

Dr.Milind Sathe, Senior Advocate, a/w. Mr.S.Sen, Mr.Gaurav Srivastav, Mr.Anant S.Tripathi, i/b. Gopal Shah & Associates for the Respondents.

CORAM _____ : R.D. DHANUKA, J.
RESERVED ON _____ : 21st JUNE, 2018
PRONOUNCED ON : 7th AUGUST, 2018

JUDGMENT :

By consent of parties, petition is heard finally at the admission stage.

By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 31st January,2018 passed by the appellate authority and Chief Electricity Inspector under section 127 of the Electricity Act, 2003 allowing the Appeal No.183 of 2010 filed by the respondent no.1. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner is one of the successor entities of the erstwhile Maharashtra State Electricity Board and is undertaking business of distribution of electricity in its area of supply. The petitioner is the original respondent in the Appeal No.183 of 2010 whereas the respondent no.1 is the original appellant in the said appeal. The respondent no.1 is the real estate developer involved in civil construction activities. The respondent no.2 was a party respondent in the appeal filed by the respondent no.1 before the appellate authority.

3. On or about 1st July, 1997, Pune Municipal Corporation issued commencement certificate in favour of the respondent no.1 for Phase -1 of the

project. On 3rd September, 1998, the predecessor of the petitioner executed a lease deed in favour of the predecessor of the respondent no.1 whereby the predecessor of the respondent no.1 agreed to take on lease a small portion of the land for the purpose of electric transformer sub-station. The said sub-station is near the parking area on the ground floor and is a single storeyed structure.

4. On 15th January,1999, the respondent no.1 made an application to the petitioner for electric supply (new connection) seeking about 51 separate LT connections to its commercial complex. In the month of July 1999, the Maharashtra Electricity Regulatory Commission came to be established under the provisions of Electricity Regulatory Commission Act, 1998.

5. On 17th August,1999, the petitioner issued a letter of sanction in favour of the respondent no.1 for execution of work and permitting the respondent no.1 to carry out the work involved in releasing power supply to its commercial complex by paying 15% supervision charges. The said letter provided that the connections would be released only after execution and completion of the work and on payment of service connections charges and deposits by the individuals. The working sheet for assessment of the service line charges also refers to separate LT connections. It is the case of the petitioner that the said sanction letter was issued by the petitioner after processing the application made by the respondent no.1 as per their desire to have 51 separate connections to its commercial complex. The petitioner had sanctioned separate LT connections as desired by the respondent no.1.

6. On 18th August,1999, the respondent no.1 addressed a letter to the petitioner showing its intention to sell the building to multi national companies. It

is the case of the petitioner that the respondent no.1 however at no point of time, informed the petitioner about sell of the premises to any person.

7. On 23rd April, 2000, the respondent no.1 addressed a letter to the Chief Engineer, Pune Zone recording the visit of the Chief Engineer to the site and having discussion on various options. In the said letter the respondent no.1 recorded that the amount paid by the respondent no.1 for LT connections shall be adjusted towards HT connection charges. The project of the respondent no.1 at that time was at the stage of construction.

8. On 27th June, 2000, the respondent no.1 made a fresh application to the petitioner for HT connection. In the covering letter to the Chief Engineer, Zone, the respondent no.1 alleged that it was applying for HT power supply as advised by the Chief Engineer. It is the case of the petitioner that the respondent no.1 placed reliance on the said letter in its compilation before the appellate authority for the first time.

9. On 25th September, 2000, the respondent no.1 forwarded a fresh application for HT supply. The respondent no.1 requested the petitioner to treat as cancelled their previous application for HT power supply dated 27th June, 2000. The said application also enclosed in the stipulated format under covering letter dated 19th September, 2000 the requirements as per the said format stipulated identification of the point of supply. The said communication was brought on record by the petitioner in its compilation before the appellate authority.

10. On 6th November, 2000, the petitioner issued a fresh sanction for the HT connection and sought copy of the layout and point of supply and drawings of

installations. The said sanction provided that all LT and HT consumers were required to execute stamped agreement with the erstwhile Maharashtra State Electricity Board. It was required as per the sanction to specify in the layout the point of supply. The installation arrangement was required to be approved by the electrical inspector appointed under the provisions of Electricity Act, 2003 by the State Government.

11. On 13th November, 2000, the petitioner and the predecessor of the respondent no.1 executed an agreement for supplying the electricity to the predecessor of the respondent no.1 as its consumer. Clause 5(a) of the said agreement refers to the point of delivery for supply of electrical energy and provides for the supply being metered at the point of delivery on the HT side. Clause 10(b) of the agreement provides for supersession of all previous contracts. Clause 13 provides for previous consent in writing of the supplier for assigning, transferring or parting with any benefit of the agreement. Clause 15 of the said agreement provides that the Act and the Rules in force shall apply in all matters not specifically provided in the agreement. Clause 17(c) permits the petitioner as a supplier to discontinue the supply for testing or outages or maintenance.

12. On 17th April, 2001, the petitioner addressed a letter to the Executive Engineer, Bund Garden Division sanctioning release of HT connection to the premises of the respondent no.1. The said connection was a single connection released in favour of the respondent no.1. It is the case of the petitioner that the petitioner had brought on record the verification report pursuant to the grant of HT sanction by the petitioner in favour of the respondent no.1 on 17th April, 2001 which referred to the consumer number of the respondent no.1 as being a solitary consumer of the petitioner. The HT connection was accordingly given to the

respondent no.1 and the meter used for supply during the construction to the respondent no.1 was surrendered by the respondent no.1 to the petitioner.

13. On 1st February, 2002, the respondent no.1 filed an application for enhancement of load against the old load sanctioned. On 4th April, 2002, the petitioner and the respondent no.1 executed an agreement. In the said agreement, the respondent no.1 represented that the premises viz. GE Plaza, Airport Road, Yerwada, Pune – 6 was their own premises. The supply was sought at the location GE Plaza which were detailed in the agreement as commercial premises. Clause 9(a) of the said agreement provided for payment of tariff as revised, increased or decreased. Clause 13 of the said agreement provided for the requirement of the previous consent of the petitioner for assignment or transfer of the benefits under the said agreement by the respondent no.1.

14. It is the case of the petitioner that in the month of August 2002, the respondent no.1 obtained a report from ABB Consultants which was never furnished to the petitioner by the respondent no.1 till 2009. The said report has been brought on record by the respondent no.1 in the present proceedings. The said report indicates that the respondent no.1 was treating each of 9 consumers as a LT consumer and billing at rates computed by itself. It is the case of the petitioner that the respondent no.1 never informed the petitioner about the sale of the premises, the dates of possession given to those 9 consumers of the respondent no.1. On 15th April, 2003, the respondent no.2 appears to have been incorporated as a condominium.

15. On 1st December, 2003, the Tariff Booklet for the period beginning 1st December 2003 was brought on record by the petitioner as per MERC order. The

said tariff order provided for use of sub-meters in mixed load for complexes. It is the case of the petitioner that the respondent no.1 never sought any change of tariff category and did not intimate that the supply was given to mixed load by sub-meters. The petitioner continued to apply the tariff to the respondent no.1 under HTP-I Category.

16. On 25th October,2005 the Executive Engineer of the petitioner addressed a letter in relation to the enhanced load. On 30th January,2006, the respondent no.1 filed an application for additional load for expansion. The nature and line of production was mentioned as "IT". On 23rd March,2006, there was correspondence exchanged between the official of the petitioner relating to the additional load sanction applied by the respondent no.1. The said note specified site for metering. On 5th May, 2006, the petitioner addressed a letter relating to the additional load sanction.

17. On 11th July, 2006, the respondent no.1 sought additional service line charges. On 29th September, 2006 and 20th October,2006, MERC issued its tariff order in Case No. 54 of 2005 in respect of the petitioner after public hearing of the petitioner pursuant to the notices issued in 24 newspapers on 21st July, 2006. About 13,432 objectors were heard during the public hearing before the MERC which were held at Amravati, Nagpur, Aurangabad, Pune, Nashik and Mumbai from 17th August,2006 to 25th August, 2006. It was directed in the said order passed by the MERC that in future, the consumers needing single point supply would have to take individual connections or operate through franchisee route.

18. Pursuant to the order dated 29th September,2006 and 20th October,2006 in Case No.54 of 2005 passed by the learned MERC, on 1st

October,2006 High Tension Tariff Booklet applicable w.e.f. 1st October,2006 came to be issued. On 22nd March, 2007, the electrical inspector conducted annual inspection through testing division metering equipment which according to the petitioner was routine technical inspection and to ascertain whether the metering equipment was in order or not and had nothing to do with usages of electricity.

19. On 22nd May, 2007, the petitioner and the respondent no.1 entered into an agreement. The respondent no.1 entered into the said agreement as a consumer of the petitioner. The said agreement also provided a clause prohibiting assignment or transfer of the benefit under the agreement by the respondent no.1 without prior consent of the petitioner. It is the case of the respondent no.1 that on 13th December,2007, the respondent no.1 had handed over day to day administration to the respondent no.2. It is the case of the petitioner that the respondent no.1 however never informed about the handing over of day to day administration by the respondent no.1 to the respondent no.2.

20. On 17th March,2008, the respondent no.2 applied for change of name and transfer of meter from GESCO to its name. On 3rd April, 2008, the petitioner stipulated various conditions for increase of load and for carrying out the change in the name in the meter. On 31st May, 2008 and 20th June, 2008, the MERC issued a tariff order in Case No. 72 of 2007 in respect of the petitioner after public hearing. In the said order the MERC directed that in future the consumers needing single point supply would apply only to group housing societies and other consumers would have to operate through individual connections or operate through franchisee route.

21. On 3rd March,2009, the Flying Squad under the Directorate of

Vigilance and Security of the petitioner took spot inspection of the premises of the respondent no.1 and submitted a report. A separate panchanama was also carried out in respect of the commercial re-sale of electricity by the petitioner, MSEDCL Vigilance Department. It is the case of the petitioner that in the said panchanama, it was recorded that in the basement car parking area comprising of 'A' and 'B' Wings, there were two meter boxes each. For 'A' Wing, 33 sub-meters were installed and for 'B' Wing 25 sub-meters are installed aggregating to 58 sub-meters. The said ABB Report obtained by the petitioner was received by the petitioner at this stage. According to the petitioner, the panchanama also noted the different panel numbers and internal consumer numbers assigned by the respondent no.1 to various entities like Bajaj Allianz, Hewlett Packard, Ahmednagar Forgings, Kimberly Clark Lever Pvt. Ltd. and other entities.

22. It is the case of the petitioner that while having for inspection of the premises of the respondent no.1, various irregularities carried out by the respondent no.1 were observed by the said Flying Squad. The petitioner has a separate 12 ft. by 15 ft. RCC Metering Room. On 6th March,2009, the respondent no.1 submitted details of occupier/owners along with registration to the petitioner.

23. On 11th March,2009, the Provisional Assessment order under section 126 came to be passed. On 12th March,2009, the provisional bill was issued by the petitioner in the name of the respondent no.1. The respondent no.1 addressed a letter on 17th March,2009 in response to the said provisional bill raising various objections. It was stated in the said letter by the respondent no.1 that the respondent no.1 had become the owner of the premises pursuant to the scheme of arrangement approved under the Companies Act. There was a merger of the respondent no.1 with the GESCO Corporation Ltd. It was alleged that the

premises had been sold by the respondent no.1 and were in possession of various individual entities. It is the case of the petitioner that the respondent no.1 was informed about the possession of the premises of individual entities for the first time and that also after the Spot Panchanama dated 3rd March,2009 was drawn.

24. On 19th March,2009, the respondent no.1 filed its objection to the Provisional Assessment. The respondent nos. 1 and 2 were thereafter called for hearing for deciding on the objections filed by the respondent no.1 to the provisional bill. On 11th April, 2009, the final assessment order came to be passed under section 126 of the Electricity Act, 2003. The respondent no.1 filed a writ petition bearing no.4577 of 2009 in this court. On 4th May, 2009 an order came to be passed on the show cause notice issued by the enquiry officer. On 15th June, 2009, the MERC dismissed the Case No. 8 of 2009 filed by the respondent no.1 challenging the assessment order.

25. On 17th August,2009, the MERC passed an order in Case No.5 of 2009 filed by the respondent no.2 seeking relief on the ground that the issue of Single Point Supply was pending consideration and deliberation before the MERC in Case No.75 of 2007. The MERC dismissed the said Case No. 5 of 2009 filed by the respondent no.2.

26. On 23rd February,2010, this court dismissed the writ petition bearing no. 4577 of 2009 filed by the respondent no.1 in this court. On 19th March,2010, the Hon'ble Supreme Court dismissed the Special Leave Petition (C) No.7036 of 2010 filed by the respondent no.1. In the said special leave petition, the respondent no.1 had challenged the order passed by this court on 23rd February,2010 in Writ Petition No. 4577 of 2009.

27. On 3rd April, 2010, the respondent no.1 preferred an appeal under section 127 of the Electricity Act, 2003 (Appeal No. 183 of 2010) thereby impugning the order dated 11th April, 2009. On 26th November,2010, the petitioner called upon the respondent no.1 to avail of Single Point Supply through franchisee root in terms of directives of MERC. None of the respondents however exercised any option in compliance with the said letter dated 26th November,2010 for individual connections.

28. On 25th March,2011, the petitioner again forwarded a copy of the draft franchisee agreement to the respondent no.1 and also sent a web link of the MERC order. The respondent no.1 however did not give any response for obtaining the franchisee root or separate individual connections till date.

29. On 17th June, 2011, the petitioner filed its reply to the Appeal No.183 of 2010 filed by the respondent no.1. In the said appeal filed by the respondent no.1, respondent no.2 was also impleaded as a respondent. On 11th July,2011, the Appellate Authority passed a judgment on the Single Point Supply issue and also referred to the case of GESCO under section 126. The respondent no.1 filed rejoinder to the reply filed by the petitioner before the Appellate Authority.

30. On 10th January,2012, the petitioner sent a letter in terms of the orders dated 1st June, 2010 and 24th May, 2010 passed by the MERC to the respondent no.1. On 29th April,2016 the judgment allowing Appeal No.183 of 2010 under section 127 of the Electricity Act, 2003 was forwarded to the petitioner. The said order was undated. On 21st March,2017, this court in Writ Petition No.4430 of 2017 was pleased to set aside the said undated order passed by the Appellate

Authority under section 126 of the Electricity Act, 2003. Special Leave Petition No.10253 of 2017 filed by the respondent no.1 challenging the order dated 10th March,2017 passed by this court came to be dismissed by an order dated 13th April, 2017.

31. On 31st January,2018, the Appellate Authority passed the impugned order in Appeal No.183 of 2010 pursuant to the *de-novo* hearing directed by this court and allowed the said appeal filed by the respondent no.1. The petitioner has impugned the said order dated 31st January,2018 in this writ petition filed under Article 227 of the Constitution of India.

32. Ms.Deepa Chawan, learned counsel for the petitioner invited my attention to several documents annexed to the compilation of documents and pleadings, various averments made by both the parties in their respective pleadings before the Appellate Authority, various provisions of the Electricity Act, 2003, orders passed by MERC in various proceedings, orders passed by this court and Hon'ble Supreme Court and various findings rendered in the impugned order passed by the Appellate Authority and also the assessing authority.

33. Learned counsel placed reliance on the definition of “consumer” under section 2(15), “distribution licensee” under section 2(17), “franchisee” under section 2(27), “licence” under section 2(38), “licensee” under section 2(39). She also placed reliance under section 12 of the Act which provides as to who are the authorized persons to transmit, supply etc. electricity. Section 13, i.e. power to exempt, section 14 i.e. grant of licence, section 62 which provides determination of tariff, section 64 which provides for procedure for determination of tariff order, section 86 which provides for functions of State Commission, section 126 which

provides for procedure for assessment, section 127 provides for appeal to the appellate authority against the order final order under section 126, section 135 which provides for situations when it could be considered as theft of electricity, section 181 which empowers the State Commission to make regulations.

34. Learned counsel also referred to various provisions of the regulations published on 17th March, 2006 by the Central Electricity Securities known as Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006. Learned counsel placed reliance on some of the provisions from the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, copies of the letters dated 26th November 2010, 25th March 2011 and 10th January, 2012 from the Superintendent Engineer (RPEU), Pune to the predecessor of the respondent no.1.

35. Learned counsel appearing for the petitioner submits that the respondent no.1 had admittedly preferred an application for electricity connection on 15th January,1999 seeking 51 LT connections on Phase-1 of the project. Admittedly the petitioner had issued a sanction for execution of the work in the said connections. The said sanction dated 17th August,1999 refers to grant of 54 connections. The respondent no.1 had informed the petitioner on 18th August,1999 about its intention to sell the premises in the building to multi national companies. The respondent no.1 on its own thereafter requested for HT supply by letter dated 23rd April, 2000 followed by a fresh application dated 27th June, 2000.

36. On 25th September, 2000, the respondent no.1 addressed a letter in respect of a fresh application for a single HT connection supply on its own merits. She submits that the respondent no.1 had specifically requested to treat the

previous application for 52 connections as cancelled and to adjust the amount paid earlier. Pursuant to the said application made by the respondent no.1, the petitioner had sanctioned HT connections on 6th November, 2000. She submits that by the said sanction, the petitioner has sought copies of the layout point of supply and drawn on installation from the respondent no.1 and had clearly informed the respondent no.1 that all the LT and HT consumers were required to execute stamped agreement with the erstwhile Maharashtra State Electricity Board. The petitioner had accordingly treated the earlier application and sanction as cancelled respondent no.1 however did not comply with the said requisition or direction dated 6th November,2000.

37. It is submitted by the learned counsel that admittedly in the agreement dated 13th November,2000, it was clearly provided that the said agreement was in supersession of all the previous contracts. Learned counsel vehemently placed reliance on clause 13 of the agreement dated 13th November,2000 stating that the consumer shall not, without the previous consent in writing of the supplier, assign, transfer or part with the benefit of this agreement nor shall the consumer in any manner part with or create any partial of separate interest in it.

38. It is submitted that the petitioner had prepared a verification report on 23rd April, 2001 and thereafter had provided HT connection to the respondent no.1. The respondent no.1 had surrendered the meter then in use for supply during the construction of the petitioner.

39. It is submitted by the learned counsel that though the respondent no.1 had applied for enhancement of load twice, the respondent no.1 did not inform the petitioner of the premises having been sold to any of the entities in the project.

Even though an agreement was executed by and between the parties on 4th April, 2002, even in the said agreement, the respondent no.1 had represented that the premises viz. GE Plaza, Airport Road, Yerwada, Pune – 6 was their premises. The supply was sought at the location GE Plaza which was detailed in the agreement as consumer premises. Clause 13 of the said agreement also provided for similar prohibition from the assignment or transfer of the benefit under the said agreement without prior consent of the petitioner.

40. Learned counsel for the petitioner strongly placed reliance on the ABB Consultants report obtained by the respondent no.1 in the month of August 2002 which was produced only in the year 2009 by the respondent no.1. The said report clearly disclosed that there were 9 consumers and that the respondent no.1 was treating each consumer as a separate consumer. Different panel numbers and internal consumer numbers were assigned by the respondent no.1 to various entities. The said report also indicated the date of possession in respect of those 9 consumers. The respondent no.1 had been charging even electricity duty to those consumers without any sanction or letter which electricity duty was over and above the basic tariff charged by the petitioner to the respondent no.1. The respondent no.1 did not bring on record any challan showing the deposit of the duty collected by the respondent no.1 in the Government treasury. The respondent no.1 also challenged the interest at the rate of 15% on the security deposit to its consumer.

41. It is submitted that the respondent no.1 has admittedly not disputed the contents of the said ABB report obtained by them which clearly indicated that the respondent no.1 was engaged in resale of the electricity without obtaining any franchisee licence from the petitioner and in infringement of the provisions of

Electricity Act. The respondent no.1 had changed the purpose of usage of electricity agreed by and between the petitioner and the respondent no.1 had collected higher tariff. The respondent has illegally gained by sale and sub-distribution of the electricity. It is not the case of the respondent no.1 that the consumers of the respondent no.1 or the petitioner had entered into any individual agreement duly stamped with the petitioner for consumption of electricity by virtue of such distribution of electricity by the respondent no.1.

42. Learned counsel for the petitioner submits that the basic tariff of MSEB in the year 2002 was Rs. 2.85 paise as opposed to Rs.8.23 paise recommended to be charged by the respondent no.1 to its consumers. Even according to the said report, the respondent no.1 was charging to their consumers at the rate of Rs.7.00 per Kwh and thus had made substantial profit illegally without obtaining prior permission from the petitioner.

43. It is submitted by the learned counsel that the tariff booklet produced by the respondent no.1 before the Appellate Authority deals with mixed load for complexes for the period beginning 1st December,2003. Under the said tariff sanctioned by MERC, the tariff HT-VI provided for use of sub-meters in mixed load for complexes. He submits that the respondent no.1 however at no point of time sought any change of tariff category nor had informed the petitioner that the supply was given to the mixed load by sub-meters. The petitioner accordingly continued to charge the respondent no.1 as per HTP-I category.

44. It was the duty of the respondent no.1 to inform the petitioner about these changes and ought to have applied for proper tariff classification and also to obtain prior permission before carrying out such distribution of electricity. All

such tariff orders issued by the MERC were issued after wide publicity and after hearing the objection from the large number of consumers and the licensees. The MERC had clearly directed that in future the consumers dealing Single Point Supply would have to take individual connections or operate through franchisee route. She submits that the tariff orders dated 31st May, 2008 and 20th June, 2008 issued by the MERC clearly prohibited the sub-distribution by consumer when a Single Point Supply was given by the licensee. The respondent no.1 was aware of all such tariff orders or deemed to have been aware of all such tariff orders which were within the public domain.

45. Learned counsel for the petitioner submits that the entire order passed by the Appellate Authority is based on the premise that the petitioner was fully aware of the resale and sub-distribution of electricity by the respondent no.1 and thus could not have recovered any amount other than the tariff applicable to the respondent no.1 under tariff HTP-I. This finding rendered by the Appellate Tribunal is totally perverse and contrary to the provisions of the Electricity Act, 2003 and also the agreement entered into between the parties from time to time. There could not be any estoppel against any statute. Admittedly, the respondent no.1 had not obtained any prior permission nor consent of the petitioner before carrying out any sub-distribution of electricity to their consumers. The respondent no.1 had committed contravention of sections 12 to 14 of the Electricity Act, 2003. Though this issue was raised by the petitioner specifically before the Appellate Authority, the said contention of the petitioner has not been considered by the Appellate Authority in the impugned order at all.

46. It is submitted by the learned counsel that the finding of the Appellate Authority that the onus of exercising the option to franchisee route was on the

petitioner and that the petitioner ought to have given an opportunity to the respondent no.1 is totally perverse and contrary to the provisions of Electricity Act and more particularly the detailed procedure for tariff determination required to be followed by the MERC before passing any order for tariff determination. If there was any change in the purpose or usage of the electricity after an agreement was entered into between the parties which change would necessitated, the change of the entry in the tariff order, the respondent no.1 ought to have brought those facts to the notice of the petitioner and ought to have applied for prior permission and for modification of the earlier agreement and for the classification of tariff based on such change. The respondent no.1 however did not inform the petitioner about any such changes effected by the respondent no.1 and did not take prior permission before carrying out such sub-distribution of electricity.

47. Learned counsel for the petitioner placed reliance on section 2 of the Maharashtra Apartment Ownership Act, 1970 and would submit that under the said provision, an application for formation of the condominium could be made also by the sole owner. The petitioner was thus not supposed to know that various different entities were using the electricity by use of separate sub-meters provided by the respondent no.1. Section 2 of the provision of Maharashtra Apartment Ownership Act, 1970 has been totally misconstrued by the Appellate Authority. The petitioner had classified the respondent no.1 based on the tariff order passed by the MERC and also based on the representation made by the respondent no.1 at the relevant time. Since there were changes in the facts situation after the petitioner having granted sanction initially, the duty was cast upon the respondents to apply for change in classification and to obtain prior permission. The finding of the Appellate Authority in this regard is totally perverse. The entire onus is erroneously cast on the petitioner by the Appellate Authority contrary to the

provisions of the Electricity Act, 2003.

48. Insofar as finding of the Appellate Authority that it was the duty of the petitioner to carry out inspection before granting any sanction and more particularly when the respondent no.1 had applied for enhancement of load is concerned, learned counsel for the petitioner relied upon regulation 3.1 which provides for inspection of premises, regulation 4.2.9.1 which provides for carrying out the work required for providing such power supply through a licensed electrical contractor as per specifications/drawings as may be prescribed by the petitioner. No such specification or drawings were asked by the respondent no.1 from the petitioner for carrying out such work. She relied upon Regulation 4.3.3 in support of her submission that unless otherwise specified, all HT and LT charges refer to one point of supply and each separate establishment is required to be given separate point of supply. She also placed reliance on regulations 6.1, 10.1, 12.1, 16.1, 16.2, 17.5, 21.5.1.

49. It is submitted that the Appellate Authority considered only regulation 3 and not the regulation 4.2.9.1 and 4.3.3 in the impugned order erroneously. She submits that under the regulation 6.1, the petitioner was under the obligation to take all precautions to maintain the voltage at the point of supply at the appropriate declared level and shall further take all precautions to restrict the variation in the voltage from the declared voltage at the point of supply, except with the written consent of the consumer or with the previous sanction of the commission.

50. Under regulation 12.1, the authorized engineer of the petitioner is required to take inspection and approve the wiring and apparatus in case of L.T. consumers and transformers, switchgears, other electrical equipment in case of all

H.T. consumers before the same are connected to the system of the petitioner. The said regulation further provided that all H.T. consumers shall produce and submit approval of the concerned electrical inspector about the H.T. Installation. No such approval of the concerned electrical inspector was obtained by the respondent no.1 or produce before the petitioner. She submits that the respondent no.1 did not produce any record before the Appellate Authority showing that the petitioner had taken inspection of the basement when the respondent no.1 had applied for enhancement of load. The petitioner always relied upon one meter and one connection all throughout based on the representation made by the respondent no.1. Since the respondent no.1 themselves had applied for cancellation of the earlier sanction granted by 54 connections, the Appellate Authority could not have taken cognizance of the said application for the purpose of drawing such erroneous finding that the petitioner was aware of the fact that the respondent no.1 had proposed to sale the building to multi national companies.

51. It is submitted that there is no dispute that the entering into a franchisee agreement is permissible under the provisions of Electricity Act, 2003. The inspection permissible under the Electricity Act and various regulations is not beyond the point of supply and is permissible only for limited purpose. The respondent no.1 had failed to establish awareness of the petitioner of sub-distribution or electricity by the respondent no.1 or about the sale of the premises by the respondent no.1 to various parties. The respondent no.1 though had given details of 52 sub-meters when the application for sanction was made by the respondent no.1, the said application was thereafter admittedly cancelled at the instance of the respondent no.1.

52. Learned counsel for the petitioner heavily placed reliance on the

electricity tariff w.e.f. 1st December,2003 and more particularly clause 4 thereof in support of her submission that the said tariff clearly provided that the same was applicable for supply at one point only. The entity HTP-I provided that unless otherwise specified, this tariff was applicable to all High Tension industries and other High Tension consumers exclusively situated in Mumbai Metropolitan Region and Pune Metropolitan Region as defined by the State Government. HTP-VI was applicable for HT residential and Commercial complexes taking supply at one point and sub-distribution further. She submits that the said entry clearly provided that the case of mixed complexes use of sub-meter is essential for arising out of energy charge for such type of category. The Appellate Authority has held that the entire HTP-VI would have been classified from day one.

53. Neither the respondent no.1 nor the respondent no.2 made any application for any such classification from HTP – 1 to HTP – VI. No application was made by the respondent no.1 showing that it had intended to distribute the electricity by sub-meter to other parties i.e. the purchasers of various units from the respondent no.1. Learned counsel for the petitioner placed reliance on the electricity tariff w.e.f. 1st October,2006 having similar entries. The said tariff was applicable to the supply at one point only. She submits that though the respondent no.1 had initially applied for 52 connections, the respondent no.1 had cancelled the said application and for one time connection which clearly indicates the intention of the respondent no.1 to sub-distribute the electricity without prior consent of the petitioner. In view of the representation made by the respondent no.1 and in view of the electricity tariff order passed, the respondent no.1 could not have been classified under any other tariff under HTP-I at that point of time. Learned counsel for the petitioner placed reliance on the tariff w.e.f. 1st June, 2008.

54. It is submitted that under Tariff HT VI the petitioner is directed to ensure metering the arrangements so that the consumers currently classified under HT-VI commercial category, and requiring a single point supply, will have to either operate through a franchisee route or take individual connections and relevant category. She submits that the purpose and use of electricity was challenged by the respondent no.1. The respondent no.1 admittedly never applied for a sub-meter at any point of time. It is submitted that the cancellation of earlier application by the respondent no.1 shows malpractice on its part. The MERC revolves a category through franchisee route or taken individual connection by unit holder. The respondent no.1 never applied for sub-meter at any point of time. MERC had directed the consumer to approach the petitioner for particular connection and classification.

55. Learned counsel for the petitioner invited my attention to the order dated 15th June, 2009 passed by the MERC in the Case No. 8 of 2009 filed by the respondent no.1 challenging the assessment under section 126 of the Electricity Act, 2003 contrary to the order of the MERC in the appeal filed by the respondent no.2. She invited my attention to the order passed by MERC on 17th August, 2009 in Case No. 5 of 2009 filed by the respondent no.2 challenging the provisional bill issued by the petitioner. The MERC dismissed the said Case No.5 of 2009 on the ground that it had no jurisdiction in the matter. It is held that the issue of a single point HT connection and sub-distribution raised in its original petition is a red-herring and is not the issue on which it has been charged by the MERC and no relief was warranted on that account. The MERC held that the prayer for action under section 128 is superfluous and misleading and accordingly dismissed the said case No.5 of 2009. It is submitted by the learned counsel that the impugned order passed by the Appellate Authority is contrary to the order

passed by the MERC and in the application filed by the respondent no.2 shows *ex facie* perversity.

56. Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and another vs. Sri Seetaram Rice Mill, (2012) 2 SCC 108*** and in particular paragraphs 15, 16, 18, 19, 26, 39 and 41 and would submit that since the respondent no.1 has also committed violation of the terms and conditions of the agreement entered into between the parties and committed malpractice, the same fell within the expression of 'unauthorized use of electricity'. She submits that the sub-distribution of electricity without prior consent of the petitioner would amount to unauthorized use of the electricity and would thus fall within the ambit of section 126 of the Electricity Act, 2003. The respondent no.1 was thus an unauthorized user and thus the petitioner was entitled to make a final assessment by following the requisite procedure under section 126.

57. Learned counsel for the petitioner placed reliance on the judgment of this court in case of ***Emtex Industries (India) Ltd. and another vs. Maharashtra Industrial Development Corporation Limited and another, (2004) 5 Bom.C.R. 274*** and in particular paragraphs 14 and 24 in support of the submission that without admitting the allegations of the respondent no.1 that the Chief Engineer of the petitioner had advised the respondent no.1 to apply for cancellation of 52 meters and to apply for one meter, no such advise could have been given by the chief engineer illegally. In any event, the said alleged advice would not be binding upon the petitioner being not within the four corners of the law. The chief engineer had no power or authority to give such alleged advise to the respondent no.1.

58. Learned counsel for the petitioner invited my attention to the photographs annexed to the compilation showing the point of supply granted to the respondent no.1 by the petitioner. My attention is also invited to the photograph of the basement showing 58 meters and also the bills issued by the respondent no.2 to their clients/members.

59. Learned counsel for the petitioner invited attention to the letters dated 26th November 2010, 25th March 2011 and 10th January, 2012 and would submit that even during the pendency of the proceedings, the petitioner had called upon the respondent no.1 to become franchisee in accordance with the order passed by the MERC. The respondent no.1 however did not give any response to those letters.

60. Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***Shama Prashant Raje vs. Ganpatrao and others, (2000) 7 SCC 522*** and in particular paragraphs 5 and would submit that if on mere perusal of the order of a Tribunal if the High Court comes to the conclusion that such Tribunal has committed manifest error by mis-construing certain documents, or the High Court comes to the conclusion that on the materials on record, it is not possible for a reasonable man to come to a conclusion arrived at by the inferior Tribunal or the inferior Tribunal has ignored to take into consideration certain relevant materials or has taken into consideration certain materials which are not admissible, then the High Court will be fully justified in interfering with the findings of the inferior Tribunal. She submits that in this case the Appellate Authority has decided totally contrary to the provisions of Electricity Act, 2003, various orders passed by the MERC from time to time, various regulations framed

by the authority and also the provisions of the agreement entered into between the parties. The findings rendered by the Appellate Authority are totally perverse and thus this court has ample power to interfere with such perverse findings rendered by the Appellate Authority.

61. Learned counsel placed reliance on the judgment of Supreme Court in case of *Maharashtra Academy of Engineering and Educational Research vs. State of Maharashtra and others*, (2001) 10 SCC 166 in support of her submission that since the Appellate Authority has decided contrary to the provisions of law and has rendered various perverse findings, this court has ample power to interfere with such order under Article 227 of the Constitution of India.

62. Dr.Sathe, learned senior counsel appearing for the respondents on the other hand placed reliance on section 126 of the Electricity Act, 2003 and submits that since in this case the petitioner was fully aware of the requirement of load of electricity of the respondent no.1 based on the Gadgets, lines, devices which were found or ought to have been found and used on inspection of the premises of the respondents from time to time by the petitioner. He submits that since the petitioner was fully aware of the equipment, Gadgets, lines, devices on inspection of records and the premises of the respondents, section 126 of the Electricity Act, 2003 was not attracted in the facts of this case at all.

63. In his alternate submission, it is submitted by the learned senior counsel that even if the arguments of the petitioner that the petitioner could not have come to know about such unauthorized use of the electricity by the respondents and it was not possible to ascertain the said fact by the petitioner is accepted, the petitioner cannot levy the tariff / penalty under section 126(6) of the

Electricity Act, 2003 at the rate equal to twice of tariff applicable to the respondents. The petitioner in this case has levied the double rate of the tariff applicable for April, 2002 to March, 2009 contrary to section 126(5) and (6) of the Electricity Act, 2003.

64. It is submitted by the learned senior counsel that the entitlement, if any, of the petitioner prior to 15th June, 2007 under section 126(6) of the Electricity Act, 2003 was one and half time which was substituted by "twice" with effect from 15th June, 2007. The petitioner however has applied the same rate from April, 2002 to March, 2009 though prior to 15th June, 2007, the rate provided in section 126(6) of the Electricity Act, 2003 was one and half times of the tariff applicable to the respondents. The authority who made final assessment of the bill did not consider this crucial aspect in the final assessment order. The satisfaction was not recorded in the final order about any alleged unauthorized use of the electricity by the respondents and for what period. It is submitted that the final assessment order thus passed by the authority was *ex-facie* illegal and contrary to section 126(5) and (6) of the Electricity Act, 2003.

65. It is submitted by the learned senior counsel that the first connection was applied by the predecessor of the respondent no.1 only on 13th November, 2000. During the period between 2000 and 2005, the respondent no.1 had sold various units to the various multinational companies and others and those units have been in possession of their respective premises and were using the electricity. The petitioner thus could not have charged the double rate to the respondent no.1 contrary to these admitted facts. In his alternate argument, learned senior counsel submits that no enquiry was made on the basis of the date of the user by the petitioner.

66. Learned senior counsel for the respondents invited my attention to the application dated 15th January, 1999 made by the respondent no.1 to the petitioner for new connection and also the sanctioned letter issued by the petitioner on 17th August, 1999. He submits that in the said sanctioned letter itself, the number of occupants of the office bearers and the electricity load load-wise was mentioned totaling to 44 numbers. On 18th August, 1999, the predecessor of the respondent no.1 had informed the Chief Engineer of the petitioner about the intention of the respondent no.1 to sell the building to multinational companies and had applied for permission to install two numbers of 750 KVA transformers in place of two numbers of G-3010 transformers. It is submitted that the petitioner was thus fully aware of the fact that the respondent no.1 had intended to sell all the units to multinational companies. The petitioner thus could not have levied the rate twice the normal tariff applicable to the respondent no.1 for the entire period. He submits that the question of any unauthorized user by the respondents thus did not arise. The Executive Engineer had estimated the total load based on the said requirement of the respondent no.1.

67. Learned senior counsel for the respondents placed reliance on the inspection report dated 22nd November 1999 prepared by the Executive Engineer (BGDN), Pune recommending to release power supply to the predecessor of the respondent no.1 by making various provisions and recommending the estimate for sanction. He also placed reliance on the letter dated 23rd April 2000 from the predecessor of the respondent no.1 to the Chief Engineer of the predecessor of the petitioner recording the visit of the Chief Engineer of the predecessor of the respondent no.1 and various discussions alleged to have been held with the Chief Engineer regarding power supply to the project of the predecessor of the

respondent no.1.

68. The predecessor of the respondent no.1 requested the Chief Engineer to adjust the amount paid by the respondent no.1 for L.T. connection in H.T. connection charges and requested for quotation and approval for H.T. connection at the earliest. In the said letter, it was alleged that various options were discussed with the Chief Executive Engineer for giving power supply to the project of the predecessor of the respondent no.1 and finally the predecessor of the respondent no.1 came to the conclusion to go for H.T. connection. He submits that the said request was to save installation of transformer. It is submitted that it was at the suggestion of the Chief Engineer that the predecessor of the respondent no.1 had applied for change to H.T. connection as against the L.T. connection applied earlier. The predecessors of the petitioner were thus fully aware of the change of purpose as far back as on 27th June 2000.

69. Learned senior counsel for the respondents invited my attention to the application dated 9th May 2000 from the predecessor of the respondent no.1 to the Chief Engineer of the predecessor of the petitioner seeking power supply to their project. On 27th June 2000, the predecessor of the respondent no.1 applied to the Chief Engineer of the predecessor of the petitioner alleging that as per advise of the then Chief Engineer, the predecessor of the petitioner applied for HT power supply to their project "G.E. Plaza, Airport Road, Pune 411 006" and once again requested to adjust the earlier amount paid by them for LT connection in the new HT supply sanction.

70. In the application in prescribed format for electric power for industries for loads above 50 KW, the purpose, nature and lines of production is

mentioned as 'Real Estate Developers.' The predecessor of the respondent no.1 vide their undated letter requested the Chief Engineer thereby enclosing a fresh application of HT supply and for release for HT supply for Phase I i.e. 750 kw connected load and 500 KVA contract demand as alleged to have been agreed by the Chief Engineer.

71. In the said letter, the predecessor of the respondent no.1 requested the Chief Engineer to treat their previous application for H.T. power supply dated 27th June 2000 as cancelled. On the said application, an endorsement came to be made by one of the officers of the predecessor of the petitioner stating that revised load proposal submitted by the party is accordingly processed after receipt of estimates from the Executive Engineer.

72. Learned senior counsel invited my attention to the sanctioned letter dated 6th November 2000 issued by the predecessor of the petitioner to the predecessor of the respondent no.1 thereby sanctioning fresh power supply at 11 KV to the complex of the respondent no.1. On 13th November 2000, the predecessor of the petitioner and the predecessor of the respondent no.1 entered into an agreement. In the recital of the said agreement, it was provided that the purpose for which the power was required, should be mentioned in specific details e.g. Flour Mill, Ginning & Pressing factory, Vegetable Oil Factory, Spinning & Weaving Mill etc. of Commercial Complex.

73. It is submitted by the learned senior counsel that the predecessor of the petitioner as well as the petitioner were thus fully aware that the said connection was applied by the predecessor of the respondent no.1 for commercial complex of the predecessor of the petitioner. However, in clause 8 (a) of the said

agreement provided that tariff schedule HTP-1 would be applicable to the predecessor of the respondent no.1 to the class of service and in force from time to time.

74. Learned senior counsel placed reliance on the verification report annexed at page 41 of the compilation of documents and more particularly special remarks stating new HTP-1 SP/1228 charged on 23rd April 2001. He also placed reliance on the letter dated 1st February 2002 from the predecessor of the respondent no.1 to the Chief Engineer of the predecessor of the petitioner i.e. application in the prescribed format for sanction of the addition maximum demand 300 KVA for their project. The existing sanction at that point of time was 800 KVA. He placed reliance on the sanction letter dated 13th March 2002 from the predecessor of the petitioner to the predecessor of the respondent no.1 sanctioning the additional load of 300 KVA for the purpose of 'Real Estate and Developers.'

75. Learned senior counsel placed reliance on the agreement dated 4th April 2000 between the predecessor of the petitioner and the predecessor of the respondent no.1. In the recital of the said agreement, the purpose was mentioned as 'Real Estate and Developers.' He submits that the said purpose mentioned in the said agreement was ex facie erroneous. He also placed reliance on clause 8 (a) of the said agreement stating that tariff schedule HTP-1 would be applicable to the predecessor of the respondent no.1

76. Learned senior counsel placed reliance on the letter dated 25th August 2004 from the respondent no.1 to the petitioner thereby forwarding the application along with various documents and applying for an additional load.

He placed reliance on the Technical Feasibility Report dated 15th October 2005. The purpose mentioned in the said report for additional load is 'for Commercial Complex.' The Executive Engineer gave an estimate for giving additional power supply to the respondent no.1 at Commercial Complex. He placed reliance on the internal communication dated 23rd March 2006 from the Superintending Engineer of the petitioner to the Executive Engineer requesting to send the estimate within 10 days from the date of issuance of the said letter and to arrange joint visit for site inspection.

77. It was mentioned that metering should be on front side near the entrance gate/ with separate gate/with metering room of 6 mtrs. x 8mtrs./space of 6 x 8 mtrs. duly fenced for outdoor type kiosk. He also placed reliance on the internal communication from the Executive Engineer of the petitioner to the Assistant Engineer forwarding the HT file with site plan and requesting to keep ready the data for preparation of estimate duly marked on site plan. Learned senior counsel placed reliance on the letter dated 11th July 2006 from the petitioner to the respondent no.1 calling upon the respondent no.1 to make the payment of additional SLC of Rs.1,39,250/- forthwith.

78. Learned senior counsel for the respondents invited my attention to the agreement dated 22nd May 2007 entered into between the petitioner and the respondent no.1. He submits that in the recital of the said agreement, the purpose mentioned as 'Commercial Complex.' The tariff schedule made applicable to the respondent no.1 was HT-IN. It is submitted by the learned senior counsel that since admittedly the respondent no.1 had applied for sanction of additional load twice to the petitioner or its predecessor, the additional load was required to be considered on the basis of gadgets, equipments etc. to be used and installed in the

premises. The petitioner was fully aware and had knowledge about the user of the said premises. The petitioner continued to apply the tariff schedule HTP-1 to the respondent no.1 in spite of such knowledge and rightly so. The petitioner thus cannot be allowed to raise a plea that there was a wrong classification of tariff to the respondent no.1 by the petitioner.

79. Learned senior counsel for the respondents placed reliance on the inspection report dated 3rd March 2009 stating the category of the consumer as 'Commercial.' The tariff applied was HT-IN. Type of installation and nature of the work carried out was 'Commercial Office Complex.' He also invited my attention to clause 17 of the inspection report alleging various irregularities observed by the officer of the inspection in the premises of the respondent no.1 such as 'wrong tariff was applied to the respondent no.1 by applying industrial tariff whereas actual use of connection was for the commercial offices situated in the building.' The respondent no.1 had installed new meters to commercial consumers, separate metering was done and was billed commercially by the respondent no.1. There was resale of the energy by the respondent no.1 observed in the said report.

80. It was remarked that correct tariff should be applied to the respondent no.1 observing the documents and agreements. Tariff difference assessment bill should be issued and recovered from the consumers and an appropriate action against the respondent no.1 would be taken. It is submitted that the respondent no.1 all throughout had disclosed to the petitioner that the purpose of use of electricity was for commercial complex and there was no question of any resale of the energy.

81. Learned senior counsel placed reliance on the internal letter dated 4th March 2009 to the Deputy Executive Engineer (VS & E) of the petitioner recording various observations made during inspection. It was observed that there were 8 commercial offices found functioning in the building. Single point HT supply was given to the premises. Names of those 8 companies who were found in the premises were mentioned. The Deputy Director was instructed to prepare bill as per Section 126 of the Electricity Act, 2003 as per tariff applicable time to time in force since the date of agreement. It was also noticed that individual consumers were charged their electricity bill to the respondent no.1 at the rate Rs.7/- unit. The respondent no.1 was sanctioned consumer supply for real estate and developers purpose and was billed HTP-1 tariff.

82. It was recommended that the respondent no.1 was required to be billed as per HT-VI (Commercial) tariff. The actual use of supply was observed for the purpose other than sanctioned and shown violation of agreement from the side of the respondent no.1. It was also recommended that the respondent no.1 was liable for penalty under Section 126 of the Electricity Act, 2003. The spot panchnama was enclosed to the said report. Learned senior counsel submitted that the Executive Engineer acted at the behest of the superior officer and prepare provisional and final bill without application of mind.

83. Learned senior counsel for the respondent placed reliance on Regulation 13 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, and would submit that it was the statutory duty of the petitioner to classify or reclassify the respondent no.1 as a consumer into various commission tariff categories based on the purpose of usage of supply by such consumer. The petitioner cannot be

allowed to invoke the section 126 of the Act in the year 2009 after several years and to contend that the respondent no.1 was wrongly classified under the category when the respondent no.1 had applied for electricity connection.

84. Learned senior counsel placed reliance on section 2 of the Maharashtra Apartment Ownership Act, 1970 and would submit that under the said provision, even the sole owner of the apartment could apply for registration under the provisions of the said Maharashtra Apartment Ownership Act, 1970. The petitioner themselves had classified the respondent no.1 as industrial user and thus cannot be allowed to contend that the said classification of the respondent no.1 was wrongly made by the petitioner after several years. All requisite information were already furnished by the respondent no.1 to the petitioner when the respondent no.1 had applied for electricity connection and subsequently when the application for additional load was made by the respondent no.1 to the petitioner.

85. Insofar as the explanation (b)(ii) to section 126(6) of the Act sought to be applied by the petitioner is concerned, it is submitted by the learned senior counsel that the said provision would not apply to the facts of this case in view of the fact that the respondent no.1 was authorized to use and consume the electricity by granting sanction in favour of the respondent no.1. Insofar as the explanation (b)(iv) is concerned, it is submitted that the said provision also would not apply to the facts of this case on the ground that the sanction was granted in favour of the respondent no.1 for use of the electricity for commercial purposes which purpose has not changed by the respondent no.1. He submits that even if the wrong tariff is applied to the respondent no.1 by the petitioner, the petitioner could always change the tariff with prospective effect and not with retrospective effect.

86. Insofar as explanation V to section 126(6)(b) is concerned, it is submitted by the learned senior counsel that the said provision sought to be pressed in service by the petitioner would not apply on the ground that there is no change of premises in this case for which the supply of electricity was authorized by the petitioner in favour of the respondent no.1. The conditions precedent for invoking section 126(5) have not been satisfied in the facts of this case.

87. Learned senior counsel for the respondents placed reliance on Regulations 4.3.1 and 4.3.2 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 in support of his submission that the entitlement of the petitioner is to recover tariff for the electricity supply by the petitioner to the respondent no.1 only in accordance with the tariff determined by the commission from time to time and not based on any other basis. He also placed reliance on Regulation 13.1.1 of the said regulations and would submit that it was the duty of the petitioner to take inspection and carry out testing of the installment of the consumer. The petitioner was thus fully aware that there were various parties to whom the respondent no.1 had sold the tenements in the premises using electricity.

88. Learned senior counsel placed reliance on Regulation 14.1 of the said regulation and would submit that when the respondent no.1 had applied for additional load of electricity to the petitioner, the petitioner was under an obligation to investigate the requirement of the respondent no.1 and to even recover the expenses for carrying out such investigation from the respondent no.1. The petitioner thus cannot claim ignorance of the commercial activities carried out by the respondent no.1 or 2 in the premises. It is submitted that the petitioner had never applied the tariff HTP-VI to the respondent no.1 rightly and applied the tariff

HTP-I as per the tariff finalized by the Maharashtra Electricity Regulatory Commission.

89. It is submitted by the learned senior counsel for the respondents that the concept of sub-distribution of the electricity canvassed by the petitioner in this case has been already recognized in the electricity tariff decided by the Maharashtra Electricity Regulatory Commission itself and is in force for last several years. In the year 2010 when the new tariff was finalized by the Maharashtra Electricity Regulatory Commission, it was provided for execution of a franchisee agreement within a period of one year from the date of finalization of such new tariff. He also placed reliance on section 14 of the Electricity Act and more particularly second proviso to the said provision and would submit that even the said provision provides for the concept of sub-distribution.

90. It is submitted that the sub-distribution is thus not prohibited under the provision of Electricity Act, 2003 but it was recommended by the Maharashtra State Electricity Commission to regulate the concept of sub-distribution. He submits that the respondent no.1 has not assigned the agreement in favour of the respondent no.2 or nobody else and has thus not committed any violation of any of the provision of the agreement entered into between the petitioner and the respondent no.1. He placed reliance on the order passed by the Maharashtra Electricity Regulatory Commission on 24th May, 2016 which provides for execution of the franchisee or individual contract. It is submitted that without admitting the allegations of the petitioner that the respondent no.1 had indulged in an sub-distribution electricity, sub-distribution electricity is not prohibited under the provisions of the Electricity Act, 2003.

91. It is submitted by the learned senior counsel that the provision of section 126 of the Electricity Act, 2003 being a penal provision, in case of any ambiguity in the said provision, the benefit of such ambiguity has to be considered in favour of the consumer and not the petitioner.

92. It is submitted that though the Electricity Act, 2003 itself came into effect on 26th May, 2003, the petitioner had revised the demand in the final assessment for the period 2002 to 2009. He submits that though the penalty, if any, under section 126(6) was one and half time prior to 15th June, 2007 and became twice w.e.f. 15th June, 2007, the petitioner has assessed the penalty at the double rate to the respondent no.1 for the entire period illegally.

93. Learned senior counsel made an attempt to distinguish the judgment of Supreme Court in case of **Shama Prashant Raje** (supra) relied upon by the learned counsel for the petitioner on the ground that the petitioner could not show any perversity in the impugned order passed by the appellate authority.

94. The next submission of Dr.Sathe, learned senior counsel for the respondents is that the petitioner did not give any break up, basis or any proof of the proposed demand in the provisional assessment. He submits that the petitioner has not only charged the respondent no.1 at the double rate but has doubled the quantity also. Though the respondent no.1 had repeatedly called upon the petitioner to explain the details to enable the respondent no.1 to deal with the quantity and the rate mentioned in the provisional assessment by various letters, the petitioner did not give any such details. The assessing officer had finalized the assessment without following the principles of natural justice. The respondent no.1 had made an application for such details even before the appellate authority which

application was neither opposed by the petitioner nor any details were furnished. The application was made by the respondents on 6th April, 2009 raising various queries. Admittedly, no further hearing was held after 6th April, 2009. The assessing officer passed a final assessment order on 11th April, 2009.

95. It is submitted that there was no mention about the basis of such quantification arrived at in the final assessment order. The application was made by the respondent no.1 before the appellate authority on 15th September, 2011 *inter alia* praying for production of the record. Instead of producing the record even at that stage, the petitioner opposed the said application and refused to produce the record. It is lastly submitted by the learned senior counsel that the entire procedure of determination of the demand followed by the assessing officer was totally contrary to the provisions of the Electricity Act, 2003 and various other regulations framed by the Government from time to time.

96. Ms.Chavan, learned counsel appearing for the petitioner in rejoinder placed reliance on the Regulation-VI of the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 and would submit that generally all the consumer meters are owned by the licensee. If any consumer elects to purchase a meter, the same may be purchased by him however, shall be tested, installed and sealed by the licensee. The consumer is permitted to claim the meter purchased by him as his assets only after it is permanently removed from the system of the licensee. It is submitted that in this case though the respondent no.1 has purchased and installed on its own about 58 sub-meters, the respondent no.1 never applied for testing, installation or for sealing of those meters by the petitioner licensee. The installation of such sub-meters itself was thus unauthorized and contrary to the Regulation – VI of the aforesaid Regulations.

97. Insofar as the submission of Dr.Sathe, learned senior counsel appearing for the respondents that the petitioner had not furnished any details or break-up of various entries in the provisional list at any point of time though repeatedly called upon by the respondents to the petitioner is concerned, it is submitted by the learned counsel for the petitioner that all such details were already given by the assessing officer in the provisional assessment order itself. There is no provision issuing any interrogatories by the respondents upon the petitioner under any of the provisions of the Electricity Act, 2003.

98. It is submitted that in any event though the respondent no.1 had made an application for seeking such details on 15th September, 2011 before the appellate authority, the respondent no.1 on remand of the said appeal before the appellate authority did not press such application at any point of time before the disposal of the said appeal on 29th April, 2016. She submits that in any event the appellate authority did not allow the said appeal filed by the respondent no.1 on the ground that the assessing officer had not furnished any break-up or details of the amount reflected in the provisional bill.

99. Insofar as the alleged knowledge of the petitioner of the user of the electricity by various unit holders is concerned, it is submitted by the learned counsel for the petitioner that the petitioner had classified the respondent no.1 and had applied H.T.P.-1 category on the basis of the facts presented by the respondent no.1 to the petitioner at the time of making an application for such electricity connection. If the respondent no.1 would have informed the petitioner about handing over possession of the units to various third parties and that those third parties were using and consuming the electricity, which was meant to be supplied

to the respondent no.1, the petitioner would have classified the respondent no.1 under different tariff based on such user by the unit holders. The respondent no.1 never furnished any such details at any point of time to the petitioner or did not apply for change of classification based on change of user of the electricity supplied by the petitioner.

100. Insofar as the submission of the learned senior counsel for the respondents that the petitioner could not have applied the double rate of penalty provided in section 126(6) of the Electricity Act, 2003 for the entire period i.e. from 2002 to 2008 is concerned, learned counsel for the petitioner submits that the petitioner is entitled to levy such penalty at the double rate prevailing on the date of detection of the change of user or sub-distribution of the electricity by the respondent no.1 illegally in favour of the members of the respondent no.2.

101. Insofar as the submission of the learned senior counsel for the respondents that the concept of sub-distribution is already recognized in the Electricity Act, 2003, under various Regulations and under various orders passed by the Maharashtra Electricity Regulatory Commission is concerned, it is submitted by the learned counsel for the petitioner that it is not the case of the respondent no.1 that the respondent no.1 had applied at any point of time for permission for sub-distribution of the electricity to their customers. If the respondent no.1 would have applied for such permission, the petitioner could have considered such permission subject to the provisions of the Electricity Act and various Regulations. The fact remains that the respondent no.1 committed violation of the terms and conditions of the Electricity Act, 2003 and also various provisions of the agreement entered into between the parties which prohibited sub-distribution of the electricity without prior permission of the petitioner. The

petitioner could have given L.T. connections to the individual also if the respondent no.1 would have applied for such prior permission for sub-distribution which the respondent no.1 failed in this case.

102. Insofar as the submission of the learned senior counsel for the respondents that the respondent no.1 had applied for a single connection on the advice of the then Chief Engineer of the predecessor of the petitioner is concerned, it is submitted by the learned counsel for the petitioner that neither such officer could give any such advice to the respondent no.1 nor such advice was given. There is no estoppel against the law. Even if any such advice was given by the then Chief Engineer of the predecessor of the respondent, the same was not binding on the petitioner. The respondent no.1 cannot claim any equity based on any such alleged advice given by the then Chief Engineer.

103. Insofar as the submission of the learned senior counsel for the respondents that in the sanction granted by the petitioner, the purpose mentioned as “for real estate developer” was erroneous is concerned, it is submitted by the learned counsel for the petitioner that no such plea had been raised by the respondent no.1 at any point of time earlier. The purpose mentioned by the respondent no.1 itself in the last application was for “I.T. Purpose”. The respondent no.1 itself had asked the petitioner to cancel the earlier application and thus could not rely upon the contentions based on the earlier application in support of the submission that the petitioner was fully aware that the respondent no.1 had proposed to sell various units to various companies.

104. Insofar as reliance placed on Regulation 13.1.1 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code & Other Conditions

of Supply) Regulations, 2005 by the respondents is concerned, it is submitted that the said Regulation is not applicable to the respondent no.1. The said provision applies only to the installation of the L.T. consumer, whereas the respondent no.1 admittedly was classified as H.T. consumer. In the case of the respondent no.1, Regulation 13.2 of the said Regulations would apply. She submits that the appointment of the Electrical Inspector is not by the petitioner but by the State Government. It is submitted that the report obtained by the respondent no.1 from A.B.B. Consultants was received by the petitioner on 15th April, 2009 and not prior thereto. Only upon receipt of such copy of report, the petitioner came to know about such unauthorized user and illegal sub-distribution of the electricity by the respondent no.1 to its various customers.

105. It is submitted by the learned counsel for the petitioner that since the respondent no.1 had not only committed breaches of the provisions of the Electricity Act, 2003 and various other Regulations which are statutory in nature but had also committed breach of various provisions of the agreement entered into between the petitioner and the respondent no.1, the petitioner was entitled to take action against the respondent no.1 under section 126 of the Electricity Act, 2003. In support of this submission, learned counsel for the petitioner once again heavily relied upon the judgment of the Supreme Court in case of ***Executive Engineer, Southern Electricity Company of Orissa Limited and Anr.*** (supra).

106. Insofar as the submission of the learned senior counsel for the respondents that Explanation – (ii), (iv) and (v) to section 126(6)(b) of the Electricity Act, 2003 would not attract to the facts of this case is concerned, it is submitted by the learned counsel for the petitioner that Explanation - (ii) would apply in view of the fact that the respondent no.1 was permitted and was granted

sanction to use the electricity for its own use and not for sub-distribution of the electricity to their consumers' earlier customers. Explanation – (iv) would apply for the reason that though the petitioner had installed the meter in the premises of the respondent no.1 for supply of electricity for their own use, the respondent no.1 had installed the sub-meters without approval of the petitioner and without testing.

107. Insofar as Explanation – (v) to section 126(6)(b) is concerned, it is submitted by the learned counsel that the said provision will apply for the reason that the respondent no.1 while obtaining the sanction from the petitioner for supply of electricity had represented that the entire premises belong to it, whereas after obtaining the sanction from the petitioner, the respondent no.1 had diverted the use of the electricity to other premises which are now in possession of various consumers of the respondent no.1 who are using the electricity for their own commercial activities illegally. Those premises which are already transferred by the respondent no.1 to those unit purchasers ceased to be the premises in possession of the respondent no.1.

108. It is lastly submitted that the entire order passed by the appellate authority shows patent perversity and thus deserves to be set aside.

REASONS AND CONCLUSIONS :

109. The first question that arises for consideration of this Court is whether section 126 of the Electricity Act, 2003 or any part thereof was attracted in the facts of this case or not.

110. Section 2(13) defines the “consumer” means any person who is

supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.

111. Section 2(17) defines “distribution licensee” means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Section 2(27) defines “franchisee” means a person authorized by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply.

112. Section 12 defines as to who is the authorized person to transmit, supply electricity etc. Section 13 provides for power to grant exemption by the Appropriate Commission in favour of any local authority, Panchayat Institution, users' association, co-operative societies, non-government organizations or franchisees subject to such conditions and restrictions as may be imposed by the Appropriate Commission.

113. Section 14 provides for grant of licence by Appropriate Commission to any person to transmit electricity, to distribute electricity or to undertake trading in electricity in any area as may be specified in the licence. Section 62 provides for determination of the tariff for supply of electricity by a generating company to a distribution licensee. Section 64 provides for procedure for fixation of a Tariff Order.

114. It is not in dispute that the respondent no.1 was neither the distribution licensee nor a franchisee within the meaning of section 2(17) or 2(27) respectively. It is an admitted fact that the respondent no.1 had applied for separate 54 LT connections to its commercial complex on 15th November, 1999. The petitioner had sanctioned the said connections in favour of the respondent no.1 on 17th August, 1999. The said letter specifically provided that the connections would be released only after execution and completion of the work and on payment of service connection charges and deposits by individuals. The said LT connection was sanctioned by the petitioner after processing the application made by the respondent no.1 showing its desire to have 54 separate connections to its commercial complex. The individual users were required to enter into a separate individual agreements with the petitioner for such LT connections. It is not in dispute that the respondent no.1 or its consumers did not execute any such individual agreements in respect of such 54 separate connections.

115. It is also an admitted position that the respondent no.1 thereafter vide its letter dated 23rd April, 2000 to the Chief Engineer of the predecessor of the petitioner had requested the predecessor of the petitioner to adjust the charges paid by the respondent no.1 towards HT connection charges. The respondent no.1 had made a fresh application on 27th June, 2000 for HT connection. A fresh application was made by the respondent no.1 on 25th September, 2000 for HT supply with a request to cancel the previous application. Based on the request of the respondent no.1 seeking cancellation of the earlier application made by the respondent no.1 seeking fresh licence for HT connections based on the details furnished in the application form, the petitioner granted fresh sanction to the respondent no.1 under tariff HTP-I category.

116. Accordingly the parties executed an agreement on 13th November, 2000 for supply of electricity by the petitioner to the respondent no.1 for its own purposes. It was specifically provided in clause 13 of the said agreement that the previous consent in writing of the supplier for assigning, transferring or parting with any benefit of the agreement will have to be obtained by the respondent no.1. It was also provided in clause 15 thereof that the Act and Rules in force shall apply in all the matters not specifically provided in the said agreement.

117. A perusal of the record further indicates that the verification report prepared by the officials of the petitioner pursuant to the grant of HT connection by the petitioner in favour of the respondent no.1 on 17th April, 2001 referred to the consumer number of the respondent no.1 as being a solitary consumer of the petitioner. It is not in dispute that even at that point of time or at any time in future, the respondent no.1 informed the petitioner that the respondent no.1 had sold various units which were constructed by the respondent no.1 to various parties and those parties were given separate individual electricity connection by the respondent no.1 by installing separate sub-meters and that they were conducting commercial activities in their respective premises.

118. It is also not in dispute that though the respondent no.1 had applied for sanction for additional load to the petitioner twice during the period between the original sanction and preparation of the provisional bill by the Assessing Authority, the respondent no.1 did not inform the petitioner that the respondent no.1 had sold several of their units to the various parties and that the respondent no.1 had provided sub-meters to those parties and had allowed them to use the electricity which was supplied by the petitioner to the respondent no.1 for its own use through a single meter.

119. Admittedly, the respondent no.1 also did not apply for permission for sub-distribution of the electricity as franchisee. The respondent no.1 also did not request the petitioner that in view of the sub-distribution of the electricity by the respondent no.1 in favour of its various customers, the tariff order applicable to the respondent no.1 was required to be revised. The respondent no.1 also did not seek any specific drawings from the petitioner for carrying out any work for the purposes of supplying the power under Regulation 4.2.9.1.

120. A perusal of the impugned order passed by the Appellate Authority indicates that the Appellate Authority has not considered Regulations 4.2.9.1, 4.3.3, 6.1, 10.1, 12.1, 16.1, 16.2, 17.5 and 21.5.1 and other relevant regulations on this issue but placed reliance on Regulation 3 which was not relevant.

121. Regulation 3.4.1 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code & Other Conditions of Supply) Regulations, 2005 provides that the Distribution Licensee is authorized to recover electricity charges in accordance with such charges as may be fixed from time to time by the Commission. Regulation 3.4.3 thereof provides that unless otherwise specified, all HT and LT charges referred to one point of supply and each separate establishment shall be given separate point of supply. Regulation 4.1 (iv) of the said Regulations provides that in the application for supply or for additional load, shifting of services, extension of services or restoration of supply, the applicant has to furnish various details and also has to disclose the purpose of uses of electricity and load applied for each such uses. Regulation 4.1 (viii) provides that the applicant may also provide the additional details, at his option to facilitate the supply of electricity at consumer's risk by the Distribution Licensee. Regulation 5.1 provides

for procedure for processing such applications for the electricity supplied or for the additional load etc.

122. Regulation 5.1 (b) provides for inspection of the premises to which supply has to be given, with prior intimation to the applicant. Proviso to the said Regulation provides that the service position shall normally be at an accessible location and the meter shall be fixed at a height so as to enable the convenient reading of meter and to protect the meter from adverse weather conditions.

123. Regulation 10.1 provides for transfer of connection in the name of another person upon death of the consumer or in case of transfer of the ownership or occupancy of the premises, upon the application for change of the name of the new owner or occupier. Along with such application, the applicant has to furnish various details including the proof of ownership of the premises, consent letter of the transferor etc.

124. Regulation 13 provides that the Distribution Licensee may classify or reclassify the consumer in the various commission approved tariff categories based on the purpose of uses of supply by such consumer. Regulation 14.1.3 gave an option to the consumer to purchase a meter from the Distribution Licensee or from any supplier of correct meter in accordance with the specification laid down by the authority in the Regulations made under section 55 of the Act subject to proviso that where the consumer elects to purchase the meter from the suppliers other than the Distribution Licensee, shall be entitled to test the correctness of the meter prior to installation.

125. Regulation 20.1 of the “Conditions of Supply based on Maharashtra

Electricity Regulatory Commission (Electricity Supply Code & Other Conditions of Supply) Regulations, 2005” provides that in case of transfer of the ownership or occupancy of the premises and upon an application on the standard form by the transferee or the new owner / occupier of the said premises where the MSEDCL i.e. the petitioner herein has already given power supply, the petitioner shall transfer the electricity connection in the name of the transferee or the new owner / occupier in the said premises upon the applicant or such transferee produces various documents, including the proof of ownership of the premises, proof of lawful occupancy of the premises, proof of purchase etc.

126. A perusal of the record clearly indicates that it is not in dispute that though the respondent no.1 had initially shown its intention to transfer the units to the multinational companies, the respondent no.1 never informed the petitioner about the actual transfer of those units to various companies or its customers nor any such consumers of the respondent no.1 who are in possession of various units which originally belong to the respondent no.1 applied for transfer of electricity meter in its name. If the respondent no.1 or such unit-holders to whom the units were transferred by the respondent no.1 if would have applied for change of meter in their name by producing such records prescribed in Regulation 20.1 and would have applied for separate electricity connection, the petitioner would have transferred in their individual names on completion of the requirements under the Regulations.

127. Admittedly, the respondent no.1 also did not apply for permission of the petitioner for supplying the electricity from the meter installed by the petitioner in the premises in the premises of the respondent no.2 by way of sub-distribution of the electricity. The respondent no.1 has thus committed breaches not only of the

agreement entered into between the parties but also various provisions of the Electricity Act, 2003 and more particularly section 12. In my view, the respondent no.1 was not authorized to transmit the supply of electricity to its consumers. No licence to supply the electricity to the consumers of the respondent no.1 was admittedly granted by the petitioner under the provisions of section 14 or under any other provisions of the Electricity Act, 2003.

128. A perusal of the order passed by the Appellate Authority indicates that the entire order passed by it allowing the appeal filed by the respondent no.1 and setting aside the final assessment order passed by the Assessing Authority is mainly on the ground that the petitioner was either fully aware of the transfer of those tenements by the respondent no.1 to its consumers or that the petitioner was deemed to have knowledge of such transfer of the tenements by the respondent no.1 and thus the petitioner could not have levied the tariff at double the rate prescribed under section 126(6) of the Electricity Act, 2003.

129. In my view, the finding rendered by the Appellate Authority is also totally contrary to the Regulations 3.1.1, 4.2.1, 4.2.2, 4.2.8, 4.2.9.1 and 4.3.3. The respondent no.1 though had installed various sub-meters for the purpose of sub-distribution of the electricity to its customers, the respondent no.1 neither applied for testing of such meters installed by the respondent no.1 purchased from the other suppliers. It was not the case of the respondent no.1 that the petitioner had in fact taken any inspection of the tenements in the basements also where the consumers of the respondent no.1 were carrying on their business and in those premises the electricity was supplied by the respondent no.1.

130. I am not inclined to accept the submission made by the learned

counsel for the petitioner that since the petitioner came to know for the first time when the spot inspection of the premises of the respondent no.1 was taken by the officers of the petitioner and its nine consumers which were found in the premises at the time of taking inspection and were provided the electricity connection by the respondent no.1 by installing sub-meters, the petitioner is entitled to charge the penalty at the rate prevailing on the date of such detection of sub-distribution of the electricity for the entire period between 2000 and 2009. Atleast on the date of the petitioner having been furnished with the copy of the ABB Report, the petitioner was aware of the sub-distribution of electricity by the respondent no.1 to its consumers on different dates made diverse agreements.

131. I am not inclined to accept the submission of Dr.Sathe, learned senior counsel for the respondents that since the respondent no.1 had applied for additional load twice during the period 2000 and 2009, the petitioner were deemed to have been aware of the transfer of the tenements by the respondent no.1 to its customers or that the respondent no.1 were already distributing the electricity to its customers. In my view though there are provisions in the Electricity Act, 2003 and various Regulations for taking inspection of the premises where the electric supply has to be supplied on the application of the consumers, such powers of taking inspection are limited.

132. In my view, it is the duty of the consumer to notify the changes, if any, in the use of the premises, mode and manner of use of electricity, change of the ownership or any other rights in the property in favour of the third party, subsequent user based on such transfer in favour of the third party or any other factors which would have any bearing on the change of classification of the tariff or category to the petitioner to make such changes in the record in accordance with

the provisions of the Electricity Act, 2003 and the Regulations made thereunder. The respondent no.1 has failed to comply with its duty and obligation under the provisions of the Electricity Act, 2003 and Regulations referred to aforesaid.

133. The Supreme Court in case of ***Executive Engineer, Southern Electricity Company of Orissa Limited and Anr.*** (supra) has construed section 126 of the Electricity Act, 2003 in great detail. The Supreme Court also considered the agreement entered into between the licensee and the consumer. It is held by the Supreme Court that the Regulatory Regime under 2003 Act empowers the commission to frame the tariff, which shall be the very basis for raising a demand upon the customer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such customer. The Supreme Court rejected the contention of the consumer that the provisions of section 126 of the 2003 Act have to be given contextual interpretation.

134. It is held that the supply of electricity to a consumer is always subject to the provisions of 2003 Act, State Acts, Regulations framed thereunder and the terms and conditions of supply in the form of contract or otherwise. It is held that generally when the electricity consumer is in violation of any or of all these, it would be understood as “unauthorized use of electricity”.

135. The Supreme Court has held in the said judgment that the unauthorized use of the electricity means use of the electricity by means and for the reasons stated in the said clause (i) to (v) of clause (b) of Explanation to section 126 of the 2003 Act. It is held that some of the illustration stated the circumstances of “unauthorized use” in the section cannot be construed as exhaustive. Unauthorized use of the electricity would mean what is stated under

those Explanation, as well as such other unauthorized user which is consequently in violation of the statutory provisions of the said Act or the contractual provision. In paragraph 61 of the said judgment, it is held that unauthorized use of the electricity cannot be restricted to the stated clauses under Explanation but has to be given wider meaning so as to cover the cases of violation of the terms and conditions of supply and the Regulations and the provisions of the Electricity Act, 2003 governing such supply. “Unauthorized use of electricity” itself has expression which would, on its plain reading, take within its scope of misuse of the electricity or even malpractice adopted while using the electricity.

136. It is held by the Supreme Court that if a person unauthorizedly consuming the electricity, then he can certainly be dealt with in accordance with law and the penalty may be imposed upon him as contemplated under the contractual, regulatory and statutory regime. In paragraph 65 of the judgment, it is held that once the category stands changed because of excessive consumption of the electricity, the tariff and other conditions would stand automatically change. The licensee has a right to reclassify the consumer under Regulation 82 if it is found that the consumer has been classified in a particular category erroneously or the purpose supplied as mentioned in the agreement has changed or consumption of power has exceeded the limit of that category etc.

137. It is held by the Supreme Court that the expression “malpractices” has to be construed in its proper perspective and normally may not amount to theft of electricity contemplated under section 135 of the Electricity Act, 2003. Such Acts / malpractices would fall within the mischief of unauthorized use of electricity as stipulated under section 126 of the Electricity Act, 2003. The Supreme Court rejected the submission that it was only actual change in purpose

of use of the electricity and not the change of category that would attract the provisions of section 126 of the Electricity Act, 2003. The Supreme Court rejected the contention that where the electricity was provided for domestic purpose and is used for the industrial purpose or commercial purpose, then alone it will amount to change of use of the purpose.

138. In my view, the principles laid down by the Supreme Court in case of ***Executive Engineer, Southern Electricity Company of Orissa Limited and Anr.*** (supra) squarely applies to the facts of this case. The respondent no.1 having sub-distributed the electricity to its customers without prior permission of the petitioner and having not obtained any licence to transmit or supply the electricity to its customers by making appropriate application to the petitioner would clearly fall within the ambit of section 126 and more particularly Explanation (b), (ii), (iv) and (v) of section 126 of the Electricity Act, 2003. In view of the fact that the respondent no.1 has also committed breach of the provisions of the agreement clearly prohibiting the transfer or assign of the electricity without prior consent of the petitioner would also amount to unauthorized use of the electricity under section 126, Explanation (b), (ii), (iv) and (v) of the Electricity Act, 2003. The petitioner was thus entitled to levy the tariff at the rate prescribed under section 126(6) of the Electricity Act, 2003 upon the respondent no.1 for the period of such unauthorized sub-distribution of electricity.

139. The respondent no.1 has not disputed the contents of the ABB report which clearly indicates that the various amounts are collected by the respondent no.1 from its customers under various heads which amounts are more than the amount being paid to the petitioner under tariff HTP-I. The respondent no.1 has *ex-facie* distributed the electricity without any authority to its customers and has

illegally gained upon such distribution to its customers.

140. A perusal of the record clearly indicates that though the respondent no.1 itself had initially applied for 54 connections, the respondent no.1 subsequently applied for withdrawal of the said application and the sanction granted by the petitioner and applied for a single meter for self use. The respondent no.1 also did not seek any specifications and the drawings proposal from the petitioner subsequently for the sub-distributing the electricity. In my view, there is thus no substance in the submission made by Dr.Sathe, the learned senior counsel appearing for the respondents that the petitioner cannot be allowed to reclassify the tariff insofar as the respondent no.1 is concerned from HTP-I to HTP-VI.

141. A perusal of the record further indicates that even in the agreement dated 4th April, 2000 entered into between the parties, in the recital of the said agreement, the purpose mentioned was “real estate and developer”. The respondent no.1 never applied for change of the said purpose even thereafter to the petitioner. The respondent no.1 also did not apply for correction of any portion of the said agreement on the ground that the purpose mentioned therein was erroneous.

142. A perusal of the inspection report dated 3rd March 2009 indicates that it was noticed by the inspection team that type of installation and nature of the work carried out was 'Commercial Office Complex.' Various irregularities were noticed by the inspection team. It was noticed that wrong tariff was applied to the respondent no.1 and instead of applying industrial tariff, the respondent no.1 ought to have applied the actual use of connection for the commercial offices

situated in the building. The respondent no.1 had installed various new meters and was billed to its consumers separately on commercial basis. There was resale of the energy by the respondent no.1 to its various consumers. The respondent no.1 was charging electricity bill towards individual consumer at the rate of 7 per unit including under the head of the electricity duty which was more than the amount per unit paid by the respondent no.1 to the petitioner. I am not inclined to accept the submission of the learned senior counsel for the respondents that the Assessing Officer had acted at the behest of the superior officer and had prepared provisional and final bill based on such instructions of his superior.

143. Insofar as the reliance placed on Regulation 13 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 by the learned senior counsel for the respondents is concerned, it was the duty of the petitioner to classify or reclassify the respondent no.1 as a consumer into various commission tariff categories based on the purpose of usage of supply by such consumer. However, it was also the duty of such consumer to notify the change of user of electricity from time to time which would necessitate reclassification of tariff by the petitioner. There is no substance in the submission of the learned senior counsel for the respondents that in the facts of this case, the petitioner cannot be allowed to invoke the provision of Section 126 of the Electricity Act, 2003 after several years.

144. Insofar as the submission of the learned senior counsel for the respondents that the petitioner themselves had classified the respondent no.1 as industrial user and thus could not be allowed to reclassify the respondent no.1

under different tariff is concerned, there is no merit in this submission made by the learned senior counsel for the respondents. The respondent no.1 had already ceased to use the electricity for industrial purposes after construction of building and after transfer of various units to its consumers and had permitted its customers to use the premises for commercial purposes i.e. for the purposes other than the purpose for which connection was provided to them by the petitioner.

145. Insofar as the question as to whether application under the provisions of the Maharashtra Apartment Ownership Act, 1970 could be filed by an individual member or not is not of much significance for the purpose of deciding this petition. The respondent no.1 has not produced any proof either before the Assessing authority or before the Appellate Authority that the respondent no.1 had informed the petitioner about the actual transfer of various units to its consumers who were actually using the electricity supplied by the respondent no.1. No such proof is produced even before this Court by the respondent no.1.

146. Insofar as the submission of the learned senior counsel for the respondents that the explanations (b)(ii), (b)(iv) and (b)(v) in Section 126(6) of the Electricity Act, 2003 would not apply to the facts of this case is concerned, in my view, there is no merit in this submission of the learned senior counsel for the respondents. Change of user and sub-distribution of electricity without prior permission of the petitioner by the respondent no.1 would clearly fall under explanations (b)(ii), (b)(iv) and (b)(v) to Section 126(6) of the Electricity Act, 2003

147. Insofar as the reliance placed on Regulations 4.3.1 and 4.3.2 of the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and

Other Conditions of Supply) Regulations, 2005 by the learned senior counsel for the respondents is concerned, there is no dispute that the petitioner is entitled to recover charges of electricity supplied to the respondent no.1 in accordance with the tariff determined by the Maharashtra Electricity Regulatory Commission.

148. In my view, if the consumer is wrongly classified under a particular tariff or if there was any change in the purpose due to which the consumer may fall under a different classification and under a particular tariff, the petitioner is neither prohibited from applying the correct tariff to the consumer nor is prohibited from collecting the amount at the rate mentioned in Section 126(6) of the Electricity Act, 2003. Similarly, reliance placed on Regulation 13.1.1 of the said Regulations by the respondents in support of the submission that it was the duty of the petitioner to take inspection and carry out testing of the installment of various equipments is concerned, it was for the respondent no.1 to bring to the notice of the petitioner any changes in the purpose of user and also of the transfer of the ownership of the tenement in favour of third party which duty, the respondent no.1 totally failed to comply with.

149. Insofar as the submission of the learned senior counsel for the respondents that the concept of sub-distribution of the electricity was already recognized in the electricity tariff decided by the Maharashtra Electricity Regulatory Commission itself and has been in force for last several years is concerned, the fact remains that the respondent no.1 did not apply for permission to the petitioner for the sub-distribution of the electricity to its customers. On the other hand, the record indicates that even during the pendency of the proceedings before the Appellate authority, though the petitioner had called upon the respondent no.1 to apply for franchisee and separate individual connection in so

far as the consumers of the respondent no.1 are concerned, there was no response from the respondent no.1 to such letters addressed by the petitioner. Even if the sub-distribution of the electricity is permissible either under the Electricity Act, 2003 subject to the Regulations framed under the said provisions, the same could not be done without prior consent of the petitioner. It was not the case of the respondent no.1 that the respondent no.1 had obtained any prior permission from the petitioner before carrying out sub-distribution of the electricity to its consumers. This submission thus made by the learned senior counsel is of no merit.

150. Insofar as the submission of the learned senior counsel for the respondents that the benefit of ambiguity in the provisions, if any, should be given to the respondent no.1 is concerned, in my view, since there is no ambiguity in the said provision, this submission of the learned senior counsel has no merit.

151. Insofar as the submission of the learned senior counsel for the respondents that various findings of facts rendered by the Appellate authority being not perverse and thus cannot be interfered with by this Court in this petition filed under Article 226 of the Constitution of India is concerned, a perusal of the findings rendered by the Appellate authority clearly indicates that most of the submissions advanced by the petitioner are not at all considered in the impugned order. The finding of the Appellate authority that the petitioner had knowledge of transfer of units by the respondent no.1 to its various consumers and thus the petitioner could not have reclassified the respondent no.1 under different tariff is ex facie perverse. The respondent no.1 could not produce any material before the Assessing authority or before the Appellate authority or before this Court as to when the respondent no.1 had informed the petitioner about sale of various units

to its various consumers and that such consumers were supplied electricity by the respondent no.1 after obtaining prior permission from the petitioner.

152. Supreme Court in the case of ***Shama Prashant Raje Vs. Ganpatrao and Anr.*** (supra) has held that if on a mere perusal of the order of an inferior tribunal if the High Court comes to a conclusion that such tribunal has committed manifest error by misconstruing certain documents or the High Court comes to the conclusion that on the materials, it is not possible for a reasonable man to come to a conclusion arrived at by the inferior tribunal or the inferior tribunal has ignored to take into consideration certain relevant materials or has taken into consideration certain materials which are not admissible, then the High Court will be fully justified in interfering with the findings of the inferior tribunal. In my view, this principle of law laid down by the Supreme Court about the scope of interference by the High Court under Article 226 of the Constitution of India would squarely apply to the facts of this case.

153. In my view, the Appellate authority has totally rendered perverse findings and has not taken into consideration various relevant documents produced by the petitioner including the agreement entered into between the parties, the correspondence exchanged between the parties. This Court has ample power under Articles 226 and 227 of the Constitution of India to interfere with such perverse findings rendered by the Appellate authority. I am bound by the principles of law laid down by the Supreme Court in the case of ***Shama Prashant Raje Vs. Ganpatrao and Anr.*** (supra) which are clearly applicable to the facts of this case.

154. A perusal of the impugned order passed by the Appellate authority

also indicates that the Appellate authority has erroneously held that when the respondent no.1 had mentioned the purpose of the use of electricity at the time of making an application for supply of electricity, it was the responsibility of the petitioner to make classification in the proper category. Learned Appellate authority did not consider the fact that the purpose of supplying the electricity to the respondent no.1 was changed by the respondent no.1 from industrial to commercial and that also by sub-distributing the electricity to its various customers. The respondent no.1 having suppressed the subsequent events from the petitioner thus could not be allowed to urge that the petitioner having failed to classify the respondent no.1 under a particular category, the respondent no.1 cannot be charged under that category and tariff.

155. In my view, the finding of the Appellate authority that even if a new tariff rate under HTP VI would have become applicable with effect from 1st December 2003 since the petitioner did not apply the said tariff, the respondent no.1 was not responsible is concerned, is ex facie perverse. If the respondent no.1 would have notified the changes in the user and would have applied for permission to sub-distribute the electricity or for franchisee or for individual connection at the relevant time after producing the proof of change of ownership in respect of various units, the petitioner could have applied tariff under HTP-VI of the respondent no.1 at that point of time itself. The respondent no.1 having suppressed these facts from the petitioner, the petitioner cannot be restrained from applying the correct tariff applicable to the respondent no.1. In my view, the respondent no.1 having sold the independent premises to various entities could not have sub-distributed the electricity to such third parties and that also without prior permission of the petitioner. Such sub-distribution of the electricity to third parties who were owners of those units clearly amounted to the

unauthorized change of purpose of electricity.

156. In my view, the finding of the Appellate authority that the explanation given by the petitioner that they were not aware of the fact that the respondent no.1 had been providing the electricity to the third party for commercial purposes appears dishonest and not inconsistent with the law is ex facie perverse contrary to the admitted position on record and is without any evidence. The onus was on the respondent no.1 to prove that they had disclosed the petitioner about sale of various units to its various parties and that such parties were sub-distributed the electricity and were issued separate bills for collection of higher amount from those customers. The Appellate authority, in my view, has totally misunderstood the controversy and the relevant facts.

157. The finding of the Appellate authority that the clarification given by the respondent no.1 that the amount recovered from various unit holders @ Rs.7/- per unit had been utilized for the purpose of alternative power equipments and for providing common amenities was proper and satisfactory is totally perverse and contrary to the record produced by the parties before the Appellate authority. In my view, since sub-distribution of the electricity itself was illegal and contrary to the provisions of the Electricity Act, 2003, various regulations and the provisions of the agreement entered into between the parties, the alleged utilization of the surplus amount, if any, for various purposes is of no significance. Be that as it may, the respondent no.1 did not produce any material before the Appellate authority to demonstrate that the respondent no.1 had not gained because of sub-distribution of the electricity to its various customers or that the amount recovered by the respondent no.1 was utilized for alternative power equipments and for providing common amenities.

158. In my view, the finding of the Appellate authority that the respondent no.1 having failed to deposit the electricity charges/duty by it to its various customers in the government treasury, they are bound to do so is totally perverse. The respondent no.1 at the first instance could not have collected any such electricity charges/duty from its consumers illegally which aspect is totally overlooked by the Appellate Authority.

159. Insofar as the submission of the learned senior counsel for the respondents that though the respondent no.1 had applied for break up of the calculation and the demand made in the provisional assessment, the petitioner refused to furnish any such break up or proof in support of the demand is concerned, a perusal of the record indicates that the respondent no.1 had made such request for furnishing break up or proof in support of the demand proposed in the provisional bill and also made an application in writing before the Appellate authority against the petitioner. The petitioner however did not furnish any such break up or any proof in support of demand made in the provisional assessment and on the other hand, opposed the said application filed by the respondent no.1 before the Appellate authority.

160. Learned counsel appearing for the petitioner has opposed this submission made by the learned senior counsel for the respondent on the ground that under no provision of the Electricity Act, 2003 or under any Regulations, the petitioner was under an obligation to furnish any such break up or proof in support of the demand made in the provisional bill to the respondent no.1 and thus there is no violation of principles of natural justice. It is also the case of the petitioner that though the respondent no.1 had admittedly made a request for

furnishing break up or proof before the Appellate authority from the petitioner, the respondent no.1 did not press the said application after remand of the matter by this Court to the Appellate authority with a direction to hear the said appeal filed by the respondent no.1.

161. It is an admitted position that the respondent no.1 had made demand for break up of the amount demanded in the provisional assessment and the proof in support thereof. Admittedly, the petitioner did not furnish any break up as sought by the respondent no.1 and also the proof thereof. The respondent no.1 had made an application before the Appellate authority for appropriate direction against the petitioner to furnish the break up and proof.

162. Section 126 (1) of the Electricity Act, 2003 empowers the assessing officer to provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use. Such order of provisional assessment shall be served upon the persons in occupation or possession or in charge of the place or premises. Under Section 126 (3), such person is entitled to file an objection, if any, against the provisional assessment before the assessing officer. The assessing officer has to afford a reasonable opportunity of hearing to such person and thereafter to pass a final order of assessment within the time prescribed.

163. In my view, the consumer who is served with such provisional assessment which is based on the best of the judgment of the assessing officer, is entitled to seek necessary break up or details from such provisional bill to enable him to raise an objection on the issue of payability as well as quantification. If any particulars in the bill are missing or vague and are not furnished to such person

who is entitled to file objection, such person would not be able to deal with such provisional assessment made by the assessing officer in right perspective. In my view, the assessing officer has to follow the principles of natural justice while passing a final assessment order under Section 126(3) of the Electricity Act, 2003.

164. In this case, the respondents had though repeatedly called upon the assessing officer to furnish the break up and details of various datas given in the provisional assessment, the assessing officer failed to furnish such break up and details. In my view, the final assessment order passed by the assessing officer thus was in violation of principles of natural justice. I am not inclined to accept the submission made by the learned counsel for the petitioner that there is no provision under the Electricity Act, 2003 or any of the Regulations or that the petitioner was not under an obligation to furnish any such break up or details as sought by the respondent no.1 while passing a final assessment order. The final assessment order passed by the assessing officer determining the liability of the consumer entails civil consequences and thus it is mandatory duty of such assessing officer to comply with the principles of natural justice before passing a final order of assessment under Section 126(3) of the Electricity Act, 2003 by providing such details and breaking up of the amounts reflected in the provisional assessment.

165. In my view, there is no merit in the submission of the learned counsel for the petitioner that since the Appellate authority has not set aside the order of provisional assessment on the ground of violation of principles of natural justice by the assessing officer, this Court cannot set aside the final order of assessment passed by the assessing officer on that ground. In my view, the

impugned order passed by the assessing officer thus deserves to be set aside on this ground.

166. A perusal of the record indicates that though the respondent no.1 had not disclosed the details of units sold in favour of its various consumers to the petitioner at the relevant time or at least till the spot inspection was made by the inspection team of the petitioner, the fact remains that the ABB report obtained by the respondent no.1 was already furnished to the petitioner in the year 2009 which included various details of the agreement entered into between the respondent no.1 and its various customers in respect of various units sold by the respondent no.1 who were sub-distributed the electricity by the respondent no.1 by installing various sub-meters.

167. A perusal of the final assessment order clearly indicates that though at least at that stage, the assessing officer was aware of details of sale of various units by the respondent no.1 to its various consumers from the connection provided by the petitioner in the premises of the respondent no.1, the assessing officer has levied the rate equal to twice the tariff applicable for the relevant category of services specified in Sub-section (5) of Section 126 of the Electricity Act, 2003 for the entire period. Learned counsel for the petitioner could not dispute that the entitlement of the petitioner to charge a rate equal to twice the tariff was in substitution of "one-and-half times" w.e.f. 15th June 2007. Some of the units were sold and there was sub-distribution of electricity in favour of some of those unit holders prior to 15th June 2007. The respondent no.1 had admittedly not disputed the contents of ABB report including the date of agreement entered into between the respondent no.1 and those unit holders. It was thus possible for the assessing officer to ascertain the unauthorized use of

electricity and the period thereof based on such information available from the said ABB report.

168. A perusal of the final assessment order indicates that the learned assessing officer did not make any efforts to ascertain period of unauthorized use of electricity while passing an order of final assessment. The assessing officer thus could not have demanded a rate equal to twice the tariff applicable from the respondent no.1 for the entire period. In my view, the impugned order of final assessment thus deserves to be set aside on this ground also. The matter deserves to be remanded back to the assessing officer for deciding the final assessment afresh.

169. I therefore pass the following order :-

i). The impugned order dated 31st January 2018 passed by the Appellate authority in Appeal No.183 of 2010 under Section 127 of the Electricity Act, 2003 is quashed and set aside.

ii). The impugned order of final assessment dated 11th April 2009 passed by the assessing officer under Section 126 of the Electricity Act, 2003 is quashed and set aside.

iii). The provisional assessment order dated 11th March 2009 is restored to file before the assessing officer. The assessing officer is directed to furnish the break up and the details showing the basis of such calculations to the respondent no.1 within four weeks from the date of communication of this order.

iv). The respondent no.1 would be at liberty to file further objections before the assessing officer insofar as the issue of quantification is concerned and not on the issue whether there was any unauthorized sub-distribution of electricity by the respondent no.1 or not.

v). The assessing officer shall deal with such objections on quantification, as may be raised by the respondent no.1 while passing the final order of assessment under Section 126(3) of the Electricity Act, 2003 after affording a reasonable opportunity of hearing to the respondent no.1.

vi). The assessing officer shall pass a final assessment order expeditiously and not later than four months from the date of first hearing. The deposit made by the respondent no.1 shall be subject to the outcome of the final assessment.

vii). Rule is made absolute in aforesaid terms. There shall be no order as to costs.

viii). Parties to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)