A M/S SESA STERLITE LTD.

v.

ORISSA ELECTRICITY REGULATORY COMM. & ORS.

B (Civil Appeal No. 5479 of 2013)

APRIL 25, 2014

**[SURINDER SINGH NIJJAR AND A. K. SIKRI, JJ.]**

C *Electricity Act, 2003 – Enactment of – Object – Payment of Cross Subsidy Surcharge (CSS) to Distribution company – Rationale – Discussed – Held: CSS is the charge payable by a consumer who opts to avail power supply through open access from someone other than Distribution licensee in* D *whose area it is situated – Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee.*

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*Electricity Act, 2003 – s.14 – Appellant, a Developer in the SEZ area having its unit in the SEZ, not drawing or utilizing any electricity from the Distribution Licensee viz. WESCO for its unit – State Electricity Regulatory Commission rejected* F *the Power Purchase Agreement (PPA) entered into by the appellant with M/s. Sterlite Energy and directed the appellant to pay Cross Subsidy Surcharge (CSS) to WESCO holding the appellant to be a 'consumer' – Validity – Whether developer of a notified SEZ, who has been deemed by law to* G *be a licensee for distribution of electricity, is required to, once again, apply to the Electricity Regulatory Commission for grant of a licence or the deeming fiction carved out in s.14 of the Electricity Act automatically dispenses with this requirement and ipso facto makes such SEZ developer a*

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*distribution licensee – Held: No doubt by virtue of the status of a developer in the SEZ area, the appellant was also treated as deemed Distribution Licensee – However with this, it only got exemption from specifically applying for licence u/s.14 of the Electricity Act – In order to avail further benefits under the Act, the appellant was also required to show that it was in fact having distribution system and had number of consumers to whom it was supplying the electricity – That was not the case here – Notification dated 03.03.2010 issued u/s.49(1) of the SEZ Act providing for the "Developer" of SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and did not apply to a Developer like appellant who had established the SEZ only for itself – Appellant to make payment of CSS to WESCO – Special Economic Zone Act, 2005 – s.2(g)(j)(za)(zc), ss.3, 4, 11; 12, 13, 15 and 49.*

**Dismissing the appeal, the Court**

**HELD:1. In the present case, no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Electricity Act, 2003. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. The object and scheme of SEZ Act envisages several units being set up in a SEZ area. This is evident from a collective reading of the various provisions of the Special Economic Zone Act, 2005 (SEZ Act) viz. Section 2(g)(j)(za)(zc), Section 3, 4, 11, 12, 13 and 15. The**

**Notification dated 03.03.2010 issued under Section 49(1) of the SEZ Act providing for the "Developer" of SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself. Having regard to the factual and legal aspects and keeping in mind the purpose for which CSS is payable, on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. [Paras 43, 44] [458-F-H; 459-A-E]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5479 of 2013.

From the Judgment and Order dated 03.05.2013 of the Appellate Tribunal for Electricity in Appeal No. 206 of 2012.

Shyam Diwan, Sr. Adv., Ms. Ranjana Roy Gawai, Abhishek K. Rao, Ms. Divya Roy, Ms. Vasudha Sen, Advs. for the Appellant.

Parag P. Tripathi, Sr. Adv., Sibo Sankar Mishra, Adbhut Pathak, Buddy A. Ranganadhan, Hasan Murtaza, Aditya Panda, Shiv Kumar Suri, Raj Kumar Mehta, Ms. Ishita C. Dasgupta, Advs. for the Respondents.

The Judgment of the Court was delivered by

**A. K. SIKRI, J.** 1. Instant is a statutory Appeal which is filed by the Appellant under Section 125 of the Electricity Act, 2003 (hereinafter referred to as 'the Act'). This Appeal arises out of the judgment and order dated 3rd May, 2013 passed by Appellate Tribunal for Electricity.

2. By the aforesaid judgment, the Appellate Tribunal has affirmed the orders of the Odisha Electricity Regulatory Commission (hereinafter referred to as the 'State Commission'). The essence of these orders is that even when the Appellant is a "Deemed Distribution Licensee" for the purpose of Electricity Act, it is still liable to pay Cross Subsidy Surcharge (CSS) to the Respondent No.8 viz. WESCO which is a Distribution Licensee for the area in question.

3. To put it in nutshell, the case of the Appellant is that it has its unit in Special Economic Zone (SEZ) and it is a Developer in the said SEZ area. It is not drawing or utilizing any electricity from the Distribution Licensee viz. WESCO for its unit namely VALE-SEZ. In fact, the Appellant had entered into a Power Purchase Agreement (PPA) dated 18th August, 2011 with M/s. Sterlite Energy Ltd. The Appellant had filed application for getting approval of the said PPA. However the Odisha State Commission, instead of granting the approval, rejected the said PPA and directed the Appellant to pay CSS to WESCO holding the Appellant to be a 'Consumer'.

4. As per the Appellant, as it is a deemed distribution licensee for the purpose of Electricity Act by virtue of it being a 'Developer' because of the reason that its unit is in SEZ area and such a recognition is given to the Appellant statutorily under the provisions of Special Economic Zone Act, 2005 (hereinafter referred to as SEZ Act). Therefore, the question of payment of CSS to the Distribution Licensee does not arise. It is also the case of the Appellant that, in any case, since no electricity is being drawn from the open access network of WESCO, there is no question of making payment of cross subsidy surcharge. This is the brief description of the dispute raised by the Appellant and in order to understand the gravamen of this dispute, we take a tour of the factual roadmap.

A **The Facts:**

5. These facts are in narrow compass and have been narrated succinctly by the Appellate Tribunal in its order. As there is no dispute about the correctness of these facts, we
B intend to traverse the same therefrom. The Appellant is engaged in the business of production and export of aluminium. The Appellant has set up a 1.25 MTPA capacity aluminium smelter project in a sector specific Special Economic Zone. After getting all necessary approvals for the development of
C SEZ for manufacture of export of aluminium the appellant set up the aforesaid plant. These approvals include the approval with captive power plant as well. It is also a matter of record that on 27th February, 2009 the Ministry of Commerce and Industry, Government of India issued a notification declaring
D the unit of the Appellant to be SEZ. It was followed by Notification dated 3rd March, 2010 under Section 49(1) of the SEZ Act. By the said notification, the Central Government of promoting the objects of Special Economic Zone and in terms of powers delegated under the Special Economic Zone Act,
E introduced a proviso to the provisions of Section 14(b) of the Electricity Act, 2003. By the said introduction, a developer of a Special Economic Zone was declared as a deemed licensee authorized to distribute electricity within the Special Economic zone area. The effect of the aforesaid Notification under
F section 14(b) of the Electricity Act is that the Appellant became a deemed Distribution Licensee.

6. It would be pertinent to mention at this stage that the units of the Appellant are divided into two broad areas. One is
G Domestic Tariff Area (DTA) where it has established one of its unit. Other unit is VAL-SEZ which is in SEZ (hereinafter referred to as VAL-SEZ Unit). In so far as its unit in DTA is concerned, it draws power from open access and duly phased pays cross subsidy surcharge for this area. There is no dispute
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to this extent. In the present Appeal, we are concerned with VAL-SEZ which is in SEZ Area where the Appellant is stated as deemed Distribution Licensee for the purpose of Electricity Act by virtue of Notification under Section 14(b) of the Electricity Act.

7. For supply of energy to this unit in SEZ Area (VAL-2), the Appellant entered into a PPA on 18th August, 2011 with Sterlite Energy Ltd. which was arrayed as Respondent No.4 in the Appeal. However during the pendency of the Appeal under the scheme of merger approved by the High Court, Sterlite stood merged with the Appellant itself and because of this reason the Respondent No.4 (hereinafter referred to as 'Sterlite') has been deleted from the array of parties at the instance of the Appellant.

8. Since the supply of power by a Generating Company to Distribution Company is regulated under the provisions of Electricity Act, 2003, the Appellant on 30th August, 2011 filed a petition before the State Commission for approval of the said PPA. Subsequently, the State Commission at the preliminary hearing sought some clarifications with regard to the factual aspects. The Appellant, thereafter filed two amendment petitions. One was on 8th November, 2011 and another was on 27th March, 2012 seeking for the additional prayer requesting the State Commission to grant deemed distribution licence in favour of the Appellant on the strength of the Government of India notification issued dated 3rd March, 2010 with effect from the date of the said notification.

9. As already pointed out above, the State Commission rejected this application for grant of deemed Distribution Licensee and subsequently rejected the prayer of the Appellant for approval of PPA also. The State Commission, while doing so held as under:

A "a. Since the Application for grant of Distribution License was rejected, State Commission did not consider it necessary to go into the issues relating to the PPA.

b. Consequent upon the rejection of the Application for
B grant of Distribution License, State Commission held that VAL is to be treated as a consumer of WESCO.

c. As a result, VAL has to pay cross subsidy surcharge to WESCO for open access drawal of power from SEL."

C 10. This Order of the State Commission has been upheld by the Appellate Tribunal in Appeal filed by the Appellant.

**Question of Law:**

11. In the present Appeal, the Appellant has raised
D following question of law which the Appellant recall this Court to determine an answer:

"Whether a developer of a notified Special Economic Zone, who has been deemed by law to be a licensee for
E distribution of electricity, is required to, once again, apply to Electricity Regulatory Commission under the Electricity Act for grant of a licence or the deeming fiction carved out in Section 14 of the Electricity Act automatically dispenses with this requirement and ipso facto makes
F such SEZ developer a distribution licensee."

**The Arguments: Appellant**

12. Mr. Shyam Diwan, Learned Senior Counsel
G appearing for the Appellant, with full of passion and vehemence argued that all the three findings of the State Commission, which are upheld by the Appellate Tribunal, are *ex facie* untenable in law. Questioning the first aspect of the order of the authorities below refusing to register the said PPA, his
H plea was that since the PPA is a contract between the two

parties, the State Commission could not have refused to consider the same. Such outright refusal amounts to failure to discharge the function enjoined by the Parliament on the State Commission under Section 86(b) of the Act. Under this provision, the State Commission has to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating company. Thus it was duty bound to approve a PPA subject to the terms and conditions which it deems fit in law and only when the parties fail to comply with those terms of the license that such license can be revoked. The failure to not look into a PPA altogether amounts to non exercise of jurisdiction.

13. In so far as the opinion of the Appellate Authority that the Appellant is to be treated as a consumer of WESCO is concerned, Mr. Diwan placed heavy reliance on the proviso to Section 14(b) of the Act as per which developer of the notified SEZ itself becomes deemed Licensee from the date of such notification. He thus argued that when there was a specific notification under that proviso declaring the Appellant as a developer, the Appellant was a deemed Licensee and therefore there could not have any requirement for the Appellant to obtain the license under the Electricity Act. As a fortiorari, such a developer cannot be treated as a 'consumer'. Therefore, the authorities below could not, in law, hold the Appellant to be a consumer of WESCO.

In the alternative, it was argued that in any case, the Appellant was purchasing the electricity from Sterlite under the PPA and, therefore, by no stretch of imagination, it could be treated as consumer of WESCO. To buttress this submission, Mr. Diwan referred to the provisions of Section 2(15) of the Electricity Act which defines the term "consumer" and submitted that in order to treat the Appellant as a consumer, it was

A necessary to establish that it is supplied with the electricity by such "Licensee" or the "government" or "any other person engaged in the business of supplying electricity to the public".

14. In so far as the third finding holding the Appellant liable
B to pay CSS to WESCO for open access drawal of power from SEZ is concerned, the submission of Mr. Diwan was that there was no occasion for the State Commission (or for that matter Appellate Tribunal) to go into the aspect of CSS in an application filed by the Appellant initially for approval of PPA
C only which was later amended on the directions of the State Commission to include a prayer to the extent that the Appellant should be recognized as a Distribution Licensee under Section 14(b) of the Electricity Act. It was submitted that even in the amended application there was no issue of CSS and the
D authorities below exceeded their jurisdiction in going into this issue and giving such a direction.

Without prejudice to the aforesaid preliminary submission, Mr. Diwan argued that even on merits that such a
E decision was palpably contrary to law. In this behalf his submission was that since under Section 42 of the Electricity Act, 2003, cross subsidy surcharge is payable to the Distribution Licensee of the area of supply only when the "distribution system" of such Distribution Licensee is "used"
F for supply of electricity. Therefore, without a clear finding of fact on appreciation of evidence, that the supply-line of SEL-VAL is connected to WESCO and that WESCO's "distribution system" is "used" for supply of electricity, State Commission could not have held that VAL has to pay cross subsidy
G surcharge to WESCO for open access drawal of power from SEL.

In this context, the attention of the Court was drawn to the National Tariff Policy dated 6th January, 2014, Clause 8.5,
H Orissa Electricity Regulatory Commission (Terms and

Conditions for Open access Charges) Regulations, 2005 (Clause 13(1)(ii)] and to Orissa Electricity Regulatory Commission (Determination of Open access Charges) Regulations, 2006 [Clause 2(j). It was submitted that from a bare perusal of the relevant Clauses of these Regulations, it is clear that CSS can be levied on "open access customers" i.e. "a consumer who has availed of or intends to avail of open access".

In addition to the aforesaid submission, questioning the correctness of the each of the findings of the State Commission and the Appellate Tribunal, Mr. Diwan emphasized that it is to be kept in mind in deciding the issue that VAL SEZ is a Deemed Distribution Licensee by operation of law and it need not be a Distribution Licensee within the meaning of Section 2(17) of the Electricity Act, 2003. He admitted that a contention of the Respondents that VAL SEZ does not qualify as a Distribution Licensee within the meaning of Section 2(17) of the Electricity Act, 2003 is misplaced since accepting such contention would defeat the very purpose of the deeming fiction created by the statute. The deeming fiction would have no relevance if the reality which the statute creates by way of fiction already existed. He argued that none of the five provisos to Section 14 of the Electricity Act, 2003 require the deemed distribution licensees mentioned therein to obtain a license under the Electricity Act. The Developer of a notified SEZ is a special entity under a special legislation and the definition of "consumer" or "distribution licensee" etc. as defined under the Electricity Act, 2003 cannot be made applicable.

It is crucial point that the SEZ Act conceptually envisages "Developer" of an SEZ distinct from the "Zone" itself as also distinct from "Unit". Developer is defined under Section 2(g) of the SEZ Act whereas Special Economic Zone is defined under Section (za) of the SEZ Act and Unit is defined under Section 2(zc) of the SEZ Act. Thus the Appellant in its capacity

A as the Developer of the SEZ has the duty to develop, operate and maintain the Zone. Failing the reconciliation between the provisions of the Electricity Act, 2003 and the SEZ Act, the provisions, objects and purpose of the SEZ Act will prevail (Section 51 of the SEZ Act). The object and purpose of the B SEZ Act, *inter alia*, is to provide an internationally for export production, expeditious and single window approval mechanism and a package of incentives to attract foreign and domestic investments for promoting export-led growth.

C **The Arguments: Respondents**

15. Mr. R.K. Mehta, Learned Counsel appearing on behalf of GRIDCO Ltd. refuted the aforesaid submissions of Mr. Diwan. His main argument was that even though the D Appellant was possessed of notification issued under Proviso to Section 14(b) of the Electricity Act, which treats the Appellant as of Deemed Distribution Licensee, the concept of Distribution Licensee under the Electricity Act pre-supposes supply/distribution of power. An entity which utilizes the entire E quantum of electricity for its own consumption and does not have any other consumers cannot be deemed to be a Distribution Licensee, even by a legal fiction. In support of this submission, the Learned Counsel referred to the definitions of "consumer" in Section 2(15), "Distribution Licensee" as F contained in Section 2(17) and "supply" in relation to electricity to the consumers in Section 2(70). He also referred to Section 42 of the Act which spells out the duties of Distribution Licensee and open access. His submission, thus, was that by virtue of the legal fiction created by the Notification dated 3rd March, G 2010, a person who distributes Electricity can be deemed to be a distribution licensee even though he does not have a distribution license – But the legal fiction cannot go further and make a person who does not distribute electricity as a distribution licensee.

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16. He also argued that if a 'Distribution Licensee' is equated with 'Consumer' the provisions of Section 2(15), 2(17), 42 and 43 of the Electricity Act, 2003 would be rendered otiose and nugatory. The mandate of Section 42 and 43 of the Electricity Act, 2003 cannot be negated by exercise of power under Section 49(1)(b) of the SEZ Act. It was further submitted that only a proviso has been added to Section 14(b) by Notification dated 3rd March, 2010 qua the Appellant. There is no stipulation in the Notification that other provisions of the Electricity Act will not apply to the Developer of a SEZ.

17. Mr. Mehta called for harmonious construction of the provisions of SEZ and the Electricity Act to support his submission that the legal fiction of deemed Distribution Licensee cannot be taken to the level of absurdity and made applicable even when it does not involve distribution/supply of power at all. He further pointed out the object and scheme of SEZ Act envisages several units being set up in a SEZ. This is evident from a collective reading of the various provisions of the SEZ Act viz. Section 2(g)(j)(za)(zc), Section 3, 4, 11, 12, 13 and 15. There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the appellant may be rare. The Notification dated 3rd March, 2010 providing for the "Developer" of an SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself.

18. Mr. Parag P. Tripathi, Learned Senior Counsel appeared with Mr. Shiv Kumar Suri, Advocate on behalf of WESCO. His submission was that in the facts of present case WESCO was entitled to CSS on the electricity purchase by

A the Appellant from Sterlite which was consumed wholly and completely by the Appellant itself. It was pointed out that surcharge was meant to compensate a Distribution Licensing from the loss of cross subsidy surcharge that such distribution licensee would suffer by reason of the consumer taking supply B from someone other than such Distribution Licensee, the moment it is found that the Appellant is covered by the Definition of a consumer within the meaning of Section 2(15) of the Act. He argued that in such a situation the mere fact that the Appellants claims to be a deemed Distribution Licensee is of C no consequence at all since the entire power purchase by the Appellant is for its own use or consumer and not for the purpose of Distribution. The Appellant, therefore, could be categorized as a consumer as regards its own consumption even if it is a deemed Licensee. On merits, it was submitted that D Transmission line between the Generating Company (Sterlite) and the Appellant is not a Dedicated Transmission Line, with an attempt to justify it giving various reasons which we shall advert to all a later stage.

E 19. It was also argued that as per Regulation 27 of the OERC (Conditions of supply Code) Regulations 2004, the "service line" shall be the property of the licensee unless otherwise specified in writing. Hence the line between the grid sub-station and the Appellant's SEZ qualify as the property F of WESCO and therefore any use of such line could only be by Open Access under the EA and in any event CSS would be payable. Reference was also made to the Rule 4 of the Electricity Rules, 2005, as per which aforesaid line would be deemed as part of the Distribution System of WESCO. On G that basis submission of Mr. Tripathi was that from any angle the matter is to be looked into the orders of the Appellate Tribunal was perfectly justified.

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**Our Analysis:**

20. From the aforesaid narration of events as well as arguments of the counsel for the parties, it has become manifest the primary dispute relates to the CSS which the Appellant is called upon to pay to WESCO. As per the Appellant no such CSS is payable and the PPA which was submitted by the Appellant to the State Commission for approval, should have been accorded due approval by the State Commission.

**(1) Special Feature of the 2003 Act**

21. Before adverting to this central issue, it would be apt to understand conceptually the rationale of payment of such CSS to the Distribution Company, under the scheme of the Electricity Act. The first enactment to govern electricity supply in India was passed in the year 1910 viz. the Electricity Act, 1910. This Act envisaged growth of electricity industry through private licences. It created the legal framework for laying down of wires and other works relating to the supply of electricity. Thereafter, the Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The Board assigned the responsibility of arranging the supply of electricity in the State. It was experienced that over a period of time the performance of State Electricity Boards had deteriorated on account of various factors. Main failure on the part of these Electricity Boards was to take decision on tariffs in independent manner and cross subsidies had reached untenable levels. To address this issue and also to distance governance from determination of tariffs, the Electricity Regulation Commission Act was enacted in the year 1998. This Act created regulatory mechanism. Within few years, it was felt that the three Acts of 1910, 1948 and 1998 which were operating in the field needed to be brought in a new self contained comprehensive

A legislation with the policy of encouraging private sector participation in generation, transmission and distribution and also the objectives of distancing the regulatory responsibilities from the Government and giving it to the Regulatory Commissions. With these objectives in mind the Electricity
B Act, 2003 has been enacted. Significant addition is the provisions for newer concepts like power trading and open access. Various features of the 2003 Act which are outlined in the statement of objects and reasons to this Act. Notably, generation is being delicensed and captive generation is being
C freely permitted. The Act makes provision for private transmission licensees. It now provides open access in transmission from the outset.

**(2) Open Access and CSS**

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22. Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression "open access" has been defined in the Act to mean
E "the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission". The Act mandates
F that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the
G transmission systems without any discrimination. This would facilitate sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.

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23. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.

24. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.

**(3) CSS: Its Rationale**

25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation

A to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts – one, on its ability to cross-subsidise
B the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.
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26. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the
D consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some
E other source.

27. With this open access policy, the consumer is given a choice to take electricity from any Distribution Licensee. However, at the same time the Act makes provision of
F surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for:

G (a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and

(b) obligation to supply.

28. Therefore, in the aforesaid circumstances though
H CSS is payable by the Consumer to the Distribution Licensee

of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiorari, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay Cross Subsidy Surcharge under the Act. Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee.

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**(4) Application of the CSS Principle**

29. In the present case, admittedly, the Appellant (which happens to be the operator of an SEZ) is situate within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite (an Independent Power Producer ("IPP") (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the Cross Subsidy that WESCO would

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A otherwise have got from it if WESCO were to supply electricity to the Appellant. In order to be liable to pay cross subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not
B necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition.

30. Having regard to the aforesaid scheme, in normal
C course when the Appellant has entered to PPA with Sterlite, another Electricity Generating Company and is purchasing electricity from the said Company it is liable to pay CSS to the WESCO. Admittedly under the PPA, the Appellant is purchasing his electricity from the said generating station and
D it is consumed by the single integrated unit of the Appellant. The Appellant therefore, qualifies to be a "consumer" under Section 2(15) of the Electricity Act. It is also not in dispute that the unit of the Appellant is in the area which is covered by the licenses granted to WESCO as distribution licenses.

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31. Notwithstanding the above, because of the reason that the area where the unit of Val-SEZ unit of the Appellant is situate is a SEZ area and the Appellant is declared as developer for that area under the SEZ Act, it is the contention
F of the Appellant that in such a scenario it is not liable to pay any CSS to the WESCO. This submission flows from the fact that there is a notification issued in this behalf under proviso to Section 49 of the SEZ Act and the Appellant itself is treated as a deemed Distribution Licensee as per the provisions of
G Section 14 of the Electricity Act. On that basis, detailed submissions are made by the Appellant with an attempt to show that it cannot be treated as a "consumer" under the Electricity Act when the Appellant itself is deemed to be a licensee. It is further argued that since the supply line of VAL-SEZ is not

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connected to WESCO and it is getting the electricity directly from Sterlite under the PPA, there is no question of payment of CSS to WESCO at all. Argument of the WESCO that the lines owned by the VAL-SEZ are only "Transmission Lines" under Section 2 of the Electricity Act and not "dedicated Transmission Lines" because of the reason that the duty of the Generator to establish and maintain dedicated transmission lines, is sought to be refuted by arguing that even as per Section 2(72) of the Act Transmission Lines are part of the Distribution System of Licensing". It is argued that it is not even the case of WESCO that the supply line of SEL-VAL is a part of WESCO Distribution System.

**(5) Factual Aspect of the Electricity Supply to the Appellant:**

32. In order to appreciate these arguments, it would appropriate to first advert to the factual aspect of the supply of electricity by Sterlite to the Appellant under the PPA. No doubt the Appellant is getting direct supply of electricity from Sterlite. However, question is as to whether, in the process, it is using dedicated transmission lines of WESCO. We may point out at the outset that such an argument was not even raised before the two authorities below. Primarily it was argued that having acquired the status of deemed distribution licensee under the Electricity Act, it cannot be treated as a "consumer" of other distribution licensee, viz. the WESCO. Even the question of law which is proposed and framed in the grounds of appeal and is already reproduced, does not raise this issue, which is even otherwise factual. Notwithstanding, the Learned Counsel for the WESCO has argued that the transmission line between the Sterlite and the Appellant is not a dedicated transmission line for the following reasons:

(a) Under Section 2(16) of the Electricity Act, 2003, a "Dedicated Transmission Line" is an electric supply line for

A "point to point" transmission, which are required for the purpose of connecting electric line or electric plan of a generating station to "any transmission line", or "sub-station" or "generating station" or the "load centre"; "as the case may be".

B (b) The Transmission Line in question commences from the Generator (Sterlite) and connects to the 400 KV Sub-Station at Sterlite end at Jharsuguda. It does not connect directly to the "Load Centre" which is the Appellant.

C (c) The 400 KV Busbar at the Generator (Sterlite) end is connected to a 200 KV Busbnar at VAL-CGP caters to the VAL - Smelter 1 in the Domestic Tariff Area.

(d) The said 400/200 KV sub-station is also connected to the OPTCL Grid (State Transmission Utility) at Budhipadar D through 220 KV Bus at VAL – CGP end for the purpose of evacuation of Sterlite power to GRIDCO as well as drawal of power by VAL – Smelter – 1.

(e) The said 400/220 kv sub-station is also connected E to Power Grid Corporation of India (PGCIL) line from which 2 nos of 400 KV Lines emanate for Interstate sale of its Sterlite power through PGCIL Grid.

(f) The said 400/220 kv sub-station which is connected F through 5 Km of 220 KV line to the 220 KV Bus of switching station at VAL – CGP end. There are 4 no's of 200 KV transmission lines branching out from the said 220 KV switching station to carry power to VAL Smelter-1 Unit of the Appellant which is within the area of the Distribution Licensee G (WESCO).

(g) The said 400/220 kv sub-station also has 2 nos of 33 KV Tertiary transmission lines from 100/220/33 KV Transformer supplying electricity to Vedanta Township.

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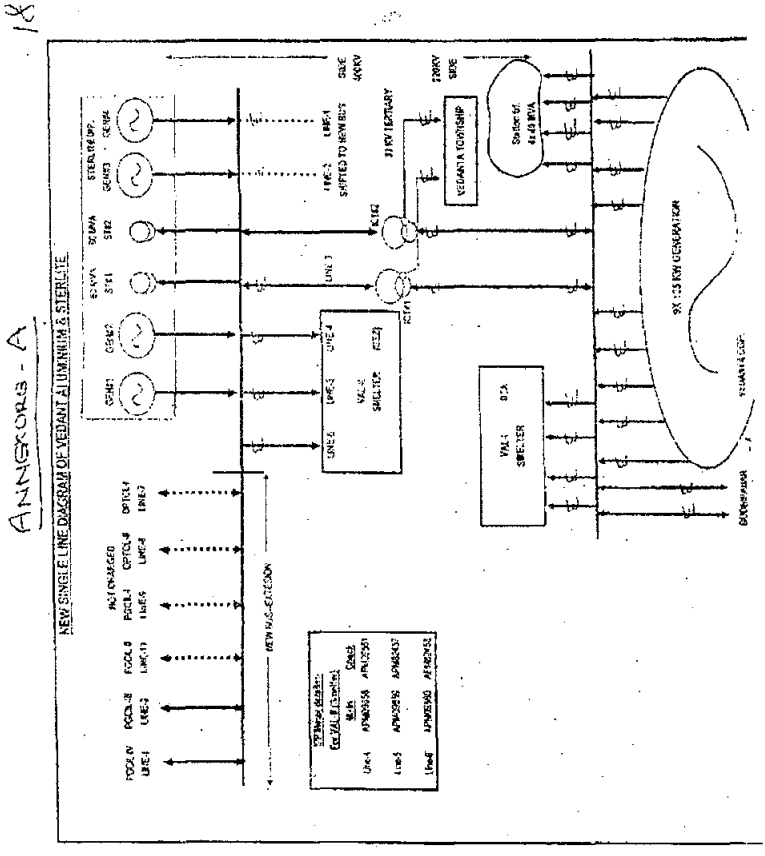
(h) Three such 400 KV Transmission lines emanating from the 400 KV Busbar at the Sterlite-IPP (Generator end) also happens to Supply power from the sub-station to the Appellant's load centre (VAL-Smelter-2) in the SEZ area.

(i) Hence, the only part of the "dedicated" transmission line, if at all, is from the Generating Station 9Sterlite – IPP) to such 400 KV Busbar of the 400/220 KV Grid Sub-station.

(j) The transmission line that connects the sub-station to the load centre of the Appellant is only a "transmission line" under Section 2(72) of the EP 2003.

33. Following diagram is placed by WESCO to demonstrate this:



34. Though the Appellant endeavoured to counter this position and has given its own diagram that does not lodge the aforesaid factual aspect. Therefore, prima facie we accept the position as explained by the WESCO. Thus we feel that notwithstanding that supply line of SEL-VAL is transmission line, but not "dedicated transmission line". The Appellant cannot run away from the fact that under Section 2(10) of the Electricity Act, it is the duty of the Generating Company (i.e. WESCO) in this case to establish, operate and maintain dedicated transmission lines. Since it is duty bound to establish, operate and maintain these dedicated lines by making huge investment, in order to get into the consumption in the area in question the very necessity of payment of CSS arises by the consumer of Electricity covered by the definition of "consumer" under Section 2(15) of the Act but is not getting supply of that Generator and someone else. We have also to keep in mind the provision of Regulation 27 of OERC (Conditions of Supply Code) Regulation 2004. As per this Regulation the "service line" shall be the property of the licensee unless otherwise specified in writing. This clause reads as under:

> "27. The entire service line, notwithstanding that whole or portion thereof has been paid for by the consumer, shall be the property of the licensee and shall be maintained by the licensee who shall always have the right to use it for the supply of energy to any other person unless the line has been provided for the exclusive use of the consumer through any arrangement agreed to in writing."

35. Further as per Rule 4 of the Electricity Rule, 2005 the aforesaid line would be deemed to be part of Distribution System of WESCO:

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

"Distribution system" is defined in Section 2(19) of the Act to mean:-

"(19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers:"

"Transmission Line" is defined in Section 2(72) to mean:-

(72) "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works...."

**(6) Appellant deemed distribution Licensee: Its effect**

36. It is now to be seen as to whether the fact that the Appellant is a Developer in SEZ, armed with Notification dated 3rd March, 2010 issued under Proviso to Section 49 of the SEZ Act and it deemed distribution licensee as per Section

A 14 of the Electricity Act, this would take away the Appellant from the clutches of CSS liability?

37. In order to appreciate this argument let us first refer to the certain statutory provisions:

B Section 49 of the Special Economic Zone Act provides as under:

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

C

(1) the Central Government may, by notification, direct that any of the provision of this Act (other than Section 54 and 56) or any other Central Act or any rules or regulations made thereunder or any notification or Order

D issued or direction given thereunder (other than the provisions relating to making of the rules or regulations) specified in the notification-

(a) shall not apply to a Special Economic Zone or a class

E of Special Economic Zones or all Special Economic Zones: or

(b) shall apply to a Special Economic Zone or a class of Special Economic Zones or all Specials Economic Zones only with such exceptions, modifications and

F adaptation, as may be specified in the notifications."

38. Likewise Section 14 of the Electricity Act reads as under:

"14. Grant of License

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The Appropriate Commission may, on application made to it under section 15, grant any person licence to any person –

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(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 which may be specified in the licence:

Provided that any person engaged in the business of transmission or supply or 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 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:

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

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:

Provided also that the Damodar Valley Corporation, established under sub-section(1) of section 3 of the Damodar Valley Corporation Act, 1948, shall be deemed

A 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:

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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 C be deemed to be a licensee under this Act.

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 D same area, subject to the conditions that the applicant for grant of licence 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 E the additional requirements (including the capital adequacy, credit worthiness, or code of conduct) as may be prescribed by the Central Government, and no such applicant who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground F that there already exists a licensee in the same are for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a G 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:

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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:

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

39. We would also like to take note of Notification dated 3rd March, 2010 issued in the case of Appellant. It makes the following reading:

"NOTIFICATION

S.O. No.528(E). In exercise of the powers conferred by clause(b) of sub-section (1) of section 49 of the Special Economic zones Act, 2005 (28 of 2005), the Central Government hereby notifies that the provisions of clause (b) of section 14 of the Electricity Act, 2003 (36 of 2003), shall apply to all Special Economic Zones notified under sub-section (1) of section 4 of the Special Economic Zones Act, 2005, subject to the following modification, namely:-

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

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

40. The reading of Section 49 of SEZ Act would reveal that the Central Government has got the authority to direct that

A any of the provisions of a Central Act and rules and regulations made thereunder would not apply or to declare that some of the provisions of the Central Acts shall apply with exceptions, modifications and adaptation to the Special Economic Zone. So, under the scheme of Special Economic Zone Act, Central
B Government has to first notify as to what extent the provision of the other Acts are to be made applicable or applicable with modification or not applicable for the Special Economic Zone area. It is in furtherance thereto, the Government of India, Ministry of Commerce and Industry through its notification dated
C 21st March, 2012, with regard to power generation in Special Economic Zone, has declared that all the provisions of the Electricity Act, 2003 and Electricity Rule, 2005 shall be applicable to the generation, transmission and distribution of
D power, whether stand alone or captive power. This notification would clarify that there is no inconsistency between Special Economic Zone Act, 2005 and Electricity Act, 2003.

41. No doubt vide Notification dated 3rd March, 2010 Central Government has added an additional proviso to Clause
E (b) of Section 14 of the Electricity Act viz. the Appellant shall be deemed to be licensee for the purpose of the said clause w.e.f. the date of notification of such SEZ. It is on this basis, the argument of the Appellant is that as it is already a deemed Distribution Licensee it need not apply for this license to the
F said Commission before entering into the PPA and the State Government is bound to grant the License. This contention is negated by the Appellate Tribunal on two grounds which are as follows:

G (i) There has to be a harmonious construction of SEZ Act and Electricity Act to give effect to the provisions of both the acts so long as they are not consistent with each other in the opinion of the Tribunal. The provisions of Section 51 of SEZ Act, 2005 are to be considered along with the provisions
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of Section 49 of the said Act. Accordingly, in view of the provision of the SEZ Act, 2005 and consequent notification by the Ministry of Commerce and Industry, the deemed distribution licensee status as claimed by the Appellant should also be tested through other provisions of the Electricity Act, 2003 and Electricity Rules, 2005, for certifying its validity and converting it into a formal distribution licensee. In fact, the Appellant has submitted to the jurisdiction of the State Commission, by filing a petition before the State Commission seeking for approval of the PPA and also for grant of distribution licence. The Appellate Tribunal, thus queried as to how could the Appellant now question the jurisdiction?

(ii) The Appellate Tribunal pointed out that there are none provisos to Section 14(b) of the Electricity Act and another is added in respect of the Appellant vide Notification dated 3rd March, 2010. A reading of these provisos would indicate that some of them confer status of deemed distribution licensee on certain specified entities who are not required to take separate licence from the State Commission under this Act whereas some other provisos merely declare the party as deemed licensee and nothing specified as to whether they are required to obtain the licence or not. However when it is specially provided in proviso 4 and proviso 8 and 2 that the Damodar Valley Corporation and State Government are not required to obtain licence, and other provisos do not confer such privilege, they would be required to obtain licence.

42. Further discussion on this aspect by the Appellate Tribunal is as under:

> "42. Keeping this in mind, the statute makers by the notification dated 3.03.2010 have inserted the additional proviso to Section 14(b) of the Electricity Act. Admittedly, the development and operation of the SEZ are two

distinct activities. Thus, the jurisdiction of the State Commission to scruitinise the deemed distribution status of the Appellant is well established in view of the Section 49(1) of SEZ, Act, 2005 and the notification of the Central Government dated 21.03.2012. Therefore, the contention of the Appellant that the State Commission dealt with the matter relating to the grant of distribution licence by going beyond its jurisdiction is misplaced.

43. It is noticed that the Ministry of Commerce and Industry (Department of SEZ Section) has accorded SEZ status to the Appellant for development and operation and maintenance of sector specific Special Economic Zone for manufacture and export of aluminium on the condition that the Appellant should establish captive generating plant as stipulated in the approval letter of Ministry of Commerce and Industry but it is pointed out the still the plant has not been established for various reasons. If Captive generating plant of 1215 MW had been established as per the condition inside the SEZ area, the question of power purchase from Sterlite Energy Limited under the pretext of distribution licensee status would not have arisen. That apart, the State Commission has framed Orissa Electricity Regulatory Commission (conduct of business) Regulation, 2004 under the powers conferred under Section 181 of the Electricity Act, 2003. The distribution of electricity Licence (Additional requirement of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005 framed by the Central Government also would apply to the Appellant for distribution licence in addition to the requirements of State Commission's Regulations.

45. Section 174 of the Electricity Act provides that the provisions of the Electricity Act shall have to overriding

effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than Electricity Act. That apart, Section 175 also provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force.

47. The perusal of the notification dated 03.03.2010 would make it evident that the legislation's intention for declaring the developer in SEZ area as deemed distribution licence, is confined only to clause-b of Section 14 of Electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity. The said notification has not curtailed the power of State Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of deemed distribution licence by the State Commission. Therefore, the State Commission rightly acted upon those provisions. As a matter of fact, by the said amendment by inserting another proviso to Section 14(b), the context has not been changed as claimed by the Appellant.

49. As correctly indicated by the State Commission, the definition of term "distribution licensee" as enumerated under Section 2(17) of Electricity Act, 2003, emphasizes upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers. Considering the definition of 'supply' in Section 2(70), the supply here means sale of electricity to consumers. By merely being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of distribution licensee to any person. The purpose of such

establishment is for supply of power to consumers. Mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence at all since admittedly, the entire power purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.

50. An entity which utilizes the entire quantum of electricity for its own consumption and does not have any other consumers, cannot, by such a notification, be deemed to be distribution licensee, even by a legal fiction. By virtue of the legal fiction created by the notification dated 3.03.2010, the Developer of SEZ notified under the SEZ Act, who distributes electricity can be deemed to be a distribution licensee. Thus, this legal fiction cannot go further and make a person who does not distribute electricity to the consumers as to distribution licensee. Therefore there is no merit in the contention of the Appellant.

43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of SEZ Act which envisages several units being set up in a SEZ area. This is

evident from a collective reading of the various provisions of the SEZ Act viz. Section 2(g)(j)(za)(zc), Section 3, 4, 11, 12, 13 and 15. There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the Appellant may be rare. The Notification dated 03.03.2010 providing for the "Developer" of SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself.

44. Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this Appeal which is accordingly dismissed.

Bibhuti Bhushan Bose

Appeal dismissed.