

A M/S. JINDAL STEEL AND POWER LIMITED

v.

THE CHHATTISGARH STATE ELECTRICITY
REGULATORY COMMISSION AND ORS.

B (Civil Appeal Nos. 3607-3610 of 2008)

SEPTEMBER 29, 2022

[AJAY RASTOGI AND B. V. NAGARATHNA, JJ.]

C *Electricity Act, 2003: s.14 – Distribution licence/minimum area of supply u/s.14 of the 2003 Act granted to appellant-JSPL by the Chattisgarh State Electricity Regulatory Commission (Commission) – Cancellation of, by the Tribunal – Challenge against – Held: s.14 of the 2003 Act states that appropriate Commission may grant a license to any person (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or*

D *(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the license – The sixth proviso to s.14 states 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 applicant complying with additional requirements – Explanation to r.3 of 2005*

E *rules prescribes the area falling within a Municipal Council or a Municipal Corporation as defined under Art.243 (Q) of the Constitution of India or Revenue District – The area of supply authorised by the Appropriate Commission shall be the ‘minimum area of supply’ – Thus, the expression ‘within the same area’ cannot*

F *refer to the entire Municipal Council or a Municipal Corporation or a Revenue District but ‘the area falling within’ a Municipal Council or a Municipal Corporation or a Revenue District in respect of which a distribution licensee is authorised – Hence the authorized ‘area of supply’ shall be the ‘minimum area of supply’ – Therefore,*

G *the contention of respondent no. 2 that the ‘minimum area of supply’ must comprise of the ‘entire’ Municipal Council or a Municipal Corporation or a Revenue District is unsustainable – Thus, the area in respect of which the license was granted to appellant is the minimum area of supply and appellant is bound to supply electricity in the said area of supply – Judgment of tribunal set aside –*

H *Electricity Rules, 2005 – r.3, explanation.*

Allowing the appeals, the Court

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HELD: 1. The 2003 Act, came into force on 10.06.2003 insofar as Sections 1 to 120 and Sections 122 to 185 are concerned. The Preamble of the 2003 Act states that it has been enacted 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. [Para 27][407-B-D]

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2. On a reading of Section 14 of the 2003 Act, it is clear that the appropriate Commission may, on an application made to it under Section 15 grant a licence to any person (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence. The sixth proviso which is under consideration states that the appropriate Commission may grant a licence 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 licence within the same area, shall, without prejudice to the other conditions or requirement under the Act comply with the additional requirements relating to the capital adequacy, creditworthiness, 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 licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose. [Paras 32 and 33][412-A-E]

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3. Within the same area, there could be two or more persons for distribution of electricity. As to what is the area within which there could be grant of licence to two or more persons is

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A concerned under the sixth proviso to Section 14, the Explanation
to Rule 3 prescribes the area falling within a Municipal Council
or a Municipal Corporation as defined under Article 243 (Q) of
the Constitution of India or Revenue District. The area of supply
authorised by the Appropriate Commission shall be the minimum
area of supply. Thus, the ‘minimum area of supply’ would fall
B ‘within the area’ which is comprising of a Municipal Council or a
Municipal Corporation or a Revenue District but it does not imply
that the licence to supply electricity for an area or an ‘area of
supply which is the ‘minimum area of supply’ must extend to the
‘entire area falling within’ a Municipal Council or a Municipal
C Corporation or a Revenue District. Thus, the expression ‘within
the same area’ cannot refer to the entire Municipal Council or a
Municipal Corporation or a Revenue District but ‘the area falling
within’ a Municipal Council or a Municipal Corporation or a
Revenue District in respect of which a distribution licensee is
authorised by its licence to supply electricity. Therefore, by the
D aforesaid interpretation, the authorised ‘area of supply’ shall be
‘the minimum area of supply’. [Paras 37, 40, 42][414-A-B, G-H;
415-A, E-G]

4. On the other hand, on a reading of the licence granted to
the appellant, it is clear that respondent No.1 was conscious of
E the fact that it was granting licence to the appellant JSPL having
regard to the fact that the said appellant had established an
industrial park for which it had the responsibility for distribution
of electricity and in addition, two more villages were added to
the area comprised in the industrial park for the purpose of
F distribution of electricity. The area in respect of which the licence
was granted and thereby authorisation provided to supply
electricity is the minimum area of supply. The ‘area of supply’ is
‘an area falling within’ a Municipal Council or a Municipal
Corporation or a Revenue District and in the instant case, it is a
Revenue District. Since, the ‘area of supply’ authorised in the
G licence granted to the appellant JSPL in the instant case is the
‘minimum area of supply’, the said appellant is bound to supply
electricity in the said area of supply. The licensee cannot resile
from the condition of supplying electricity as per the authorisation
of the area of supply indicated in the license. This would also
H mean that the licensee cannot supply electricity in an area beyond

the area of supply authorised under the license. This is because in respect of an area falling within a Municipal Council or a Municipal Corporation or a Revenue District, there could be two or more persons who could be granted licence and authorisation to distribute electricity in terms of the respective area of supply specified. [Para 44][416-A-E]

S. Sundaram Pillai v. V.R. Pattabiraman (1985) 1 SCC 591 : [1985] 2 SCR 643; *Global Energy Ltd. v. Central Electricity Regulatory Commission* (2009) 15 SCC 570 : [2009] 9 SCR 22; *Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corporation* (2018) 8 SCC 281 : [2018] 10 SCR 773; *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & Ors.* (2006) 4 SCC 327 : [2006] 3 SCR 420; *Bharathidasan University & Anr. v. All India Council for Technical Education & Ors.* (2001) 8 SCC 676 : [2001] 3 Suppl. SCR 253; *P. Mahendran v. State of Karnataka* (1990) 1 SCC 411 : [1989] 2 Suppl. SCR 385; *A.A. Calton v. Director of Education* (1983) 3 SCC 33; *Gopal Krushna Rath v. M.A.A. Baig (dead) by LRs* (1999) 1 SCC 544; *Federation of Indian Mineral Industries & Ors. v. Union of India & Anr.* (2017) 16 SCC 186 : [2017] 12 SCR 724; *Hindustan Unilever Ltd. v. State of Madhya Pradesh* (2020) 10 SCC 751; *Gujarat Electricity Board v. Shantilal R. Desai* [1969] 1 SCR 580; *DAV College Trust and Management Society & Ors. v. Director of Public Instructions & Ors.* (2019) 9 SCC 185 : [2019] 12 SCR 549; *C.I.T Andhra Pradesh v. M/s. Taj Mahal Hotel, Secunderabad* (1971) 3 SCC 550 : [1972] 1 SCR 168; *Madhav Rao Jivaji Rao Scindia v. Union of India* (1971) 1 SCC 85 : [1971] 3 SCR 9; *Ramana Dayaram Shetty v. International Airport Authority of India* (1979) 3 SCC 489 : [1979] 3 SCR 1014; *Energy Watchdog v. Central Electricity Regulatory Commission and Others* (2017) 14 SCC 80 : [2017] 3 SCR 153; *Thampanoor Ravi v. Charupara Ravi* (1999) 8 SCC 74 : [1999] 2 Suppl. SCR 419; *Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India* (1992) 2 SCC 343; [1992] 1 SCR 406; *Chief Forest Conservator*

- A *(Wildlife) & Ors. v. Nisar Khan* (2003) 4 SCC 595 : [2003] 2 SCR 196; *Howrah Municipal Corporation and Ors. v. Ganges Rope Co. Ltd. and Ors.* (2004) 1 SCC 663 : [2003] 6 Suppl. SCR 1212; *Union of India and Ors. v. Indian Charge Chrome and Anr.* (1999) 7 SCC 314; *M/s. Hiralal Rattanlal Etc. Etc. v. State of U.P. and Anr. Etc. Etc.* (1973) 1 SCC 216 : [1973] 2 SCR 502; *Dattatraya Govind Mahajan v. State of Maharashtra* (1977) 2 SCC 548 : [1977] 2 SCR 790 – referred to.

	<u>Case Law Reference</u>		
C	[1985] 2 SCR 643	referred to	Para 22.2
	[2009] 9 SCR 22	referred to	Para 22.2
	[2018] 10 SCR 773	referred to	Para 22.4
D	[2006] 3 SCR 420	referred to	Para 22.4
	[2001] 3 Suppl. SCR 253	referred to	Para 22.4
	[1989] 2 Suppl. SCR 385	referred to	Para 22.6
	(1983) 3 SCC 33	referred to	Para 22.6
E	(1999) 1 SCC 544	referred to	Para 22.6
	[2017] 12 SCR 724	referred to	Para 22.6
	(2020) 10 SCC 751	referred to	Para 22.6
	[1969] 1 SCR 580	referred to	Para 22.6
F	[2019] 12 SCR 549	referred to	Para 22.8
	[1972] 1 SCR 168	referred to	Para 22.8
	[1971] 3 SCR 9	referred to	Para 22.8
	[1979] 3 SCR 1014	referred to	Para 22.9
G	[2017] 3 SCR 153	referred to	Para 22.9
	[1999] 2 Suppl. SCR 419	referred to	Para 25.3
	[1992] 1 SCR 406	referred to	Para 25.5
	[2003] 2 SCR 196	referred to	Para 25.5
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[2003] 6 Suppl. SCR 1212 referred to Para 25.10 A
(1999) 7 SCC 314 referred to Para 25.10
[1973] 2 SCR 502 referred to Para 25.10
[1977] 2 SCR 790 referred to Para 25.10

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3607- B
3610 of 2008.

From the Judgment and Order dated 07.05.2008 of the Appellate
Tribunal for Electricity, New Delhi in Appeal Nos. 179, 188 of 2005, 16
and 27 of 2006.

With C

Civil Appeal Nos. 4104-4107 of 2008.

Sanjay Sen, Sr. Adv., Sanjeev K. Kapoor, Ms. Divya C., Saransh
Shaw, Ms. Mandakini Ghosh, Ms. Neha Dabral, Pranav Sood,
M/s Khaitan & Co., Shibashish Misra, Ms. Divya, Ms. Swapna Seshadri, D
Anand K. Ganesan, Pramod Dayal, Nikunj Dayal, Ms. Kriti Soni, Rakesh
Kumar, Raj Kumar Mehta, Ms. Rashmi Singh, Pukhrambam Ramesh
Kumar, Damodar Solanki, Karun Sharma, W. Immanuel M., Advs. for
the appearing parties.

The Judgment of the Court was delivered by E

NAGARATHNA, J.

1. These Civil Appeals filed under Section 125 of the Electricity
Act, 2003 arise out of common impugned Judgment dated 07.05.2008
passed by the Appellate Tribunal for Electricity, New Delhi ('Appellate
Tribunal', for short). By the said judgment, the Appellate Tribunal has set F
aside the order of respondent No.1 dated 29.11.2005 and cancelled the
distribution licence granted to the appellant in C.A. Nos.3607-3610 of
2008. Hence, these appeals.

2. Since the questions of law and facts which arise in both the
above captioned Civil Appeals are similar, these appeals are being disposed G
of by this common judgment.

Re: Civil Appeal Nos. 3607-3610 of 2008:

3. The appellant-Jindal Steel and Power Ltd. ('JSPL', for short)
in this civil appeal established a sponge iron/steel plant at Raigarh, H

- A Chhattisgarh in the year 1990. A captive power plant was also set up by JSPL at a distance of 40 km from the aforesaid steel plant.

4. Respondent No.1 is Chhattisgarh State Electricity Regulatory Commission ('Commission', for short), respondent No.2 is Chhattisgarh State Electricity Board ('CSEB', for short) later became 'Chhattisgarh State Power Distribution Company' and respondent No.3 is Chhattisgarh Vidyut Mandal Abhiyanta Sangh ('CVMAS', for short).
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5. The newly created State of Chhattisgarh formulated its industrial policy for 2001-2006 which encouraged the establishment of industrial estates in private-public partnership as well as the installation of captive power plant.
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6. A proposal for permission to set up an industrial estate in 500 acres of land, adjacent to the existing land at Raigarh, was submitted by JSPL *vide* letter dated 28.12.2001. The land was to comprise of villages of Kosampali, Dhanagar, Barmuda or at a site in the Tehsil of Gharghoda comprising villages Tarai Mal and Ujjalpur. JSPL, addressed a letter dated 09.04.2002 to the Department of Mineral Resources, Commerce and Industries, Government of Chhattisgarh seeking permission for establishing such an industrial estate at Raigarh. A map showing the proposed industrial area was annexed with the letter. The Government of Chhattisgarh, *vide* letter dated 26.04.2002 informed JSPL that the Energy Department was taking action to grant permission for sale of power and to lay transmission lines to various units in the private industrial estate being established by JSPL and requested JSPL to prepare and submit a draft of Memorandum of Understanding ('MoU', for short) for the said purpose for approval. The facilities were to be provided as per the new industrial policy dated 01.11.2001.
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7. JSPL, on 16.07.2002, requested the Chief Minister of Chhattisgarh to issue appropriate directions for grant of permission to supply power to the units in the proposed industrial estate. The Government of Chhattisgarh, on 14.08.2002, sent a reply to the aforesaid request made by JSPL and informed that it shall have to take certain actions /steps with regard to the supply of power to the proposed industrial units. In compliance of the aforesaid letter on 04.09.2002, JSPL addressed a letter requesting for grant of permission under Section 28 of the Indian Electricity Act, 1910 ('1910 Act', for short) for sale of power to the proposed units in the industrial state from its captive power plant and for
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grant of permission to set up transmission and distribution lines/system for supply of power to the industrial units in the proposed industrial estate. JSPL further stated that they will obtain necessary permission under the Electricity Supply Act, 1948 ('1948 Act', for short) for setting up transmission and distribution lines from CSEB. A

8. A MoU was signed on 23.10.2002 between Chhattisgarh State Industrial Development Corporation ('CSIDC', for short) acting on behalf of Government of Chhattisgarh and JSPL for setting up the industrial estate. The Government of Chhattisgarh, on 29.01.2003 granted permission for supply of power by JSPL to the new industrial units being set up in the private industrial estate proposed in four villages of Raigarh District i.e., Punjipathra, Tumdih, Jorapalli and Dhanagarh from its captive power plant and laid down certain terms and conditions. CSEB, on 31.05.2003 granted permission for laying transmission and distribution lines of 220 KV for supply of power to the prospective units at the Industrial Estate in Raigarh, Chhattisgarh by tapping 220 KV from the captive power plant of JSPL. B C D

9. On 06.10.2003, JSPL made a formal application for sanction under Section 28 of the 1910 Act wherein it provided details of the project enclosing relevant documents. The Government of Chhattisgarh passed two orders on 28.02.2004. *Vide* its first order exercising power under Sections 68(1) and 68(3) of the Electricity Act, 2003 ('2003 Act', for short), the State Government accorded permission for construction of transmission and distribution lines as recommended by the CSEB on certain terms and conditions. *Vide* its second order, relating to the No-Objection of the State Government regarding direct power supply by JSPL from their power plant to the industrial units proposed to be set up in the private industrial estate in Raigarh, Chhattisgarh, the State Government of Chhattisgarh opined that since the 2003 Act was in force in the State from 09.12.2003 and the 1910 Act stood repealed, no permission could be granted under the latter Act. E F

10. JSPL commenced supply of electricity to the industrial units which were already setup with effect from 01.03.2004. G

11. Thereafter, on 15.09.2004, JSPL filed an application for grant of distribution licence before the Commission under Section 14 of the 2003 Act. The same was returned by the Commission on 15.09.2004 for filing in the prescribed format. On 25.01.2005, JSPL applied for the licence to the Commission in Form 1-A with all necessary enclosures as per H

- A Regulation 3 (1) of the Chhattisgarh State Electricity Regulatory Commission (License Regulations), 2004 ('State License Regulations', for short) along with Demand Draft of Rs.5 Lakhs. In the said application, JSPL stated that the area to which supply was to be made was the Jindal Industrial Park in the private sector in Punjipathra and Tumdih villages of Garghoda Tehsil, Raigarh District having an area of 750 acres and shall accommodate seventy units. Pursuant to the filing of the said application, notices were published in the newspapers and objections were invited under Section 15 of the 2003 Act. Three objections were received, one each from respondent Nos.2 and 3 and the third objection was from Mr. R.K. Aggarwal. The objection of Mr. R.K. Aggarwal was subsequently rejected by the Commission on 27.08.2005 being bereft of any *locus standi*.

12. Various correspondences and pleadings were exchanged between JSPL, CSEB, CVMAS and the Commission and thereafter the Commission framed a total of five issues and *vide* its Order dated 29.09.2005, decided to grant distribution licence under Section 14 of the 2003 Act. The pertinent findings of the Commission can be encapsulated as under:

- i. A harmonious reading of Sections 10(2), 42(2), 2(47) & 12 of the 2003 Act, clearly brings out that a generating company may supply electricity to a consumer under the provisions of Section 10(2) of the 2003 Act only subject to the provisions of open access. The scheme of the Act, particularly Part IV (Licensing) thereof, is such that it cannot authorize a generator to supply electricity to a consumer without a licence. That the present application is not for supply through open access and the same is for distribution of electricity to a significant number of industries in an industrial area set up under specific permission of the State Government.
- ii. Section 28 of the 1910 Act is quite clear that supply of electricity to the public mandates the previous sanction of the State Government. That, by no stretch of the argument, can the letter of the State Government dated 29.01.2003 be treated as sanction of the State government. Therefore, the said letter does not confer any right on JSPL under Section 28 of the 1910 Act to supply electricity.

- iii. No-objection letter dated 28.02.2004 also does not confer any such right on the applicant. If the said letter conveyed any right, either the application for licence would not have been made or a claim of existing right should have been made. The application of JSPL clearly stated that it had no licence. Further, the second letter of the said date, conveying No-objection of the State Government cannot be said to be valid since there is no provision for such no objection from the State Government. Therefore, as on that date, distribution of electricity by JSPL was without any legal authority.

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- iv. On the aspect of area for which the licence had been applied for, it was observed that the present case ought to be treated as an exception to Rule 3 of the Distribution License Rules and to Para 5.4.7 of the National Electricity Policy since effective steps for setting up of the industrial estate herein and an understanding with the State Government to the effect that JSPL would provide electricity from its captive power plant were taken much before the National Electrical Policy was notified. As per the application, supply of electricity commenced with effect from 01.03.2004 to some industries on the basis of the letter dated 28.02.2004 and therefore, the National Electrical Policy notified subsequently cannot be invoked to deny distribution licence in this case.

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- v. That if a distribution licence is refused at this stage, which is approximately one and half years after supply of electricity has commenced, whether with or without legal authority, the same shall impact the consumers of JSPL. CSEB also conveyed its no objection to lay transmission and distribution network as early as on 30.05.2003. That JSPL had gone way ahead with the industrial estate project in full, including distribution of power on the basis of the understanding with the State Government. A large investment of Rs.17.79 Crores was made, and there were twenty-four industries, most of which were power intensive. If a distribution licence was denied, they will have to close down their industries. Apart from that, the consumers will be forced to buy power from CSEB at a much higher rate than at present. Therefore,

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A the grant of distribution licence in this case may be in the interest of the competition and in the interest of consumers who have already entered into a long-term supply contract with JSPL.

B **vi.** Further, in view of the overall position of the case, the balance of convenience would lie in grant of a distribution licence to JSPL and there was an adequate justification for the same. Moreover, the CSEB could not clarify as to why it was in opposition to a distribution licence in a limited area when CSEB was itself not in a position to supply quality power to their existing industrial consumers.

C **vii.** In respect of JSPL's eligibility for grant of such distribution licence, it was observed that JSPL met all the requirements of capital adequacy, creditworthiness and code of conduct as laid down by the Central Government in the Distribution License Rules.

D **viii.** In respect of levy of cross-subsidy charges on the consumer of JSPL, the Commission held that there was no justification in such levy since the same was not a case of open access. The scheme of the 2003 Act is such that a distribution licensee cannot recover cross-subsidy surcharge from another distribution licensee and that JSPL had undertaken to supply electricity to all its consumers in the area for which licence was proposed to be granted.

E **ix.** Lastly, it was held that JSPL was liable to pay a penalty of Rs. One Lakh for contravention of Section 12 of the 2003 Act which mandates licence to be obtained for supply of electricity and violation of the same was punishable under Section 142 of the 2003 Act.

F **13.** The following conditions, apart from the general and special conditions applicable to such licenses under the Regulations, were imposed on JSPL by the Commission for grant of distribution license:

G **“(i)** The license will be for the area of the two villages, Tumdi and Punjipathra of Gharghoda Tehsil of Raigarh District. However, the number of industrial consumers in the Jindal Industrial Park shall be limited to 70 and their total demand

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for electricity not increasing 299 MW, as agreed with the State Government. A

- (ii) The applicant shall lay necessary distribution lines and put-up sub-station at his own cost in the two villages for supply of electricity to any person who may apply for it and supply electricity at a rate not more than Rs.2.50 per unit or at the supply rate of the Board for that category of consumer, which is lower. This will include domestic, agriculture, industrial and other consumers. The option to choose between the licensee and the Board shall be with the consumer. B
- (iii) All other general and special conditions applicable to a distribution licensee as per the provisions of the License Regulations.” C

14. Respondent Nos.2 and 3 on 07.10.2005, filed objections to the order dated 29.09.2005 before the Commission. Thereafter, respondent No.2 filed Appeal No.179/2005 and respondent No.3 filed Appeal No.188/2005 before the Appellate Tribunal. The appellant herein challenged the imposition of penalty of Rs. One Lakh before the Appellate Tribunal in Appeal No.27/2006. D

15. On hearing the respective parties, the Commission, *vide* its Order dated 29.11.2005, granted licence to JSPL on the following terms and conditions: E

- “(i) The distribution license shall be valid for a period of twenty-five years from the date of issue, as per the provision of Section 15(8) of the Act, unless revoked earlier. F
- (ii) The area of the license shall be the geographical area of the villages Tumdih and Punjipathra, including the Jindal Industrial Park aforementioned, of Gharghoda tahsil of Raigarh District of the State as indicated in the map enclosed herewith. G
- (iii) The distribution licensee shall abide by all the relevant provisions of the Electricity Act, 2003, the National Electricity Policy, i.e. Rules 1956 and Electricity Rules 2005, as amended from time to time. H

- A (iv) The licensee shall abide by the general conditions of license as given in chapter III and the other conditions applicable to a distribution licensee as given in chapter V of the CSERC (Licence) Regulations 2005, as amended from time to time. He shall also comply with the relevant provisions of all the regulations issued or as may be issued by the Commission, as amended from time to time.
- B (v) The licensee shall abide by all the relevant provisions of the Chhattisgarh State Electricity Supply Code, 2005.
- C (vi) The licensee shall lay necessary distribution lines and put-up sub-stations at his own cost in the two villages for supply of electricity to any person who may apply for it and supply electricity at a provisional rate of not more than Rs.2.50 per unit or at the supply rate of the Board for that category of consumer, whichever is lower, till the tariff for supply is determined by the Commission. This will include domestic, agriculture, industrial and other consumers.
- D (vii) The consumers of the area other than area of Jindal Industrial Park (JIP) shall have the option to choose between the licensee and the Chhattisgarh State Electricity Board (CSEB) or its successor entity/entities.
- E (viii) The existing tariff being charged from the industrial consumers in the designated area of JIP shall continue to be charged by the licensee till the tariff is determined by the Commission.
- F (ix) For determination of tariff in the area of supply, the distribution licensee shall file the necessary application under Section 64 of the Act and clause 10 of the CSERC (Details to be 'furnished by licensee or generating company for determination of tariff and manner of making application) Regulations, 2004 before the Commission on or before 31st March 2006, and thereafter in terms of the provisions of the same Regulations.
- G (x) The licensee shall abide by the safety rules and safety standards issued by the Central Electricity Authority, Ministry of Power, Govt. of India and other Government agency/department.
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- (xi) The licensee shall not transfer or assign, by sale, lease exchange or otherwise, this license or part thereof to any other person without prior approval of the Commission. A
- (xii) The licensee shall undertake electrification of villages Tumdih and Punjipathra as per the norms laid down for rural electrification within a period of six months, i.e., before 29.05.2006. It shall also provide public lamps in adequate number in these two villages on the request of the concerned Gram Panchayat and maintain the same. B
- (xiii) All issues relating to interpretation of this licence and its terms and conditions, shall be a matter for determination by the Commission and the decision of the Commission on such issues shall be final, subject only to the right of appeal. C
- (xiii) The conditions of the license may be altered or amended by the Commission at any time, if it deems fit in the public interest, in terms of Section 18 of the Act.” D

16. Respondent No.2 filed Appeal No.16/2006 before the Appellate Tribunal challenging the order dated 29.11.2005 passed by the Commission. The Appellate Tribunal, *vide* its Order dated 11.05.2006, upheld the order granting distribution licence dated 29.11.2005 passed by the Commission. Aggrieved by the order dated 11.05.2006 passed by the Appellate Tribunal, respondent Nos.2 and 3 filed appeals before this Court being Civil Appeal Nos. 3996 of 2006 and 4268 of 2006. JSPL also preferred an appeal before this Court being Civil Appeal No.4529 of 2006. This Court, *vide* its order dated 19.09.2007, allowed the aforesaid appeals, set-aside the order dated 11.05.2006 passed by the Appellate Tribunal and remanded the matter to the Appellate Tribunal for fresh determination. E F

17. On remand, the Appellate Tribunal reconsidered the matter and all the aforesaid appeals (Appeal No.179/2005, Appeal No.188/2005, Appeal No.27/2006 and Appeal No.16/2006) were allowed *vide* common impugned order dated 07.05.2008 which is challenged before this Court by way of the present appeals. The pertinent observations and decision of the Appellate Tribunal are encapsulated as under: G

- i. With respect to JSPL’s argument that the MoU had a specific clause that allowed JSPL to directly sell power to the

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- A industrial units set up in the proposed industrial estate, it was held that it was not the correct way to read the MoU. The MoU was entered into when the estate had not even come into existence and the terms therein only envisioned what would happen in the future. Therefore, it was too early to grant licence for supply or distribution of electricity by JSPL. It was further held that JSPL itself did not treat this clause in the MoU as grant of license. Had the MoU itself meant grant of license, there would have been no occasion for the subsequent correspondence between the JSPL and the Government of Chhattisgarh. Therefore, neither the State Government nor JSPL was acting under an understanding that JSPL had already been granted a license.
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- ii. That the letter dated 29.01.2003 which is a ‘No-Objection’ from the Government of Chhattisgarh had a clear stipulation that JSPL was required to take permission under Section 28 of the 1910 Act for direct power supply from its captive power plant to the industrial estate and the said letter cannot be read as Government’s promise to give license.
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- iii. On examining the two letters dated 28.02.2004, it was found by the Appellate Tribunal that the first order accorded permission for construction of power, transmission and distribution lines under Sections 68(1) and (3) of the 2003 Act and the second order dealt with prayer for approval under Section 28 of the 1910 Act. *Vide* the second order, it was made sufficiently clear that JSPL will have to get the permission/licence from the Commission since Section 28 of the 1910 Act stood repealed and no permission thereof could be given.
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- iv. That there cannot be an estoppel against the statute. The relevant authority at that time was the Commission and the licence was to be obtained under Section 14 of the 2003 Act from the Commission, after fulfilling the requisite terms and conditions. JSPL could not have taken advantage of the doctrine of promissory estoppel since, even if the aforesaid letters were construed to be a promise, the same would only be binding on the Government of the State of
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- Chhattisgarh and not the Commission which is not subordinate to the Government or its successor or assignee. A
- v. The Appellate Authority, on considering the issue as to whether JSPL was entitled to the license/minimum area of supply under Section 14 of the 2003 Act observed that on the date when the application for licence filed by JSPL under the 2003 Act was under consideration, the Commission was required to apply the regulation in force at that point of time which included the rule of minimum area of supply. It was observed that the Commission was incorrect in ignoring the said rule and granting the licence in violation thereof. No exception to the aforesaid rule could have been made out by the Commission. B C
- vi. While interpreting Section 10(2) of the 2003 Act that allowed a generating company to supply electricity to any licensee or to any consumer, it was held that the JSPL is a captive power plant and is governed by Section 9 of the 2003 Act and not by Section 10 of the said Act. D
- vii. That JSPL had applied for a distribution licence because it intended to purchase power from another generating company called Jindal Power. JSPL, being a captive power plant and not a generating company at the relevant time could not have made any supply to any third person without a license. E
- viii. On considering CSEB's argument that the supply from a captive power plant or even under Section 10(2) of the 2003 Act is permissible only when the same is made by use of the grid or the transmission lines of distribution licensee or transmission licensee by use of open access and that unless open access is availed, the supply cannot be made, it was held that open access is an enabling provision that helps expansion of the electricity sector and not to limit its development. If it was the intention of the 2003 Act that no sale was possible except by availing open access, it would have said so. It was further observed that Section 10(2) of the 2003 Act prescribes that the supply to a consumer will be subject to Regulations made under sub-section (2) of F G H

- A Section 42 of the 2003 Act. While interpreting the use of the words '*subject to the rules made under sub-section (2) of Section 42*', it was held that the provision under Section 42(2) of the 2003 Act would only be attracted when the access through the existing distribution was sought; when such access was not sought, the aforesaid provision shall not apply.
- B
- ix. With respect to the Commission's order imposing penalty of Rs. One Lakh on JSPL, the same was set-aside. This was because, although JSPL did not have a licence when it started supplying electricity to Jindal Industrial Park, a penalty was not automatically attracted. As per Section 142 of the 2003 Act, a person sought to be punished has to be given an opportunity to be heard. Admittedly, the said opportunity was not given to JSPL. It was found that the Commission was merely hearing the application for grant of distribution license. The issue as to whether JSPL had rendered itself liable to punishment at all was never an issue before the Commission.
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Re: Civil Appeal Nos. 4104-4107 of 2008:

- E 18. The facts and circumstances in both these appeals are similar and therefore have not been reproduced to avoid repetition except to the extent it is necessary to do so.

- F 19. The appellant in these civil appeals is the consumer of electricity in Jindal Industrial Park in Raigarh, Chhattisgarh who is aggrieved by the cancellation of distribution licence granted in favour of JSPL and due to unavailability of an alternative distribution licensee. It is the grievance of the appellant herein that it was not a party before the Appellate Tribunal.

- G 20. JSPL, on 08.05.2008, by way of its notice, informed the appellant in this appeal that since its distribution licence had been cancelled, it had to stop supplying power to all the industries in the Jindal Industrial Park whereafter on 09.05.2008, at 1:00 p.m., the electricity supply to all the units of the appellant was disconnected. The appellant contends that all the units were brought to a standstill and the appellant has been facing losses running to crores of rupees. The appellant avers that it is a third party and an end consumer of JSPL who is deprived
- H

of electricity in the absence of any alternative distributor in place. Hence A
these appeals.

21. We have heard Sri Sanjay Sen, learned senior counsel for the
appellant in C.A. Nos. 3607-3610 of 2008 and Sri C.S. Vaidyanathan,
learned senior counsel for the appellant in C.A. Nos. 4104-4107 of 2008
duly assisted by their instructing counsel; Ms. Swapna Seshadri, learned B
counsel for the respondent No.1, Sri Raj Kumar Mehta, learned counsel
for the respondent No.2 and perused the material on record.

22. The submissions of the learned senior counsel for the
appellant- JSPL in Civil Appeal Nos.3607-3610 of 2008 are epitomised
as under: C

- 22.1 That the Commission in its order dated 29.11.2005, after
taking note of the Distribution of Electricity (Additional
Requirement of Capital and Adequate Creditworthiness
and Code of Conduct) Rules, 2005 ('2005 Rules', for short)
had proceeded to grant licence keeping in view the D
historical background, investment made by the
appellant-JSPL and the benefits that accrued in favour
of industrial consumers who had set up their industrial
plants and had no other source of power supply at the
relevant time. By its Order dated 29.09.2005, the
Commission had specifically noticed the inability of CSEB E
to provide electricity for want of physical infrastructure
and unavailability of surplus power. In fact, the State of
Chhattisgarh was suffering from power shortages and
was buying power from the captive power plant of this
appellant-JSPL. On the basis of the permission granted F
by the State Government/CSEB, in terms of MoU dated
23.10.2002, the construction of transmission and
distribution network was undertaken and completed and
supply of power on the basis of the long-term agreement
had commenced on or about 01.03.2004 which was much G
prior to the coming in to existence of the Commission and
the 2005 Rules. Further, the State Government with the
concurrence of CSEB had acted substantially in terms of
powers vested under the repealed law i.e., Section 28 of
the 1910 Act and the State's Industrial and Energy Policies.
The original application for grant of licence filed on H

- A 15.09.2004 and revised application for grant of licence filed on 25.01.2005 were both before notification of the 2005 Rules. However, the Appellate Tribunal has taken a narrow and pedantic view solely on the basis of Explanation to Rule 3 of the 2005 Rules.
- B 22.2 It was contended that an ‘explanation’ to a provision is merely meant to explain or clarify certain ambiguities and cannot be treated as a substantive provision. In this regard, the learned senior counsel appearing on behalf of the appellant-JSPL has placed reliance on ***S. Sundaram Pillai v. V.R. Pattabiraman (1985) 1 SCC 591*** and ***Global Energy Ltd. v. Central Electricity Regulatory Commission (2009) 15 SCC 570***. He further states that the Explanation to Rule 3 is not a part of the statute’s provisions or primary legislation but is in the context of subordinate legislation. From a conjoint reading of Section 2(3), Section 14 and sixth proviso thereof, Section 86 and Section 176(2)(b) of the 2003 Act, it is clear that the Central Government has not been vested with the jurisdiction to define the area of supply. It is clear that the statute required the Central Government to specify conditions only on three subjects namely capital adequacy, credit worthiness and code of conduct. If the Central Government indeed had delegated the power to define the area of supply of a distribution licensee, it would have made a substantive rule and not inserted it through an Explanation. According to learned senior counsel, Explanation to Rule 3, at the highest, can act as a guideline for discharge of regulatory functions which should be generally followed.
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- F
- G 22.3 The position that the Explanation to Rule 3 is in the nature of a guideline is strengthened by the fact that Clause 5.4.7 of the National Electricity Policy has a similar provision relating to minimum area of supply that acts only as a guidance in discharge of statutory functions. Sections 61(i) and 86(4) of the 2003 Act clearly states that both the National Electricity Policy and the Tariff Policy will act as a guidance.
- H

- 22.4 The learned senior counsel for the appellant-JSPL reiterated that the Central Government's power to introduce a substantive rule defining the area of licence cannot be traced to any provision under the statute. On the contrary, the area of supply has to be prescribed in the licence issued by the State Government under Sections 2(3), 14, 15 and 86(1)(d) of the 2003 Act to each and every supplier. Therefore, Explanation to Rule 3 is without authority of law. In this behalf, the learned senior counsel for the appellant placed reliance on *Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corporation (2018) 8 SCC 281*, *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & Ors. (2006) 4 SCC 327* and *Bharathidasan University & Anr. v. All India Council for Technical Education & Ors. (2001) 8 SCC 676*. A
B
C
- 22.5 It was further contended that in the instant case, the distribution licence was granted on 29.09.2005 and the same was confirmed by the Appellate Authority *vide* order dated 11.05.2006 in Appeal No.27 of 2006. Therefore, there was no occasion to challenge the *vires* of 2005 Rules. Even if the Rules have not been specifically challenged, the same cannot be applied if found to violate any provision. D
E
- 22.6 It was submitted that if the Explanation to Rule 3 is applied to the present case as a substantive rule, it would result in impairment of vested/accrued rights of the appellant-JSPL and the consumers of Jindal Industrial Park. At the time of making a formal application on 15.09.2004, the 2005 Rules were not in existence. The appellant-JSPL had acted *bonafide*, in terms of concurrence/permission of the State Government under the repealed 1910 Act and also under the present 2003 Act, the same cannot be now made to suffer on account of delay in grant of licence and introduction of the 2005 Rules. The learned senior counsel for the appellant stated that the same cannot be done in terms of various judgments passed by this Court *viz. P. Mahendran v. State of Karnataka (1990) 1 SCC 411*, *A.A. Calton v. Director of Education (1983) 3 SCC* F
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- A 33 and **Gopal Krushna Rath v. M.A.A. Baig (dead) by LRs (1999) 1 SCC 544**. Placing reliance on **Federation of Indian Mineral Industries & Ors. v. Union of India & Anr. (2017) 16 SCC 186**, the learned senior counsel urged that a subordinate legislation cannot be made to have a retrospective effect unless the parent statute, expressly or by necessary implication authorizes it to do so.
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- 22.7 The next limb of argument was that the exercise of power by the State Government in allowing the appellant-JSPL in these appeals to proceed with supply of electricity manifests in the form of the terms of the MoU dated 23.10.2002 as well as letters dated 29.01.2003 and 28.02.2004. These permissions were no less than a sanction contemplated under Section 28 of the 1910 Act and thus saved in terms of Section 6 of the General Clauses Act, 1897 and Section 185 of the 2003 Act. In this regard, the learned senior counsel for the appellant-JSPL banked upon **Hindustan Unilever Ltd. v. State of Madhya Pradesh (2020) 10 SCC 751** and **Gujarat Electricity Board v. Shantilal R. Desai (1969) 1 SCR 580**.
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- E 22.8 It was further submitted that on the basis of amendment that came into effect on 27.01.2004, the legislature replaced the word ‘including’ with ‘relating to’ in sixth proviso to Section 14 of the 2003 Act. The word ‘including’ makes the provision expansive as has been held by this Court in the cases of **DAV College Trust and Management Society & Ors. v. Director of Public Instructions & Ors. 2019 (9) SCC 185** and **C.I.T Andhra Pradesh v. M/s. Taj Mahal Hotel, Secunderabad 1971 (3) SCC 550**. Further, the Parliament curtailed the power of the Central Government and by an amendment removed the word ‘including’ and instead used the term ‘relating to’. For something to be treated as ‘relating to’ a provision, it has to established that ‘the dominant purpose and theme of the provision is one and one only’ as was observed in the case of **Madhav**
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Rao Jivaji Rao Scindia v. Union of India (1971) 1 SCC 85 A
Therefore, a restrictive meaning must be given to the sixth proviso.

22.9 Placing reliance on ***Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489***, it was further urged that the appellant-JSPL has been supplying electricity to its consumers since 01.03.2004 and has taken regulatory/contractual/legal steps thereof and the decision to deny distribution licence is detrimental to the interest of the appellant-JSPL as well as the consumers. B C

23. The submissions of the learned senior counsel Sri Vaidyanathan for the appellant in Civil Appeal Nos.4104-4107 of 2008 are encapsulated as under:

23.1 The appellant herein is a consumer of electricity supplied by JSPL in Jindal Industrial Park. The judgment of the Appellate Tribunal in so far as the same sets aside the grant of distribution licence by the Commission without appointing any alternative distribution licence is *ultra vires* the 2003 Act read with the 2005 Rules. D

23.2 The Appellate Tribunal failed to appreciate the scheme of the 2003 Act that does not permit the Commission or the Tribunal to cancel a distribution licence without hearing the consumers. The entire purpose and object of the 2003 Act was to liberalise the generation, transmission, distribution and supply of electricity to prevent monopolies from demanding heavy electrical charges from consumers and open access was permitted so that any trader or distributor could, as of right, distribute and supply electricity to industries or consumers who demanded electricity through the particular trader or distributor. The sixth proviso to Section 14 of the 2003 Act makes the aforesaid position even clearer by providing for more than one licensee distributing and supplying power in the same area. E F G

23.3 The area of supply is defined under Section 2(3) of the 2003 Act and nowhere, the Act has defined the area of supply as restricted to mean an entire district or an entire H

- A area of the municipality under Article 243Q of the Constitution of India.
- 23.4 The Appellate Tribunal failed to note that CSEB was not operating in the Jindal Industrial Park and therefore cancelling the distribution licence on this ground was incorrect. CSEB itself expressed its inability to supply power in the Jindal Industrial Park during the hearing before the Appellate Tribunal.
- B
- 23.5 Further, Explanation to Rule 3 does not indicate that the second licensee must have a minimum area of supply as construed by the Appellate Tribunal. The term ‘same area’ appearing in the Explanation states what should be the area for which the two licensees may be said to be operating ‘within the same area’. The term same area has not been explained in the 2003 Act or in the 2005 Rules and the Explanation, gives the meaning that the overlapping must be at least of an area comprised within a Municipal Corporation or a revenue district, etc.
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- D
- 23.6 The Central Government in making rules under Section 14 of the 2003 Act has added an Explanation to Rule 3(2) of the 2005 Rules by which it has restricted the concept of same area in terms of the sixth proviso to Section 14 of the 2003 Act to ‘the area comprising a municipal council or a municipal corporation as defined in Article 243Q of the Constitution of India or a revenue district, which shall be the minimum area of supply. The said construction is fully inconsistent and violative of the express provision of sixth proviso to Section 14 of the said 2003 Act and goes counter to the entire spirit, purpose and object of the 2003 Act.
- E
- F
- 23.7 The grant of distribution licence is an administrative function of the Commission and the Appellate Tribunal had no jurisdiction to interfere as was rightly held in the earlier judgment of the Appellate Tribunal dated 11.05.2006. That under the 2003 Act, the Appellate Tribunal is neither empowered to grant licence nor to cancel the same.
- G
- 23.8 By virtue of Section 19 of the 2003 Act, only the Commission is empowered to revoke a license, that too, after complying
- H

with the procedural safeguards therein and no such power has been conferred upon the Appellate Tribunal. Further, no appeal can lie from an executive order passed by the Commission. A

23.9 There are more than thirty industries that have been set up in Jindal Industrial Park by investing more than Rs.600 crores. More than 4000 direct employees are provided employment. Therefore, cancelling the said distribution licence is opposed to public policy. B

23.10 Learned senior counsel, Sri C.S. Vaidyanathan appearing for the appellant in C.A. Nos. 4104-4107 of 2008 contended that the said appellant was one of the consumers of electricity being supplied by JSPL and on account of the cancellation of the licence, the appellant had been adversely affected and therefore the impugned judgment of Appellate Tribunal may be set aside and the Order of the respondent No.1 may be given effect to. C D

24. The submissions of the learned counsel for respondent No.1 in Civil Appeal Nos.3607-3610 of 2008 are summarised as under:

24.1 The term 'within the same area' appearing in the Explanation to Rule 3 of the 2005 Rules has to be read as being an area comprising of a Municipal Council or a Municipal Corporation as defined in Article 243(Q) of the Constitution of India or a revenue district. The said Explanation provides for a minimum area of supply for grant of a parallel/second distribution license. For a minimum area to be provided as a qualifying condition for grant of distribution license, an interpretation that the area should merely fall within a revenue district or the municipal council, would negate the very provision of a minimum area as a qualifying criterion. Thus, the concept of a minimum area would be inherently inconsistent or contradictory to the interpretation that the area needs to fall within and not equivalent to the area comprised of a municipal corporation or a revenue district. E F G

24.2 A distribution licensee has a universal supply obligation under Section 43 of the 2003 Act, i.e., to supply electricity to any person requiring the same within the area of its operation. H

- A It was submitted that Para 5.4.7 of the National Electricity Policy makes clear the intention of Government of India on the minimum area to be provided for grant of a second/parallel distribution license. The purpose of prescription of minimum area as comprising of a municipal corporation/
- B council or a revenue district is that there would be a mix of all categories of consumers within the said area. Thus, the second distribution licensee would also be under an obligation to supply electricity to all consumers within such area, and not only to high paying consumers. Hence, cherry picking of the consumers has to be avoided and therefore the
- C Government of India thought it fit to prescribe a minimum area for which a second distribution licence can be granted.
- 24.3 Thus, the minimum area condition specified in Explanation to Rule 3 needs to be fulfilled for grant of the second distribution license. The said distribution licence is neither
- D co-terminus with the existence of the revenue district nor would the distribution licence be amended, revoked or in any manner affected by delimitation or consolidation of revenue districts. Any subsequent change to the area on account of consolidation of revenue district etc. would not affect the area for which the distribution licence has been
- E granted which is the area of minimum supply.
- 24.4 That the cancellation of licence granted by the State Commission was not proper in the instant case as the State Commission, after considering the entire factual situation and while making an exception, has already directed that
- F JSPL would be required to supply electricity to two villages, namely, Tumdih and Punjipathra.
- 24.5 It was therefore contended that the Appellate Tribunal was not right in setting aside the order of the Commission.
- G 25. The submissions of the learned counsel for respondent No.2 in Civil Appeal Nos.3607-3610 of 2008 are encapsulated as follows:
- 25.1 That the National Electricity Policy framed by the Government of India, Ministry of Power, under Section 3 of the 2003 Act stipulates that the area of supply under a
- H distribution licence has necessarily to be a minimum area

- comprising a revenue district, a municipal council for a smaller urban area or a municipal corporation for a larger urban area. By virtue of Section 86(4) of the 2003 Act, the State Commission is statutorily bound to be guided by the said National Electricity Policy. Placing reliance on the judgment of this Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Others (2017) 14 SCC 80*, the learned counsel for respondent No.2 submitted that in the context of Tariff Policy, a tariff policy issued under Section 3 of the 2003 Act has the force of law. Similarly, the aforesaid provision in National Electricity Policy was statutorily embodied in the 2005 Rules. A B C
- 25.2 Further, a combined reading of the above provisions of the Electricity Act, 2003, the National Electricity Policy and 2005 Rules, the legal position that emerges is that the ‘minimum area of supply’ for grant of a distribution licence has to comprise the entire area of a municipal council or a municipal corporation or a revenue district. No distribution licence can be granted for a lesser area even though such lesser area forms a part of the municipal council or a municipal corporation or a revenue district. D
- 25.3 The interpretation that it can be ‘any area’ which falls within a municipal council or a municipal corporation or a revenue district would defeat the very object sought to be achieved by the legislature by providing for universal supply obligation of the distribution licence to supply electricity in its area of supply read with Explanation 3 of 2005 Rules. Such interpretation would render the Explanation nugatory and redundant and it is a settled principle of interpretation that redundancy cannot be attributed to the legislature. Reliance in this regard was placed on the judgment in the case of *Thampanoor Raviv. Charupara Ravi (1999) 8 SCC 74*. E F G
- 25.4 The condition of minimum area of supply as mandated by sixth proviso to Section 14 of the 2003 Act read with Explanation to Rule 3(2) of the 2005 Rules is integral to ‘fair competition’ and ‘level playing field’. The same is necessary to fulfill the statutory obligations of universal H

- A supply stipulated under Section 43 of the 2003 Act. Further, in the regime of multiple licenses introduced under the 2003 Act, insistence upon minimum area of supply prevents any form of cherry picking of high end-consumers only in a self-chosen area of supply as in the present case.
- B 25.5 While relying on the judgment of this Court in *Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343* and *Chief Forest Conservator (Wildlife) & Ors. v. Nisar Khan (2003) 4 SCC 595*, it was urged that the Explanation to Rule 3 of the 2005 Rules was enacted so as to effectuate the working of the 2003 Act and is therefore a part of the said Act. Thus, the requirement of minimum area of supply for grant of distribution licence is an integral part of the scheme of grant of distribution licence under the 2003 Act read with 2005 Rules.
- C
- D 25.6 Therefore, in light of the aforesaid submission, JSPL was not entitled to a licence under Section 14 of the 2003 Act as it does not satisfy the condition of ‘minimum area of supply’.
- E 25.7 The Commission, while granting license, *vide* order dated 29.09.2005 was well-aware that the appellant JSPL did not satisfy the requirement of the ‘minimum area of supply’ as specified in the Explanation to Rule 3 and was not in a position to fulfill its statutory duty/universal obligation under Section 43 of the 2003 Act. Therefore, the Commission imposed a special condition on the appellant by granting distribution licence to JSPL for two villages namely Tumdih and Punjipathra of Tehsil Gharghoda, District Raigarh and remaining area of these two villages. Even the said special condition imposed does not amount to compliance of the condition regarding ‘minimum area of supply’ for grant of a second licence as mandated in the Explanation to Rule 3(2).
- F
- G 25.8 The appellant was duty bound by the special condition in the order granting distribution licence to provide supply of power to consumers of the aforesaid two villages. However, the appellant- JSPL has been making huge profits by supplying electricity only to twenty-five industries in the
- H

- Jindal Industrial Park and has completely failed to fulfill its obligation to supply power to two villages namely Tumdih and Punjigraha of Tehsil Gharghoda, District Raigarh. A
- 25.9 Due to this gross and flagrant violation by the appellant-JSPL of the special condition imposed by the Commission, the Distribution Company i.e., the Chhattisgarh State Power Distribution Company Limited has been deprived of revenue to the extent of Crores of rupees per month. Thus, keeping in view the above, the licence granted needs to be quashed on this ground too. B
- 25.10 The appellant's contention that the 2005 Rules were not in existence at the time of filing of the application for distribution licence by the appellant-JSPL and that the grant of such licence cannot be faulted with on the ground of violation of Rule, is highly misconceived, since, it is a settled position of law that the Authority is required to apply the Rules and legal provisions in force on the date when the application is considered. Further, the argument of the appellant-JSPL that the Explanation is only in the nature of a guideline is also devoid of any merit. In this regard, the counsel for respondent No.2 placed reliance on the following judgment passed by this Court in *Howrah Municipal Corporation and Ors. v. Ganges Rope Co. Ltd. and Ors. (2004) 1 SCC 663, Union of India and Ors. v. Indian Charge Chrome and Anr. (1999) 7 SCC 314, M/s. Hiralal Rattanlal etc. etc. v. State of U.P. and Anr. etc. etc. (1973) 1 SCC 216 and Dattatraya Govind Mahajan v. State of Maharashtra (1977) 2 SCC 548.* C D E F
- 25.11 Explanation to Rule 3 of the 2005 Rules cannot be said to have no authority of law. The 2005 Rules have been enacted in exercise of power under Section 176(1) and Section 176(2)(b) of the 2003 Act. Further since the appellant-JSPL has not even challenged the *vires* of the 2005 Rules, the appellant-JSPL is estopped from raising the contention that Explanation to Rule 3 of the 2005 Rules has no authority of law. G
- 25.12 The contention that the appellant-JSPL acted *bonafide* in terms of the concurrence/permission of the State H

- A Government as the same are saved under Section 6 of the General Clauses Act, 1897 as also Section 185 of the 2003 Act is also misconceived and untenable. The counsel for respondent No.2 urged that the Appellate Tribunal in the impugned judgment rightly pointed out that all the permissions given by the State Government and other authorities were specifically made subject to and conditional upon the licence being granted by the Commission under the 2003 Act. It is, therefore, incorrect for the appellant to rely on the permissions/concurrences given by the State Government since the appellant does not satisfy the requirement of minimum area of supply as mandated under Explanation to Rule 3 of 2005 Rules.
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- C
- 25.13 The submission of the appellant-JSPL that the sixth proviso to Section 14 has been amended to narrow down the scope of Rule-making power is also misconceived. The substitution of the word ‘relating to’ in place of the word ‘including’ does not amount to restricting the scope of the rule-making power. The term ‘relating to’ is of wide amplitude and cannot be restrictive in any manner.
- D
- 25.14 Further, the submission of appellant that the grant of distribution licence was in public interest is devoid of any merit since the appellant has only been furthering its own interest.
- E
- 25.15 To sum up, the counsel for respondent No.2 strenuously contended that the ‘minimum area of supply’ as provided in the Explanation to Rule 3 of 2005 Rules is a mandatory requirement for grant of second or subsequent distribution licence in the area of supply of an existing distribution license. It was thus contended by respondent No.2 that the Tribunal was correct in setting aside the order granting licence to the appellant.
- F
- G
26. Having heard learned senior counsel and counsel for the respective parties, it is noted that the appellants in both the appeals are challenging the order dated 07.05.2008 whereby the Appellate Tribunal allowed the appeals filed by the respondents herein and set-aside the order passed by the Commission dated 29.05.2005, thereby, canceling
- H

the distribution licence granted in favour of the appellant for supply of power by the appellant from its captive power plant to the industrial units in Jindal Industrial Park. A

27. Before delving further upon the various issues in the present matter, we shall analyse relevant provisions of the 2003 Act. The 2003 Act, came into force on 10.06.2003 insofar as Sections 1 to 120 and Sections 122 to 185 are concerned. The Preamble of the 2003 Act states that it has been enacted 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. B C

28. Section 2 of the 2003 Act is the definition clause and the relevant definitions for the purposes of the present cases read as under: D

“Section 2. (Definitions): --- In this Act, unless the context otherwise requires, --

X X X X X X X X E

(3) “area of supply” means the area within which a distribution licensee is authorised by his licence to supply electricity;

(4) “Appropriate Commission” means the Central Regulatory Commission referred to in sub-Section (1) of Section 76 or the State Regulatory Commission referred to in Section 82 or the Joint Commission referred to in Section 83, as the case may be; F

XXXXXX

(38) “licence” means a licence granted under Section 14;

(39) “licensee” means a person who has been granted a licence under Section 14; G

XXXXXXXXX

(41) “local authority” means any Nagar Panchayat, Municipal Council, Municipal Corporation, Panchayat constituted at the H

A village, intermediate and district levels, Body of Port Commissioners or other authority legally entitled to, or entrusted by the Union or any State Government with, the control or management of any area or local fund;

XXXXXXXX

B (64) “State Commission” means the State Electricity Regulatory Commission constituted under sub-Section (1) of Section 82 and includes a Joint Commission constituted under sub-Section (1) of Section 83;”

C 29. Part II of the 2003 Act deals with National Electricity Policy and Plan. In compliance with section 3 of the 2003 Act, the Central Government has notified the National Electricity Policy dated 12th February, 2005, the relevant portions of which are extracted as under:

“1.0 INTRODUCTION

D X.X.X.

E 1.5 Electricity industry is capital-intensive having long gestation period. Resources of power generation are unevenly dispersed across the country. Electricity is a commodity that can not be stored in the grid where demand and supply have to be continuously balanced. The widely distributed and rapidly increasing demand requirements of the country need to be met in an optimum manner.

F 1.6 Electricity Act, 2003 provides an enabling framework for accelerated and more efficient development of the power sector. The Act seeks to encourage competition with appropriate regulatory intervention. Competition is expected to yield efficiency gains and in turn result in availability of quality supply of electricity to consumers at competitive rates.

G 1.7 Section 3 (1) of the Electricity Act 2003 requires the Central Government to formulate, *inter alia*, the National Electricity Policy in consultation with Central Electricity Authority (CEA) and State Governments. The provision is quoted below:

H “The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal

utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy”. A

Section 3 (3) of the Act enables the Central Government to review or revise the National Electricity Policy from time to time.

1.8 The National Electricity Policy aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues. B C

X.X.X.

5.4 DISTRIBUTION

X.X.X.

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. State Governments have full flexibility in carving out distribution zones while restructuring the Government utilities. For grant of second and subsequent distribution licence within the area of an incumbent distribution licensee, a revenue district, a Municipal Council for a smaller urban area or a Municipal Corporation for a larger urban area as defined in the Article 243(Q) of Constitution of India (74th Amendment) may be considered as the minimum area. The Government of India would notify within three months, the requirements for compliance by applicant for second and subsequent distribution licence as envisaged in Section 14 of the Act. With a view to provide benefits of competition to all section of consumers, the second and subsequent licensee for distribution in the same area shall have obligation to supply to all consumers in accordance with provisions of section 43 of the Electricity Act, 2003. The SERCs are required to regulate the tariff including connection charges to be recovered by a distribution licensee under the provisions of the Act. This will ensure that second distribution licensee does not resort to cherry picking by demanding unreasonable connection charges from consumers.” D E F G

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A 30. Part III deals with generation of electricity. Part IV of the
2003 Act is of relevance to these cases as it concerns licensing. Section
12 states that no person shall (a) transmit electricity; or (b) distribute
electricity; or (c) undertake trading in electricity, unless he is authorised
to do so by a licence issued under Section 14, or is exempt under Section
B 13. The power to exempt is prescribed in Section 13. The grant of licence
is as per Section 14 and the procedure for grant of licence is dealt with
in Section 15 while the conditions of licence are in terms of Section 16.
Section 18 of the said Act speaks of Amendment of licence while Section
19 concerns revocation of licence.

C 31. Section 14 of the 2003 Act which deals with grant of licence
reads as under:

14. Grant of licence- The Appropriate Commission may, on an
application made to it under Section 15, grant a licence to any
person –

D (a) to transmit electricity as a transmission licensee; or
(b) to distribute electricity as a distribution licensee; or
(c) to undertake trading in electricity as an electricity trader,
in any area as may be specified in the licence:

E Provided that any person engaged in the business of transmission
or supply of electricity under the provisions of the repealed laws
or any Act specified in the Schedule on or before the appointed
date shall be deemed to be a licensee under this Act for such
period as may be stipulated in the licence, clearance or approval
granted to him under the repealed laws or such Act specified in
F the Schedule, and the provisions of the repealed laws or such Act
specified in the Schedule in respect of such licence shall apply for
a period of one year from the date of commencement of this Act
or such earlier period as may be specified, at the request of the
licensee, by the Appropriate Commission and thereafter the
provisions of this Act shall apply to such business:

G Provided further that the Central Transmission Utility or
the State Transmission Utility shall be deemed to be a transmission
licensee under this Act:

H Provided also that in case an Appropriate Government transmits
electricity or distributes electricity or undertakes trading in

electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act: A

Provided also that the Damodar Valley Corporation, established under sub-Section (1) of Section 3 of the Damodar Valley Corporation Act, 1948, (14 of 1948), shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation: B

Provided also that the Government company or the company referred to in sub-Section (2) of Section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act: C

Provided also that the Appropriate Commission may grant a licence 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 licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements relating to 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 licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose: D E

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply: F

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under Section 53: G

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

32. On a reading of Section 14 of the 2003 Act, it is clear that the appropriate Commission may, on an application made to it under Section 15 grant a licence to any person (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence.

33. The first three provisos to Section 14 of the 2003 Act are in the nature of saving clauses. The fourth and fifth provisions are not relevant to these cases. The sixth proviso which is under consideration states that the appropriate Commission may grant a licence 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 licence within the same area, shall, without prejudice to the other conditions or requirement under the Act comply with the additional requirements relating to the capital adequacy, creditworthiness, 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 licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose.

- E 34. The Central Government had enunciated the 2005 Rules w.e.f. 23.03.2005 as per Section 176 of the 2003 Act. Rule 3 is relevant for the purpose of these cases is extracted as under:

3. Requirements of capital adequacy and creditworthiness.

F — (1) The Appropriate Commission shall, upon receipt of an application for grant of licence for distribution of electricity under sub-Section (1) of Section 15 of the Electricity Act, 2003, decide the requirement of capital investment for distribution network after hearing the applicant and keeping in view the size of the area of supply and the service obligation within that area in terms of Section 43.

G (2) The applicant for grant of licence shall be required to satisfy the Appropriate Commission that on a norm of 30% equity on cost of investment as determined under sub-rule (1), he including the promoters, in case the applicant is a company, would be in a position to make available resources for such equity of the project on the

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basis of the network and generation of internal resources of his business including of promoters in the preceding three years after excluding his other committed investments. A

Explanation—For the grant of a licence for distribution of electricity within the same area in terms of sixth proviso to Section 14 of the Act, the area falling within a Municipal Council or a Municipal Corporation as defined in the article 243(Q) of the Constitution of India or a revenue district shall be the minimum area of supply. B

35. The controversy in these cases surrounds the interpretation to be given to the Explanation to Rule 3. As already noted, the 2005 Rules, under consideration have been prescribed having regard to the sixth proviso to Section 14 of the Act. The said proviso would apply only when the appropriate Commission considers it necessary to grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, in which case, there are certain additional requirements which the applicant must fulfil relating to capital adequacy, creditworthiness or code of conduct. It is only with regard to the aforesaid three aspects that the 2005 Rules have been prescribed. C D

36. In response to the arguments of learned senior counsel for the appellants, the contention of respondent No.2 herein is that the appellant-JSPL does not fulfil the condition mentioned in the Explanation to Rule 3 inasmuch as the said appellant does not fulfil the condition of minimum area of supply as the area that the said appellant is supplying, is not for an entire Municipal Council or a Municipal Corporation or a Revenue District. The area of supply as per the licence of the appellant-JSPL is for the area comprised in the industrial park set up by the appellant and for two other villages only. Hence, the licence issued to the said appellant is vitiated as the area of supply prescribed in the licence does not conform to the Explanation to Rule 3 of the 2005 Rules. E F

37. In order to answer the aforesaid contention, it would be necessary to consider the sixth proviso to Rule 14 in light of the definition of ‘area of supply’ and the Explanation to Rule 3 of the 2005 Rules. On a conjoint reading of the same, it is noted that the sixth proviso to Section 14 applies to a situation where the appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area subject to the applicant-JSPL complying with the additional requirements. Therefore, G H

- A it is clear that within the same area, there could be two or more persons for distribution of electricity. As to what is the area within which there could be grant of licence to two or more persons is concerned under the sixth proviso to Section 14, the Explanation to Rule 3 prescribes the area falling within a Municipal Council or a Municipal Corporation as defined under Article 243 (Q) of the Constitution of India or Revenue District. The area of supply authorised by the Appropriate Commission shall be the minimum area of supply.
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38. The ‘area of supply’ is defined under sub-section 3 of Section 2 to mean that area within which the distribution licensee is authorised by his licence to supply electricity. This ‘area of supply’ must fall ‘within’ a Municipal Council or a Municipal Corporation as defined under Article 243 (Q) of the Constitution of India or a Revenue District. That means that the ‘area of supply’ must fall ‘within’ the local authority of a Municipal Council or a Municipal Corporation as defined in sub-section 41 of Section 2 of the Act or a Revenue District, as the case may be, and within which area of supply, licence is granted for distribution of electricity. Therefore, the expression area in the sixth proviso of Section 14 is explained as the ‘area falling within’ a Municipal Council or a Municipal Corporation as defined under Article 243 (Q) of the Constitution of India or a Revenue District which shall be the ‘area of supply’. As already noted, within such area, there could be two or more persons who are granted a licence to distribute electricity which is in terms of the provision granting license. The ‘area within which they are authorised to supply electricity’ is the ‘area of supply’ and such ‘area of supply’ in respect of which authorisation is granted under the licence is the “minimum area of supply”.
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- F 39. Therefore, when two or more persons are granted licence within an area forming a Municipal Council or a Municipal Corporation or a Revenue District, the authorisation to supply electricity granted to a distribution licensee within the aforesaid area is the actual area of supply and the actual area of supply in respect of which the authorisation is granted under the licence is called the minimum area of supply.
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40. Thus, on a conjoint reading of the aforesaid provisions, it is clear that the ‘minimum area of supply’ would fall ‘within the area’ which is comprising of a Municipal Council or a Municipal Corporation or a Revenue District but it does not imply that the licence to supply
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electricity for an area or an 'area of supply which is the 'minimum area of supply' must extend to the 'entire area falling within' a Municipal Council or a Municipal Corporation or a Revenue District. A

41. But if the interpretation as suggested by the respondent No.2 is to be accepted, then the expression 'area falling within' in the Explanation would become otiose or redundant. The object of providing a Municipal Council or a Municipal Corporation or a Revenue District as an area is to provide a standard area, within which area, two or more persons could distribute electricity. It does not mean that the licensee must distribute electricity in the entire standard area. The words used are 'the area falling within' a Municipal Council or a Municipal Corporation or a Revenue District. The same does not mean that the area comprising of or an area equivalent to a Municipal Council or a Municipal Corporation or a Revenue District. It is only in an 'area falling within' a Municipal Council or a Municipal Corporation or a Revenue District that two or more persons could be granted licence for distribution of electricity which interpretation is supported by the use of the expressions 'within the same area' used twice in the sixth proviso to Section 14 of the 2003 Act. Also, the use of the expression 'within the same area' in the sixth proviso as well as in the Explanation to Rule 3 have to carry the same meaning. B C D

42. Moreover, the expression 'within the same area' in the sixth proviso to Section 14 of the 2003 Act and the Explanation is analogous to the expression 'the area falling within' a Municipal Council or a Municipal Corporation or a Revenue District in the Explanation. Thus, the expression 'within the same area' cannot refer to the entire Municipal Council or a Municipal Corporation or a Revenue District but 'the area falling within' a Municipal Council or a Municipal Corporation or a Revenue District in respect of which a distribution licensee is authorised by its licence to supply electricity. Therefore, by the aforesaid interpretation it is held that the authorised 'area of supply' shall be 'the minimum area of supply'. E F

43. Hence, the contention of respondent No.2 that the 'minimum area of supply' must comprise of the 'entire' Municipal Council or a Municipal Corporation or a Revenue District is not correct. The argument in the instant case is that the appellant-JSPL, not complying with the prescription in Explanation to Rule 3 of the 2005 Rules as per the terms of the licence cannot be permitted to supply electricity and therefore, the G

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- A licence was rightly cancelled by the Appellate Tribunal also cannot be accepted.

44. On the other hand, on a reading of the licence granted to the appellant, it is clear that the respondent No.1 was conscious of the fact that it was granting licence to the appellant-JSPL having regard to the fact that the said appellant had established an industrial park for which it had the responsibility for distribution of electricity and in addition, two more villages were added to the area comprised in the industrial park for the purpose of distribution of electricity. The area in respect of which the licence was granted and thereby authorisation provided to supply electricity is the minimum area of supply. The 'area of supply' is 'an area falling **within**' a Municipal Council or a Municipal Corporation or a Revenue District and in the instant case, it is a Revenue District. Since, the 'area of supply' authorised in the licence granted to the appellant-JSPL in the instant case is the 'minimum area of supply', the said appellant is bound to supply electricity in the said area of supply.
- D The licensee cannot resile from the condition of supplying electricity as per the authorisation of the area of supply indicated in the license. This would also mean that the licensee cannot supply electricity in an area beyond the area of supply authorised under the license. This is because in respect of an area **falling within** a Municipal Council or a Municipal Corporation or a Revenue District, there could be two or more persons who could be granted licence and authorisation to distribute electricity in terms of the respective area of supply specified.

45. In view of the aforesaid interpretation, we find no substance in the contentions advanced on behalf of the respondent No.2. On the other hand, on a reading of the order passed by the respondent No.1-Commission in C.A. Nos. 3607-3610 of 2008, we find that there has been an application of mind to the licence that was granted to the appellant for distribution of the electricity.

46. In view of the aforesaid discussion, we find that the Appellate Tribunal was not right in cancelling/setting aside the licence granted to the appellant-JSPL and hence, the impugned judgment is liable to be set aside.

47. In the result, the appeals are allowed and the impugned common judgment of the Appellate Tribunal is hereby set aside.

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48. Consequently, pending applications stand disposed by A
reserving liberty to the applicants seeking impleadment to seek remedies
in accordance with law, if so advised.

49. Parties to bear their respective costs.

Devika Gujral
(Assisted by : Shevali Monga, LCRA)

Appeals allowed.