

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.3 OF 2011

Dated: 23rd March, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member

In the Matter Of

Torrent Energy Limited
Torrent House
Station Road, Off Ashram Road
Ahmedabad-380 009

..... Appellant(s)

Versus

1. Dakshin Gujarat Vij Company Ltd
Nana Varachha Road,
Kaporda
Near Gajjar Petrol Pump
Surat-395 006
2. Akhil Gujarat Vidhyut Kamdar Sangh
B.K. Thanki Bhavan, 2nd Floor,
201, Shiromani Complex,
Rajkot-360 001
3. Dahej SEZ Ltd
Block No.5, 4th Floor
Udyog Bhavan, Sector-11
Gandhinagar-382 017
Gujarat
4. Government of Gujarat
Energy and Petrochemical Department
Block No.5, 5th Floor,
New Sachivalaya
Gandhinagar-382 017
Gujarat

5. Government of India
Ministry of Commerce and Industry
Department of Commerce, SEZ Section
Udyog Bhavan, Rafi Marg,
New Delhi-110 001

6. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower
Opp Nehru Bridge,
Ashram Road,
Ahmedabad-380 009
Gujarat

..... Respondent(s)

Counsel for the Appellant :Ms. Deepa Chawan
Mr. Gaurav Arora
Mr. H.S. Jaggi
Mr. Hardik Luthra
Mr. Chetan Bundela
Mr. Samir Shah
Mr. Alok Shukla

Counsel for the Respondent : Mr. M G Ramachandran
Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Ms. Sneha Venkataramani for R-1
Mr. Buddy A. Ranganadhan for R-2
Ms. Richa Bhardwaja

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. "Whether the Torrent Energy Limited, the Appellant is entitled to be granted exclusive license in the SEZ area of supply by carving out the SEZ area from the existing distribution licensee area of DGVCL and by delimiting its existing area of Supply?" This is the question posed for consideration in this Appeal.

2. M/s Torrent Energy Limited (TEL) is the Appellant herein. 1st Respondent Dakshin Gujarat Viz Company Limited (DGVCL) is the distribution licensee in terms of Section 14 of the Electricity Act 2003 having Southern Part of Gujarat as its area of supply. 2nd Respondent Dahej SEZ Limited is the Developer of Dahej Special Economic Zone. 3rd Respondent is workers union of 2nd Respondent. 4th and 5th Respondents are the Government of India and Government of Gujarat respectively. Gujarat Electricity Regulatory Commission (State Commission) is the 6th Respondent.
3. Torrent Energy Limited has filed the present Appeal aggrieved by the order dated 17.11.2009 passed by the Gujarat State Commission granting a second license for distribution of power in a specified area to the Appellant instead of granting exclusive license. The short facts are as follows:
 - (a) The Dahej Special Economic Zone (SEZ) Limited is a Company floated by GIDC and ONGC duly notified by the Ministry of Commerce and Industry, Government of India as a Developer of multi product SEZ at Dahej in Southern part of Gujarat.
 - (b) On 23.6.2005, the Special Economic Zone Act, 2005 came into force, on 10.2.2004 Gujarat Special Economic Zone Act, 2004 came into force.
 - (c) On 20.12.2006, the Dahej SEZ was notified by the Ministry of Commerce and Industry, Government of India as a Multi product SEZ.
 - (d) On 11.6.2007, the Government of Gujarat gave "in principle" approval to designate Torrent Power Limited as a Co-Developer of Dahej SEZ Limited for the purpose of establishing 1500 MW Generation and Distribution Facilities in the SEZ area.

- (e) On 14.7.2007, the Dahej SEZ Limited acknowledged the designation of Torrent Power Limited as a Co-Developer.
- (f) On 13.2.2008 Torrent Power Limited and others promoted Torrent Energy Limited as Special Purpose Vehicle for carrying out its obligations related to generation and distribution of power in SEZ.
- (g) On 30.5.2008, the Dahej SEZ Limited acknowledged and accepted the Appellant, Torrent Energy Limited as a Co-Developer.
- (h) On 2.8.2008, the Dahej SEZ Limited (the Developer) and the Torrent Energy Limited (the Co-Developer), the Appellant, entered into an agreement called the "Co-Developer Agreement". As per the Agreement, the Co-Developer shall have sole and exclusive rights with respect to development of gas based power generation upto 1500 MW and distribution of power in the SEZ area.
- (i) On 10.10.2008, the Government of India issued a letter approving the Appellant as a Co-Developer in the place of Torrent Power Limited.
- (j) On 6.8.2008, the Appellant filed an application before the State Commission for issuance of license under Section 14 of the Electricity Act, 2003.
- (k) In pursuance of the order of the State Commission, the Appellant published a public notice on 20.9.2008 in leading Newspapers under Section 15 of the Electricity Act, 2003.
- (l) The State Commission directed the Appellant to furnish some more particulars and to comply with certain queries. Accordingly, the Appellant has furnished all the particulars along with required certificates.

- (m) In the meantime, the DGVCL reported to the State Commission that once a distribution license is granted to the Appellant, an SEZ's Developer, the DGVCL will no longer be obliged to discharge its duties in the area of Dahej SEZ Limited
- (n) On 8.5.2009, the State Commission passed an order admitting the petition of the Appellant for grant of exclusive distribution license. Under Section 15(5) (a) of the Electricity Act the State Commission published a public notice in News Papers
- (o) On this basis, on 3.6.2009, the State Commission published public notices Under Section 15 (5) and Section 18 of the Electricity Act, 2003 inviting the stake holders to submit their suggestions and objections on issuance of an exclusive distribution license to the Appellant and also for amendment to existing license of DGCVL. After considering the objections, the license application was finally heard by the State Commission on 14.10.2009.
- (p) After considering the materials available on record, the State Commission by the impugned order dated 17.11.2009 though refused to grant exclusive license to the Appellant in the SEZ area of its supply, it granted a second license to the Appellant without disturbing the distribution work of the existing licensee namely the DGVCL.
- (q) Aggrieved by the refusal of the Exclusive License, the Appellant has filed the Review Petition against the said order. The Review Petition has been dismissed on 8.10.2010. Hence this Appeal.

4. The main question that arises in this Appeal is that **“Whether the Appellant is entitled in law to an exclusive license in the SEZ area of**

supply to the exclusion of the incumbent distribution licensee, DGVCL by delimiting and reducing its existing area of supply ?

5. The Appellant's main contention is that the State Commission has failed to construe the provisions of the Special Economic Zones Act, 2005 as well as the Electricity Act, 2003 harmoniously while passing the impugned order as these Acts do not prohibit the grant of the exclusive license. In short, the claim of the Appellant is that it is entitled to an exclusive license and the license of existing licensee would have to be amended to exclude the licenced area of supply of the Appellant (i.e. Dahej SEZ area) from the area of supply of the existing licensee. The Appellant has raised the following grounds:

(a) The impugned order is violative of the provisions of the Special Economic Zone Act, 2005 which has overriding effect over the provisions of the Electricity Act, 2003.

(b) The State Commission has not considered the approval relating to Section 3 (12) of the Special Economic Zone Act, 2005 granted by the Board of Approval constituted Under Section 8 of the SEZ Act, 2005 read with the Agreement dated 2.8.2008 entered between the Appellant as a Co-Developer and DGVCL as a Developer.

(c) In terms of Section 3 (12) of the Special Economic Zone Act, 2005 and the Agreement dated 2.8.2008, the approval has been granted in favour of the Appellant to have a sole and exclusive right to generate and distribute electricity in the SEZ area and therefore, the Appellant is entitled for an exclusive license.

(d) The State Commission had earlier passed an "in-principle" order dated 8.5.2009 recognising the grant of sole and exclusive license to the Appellant and also the proposal of the present distribution

Company to cease to operate in the SEZ area and the license of the Distribution Company was agreed to be amended in terms of Section 18 of the Electricity Act,2003. However, in the impugned order dated 17.11.2009,, the State Commission has refused to grant exclusive distribution license to the Appellant and has not amended the licence of the Existing licensee DGVCL to exclude the area of supply of the Appellant from the area of supply of DGVCL. which is in contravention of the order of the State Commission dated 8.5.2009.

6. On the strength of these points, the Learned Counsel for the Appellant has made the elaborate submissions.
7. On the other hand, the learned Counsel for the Respondent Company as well as the State Commission have argued at length in justification of the impugned order to the effect that the State Commission is not bound by the law to grant such exclusive license to the Appellant especially when there was no provision either in the SEZ Act or under the Electricity Act for grant of such exclusive license.
8. It is further contended by the Learned Counsel for the State Commission that the State Commission having considered the various facts such as the consumer's interests, the relevant provisions of the Act etc, correctly decided not to grant the exclusive license to the Appellant.
9. In the light of the rival contentions urged by both the parties, the relevant question as referred to above would arise for consideration. The question is this: **“Whether the Appellant is entitled in law to an exclusive license in the SEZ area of supply to the exclusion of the incumbent distribution licensee, DGVCL by delimiting and reducing its existing area of supply”?**

10. The Appellant has mainly relied upon the provisions of the clauses of the Agreement dated 2.8.2008 between the Appellant i.e. the Co-Developer of the Dahej SEZ and Torrent Company Limited to claim that the Appellant has some exclusive right to become entitled to get a sole and exclusive license for the distribution of electricity in the SEZ area. It must be noted that this Agreement dated 2.8.2008 is a contractual arrangement between a developer and a Co-developer.
11. Under Clause-6 of the Agreement, the Developer had agreed that it will not authorize any other person to distribute electricity in the SEZ area. Clause 6 reads as under:

“6. The Co-Developer shall have the sole and exclusive right with respect to development of gas based power generation up to 1500 MW and distribution in the SEZ and to collect all revenues including advances and deposits etc. as per the applicable rules and regulations from the potential consumers.”

12. The reading of the above clause would indicate that the Developer is to give a sole and exclusive right to the Appellant, to generate and distribute electricity in the SEZ area. This means that the Developer will not grant a similar right to any other person. The above clause does not refer to the sole and exclusive license to be granted in favour of the Appellant under Section 14 of the Electricity Act 2003 by the the State Commission. This is a contractual obligation assumed by the Developer in respect of the Co-Developer. The obligation to assume cannot have any effect on the rights of the existing Distribution Company or the powers of the State Commission. In other words, this Clause in the Agreement cannot be construed by any stretch of imagination to mean that sole and exclusive license has to be granted to the Co-Developer namely the Appellant overriding the right of the existing licensee i.e. Gujarat Company to continue to distribute the power in

the SEZ area or over-riding the functions of the State Commission under the Electricity Act, 2003.

13. As mentioned above, the SEZ Act does not provide for sole or exclusive license either to a Developer or the Co-Developer in the SEZ area to generate and distribute electricity. Similarly, the clauses in the Agreement also cannot override the provisions of the Act, 2003 which provides for issuance of a license to one or more persons to have license to distribute electricity in the same area.
14. The Approval of the Agreement dated 2.8.2008 between the Co-Developer and the Developer was given by the Board of Approval constituted under Section 8 of the Special Economic Zone Act, 2005. By grant of such approval, Clause 6 of the Agreement does not become a statutory instrument. In other words, clause 6 of the Agreement cannot be construed to be a statute in a same manner as that of Special Economic Zone Act itself. Thus, the Agreement between the Co-Developer and the Developer cannot override the provisions of the Electricity act, 2003 nor have any implication on the powers and functions of the State Commission as a statutory body under the Electricity Act, 2003.
15. As a matter of fact, the Clause 6 of the Agreement dated 2.8.2008 binds only the Developer and the Co-Developer. It does not bind other third parties. This Clause 6 merely provides that the Dahej SEZ Limited will not grant similar right to any other person. The Dahej SEZ Limited has no authority to give any assurance that a licensee under the Electricity Act, 2003 shall not undertake distribution and retail supply of electricity.
16. The Appellant's reliance on the approval of the Government of India to the Co-Developer Agreement is misconceived. The approval of the Government of India to the Co-developer Agreement cannot, in law, confer a right

greater than what the SEZ Act itself has conferred on the Developer of the SEZ and the Appellant. If the SEZ Act does not contemplate an exclusive right, an approval under such Act cannot confer any such exclusive right.

17. By claiming the exclusive right to have an exclusive license for the distribution of electricity in SEZ area, the Appellant virtually wants that no person should be allowed to supply electricity in the area of its Special Economic Zone other than the Appellant Co-Developer. This is against the spirit of the Electricity Act 2003.
18. The Appellant is contending that an instrument under the Special Economic Zone Act, which is only a contract approved by the Board of Approval, ought to have overriding effect over the provisions of the Electricity Act, 2003. It must be reiterated that the contract between the Co-Developer and the Developer approved by the Board of Approval cannot have the overriding effect over the provisions of the Electricity Act, 2003. In this regard, it would be worthwhile to refer to a decision of the Hon'ble Supreme Court in *India Thermal Power Ltd V State of Madhya Pradesh (2000) 3 SCC 379* wherein the following has been observed:

“9. As some of the IPPs, the State and MPEB were not satisfied with the said order they filed letters patent appeals before the Division Bench of that Court. The contentions raised before the Division Bench were that the PPAs are statutory contracts and the condition regarding escrow cover is a statutory condition and, therefore, it is not open to the State Government to go back upon it. It was also contended that the principles of promissory estoppel and legitimate expectation would apply to the facts of these cases and, therefore, it was not open to MPEB to invite fresh bids and determine giving of priority of escrow protection on the basis of the new least tariff criterion. Contentions regarding priority of adopting least tariff criterion and who can be said to be lowest according to that criterion were also raised.

10. The Division Bench held that the PPAs are statutory contracts as they have been entered into under Section 43 and 43-A. It however, upheld the contention raised by the State and MPEB that the decision

to invite fresh bids on the basis of least tariff was taken in larger public interest and the least tariff criterion is a good criterion. It also held that once the IPPs participated in the negotiations and gave their fresh bids they can be said to have abandoned their right to seek enforcement of the PPAs and to challenge the earlier decision of issuing letter so comfort to six IPPs it was not now entitled to any relief. Taking this view, the Division bench allowed the appeals and dismissed the writ petitions filed by the IPPs.

11. *It was contended by Mr. Cooper, Learned Senior Counsel appearing for Appellant GPL and also by some counsel appearing for other appellants that the Appellant/IPP's had entered into PPAs under Section 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion, the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A (1) provides that a generating company may enter into a contract for the sale of electricity on such terms as may be agreed. Section 43-A (1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43 (1) (2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notification issued there under. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. It entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which may not be a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirement of section 43-A(2). Opening and*

maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow account that obligation cannot be regarded as statutory”.

19. In the above case, the Hon'ble Supreme Court has gone into the issue of contract approved under a Statute and has held that the same would mean that it is a statutory contract, even if the Act deals with some of the terms and conditions of such contract. The contract will remain an agreement between the parties with some terms which are statutory and cannot be changed. The basic nature remains a contractual arrangement. This also clear from the fact that the Special Economic Zone Act does not mandate the appointment of a Co-Developer and merely the approval taken from the Board of Approval will not made a contract statutory in nature.
20. In any event, the contract entered into by the Appellant and enabling provisions in the SEZ Act recognizing the contract do not confer a statutory character on the contract itself.
21. As a matter of fact, the State Commission after considering the 6th proviso Under Section 14 of the Electricity Act, 2003 providing for the grant of more than one distribution licenses in the same area of its supply in view of the objects of the special enactment to promote the competition to protect interests of consumers and rationalization of electricity tariffs and after considering National Electricity Policy providing for the concept of the multiple licensees in the same area of supply, rejected the proposal of an exclusive area of supply to the Appellant to the exclusion of the incumbent distribution licensee.
22. The State Commission in the impugned order considered the various technical and operational aspects governing safety in the operation of two distribution licensees in the same area of supply since such aspect was

covered under the Indian Electricity Rules 1956 for energizing the electricity system. Not only that, the State Commission has taken into consideration of the Preamble of the Act, 2003, 6th proviso of Section 14 of the Act as well as the National Electricity Policy. The preamble of the Electricity Act, 2003 is as follows:

“An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto”.

23. 6th proviso of Section 14 provides for grant of license to two or more persons for distribution of electricity. The same is as follows:

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

24. The National Electricity Policy provides for concept of multiple licensees in the same area of supply through their independent distribution systems. The same is as follows:

“5.4.7 One of the key provisions of the Act on competition in distribution is the concept of multiple licensees in the same area of supply through their independent distribution systems”.

25. Having taken all these provisions into consideration with a view to provide benefits of competition to all the sections of consumers, the State Commission issued second license to the Appellant for distribution in the same area as it has got an obligation to supply to all consumers in accordance with provisions of Section 43 of the Electricity Act, 2003. That apart, State Commissions are required to regulate the retail tariff, connection charges to be recovered by a distribution licensee under the provisions of the Act. This will ensure the second distribution licensee does not resort to cherry picking by demanding unreasonable connection charges from the consumers.
26. As indicated above, one of the major cornerstones of the 2003 Act is to promote competition which permeates through various provisions which requires the State Commission to act accordingly. That apart, the State Commissions are required to be guided by the factors while notifying the tariff regulations which would encourage competition.
27. The prayer of the Appellant in this case would virtually amount to claiming that the competition of having two or more distribution licensees in the same area of supply should be demoted by not allowing anybody other than the Appellant to supply in the Special Economic Zone. If this claim is acceded to, then it will lead to uneven playing ground as there would be no option or choice available for the consumers to choose their suppliers.
28. The State Commission while dealing with the question as to whether the Appellant is entitled to the exclusive distribution license in the area of SEZ in the light of the proviso of Section 14 of the Act has given the following finding in the impugned order:

“19.3.2 According to the above proviso, the Commission can grant two or more licenses to two or more persons in the same area of distribution license who comply with all the requirements for grant of

license. Two licensees operating in the same area is likely to create competition amongst the licensees and the consumers will get option to opt for the electricity supply from any one of the licensees.

19.3.3 The existing licensee, viz DGVCL and the Govt of Gujarat (Energy & Petrochemicals Department) have pleaded to grant exclusive license to the Applicant. The Commission feels that this would infringe upon consumers' right to get supply from the supplier of their choice. Moreover, this may create a sense of uncertainty in the minds of existing consumers.

19.3.4 DGVCL have also raised the question of safety, in case of two licensees operating in the same area. On this issue, we observe that the Distribution licensees are fully aware that the Electricity Rules, 1956 notified by the Government of India that are required to be followed prior to energizing the electricity system. These rules have various provisions to avoid the electrical accidents. It is also essential to get approval of the Electrical Inspector prior to energisation of any power supply system. Hence, the submission of DGVCL regarding removal of existing license area of DGVCL on safety considerations is not valid and same is therefore rejected.

19.3.5 The Commission is of the view that if the existing consumers of DGVCL in the license area do not object to the proposed license of the applicant, it does not mean that they desire to become consumers of the proposed licensee. The existing consumers of DGVCL in the proposed license area are also having some contractual relationship with the existing licensee DGVCL. The DGVCL has at present universal supply of power obligation in the proposed license area. Hence, it is unjust and unfair to the consumers if DGVCL discontinues power supply to the above consumers. It is not in accordance with the law also. Hence, we decide that the DGVCL has to continue supply to the above consumers in the proposed license area in future also. So far as the existing network and manpower are concerned, it is the duty of the DGVCL to keep its infrastructure in proper condition to provide power to the consumers in the existing license area.

19.3.6. In view of the above, we are of the view that the applicant should be granted second license in the proposed area, with DGVCL being the existing licensee”.

29. So, from the above finding the following factors would emerge:

- (a) The State Commission has given a reasoned finding for not granting an exclusive licence;
- (b) The State Commission has clearly found that it would be opposed to the consumer interest to divest the existing licensee of its license obligations and grant an exclusive license to the Appellant;
- (c) The State Commission has clearly proceeded on the basis that no right is invested with the Appellant to claim exclusive license.

30. Let us now consider the question whether the SEZ Act, 2005 has got overriding effect on the Electricity Act, 2003. It requires the analysis over the interpretation of both the Acts.
31. According to the Appellant, the impugned order is violative of the provisions of the Special Economic Zone Act, 2005 which has got overriding effect over the provision of the Electricity Act, 2003.
32. This contention cannot be accepted due to the following reasons. It is not disputed that the Special Economic Zone Act, 2005 and the Electricity Act, 2003 are special Acts. The Electricity Act came into force in the year 2003 and Special Economic Zone Act came into force in the year 2005.
33. Section 51 of the Special Economic Zone Act, 2005 provides that the provisions of the SEZ Act, 2005 shall prevail over the other Acts, in case of inconsistency with the provisions of other laws for time being in force.
34. In the above context we have to analyse whether there is any inconsistency between the relevant provisions of these two Acts.
35. In the present case, the issue is for granting distribution of electricity license to the Appellant in the SEZ area notified by the Department of Commerce, Ministry of Commerce and Industry, Govt of India under the SEZ Act.

Admittedly, the application for license was filed by the Appellant under Section 14 and 15 of the Electricity Act, 2003 read with Gujarat Electricity Regulatory Commission (Distribution License) Regulations, 2005 notified by the State Commission. There was no provision in the Act, 2005 regarding grant of distribution of electricity license to the SEZ developers. As such, there was no inconsistency between the Sections of the SEZ Act, 2005 and the Electricity Act, 2003.

36. In view of the same, the issue with reference to the overriding effect of the SEZ Act, 2005 on Electricity Act, 2003 does not arise.
37. In the absence of any provision in the SEZ Act for exclusive right of distribution licensee, it cannot be said that there is any inconsistency between the provision of the SEZ Act, 2005 and Electricity Act, 2003.
38. The harmonious construction of both the SEZ Act, 2005 and Electricity Act, 2003 means to give effect to the provisions of both the Acts so long as they are not inconsistent with each other. In the present case, the State Commission has granted 2nd distribution license to the Appellant as per the provisions of Section 14 of the Electricity Act, 2003 and the GERC (Distribution License) Regulations, 2005 through its impugned order dated 17.11.2009.
39. This could be viewed from yet another angle. It is true that Section 51 of the Special Economic Zone Act provides for the over-riding application of the provisions of the said Act, but the same is confined to the plenary provisions contained in the Act itself. The said Section does not say that the provisions of the Rules or Regulations framed under the Special Economic Zone Act or any other contracts envisaged under the Special Economic Zone Act for approval by the Board of Approval shall also over-ride the other Acts.

40. The provisions of the Section 51 of the Special Economic Zone Act have to be construed along with the provisions of Section 49 of the said Act. Section 49 of the Special Economic Zone Act provides as under:

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

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

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

(b) shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exception, modification and adaptation, as may be specified in the notification:

“Provided that nothing contained in this Section shall apply to any modifications of any Central Act or any rule or regulation made there under or any notification or order issued or direction given or scheme made there under so far as such modification, rule, regulation, notification, order or direction or scheme relates to the matters relating to trade unions, industrial and labour disputes, welfare of labour including conditions of work, provident funds, employer’s liability, workmen’s compensation, invalidity and old age pensions and maternity benefits applicable in any Special Economic Zones.”

(2) A copy of every notification proposed to be issued under sub section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.”

41. Under the scheme of the Special Economic Zone Act, the Central Government has to first notify to what extent the provisions of the other Acts are to be made not applicable for the SEZ area. Admittedly, there was no notification by the Central Government to provide that the licenses to be granted to a Developer in the SEZ area shall be exclusive so as to exclude others from getting a license.
42. As mentioned above, the said Special Economic Zone Act, 2005 enacted by the Parliament does not provide for any sole or exclusive right either to the Developer or to the Co-Developer to undertake the business of generation and distribution of electricity in the SEZ area. Similarly, the Special Economic Zone Act does not provide that no person other than the Developer or Co-Developer shall be entitled to undertake generation and distribution of electricity in the SEZ area. In other words, there was prohibition in the Special Economic Zone Act for any other person from taking approval from the Developer or the Co-Developer to effect distribution of electricity to the users in the SEZ area.
43. Section 49 of the Special Economic Zone Act enables the Central Government to issue notification from time to time to provide for modification of other enactments in its application in the SEZ area. Section 49 of the Act clearly implies that unless the Central Government chooses to issue notification, the other enactments will continue to have a full force and effect in the SEZ area. It is for the Central Government to decide on the scope and extent of the modification of other enactments in its application to SEZ area. The Central Government can issue such a notification under Section 49 providing for the total non-application of the provisions of the other enactments or application of the provisions of such other enactments with such exception as may be specified in the notification.

44. As indicated above, there was no such notification issued by the Central Government.
45. Under the above circumstances, it has to be concluded that the question of any harmonious construction between the provisions of the Special Economic Zone Act and the Electricity Act, 2003, in regard to the licensing of distribution of electricity under the Special Economic Zone Act over-riding the provisions of the Electricity Act, 2003 does not arise. As such, the submissions of the Appellant in this regard are totally without any substance.
46. It is strenuously contended by the Appellant that the State Commission while passing the impugned order dated 17.11.2009, has completely ignored the earlier detailed order passed by the State Commission on 8.5.2009 issuing the notice inviting the public hearing for considering the issue of an exclusive license to the Appellant and amendment of a license of the existing licensee under Section 18 of the Act 2003 and as such, the impugned order is bad in law.
47. It is true the order that was passed by the State Commission on 8.5.2009 issuing public notice for inviting objection with regard to exclusive license to the Appellant as well as for the amendment to the licence of the existing licensee DGVCL. The order was based upon the then decision taken by the State Government to the effect that it would withdraw from SEZ area under the situation then prevalent. In that context, the order passed on 8.5.2009 by the State Commission, the Commission issued a notice by invoking Section 15(5) (a) and 18 of the Act, 2003. The relevant portion of the order is as follows:

“5.7 Now we deal with the issue of universal license to the Appellant. The Govt. of Gujarat has clarified that the distribution license which will be granted to an SEZ Developer should be with universal

obligation to distribute electricity in the entire SEZ area. Once the distribution license is granted to an SEZ Developer for an area, that particular area will be excluded from the license area of the existing Distribution Licensee. The objector DGVCL has also suggested that once the distribution license is granted to an SEZ Developer, DGVCL will no longer be obliged to discharge its duties as a licensee in the area of Dahej SEZ Limited”.

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“The Applicant has stated that they would like to get the distribution license from the Commission by continuing the present application which they have filed before the Commission. As such, the developer/Co-developer of an SEZ can apply for distribution license in accordance with Section 14 of the Electricity Act, 2003 from the appropriate Commission or it can send the application to the State Government for recommendation as laid down in the guidelines issued by the Ministry of Commerce on 27.2.2005. The applicant has stated that they would like to continue the present application and would like to get the distribution license from the Commission.”

.....

“On consideration of the material available on record, we propose to issue a distribution license to the applicant for its SEZ area (247.522 hectares) as notified by the Government of India for which the details are stated in the License Application. We therefore, direct that a Public Notice under clause (a) of subsection (5) of Section 15 of the Act may be published inviting comments from the public. The suggestions and objections, if any, to the proposal for grant of license may be filed by any person before the Commission. A final view on grant of license shall be taken thereafter, having considered the suggestions or objections. As the Commission proposes to issue an exclusive license to the Applicant by reducing the license area of DGVCL, a copy of this order shall also be sent to DGVCL and Government of Gujarat for filing objections/ suggestions, if any, in this regard”.

48. The above observations made by the State Commission in the order issuing public notice on 8.5.2009 would indicate the following things:

(a) In the impugned order the State Commission had only formed a prima facie view on the license application filed by the Appellant and the GUVNL's request to curtail their license area.

(b) The State Commission in the order made it clear that the State Commission would take a final view on the issues raised therein after hearing the comments or suggestions made by the parties in response to such a public notice.

(c) Hence the said order dated 8.5.2009 could not be said to be a conclusive determination of any kind on either (i) the grant of a licence or (ii) on grant of an exclusive license.

49. Thus, the order passed on 8.5.2009 was not the final order and the in principle approval was granted by the State Commission considering the details available at that time. However, after ascertaining the factual position and obtaining the comments/objections from the stake holders, the Commission decided to grant second license to the Petitioner to safeguard the interest of the consumers of the existing distribution licensee DGVCL and to promote competition which is in consonance with the intent of the Electricity Act, 2003. The relevant finding of the State Commission in the impugned order on this aspect is as follows:

“19.3.3 The existing licensee, viz DGVCL and the Govt. of Gujarat (Energy & Petrochemicals Department) have pleaded to grant exclusive license to the Applicant. The Commission feels that this would infringe upon consumers' right to get supply from the supplier of their choice. Moreover, this may create a sense of uncertainty in the minds of existing consumers.

19.3.4 DGVCL have also raised the question of safety, in case of two licensees operating in the same area. On this issue, we observe that the Distribution Licensees are fully aware that the Electricity Rules, 1956 notified by the Government of India that are required to be followed prior to energizing the electricity system. These rules

have various provisions to avoid the electrical accidents. It is also essential to get approval of the Electrical Inspector prior to energisation of any power supply system. Hence, the submission of DGVCL regarding removal of existing license area of DGVCL on safety considerations is not valid and same is therefore rejected.

19.3.5 The Commission is of the view that if the existing consumers of DGVCL in the license area do not object to the proposed license of the applicant, it does not mean that they desire to become consumers of the proposed licensee. The existing consumers of DGVCL in the proposed license area are also having some contractual relationship with the existing licensee DGVCL. The DGVCL has at present universal supply of power obligation in the proposed license area. Hence, it is unjust and unfair to the consumers if DGVCL discontinues power supply to the above consumers. It is not in accordance with the law also. Hence, we decide that the DGVCL has to continue supply to the above consumers in the proposed license area in future also. So far as the existing network and manpower are concerned, it is the duty of the DGVCL to keep its infrastructure in proper condition to provide power to the consumers in the existing license area.

19.3.6 In view of the above, we are of the view that the applicant should be granted second license in the proposed area, with DGVCL being the existing licensee”.

50. So, these observations would make it clear that this final order had been passed in the interest of the consumers holding that if the consumers of DGVCL has not received power supply continuously from the DGVCL, those consumers would suffer. Under those circumstances, the State Commission held that the Appellant should be granted second license in the proposed area with DGVCL being the existing licensee.
51. According to the Appellant, the State Commission has not considered the process under Section 18 of the Electricity Act and while the State Commission has invoked Section 18 of the Act by sending a notice proposing to an exclusive license the process under Section 18 has not been invoked. This contention is also misconceived. Let us now quote Section 18 which is as under:

“Section 18. (Amendment of license):

- (1) *Where in its opinion the public interest so permits, the Appropriate Commission, may, on the application of the licensee or otherwise, make such alterations and amendments in the terms and conditions of his licence as it thinks fit:*

Provided that no such alterations or amendments shall be made except with the consent of the licensee unless such consent has, in the opinion of the Appropriate Commission, been unreasonably withheld.

- (2) *Before any alterations or amendments in the licence are made under this Section, the following provisions shall have effect, namely:-*

(a) *Where the licensee has made an application under sub-section (1) proposing any alteration or modifications in his licence, the licensee shall publish a notice of such application with such particulars and in such manner as may be specified;*

(b) *In the case of an application proposing alterations or modifications in the area of supply comprising the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or any building or place in the occupation of the Government for defence purposes, the Appropriate Commission shall not make any alterations or modifications except with the consent of the Central Government;*

(c) *Where any alterations or modifications in a licence are proposed to be made otherwise than on the application of the licensee, the Appropriate Commission shall publish the proposed alterations or modifications with such particulars and in such manner as may be specified;*

(d) *The appropriate Commission shall not make any alterations or modification unless all suggestions or objections received within thirty days from the date of the first publication of the notice have been considered”.*

52. The perusal of the above provision would reveal that the process prescribed under Section 18 of the Act, 2003 is only an option to the State

Commission. There is no prohibition under the Electricity Act to the effect that if during any proceedings, the State Commission thinks it appropriate it can adjust the equities by granting multiple licenses or following any other appropriate course. The submissions of the Appellant that having issued a public notice with the proposal to issue exclusive license, the State Commission cannot at all deviate and delete the proposed area from the license of the Respondent is not tenable.

53. As a matter of fact, the Appellant after the impugned order which was passed on 17.11.2009 filed a review before the State Commission on the very same ground.
54. After hearing the parties, the State Commission has rejected the said review Petition by the order dated 8.10.2010. The relevant portion of the finding is as follows:

“9.3. Thus, the order dated 8.5.2009 was not the final order and in principle approval was granted by the Commission due to inadequate and incorrect data provided by the Petitioner and Respondent No.1. However, after ascertaining the factual position, the Commission decided to grant the second license to the Petitioner to safeguard interests of the consumers of the existing distribution license area of DGVCL and to promote competition which is in consonance with the intent of the Electricity Act, 2003. Moreover, the Additional Secretary, Ministry of Commerce & Industry sent a letter to Member Secretary, CERC vide letter dated 19th April, 2010, stating that the Government of India have amended the Electricity Act to treat Developers of SEZ as a ‘licensee’. Since there is already an existing power distribution licensee, they would be second licensee”.

55. So, this finding was based on the reason that the order passed on 8.5.2009 was an interim and not final order and further the Government sent a letter stating that Government have amended the Electricity Act to treat the Developers of SEZ area as a license and since there is already an existing power distribution licensee, they would be the second licensee.

56. At this stage, it is brought to our notice by the Learned Counsel for the Respondent that the Central Government, after the impugned order dated 17.11.2009, issued notification dated 3.3.2010 by which the Appellant has got the status of a deemed licensee and therefore there was no requirement for the Appellant to obtain a separate license from the State Commission in regard to its activities effective from 3.3.2010. It is clarified by the Learned Counsel for the Respondent by virtue of the Notification No.228 dated 3.3.2010 issued by the Central Government the entire proceedings initiated by the Appellant before the State Commission have already become infructuous. The said notification is quoted below:

“S.No.228 (E). In exercise of powers conferred by clause (b) of the sub-section (1) of Section 49 of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby notifies that the provisions of clause (b) of Section 14 of the Electricity Act, 2003 (36 of 2003) shall apply to all Special Economic Zones notified under Sub Section (1) of Section 4 of the Special Economic Zones act, 2005 subject to the following modifications, namely:

In clause (b) of Section 14 of the Electricity Act, 2003 (36 of 2003), the following proviso shall be inserted, namely:

Provided that the Developer of a Special Economic Zone notified under Sub Section (1) of Section 4 of the Special Economic Zones Act, 2005 shall be deemed to be a licensee for the purpose of this clause, with effect from the date of notification of such Special Economic Zone”.

57. So, in terms of the above notification, it is pointed out that the Appellant does not require any license from the State Commission to distribute electricity in the SEZ area and as such the prayer made by the Appellant for exclusive claim become infructuous.

58. Refuting this contention it is submitted by the Appellant that the deemed licensee status conferred on the Appellant through notification dated 3.3.2010 in fact supports the case of the Appellant that the approval granted

by the Board of Approvals has not been in any manner altered or modified by the Government of India. This contention is again misplaced. The stand taken by the Appellant is that the agreement dated 2.8.2008 was approved by the Board of approval of SEZ constituted under section 8 of the SEZ Act, 2005 and the Ministry of Commerce and Industry through their letter dated 10.10.2008 granted Co-Developer status to the Appellant. It must be stated that the said approval does not provide exclusive rights for the above activities to the Appellant. Moreover, the said approval granted under the SEZ Act, 2005 is not at par with the statutory provisions of the Electricity Act, 2003.

59. As a matter of fact, the Electricity Act, 2003 contemplates second license provision under the 6th proviso of Section 14 of the said act. In the present case, the Commission has granted Distribution license to the Appellant as per the provisions 14 read with Section 15 of the Electricity Act, 2003 and GERC (Distribution License) Regulations, 2005 through the impugned order dated 17.11.2009.
60. As mentioned earlier, there was no provision either in the SEZ Act, 2005 or in the notifications made there under to grant exclusive license to the SEZ developer or Co-developer for the SEZ area prior to 3.3.2010, the date of notification. In other words, the status of the Appellant being a deemed licensee does not grant any special right or entitlement to him in the law to claim exclusivity in the area of supply.
61. **Summary of Our Findings**
- (a) **The Co-developer Agreement executed between the Developer and the Co-Developer cannot override the provisions of the Electricity act, 2003 nor it can have any implication on the powers and functions of the State Commission as a statutory**

body under the Electricity Act, 2003. This Clause 6 merely provides that the Developer Dahej SEZ Limited will not grant the right of generation and distribution of electricity in SEZ area to any other person. The Dahej SEZ Limited has no authority to give any assurance that a licensee under the Electricity Act, 2003 shall not undertake distribution and retail supply of electricity. The Appellant's reliance on the approval of the Government of India to the Co-Developer Agreement is misconceived. The approval of the Government of India to the Co-developer Agreement cannot, in law, confer a right greater than what the SEZ Act itself has conferred on the Developer of the SEZ and the Appellant. If the SEZ Act does not contemplate an exclusive right, an approval under such Act cannot confer any such exclusive right.

- (b) As indicated above, one of the major cornerstones of the 2003 Act is to promote competition which permeates through various provisions which requires the State Commission to act accordingly. That apart, the State Commissions are required to be guided by the factors while notifying the tariff regulations which would encourage competition. The prayer of the Appellant in this case would virtually amount to claiming that the competition of having two or more distribution licensees in the same area of supply should be demoted by not allowing anybody other than the Appellant to supply in the Special Economic Zone.
- (c) In the present case, the issue is for granting distribution of electricity license to the Appellant in the SEZ area under the SEZ Act. There was no provision in the Act, 2005 regarding grant of distribution of electricity license to the SEZ developers.

Admittedly, the application for license was filed by the Appellant under Section 14 and 15 of the Electricity Act, 2003 read with Gujarat Electricity Regulatory Commission (Distribution License) Regulations, 2005 notified by the State Commission. As such, there is no inconsistency between the Sections of the SEZ Act, 2005 and the Electricity Act, 2003. Therefore, the question with reference to the overriding effect of the SEZ Act, 2005 on Electricity Act, 2003 does not arise.

62. In view of our findings, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 23rd Mar, 2012

√ Reportable/Not Reportable