a) M/s. Serene Properties Pvt. Ltd. (Now known as Mindspace Business Parks Pvt. Ltd.).
- (b) M/s. Gigaplex Estate Pvt. Ltd.
- (c) M/s. KRC Infrastructure & Projects Pvt. Ltd.

**4.29** It is submitted that, the Electricity Act and the SEZ Act being Central Acts are applicable to both the Appellant and Regulator alike.

### **Infusion of additional Equity Share Capital**

**4.30** The Telangana Commission based on the information placed before it, has in Para 21 of the Impugned Order held that:-

- (a) As a stand-alone entity SPL does not fulfil the conditions laid-down in Rule 3 of the Capital Adequacy Rules.
- (b) However, **Rule 3(2) allows the Net Worth of SPL's Promoters to be considered** for computing the Debt : Equity ratio of 70:30.
- (c) **The Net Worth of SPL's Promoters varied between Rs. 1,577 Crores to Rs. 1,760 Crores for the year ending 31.03.2015, 30.03.2014 and 30.03.2013, which meets the requirements laid down in Rule 3(2) Capital Adequacy Rules.**

**4.31** Despite the aforesaid findings, Telangana Commission arbitrarily, without assigning any reason, directed SPL to infuse further Equity to the tune of Rs.26.9 Crores (being 30% of the total anticipated investment of Rs.89.53 Crores) as Equity Share Capital contribution for the power distribution business, by way of account payee cheques and not as book entries.

**4.32** Firstly, Telangana Commission wrongly applied the Capital Adequacy Rules on a Deemed Distribution Licensee contrary to the statutory framework as submitted hereinabove. Thereafter, despite holding that SPL fulfils the requirements under Rule 3(2) of

the Capital Adequacy Rules as well, it imposed additional extraneous conditions upon SPL, which is contrary to law. It is submitted that, Telangana Commission's actions are a means to thwart competition to the State Distribution Licensee (i.e., TSSPDCL / Respondent No.2), who presently has monopoly in the State and continues to supply power to the consumers within SPL's SEZ area. In this regard, it is pertinent to note that despite there being over 30 operationalized SEZ's in the State of Telangana, no other Developer apart from SPL has sought recognition as a Deemed Distribution Licensee, in light of the extraneous conditions being imposed by Telangana Commission in SPL's case. This is in contrast to the State of Maharashtra where there are numerous SEZ Developers who have been duly identified by Maharashtra Commission as Deemed Distribution Licensees. Evidently, by imposing such additional extraneous conditions, Telangana Commission has itself gone beyond the Capital Adequacy Rules itself and defeats the principle of competition enshrined under the Electricity Act.

**4.33** As regards Telangana Commission's contention that the condition in respect of infusion of fresh Equity Share Capital to the tune of Rs. 26.9 Crores by SPL's Promoters, is imposed in terms of its

powers to impose General and Specific Conditions under Section 16 of the Electricity Act, it is submitted that:-

- (a) Section 16 of the Electricity Act provides that the Appropriate Commission **may specify** any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence.
- (b) Section 2(62) of the Electricity Act defines the terms “**specified**” **to mean specified by Regulations** made by the Appropriate Commission or the Authority as the case may be under the Act.

34. Admittedly, the aforesaid extraneous conditions have been imposed as a precondition by Telangana Commission in the Impugned Order, by which SPL's Deemed Distribution Licence status was to be taken on record. **It is an undisputed fact that, Telangana Commission has till date (i.e., despite a lapse of 3 years from the Impugned Order) not specified any Specific Conditions of Licence for SPL.** In view of above and assuming without admitting that, in the event any specific conditions qua infusion of additional equity could have been legally imposed, it would have to be done by drafting Regulations for Specific Conditions of Licence for SPL. Evidently, the same has not been done till date and therefore Telangana Commission cannot seek



solace of Section 16 of the Electricity Act. In any event, Section 16 of the Electricity Act is a condition which can be imposed post grant / recognition of Distribution Licence and not as a pre-condition for such grant/ recognition. Therefore, Telangana Commission cannot seek to rely on Section 16 for imposing such illegal considerations for recognition of SPL's deemed distribution licence status.

- 4.35** Without prejudice to the foregoing, imposition of conditions which are beyond what has been stipulated by the Parliament is contrary to law and therefore cannot anyway be sustained.

**Modification Application filed by SPL& Pendency of Review Petition**

- 4.36** Without prejudice to the fact that a Deemed Distribution Licensee is not required to comply with the requirements of the Capital Adequacy Rules, Regulation 12 of the AP Distribution Licence Regulations and the 6<sup>th</sup> Proviso to Section 14 of the Electricity Act, before being recognized as a Deemed Distribution Licensee, SPL as a prudent entity, in order to operationalize its Distribution Licence at the earliest and in consumer interest, filed an Interim Application (being I.A. No.2 of 2016 in O.P. No. 10 of 2015) seeking modification/ clarification of the Impugned Order to the

extent that Telangana Commission may:-

- (a) Modify Para 26(D) of the Impugned Order and permit SPL to capitalize a sum of Rs.26.90 Crores out of its Securities Premium Account, for issuing Bonus Equity Shares of the Face Value of Rs.10/- each aggregating to a sum of Rs. 26.90 Crores, proportionately to all the Equity Shareholders of SPL. Further, grant an extension of 6 months to SPL, beyond 31.03.2016 (i.e. upto 30.09.2016), for completion of the above process.
- (b) Modify Para 26(L) of the Impugned Order thereby acknowledging the existing charge/ mortgage created by SPL, on the buildings / power distribution assets, prior to 01.04.2016.

**4.37** On 10.06.2016, SPL filed a Compliance Affidavit appraising Telangana Commission that, it had completed the process of increasing its Equity Share Capital by allotment of Bonus Equity Shares to all its Equity Shareholders, **thereby meeting the requirement for actual infusion of Equity Share Capital from the Promoters**, as desired by Telangana Commission, *albeit* in a slightly different manner.

**4.38** Pursuant to detailed hearings, Telangana Commission by its Order dated 04.08.2016 ("**Order dated 04.08.2016**") **erroneously**

**dismissed SPL's said Modification Application** (on misconstrued facts/ a wrongful recording of an alleged concession made by SPL), to hold that:-

- (a) The Modification Application is filed under Sections 94(2)(f) and (g) of the Electricity Act (review).
- (b) SPL is limiting/ confining its prayer in the Modification Application to seeking extension of time to comply with the Impugned Order, as regards Equity Infusion and continuation of power supply by TSSPDCL till the time extended for Equity Infusion.

**4.39** By the said Order dated 04.08.2016, Telangana Commission directed SPL to operationalize its distribution licence by 30.09.2016, and further directed TSSPDCL to continue power supply to SPL's SEZ area only till 30.09.2016, despite the fact that SPL had:

- (a) Appraised/ highlighted that it will take some time to operationalize its distribution licence, as various regulatory processes were pending.
- (b) By its Petition O.P No.13 of 2016, sought for extension of time for receiving supply of power from TSSPDCL, till the time SPL operationalized its distribution licence.
- (c) Not sought extension of time up till 30.09.2016 for receiving supply

from TSSPDCL, as wrongly recorded by Telangana Commission in its Order dated 04.08.2016.

**4.40** It is submitted that, while fixing such unreasonable deadline, Telangana Commission completely disregarded the fact that, in order to commence distribution operations, SPL is required to *inter alia*, comply with the various regulatory processes, including obtain approval for Retail Supply Tariff in the licence area, **which even as on date (despite a lapse of 3 years) is not only pending but kept in abeyance by Telangana Commission.** Furthermore, the State Transmission Utility has denied grant of transmission/ grid connectivity alleging certain constraints. Therefore, Telangana Commission's adverse and erroneous directions put SPL's status as a Deemed Distribution Licensee to peril, while also taking away the rights of the consumers choice of supply and choice of availing cheaper electricity.

**4.41** On 26.08.2016, SPL filed a Review Petition (R.P No.40 of 2016), seeking review of the Order dated 04.08.2016 passed by Telangana Commission in the Modification Application (I.A. No. 2 of 2016) ("**Review Petition**"), to the extent that:

- (a) The Modification Application is not limited to seeking extension of time qua equity infusion.

- (b) No concession had been given by SPL/ its Counsel qua limiting its Modification Application to only seeking extension of time to comply with the directions in the Impugned Order.
- (c) The deadline of 30.09.2016, as set out in the Order dated 04.08.2016 does not apply to continuation of supply of power by TSSPDCL.
- (d) Permit SPL to make submissions in relation to the relief sought in the Modification Application and thereafter grant the same;
- (e) Direct TSSPDCL to continue supply of power beyond 30.09.2016, till the time STU/ SLDC grants Transmission Open Access and SPL commences its distribution operations.

**4.42** As is evident from the foregoing paragraphs, *SPL's prayers in the Modification Application were not confined to seeking extension of time for compliance with equity infusion in terms of the Impugned Order and continuation of power supply, as wrongly recorded by Telangana Commission. It was for this reason that SPL was constrained to file the Review Petition.*

**4.43** Furthermore, TSSPDCL's contention that the instant Appeal is not maintainable due to pendency of the said Review Petition is wrong and denied. It is also denied that SPL had accepted Telangana Commission's directions in the Impugned Order qua infusion of

addition Equity Capital. As is evident from the aforesaid submissions SPL as a prudent entity, in order to operationalize its Distribution Licence at the earliest and in consumer interest, had without prejudice to its stand that a Deemed Distribution Licensee is not required to fulfil the Capital Adequacy Rules and Regulation 12 of the AP Distribution Licence Regulations filed the Modification Application seeking permission to capitalize a sum of Rs.26.90 Crores out of its Securities Premium Account, for issuing Bonus Equity Shares of the Face Value of Rs.10/- each aggregating to a sum of Rs. 26.90 Crores, proportionately to all the Equity Shareholders of SPL.

**4.44** Despite this Tribunal's explicit directions in its Order dated 13.03.2018 passed in IA No. 3 of 2017 filed by SPL, Telangana Commission has failed to list and/ or hear the aforesaid Review Petition amongst 4 other Petitions which are pending adjudication before it since 2016. Details of the proceedings/ petitions filed by SPL before Telangana Commission, which are quintessential for commencing/ operationalizing the distribution operations but have not been listed for hearing by Telangana Commission.

**4.45** Without prejudice to the fact that as a Deemed Distribution Licensee, SPL is not required to fulfill the Capital Adequacy Rules, it is submitted that, Telangana Commission itself in the Impugned Order has held that SPL meets the requirements prescribed under the said Rules. Therefore, imposition of Additional Equity to the tune of Rs. 26.90 Crores is not in terms of its own findings.

**4.46** It is submitted that, out of the total anticipated investment of Rs.89.53 Crores for the power distribution system in the SEZ Area, SPL as on date has already spent a sum of approx. Rs.72 Crores in setting up the power distribution system in the SEZ, through which the consumers receive power supply even today.

**SPL's response to objections raised by TSSPDCL**

**4.47** TSSPDCL during the hearing and in its Written Submissions dated 29.04.2019 has, *inter alia*, contended that:

- (a) SPL has failed to satisfy the criteria of capital adequacy, creditworthiness, code of conduct and minimum area of supply, as prescribed under the Capital Adequacy Rules, due to the following reasons:-
  - (i) At the end of FY 2013-14, SPL had accumulated losses and more than 50% of its Net Worth/ total equity share capital

had been wiped-out, as is evident from its Statutory Auditors report.

- (ii) SPL's Directors namely, Mr. Neel C Raheja and Mr. Ravindernath were convicted in the Andhra Pradesh Industrial Infrastructure Corporation (APIIC) case. There is another matter pending before the Magistrate Court in Mumbai.
  - (iii) SPL does not comply with the minimum specified area requirement, as SPL is rendering services and operating in an area of only 14.47 Ha., which cannot be equated with a revenue district or a municipal corporation.
- (b) SPL's claim that it is a 'Deemed Licensee' is not acceptable, as the said term has not been defined under the Electricity Act. The Electricity Act does not provide for an automatic grant of licence to a Developer of an SEZ for distribution of power. SPL has to comply with the conditions prescribed in the Sixth Proviso to Section 14 read with Regulation 12 of the AP Distribution Licence Regulations, in addition to the procedure for grant of licence prescribed in Section 15 of the Electricity Act.



**4.48** At the outset, it is submitted that TSSPDCL has failed to demonstrate any legal injury or harm caused to it as a result of SPL being recognized as a Deemed Distribution Licensee. In the guise of its objections, TSSPDCL is trying to thwart competition for supply of electricity in its area of supply (the SEZ area), which ought not to be permitted by this Hon'ble Tribunal.

**4.49** It is further submitted that, the objections raised by TSSPDCL were not only raised before Telangana Commission, but have been duly recorded in the Impugned Order and specifically dealt with therein. As a competing Distribution Licensee, TSSPDCL cannot be permitted to dictate the terms on which SPL be recognized as a Deemed Distribution Licensee, especially when there is no statutory prescription for the same. Further, TSSPDCL cannot object to issues settled by the Impugned Order, which are not the subject matter of the present challenge.

**4.50** Without prejudice to the fact that SPL is not required to comply with the requirements of the Capital Adequacy Rules, it is submitted that, SPL has fulfilled all the criteria specified thereunder, which has been duly appreciated and held by Telangana Commission in the Impugned Order itself.

**4.51** Telangana Commission in Para 21 of the Impugned Order has held that, SPL fulfils the criteria of Capital Adequacy as provided for in Rule 3(2) of the Capital Adequacy Rules. As such TSSPDCL's contention is wrong and misleading.

### **Capital Adequacy & Credit Worthiness**

**4.52** Without prejudice to the fact that these issues are not before this Tribunal for adjudication, for the completion of record, SPL is placing its response to the wrongful/ extraneous submissions made by TSSPDCL.

**4.53** As regards TSSPDCL's contention that SPL had suffered losses in the initial; years, it is submitted that SPL's business, being that of development and operation of an IT/ITES SEZ requires large infrastructure construction over a period of time. During such period, the entire capital expenditure is accounted as Capital Work in Progress and the revenue expenditure (viz. royalty, selling and marketing expenses, audit expenses, office maintenance, etc.) are charged to the Profit & Loss Account. Hence, SPL had declared losses for the earlier years (i.e., FY 2013-14).

**4.54** However, the said trend has reversed, and SPL has been earning cash profits. A summary of SPL's Profit and Loss Statement from

2013 to 2018 is tabulated hereunder for ease of reference:

**M/S. SUNDEW PROPERTIES LIMITED, PROFIT/LOSS STATEMENT  
FROM 2013-2018**

Particulars	Year ending 31.03.2013	Year ending 31.03.2014	Year ending 31.03.2015	Year ending 31.03.2016	Year ending 31.03.2017	Year ending 31.03.2018
Profit before Tax (in Rs. Lacs)	-1126.40	1019.19	553.67	3483.24	8155.5	6498.77
Profit after Tax (in Rs. Lacs)	-1167.50	607.18	-521.47	2817.57	6305.43	-1714.31

**Note:** SPL had filed the Application in the prescribed proforma before Telangana Commission on 10.03.2014.

Copies of the Audited Balance Sheet - Profit/ Loss Account of SPL for FY 2013 – 2018 and a copy of the Independent Auditor's Certificate on extract from the Statement of Profit and Loss for year ended 31.03.2018 were also placed before the Commission.

**4.55** Evidently, SPL is solvent and making profits year on year. As rightly appreciated by this Hon'ble Tribunal during the hearing on 15.01.2019, SPL being a Developer of an IT/ITES SEZ would most certainly have capital adequacy and credit worthiness. In the event SPL's equity share capital would have been wiped-out, as alleged by TSSPDCL, then large Multi-National IT/ ITES (Fortune 500) Companies would not invest Crores of Rupees in setting up their offices in SPL's IT Park.

**4.56** In light of the foregoing, TSSPDCL's contention/ allegation that SPL's total Equity Share Capital has been wiped-out is totally

misplaced, erroneous and misleading.

**SPL's Director(s) are not convicted by the Anti-Corruption Bureau**

**4.57** TSSPDCL has without adducing any documentary evidence falsely alleged that, SPL's Directors, viz., Mr. Neel C. Raheja and Mr. B. Ravindernath have been convicted by the Anti-Corruption Bureau ("**ACB**") in the APIIC case. It is submitted that, during SPL's oral arguments on 15.01.2019, Counsel for TSSPDCL had once again raised the said contention and sought time to file an Affidavit to that effect. However, neither during its oral arguments on 25.04.2019 nor in its Written Submissions has TSSPDCL provided an iota of evidence to substantiate its claim. It is settled law that the onus of proving a fact is on the person making it.

**4.58** Without prejudice to the fact that TSSPDCL's aforesaid contention is false and completely baseless, it is submitted that, the Hon'ble Andhra Pradesh High Court, Hyderabad by its Order date 20.06.2017 in Criminal Revision Case Nos. 143, 290, 291, 272, 273, 279 and 262 of 2016 quashed the criminal proceedings, *inter alia*, against SPL's Directors. Accordingly, Case CC No.21 of 2015 in Cr. No.6/ACB-CIU-HYD/2011 in the Court of the Principal Special Judge for SPE & ACB Cases, City Civil Court, Hyderabad

has been closed vide Order dated 21.07.2017.

**Minimum area of supply as provided under the Capital Adequacy Rules**

**4.59** It is submitted that, Telangana Commission in Para 22 of the Impugned Order has categorically dealt with TSSPDCL's contention that SPL does not comply with the minimum specified area requirement.

**4.60** Telangana Commission has rightly concluded that, the minimum area of supply condition stipulated in the Capital Adequacy Rules does not apply to SPL (a Developer of an SEZ). TSSPDCL in the present Appeal filed by SPL cannot be permitted to reagitate arguments which have been duly dealt with and decided against TSSPDCL by Telangana Commission in the Impugned Order.

**Supreme Court's findings in the Sesa Sterlite Judgment**

**4.61** The Respondent's contention that, in terms of the Hon'ble Supreme Court's Judgment in the case of Sesa Sterlite (*supra*), SPL as a deemed Distribution Licensee is liable to comply with the Capital Adequacy Rules is wrong and denied.

**4.62** It is settled law that, the ratio in a Judgment has to be appreciated in the context of what was the question of law and how was it dealt with by the court. It is submitted that, the issue in the Sesa Sterlite

case was whether Sesa (the appellant therein) a deemed distribution licensee for the purpose of the Electricity Act, was still liable to pay Cross-Subsidy Surcharge (“**CSS**”) to WESCO, i.e., the incumbent Distribution Licensee for the area in question.

**4.63** It was in light of the particular facts of the Sesa Sterlite case that the Hon’ble Supreme Court held:

- (a) By virtue of the status of a developer in the SEZ area, Sesa Sterlite is also treated as a deemed distribution licensee. Accordingly, it gets exempted from specifically applying for grant of a distribution licence under Section 14 of the Electricity Act.
- (b) In order to avail further benefits under the Electricity Act (exemption from payment of CSS), Sesa Sterlite is also required to show that it is in fact having a distribution system and has number of consumers to who it is supplying electricity. That is not the case.
- (c) The object and scheme of the SEZ Act envisages several units being set up in an SEZ area. There can be a sector specific SEZ. However, in Sesa’s case it was a Single Unit SEZ. MoCI’s Notification dated 03.03.2010 providing for the “developer” of SEZ being deemed as a distribution licensee was issued keeping in view the concept of multi-unit SEZs and will apply only to such cases. The said Notification dated 03.03.2010 will not apply to a

developer like Sesa Sterlite, who has established an SEZ only for itself.

- (d) Having regard to the factual and legal aspects and keeping in mind the purpose for which CSS is payable, it was held that Sesa Sterlite was liable to pay CSS to WESCO and it was in this context that Hon'ble Tribunal's Judgment was upheld.

**4.64** It is submitted that, the Respondents contention that in the Sesa Sterlite Judgment the Hon'ble Supreme Court had relied on MoCI's Notification dated 21.03.2012 to hold that there is no inconsistency/ conflict between the provisions of the Electricity Act and SEZ Act. And that, there is a need for harmonious construction of the SEZ Act and the Electricity Act in order to give effect to the provisions of both Acts. In this regard, it is submitted that:-

- (a) MoCI's aforesaid Guidelines/ Notification dated 21.03.2012 **have been repealed by MoCI's subsequent Notification/ Guidelines for Power Generation in SEZ's dated 06.04.2015**, [Notification No.P.6/3/2006-SEZ], which has revived its earlier Guidelines dated 27.02.2009].
- (b) The said **Notification dated 27.02.2009 provides that**, the provisions of the Electricity Act and the Rules made thereunder are

to be made applicable to deemed licensees (Developers of SEZ),  
**wherever warranted.**

**4.65** From the above it is evident that, pursuant to the Sesa Sterlite Judgment, the Central Government in its wisdom deemed it necessary and prudent to withdraw the Notification dated 21.03.2012 and revive the earlier Notification dated 27.02.2009 which clearly evidenced that provisions of the Electricity Act and Rules are to be made applicable to Developers of SEZ only wherever warranted, i.e., in other words acknowledging that there might be situations wherein there might be a conflict between the two Statutes.

**4.66** It is settled principle of law that, when there is a conflict between the provisions of two special Acts/ Statutes, the latter Act/ Statute will prevail over the former, if there is a provision in the latter special Act/ Statute, giving it an overriding effect. Section 51 of the SEZ Act, provides that, the provisions of the SEZ Act shall have effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force.

**4.67** As is evident from the foregoing, the facts of Sesa Sterlites' case are distinct from those SPL's case. Undisputedly, multiple IT/ ITES Units are already operating within SPL's SEZ area. Furthermore,



Telangana Commission has in the Impugned Order already held that by virtue of MoCI's Notification dated 03.03.2010 SPL is a deemed distribution licensee in the SEZ area. It is further submitted that, reference to the Capital Adequacy Rules in the said Sesa Sterlite Judgment is to be appreciated from the context in which it was relied upon (Sesa Sterlite had sought for grant of a distribution licence). In this regard, it is pertinent to note that, this Hon'ble Tribunal in para 43 of its Judgment prior to referring to the Capital Adequacy Rules held that:

*"43. It is noticed that the Ministry of Commerce and Industry (Department of SEZ Section) has accorded SEZ status to the appellant for development and operation and maintenance of sector specific special economic zone for manufacture and export of aluminium on the condition that the appellant should establish captive generating plant as stipulated in the approval letter of the Ministry of Commerce and Industry but it is pointed out that still the plant has not been established for various reasons. If captive generating plant of 1215 MW had been established as per the condition inside the SEZ area, the question of power purchase from Sterlite Energy Ltd. under the pretext of distribution licensee status would not have arisen."* [Emphasis supplied]

**4.68** Therefore, the Respondent's reliance on the Sesa Judgment to state that the Capital Adequacy Rules have to be met before the Deemed Distribution Licensee status can be recognized, is completely misplaced and unfounded in law.

**4.69** In light of the foregoing, it is most respectfully prayed that this Tribunal allow the instant Appeal and grant the reliefs sought therein, to enable SPL to operationalize its distribution operations within the SEZ Area, in terms of the Electricity Act and the SEZ Act.

**5. Ms. D.Bharathi Reddy, learned counsel appearing for the Respondent No.1 has filed the written submissions for our consideration as under:-**

**5.1** The present Appeal has been filed challenging the impugned judgement dt. 15.02.2016 passed by the Respondent No.1 /Telangana State Electricity Regulatory Commission (TSERC) in OP No. 10/2015.

**5.2** As per the impugned judgement dt. 15.02.2015<sup>6</sup> the TSERC in exercise of the powers conferred U / s 14 (b) of the Electricity Act, 2003 has identified and recognised the Appellant/ M/s. Sundew Properties Ltd. as a "*deemed distribution licensee*" with effect from 01.04.2016 to distribute electricity in the area admeasuring 14.4 7 hectares.

**5.3** It is pertinent to note that the identification of the Appellant as a (*deemed distribution licensee*" was subject to General & Specific Conditions which were laid down as per Section 16 of the

Electricity Act, 2003 and the Electricity Act, 2003, the Rules made thereunder and Regulations made by the Telangana Commission.

**5.4** The Prayer in OP No. 1 of 2015 to record the Appellant as a "Deemed Distribution 1;- licensee" was allowed by TSERC. However, the Appellant has chosen to file the present Appeal in bid to circumvent the general & specific; conditions imposed by the State Commission. The relief sought in the present Appeal is extracted as under:

*(a) Allow the Appeal and set aside the Impugned Order dt. 15.02.2016 passed by Ld. Telangana Commission, to the extent that it: -*

*i. Requires M/ s. Sundew Properties Ltd. a deemed distribution licensee, to comply with conditions stipulated in Rule 3 of the Capital Adequacy Rules read with Sixth Proviso to Section 14 of the Electricity Act; and /or*

*ii. Holds that Regulation 12 read with Regulation 49 of*

*The Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations/ 2013 is applicable to a deemed distribution licensee.*

*b) In the alternative, hold that the Appellant has complied with the requirement of Rule 3 of the Capital Adequacy Rules read with Sixth Proviso to Section 14 of the Electricity Act."*

**5.5** The entire basis for filing the present Appeal is to circumvent the statutory rules & regulations framed under the Electricity Act,

2003. Therefore, the present Appeal is a sheer abuse of process and deserves to be dismissed.

**5.6** The Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness & Code of Conduct) Rules 2005 and the Andhra Pradesh Electricity Regulatory Commission (Distribution License) Regulations 2013 apply to the Appellant (Deemed Distribution Licensee) as per the law laid down by Hon'ble Supreme Court in *SESA STERLITE Ltd!* case- {2014}8 SCC!J-44.

**5.7** Hon'ble Supreme Court in *SESA STERLITE Case* has examined the effect of a Deemed Distribution License under Section 14 (b) of the Electricity Act and held that there is a need for harmonious construction of the Special Economical Zones Act, 2005 (SEZ Act, 2005) and Electricity Act, 2003 in order to give effect to the provisions of the both Acts.

**5.8** On a perusal of Notification dt. 03.03.2010 issued under SEZ Act, 2005, it is evident that the legislation's intent for declaring the developer of an SEZ as a (*'Deemed Distribution Licensee'*) is confined only to Clause (b) of Section 14 of the Electricity Act, 2003 which deals with the grant of Licence by the appropriate State Commission. It was categorically held that by virtue of

being a developer of an SEZ, the Appellant will be treated as a "*Deemed Distributor Licensee*" which would only grant exemption from specifically applying for licence U /s 14 of the Electricity Act, 2003. It was further held that the said notification has not curtailed the power of State Commission *in so far as* the applicability of other provisions of the Electricity Act, 2003.

**5.9** In light of law laid down by Hon'ble Supreme Court in *SESA STERALITE Case*, it is not open to the Appellant to contend that the Distribution . of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness & Code of Conduct) Rules 2005 and the Andhra Pradesh Electricity Regulatory Commission (Distribution License) Regulations 2013 do not apply to the Appellant being a "*Deemed Distribution Licensee*".

**5.10** The General and Specific Conditions imposed by the TSERC upon the Appellant vide impugned judgment dt. 15.02.2016 as under are in accordance with law and do not warrant any interference by this Hon'ble Tribunal:

- a) TSERC while identifying the Appellant as a ("*Deemed Distribution Licensee*") has imposed certain General and Specific Conditions which are in keeping with the Capital Adequacy

Rules, 2005 and the AP Distribution Licence Regulations, 2013 read with Section 16 of Electricity Act, 2003.

- b) As a stand-alone entity the Appellant does not fulfil the conditions laid down in Rule 3 of the Capital Adequacy Rules, 2005, however by taking into account the Net Worth of the promoters it was held that the requirements laid down in Rule 3(2) were satisfied. That the Ld. TSERC placed certain conditions in respect of infusion of Fresh Equity Share Capital from the promoters of the Appellant under Section 16 of the Electricity Act, 2003.
- c) The Appellant herein is a developer of an SEZ having no prior experience in the business of Distribution of Electricity and therefore as Regulator, the Ld. TSERC is empowered to lay down General and Specific Conditions in Public Interest and the same do not warrant interference by this Tribunal.

**5.11** In light of the above-mentioned facts and circumstances it is prayed that this Tribunal may be pleased to uphold the Impugned Final Judgement dt. 15.02.2016 and thereby dismiss the Present Appeal.

**6. Mr. Rakesh K. Sharma, learned counsel appearing for the Respondent No.2 has filed the written submissions for our consideration as under:-**

**6.1** The Appellant is challenging the impugned order, which mandates the Appellant to comply with the Rule 3(2) of the Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 read with Sixth Proviso to Section 14 of Electricity Act, 2003; and Rule 12 read with Rule 49 of the Andhra Pradesh Electricity Regulatory Commission (Distribution License) Regulations 2013.

**6.2** The Central Government having derived power under section 176 of the Electricity Act, 2003 made Rules known as the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 (Hereinafter referred to as 'Capital Adequacy Rules') Which specify additional requirements like Appellant's finance plan for investment to set up distribution business, minimum area of supply and code of conduct of the applicant. The said rules were made to ensure that the Appellant has creditworthiness, has service obligations and mix up of consumers and transparency of the Managerial Personnel / Directors / Officers.

- 6.3** It is important to note from the List of Dates of the Appeal paperbook that on 15.02.2016 the impugned order came to be passed and on 16.03.2016 the Appellant filed an application under Section 14 of the Act, being I.A. No. 2 of 2016 in O.P. No. 10 of 2015 (Modification Application). By the said modification application having accepting the impugned order the Appellant wanted certain modifications and prayed that Para 26 D, 26 L and sought extension of time for complying with the impugned order.
- 6.4** The aforesaid Application I.A. No. 2 of 2016 was heard and order dated 04.08.2016 came to be passed by the Appellant had restricted its prayer to extension of time which was accorded by the Commission till 30.09.2016.
- 6.5** It is pertinent to point out that when having accepted with the order of the Commission i.e. the impugned order and modification application allowed by the Commission limiting to the prayer of extension of time, the Appellant then filed review petition on 26.08.2016 for the review of the order dated 04.08.2016 and thus they further seek review for modification of Para 26D and 26L of impugned order. And when the extended time (30.09.2016) came nearer then conspicuously the instant Appeal was preferred on



21.09.2016 and thus the instant Appeal is not maintainable when review petition is still pending for adjudication.

**6.6** The following questions arise for the consideration of this Tribunal;-

- i. Whether the impugned order 15.02.2016 has not attained finality when the same was accepted by the Appellant and time extension was sought by the Appellant for compliance?
- ii. Whether the impugned order can be assailed by the Appellant when Review Petition is still pending?
- iii. Whether the pendency of Review Petition will not concurrently eclipse the finding of this Hon'ble Court, if arrived at in the instant case?
- iv. Whether the conduct of the Appellant is proper in approaching this Tribunal when it had accepted the Terms of impugned order and by order dated 04.08.2016 the time was extended and review petition was filed and is still pending?

**6.7** The Appellant had accumulated losses at the end of the financial year 2013-2014 and more than 50% of its net-worth has been wiped-out which fact is reported in the Statutory Auditor's report. The Company's financial position is in jeopardy and the present

Directors of the Company namely Mr. Neel C Raheja and Mr. B. Ravindernath were convicted in a case registered by the Anti Corruption Bureau in Andhra Pradesh Industrial Infrastructure Corporation (APIIC) case. Further, another suit is filed against Mr. Ravi C. Raheja and Mr. Neel C. Raheja, present Directors of the Company and the matter is pending in the Court of Magistrate, Mumbai. Therefore, the Appellant Company has not satisfied the Code of conduct clause of Capital Adequacy Rules aforesaid. The impugned order though has not considered the above contention being pending cases, but from 15.02.2016 till date over 3 years have passed and Appellant has not whispered anything about the said conviction in the Appeal or Rejoinder and no order has been produced in this regard. (The above fact of Corruption cases was specifically pointed out during the submissions of the Appellant on 15.01.2019).

- 6.8** There is no definition of 'deemed licensee' in the Electricity Act, 2003 and Section 14 is the only section which provides for the grant of a licence for distribution of power by any person. The Appellant may have the required qualifications under the SEZ Act to develop and run a SEZ, but that does not provide for an

automatic grant of licence for distribution of power under Section 14 of the Act and the Appellant has to comply with the other mandatory provisions and conditions of the Electricity Act, 2003.

**6.9** The provisions of sixth (6th) proviso to Section 14 of the Act, and Rules made thereunder are applicable to the Appellant and the Appellant must comply with the conditions prescribed in the sixth (6th) proviso to section 14, in addition to the procedure prescribed in section 15 of the Act.

**6.10** The Appellant failed to comply with the provisions of Regulation No.10 of 2013 relating to capital adequacy, creditworthiness and code of conduct. The Rule 12 of the Regulation No.10 of 2013 refers to the Rules as laid-down in “Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005” (the Capital Adequacy Rules) issued by the Central Government.

**6.11** The Appellant's business activities are being run by the borrowed funds i.e., loans and the entire share capital of Rs.1.12 crores as on 31.03.2013 has been wiped-out on account of the accumulated losses. Rule 3 of the Capital Adequacy Rules stipulates that the

Appellant has to contribute 30% of the total investment of the power distribution business by way of equity but its total equity share capital has been wiped-out and thereby the Appellant has violated the Rule 3 notified under section 176 of the Electricity Act, 2003.

**6.12** One of the main objectives of 2003 Act is to protect the consumers and the Appellant with criminal background of Directors/Promoters and eroded net worth, it is pertinent to note that they want the Distribution of Electricity to be source of income and business prospect which was never the intention of 2003 Electricity Act or 2005 SEZ Act.

**6.13** It is submitted by the Appellant that Fortune 500 companies are occupying the office spaces in the SEZ of Appellant and suffering due to the instant litigation, this is meaningless and has no connection in this case as they are being supplied power without any hindrance and there is no problem whatsoever in their business activities.

**6.14** The 'explanation' to Rule 3 of the Capital Adequacy Rules stipulates that for granting of licence within the same area in terms of sixth (6th) proviso to Section 14 of the Act, the area falling within

a municipal corporation or a revenue district shall be the minimum area of the supply. The Appellant is a developer of SEZ for rendering the services of ITS and ITES and it is operating in an area of 14.47 hectares in Madhapur, Cyberabad, Ranga Reddy District which cannot be equated with a revenue district or a municipal corporation. Thus, the Appellant did not fulfill the condition(s) laid-down in Rule 3 of the Notification dated 23.03.2005 issued under Section 176 of the Act.

**6.15** The Appellant's claim that it is a 'deemed licensee' is not acceptable. The notification issued under the SEZ Act can be placed before the Commission as one of the materials seeking for grant of a licence but that notification alone would not be sufficient to seek the Commission to grant such a licence under Section 14 of the Act. A deemed licensee has to comply with the procedures prescribed under Section 15 and Rule 12 of the Regulation.

**6.16** The financial statements of the Appellant as on 31.03.2013, the report of the Statutory Auditor of the Appellant at clause x of the audit report reads as under:

*“(x). The Company's accumulated losses at the end of the financial year are more than fifty percent of its net worth. The company has not incurred cash losses in the current*

*financial year though has incurred cash losses in the immediately preceding financial year.”*

The above qualification of the Auditor in his Audit Report establishes the fact that the Appellant did not fulfil Rule 3 of the Capital Adequacy Rules as on 31.03.2013.

**6.17** Reliance is placed on the decision of this Tribunal in Appeal No. 206 of 2012 in the case of M/s.Vedanta Aluminium Ltd., Vs. Orissa Electricity Regulatory Commission more particularly paras: 12, 24, 25, 31, 32, 33, 34, 35, 45, 46, 47 and 50 of this decision clearly establish that the Appellant's application is not in accordance with the ratio laid down in this decision. It is further submitted that the aforesaid decision of this Tribunal has been confirmed and affirmed by the Hon'ble Supreme Court of India in the case of M/s. Sesa Sterlite Ltd., Vs. Orissa Electricity Regulatory Commission reported as (2014) 8 SCC 444.

**6.18** The reading of the aforesaid judgment carefully in its true spirit, it is evident that the proviso to Sec. 14(b) of the Electricity Act, 2003 confers deemed distribution licensee status to the developer of SEZ but doesn't permit the developer of SEZ from giving a go by or ignoring the other provisos of the Electricity Act and Electricity Rules thereunder. This is strictly in concurrence to the Hon'ble

Supreme Court Judgment in the Sesa Sterlite appeal. The proviso of Sec. 14(b) merely says that the Developer of the SEZ shall be a deemed licensee. But the same proviso has not permitted the Deemed Distribution License to not comply with the other provisos of Sec. 14 by any legal fiction. Hence it is clear from the intent of the legislature that it is necessary for the Appellant, though a deemed distribution licensee to comply with all other provisions of the Electricity Act, 2003, and Electricity Rules 2005

**6.19** The distribution and retail supply activities of the Appellant have to be regulated by the State Commission under the Electricity Act, 2003 and thus the Regulation 12 of the AP Distribution License Regulations 2013 is in line with the Electricity Act, 2003 and is backed with legal validity and applicability. It is highly improper on the part of Appellant to say that Respondent Commission has erred in holding that fulfillment of Rule 3(2) of the Capital Adequacy Rules and Rule 12 of the AP Distribution License Regulations is mandatory to be recognized as a Deemed distribution licensee. The clause (b) of section 14 of the Electricity Act, 2003 (36 of 2003), has the following proviso which has been inserted namely:-

*“Provided that the **Developer of a Special Economic Zone** notified under sub-section (1) of section 4 of the*

***Special Economic Zones Act, 2005, shall be deemed to be a license for the purpose of this clause, with effect from the date of notification of such Special Economic Zone.”***

**6.20** There are few provisos where the Act explicitly conveyed deemed licensee status by specifically mentioning that they do not require to obtain license under the said provisions. Whereas in the new proviso added to Sec. 14(b) it is categorically mentioned that the developer of special Economic Zone shall be deemed to be a licensee for the purpose of this clause but not clearly mentioned that they do not require to obtain license which is otherwise explicitly stated in the proviso 3 in case of Government or Proviso 4 in case of Damodar Valley Corporation. Accordingly, the Commission has framed Regulation No. 10 of 2013 which deals with Distribution License rules to be followed by the licensees. The Rule 12 and Rule d) of the AP Distribution License Regulation which deals with mandatory compliance of the Distribution of Electricity Rules, 2005 by any person applying for grant of license including deemed distribution license is extracted below;

*“12. Application for grant of Distribution Licence in the area of supply of an existing Distribution Licensee*

*A person applying for grant of licence for distribution of electricity through its own distribution system within the same area of supply of an existing Distribution Licensee shall, in addition to the provisions of Regulation 4 to 11, comply with*



*Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 issued by Central Government.*

*The deemed licensees shall make application in the form specified in Schedule-2 to the Commission to get identified as deemed licensee. Provided that nothing in Regulations 4 to 11 shall apply to the deemed licensees.”*

**6.21** It is clear by the Regulation that only Regulation 4 to 11 i.e. application for grant of license, public notice of the application, calling for objections is not applicable to the person seeking Deemed distribution license status but the Rule 12 is mandatory even for deemed distribution licensee. Hence, it is the duty of the appellant to comply with Rule 12 in addition to other rules as mandated in the Regulation to the satisfaction of the Respondent No. 1. The impugned order is passed considering all the statutes and facts harmoniously and the Appellant is trying to divert the issue and cause confusion and to mislead this Tribunal.

**6.22** It is important to note that as per APERC regulations (Annexure A) it is clear that two schedules are given, Schedule 1 for Application form for grant of Distribution License and Schedule 2 for Application form for Deemed Licencee. This schedule 2 itself is specifically for deemed licensee status by virtue of some other act and the form specifically provides for disclosure of funding patterns

and equity involved and also the criminal antecedents of the Directors/Promoters and thus the impugned Capital Adequacy Rules and Code of Conduct Rules are incorporated in the Regulation and is mandatory and binding on the Appellant itself.

**6.23** By the express language of the said rule it can be derived that the applicant for grant of license has to contribute 30% equity on the cost of the investment after excluding the committed investments. Hence the appellant has to infuse equity to the extent of total investment on the distribution business to meet the requirements of the capital adequacy Rules. The same has been highlighted by the Commission in its order in the O.P. NO. 10 of 2015 through its direction to the appellant to infuse Rs. 26.9 crores (i.e. 30% of investment of Rs. 89.53 crores) fresh equity by way of account payee cheques and not as book entries to which the appellant has not adhered to. The appellant in its I.A. before Respondent No. 1 has requested for modification of the O.P. by allowing the appellant to increase the share capital be way of issue of bonus shares to its equity share holders out of share premium account in the form of book entries. Hence the appellant has not complied with the directions of the Commission in infusing the share capital

by way of account payee cheques only. The appellant has not fulfilled the criteria of the debt–equity norm set out by the Commission which is prerequisite under Rule 3(2) of the Capital Adequacy Rules. As the distribution activity is a discrete activity which is apart from the SEZ business, the appellant has to prove its credit worthiness by way of infuse of equity earmarked for the distribution business. Further, as per Rule 43 read with Rule 49 of Distribution License Regulation, the Distribution licensee including Deemed Distribution Licensee has to maintain separate accounts for the licensed business and prepare account statements along with a report from the auditor to the extent of true and fair view of revenues, costs, assets and liabilities. It implies that a distribution licensee including deemed distribution licensee has to treat the distribution business as a separate activity which requires its own net worth to be instilled to carry out the business.

**6.24** The Respondent No. 1 has passed the impugned judgment with careful consideration and proper interpretation of the statute and has considered the judgments passed by Hon'ble Supreme Court in Sesa Sterlite case (supra) and this Tribunal in Vedanta Aluminium case (supra) which squarely covers the instant case. The Appellant is trying to mislead this Court by bringing up

unnecessary orders and notifications, keeping review petition pending and simultaneously suppressing the relevant material facts, this shows the conduct of the Appellant and this Tribunal ought not interfere in the present matter and the instant Appeal filed by the Appellant deserves to be dismissed on this ground.

- 7. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondents at considerable length of time. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-**

**Issue No.1:** Whether the Telangana Electricity Regulatory Commission has rightly held that fulfilment of conditions stipulated in Rule 3(2) of the capital adequacy rule read with Section 14 of the Electricity Act and Rule 12 of the AP Distribution Licence Regulations are mandatory pre-requisite for the Appellant, a developer of a notified SEZ, to be recognized as a deemed distribution licensee under Regulation 13 and Proviso to Section 14(b) of the Electricity Act?

**Issue No.2:** Whether Telangana Commission was right in directing the Appellant to infuse additional equity after having held that the Appellant has complied with the requirement of Rule 3(2) of the Capital Adequacy Rules?

**OUR ANALYSIS AND FINDINGS:**

**8. ISSUE NO.1:-**

**8.1** Learned counsel for the Appellant / SPL submitted that the Appellant is a developer in terms of Section 3 & 4 of the SEZ Act from 16.10.2006 and in terms of Proviso to Section 14(b) of the Electricity Act, 2003, it is deemed distribution licensee. Learned counsel further submitted that after admitting these facts, the Telangana Commission has imposed extraneous conditions in the impugned order such as infusion of additional equity in terms of Rule 3(2) of the Capital Adequacy Rules and as such the Impugned Order is in contravention to the provisions of the SEZ Act as well as the Electricity Act. In fact, the Telangana Commission has failed to appreciate that the Recognition of the status of a Deemed Distribution Licensee is not contingent upon fulfillment of Rule 3(2) of the Capital Adequacy Rules read with Regulation 12 of the AP Distribution Licence Regulations.

**8.2** To substantiate his contentions, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in *Sesa Sterlite* case in which the various provisions of the SEZ Act and Electricity Act have been analysed in detail and the apex court has carved out the distinction between a Deemed Distribution Licensee and an Applicant seeking grant of licence. The said judgment has clearly

laid the principle that a developer of a SEZ is automatically deemed to be a distribution licensee under Sections 3 and 4 of the SEZ Act and further a deemed distribution licensee is not required to make an Application for grant of licence under Sections 14 and 15 of the Electricity Act.

**8.3** Learned counsel for the Appellant further submitted that the AP Distribution Licence Regulations also recognized the difference between a person making an application for grant of licence and a Deemed Distribution Licensee making an application for getting identified as a deemed distribution licensee. The relevant provisions of the AP Distribution Licence Regulations are cited as under:-

- (a) **Regulation 2(d):** *“Applicant means a person who has made an application to the Commission for grant of Distribution Licence”;*
- (b) **Regulation 2(h):** *“Deemed licensee means a person authorised under sub-section (b) of Section 14 and also under the first, second, third, and fifth provisos to section 14 of the Act to operate and · maintain a distribution system for supply of electricity to the consumers in his area of supply”;*
- (c) **Regulation 12:** *“Application for grant of Distribution Licence in the area of supply of an existing Distribution Licensee*  
*A person applying for grant of a licence for distribution of electricity through his own distribution system within the same area of supply of an existing Distribution Licensee shall, in addition to the provisions of Regulation 4 to 11, comply with" Distribution of Electricity Licence (additional requirements of Capital Adequacy,*

*Creditworthiness and Code of Conduct) Rules, 2005" issued by the Central Government."*

- (d) **Regulation 13:***"The deemed licensees shall make application in the form specified in Schedule-2 to the Commission to get identified as the deemed Licensee. Provided that nothing in Regulations 4 to 11 shall apply to deemed licensees."*

It is evident from the above regulations that there are distinct categories of licensees, being one where a person makes an Application for grant of a Distribution Licence [Regulations 2(d) and 12 of the AP Distribution Licence Regulations]; and the other, where the person is already a deemed licensee by operation of law and only seeks recognition by the Appropriate Commission. [Regulations 2(h) and 13 of the AP Distribution Licence Regulations].

- 8.4** Learned counsel vehemently submitted that the Telangana Commission in Para 18 of the Impugned Order has rightly held that the Appellant/SPL is not required to make an application seeking grant of a licence and follow/ comply with the procedure specified in Section 15 (2) to (6) of the Electricity Act read with Rules 4 to 11 of the AP Distribution License Regulations. However, contrary to the same, it has wrongly held that the Capital Adequacy Rules are applicable to the Appellant in terms of Regulations 12 and 49 of the said Licence Regulations. Learned counsel was quick to

submit that the Capital Adequacy Rules have been framed by the Central Government in terms of its rule making powers under Section 176(2)(b) read with the 6<sup>th</sup> Proviso to Section 14 of the Electricity Act. The Telangana Commission in para 16 of the Impugned Order has held that:

*“16. ... On a close reading of the provisions of section 14, **we are of the view that the ‘provisos’ to section 14 are not applicable to a deemed licensee.** The status of a deemed licence to a person under Section 14(b) of the Electricity Act,2003 (The Act) emanates from the Notification given under Section 49(1) of the SEZ Act to a developer of SEZ provided the deemed Licensee satisfies the other provisions of the Act.” [Emphasis supplied]*

Learned counsel alleged that even after the aforesaid categorical finding in Para 16 of the Impugned Order, the Telangana Commission could not have come to a conclusion that a Deemed Licensee needs to fulfil the conditions stipulated under the Capital Adequacy Rules, as a pre-condition to being recognized as a Deemed Licensee.

- 8.5** Learned counsel further submitted that the fallacy in the Impugned Order is at Paragraph 19 where the Commission has stated that “By Implication” Regulation 12 of the AP Distribution Licence Regulations (which is the same as the 6<sup>th</sup> Proviso of Section 14) is applicable to a Deemed Distribution Licensee, since Regulation 13 only exempts a Deemed Distribution Licensee from following what



is stipulated under Regulations 4 -11 and not Regulation 12. Learned counsel emphasized that the Capital Adequacy Rules in clear and unambiguous terms state that the Appropriate Commission, shall on receipt of an application under Section 15(1) of the Electricity Act, decide the requirements of capital investment. It is thus clear that the aforesaid provisions are contemplated as pre-requisites for grant of a licence. Therefore, by no stretch of imagination can the same be made applicable to a Deemed Distribution Licensee enjoying special considerations under the provisions of the Electricity and SEZ Acts.

**8.6** Learned counsel contended that other Commissions such as in the states of Tamil Nadu, Gujarat, Maharashtra etc. nowhere such compliance of the Capital Adequacy Rules as a pre-condition are being made for being recognized as a Deemed Distribution Licensee.

**8.7** ***Per contra***, learned counsel appearing for Respondent Nos.1 & 2 submitted that as per the law laid down by Hon'ble Supreme Court in Sesa Sterilite Case, 2014, it is not open to the Appellant to contend that the Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness and Code of

Conduct) Rules, 2005 and the Andhra Pradesh Electricity Regulatory Commission (Distribution License) Regulations 2013 do not apply to a deemed distribution licensee. The Hon'ble Supreme Court in the above case has examined the effect of a deemed distribution licensee under Section 14 (b) of the Electricity Act and held that there is a need for harmonious constructions of the SEZ Act, 2005 and the Electricity Act, 2003 in order to give effect to the provisions of the both Acts. Therefore, it is not open to the Appellant to contend that the Capital Adequacy Rules and the Andhra Pradesh (Distribution License) Regulations do not apply to it, being a distribution licensee. In fact, the general and the specific conditions imposed by the Telangana Commission upon the Appellant vide the impugned order dated 15.02.2016 are entirely in accordance with law and do not warrant any interference by this Tribunal.

- 8.8** Learned counsel for the second respondent pointed out that having accepted the impugned order of the State Commission and modification application allowed by the Commission limiting to the prayer of extension of time, the Appellant then filed review petition on 26.08.2016 for the review of the order dated 04.08.2016. Accordingly, time was extended up to 30.09.2016 but

prior to the extended time, the instant Appeal has been preferred by the Appellant on 21.09.2016 and thus the instant Appeal is not maintainable when review petition is still pending for adjudication.

**8.9** Learned counsel were quick to submit that (i) whether the impugned order 15.02.2016 has not attained finality when the Appellant accepted the same and sought for extension of time for compliance and the Review Petition is still pending? (ii) Whether the pendency of Review Petition will not concurrently eclipse the finding of this Hon'ble Court, if arrived at in the instant case? Learned counsel further contended that though the Appellant may have the required qualification under the SEZ Act to develop and run a SEZ but that does not provide for automatic grant of sanction for distribution of power under Section 14 of the Act and the Appellant has to apply with other mandatory provisions and conditions of the Electricity Act, 2003 and Rules.

**8.10** Learned counsel for the Respondents highlighted that distribution and retail supply activities of the Appellant have to be regulated by the State Commission under the Electricity Act, 2003 and thus the Regulation 12 of the AP Distribution License Regulations 2013 is in line with the Electricity Act, 2003 and is backed with legal validity and applicability. As such, it is highly improper on the part of Appellant to say that Respondent Commission has erred in holding

that fulfillment of Rule 3(2) of the Capital Adequacy Rules and Regulation 12 of the AP Distribution License Regulations is mandatory to be recognized as a Deemed distribution licensee. Learned counsel for the Respondents vehemently submitted that only Regulation 4 to 11 i.e. application for grant of license, public notice of the application, calling for objections is not applicable to the person seeking Deemed distribution licensee status but the Rule 12 is mandatory even for deemed distribution licensee. As per AP Regulations, it is clear that two schedules are given, Schedule 1 for Application form for grant of Distribution License and Schedule 2 for Application form for Deemed Licencee. This schedule 2 itself is specifically for deemed licensee status by virtue of some other act and the form clearly provides for disclosure of funding patterns and equity involved and also the criminal antecedents of the Directors/Promoters. In other words, the Capital Adequacy Rules and Code of Conduct Rules are inbuilt in the Regulations and is mandatory and binding on the Appellant itself.

**8.11** Learned counsel for the Respondents emphasised that the State Commission has passed the impugned order with careful consideration and proper interpretation of the statute and has

considered the judgments passed by Hon'ble Supreme Court in Sesa Sterlite case (supra) and this Hon'ble Tribunal in Vedanta Aluminium case (supra) which squarely covers the instant case. As such, the interference of this Tribunal is not attracted in the present case.

**OUR FINDINGS:-**

**8.12** We have carefully considered the contentions of the learned counsel for the Appellant and learned counsel for the Respondents and also taken note of the judgment relied upon by the Parties. Learned counsel for the Appellant/SPL contends that in fact the Respondent Commission has failed to appreciate that the Recognition of the status of a Deemed Distribution Licensee is not contingent upon fulfillment of Rule 3(2) of the Capital Adequacy Rules read with Regulation 12 of the AP Distribution Licence Regulations. It is not in dispute that under Rules 3 & 4 of the SEZ Act, a developer of SEZ is automatically deemed to be a distribution licensee and is not required to make an application for grant of license under Section 14 & 15 of the Electricity Act. However, a deemed distribution licensee has to make an application to the Appropriate Commission for getting identified as a deemed distribution licensee in the form prescribed by the

Commission. The Telangana Commission in Para 18 of the impugned order has held that the Appellant is not required to make an application seeking grant of a license but it has stipulated that the capital adequacy rules are applicable to the Appellant in terms of Regulation 12 & 49 of the distribution license regulations of the Commission.

**8.13** It is relevant to note that the real issue of the dispute is a finding of the Commission in the impugned order that a deemed licensee is required to fulfil the conditions stipulated under the capital adequacy rules as a pre-condition to being recognized as a deemed licensee. In justification to the said findings, Telangana Commission has indicated that 'by implication' Regulation 12 of AP Distribution License Regulations (which is the same as the 6<sup>th</sup> Proviso to Section 14) is applicable to a deemed distribution licensee since Regulation 13 only exempts a deemed licensee from following what is stipulated under Regulations 4 to 11 and not Regulation 12. To substantiate his submissions, learned counsel for the Appellant has contended that many State Commissions such as Tamil Nadu, Gujarat, Maharashtra etc. have passed several orders and nowhere such compliance of the capital

adequacy rules has been made a pre-condition for duly recognized as deemed distribution licensee.

**8.14** On the other hand, learned counsel for the Respondents contend that the Hon'ble Supreme Court in the case of Sesa Sterilite has clearly held that there is a need for harmonious construction of SEZ Act, 2005 and the Electricity Act, 2003 in order to give effect to the provisions of both Acts and, therefore, it is not open to the Appellant to contend that the Capital Adequacy Rules and AP (Distribution License) Regulations do not apply to it. It is also noticed that the Appellant accepted the impugned order of the State Commission and moved a modification application with prayer for extension of time up to 30.09.2016 to comply with the conditions listed in the impugned order, however, even before expiry of the extended date, the Appellant preferred the instant appeal on 21.09.2016. Supporting the findings in the impugned order, the respondents highlight that the distribution and retail supply activities of the Appellant have to be regulated by the State Commission under the Electricity Act, 2003 and Regulation 12 which is backed with legal validity and applicability would apply to the Appellant. Learned counsel for the Respondents reiterate that only Regulation 4 to 11 i.e. application for grant of license, public

notice of the application, calling for objections etc. is not applicable to the person seeking recognition of Deemed distribution licensee status but the Rule 12 is mandatory for all the distribution licensees. Even the Schedule 2 which is meant for deemed distribution licensee itself specifically provides for disclosure of funding patterns and equity involved and also the criminal antecedents of the Directors/Promoters. In other words, the Capital Adequacy Rules and Code of Conduct Rules are inbuilt in the Regulations and is mandatory and binding on all distribution licensees including the Appellant. In view of these facts, it is pertinent to note that while the Appellant is not required to apply for grant of license but being a deemed distribution licensee has to fulfil other technical and financial requirements as per prevailing rules and regulations of the State Commission which is mandated to regulate the Electricity business in the state whether it is a DISCOM or any other deemed distribution licensee as in the present case. Accordingly, we are of the opinion that the State Commission has passed the impugned order with careful consideration and proper interpretation of the statute and also considering the judgments passed by Hon'ble Supreme Court in Sesa Sterilite case (supra) and the Tribunal's judgment in Aluminium case which squarely cover the case in hand. As such,



we are not inclined to interfere in the findings of the State Commission on this issue.

**9. ISSUE NO.2 :-**

**9.1** Learned counsel for the Appellant submitted that the Telangana Commission based on the information placed before it, has in Para 21 of the Impugned Order held that:-

- (a) As a stand-alone entity SPL does not fulfil the conditions laid-down in Rule 3 of the Capital Adequacy Rules.
- (b) However, Rule 3(2) allows the Net Worth of SPL's Promoters to be considered for computing the Debt : Equity ratio of 70:30.
- (c) The Net Worth of SPL's Promoters varied between Rs. 1,577 Crores to Rs. 1,760 Crores for the year ending 31.03.2015, 30.03.2014 and 30.03.2013, which meets the requirements laid down in Rule 3(2) Capital Adequacy Rules.

**9.2** Learned counsel alleged that despite the aforesaid findings, Telangana Commission arbitrarily, without assigning any reason, directed SPL to infuse further Equity to the tune of Rs.26.9 Crores (being 30% of the total anticipated investment of Rs.89.53 Crores) as Equity Share Capital contribution for the power distribution business, by way of account payee cheques and not as book entries. Learned counsel further submitted that the Telangana

Commission has wrongly applied the Capital Adequacy Rules on a Deemed Distribution Licensee contrary to the statutory framework. Additionally, despite holding that SPL fulfils the requirements under Rule 3(2) of the Capital Adequacy Rules as well, it imposed additional extraneous conditions upon the Appellant, which is contrary to law. Evidently, by imposing such extraneous conditions, Telangana Commission has itself gone beyond the Capital Adequacy Rules itself and defeats the principle of competition enshrined under the Electricity Act. Learned counsel was quick to point out that the Telangana Commission has till date, despite a lapse of 3 years from the Impugned Order, not specified any Specific Conditions of Licence for the Appellant.

- 9.3** Learned counsel submitted that on 26.08.2016, the Appellant filed a Review Petition (R.P No.40 of 2016), seeking review of the Order dated 04.08.2016 passed by Telangana Commission in the Modification Application praying for the extension of time up to 30.09.2016 for compliance with equity infusion and continuation of power supply etc.. Furthermore, the contention of the Respondents that the instant Appeal is not maintainable due to pendency of the said Review Petition is wrong and denied. It is also denied that Appellant had accepted Telangana Commission's directions in the

Impugned Order qua infusion of addition Equity Capital. Learned counsel pointed out that despite this, Tribunal's explicit directions in its Order dated 13.03.2018 passed in IA No. 3 of 2017 filed by the Appellant, Telangana Commission has failed to list and/ or hear the aforesaid Review Petition amongst 4 other Petitions which are pending for adjudication before it since 2016. Learned counsel further submitted that without prejudice to the fact that being a Deemed Distribution Licensee, the Appellant is not required to comply with the requirements of the Capital Adequacy Rules as it has fulfilled all the criteria specified thereunder and have been duly appreciated and held by Telangana Commission itself under para 21 in the Impugned Order.

- 9.4** Regarding contentions of the Respondents that the Appellant had suffered huge losses in the initial; years, learned counsel for the Appellant contended that the business of the Appellant, being that of development and operation of an IT/ITES SEZ requires large infrastructure construction over a period of time and during such period, the entire capital expenditure is accounted as Capital Work in Progress and the revenue expenditure (viz. royalty, selling and marketing expenses, audit expenses, office maintenance, etc.) are charged to the Profit & Loss Account. Hence, the Appellant had

declared losses for the earlier years (i.e., FY 2013-14). However, the said trend has reversed, and SPL has been earning cash profit as evident from the SPL's Profit and Loss account submitted before the State Commission. As such, the contention of the Respondents that the Appellant's total equity share has been wiped out is totally misplaced.

**9.5** *Per contra*, learned counsel for the Respondents submitted that as a stand-alone entity the Appellant does not fulfil the conditions laid down in Rule 3 of the Capital Adequacy Rules, 2005, however by taking into account the Net Worth of the promoters it was held that the requirements laid down in Rule 3(2) were satisfied. Accordingly, the Commission placed certain conditions in respect of infusion of Fresh Equity Share Capital from the promoters of the Appellant under section 16 of the Electricity Act, 2003. Learned counsel further submitted that the Appellant being a developer of an SEZ having no prior experience in the business of Distribution of Electricity and therefore as Regulator, the State Commission is empowered to lay down General and Specific Conditions in Public Interest and the same do not warrant interference by this Tribunal.

**9.6** Learned Counsel for the second Respondent highlighted the

accumulated losses of the Appellant at the end of the financial year 2013-2014 and submitted that more than 50% of its net-worth has been wiped-out which is also reported in the Statutory Auditor's report. Learned counsel further contended that the Company's financial position is in jeopardy and the present Directors of the Company were convicted in a case registered by the Anti Corruption Bureau in Andhra Pradesh Industrial Infrastructure Corporation (APIIC) case. Further, another suit is filed against its Directors and the matter is pending in the Court of Magistrate, Mumbai. The Appellant Company has, therefore, not satisfied the Code of conduct clause of Capital Adequacy Rules and the Appellant has not whispered anything about the said conviction in the Appeal or rejoinder and no order has been produced in this regard .

- 9.6** Learned counsel submitted that the Appellant's business activities are being run mainly by the borrowed funds i.e., loans and the entire share capital as on 31.03.2013 has been wiped-out on account of the accumulated losses. Further, Rule 3 of the Capital Adequacy Rules stipulates that the Appellant has to contribute 30% of the total investment of the power distribution business by way of equity but its total equity share capital has been wiped-out

and thereby the Appellant has violated the Rule 3 notified under section 176 of the Electricity Act, 2003. Learned counsel emphasized that one of the main objective of Electricity Act, 2003 is to protect the consumers and the Appellant with criminal background of Directors/Promoters and eroded net worth wants the Distribution of Electricity to be source of income and business prospect which was never the intention of Electricity Act or SEZ Act. To substantiate his submissions, learned counsel for the second respondent placed reliance on the judgment of this Tribunal in Appeal No.206 of 2012 in the case of M/s. Vedanta Aluminium Ltd., Vs. Orissa Electricity Regulatory Commission which clearly establishes that the Appellant's application is not in accordance with the ratio laid down in this decision. The said judgment of this Tribunal has been affirmed by the Hon'ble Supreme Court of India in the case of M/s. Sesa Sterlite Ltd., Vs. Orissa Electricity Regulatory Commission reported as (2014) 8 SCC 444. In view of these facts, it is highly improper on the part of Appellant to say that Respondent Commission has erred in holding that fulfillment of Rule 3(2) of the Capital Adequacy Rules and Rule 12 of the AP Distribution License Regulations is mandatory to be recognized as a Deemed distribution licensee.

**9.7** Learned counsel further pointed out that by the express language of the said rule it can be derived that the applicant for grant of license has to contribute 30% equity on the cost of the investment after excluding the committed investments. Keeping this in view, the State Commission in its order in the O.P. NO. 10 of 2015 directed the Appellant to infuse Rs. 26.9 crores (i.e. 30% of investment of Rs. 89.53 crores) fresh equity by way of account payee cheques and not as book entries to which the appellant has not adhered to. In other words, the appellant has not complied with the requirements under Rule 3(2) of the Capital Adequacy Rules. As the distribution activity being a discrete activity which is apart from the SEZ business, the appellant has to prove its credit worthiness by way of induction of requisite equity for the distribution business. Learned counsel for the second Respondent further submitted that the Appellant is trying to mislead this Tribunal by bringing up unnecessary orders and notifications, keeping review petition pending and simultaneously suppressing the relevant material facts.

**9.8** Learned counsel while summing up his arguments reiterated that keeping in view the conduct of the Appellant, this Tribunal ought not to interfere in the present matter and the instant Appeal filed

by the Appellant deserves to be dismissed .

**OUR FINDINGS:-**

**9.9** We have critically analysed the submissions of both the parties and also gone through the findings of the State Commission in the impugned order. What thus transpires is that the Appellant, as a stand alone entity does not fulfil the conditions laid down in the Capital Adequacy Rules, however, Rule 3(2) allows the Net Worth of SPL's Promoters to be considered for computing the Debt : Equity ratio of 70:30 and by considering the same, the Appellant meets the requirements laid down in Rule 3(2) Capital Adequacy Rules. In fact, the Appellant is aggrieved by the directions of the State Commission to infuse an Equity to the tune of Rs.26.9 Crores (being 30% of the total anticipated investment of Rs.89.53 Crores) for the power distribution business. The Appellant contends that once it meets the requirement laid down in Rule 3(2) of the Capital Adequacy Rules by considering net worth of its promoters, then the imposition of extraneous conditions upon the Appellant, is contrary to law and also beyond the Capital Adequacy Rules itself. Contrary to the justifications made by the Appellant, learned counsel for the Respondents were quick to point out that as the Appellant on its own could not meet the



requirement of Capital Adequacy Rules, the State Commission considered it prudent to impose certain conditions in respect of infusion of fresh equity share capital from the promoters of the Appellant under section 16 of the Electricity Act. It is also the case of the Appellant that during initial years of operation, it suffered huge accumulated loss up to the end of the FY 2013-14 and it is noted that more than 50% of the Appellants net-worth had been wiped-out which is also reported in the Statutory Auditor's Report. In addition, Respondents also pointed out certain corruption case registered by the Anti Corruption Bureau in Andhra Pradesh Industrial Infrastructure Corporation (APIIC) case against some of its Directors and the matter is pending in the Court of Magistrate, Mumbai.

**9.10** Further, Rule 3 of the Capital Adequacy Rules stipulates that the Appellant has to contribute 30% of the total investment of the power distribution business by way of equity and the State Commission, being the electricity regulator and being mandated to protect the interest of consumers at large has specified certain conditions including the infusion of equity capital accordingly. Having regard to the contentions of the Appellant and the Respondents, it is relevant to note that having noted some

deficiency in the equity capital of the Appellant in the business of electricity as well as the pending corruption cases against some of the Directors, the State Commission considered it justified to impose certain conditions upon the Appellant with an objective of testing the credit worthiness of the licensee so as to safeguard consumers interest at large.

**9.11** In view of the facts stated supra, we are of the opinion that the State Commission has rightly considered to direct the Appellant to infuse the requisite equity capital so as to meet the requirement of Capital Adequacy Rules and we find no infirmity or illegality in the decisions of the State Commission. Hence, interference of this Tribunal is not called for on this issue.

### **SUMMARY OF FINDINGS:-**

**10.** In view of our deliberations and findings stated supra, we are of the considered opinion that the issues raised in the instant appeal lack merit and hence the Appeal is liable to be dismissed. The Telangana Commission has passed impugned order with careful consideration based on the relevant material placed before it and

after rendering cogent reasoning on the same. Hence, the impugned order deserves to be upheld.

**ORDER**

In the light of above, we are of the considered view that the issues raised in the instant appeal, being Appeal No.03 of 2017 are devoid of merits. Hence, the appeal is dismissed as devoid of merits.

The Impugned Order dated 15.02.2016 passed by the Telangana State Electricity Regulatory Commission in Petition No. O.P. No.10 of 2015 is hereby upheld.

In view of the disposal of the Appeal, the relief sought in the IA No. 03 of 2017 & IA No.253 of 2018 do not survive for consideration and IAs stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **27<sup>th</sup> day of September, 2019.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / NON-REPORTABLE**

Pr