

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2641 OF 2014**

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**

a Corporation constituted under the Corporation
Act, 1888 having their office at Mahapalika
Marg, Fort, Mumbai 400 001.

...Petitioners

Versus

- 1. MAHARASHTRA ELECTRICITY
REGULATORY COMMISSION,**
constituted under Section 82 of the
Electricity Act, 2003 having its office at
The World Trade Centre, Centre No. 1,
13th floor, Cuffe Parade, Mumbai 400 005.
- 2. TATA POWER COMPANY LIMITED,**
a Public Company established under The
Indian Companies Act VII of 1913, having
its registered office at Bombay House 24,
Homi Mody Street, Fort, Mumbai 400 001.
- 3. THE STATE OF MAHARASHTRA,**
through the Government Pleader, High
Court, Bombay.

...Respondents

APPEARANCES

FOR THE PETITIONERS

Mr. K. Setalvad, Senior Counsel, a/w
Mr. Y. Deshmukh, Mr. R. Singh
and Mr. H. Parte, i/b M/s M. V.
Kini & Co.

FOR THE 1ST RESPONDENT	Mr. R. Singh, Advocate
FOR THE 2ND RESPONDENT	Mr. I. M. Chagla, Senior Counsel, <i>a/w Mr. N. Agarwal, Mr. A. Munot and Mr. K. Kaul i/b M/s. J. Sagar & Associates</i>
FOR THE 3RD RESPONDENT	Ms. I. K. Calcuttawala, AGP

CORAM : **S. C. Dharmadhikari & G.S.Patel, JJ.**

JUDGMENT RESERVED ON : **15th February 2016**

JUDGMENT PRONOUNCED ON : **2nd March 2016**

JUDGMENT (per G. S. Patel, J):

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith and the Petition is taken up for hearing and disposal. We have heard Mr. Setalvad and Mr. Chagla, learned Senior Counsel for the Petitioners and the 2nd Respondent respectively at some length, and, in addition, Mr. Singh and Ms. Calcuttawala for the other Respondents. We have considered the material on record.

2. The Petitioner is the Municipal Corporation of Greater Mumbai (“MCGM”). This is a statutory corporation and a local authority for Greater Mumbai. Among its various functions is the provision of electric supply and transport for the Island City of Mumbai, through the Brihanmumbai Electric Supply & Transport Undertaking (“BES&T”; in this judgment, the term **BES&T** refers also to the Petitioner). In this Writ Petition under Article 226 of the Constitution of India, the MCGM challenges Regulation 4.10 read

with Regulations 4.1 and 4.7 of the Maharashtra Electric Regulatory Commission (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations 2014 (“**the SOP Regulations 2014**”; “**the Regulations**”), framed by the 1st Respondent. The challenge is on two grounds. First, that these Regulations are *ultra vires* Section 43(1) read with Section 181(2)(t) of the Electricity Act, 2003 (“**the 2003 Act**”), and, second, that the impugned Regulations are beyond the rule-making power of the 1st Respondent under Section 181(2)(t) of the 2003 Act.

3. In our considered view, there is no merit at all in this Petition. The BES&T’s challenge is a studied attempt at subverting a statute that has as its primary intent the interests of the individual consumer of electricity and the promotion of efficient and healthy competition, the adoption of best practices and the development of effective power distribution systems. We find, however, that the BES&T’s attempts are in exactly the opposite direction: to retain, willy-nilly, its stranglehold over its hapless consumers and to keep out all competition. We find MCGM’s approach to be far, far less than fair and candid; we find it to be contrarian, antagonistic, and designed to retain a complete monopoly within its command area, all at the cost of the individual consumer. We have dismissed the Petition. Our reasons follow.

4. In 1905, BES&T was granted a license under the erstwhile statutes, viz., Indian Electricity Act, 1903 and the Indian Electricity Act, 1910. BES&T was subsequently acquired and municipalized in

1947 by the Bombay Municipal Corporation. It is a 'Distribution Licensee' within the meaning of Section 2(17) of the 2003 Act.

5. The 1st Respondent is the Maharashtra Electricity Regulation Commission ("MERC"), a statutory body constituted under Section 82 of the 2003 Act. Respondent No.2, Tata Power Company Ltd. ("TPC") is a limited company that has been selling, supplying and distributing electricity in and around Mumbai city and its suburban area for more than a century, under licenses acquired under the previous statutes. It is today a deemed licensee under Section 14 of the 2003 Act. Respondent No.3 is the State of Maharashtra.

6. In April 2009, one of BES&T's consumers approached TPC for the supply of electricity, intending to switch over from the former. BES&T refused to allow TPC to use its distribution network for electric supply. The matter was taken to the MERC for adjudication. MERC directed TPC to fulfil the demand for electricity using either its own cables or those of BES&T. The MCGM challenged this order before the Appellate Tribunal, which dismissed the appeal by an order dated 4th April 2012. Aggrieved, the MCM appealed to the Supreme Court under Section 125 of the 2003 Act.¹ The Supreme Court dismissed the Appeal on 8th May 2014. On 20th May 2014, MERC framed the impugned regulations.

7. Mr. Setalvad submits that Regulation 4.10 read with Regulations 4.1 and 4.7 of the SOP Regulations 2014 is in gross

¹ *Brihanmumbai Electric Supply and Transport Undertaking v Maharashtra Electricity Regulatory Commission*, (2015) 2 SCC 438.

violation of the intent and the object of the 2003 Act; specifically, *ultra vires* Sections 43(1) and (3).

8. Mr. Setalvad's case is that Sections 43 and 42 of the 2003 Act cast a mandatory duty on each distribution licensee to supply electricity within the time periods set out in Section 43. Section 42 speaks of the duties of distribution licensees and open access. Section 42(1) says that every distribution licensee is duty-bound to develop and maintain an efficient, coordinated and economical distribution system in its command area, and to supply electricity in accordance with the 2003 Act. "Open Access" is a term defined in Section 2(47) to mean the *non-discriminatory* provision for the use of transmission lines or distribution systems or associated facilities with such lines or systems by any licensee or consumer or a person engaged in generation, in accordance with the regulations framed by the Appropriate Commission. Section 42(2) requires each State Commission to introduce open access in a phased and conditional manner within a year of the date appointed by it. All operational and cost factors must be considered. Overall, the legislative intent of Section 42 is pro-consumer and is intended to give consumers, albeit gradually, a choice of service provider. Section 42(3) in terms contemplates a sort of 'piggybacking', where one distribution licensee may use the cables or lines of another, subject to certain statutory conditions, to effect the demanded electricity supply.

9. Section 43, "Duty to Supply on Request", makes it obligatory for each distribution licensee, subject only to statutory exceptions, to supply electricity within a month of a demand from any owner or occupier of any premises. The provisos to that Section make

allowance for certain contingencies and exigencies. Section 43(3) imposes a penalty on a distribution licensee of Rs.1000 per day of default should that distribution licensee fail to provide electricity within a month. The application for supply must, of course, be one that is complete in all respects.² Section 43 of the Act reads:

"43. Duty to supply on request.— (1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.

Provided that where such supply requires extension of distribution mains or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

Explanation – For the purposes of this sub-section, "application" means the

² Explanation to Section 43(1).

application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) : Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default."

10. MERC has framed regulations in exercise of its powers under Section 181 of the 2003 Act. Section 181(2)(t) is directly relatable to Section 43(1), and allows the framing of regulations for the purpose of that Section. Regulation 4 is entitled "Period for Giving Supply". Mr. Setalvad says that Regulations 4.1 to 4.9 specify various time periods applicable to different situations; and then Regulation 4.10 nullifies all these and renders them otiose. In his submission, Regulation 4.10 is overbroad and inherently vague. Regulations 4.1, 4.7, 4.8 and 4.10 provide:

"4.1 The Distribution Licensee shall, on an application made by post or by hand by the owner or occupier of any premises, give supply of electricity to such premises after receipt of the application by chronological order of receipt of its complete application requiring such supply.

4.7 The Distribution Licensee shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one (1) month after receipt of the completed application and payment of charges for requiring such supply, if the supply to an Applicant is to be given from an existing network of the Distribution Licensee.

4.8 Where the supply of electricity to a premise requires extension or augmentation of distributing mains, the Distribution Licensee shall give supply to such premises within three (3) months from the date of receipt of the completed application and payment of charges. The extension or augmentation of distributing mains includes the extension of HT, LT lines and augmentation of distribution transformer substation.

4.10. The Distribution Licensee shall not be held responsible for the delay, if any, in giving supply account of problems relating to statutory clearances, right of way, acquisition of land or the delay in consumer's obligation which is beyond the

reasonable control of the Distribution Licensee.

(Emphasis added)

11. Section 44, Mr. Setalvad argues, already contains what is to all intents and purposes a *force majeure* provision:

“44. Nothing contained in Section 43 shall be taken as requiring a distribution licensee to give supply of electricity to any premises if he is prevented from doing so by cyclone, floods, storms or other occurrences beyond his control.”

12. This provision of the 2003 Act is echoed in Regulation 11 (“Exemptions”) which specifically states that nothing in the Regulations applies where MERC is of the opinion that the distribution licensee has been prevented from fulfilling its obligations on account of one or more of the situations set out in that Regulation. These situations include, *inter alia*, *force majeure* events, outages, and, as a residuary provision, “other occurrences beyond the control of the Distribution Licensee.” We may also note that Regulation 12 speaks of the determination of compensation to be paid by the Distribution Licensee to the affected persons.

13. Section 14 of the 2003 Act, Mr. Setalvad says, contemplates three kinds of licenses: a transmission license, a distribution license and a license as an electricity trader. There is no reason at all, he insists, why TPC should not fulfil its mandate through its own power lines.

14. Mr. Setalvad submits that Regulation 4.10 is beyond the rule-making powers of MERC under Section 181(2)(t) of the 2003 Act, and that this Regulation is against the interests of consumers. He would have it that this Regulation on its own introduces a regime where a distribution licensee could refuse to supply electricity to remote areas where such power supply is non-profitable and to allow it to 'cherry-pick' only profit-making distribution routes. It also results, he says, in rendering nugatory the penal provisions of the statute, apart from being overbroad and therefore vague in its wording. Anything that creates a non-level playing field is abhorrent to the statute, he submits, for, by definition, this is against the consumer's interest.

15. Even without considering the responses from Mr. Singh for MERC and Mr. Chagla for TPC, we find these submissions on behalf of MCGM to be bewildering. All that MCGM/BES&T seem to be saying is that even if TPC is unable to lay cabling within BES&T's command area, TPC should be held accountable; and even matters beyond TPC's control, such as the MCGM itself denying permission for the necessary works for cable-laying, should not operate to limit in any way TPC's liability. That BES&T itself might not be able to adhere to these time frames seems not to matter; BES&T seems to be content to pay a liability (or perhaps to continually challenge it), just so long as TPC and every other distribution licensee to whom a consumer makes a request for supply within BES&T's command area is subjected to penalties as well. This seems to us to be dangerously against the legislative purpose and intent of the 2003 Act, which is decidedly pro-consumer and attempts to afford each consumer a plenitude of

choice. BES&T's submission is but a veneer, in our view, to ensure that it retains a thoroughly non-competitive, anti-consumer monopoly throughout its command area.

16. We are therefore surprised at Mr. Setalvad's reliance on the Supreme Court decision in *Brihanmumbai Electric Supply and Transport Undertaking v Maharashtra Electricity Regulatory Commission*,³ even though it is to the limited extent of saying that every distribution licensee must comply with the statutorily prescribed timelines for supply against demand. In paragraphs 25 to 27 of this decision, the Supreme Court *inter alia* said that there is an exception to the open access regime under Section 42(3) for a distribution licensee that is also a local authority. This only means that BES&T's distribution competitors cannot piggy-back on BES&T's networks; they must lay their own. However, said the Supreme Court, the *duty* of the distribution licensee to supply electricity under Section 43 makes no such distinction. The 'Universal Service Obligation' under Section 43 is in that sense agnostic. Mr. Chagla is, however, correct in pointing out that even before the Supreme Court, BES&T took an extreme position, viz., that where a local authority (such as the MCGM) is also a distribution licensee (such as BES&T), there can be no other distribution licensee in its command area. This was expressly negated by the Supreme Court in paragraph 31 of the very decision that Mr. Setalvad cites. Yet, we find that this is precisely the purport of the present submissions by BES&T before us. This is not so much a case of cherry picking as it is of BES&T wanting a second bite at an already well-masticated cherry. As the Supreme Court

³ (2015) 2 SCC 438.

observed, a Court must tilt toward a purposive interpretation, one that serves the legislative purpose. In the present case, this is to promote competition and to give consumers an option of choosing a distribution licensee.

17. Read thus, Mr. Setalvad's reliance on the decision of Single Judge of the Madras High Court in *T. M. Prakash v the District Collector*⁴ does nothing to advance his cause. No one disputes the generality of the proposition that the penal provisions of the 2003 Act and the Regulations are mandatory. This does not in any way assist Mr. Setalvad in assailing one of those Regulations as being *ultra vires*.

18. Mr. Singh for MERC is correct, in our view, in saying that the entire attempt is to somehow retain a complete monopoly over BES&T's command area. Indeed, their suggestion at the time the Regulations were circulated in draft for suggestion, was that the time frame be extended to 105 days. In any case, all these submissions have effectively been examined and answered by the Supreme Court in *BES&T v MERC 2015*, and there is no call, he submits, for re-opening any of these issues.

19. Mr. Chagla for TPC is understandably more withering in his response. BES&T is, he says, a licensee that has left no stone unturned to cling on to its distribution monopoly. Nothing could be further from the statutory intent as enunciated by the Supreme Court; the entire attempt is to root out all competition and force

⁴ 2013 (6) CTC 849

every consumer within BES&T's distribution area to depend only on it, and to deprive every consumer of choice of supplier. The present challenge is utterly baseless, he submits. The first proviso to Section 43(1) empowers MERC to specify the time period within which a distribution licensee is required to supply electricity in cases where such supply requires extension of distribution mains or commissioning of new substations. Implicit in this power to stipulate the period, Mr. Chagla says, is the power to stipulate the circumstances in which the distribution licensee is *not* to be held liable for a delay in the supply of electricity within that time frame. BES&T urges an isolationist view of Section 43, deliberately ignoring Section 44. Regulation 4.10, impeached by BES&T, is in fact in complete consonance with Section 44, upholding its spirit and purpose, not in any way destroying its intent.

20. Mr. Chagla is, in our view, correct in saying that Section 43(1) embodies the concept of Universal Service Obligation: a distribution licensee is *obliged* to supply electricity to any person situated within his area of supply within one month from the receipt of an application from such person. Section 44 and the first and second provisos to Section 43(1), carve out essential exceptions. These are necessary because of known practical difficulties in laying distribution networks. In a city like Mumbai, such an endeavour is time intensive. There are space constraints. Rights of way must be obtained. Municipal sanctions are required. It is not mere coincidence, he says, that those very permissions are required to be sought from the present Petitioner itself; one that argues solemnly that even if such permissions are not given, penalties on the distribution licensee must nonetheless follow. In the past two

financial years, of the 4,784 applications made to the MCGM for excavation permission, about 71% were pending as on 2nd February 2015. Today, that figure has risen to 94%.

21. Mr. Chagla also points out that it is a mistake to see these Regulations as being restricted to Mumbai alone. They are not. They apply throughout the State. Each area poses its own peculiar difficulties for distribution licensees. Appreciating such practical difficulties faced by the distribution licensees, Parliament did not specify a rigid time frame for supplying of electricity. It left this power to an independent regulator, one with a a better understanding of ground realities. This is evident from the 31st Report on the Electricity Bill, 2001, submitted by the Standing Committee on Energy, Minsitry of Power, to the Lok Sabha and Rajya Sabha. Paragraph 8.78 is revealing:

"The Committee notes that Clause 43 of the Bill provides that every distribution licensee, on an application by the owner or occupier of any premises, shall supply electricity within one month after the receipt of the application. This Clause also provides where such supply requires extension of distribution main or commissioning of new sub-stations, the distribution licensee shall supply electricity immediately after such extension or commissioning or within 6 months, whichever is earlier. Failure to do so would lead to a penalty of Rs. 1000/- for each day of default. **After going through the Memoranda submitted by various**

organisations and State Governments, the Committee finds that most of them agreed that the said provisions of the Clause 43 are un-implementable due to various reasons like unavailability of leave way, inability to provide proof of legal occupancy and gap in demand and supply as well as due to large pendency of applications and financial constraints. For example, in Rajasthan, there are about 2.3 lakh pending applications for agricultural connection only and some of them are pending for the last 9- 10 years. The Committee, therefore, feels, that there should be no rigid time-limit in the Bill for the supply of electricity in the un-electrified areas in the Bill. The Committee recommend that such a limit be fixed by the Appropriate Commission on a reference made by State Governments taking into consideration the ground realities. The Committee, however, recommends that the time schedule given under the Bill be adhered meticulously for an electrified area, failing which penalty as prescribed be imposed. The Committee also desire that while reckoning time period, it should be ensured that the Applicant has completed all the formalities and paid all the prescribed fees, charges, etc. The Committee also agrees with the suggestion made to the Committee that the time limit and obligation to supply should be applicable to the applications for increase in the electricity load also. The Committee finds that the Bill, does not

indicate the authority/agency to whom the penalty amount shall accrue, in the event of default of supply of electricity. The Committee are of the view that since there has been deficiency on the part of the licensee, to provide service expected of him, the penalty' amount should be collected by the Appropriate Commission and may be passed on to the aggrieved consumers. The Committee desire that Bill be amended suitably ..."

(Emphasis added)

22. Interestingly, MCGM itself raised this concern in Case 90/14 before the MERC:⁵

"TPC will not be able to meet the USC in Mumbai city as well. It is far from the question of capability, **the practical difficulties will not enable second licensee to meet the USC in stipulated timeframe.** Hon'ble Commission may take cognizance of this. **BEST humbly submits that network development is a prolonged process and is extremely challenging in the city limits of Mumbai, it is virtually impossible for TPC to meet its Universal Supply Obligation through independent network.** Therefore, looking at the past performance of TPC in meeting USC through independent network the application to be dismissed."

⁵ Order of Maharashtra Electricity Regulatory Commission in Case 90/204 dated 14th August 2014 para 5.6.2, *p.* 33

23. Sections 43 and 44 must be read together. A distribution licensee is obliged to supply electricity to a consumer within one month from the date on which the complete application for supply of electricity is made by a consumer/occupier of the premises. Where the supply requires an extension of distribution mains, or commissioning of new sub-stations, the distribution licensee is allowed some leeway: the supply is allowed to be made immediately after such extension or commissioning, or within the period specified in the Regulations. These periods do not apply where the distribution licensee is prevented from supplying electricity by cyclone, floods, storms or other occurrence beyond its control. This limits the liability of the distribution licensee. Section 44 opens with the words “nothing contained in Section 43”. This makes it clear that the distribution licensee’s obligations under Section 43 are subject to the exemptions under Section 44. The latter is a form of a statutory protection against unforeseen eventualities.

24. Providing exemptions for events beyond the control of a distribution licensee such as non-grant of statutory clearances, right of way, acquisition of land etc, is no novelty introduced either by the 2003 Act or these Regulations. Such exceptions have also been recognised by the Forum of Regulators, a statutory body under Section 166(2) of the 2003 Act in the Model Standard of Performance Regulation for Distribution Licensee (2010).⁶ Similar regulations also exist in eight other states such as Delhi,⁷ Orissa,⁸

⁶ Para 14.26

⁷ Regulation 16(x) of The Delhi Electricity Regulatory Commission Supply Code and Performance Standards Regulations, 2007.

⁸ Regulation 3.5 of The Orissa Electricity Regulatory Commission (Licensees’ Standards of Performance) Regulations, 2004

Bihar,⁹ Kerala,¹⁰ Punjab,¹¹ Meghalaya,¹² Arunachal Pradesh¹³ and Uttar Pradesh.¹⁴

25. An acceptance of MCGM's argument is apt to have bizarre and unintended consequences. Every prospective distribution licensee would be held liable for delay in supply electricity for no fault of its own. For instance, even a defaulting consumer would succeed in holding a distribution licensee liable. Regulation 4.10 is a regulation of pragmatism, and perhaps none is so protected by it as BES&T itself. That BES&T should be moved to impeach it suggests to us that its intentions are not what they are avowed to be.

26. As to MERC's rule-making power, we find nothing in Section 181(2)(t) to suggest that Regulation 4.10 transgresses that power. We note also that Section 181(2)(zp) confers a power to frame regulations on any matter not expressly mentioned in the Act.

27. In *State of Jammu and Kashmir v Lakhwinder Kumar and Ors.*¹⁵ the Supreme Court held that when a general power to make regulations is followed by a specific power to make regulations, the

⁹ Regulation 15(4)(b)(f) Bihar Electricity Regulatory Commission Standard of Performance of Distribution Licensee, 2007

¹⁰ Regulation 86(3) of the Kerala Electricity Supply Code, 2014

¹¹ Regulation 8 of The Punjab State Electricity Regulatory Commission Regulations on Electricity Supply Code and Related Matters, 2007.

¹² Regulation 15.25 of The Meghalaya State Electricity Regulatory Commission (Standard of Performance) Regulations, 2012

¹³ Regulation 4.43 of the Arunachal Pradesh Electricity Supply Code, 2013

¹⁴ Regulation 4.4(e) of The Uttar Pradesh Electricity Commission Electricity Supply Code, 2005.

¹⁵(2013) 6 SCC 333

latter does not limit the former. This is the principle of ‘generality vs enumeration’: a residuary provision can always be given voice.¹⁶

28. MCGM also alleges that Regulation 4.10 was inveigled into the Regulations as a bespoke provision for TPC on 20th May 2014, immediately after the judgment of the Supreme Court in *BES&T v MERC 2015*, a decision that was delivered on 8th May 2014. This, Mr. Chagla says, and in our opinion quite rightly, is entirely baseless. The draft Regulations of 2010 and the draft Regulations of 2013 both contained Regulation 4.10. These were made available for public comments and suggestions. All this pre-dated the Supreme Court decision. In MERC’s Affidavit in Reply it is pointed out that during this consultative stage, BES&T specifically agreed with the provisions of Regulation 4.10.¹⁷ While this does not in and of itself operate as any sort of estoppel against a *vires* challenge, it certainly lends credence to the Respondents’ argument that this petition is clearly a latter-day epiphany intended to perpetuate a monopoly.

29. In the Petition, MCGM relies on a decision dated 6th April 2011 of the Appellate Tribunal in *Noida Power Company Ltd. v Paschimanchal Vidyuth Vitran Nigam Ltd. and Anr.*¹⁸ We refuse to countenance any such submission. It should never have been made before a writ court in a *vires* challenge; that citation is without precedential or jurisprudential significance.

¹⁶ *PTC India Limited v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603.

¹⁷ MERC Affidavit in Reply, p. 170.

¹⁸ Appeal No. 7 of 2010.

30. MCGM contends that the only way to escape penalties is to set up distribution networks prior to obtaining a license. This submission needs only to be stated to be rejected. This is wholly illogical and circular: no permission could be granted to lay a network except to a licensed electricity distributor; and, on this reasoning, no entity could get a license without its own separate network already in place. Should there be multiple distribution licensees, chaos would ensue. MCGM's commended scenario is of a truly Dystopian Mumbai, not so much a city as an aggregation of electricity supply trenches and craters. MCGM overlooks, too, the provisions of Section 67 of the 2003 Act for opening up of streets, breaking of drains, tunnelling and so on for the purpose of electricity distribution.

31. Nothing in Regulation 4.10 is manifestly arbitrary or beyond MERC's rule-making powers. On the contrary, we find Regulation 4.10 to be an entirely salutary, cautious and necessary provision required to maintain the necessary balance between a demand for an immediate supply and ensuring that the electricity supply so provided is stable, efficient and uninterrupted. To achieve this, a distribution licensee may need to step through many processes. Not all of these are necessarily or invariably in every distribution licensee's control. To hold every distribution licensee absolutely to a rigid and inflexible time period, irrespective of issues beyond its control (or, as with a local authority, possibly hurdles deliberately placed in its way) would be entirely unworkable and unjust.

32. MCGM's conduct, too, is wanting. It, too, received the proposed regulations in draft. It suggested a longer period itself, of

105 days (and excluding monsoons, as if this annual natural occurrence is a special factor for routine municipal operations). It also agreed to the draft regulation 4.10. The Regulations then came to be notified. On 9th October 2014, four and a half months later, the present Petition was filed. During this period, the MCGM opposed at every stage the grant of a distribution license to any other entity in BES&T's theatre of operations. It filed appeals before the Appellate Tribunal and Supreme Court opposing competition and arguing that there could, in law, be no other distribution licensee in any area that was serviced by a distribution licensee that was also a local authority. If this is not monopolistic, nothing is. It then argued that, at any rate, in such areas no rival network could be laid. This, again, is anti-competitive and anti-consumer. MCGM's appeals failed. It then filed a petition before MERC challenging the issue of an Expression of Interest by MERC for distribution licenses in BES&T's area of operations. Again, the basis of this petition was monopolistic: that there could not be a competitor to BES&T. It argued that a competitor would be "detrimental to BEST's distribution business"¹⁹ and would cause "irreparable harm, loss or injury to greater public interest." It therefore sought a refusal of distribution licenses to all other entities and a cancellation of the Expression of Interest. MERC dismissed the petition on 14th August 2014. MCGM filed an appeal. This is pending. MCGM opposed TPC's application to MERC for a distribution license. The ground for opposition was, principally, that "introducing competition in the area of supply of BEST will be

¹⁹ Order of Maharashtra Electricity Regulatory Commission in Case 37/204 dated 14th August 2014, page 4.

detrimental and prejudicial to the interest of BEST”.²⁰ Then MCGM filed an appeal challenging the grant of a distribution license to TPC. The appeal was dismissed. MCGM has challenged that appellate decision in the Supreme Court. MCGM then filed a Petition before MERC seeking the imposition of compensatory charges on those who might migrate to TPC. The imposition was sought on *consumers*; and MCGM alleged that it would be put to loss by what it described as ‘hysterical migration’. The fact that the levy was sought on consumers is telling, and gives the lie to MCGM’s protestations of being pro-consumer and wanting a level playing field; and the use of that phrase ‘hysterical migration’ is the phraseology of an intimidatory, colonial-minded oligarch, not a service provider. When TPC sought approval from MERC for its rollout plan, this, too, was predictably opposed by MCGM. On 8th November 2015, MERC issued an interim order setting out the principles for laying networks in North Mumbai. Though the interim order said that the rollout plan for the area common with BES&T’s area of supply would be separately assessed and approved, the MCGM nonetheless challenged it before the Appellate Tribunal. During these proceedings, BES&T has flatly refused to permit wheeling on its network.

33. We note, too, that in its avatar as the local authority, the MCGM is apt to refuse permission to any other distribution licensee for road work for laying a separate network; and, at the same time, in its BES&T avatar refuses to permit wheeling. In other words, in one way or the other the MCGM ensures that consumers do not ever

²⁰ Order of Maharashtra Electricity Regulatory Commission in Case 90/204 dated 14th August 2014, page 19

have the choice of another distribution licensee. How, therefore, MCGM can claim in this petition that its challenge is intended to ensure competition and freedom of choice to the consumer is, as was famously said in a wholly different context, a riddle wrapped in a mystery inside an enigma.

34. At the end of the day, what the MCGM seeks is a high prerogative remedy, a relief in exercise of our *equitable* discretion. To obtain that, it must show that it is entitled to it; or, at any rate, that it has not, by its own conduct, disentitled itself to it.²¹ A Court will not countenance a challenge disguised or masquerading as a *vires* challenge at the instance of a party whose intention is plainly to distort the legislative intent of a statute.

35. Had the MCGM been a private party, we would have been of a mind to accept Mr. Chagla's submission that this petition does not just deserve to be dismissed, but deserves a dismissal with exemplary costs. We should not be misunderstood in choosing restraint today. This is not because we find merit in anything the Petitioner says. We do not; not even the faintest vestige of it; none that would give us even a moment's pause. We choose not to impose costs only out of deference to intent of that very statute that is before us. The 2003 Act is determinedly pro-consumer, pro-citizen, anti-monopolistic, pro-competition. The MCGM has no money of its own; everything that it has is the citizens'. The MCGM is merely a custodian for it. Imposing costs on the MCGM would therefore be to impose costs on public funds. That we will not do. What we will

²¹ *V. Chandrasekaran and Anr v The Administrative Officer and Ors.*, (2012) 12 SCC 133

do, however, is to censure and excoriate MCGM in the strongest possible terms for its utterly deplorable conduct in attempting to perpetuate its stranglehold on the people of this city. In our understanding of it, MCGM's charter is to *govern* the municipal area of Mumbai. Not to rule it as a satrap would a fiefdom.

36. The Petition is utterly without merit. It deserves to be dismissed. It is.

(G. S. Patel, J.)

(S. C. Dharmadhikari, J.)