

The developer of a SEZ cannot *ipso facto* be conferred the status of a deemed distribution licensee under the Electricity Act, without scrutiny or application

In a landmark judgment, the Hon'ble Supreme Court of India (“**Supreme Court**”) in *M/s. Sundew Properties Limited v. Telangana State Electricity Regulatory Commission & Anr.*¹, has harmoniously interpreted the provisions of the Electricity Act, 2003 (“**Electricity Act**”) and the Special Economic Zone Act, 2005 (“**SEZ Act**”) to hold that: (a) A developer of a special economic zone (“**SEZ**”) is a deemed distribution licensee under the Electricity Act, however, such recognition does not specifically exempt it from making an application for ‘recognition’ as a deemed distribution licensee; (b) 6th proviso to Section 14 of the Electricity Act and consequently Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 (“**2005 Rules**”) are not applicable to a developer of SEZ; (c) State Electricity Regulatory Commissions are not empowered to impose extraneous conditions of meeting capital adequacy and/or creditworthiness before recognising a developer of a SEZ as a deemed distribution licensee under the Electricity Act.

Brief Facts

1. On March 3, 2010, the Ministry of Commerce and Industry, Government of India (“**MoCI**”) by its Notification No. SO 528(E) (“**2010 Notification**”) introduced a proviso to Section 14(b) of the Electricity Act, granting SEZ developers the status of deemed distribution licensees under the Electricity Act.
2. Pursuant to the 2010 Notification, M/s. Sundew Properties Limited (“**Appellant**”) (a ‘developer’ under the SEZ Act) approached the Andhra Pradesh Electricity Regulatory Commission seeking ‘recognition’ as a deemed distribution licensee under the Electricity Act. Upon the Andhra Pradesh Reorganization Act, 2014 coming into force, the application of the Appellant was transferred to the Telangana State Electricity Regulatory Commission (“**TSERC**”).
3. On February 15, 2016, the TSERC passed an order identifying and accorded the status of a deemed licensee to the Appellant. However, the grant of status was made conditional upon the Appellant satisfying the requirements under the 2005 Rules read with the Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013 (“**2013 Regulations**”). Consequently, the promoters of the Appellant were directed to infuse an additional capital of INR 26,90,00,000 (Indian Rupees twenty-six crore ninety lakh) into its Power Distribution business.
4. Aggrieved by TSERC’s Order, the Appellant filed Appeal No. 3 of 2017 before the Appellate Tribunal for Electricity (“**APTEL**”). On September 27, 2019, APTEL dismissed the Appellant’s Appeal. Accordingly, the Civil Appeal was filed before the Supreme Court.

¹ Civil Appeal No. 8978/2019, dated May 17, 2024.

Issue

The issues before the Supreme Court were to adjudicate:

1. whether the designation of an entity as a SEZ developer by the 2010 Notification *ipso facto* qualifies the entity to be a deemed distribution licensee, obviating the need for an application under Section 14 of the Electricity Act?
2. whether Regulation 12 of the 2013 Regulations, and by implication Rule 3(2) of the 2005 Rules, apply to a SEZ developer recognized as a deemed distribution licensee under the proviso to Section 14(b) of the Electricity Act read with Regulation 13 of the 2013 Regulations?

Findings

The Supreme Court noted that:

1. Provisos to Section 14 of the Electricity Act distinguish between entities that are *ipso facto* deemed distribution licensees and those that merely declared as deemed licensees without clarity on the necessity of making an application to obtain a licence. Thus, entities not explicitly exempted are required to make an application to the appropriate commission.
2. The 2010 Notification confers 'deemed licensee' status on SEZ developers through proviso to Section 14(b) but does not explicitly exempt them from the requirement to obtain a license. Thus, the legislative intent is that the developer of SEZ should obtain a license by making an application in terms of Regulation 13. TSERC is empowered to scrutinize these applications in accordance with the law, to the limited extent of provisions applicable to deemed licensees. Verification and acceptance recognize their status as deemed licensees.
3. Status of an SEZ developer as a deemed licensee emanates from the 2010 Notification, which introduced the proviso to Section 14(b). Reading anything beyond this would defeat the very purpose of the proviso and the concept of deemed license. Therefore, the sixth proviso to Section 14 does not apply to deemed licensees, and, therefore, the 2005 Rules do not apply to the Appellant.
4. Regulation 12 of the 2013 Regulations pertains solely to regular distribution licensees as defined under Regulation 2(h), and not to deemed licensees. 'Reading up' Regulation 12 to expand its ambit to include within it deemed licensees, especially when the Electricity Act does not stipulate any such inclusion, runs counter to the proviso to clause (b) of Section 14 of the Electricity Act. This would be impermissible.
5. Hence, the condition stipulated in Rule 3(2) of the 2005 Rules, as imposed by the TSERC with a direction to infuse additional capital of INR 26,90,00,000 (Indian Rupees twenty-six crore ninety lakh), is not justified and contrary to the statutory scheme.

Conclusion

The Supreme Court's Judgment puts to rest a decades old controversy of Electricity Regulatory Commissions applying additional regulatory stipulations while identifying deemed distribution licensees. The judgment clarifies the role of Regulatory Commissions in identifying such deemed licensees and the scrutiny required while processing such applications.

It provides an impetus to expeditious operationalizing of distribution licensee status by SEZ developers, and therefore providing a choice of supplier to consumers in SEZs. In Telangana and Andhra Pradesh, no SEZ had operationalized their deemed distribution licensee status due to this overhang, which now stands resolved. SEZ developers (and the units in such SEZs) now gain a significant competitive edge since the incumbent non-SEZ distribution licensee's tariff is typically higher.

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