

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Bhanu Bhushan, Member**
2. **Shri R. Krishnamoorthy, Member**

Petition No.8/2008

In the matter of

Application for grant of Category 'D' inter-State trading licence.

And in the matter of

Maharashtra State Electric Power Trading Co.Pvt. Ltd ... **Applicant**

The following were present:

1. Shri Vinayak Rao, Dir(F), MSEPTCL
2. Shri P.V. Page, Director, MSEPTCL

**ORDER
(DATE OF HEARING : 27.5.2008)**

Maharashtra State Electric Power Trading Company Pvt. Limited, the applicant, has made this application for grant of Category 'D' licence for inter-State trading in electricity.

2. The applicant was incorporated as a private limited company on 29.11.2007. Its authorised share capital is Rs.20 crore, with paid up share capital of Rs.1 lakh subscribed by MSEB Holding Company Limited, a Government company created consequent to unbundling of Maharashtra State Electricity Board. As per the applicant's Memorandum of Association, its main object is to carry on the business of purchase and sale of all forms of electrical power, both conventional and non-conventional, and also to supply, import and export or otherwise deal in all forms of electrical energy. There are three Directors on the Board, with Shri Subrat Ratho, IAS

as CEO, Shri Vinayak Rao as Director(Fin) and an independent Director (Shri P.V. Page).

3. The applicant has stated that its Directors have experience in power sector for the last two to three years. Shri Subrat Ratho is holding the position of Managing Director in other subsidiary companies of MSEB Holding Company Limited viz. Maharashtra State Electricity Transmission Company Limited, (hereinafter referred to as "the transmission company"), Maharashtra State Electricity Distribution Company Limited and Maharashtra State Power Generation Company Limited. Shri Vinayak Rao who is appointed as Director (Finance) of the applicant company, was, prior to his present assignment, Director (Finance) in the three other above named subsidiary companies of MSEB Holding Company Limited.

4. In the petition, the applicant submitted that C & AG was approached to appoint the auditors in accordance with Section 619 of the Companies Act to certify its net worth and prepare special balance sheet. Subsequently, the applicant vide its letter dated 27.3.2008 produced a certificate from M/s. R.B.Jain & Associates, Chartered Accountants which shows that its net worth is Rs.10.03 crore as on 12.2.2008.

5. The applicant published the notices in Free Press Journal on 25.3.2008, in Financial Express and Indian Express on 29.1.2008 and in Loksatta on 30.3.2008, under sub-section (2) of Section 15 of the Electricity Act, 2003 (hereinafter referred to as "the Act") Newspaper clippings of the publication of notices have been placed on record.

6. One Shri Chandrakant G Barbole filed objection to the application for grant of trading licence on the ground that Shri Subrat Ratho and Shri Vinayak Rao, shareholders and promoters of the applicant company, are or have been related to other sister companies of the applicant. The objector stated that Shri Subrat Ratho is also the Managing Director of the transmission company, notified as the State Transmission Utility (STU), and also operates the State Load Despatch Centre (SLDC) in the State of Maharashtra. Shri Vinayak Rao is also stated to be related to the STU and the SLDC in their financial matters. Shri Barbole has pointed out that grant of trading licence to the applicant, with Shri Ratho and Shri Rao as Directors may contradict the provisions of Sections 31(2), 39(1) and 41 of the Electricity Act.

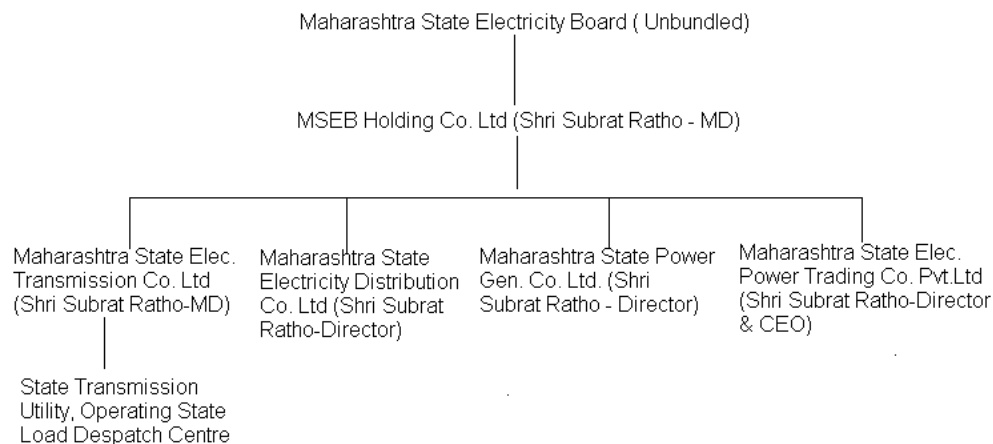
7. The response of the applicant to the objection by Shri Barbole has been received. In reply, it has been stated that MSEB Holding Company Limited is the principal shareholder of the applicant and these shares are held through its Directors, S/Shri Ratho and Vinayak Rao. It has been confirmed that the transmission company has been notified as the STU, which also operates the SLDC. Shri Ratho is holding the position of Managing Director in MSEB Holding Company Limited and is appointed as Director of the transmission company and other companies formed as a consequence of unbundling of Maharashtra State Electricity Board. It has been stated that the Act does not prohibit the companies from having common directors. It has been clarified that Shri Rao was not dealing with any financial matter of the STU and the SLDC on the date of the application, as on that date he was not holding any position in the transmission company, notified as the STU and operating the SLDC.

8. According to the applicant, second proviso to Section 31(2) of the Act provides that the Load Despatch Centre cannot engage in the business of trading in electricity.

In the present case, the application has been filed by a wholly owned subsidiary of MSEB Holding Company Limited. As neither of the two companies viz, the applicant and its holding company is functioning as the SLDC, there is no violation of Section 31(2) of the Act. It has been further sought to be clarified that the first proviso to Section 39(1) of the Act, bars the STU to engage in the business of trading in electricity. Since the applicant is not functioning as the STU, there is no violation of Section 39(1) of the Act either. Lastly, it has been submitted that the applicant does not act as a transmission licensee and, therefore, bar of third proviso to Section 41 of the Act which provides that no transmission licensee can enter into any contract or otherwise engage in the business of trading in electricity is also not attracted.

9. We heard Shri Vinayak Rao and Shri P.V. Page, for the applicant, who reiterated the applicant's stand as given in the reply to the objection of Shri Chandrakant G. Barbole.

10. From the facts placed on record, the applicant's relationship with other companies formed as a result of re-organisation of Maharashtra State Electricity Board can be depicted as under:



11. At the hearing, it was vociferously argued on behalf of the applicant, that is, it is a legal entity separate and distinct from the transmission company which also functions as the STU and operates the SLDC. Therefore, it cannot be considered to be disqualified for grant of licence for inter-State trading in electricity in terms of the above referred provisions of the Act. It was submitted that the two companies are independent and are to function without interference from each other.

12. In response to the Commission's query on the approach regarding trading to be adopted by the applicant, Shri Rao submitted that there are many small captive generators in the State. The applicant plans to buy power from them and sell the same to the distribution company to meet the load demand in the State. He, however, did not clarify why the distribution company itself cannot directly purchase it from these generators.

13. The statutory provisions as contained in the Act and relevant for our purpose are extracted below:

“Section 31. Constitution of State Load Despatch Centres: ---

(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.

(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:

Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.

.....

Section 39. State Transmission Utility and functions:

(1) The State Government may notify the Board or a Government company as the State Transmission Utility:

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

.....

Section 41. Other business of transmission licensee:

A transmission licensee may, with prior intimation to the Appropriate Commission , engage in any business for optimum utilisation of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilised for reducing its charges for transmission and wheeling:

Provided further that the transmission licensee shall maintain separate accounts for each such business undertaking to ensure that transmission business neither subsidises in any way such business undertaking nor encumbers its transmission assets in any way to support such business:

Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity.

14. It follows that the Act categorically bars that the State Transmission Utility, the State Load Despatch Centres and the transmission licensee from engaging in the business of trading of electricity. In the case before us, the applicant's sister company, the transmission company, which is notified as the STU and is operating the SLDC does not propose to engage in the business of trading. The transmission company is not a stakeholder in the applicant, presently before the Commission for grant of trading licence. However, in the present case, the point of convergence is the MSEB Holding Co. Ltd whose Managing Director, Shri Subrat Ratho, is also the Managing

Director of the transmission company, the STU, operating the SLDC and Director& CEO of the applicant company. Under these circumstances, the question arises whether the applicant and the transmission company can be considered as the single entity so as to fall within the prohibition of Sections 31, 39 and 41 of the Act.

15. It is well established that the corporation in law is treated like a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose. This principle was laid down by the House of Lords in *Aron Salomon v. Salomon & Company Limited (1897) Appeal Cases 22*, wherein the House of Lords had observed as under:

"The company is at law a different person altogether from the subscriber; and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act".

16. The principle laid down in *Salomon vs Salomon (supra)*, is a universally accepted and has been followed by the Courts in India. Therefore, on the first blush the argument made by Shri Vinayak Rao, appearing for the applicant, appeared to be convincing.

17. However, there are also well-recognised several exceptions to the doctrine that the corporation or a company has a legal and separate entity of its own, by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance . One of the exceptions noted by Gower in his book *Modern*

Company Law is that "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". Pennington in his book, Company Law, has also stated that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. Professor L Maurice Warmer has stated that "when the conception of corporate entity is employed to defraud the creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate entity as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."

18. The courts in India have also evolved the principle of lifting of corporate veil, in appropriate cases, as an exception to the principle of corporate personality enunciated in *Salomon vs Salomon* (supra). The Hon'ble Supreme Court in *Delhi Development Authority Vs Skipper Construction Company Private Limited* (1988) 4 SCC 59 has explained the applicability of the principle in the following terms:

"The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned."

19. In the case of *State of UP & Others Vs. Renusagar Power Company & Others* (1988) 4 SCC 59, the Hon'ble Supreme Court was considering the status of Renusagar Power Company, a wholly owned subsidiary of Hindustan Aluminium Company Limited (Hindalco), for the purpose of determining the liability of Hindalco under the UP Electricity Duty Act. It was held that:

“64. It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly-owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order of the profits of Renusagar have been treated as the profits of Hindalco.

65. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act.”.

20. In the case of Life Insurance Corporation of India vs Escorts Limited and Others, it was held that:

“95..... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.” (Emphasis added)

21. From the above judgments of the Hon'ble Supreme Court it follows that it is permissible to go beyond the corporate veil, in certain circumstance, including when

two or more companies are inextricably connected as to be, in reality part of one concern.

22. In the present case, the applicant, incorporated on 29.11.2007 to carry on the business of purchase and sale of electricity is a wholly owned subsidiary of MSEB Holding Co. Limited. Similarly, the transmission company, which is notified as the STU and also operates the SLDC, is also the wholly owned subsidiary of MSEB Holding Co. Ltd. Therefore, control of MSEB Holding Co. Ltd. over the applicant and the transmission licensee is pervasive. The applicant and the transmission licensee are inextricably intertwined and are to be seen as part of their holding company. When the transmission company and the trading company are owned by one entity and controlled by the Board of Directors headed by one person, the dividing line between them gets obliterated. There is every likelihood of the holding company, of which the applicant and the transmission licensees are the subsidiaries, influencing their decisions. In this view of the matter, in the light of law laid down by the Hon'ble Supreme Court, in particular in Life Insurance Corporation of India vs Escorts Ltd and others (supra) we are justified in lifting the corporate veil and to hold that they are de facto the limbs of one and the same entity. The fact that Shri Ratho is the Managing Director of both the companies, MSEB Holding Company Limited and the transmission company, and he is also Director & CEO of the applicant, only reinforces the above conclusions since he has been vested with the power of decision making in all the three companies.

23. The Act categorically prohibits the State Transmission Utility and the State Load Despatch Centre from engaging in the business of trading in electricity. The main purpose of the statutory provisions is to insulate these entities from the business

of trading in electricity and to ensure impartiality in their functioning. The STU and the SLDC have crucial roles in implementing non-discriminatory open access under the Act. The functions assigned to these entities under the law are such that there should be no semblance of their discriminating against any one. Law thus attaches paramount significance to the independence of the STU and the SLDC in their operation and has made provisions prohibiting trading by these statutory entities. We have held that the applicant and the STU (which is also operating the SLDC) are the integrated organs of one concern, MSEB Holding Co. Ltd. Under these circumstances, grant of licence for trading to the applicant will be violative of the spirit of law, that is, the provisions of the Act which interdict undertaking of trading by the STU and the SLDC. In view of the statutory provisions as contained in the Act, the applicant cannot be considered for grant of license for trading in electricity.

24. The application accordingly stands rejected.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi, dated 17th June 2008