

BEFORE THE HON'BLE MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION AT MUMBAI

IN THE MATTER OF:

(Application under Sections 14, 15, 86(1)(d) and 86(k) of the Electricity
Act, 2003 read with MERC (Trading License Conditions), Regulations, 2004
seeking grant of intra state trading license in State of Maharashtra.)
(Case No.132 of 2015)

M/s. Global Energy Private Limited

..... Petitioner/Applicant

Index		
Sr. No	Particulars	Page Nos.
1	Affidavit for placing on record additional information	1 - 18
1	Annexure A- A copy of the Data Gap	19 - 20
2	Annexure B- A copy of the judgment of the Hon'ble Supreme Court of India	21 - 57
3	Annexure C- Copy of the net worth certificate for the preceding three (3) years.	

Place: - MUMBAI

Date: - 15/02/16



Petitioner/Applicant

**BEFORE THE HON'BLE MAHARASHTRA
ELECTRICITY REGULATORY
COMMISSION, MUMBAI**

FILING NO: _____

CASE NO. 132 OF 2015

IN THE MATTER OF

Application under Sections 14, 15, 86(1)(d) and (k) of the Electricity Act, 2003, read with the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulation, 2004, seeking grant of Intra-State Trading Licence in the State of Maharashtra

AND IN THE MATTER OF

M/s. Global Energy Private Limited

having its registered office at:

207, Gera Imperium II,
Patto Plaza, Panjim,
North Goa,
Goa – 403 001



And also at:

104, 10th Floor, Makers Chambers VI,

Nariman Point,
Mumbai - 400 021

.....PETITIONER/APPLICANT

**AFFIDAVIT FOR PLACING ON RECORD
ADDITIONAL INFORMATION ON BEHALF OF
THE PETITIONER AS SOUGHT BY THE
HON'BLE COMMISSION**

I, Abhijit Dhamdhere, S/o, Anant Dhamdhere, aged about 45 years, presently working as Senior Manager with the Petitioner Company, do solemnly affirm and say as follows:

1. I am the authorised representative of M/s. Global Energy Private Limited, the Petitioner in the present matter. I am fully aware of the facts and circumstances of the present matter, and such I am fully competent to swear this affidavit.
2. The Petitioner is filing the present affidavit in order to place before this Hon'ble Commission certain additional information, which were identified by this Hon'ble Commission in the 'Data gap Set 1 for Global Energy Limited's Petition for grant of Trading Licence - Case No. 132 of 2015' (hereinafter referred to as "Data Gap") which was attached with the email dated January 27, 2016, sent by Mr Rakesh Guhagarkar,



3

Deputy Director (Technical) at the Maharashtra Electricity Regulatory Commission, wherein the Petitioner was requested to reply to the Data Gap. A copy of the Data Gap is annexed herewith and marked as **Annexure - A**.

3. The Petitioner, before proceeding to deal with and provide such information to this Hon'ble Commission pursuant to the Data Gap, craves leave of this Hon'ble Commission to submit its preliminary submissions before this Hon'ble Commission and seeks the preliminary determination thereon before proceeding further on merits. After the preliminary submissions, the Petitioner shall proceed to deal with each of the issues identified by this Hon'ble Commission in the Data Gap parawise, traversed in seriatim and dealt accordingly.
4. The Petitioner herein craves leave to reserve the right to file a detailed affidavit in this regard at any subsequent stage.

Preliminary Submissions

5. That, in paragraph 1 of the Data Gap, this Hon'ble Commission, citing Regulation 4-A of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004 (as amended), directed the Petitioner to submit an undertaking that no



4

cases/litigations are pending against any of its partners, directors or promoters, which falls under the conditions of the circumstances as mentioned in the proviso to Regulation 4-A of the said Regulations.

6. Regulation 4-A of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004 (as amended) is stated below:

"4-A: ELIGIBILITY CONDITIONS / DISQUALIFICATIONS:

The Commission may specify eligibility conditions and disqualifications for being entitled to grant of licence under these regulations. Notwithstanding the generality of the foregoing, no applicant shall be qualified for grant of license under these regulations, if, the Commission is of the opinion that conditions or circumstances exist that cast a doubt on the ability of the applicant to perform its duties and obligations under the Act.

Explanation - For the purposes of these regulations, "conditions or circumstances" shall mean and include cases of conviction of the applicant or any of its partners, directors or promoters by a Court of Law or indictment / adverse order by a regulatory authority or which relates to a grave offence of such a nature that it outrages the moral sense of the community; insolvency and bankruptcy of the applicant or any of its partners, directors or promoters; pending legal proceedings; conviction of an



offence involving moral turpitude, or any economic offence; fraudulent and unfair trade practices or market manipulation; financial integrity; competence; reputation and character, and any other sufficient reasons.

Provided that the Commission may direct the applicant to furnish with its application, an undertaking in such form and accompanied by documents and information, as may be stipulated by the Commission from time to time, which shall be available from the office of the Commission and/or its internet website.

Provided further that no application for grant of license shall be rejected unless such applicant has been given an opportunity of being heard."
[Emphasis supplied]

7. In this regard the Petitioner craves leave of this Hon'ble Commission to refer to the judgment of the Hon'ble Supreme Court of India, in the matter *Global Energy Ltd. & Anr. v. Central Electricity Regulatory Commission* (Civil Appeal Nos. 3457-3458 of 2009), wherein the Hon'ble Supreme Court of India while determining the Constitutional validity of Clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation, 2006, held that Clauses (b) and



(f) of Regulation 6A of the said Regulations are *ultra vires* the Constitution of India and also the Electricity Act, 2003. A copy of the said judgment of the Hon'ble Supreme Court of India is annexed herewith and marked as **Annexure – B.**

8. Clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation, 2006, is stated below:

“6A. Disqualifications: *The applicant shall not be qualified for grant of licence for inter-state trading, if:*

(a)

(b) *The applicant, or any of his partners, or promoters, or Directors or Associates is involved in any legal proceedings, and in the opinion of the Commission grant of licence in the circumstances, may adversely affect the interest of the electricity sector or of the consumers; or*

(c)

(d)

(e)

(f) *The applicant is not a fit and proper person for grant of licence for any other reason to be recorded in writing;*

Explanation: For the purpose of determining as to whether the applicant is a 'fit and proper person', the Commission may take account of any consideration, as it deems fit, including but not limited to the following, namely:-

- (i) financial integrity of the applicant;
- (ii) His competence;
- (iii) His reputation and character; and
- (iv) His efficiency and honesty."

9. It is humbly submitted before this Hon'ble Commission that the explanation to the term "conditions and circumstances" proffered under Regulation 4-A of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004 (as amended) includes "pending legal proceedings".

10. That under the scheme of Regulation 4-A of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004 (as amended), this Hon'ble Commission is conferred with the power to enter into the merit of the "pending legal proceedings" and disqualify an applicant if it is of the opinion that such legal proceedings would impede such an applicant from performing its duties and obligations under the Electricity Act, 2003. It is humbly submitted before this Hon'ble Commission that such power of this Hon'ble



8

Commission under Regulation 4-A of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004 (as amended) is *pari materia* to the power of the Central Electricity Regulatory Commission under Clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation, 2006, which were struck down by the Hon'ble Supreme Court in the matter *Global Energy Ltd. & Anr. v. Central Electricity Regulatory Commission (Civil Appeal Nos. 3457-3458 of 2009)*.

11. The Hon'ble Supreme Court of India in the aforementioned matter *inter alia* was of the view that:

"34. We have seen that clause (b) of Regulation 6A provides for a disqualification only on the ground of involvement of the applicant or any of its promoters, partners, directors, associates, etc., in any legal proceeding. The same may or may not by itself be sufficient to disqualify a person, but the Commission must be satisfied that grant of licence in the circumstance may adversely affect the interest of the electricity sector or of the consumers. Such legal proceedings are, apart from the judgment of convictions of



an offence involving moral turpitude or any economic offence on the part of the applicant or his partner, or promoter, or Director, or associates at any time in the past, as it may have something to do with the pending legal proceedings in which the Commission is a party.

The correctness of the Commission's determination of a dispute between the applicant and the Commission may be a subject matter of a legal proceeding. Only because a legal proceeding had been pending and the Commission is of the opinion that the same adversely affects the interest of the electricity sector or of the consumers, in our opinion, cannot by itself be an objective criteria as by reason thereof the statutory authority would be required to enter into the merit of the proceeding. The members of the Commission need not necessarily be trained in law; they may not be having legal background and, thus, a power conferred on it so as to directly or indirectly enter into the merit of a legal proceeding in which it may itself be involved, in our opinion, would not be fair and reasonable criteria."

12. In view of the above, the Petitioner urges this Hon'ble Commission to take a view as to whether or not 'pending legal proceedings' can be an objective criteria for denial of a licence to undertake trading in



electricity as an electricity trader under Section 14(c), read with Sections 15 and 52, of the Electricity Act, 2003.

13. The Petitioner herein also urges this Hon'ble Commission to take a view as to whether or not it can disqualify the Petitioner for grant of licence to undertake trading in electricity as an electricity trader under Section 14(c), read with Sections 15 and 52, of the Electricity Act, 2003, if it does not provide an undertaking to this Hon'ble Commission as directed under paragraph 1 of the Data.

14. Further, it is humbly submitted that the power of the Hon'ble Commission or of the secretary to the Hon'ble Commission or of any officer of the Hon'ble Commission or designated by it under Regulation 6.1 of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004, is not unfettered. It has to be read in the context of the Electricity Act, 2003, and has to be strictly construed in terms of the requirements contained in Section 52 of the said Act, namely, technical requirement, capital adequacy and credit worthiness for being considered for a license to be an electricity trader.



15. Section 52 of the Electricity Act, 2003,
is stated below:

**“52. Provisions with respect to
electricity trader.- (1) Without prejudice
to the provisions contained in clause (c) of
section 12, the Appropriate Commission
may, specify the technical requirement,
capital adequacy requirement and credit
worthiness for being and electricity trader.
(2) Every electricity trader shall discharge
such duties, in relation supply and trading
in electricity, as may be specified by the
Appropriate Commission.”**

16. It is humbly submitted that the
Hon'ble Commission under the scheme of
Section 52 of the Electricity Act, 2003, the
criteria for grant of licence to trade in
electricity is fixed and is limited to technical
requirement, capital adequacy and credit
worthiness. Therefore, this Hon'ble
Commission's discretionary jurisdiction with
regards to grant of licence to trade in
electricity must be exercised in conformity
therewith.

17. It is also submitted that this Hon'ble
Commission, through paragraphs 1, 5, and 6
of the Data Gap, has proceeded to seek
information from the Petitioner which has no
reasonable nexus with the regulatory
scheme and intent outlined under Section 52



of the Electricity Act, 2003, which is patently arbitrary and unreasonable, and as such contrary to the scheme laid down under Article 14 of the Constitution of India.

18. Regulation 6.1 of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004, is stated below:

“6. Scrutiny of application

6.1 The Commission or the Secretary or any Officer designated for the purpose by the Commission may, upon scrutiny of the application, and, as far as practicable, within a period of thirty (30) days from the date of receipt of application, require the applicant to furnish such additional information or particulars or documents as considered necessary for the purpose of considering the application.”

19. It is humbly submitted before this Hon'ble Commission that the power conferred under Regulation 6.1 of the Maharashtra Electricity Regulatory Commission (Trading Licence Conditions) Regulations, 2004, cannot be expanded in a manner so as to effectively lay down by necessary implication conditions / pre-qualifications for grant of licence which would be contrary to or in excess of the

12



statutory fetter prescribed under Section 52(1) of the Electricity Act, 2003.

Parawise reply

20. That with regard to paragraph 1 of the Data Gap, the Petitioner, without prejudice to the preliminary submissions made above, craves leave of this Hon'ble Commission to reserve the right to furnish before it such undertaking as specified in paragraph no. 1 of the Data Gap upon this Hon'ble Commission taking a view in terms of paragraphs 12 and 13 above.
21. That with regard to paragraph 2 of the Data Gap it is humbly submitted that the Petitioner has filed its application before this Hon'ble Commission for grant of fresh intra-state trading licence for the State of Maharashtra under 'Category A' for trading 100 MUs of kWh of electrical energy for the first year after receiving the license. Petitioner craves leave of this Hon'ble Commission to point out that in paragraph 9 of the submissions dated October 6, 2015, filed before this Hon'ble Commission by the Petitioner, the Petitioner had in fact specifically mentioned the category of licence it is seeking. The extract of the relevant portion of paragraph 9 of the submissions dated October 6, 2015, filed before this



14

Hon'ble Commission by the Petitioner is set out below:

"9.....As such the Applicant herein has approached this Hon'ble Commission for grant of a fresh intra-state trading license for the State of Maharashtra under 'Category A' for trading 100 million kWh per annum in Maharashtra (proposed to be traded)."

22. Further, Annexure III of Application for grant of Intra - State Trading License in the State of Maharashtra dated September 18, 2015, filed by the Petitioner before this Hon'ble Commission, also specifies the category of licence the Petitioner is seeking.

23. That with regard to paragraph 3 of the Data Gap, the Hon'ble Commission may please find copies of the net worth certificate for the preceding three (3) years annexed herewith and collectively marked as **Annexure - C.**

24. That with regard to paragraph 4 of the Data Gap, it is submitted that the Petitioner is primarily engaged in the businesses of generation of electricity, trading in electricity, and in consultancy and advisory services.



25. That with regard to paragraph 5 of the Data Gap, the Petitioner, in the light of the preliminary submissions made above, humbly submits that the details sought by the Hon'ble Commission pertaining to agreements entered into by the Petitioner, where the buyer and the seller of electricity are both within the State of Maharashtra, have nothing to do with the credit worthiness or financial integrity of the Petitioner, and as such is of no relevance to the current proceedings before this Hon'ble Commission, and is to that extent unreasonable.

26. It is also submitted that the details sought by this Hon'ble Commission in paragraph 5 of the data gap have no reasonable nexus with the regulatory scheme and intent outlined under Section 52 of the Electricity Act, 2003, which is patently arbitrary and unreasonable, and as such is contrary to the scheme laid down under Article 14 of the Constitution of India.

27. Without prejudice to what is submitted above, it is also humbly submitted that the information sought by the Hon'ble Commission under paragraph 5 of the Data Gap, is in the nature of trade secrets of the Petitioner and if published will cause irreparable harm to the Petitioner a trader

15



engaged in trading in electricity, which would be contrary to the true purport and intent of the Electricity Act, 2003.

28. That with regard to paragraph 6 of the Data Gap, it is submitted that the Petitioner is already in substantial compliance of its obligation to furnish information as required under Schedule 3 and 4 of the Maharashtra Electricity Regulatory Commission (Trading License Conditions) Regulations, 2004, with regard to its earlier licence to trade in electricity in the State of Maharashtra.

29. Furthermore, it is pertinent to point out here that the Data Gap issued by the Hon'ble Commission pertains to a grant of a fresh licence to trade in electricity in the State of Maharashtra and the Hon'ble Commission is deliberating afresh on such an application filed by the Petitioner. Therefore, the requirement to submit any information under Schedule 3 and 4 of the Maharashtra Electricity Regulatory Commission (Trading License Conditions) Regulations, 2004, with regard to an earlier licence of the Petitioner to trade in electricity is devoid of any merit under the current proceedings, and as such is unjust and arbitrary since information under Schedule 3 and 4 is required to be submitted by the existing trading licensees only.



30. In view of the above its quite evident that the details sought by this Hon'ble Commission in paragraph 6 of the data gap have no reasonable nexus with the regulatory scheme and intent outlined under Section 52 of the Electricity Act, 2003, which is patently arbitrary and unreasonable, and as such is contrary to the scheme laid down under Article 14 of the Constitution of India.

31. The Petitioner states that the present affidavit is bonafide and in the interest of justice, and therefore, the same may be taken on record. The Petitioner further craves leave to file any other affidavit / pleadings in the interest of justice.



DEPONENT



18

VERIFICATION

Solemnly affirmed at Mumbai on this 15th day of February, 2016, that the contents of the above affidavit are true to my knowledge (as derived from records), based on information believed to be true and no part of it is false and nothing material has been concealed therefrom.

[Handwritten Signature]

DEPONENT

BEFORE ME

[Handwritten Signature]
R. R. SHARMA

Advocate High Court &
Notary Govt. of India
Flat No. 2, 'C' Wing, Bldg. No. 2,
Shree Sai Complex, Chs., Bandook
Mala Compound, Opp. S.T. Bus Depot,
Savni Road, Mumbai - 400 025.

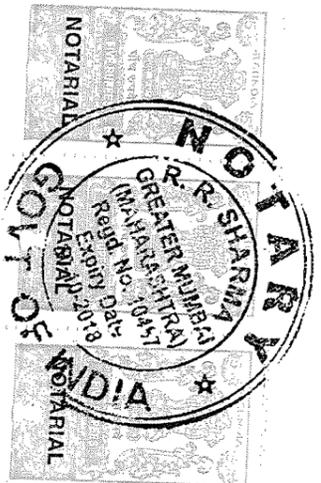
15 FEB 2016

NOTED & REGISTERED.

Sr. No. 561/2016

Date: 15/2/2016

15 FEB 2016



ANNEXURE - A 19

abhijtd

From: Rakesh Guhagarkar <rakesh.guhagarkar@merc.gov.in>
Sent: Friday, February 12, 2016 7:16 PM
To: abhijtd@globalenergy.net.in
Subject: FW: Datagap Set 1 -Global Trading Licence Petition
Attachments: Datagap Set 1 -Global Trading Licence Petition.docx

Dear Sir,

The replies to the data gaps are still awaited. Please expedite the reply.
Also, kindly send soft copy of the Petition (Word file or PDF file).

Regards

Rakesh Guhagarkar

From: Rakesh Guhagarkar [<mailto:rakesh.guhagarkar@merc.gov.in>]
Sent: Wednesday, January 27, 2016 2:17 PM
To: 'abhijtd@globalenergy.net.in'
Cc: 'prafulla.varhade@merc.gov.in'
Subject: Datagap Set 1 -Global Trading Licence Petition

Dear Sir,

Please find attached herewith the data gap set 1 in respect of the Petition of M/s. Global Energy Ltd. for grant of Trading Licence.
Kindly reply early.
TVS in the matter is scheduled 16 February, 2016 at 11.30 Hrs.

Regards

Rakesh Guhagarkar

Data gap Set 1 for Global Energy Limited's Petition for grant of Trading Licence - Case No. 132 of 2015

1. Amendment to MERC (Trading Licence Conditions) Regulations, 2004 (MERC (TRADING LICENCE CONDITIONS) REGULATIONS, 2006 -

"4-A: ELIGIBILITY CONDITIONS/DISQUALIFICATIONS:

The Commission may specify eligibility conditions and disqualifications for being entitled to grant of licence under these regulations. Notwithstanding the generality of the foregoing, no applicant shall be qualified for grant of license under these regulations, if, the Commission is of the opinion that conditions or circumstances exist that cast a doubt on the ability of the applicant to perform its duties and obligations under the Act.

Explanation – For the purposes of these regulations, "conditions or circumstances" shall mean and include cases of conviction of the applicant or any of its partners, directors or promoters by a Court of Law or indictment / adverse order by a regulatory authority or which relates to a grave offence of such a nature that it outrages the moral sense of the community; insolvency and bankruptcy of the applicant or any of its partners, directors or promoters; pending legal proceedings; conviction of an offence involving moral turpitude, or any economic offence; fraudulent and unfair trade practices or market manipulation; financial integrity; competence; reputation and character, and any other sufficient reasons.

Provided that the Commission may direct the applicant to furnish with its application, an undertaking in such form and accompanied by documents and information, as may be stipulated by the Commission from time to time, which shall be available from the office of the Commission and/or its internet website."

The applicant should submit an undertaking that no cases/litigations are pending against the Applicant or against any of its partners, directors or promoters, which falls under the conditions of the circumstances mentioned in the above proviso of the Regulations.

2. It appears that in its Petition and prayers, M/s. Global Energy has not specifically mentioned the category of Licence it is seeking. Kindly, clarify the same.
3. Please submit the networth certificate for latest three years.
4. Please inform whether M/s. Global Energy Ltd. is engaged in businesses other than Trading of Electricity.
5. Please submit the details of present agreements entered into by M/s. Global Energy Ltd. where buyer and seller both are within the State of Maharashtra.
6. M/s. Global Energy should clarify whether the information as required in Annexure 3 and Annexure 4 of MERC (Trading Licence Conditions) Regulations, 2004 has been submitted by M/s. Global Energy Ltd. for the earlier Intra-State Licence granted by the Commission. If not submitted, said data may be submitted year-wise.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3457-3458 OF 2009
(Arising out of SLP (C) Nos. 14217-14218 of 2007)

GLOBAL ENERGY LTD. & ANR.

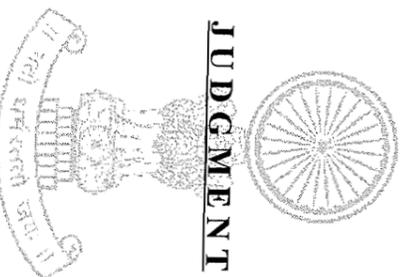
... APPELLANTS

CENTRAL ELECTRICITY REGULATORY
COMMISSION

... RESPONDENT

S.B. Sinha, J.

1. Leave granted.



JUDGMENT

JUDGMENT

INTRODUCTION

2. Constitutional validity of clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation 2006 (hereinafter referred to and called for the sake of brevity as “Amended Regulation”) is the question involved herein.

BACKGROUND FACTS

3. It arises in the following factual matrix.

The Parliament enacted Electricity Act, 2003 (hereinafter referred to as, "the said Act"). In exercise of its jurisdiction conferred by Section 178 of the said Act, the Central Electricity Regulatory Commission (for short, "CERC") made Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters), Regulation 2004 (for short, "the Regulation")

Indisputably, in terms of the provisions of the said Act as also the Regulations, inter alia, license is required to be taken by a person who is desirous of dealing in inter-state trading, which in terms of Regulation 2(g) means "transfer of electricity from the territory of one State to the territory of another State by an electricity dealer".

4. Appellant No. 1 is a Public Limited Company incorporated and registered under the Indian Companies Act.
5. Pursuant to or in furtherance of the said Act and the Regulations, the appellant No. 1 herein filed an application for grant of inter-State Trading License under Category 'A' before CERC on 23.3.2004. CERC published a

notice as regards the said application filed by the appellant No. 1 for grant of inter-state Trading License in all editions of 'Indian Express', Financial Express' and a vernacular daily 'Jansatta'. Appellant No. 1 also filed an interlocutory application seeking permission to trade in the electricity pending final disposal of its petition for grant of inter-state trading license as it had been engaged in inter-state trading of electricity prior to the commencement of the said Act. By reason of an order dated 31.3.2004, the said application was allowed. Objections filed to the appellant No.1's application for grant of license pursuant to the aforementioned notice were also rejected by an order dated 30.6.2004.

6. On or about 6.9.2004, CERC directed as under:

“(i) The petitioner No. 1 was qualified for the grant of Category 'A' license for inter-state trading in electricity for trading up to 100 million units in a year.

(ii) The CERC proposed to issue the license for inter-state trading to the petitioner No. 1 as category 'A' trader.

(iii) The petitioner No. 1 was directed to publish a notice under Section 15(5) of the Act. Section 15(5) of the Act reads as follows:

'15. Procedure for grant of licence.

.....

4

(5) Before granting a licence under section 14, the Appropriate Commission shall-

- (a) publish a notice in two such daily newspapers, as that Commission may consider necessary, stating the name and address of the person to whom it proposes to issue the licence;
- (b) consider all suggestions or objections and the recommendations, if any, of the Central Transmission Utility or the State Transmission Utility, as the case may be."

7. After the publication of notices, objections were also received as regards appellant No. 1's trading in inter-state supply of electrical energy pursuant to the aforementioned interim order. The matter was taken to High Court and interim license granted to appellant No. 1 was extended by the High Court from time to time.

Draft Regulations were published to which appellant No. 1 filed objection. The Amended Regulations were notified on 3.4.2006. By an order dated 20.8.2006, CERC rejected the application filed by the appellant No. 1 for grant of inter-state trading license opining that Regulation 6A brought in through the amended Regulation will have a retrospective effect. An appeal preferred thereagainst is pending before the Appellate Tribunal for Electricity.

28

8. Appellants filed Writ Petitions before the High Court questioning the validity of the said Regulation. By reason of the impugned judgment the said Writ Petitions have been dismissed.

CONTENTIONS

9. Mr. Dipankar Gupta, the learned Senior Counsel appearing on behalf of the appellants, inter alia, would submit :-

- i. Having regard to the objects and reasons for which the said Act was enacted, the High Court must be held to have committed a serious error insofar as it held that the Amended Regulations would apply to the appellant No. 1's application.
- ii. It was also contended that sufficient guidelines having been laid down as regards disqualification of persons applying for grant of licence, the impugned Regulations must be held to be ultra vires Article 14 of the Constitution of India.
- iii. In any event, keeping in view the facts and circumstances of this case, the provisions should be read down.

10. Mr. Parag Tripathi, learned Additional Solicitor General appearing on behalf of the respondent, would, however, support the impugned judgment.

THE ACT

11. The said Act was 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.
12. Indisputably, one of the objects and reasons for enacting the said Act was to encourage private sector's participation in generation, transmission and distribution of electrical energy. Trading is considered to be a distinct activity. Preamble of the Act also refers to distribution and trading as one of the objects sought to be achieved by reason of the said Act.
13. Section 2(71) defines "trading" to mean purchase of electricity for resale thereof and the expression "trade" is construed accordingly. Part IV of the Act providing for licensing, inter alia, mandates that no person shall

undertake trading in electricity unless he is authorized to do so by a licence issued under Section 14, or is exempt under Section 13.

Section 14 of the Act, inter alia, provides for grant of licence to any person inter alia trading in electricity as an electricity trader.

Section 15 provides for the detailed procedures for grant of licence as also the exercises required to be undertaken by the appropriate commission therefor. Section 16 of the Act empowers the Appropriate Commission to lay down conditions for grant of licence, which is as under:

“16. Conditions of licence. – The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.”

Section 17 imposes certain restrictions on activities of licensing. Section 18 empowers the appropriate commission to amend the terms of an existing licence in public interest. This power can be exercised by the appropriate commission either on an application made in this connection by

the licensee or suo motu. Section 19 lists the grounds for revocation of a licence.

Section 52 lays down the provisions with respect to eligibility of electricity trader for grant of licence. The said section provides that the Commission may specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader.

Section 66 mandates that the Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 of the Act.

Section 76 provides for constitution of a Central Commission. Functions of the Central Commission are laid down in Section 79 thereof; clauses (e) and (j) of Sub-Section (1) whereof reads as under:

“(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

xxx xxx xxx

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary.

Section 178 of the Act provides for a regulations making power. Sub-Section (1) thereof empowers the Commission to make regulations consistent with the Act and the rules generally to carry out the provisions of the Act. Sub-Section (2) of Section 178, inter alia, prescribes that such regulations may provide, inter alia, for (a) period to be specified under the first proviso to Section 14; (b) the form and the manner of the application under sub-section (1) of Section 15; and (c) the manner and particulars of notice under sub-section (2) of section 15.

THE REGULATION

14. Sub-Regulation (4) of Regulation 2 applies to trading carried out bilaterally between the generating company, including captive generating plant, distribution licensee and the electricity trader on the one hand and the electricity trader and the distribution licensee on the other. Supply to consumers is, thus, not a general function.
15. Chapter II of the Regulations lay down the procedure for grant of licence for inter-state trading.
16. Chapter III lays down the requirements of being an electricity trader. The title of Regulation 6 is Capital adequacy, Requirement and Creditworthiness, in terms whereof the net worth of the electricity trader at

the time of application is required to be not less than the amounts specified thereunder. Chapter IV provides for the terms and conditions of the licence. Regulation 7 lays down the obligations of the licensee.

AMENDMENT IN REGULATION

“5. Insertion of Regulation 6A: After regulation 6 of the principal regulations, the following shall be inserted, namely:-

“6A. Disqualifications: The applicant shall not be qualified for grant of licence for inter-state trading, if:

- (a)
- (b) The applicant, or any of his partners, or promoters, or Directors or Associates is involved in any legal proceedings, and in the opinion of the Commission grant of licence in the circumstances, may adversely affect the interest of the electricity sector or of the consumers; or
- (c)
- (d)
- (e)
- (f) The applicant is not considered a fit and proper person for the grant of licence for any other reason to be recorded in writing;

Explanation: For the purpose of determining as to whether the applicant is a ‘fit and proper person’, the Commission may take account of any consideration, as it deems fit, including but not limited to the following, namely:-

- (i) financial integrity of the applicant.

- (ii) His competence;
- (iii) His reputation and character; and
- (iv) His efficiency and honesty.”

11

INTERPRETATION

17. Regulation 6A has been inserted. The said provision is imperative in character. It is couched in negative language. It provides for disqualifications.

Indisputably, a subordinate legislation should be read in the context of the Act. Thus read, Regulation 6A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader.

It affects the creditworthiness of the applicant. It also affects the credit effectiveness, namely, (1) financial integrity of the applicant; (2) his competence; (3) his reputation and character; and (4) his efficiency and honesty.

It affects a pending proceeding. Because of the said amendment, an interim licence granted in favour of the appellants stood revoked.

This, however, would not mean that an amendment made in a regulation would under no circumstance, affect pending proceeding.

18. It is now a well settled principle of law that the rule making power “for carrying out the purpose of the Act” is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

We may, in this connection refer to a decision of this Court in Kunji Behari Lal Butail & Ors. vs. State of H.P. & Ors. [(2000) 3 SCC 40], wherein a Three Judge Bench of this Court held as under :

“14. We are also of the opinion that a delegated power to legislate by making rules “for carrying out the purposes of the Act” is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.”

(See also State of Kerala & ors. vs. Unni & Anr. (2007) 2 SCC 365 (Paras 32 to 37), A.P. Electricity Regulatory Commission vs. M/s R.V.K. Energy Pvt. Ltd. & anr. (2008) 9 SCALE 529)

19. The power of the regulation making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualification therefor. Provisions for imposition of general conditions of licence or conditions laying down the prequalifications therefor and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of licence also.

20. Mr. Tripathi had relied on a decision of this Court in The Rampur Distillery Co. Ltd. V. The Company Law Board & Anr. [(1969) 2 SCC 774]. This Court therein was considering the validity of a provision laying down the concept of a 'fit and proper person' for the purposes of Section 326(2) of the Companies Act, 1956 by reason whereof the Central Government has been conferred power to refuse the approval of appointment of a Managing Director, if in its opinion, he was not a fit and proper person. This Court held that the satisfaction contemplated thereby must be the result of an objective appraisal of relevant material and subject to the judicial scrutiny. Stating that by reason thereof, the Central Government was not made the final arbiter of the existence of the ground on which the satisfaction may be

founded. Such a power was held to be a quasi judicial one and not an administrative one, carrying with it a duty arising from the nature of the Act empowered to be done the job for which it is to be done, the conditions in which it is to be done and its repercussion upon the power of the company, the shareholders, the creditors and the general public for whose benefit, the power is to be exercised.

This decision, therefore, itself may be considered to be an authority for the proposition that where the Parliament thought it fit and proper to confer such a power upon an authority exercising quasi judicial power, the same is specifically conferred by the provisions of the Act itself and not by a subordinate legislation.

Paragraph 19 of the said decision clearly shows that for the purpose of arriving at a satisfaction that a person was fit and proper to be re-appointed as managing agent, all past conduct and actings were required to be taken into consideration. Regulation 6A is a disqualifying statute. The statute, however, does not provide for any machinery to collect independent material for being placed before the proper authority as regards evaluation of credit effectiveness and creditworthiness of the applicant.

CONSTITUTIONALITY ISSUE

25

21. For deciding the question involved herein, we must notice the purport and object for which such disqualifications have been brought into the statute book. In terms of Section 52 of the Act, the creditworthiness of the applicant must be apparent. Creditworthiness of an applicant can be considered from two angles. It may have two concepts, one is positive and the other is negative.

Four aspects of creditworthiness are envisaged in the Regulations as would appear from the Explanation appended thereto, which are as under:-

- (i) financial integrity of the applicant;
- (ii) his competence;
- (iii) his reputation and character; and
- (iv) his efficiency and honesty.

Article 19(1)(g) of the Constitution of India confers fundamental right on every citizen to carry out business, trade, profession or occupation. Clause (6) of Article 19, however, provides for imposition of reasonable restrictions by a statute. [See Udai Singh Daggar v. Union of India, {(2007) 10 SCC 306 }].

In the event a statute provides for licensee, in a case of this nature, the same must thus be found to satisfy the test of reasonableness.

The standard for determining reasonableness of a statute so as to satisfy the constitutional scheme as adumbrated in Article 14 of the Constitution of India must receive a higher level of scrutiny than an ordinary statute. Such a higher level of scrutiny is necessary not for the purpose of determining the Constitutionality of the statute alone vis-à-vis the field of legislative power as envisaged under Article 245 of the Constitution of India but also having regard to the object and purpose, the statute seeks to achieve.

Electricity was subject to strict regulations. It, subject to just exceptions, was the monopoly of the State Electricity Boards, Public Sector Undertakings.

Participation of the private sector inter alia in trading was encouraged by the provisions of the Act. Court's concern, therefore, would be not only to see that the Statute is intra vires the Constitutional scheme including the legislative field, but also as to whether it passes the test of reasonableness having regard to the object and purpose of the Act. For achieving the aforementioned purpose not only the premise, relevancy of the constitutional scheme in relation thereto is required to be taken into consideration as would be noticed a little later but therefor the doctrine of purposive interpretation should also be resorted to. [See New India Assurance Company Ltd. v. Nusli Wadia and Another, { (2008) 3 SCC 279 }]

In UCO Bank & Anr. vs. Rajinder Lal Capoor [(2008) 5 SCC 257],

this Court held:

“26. It is now a well-settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation, be made applicable in a case of this nature.”

When a disqualification is provided, it is to operate at the threshold in respect of the players in the field of trading in electricity.

When, however, a regulatory statute is sought to be enforced, the power of the authority to impose restrictions and conditions must be construed having regard to the purpose and object it seeks to achieve. Dealing in any manner with generation, distribution and supply and trading in electrical energy is vital for the economy of the country. The private players who are permitted or who are granted licence in this behalf may have to satisfy the conditions imposed.

No doubt, such conditions must be reasonable. Concededly, the doctrine of proportionality may have to be invoked. The Superior Court

would ensure that the subordinate legislation has been framed within the four corners of the Act and is otherwise valid.

22. The issue therefore which arises for our consideration is as to whether the delegation having been made for the purpose of carrying out the object, could the limitation be imposed for ascertaining as to whether the applicant is fit and proper person and disregarding his creditworthiness. There cannot be any doubt whatsoever that a statute cannot be vague and unreasonable.

23. Strong reliance has also been placed by the learned Additional Solicitor General on a decision of this Court in Clariant International Ltd. & Anr. vs. Securities & Exchange Board of India [(2004) 8 SCC 524], wherein it was held that a discretionary jurisdiction has to be exercised having regard to the purpose for which it was conferred, the object sought to be achieved and the reasons for granting such wide discretion. It was furthermore held that when any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity therewith. (See also Secretary, Ministry of Chemicals & Fertilizers, Govt. of India vs. Cipla Ltd. & Ors., (2003) 7 SCC 1, para 4.1). There cannot be any doubt or dispute with regard to the aforementioned legal proposition.

24. The question, which, however, falls for our consideration is as to whether the purported legislative policy is valid or not. Such a question did not arise for consideration in Clariant (supra).

25. Yet again in State of T.N. & Anr. vs. P. Krishnamurthy & ors. (2006) 4 SCC 517, whereupon reliance has been placed by Mr. Tripathi, it has been held:

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

26. A legislative policy providing for qualification or disqualification of a person for obtaining a trading licence should not be vague or uncertain. Parameters must be laid down therefor for determining the financial integrity, reputation, character, efficiency and honesty of the applicant. An explanation appended to clause (f) of Regulation 6A points out various aspects that may be considered while determining the said criteria.

However, what should be the criteria in regard to financial integrity, character, reputation, etc. have not been defined. How and in what manner the said criteria are required to be ascertained have not been laid down, the criteria are subjective ones.

27. A disqualifying statute, in our opinion, must be definite and not uncertain; it should not be ambiguous or vague. Requisite guidelines in respect thereof should be laid down under the statute itself. It is well settled that essential legislative function cannot be delegated.

It has been accepted by Mr. Tripathi that the explanation appended to clause (f) of Regulation 6A is not exhaustive.

It is now a well settled principle of law that essential legislative functions cannot be delegated. The delegatee must be furnished with adequate guidelines so that arbitrariness is eschewed. On what basis and in particular, keeping in view the possible loss of reputation and consequently the business of an applicant for grant of licence would suffer, it was obligatory on the part of the Parliament to lay down requisite guidelines therefore. The factors enumerated in the 'Explanation' appended to clause (f) of Regulation 6A are unlimited. For determining the question as to whether the applicant is a fit and proper person, a large number of factors may be taken into consideration. It for all intent and purport would be more than the technical requirement, capital adequacy requirement and credit worthiness for being an 'electricity trader' as envisaged under Section 52 of the Act.

42

43

22

An applicant usually would be a new applicant. It is possible that there had been no dealings by and between the applicant and the licensor. Each one of the criteria laid down in the explanation refers to creditworthiness.

28. In State of Kerala & ors. vs. Umi & anr. [(2007) 2 SCC 365], this Court has held:

“When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down.”

In State of Rajasthan & ors. vs. Basant Nahata [(2005) 12 SCC 77] Section 22-A of the Registration Act, 1908 which was inserted by Rajasthan Amendment Act 16 of 1976 was struck down, holding:- (1) The executive while making a subordinate legislation should not be permitted to open new heads of public policy, (2) the doctrine of public policy itself being uncertain cannot be a guideline for anything or cannot be said to be providing sufficient framework for the executive to work under it, (3) Essential

functions of the legislature cannot be delegated and it must be judged on the touchstone of Article 14 and Article 246 of the Constitution, and (4) only the ancillary and procedural powers can be delegated and not the essential legislative point.

29. Our attention has been drawn to some other legislations wherein the concept of 'fit and proper person' had been applied, namely, Securities and Exchange Board of India (Criteria for Fit and Proper Person) Regulations, 2004.

30. We have not been shown as to how the purpose and object of the said Regulations can be said to be in pari materia with the Regulations in question. It must also be borne in mind that an elaborate public hearing process is provided for grant of licence in terms of Section 15 of the Act. Such an independent inquiry cannot be carried out de hors the statute. But the Parliament thought it fit to confer a hearing as regards public objection only.

Regulation 6A in effect confers powers/discretion on matters of licensing even in public hearing. Such relevant factors which provide for the criteria laid down in Regulation 6A could be brought on record. Section 15, however, empowers the Commission to specify the form and manner of the

45

application and the fees that is required to be attached. The parliamentary object must be read in the context of the preamble.

The reform legislation sought to bring in transparency in the work of the public sector. It postulates competition from the private sector. Only such a competition now would give rise to a development of a proper market in the long run. The power of the Regulatory Commission to impose qualification/restrictions should be read in line with the larger object of the Act. The Consumer tariff is to be laid down by the Commission. How licensees would operate their business to the extent permissible under law should be subject to Regulation, which ordinarily should not be resorted to discourage private participation in the power sector. A trader of electricity does not deal with consumers; he is merely an intermediary between a generating company and a distribution licensee. The tariff that a distribution licensee will charge from its consumers is regulated. Even the margin that a trader can make is regulated. It is, therefore, not correct to contend that Regulation 6A is in consumer interest as it has not been shown how it will protect the consumer interest.

ULTRA VIRES ISSUE

31. Section 52 of the Act is without prejudice to the provisions contained in sub-Section (c) of Section 12. By reason of the said provision the appropriate Government is vested with the power to specify:- (1) Technical requirement; (2) Capital adequacy requirement and; (3) Creditworthiness in relation to an electricity trader.

Regulation 6 deals with capital adequacy requirement and creditworthiness. Regulation 6A (b), therefore, cannot have anything to do with capital adequacy requirement and creditworthiness. The finding of the High Court to that effect cannot be upheld as Regulation 6A is a stand alone provision providing for a set of disqualifications. Although by the said provisions, it cannot be said that the legislature has exhausted itself but the same should also be taken into consideration for the purpose of determining the effect of the Regulations. As Section 52 does not empower the Regulation making authority to provide for qualification or disqualification, the delegated legislation or a subordinate legislation as is well known must conform exactly to the power granted.

In Supreme Court Employees' Welfare Association vs. Union of India & Anr. [(1989) 4 SCC 187], this Court has held:-

“62. Thus as delegated legislation or a subordinate legislation must conform exactly to the

47

power granted. So far as the question of grant of approval by the President of India under the proviso to Article 146 (2) is concerned, no such conditions have been laid down to be fulfilled before the President of India grants or refuses to grant approval. By virtue of Article 74(1) of the Constitution, the President of India shall, in exercise of his functions, act in accordance with the advice of the Council of Ministers. In other words, it is the particular department in the Ministry that considers the question of approval under the proviso to Article 146 (2) of the Constitution and whatever advice is given to the President of India in that regard, the President of India has to act in accordance with such advice. On the other hand, the Chief Justice of India has to apply his mind when he frames the rules under Article 146(2) with the assistance of his officers. In such circumstances, it would not be unreasonable to hold that the delegation of the legislative function on the Chief Justice of India and also on the President of India relating to the salaries, allowances, leave and pensions of the officers and servants of the Supreme Court involve, by necessary implication, the application of mind. So, not only that the Chief Justice of India has to apply his mind to the framing of rules, but also the government has to apply its mind to the question of approval of the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions. This condition should be fulfilled and should appear to have been so fulfilled from the records of both the government and the Chief Justice of India. The application of mind will include exchange of thoughts and views between the government and the Chief Justice of India and it is highly desirable that there should be a consensus between the two. The rules framed by the Chief Justice of India should normally be accepted by the government and the question of exchange of thoughts and

views will arise only when the government is not in a position to accept the rules relating to salaries, allowances, leave or pensions.”

32. We may now consider the provisions of Section 178 of the Act. Although various clauses contained therein are merely illustrative in nature and not exhaustive, we will assume that although the matter relating to grant of licence is covered by Section 12 and 14 of the Act, the Regulation making power may also be available for the said purpose.

33. We have noticed hereinbefore the effect of sub-Section (1) of Section 178. We may only notice that clauses (a), (b), (c) and (o) which are referable to the provisions of Sections 14 and 15 as such do not provide for any power to deal with disqualification authorizing the respondent to frame regulation. This Court in Kerala Samasthana Chethu Thozhilali Union vs. State of Kerala & ors. [(2006) 4 SCC 327] held as under:

“37. Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less have been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under

which the statutory framework should ordinarily be worked out.”

34. We have seen that clause (b) of Regulation 6A provides for a disqualification only on the ground of involvement of the applicant or any of its promoters, partners, directors, associates etc. in any legal proceeding. The same may or may not by itself be sufficient to disqualify a person, but the Commission must be satisfied that grant of licence in the circumstance may adversely affect the interest of the electricity sector or of the consumers. Such legal proceedings are, apart from the judgment of convictions of an offence involving moral turpitude or any economic offence on the part of the applicant or his partner, or promoter, or Director, or associates at any time in the past, as it may have something to do with the pending legal proceedings in which the Commission is a party.

The correctness of the Commission's determination of a dispute between the applicant and the Commission may be a subject matter of a legal proceeding. Only because a legal proceeding had been pending and the Commission is of the opinion that the same adversely affects the interest of the electricity sector or of the consumers, in our opinion, cannot by itself be an objective criteria as by reason thereof the statutory authority would necessarily be required to enter into the merit of the proceeding. The

51

members of the Commission need not necessarily be trained in law; they may not be having legal background and, thus, a power conferred on it so as to directly or indirectly enter into the merit of a legal proceeding in which it may itself be involved, in our opinion, would not be a fair and reasonable criteria.

We are unmindful of the fact that clause (f) to Regulation 6A of the Regulations mandates recording of reasons in writing. In the event, thus, if wrong reasons are recorded a judicial review would be maintainable. But availability of judicial review itself, although is a relevant factor, by itself cannot be a ground to declare a subordinate legislation valid which otherwise it is not. {See State of Kerala & Ors. vs. Unni & Anr. [(2007) 2 SCC 365]}

Judicial review from an administrative decision lies on a very narrow compass. The superior courts in exercise of their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily would not enter into the merit of the matter. Their primary concern are with the decision making process.

LOCUS STANDI OF THE APPELLANT

35. Mr. Tripathi would urge that the appellant had no vested right in regard to grant of licence. It may be so. But then it has a right to be considered therefor. Consideration for such grant must be based on a legal and valid statute. The case of the applicant cannot be rejected at the threshold relying on or on the basis of statutory provisions which are ultra vires. Submission of Mr. Tripathi that the appellant had no locus standi to question the validity of the Regulation, therefore, is not correct.

36. In Tashi Delek Ganning Solutions Ltd. vs. State of Karnataka & ors. [(2006) 1 SCC 442], this Court held:

“If by a statutory provision the right of an agent to carry on his business is affected, he may, in our considered opinion, in his own right maintain an action.”

[See also Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal & ors. (AIR 1962 SC 1044)]

37. Strong reliance has been placed by Mr. Tripathi as also by the High Court on State of Tamil Nadu vs. M/s Hind Stone & ors. [(1981) 2 SCC 205]. One of the issues involved therein was renewal of existing mining lease where applicants had filed applications before the coming into force of the new mining policy. Merely an application was filed and no further

52

action had been taken. In the aforementioned fact situation, this Court while opining that applications for grant of mining lease should be dealt with within a reasonable time but on that account the applicant would not be clothed with a right for disposal thereof, stating:

“...No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application.”

No exception thereto can be taken. Here, however, appellant was found eligible for grant of trading licence. He was found to be qualified.

38. Reliance has also been placed on S.B. International Limited & ors. vs. Assistant Director General of Foreign Trade & ors. [(1996) 2 SCC 439], wherein in the scheme and context, it was held that no vested right accrued to the licensee for issuance of advance licence.

LEGITIMATE EXPECTATION

39. Appellant applied for grant of licence. He was found to be qualified therefor having satisfied the statutory requirements. It was granted an

interim licence. It has started trading in electricity. It, therefore, had a legitimate expectation that in considering the application for grant of licence, the same criteria as laid down in the statute shall be applied.

In P.T.R. Exports (Madras) Private Limited & ors. vs. Union of India & ors. [(1996) 5 SCC 268], whereupon reliance has been placed, this Court inter alia opined that in the matter of grant of licence the doctrine of legitimate expectation would have no role to play as it would depend upon the policy prevailing on the date of grant of licence.

It was again a case where an Export and Import Policy to be notified by the Central Government under the Foreign Trade (Development and Regulation) Act, 1992 was involved.

40. Reliance has also been placed on M.P. Ram Mohan Raja vs. State of T.N. & ors. (supra). Therein also like Hind Stone (supra) there was no intimation from the State Government to the applicant that it was found qualified for grant of mining lease.

41. Reliance has also been placed by Mr. Tripathi on Commissioner of Municipal Corporation, Shimla vs. Prem Lata Sood & ors. [(2007) 11 SCC 40]. This Court therein was concerned with a planning and development statute framed under the Himachal Pradesh Town and Country Planning Act,

54

1977. In that case, this Court was considering the enforcement of right in several stages holding that the 'conditions precedent' laid down therein unless satisfied no right can be said to have vested in the person concerned.

42. The cases relied upon by Mr. Tripathi are distinguishable on fact. We accept the general principle that an applicant by filing a mere application cannot be said to have derived a vested right but we are of the opinion that he has a right to be considered. It will bear repetition to state that such consideration must be made not only on the basis of a valid statute but also rationale and objective criteria should be applied therefor.

EPILOGUE

43. The law sometimes can be written in such subjective manner that it affects efficiency and transparent function of the government. If the statute provides for point-less discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due

55

Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19. A modern deliberative democracy can not function without these attributes. The constitutive understanding of aforementioned guarantees under the Fundamental Rights chapter in the Constitution does not give rise to a mere rhetoric and symbolic value inherited by the polity but has to be reflected in minute functioning of all the three wings of state – executive, legislature and judiciary. When we talk of state action, devil lies in the detail. The approach to writing of laws, rules, notifications etc. has to showcase these concerns.

The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation.

56

While we say so, we are not oblivious of the contours of the judicial review of legislative acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters.

A subjectively worded normative device also enables the agency to acquire rents. It determines the degree of accountability and responsiveness of officials and of political and judicial control of the bureaucracy.

However, when the provision inherently perpetuates injustice in the award of licenses and brings uncertainty and arbitrariness it would be best to stop the government in the tracks. Since the vires of the regulation is under challenge, we took the opportunity to consider the propriety and constitutionality of generic decision-making process encapsulated under the impugned legislation. Amongst others, in this context, we strike down the impugned clause.

44. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly.

Clauses (b) and (f) of Regulation 6A are declared ultra vires the Constitution of India as also the Act. The Commission is directed to consider the matter from the same stage as if the provisions had not come

57

36

into force, as expeditiously as possible, and preferably within a period of three months from the date of receipt of a copy of this order.

45. The appeals are allowed with costs. Counsel fee assessed at Rs.50,000/-.

.....J.
[S.B. Sinha]

.....J.
[Cyriac Joseph]

New Delhi;
May 11, 2009

ANNEXURE - C

58

Chhabra & Associates
Chartered Accountants

268-G, Hauz Khasi
Opp. Press Enclave
New Delhi - 110017
Ph. +91-9910003171

To Whom So Ever It May Concern

We have examined the books and accounts of the company Global Energy Private Limited, having its registered office at 207, Gera Imperium II, Patto Plaza, Parjini, North Goa, Goa-403001 and having its Corporate Office at 6th Floor, Le Meridian Commercial Tower, Raisina Road, Connaught Place, New Delhi 110001. On the basis of our examination and information and explanation given to us, we hereby certify that the Net worth of the Company based on audited financial statements for the year 2012-13, 2013-14 & 2014-2015 is as below:-

NETWORTH

Sl. No.	As on	Amount(Rs.)
1.	31.03.2015 (Audited)	1,065,369,027/-
2.	31.03.2014 (Audited)	1,013,741,717/-
3.	31.03.2013 (Audited)	921,993,032/-

This certificate is being given on the specific request of the company.

Chhabra & Associates
Chartered Accountants

Sanjeev Chhabra
Sanjeev Chhabra
Proprietor



M.No.088058
Firm Regn. No. 009846N
Date: 27/01/2016
Place: - New Delhi



Date: 15/02/2016

To,
The Principal Secretary,
Maharashtra Electricity Regulatory Commission,
World Trade Center, Center No. 1, 13th Floor,
Cuffe Parade, Colaba, Mumbai 400 005.

Subject: - Affidavit for placing on record additional information

Reference: -

- 1) **Application under Sections 14, 15, 86(1)(d) and 86(k) of the Electricity Act, 2003 read with MERC (Trading License Conditions), Regulations, 2004 seeking grant of intra state trading license in State of Maharashtra. (Case No.132 of 2015).**
- 2) **Your e-mail dated 27/1/2016**

Dear Sir,

This is with reference to the aforesaid subject. Please find enclosed herewith our submissions (1+6 copies) on Affidavit alongwith the necessary Annexures.

Thanking You,

(Abhijit Dhamdhere)

