IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

ORDER ON

IA NO. 288 of 2020 IN IA NO. 2183 OF 2019
IN
APPEAL NO. 201 of 2014

Dated : 17th November, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

Reliance Infrastructure Limited (Distribution)
having its registered office at
'H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai 400 710. Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,
having its office at World Trade Centre
No.1, 13th floor, Cuffe Parade,
Colaba, Mumbai 400 001

2. Tata Power Company Limited,
having its office at Bombay House,
24, Homi Mody Street.
Mumbai 400 001. Respondent(s)

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
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Mr. Amit Kapur
Mr. Kunal Kaul
Mr. Abhishek Kumar Munot
Mr. Samikrith Rao for R-2

Mr. Harinder Toor
Ms. Akanksha Das for BEST

ORDER

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The instant Application IA No. 288 of 2020 in IA No. 2183 of 2019 has been filed by the Appellant – Adani Electricity Mumbai Limited (formerly Reliance Infrastructure Ltd.) in the present Appeal being Appeal No.201of 2014 seeking amendment of the captioned. Appeal, along with application seeking modification of prayer(s).

2. The present appeal arises out of the order dated 14.08.2014 passed by the MERC, is in respect of grant of a distribution license with effect from 16th August, 2014 to the 2nd Respondent, inter alia, in the area of supply covered by the distribution license of the Appellant.

3. **The Applicant/Appellant has made the following submissions**:-

3.1 The present consolidated written note of submissions is being made in support of the captioned Interlocutory Applications seeking amendment of the present appeal (IA No. 2183 of 2019), along with modification of prayer (IA No. 288 of 2020), to the extent of modifying the Impugned Order dated 14.08.2014, so as to align the

same with the judgment dated 28.11.2014, passed by this Tribunal in Appeal Nos. 229 & 246 of 2012.

3.2 The present appeal has been filed against the impugned order passed by the Respondent Commission/ MERC in Case No. 90 of 2014, whereby, the Respondent Commission, after holding that the network rollout plan submitted by Respondent No. 2/ TPC is inadequate, proceeded to grant a fresh distribution license.

3.3 At this stage, it is most vital to submit that the validity of the impugned order is required to be tested keeping in mind the subsequent judgment dated 28.11.2014, passed by this Tribunal in Appeal Nos. 229 & 246 of 2012. The Respondent No. 2/ TPC, is a parallel distribution licensee in the distribution area of the Appellant/ Applicant and has opposed the present amendment applications filed by the Appellant/ Applicant.

3.4 The prayers made in the present appeal became inappropriate and could not be granted (i.e. infructuous) on account of the subsequent judgment dated 28.11.2014 passed by this Tribunal. Accordingly, applications were filed by the Appellant/ Applicant seeking amendment of the present appeal along with prayers (IA Nos. 2183 of 2019 & 288 of 2020). Hence, the present amendment is necessitated on account of the change in interpretation of law by this Tribunal, qua settling the position of law as regards network roll-out for the purpose of fulfilling the mandate of Section 43 of the Electricity Act, 2003. In this context, reference be made to the following original prayers of the present appeal:

> *"a) Set aside the impugned order to the extent it grants license to the 2nd Respondent for supply of electricity by using the Appellant's network, in the licensed area covered by the Appellant's license;*

b) Without prejudice to the aforesaid direct the 2nd Respondent not to connect to any of the existing consumers or changeover consumers or new consumers in the Appellant's licensed area till the 2nd Respondent has laid its own network in the said area to be USO ready."

3.5 In the light of the aforesaid brief background, for the purpose of considering the aforesaid applications seeking amendment of appeal and the prayers, the following issues emerge:

a. What is the need for amendment;

b. What is to be seen for allowing amendment of appeal;

c. Merits of the amendment sought, cannot be considered at the stage of allowing amendment;

d. Whether the present amendment needs to be allowed on account of delay.

Re: What is the need for Amendment

3.6 At the outset, it is submitted that the need for amendment of the present appeal arose on account of the occurrence of subsequent developments, relating to the law which was laid down by this Tribunal, after the passage of the impugned order and the filing of the present appeal. In order to appreciate the requirement for seeking the present amendment, reference be made to the following:

a. The impugned order challenged in the present appeal, was issued/ passed on 14.08.2014;

b. The present appeal was filed on 19.08.2014;

c. Reference be made to Para 7.1.5 (e) and (f) of the Impugned Order], which specifically required TPC to lay down network in

its entire distribution license area, including the area of AEML. Further, MERC directed TPC to follow the directions made in Orders passed in Case Nos. 151 of 2011 & 85 of 2013. The said orders permitted TPC to use the network of AEML "only" in the interim, and it should endeavor to lay down network in its entire license area;

d. Accordingly, the prayer(s) were framed in the appeal with respect to the understanding of law that, a parallel licensee should lay down its own network in the entire distribution area, and that TPC cannot be allowed to use the network of AEML;

e. The above understanding of law was subsequently changed when this Tribunal issued the judgment dated 28.11.2014 in Appeal Nos. 229 & 246 of 2012, i.e. after the filing of the present appeal on 19.08.2014;

f. In the aforesaid judgment, in Para 55-58 it was held that TPC should not lay down its network where a reliable network of AEML exists, and that TPC can supply power to its consumers by using the network of AEML.The aforesaid judgment has attained finality as it was not challenged by any of the parties.

Subsequently, MERC passed a consequential order dated 12.06.2017 in Case Nos. 182 of 2014 & 40 of 2015, for the purpose of implementation of the aforesaid judgment;

g. As such, on account of the aforesaid subsequent developments [*Judgment dated 28.11.2014 in Appeal Nos. 229 & 246 of 2012, and judgment/ final order dated*

12.06.2017 in Case Nos. 182 of 2014 & 40 of 2015], the prayer(s) made by AEML could not be granted, i.e. the prayers became infructuous/ inappropriate, thereby requiring moulding of relief by permitting AEML to amend the present appeal.

3.7 In the Applications filed by the Appellant seeking amendment of the appeal, and the prayers, the amended prayer which is being sought is as follows:

> *"modify the Impugned Order and license dated 14.08.2014, passed in Case No. 90 of 2014, so as to align the same with the judgment dated 28.11.2014 passed by Hon'ble APTEL in Appeal Nos. 229 & 246 of 2012."*
>
> *(Underline Supplied)*

It is pertinent to mention herein that in the application seeking amendment of the present appeal (IA No. 2183 of 2019), the Appellant initially sought complete setting aside of the impugned order, thereby also seeking cancellation of the license granted to TPC. However, this Tribunal objected to the said prayer, and required the Appellant to modify the same suitably. Thereafter, the Appellant filed the subsequent application (IA No. 288 of 2020), seeking the aforementioned modified prayer.

The aforesaid amended prayer has been sought in I.A. No. 288 of 2020. Further, the Appellant will not incorporate/ press some of the amended grounds, being Paras 9.13, 9.15, 9.17, 9.18, 9.19, 9.20 and 9.21, as contained in I.A. No. 2183 of 2019, in the appeal, if this Tribunal allows the present amendment.

3.8 Hence, the need/ the only premise for seeking the present amendment, is the aforementioned subsequent developments

which occurred after the present appeal was filed. TPC has argued that the present amendment is being sought on account of the change in shareholding/ management of the Appellant, including counsel, and that for the said reasons, an amendment cannot be allowed.

3.9 The aforesaid argument of TPC is completely erroneous, as well as factually incorrect. From a reading of paras 2 to 6 of the application seeking amendment (*please see page 1 to 4 of IA No. 2183 of 2019*), it is evident that the sole reason for seeking to present amendment is the occurrence of the subsequent events, which happened after the present appeal was filed, by way of the law laid down by this Tribunal in the judgement dated 28.11.2014 passed in Appeal Nos. 229 and 246 of 2012.

3.10 The change of shareholding/ management of the Appellant, including counsel, amongst others, is a fact which was narrated in order to explain the events which took place after the present appeal was filed. Therefore, the objections of TPC, based on the above factual events, cannot be considered while adjudicating the applications filed for seeking the present amendment.

Re: What is to be seen for allowing amendment of appeal

3.11 On the hearing held on 18.09.2020, TPC argued that AEML in its preliminary written submissions dated 17.09.2020, contended that the prayer(s) made in the present appeal became infructuous, pursuant to the subsequent judgment dated 28.11.2014, passed by this Tribunal in Appeal Nos. 229 & 246 of 2012. Hence, the appeal should be dismissed instead of allowing the amendment.

3.12 The aforesaid argument of TPC is fundamentally flawed, on account of the following:

a. It is the case of the Appellant that the prayers framed in the appeal became inappropriate, and that the same could not be granted in the light of the subsequent development of the passage of the judgement dated 28.11.2014 passed by this Tribunal;

b. The impugned order gives an independent right to the Appellant to challenge the same by filing the present appeal; and

c. On account of the subsequent development, which the Appellant could not at all have foreseen when the present appeal was filed, it would be against equity, propriety and justice if the appellant is denied the opportunity to amend the present appeal.

3.13 Further, in order to counter the aforementioned specific arguments of TPC, reference be made to the following judgements of the Hon'ble Supreme Court. In the following judgements, it has been specifically held that in the event the prayers become inappropriate, and could not be granted, on account of the subsequent change in fact or law, then the said prayers are required to be moulded by way of amendment:

a. *Pasupuleti Venkateswarlu v. Motor and General Traders*, reported in *(1975) 1 SCC 770*.

b. *Gaiv Dinshaw Irani v. Tehmtan Irani*, reported in *(2014) 8 SCC 294*.

c. *Jai Prakash Gupta v. Riyaz Ahamad*, reported in *(2009) 10 SCC 19.*

d. *Sheshambal v. Chelur Corpn. Chelur Building*, reported in *(2010) 3 SCC 470*.

e. *Om Prakash Gupta v. Ranbir B. Goyal*, reported in *(2002) 2 SCC 256*,

f. *Kedar Nath Agrawal v. Dhanraji Devi*, reported in *(2004) 8 SCC 76*.

g. *Mahila Ramkali Devi v. Nandram*, reported in *(2015) 13 SCC 132.*

3.14 From the aforementioned judgements, the principle which is culled out is that a court of law has to take into account subsequent events, *inter alia*, in the following circumstances:

a. the impact of the subsequent development is to be seen on the right to relief claimed by a party and, if necessary, mould the relief suitably so that the same is tailored to the situation that obtains on the date the relief will be granted; or

b. the relief claimed originally has by reason of subsequent change of circumstances, either in law or fact, become inappropriate, or cannot be granted; or

c. it is necessary to take notice of subsequent events in order to shorten litigation; or

d. it is necessary to do so in order to do complete justice between the parties.

Applying the aforesaid principle in the present case, it is submitted that when the impugned order was passed on 14.08.2014, and the present appeal was filed on 19.08.2014, the legal position/ understanding of law with respect to laying down of parallel distribution network in the license areas of the Appellant and the Respondent No. 2, was governed by an order dated 22.08.2012 passed in Case No. 151 of 2011 by the MERC. Accordingly, the appeal, and the prayers, were drafted and filed as per the said legal position.

3.15 However, after the present appeal was filed, this Tribunal passed the judgment dated 28.11.2014, whereby the entire legal position/ understanding of law qua laying down of distribution network in order to implement Section 43 of the Electricity Act, 2003, was interpreted. Subsequently, the Respondent Commission passed an order dated 12.06.2017 for implementing the aforesaid judgment.

The said subsequent developments, read with the law laid down vide the judgment dated 28.11.2014 of this Tribunal, requires that the present appeal be permitted to be amended so as to do complete justice between the parties, and to safeguard the right of the Appellant to file an appeal.

3.16 In furtherance to the above, it is submitted that the only relief which is possible post the aforesaid subsequent judgment, which is a subsequent event, is to seek an amendment to the original prayers, thereby seeking modification of the impugned order in order to align the same with the aforesaid judgment of this Tribunal. Furthermore, it is submitted that the application seeking amendment of the appeal ought to be allowed, as without taking into consideration the law laid down as per the judgment dated 28.11.2014, passed by this Tribunal, the real controversy in the present appeal cannot be adjudicated.

Re: Merits of the amendment sought, cannot be considered at the stage of allowing amendment

3.17 TPC argued with respect to what could be the possible impact of the amended prayer, and the appeal, which is being sought by AEML. TPC further argued that the present appeal had become infructuous when the interim/ stay order dated 04.09.2014 was vacated vide an order dated 28.04.2015.

3.18 In this context, it is submitted that it is a settled principle of law that while granting permission for amendment, the “merits” of the proposed amendment cannot at all be looked into. The only aspect which is to be looked by a Court of Law, is that whether the amendment would help in deciding the real controversy between the

parties. If the said test is passed, then the amendment is required to be allowed. In this context, reference be made to the following judgments:

a. *Rajesh Kumar Aggarwal v. K.K. Modi*, reported in *(2006) 4 SCC 385*.

b. *Lakha Ram Sharma v. Balar Mktg. (P) Ltd.*, reported in *(2008) 17 SCC 671*

c. *Mohinder Kumar Mehra v. Roop Rani Mehra*, reported in *(2018) 2 SCC 132.*

3.19 TPC further alleged that AEML is only seeking amendment of the prayer(s), and not the grounds, and therefore, the amendment should be rejected.

3.20 In this regard, it is the submitted that AEML is also seeking amendment of facts and grounds, as detailed in the amendment application (I.A. No. 2183 of 2019). Further, in its written submissions, AEML has merely stated that it will not press only those grounds which seek cancellation of the distribution license of TPC. All other grounds in the appeal, and of the aforesaid application, are being sought to be pressed by AEML, in the event the amendment is allowed. Hence, the aforesaid argument of TPC ought to be rejected.

Re: Whether the present amendment needs to be allowed on account of delay

3.21 The principle of amendment of pleadings is provided under Order 6 Rule 17 of the Civil Procedure Code, 1908, which provides as follows:

> ***"17. Amendment of pleadings*** – *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the*

parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

(Underline Supplied)

In this context, it is submitted that the Tribunals, including this Tribunal, are not bound by the procedure laid down by the Code of Civil Procedure, 1908. In this context, reference be made to Section 120 (1) of the Electricity Act, 2003, which provides as follows:

"Section 120. (Procedure and powers of Appellate Tribunal): ---

(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure."

From a reading of the above, it is clear that this Tribunal shall be guided by the principles of natural justice, and as such, strictly the provisions of CPC, 1908, is not applicable to the present proceedings, and that only the broad principles of CPC can be considered by this Tribunal while deciding the amendment application. Further, any principles/ provisions of CPC, 1908 have to be liberally construed, in light of Section 120(1) of the Electricity Act, 2003.

3.22 Furthermore, it is submitted that the stipulation in Order 6 Rule 17 of the Civil Procedure Code, 1908, that amendment is to be normally allowed before commencement of "trial", has to be seen from the context of commencement of final hearings/ arguments in an appellate proceeding. In the present case, the present appeal was never argued, and that the application for amendment was made before any commencement of final arguments. The argument of

TPC of around 65 hearings being conducted in the present batch of appeals, is completely erroneous, for the reason that not once the final hearing in the present appeal (i.e. Appeal No. 201 of 2014) has taken place.

3.23 Therefore, the present amendment, in any event, falls outside the restriction which is imposed in the aforesaid proviso of Order 6 Rule 17 of CPC.

3.24 It is necessary for adjudicating the real controversy between the parties that this Tribunal takes a holistic view of the developments on account of the judgment dated 28.11.2014 of this Tribunal, and the final order dated 12.06.2017 passed by the Respondent Commission in Case Nos. 182 of 2014 and 40 of 2015, which implemented the aforesaid judgment of this Tribunal. It is stated that the observations made in the impugned order, qua laying of network by TPC-D in the common license area with AEML, are contrary to the aforesaid judgment dated 28.11.2014.\

3.25 Hence, the only outcome, and the possible prayer, which the Appellant/ Applicant can seek at this stage is alignment of the impugned order with the aforesaid judgment dated 28.11.2014. Therefore, the amendment needs to be allowed.

3.26 The delay in filing the present amendment application is on account of the facts as mentioned under Para 3 above. As regards, the said delay, it is further stated that there is no issue of limitation which is applicable with respect to any proceedings related to regulatory or administrative functions provided under the Electricity Act, 2003. Further, an amendment which really subserves the ultimate cause

of justice and avoids further litigation, should be allowed. In this context, reference be made to the following judgment:

a) *Andhra Pradesh Power Coordination Committee and Ors. v. Lanco Kondapalli Power Ltd. & Ors.*, reported in *(2016) 3 SCC 468*.

b) *Sampath Kumar v. Ayyakannu & Anr.,* reported in *(2002) 7 SCC 559*,

c) *Pankaja v. Yellappa***,** reported in *(2004) 6 SCC 415*

3.27 At the cost of repetition, it is submitted that based on the law laid down by the passage of the judgment of this Tribunal dated 28.11.2014, and the subsequent events, the present amendment is the only solution for the purpose of keeping the present appeal alive for the purpose of adjudicating upon the real controversy between the parties.

3.28 It is submitted that no prejudice shall be caused to the Respondent No. 2/ TPC if the amendments sought by the Appellant/ Applicant are allowed as the present appeal is pending adjudication, wherein final arguments are yet to begin. Since, the amendment is being sought on account of the subsequent law laid down by this Tribunal, the issue of delay in filing the present amendment, is ministerial in nature, and is not fatal in any manner to the said amendment sought by the Appellant/ Applicant.

3.29 It is stated that, whenever there is a law laid down by an order/ judgment of any Court of Law, specially by an Appellate forum in the Regulatory Sector, which goes to the root of the matter, amendment ought to be permitted in such a scenario, otherwise, the real controversy between the parties will remain unresolved. The complex nature of the dispute between the parties in the facts and circumstances of the present appeal warrants a special approach to

be taken by this Tribunal in order to be able to effectively adjudicate the issues between the parties. As such, prime consideration ought to be accorded to the law laid down by this Tribunal itself while adopting any approach in dealing with the *lis* at hand. The present amendment, therefore, is to align the original appeal with the law laid down vide judgment dated 28.11.2014 passed by this Tribunal. Hence, the amendments as sought in I.A. Nos. 2183 of 2019 and 288 of 2020, ought to be allowed.

3.30 It is also stated that the Appellant/ Applicant is also filing a revised consolidated compilation of the judgments, which have been relied upon by the Appellant/ Applicant in the present consolidated written submissions.

3.31 In the light of the facts and circumstances of the case, as aforesaid, it is most respectfully submitted that the amendment being sought ought to be allowed.

4. **The Respondent/Tata Power Company Ltd. has made the following submissions**:-

4.1 The captioned applications have been filed by AEML, amongst others, under Order 6 Rule 17 of CPC, seeking amendment of the original prayers in the present Appeal (Appeal No. 201 of 2014), which admittedly has become infructuous. The issue for consideration before this Tribunal is *'whether in the facts and circumstances of the instant case, the present Application seeking amendment of original prayers in Appeal No. 201 of 2014, can be allowed'.*

4.2 The present Interim Applications have been filed after a period of 5 years (approximately 1800 days) and after conducting 65 hearings,

purportedly to place on record this Tribunal's Judgment dated 28.11.2014 in Appeal No. 246 of 2012 & batch and to test the Impugned Order (i.e. MERC's Order dated 14.08.2014 in Case No. 90 of 2014, which granted Distribution Licence No. 1 of 2014 to Tata Power) against the same. In this regard, AEML has, during the course of the hearing, stated that the Amendment Application ought to be allowed since:-

(a) No prejudice would be caused to Tata Power if the present Amendment Application is allowed by this Tribunal;

(b) Tata Power's submissions re dismissal of the Amendment Application pertains to the merits of the matter which can be adjudicated once the application is allowed, where AEML may not succeed.

4.3 The present Amendment Applications ought to be dismissed with exemplary cost, inter-alia, on account of the following:-

(a) The Amendment Applications fails to meet the test of Order 6 Rule 17 of CPC. It is stated that, the onus is on AEML to demonstrate that its application is bona-fide and meets the requirement of Order 6 Rule 17, which it has failed to demonstrate.

(b) The Amendment Applications seeks to modify the 'cause of action' for filing Appeal No. 201 of 2014 before this Tribunal. Once the Appeal/ prayers sought therein become infructuous, the interest of justice demands that the said Appeal be disposed off.

(c) The Amendment Application lacks bona-fide, is an abuse of process of law and causes extreme prejudice to Tata Power, since by way of the present Amendment Application AEML is seeking modification of terms of Distribution Licence No. 1 of 2014 granted to Tata Power.

(d) The entire basis of filing the present Amendment Applications is faulty since the Judgment dated 28.11.2014 was implemented by MERC by passing Order dated 12.06.2017 in Case No. 182 of 2014 ("**Order dated 12.06.2017**"). During the proceedings in Case No. 182 of 2014, AEML

had taken a position that in order to implement this Tribunal's Judgment dated 28.11.2014, Tata Power's conditions of Distribution Licence No. 1 of 2014 will have to be amended. The said contention of AEML was rejected by MERC**.** AEML had filed an Appeal before this Tribunal challenging MERC's Order dated 12.06.2017, inter-alia, on the basis that the Order dated 12.06.2017 is not in line with this Tribunal's Judgment dated 28.11.2014. However, in the Appeal No. 195 of 2017, AEML chose not to challenge MERC's findings which rejected AEML's submissions qua amendment of Tata Power's licence. Having not challenge the said issue in Appeal No. 195 of 2017, there is bar on AEML to raise the same in that Appeal. Thus, to wriggle out of this bar, the present Amendment Applications have been filed to resurrect AEML's challenge qua modification of terms of Tata Power's Distribution Licence No. 1 of 2014, which was rejected in MERC's Order dated 12.06.2017.

4.4 From the factual matrix, the following is noteworthy:-

(a) The Judgment dated 28.11.2014 is on record, in the present Appeal, since 06.01.2015, when Tata Power filed its Reply to the present Appeal.

(b) AEML's stand prior to the passing of the Judgment dated 28.11.2014 was that Tata Power should be directed to lay down its distribution network to connect to consumers. However, after passing of the Judgment dated 28.11.2014, AEML has taken a diametrically opposite stand that Tata Power should only use AEML's network to connect to consumers and not lay any network of its own. AEML has been simultaneously pursuing the contradictory stand in its Appeals Nos. 201 of 2014 and 195 of 2017 in order to somehow achieve monopoly in suburban Mumbai, despite various failed attempts since 2002.

(c) No justification has been provided by AEML qua delay in filing the present Amendment Application.

(d) AEML in its pleadings has admitted that:-

(i) After passing of the Judgment dated 28.11.2014, its Appeal No. 201 of 2014 has become infructuous, which led to the filing of the Amendments Applications.

(ii) AEML's stand in Appeal No. 201 of 2014 is diametrically opposite to its stand in Appeal No. 195 of 2017 and the Amendment Applications have been filed in an attempt to streamline the same.

(iii) The Amendment Applications are belatedly filed and AEML has not been diligent in filing the same in a timely manner.

A. Appeal has been infructuous and ought to be dismissed forthwith

4.5 In view of the factual matrix of the case, it is most respectfully submitted that, the present Amendment Applications filed by AEML ought to be dismissed with exemplary cost. In this regard, it is stated that, AEML itself has admitted that, pursuant to the Judgment dated 28.11.2014, the Appeal No. 201 of 2014 has become infructuous. It is a settled position of law, if by a subsequent event, the original proceedings have become infructuous, then it is in the interest of justice that the said proceedings be dismissed as infructuous. In this regard, the scope of enquiry of the Court is restricted only to determine whether such appeal/ proceedings have become infructuous. Further, the continuation of an infructuous proceedings causes prejudice to the other side. In this regard, the Hon'ble Supreme Court's Judgment in the case of *Shipping Corpn. of India Ltd. v. Machado Bros.*: (2004) 11 SCC 168, is noteworthy.

4.6 Thus, in terms of the law laid down by the Hon'ble Supreme Court, the present Appeal ought to be dismissed forthwith as infructuous.

B. The Amendment Applications is contrary to Order 6 Rule 17 of CPC

4.7 The Amendment Applications have been filed by AEML, amongst others, invoking Order 6 Rule 17 of CPC, which reads as under:-

*"**17.Amendment of pleadings**.—The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and **all such amendments shall be made***

***as may be necessary for the purpose of determining the real questions in controversy between the parties**:*
***Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial**."*

4.8 AEML's Amendments Applications have to be tested on the touchstone of the following salutary principles, qua amendment of pleadings, laid down by the Hon'ble Supreme Court:-

(a) The purpose and object of Order 6 Rule 17 is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances. Normally, amendments are to be allowed:- (i) If the same is required to determine the real controversy between the parties; and (ii) To avoid multiplicity of litigations.

(b) The amendment ought not be allowed if the:- (i) Amendment application lacks bona-fide; (ii) Proposed amendment constitutionally or fundamentally changes the nature and character of the case; or introduces a totally different, new and inconsistent case. In other words, if the amendment introduces a new cause of action; (iii) The court should decline amendments if a fresh challenge on the amended claims would be barred by limitation on the date of application; (iv) Allowing amendment would lead to travesty of justice as the same would lead to injustice/ prejudice to the other side, which cannot be compensated in monetary terms.

(c) Filing of an amendment application to repudiate an admission or inconsistent plea cannot be permitted as the same causes prejudice to the other side.

(d) The burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier.

4.9 In this regard, the following Judgments of the Hon'ble Supreme Court are noteworthy:-

(a) ***Revajeetu Builders and Developers v. Narayanaswamy and Sons and***

***Ors*.:** (2009) 10 SCC 84 (35, 58 and 63).

(b) ***State of Madhya Pradesh v. Union of India*:** (2011) 12 SCC 268 (Paras 16, 20, 22)

(c) ***M. Revanna v. Anjanamma*** : (2019) 4 SCC 332 (Para 7).

(d) ***Modi Spinning & Weaving Mills Co. v. Ladha Ram & Co***: (1976) 4 SCC 320 (Para 10).

(e) ***Ganesh Trading Co. v. Moji Ram***: (1978) 2 SCC 91 (Para 5)

4.10 In view of the law laid down by the Hon'ble Supreme Court, the Amendment Applications ought to be dismissed on the following grounds.

Re. Amendment Application fails to meet the test of Order 6 Rule 17 of CPC, lacks bona-fide and seeks to espouse a new 'cause of action'/ fundamentally changes the nature and character of the suit

4.11 The Hon'ble Supreme Court's Judgment in the case of ***Revajeetu Builders and Developers's case (Supra)*** is locus classicus on the subject wherein the Hon'ble Supreme Court has referred to various judgments of Indian and English courts and laid down the law re Amendment of Pleadings.

4.12 As held by the Hon'ble Supreme Court Supra, the Amendment Application can only be allowed if the amendment is required to determine the 'real controversy' between the parties. Further, such Amendment Application has to be filed before the trial commences. AEML in its Amendment Applications have failed to specify why amendment is necessary to determine the 'real controversy between the parties'. During the course of the hearing, AEML had stated that, Amendment Applications have been filed to align the Appeal with this Tribunal's Judgment dated 28.11.2014, since:-

(a) The position of law re. laying of network was changed by this Tribunal by its Judgment dated 28.11.2014. Therefore, it is imperative for AEML

to amend its prayers.

(b) As per the Judgment dated 28.11.2014, Tata Power's licence condition had to be amended.

4.13 The change in law or principles qua of laying of network cannot be the basis for amendment application. It is stated that, under Section 111 of the Electricity Act, only a 'person aggrieved' can file an Appeal before this Tribunal. The term 'person aggrieved', amongst others, includes a person who has been deprived of a legal right or is subject to legal wrong et al. Admittedly, AEML's grievance at the time of passing of the Impugned Order dated 14.08.2014 was that Tata Power has been permitted to use its network to connect the consumers. Once the said contention was upheld by this Tribunal vide its Judgment dated 28.11.2014 (and admittedly not challenged by AEML), AEML cannot now contend that its grievance has changed warranting an amendment. Thus, permitting such Amendment Applications would be a gross abuse of process and would tantamount to permitting AEML to do something indirectly which it is not permitted to do directly.

4.14 Even otherwise, it is stated that the Tribunal's Judgment dated 28.11.2014 was implemented by MERC vide its Order dated 12.06.2017. During the proceedings in Case No. 182 of 2014, AEML had taken a position that in order to implement this Tribunal's Judgment dated 28.11.2014, Tata Power's conditions of Distribution Licence No. 1 of 2014 will have to be amended. The said contention of AEML was rejected by MERC**].** AEML had filed an Appeal before this Tribunal challenging MERC's Order dated 12.06.2017, inter-alia, on the basis that the Order dated 12.06.2017 is not in line with this Tribunal's Judgment dated 28.11.2014. However, in the Appeal

No. 195 of 2017, AEML has not challenged MERC's findings rejecting AEML's submissions that this Tribunal's Judgment dated 28.11.2014 requires MERC to amend Tata Power's licence. In other words, AEML was not aggrieved by MERC's said findings. Having not challenged the said issue in Appeal No. 195 of 2017, AEML is barred from raising the said issue in Appeal 195 of 2017 by way of an amendment in terms of Order 6 Rule 17 of CPC. Thus, to wriggle out of this bar, the present Amendment Applications have been filed to resurrect AEML's submissions/ challenge qua amendment of Tata Power's Distribution Licence No. 1 of 2014.

4.15 It is further submitted that:-

(a) Scope of Appeal No. 201 of 2014 was pertaining to challenge to the grant of licence to Tata Power to the limited extent it permitted Tata Power to use AEML's network to connect to the consumers.

(b) Scope of Appeal No. 246 of 2012 & batch and MERC's Order dated 12.06.2017 and Appeal No. 195 of 2017 & Batch, relates to conditions qua laying of parallel network and connecting to the consumers (terms applicable post grant of licence) and not the grant of licence.

4.16 By seeking amendment to Appeal No. 201 of 2014, AEML is seeking to revise/ change the cause of action of Appeal No. 201 of 2014. It is a settled position of law that amendment of pleadings cannot be permitted for introducing a totally different case or to fundamentally change the scope of appeal/ introduce a different cause of action. In this regard, the Hon'ble Supreme Court, in the case of ***Ganesh Trading Co. v. Moji Ram***, (1978) 2 SCC 91 held that:-

"…5. ***It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have***

accrued in its favour due to lapse of time. *But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit…….*

4.17 The said Judgment has been following by the Hon'ble Supreme Court in the case of ***Revajeetu Builders & Developers v. Narayanaswamy & Sons*****, (2009) 10 SCC 84,** where after analysing various Indian and English case law on the subject of amendment of pleadings, the Hon'ble Supreme Court held that:-

"Factors to be taken into consideration while dealing with applications for amendments
63. *On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*
…*…..*
(5) ***whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and…"***

4.18 The said principle has been reiterated once again by the Hon'ble Supreme Court in the case of ***M. Revanna v. Anjanamma*****, (2019) 4 SCC 332,** where it held that:-

"….7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit….."

4.19 Thus, in view of the law laid down by the Hon'ble Supreme Court, the Amendment Applications ought to be dismissed.

4.20 Further, as regards, AEML's submissions that allowing the Amendment Application would not cause any prejudice to Tata Power is wrong and denied. In this regard, it is stated that, AEML is essentially seeking amendment to Tata Power's licence, which causes severe prejudice to it and cannot be compensated in terms of monetary value.

4.21 It is noteworthy that, during the course of the hearing, MERC had contended that, as per MERC's Order dated 14.08.2014 read with the terms of Tata Power's Distribution Licence No. 1 of 2014, MERC's Order dated 12.06.2017 is a part of Tata Power's licence condition. For completion of record, it is further stated that, the issue whether MERC's Order dated 12.06.2017 is a part of Tata Power's licence condition is pending consideration before this Tribunal in Appeal No. 195 of 2017 & Batch. In case, this Tribunal in Appeal No. 195 of 2017 & Batch holds that, MERC's Order dated 12.06.2017 is a part of Tata Power's licence condition, then the present Amendment Applications become meaningless. However, if the said issue is decided in favour of Tata Power in Appeal No. 195 of 2017 & Batch, then severe prejudice would be caused to Tata Power if the present amendment is allowed since AEML would get a second bite at the cherry to impose restrictions on Tata Power's terms of Distribution Licence No. 1 of 2014. In any case, as held by the Hon'ble Supreme Court in the case of ***Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co.*, (1976) 4 SCC 320** has held that allowing amendment of pleadings if it seeks to repudiate an admission or inconsistent plea causes prejudice to the other side. In this regard, Tata Power's detailed submissions are at Para 24 to Para 27 below.

4.22 As stated above, if at all AEML was aggrieved by the fact that Tata Power's terms of licence was not challenged as per its reading of Judgment dated 28.11.2014, it ought to have raised the said issue in Appeal No. 195 of 2017. It is a settled position of law, the Courts help those who are vigilant and do not slumber over their rights. Thus, in the facts of the present case, there is no justification either

in law or in equity to allow the Amendment Applications and the same sought to be dismissed with exemplary cost.

Re. Amendment Application cannot pe permitted to address the inherent contradictions or concession in the pleadings

4.23 As stated above, AEML in its pleadings has admitted that:-

(a) After passing of the Judgment dated 28.11.2014, its Appeal No. 201 of 2014 has become infructuous, which led to the filing of the Amendment Application.

(b) AEML's stand in Appeal No. 201 of 2014 and diametrically opposite to its stand in Appeal No. 195 of 2017 and the Amendment Applications have been filed to address this contradiction in its appeals.

(c) Judgment dated 28.11.2014 is applicable to the erstwhile licence of Tata Power and not to Tata Power's Distribution Licence No. 1 of 2014.

4.24 The Hon'ble Supreme Court has repeatedly held that, the amendment of pleadings cannot be permitted if it seeks to repudiate an admission or inconsistent plea, since the same causes prejudice to the other side. In this regard, the Hon'ble Supreme Court in the case of ***Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co.*, (1976) 4 SCC 320,** held that:-

*"**10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants**. The High Court rightly rejected the application for amendment and agreed with the trial court."*

4.25 Further, the Hon'ble Supreme Court in the case of ***Usha Balashaheb Swami v. Kiran Appaso Swami: (2007) 5 SCC 602,*** held that prayer for amendment of the plaint (filed by the plaintiff) and a prayer for amendment of the written statement (filed by the

respondent) stand on different footings. Taking an inconsistent plea in written statement would not be objectionable, however the same would be objectionable if it is taken in the plaint, since it causes prejudice to the respondent. The relevant part of the Judgment is as under:-

"19. … a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. ***Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.***

20. Such being the settled law, we must hold that in the case of amendment of a written statement, ***the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case."***

4.26 Thus, in view of the above, the present Amendment Application ought to be dismissed.

Re. No justification for filing the Amendment Application belatedly

4.27 The present Amendment Applications have been filed after a period of 5 years (approximately 1800 days) and after conducting 65 hearings, purportedly to place on record this Tribunal's Judgment dated 28.11.2014, which has been on record since 06.01.2015, when Tata Power filed its Reply to the present**.**

4.28 As regards the issue of delay in filing the Amendment Application, AEML has merely stated that:- (a) No final hearing has commenced in the matter and therefore AEML ought to be permitted to file an Amendment Application; (b) There was a change in management/ shareholder of the company after R-Infra was taken over by AEML; and (c) There was a change in counsel.

4.29 As regards AEML's issue that no final hearing has commenced in the matter, it is stated that, Order 6 Rule 17 does not create a bar only when the final hearing commences. In fact, Order 6 Rule 17 created a bar in filing an Amendment Application after *'trial has commenced'*. The term *'trial has commenced'* has been interpreted by the Hon'ble Supreme Court in the case of ***Kailash v. Nanhku: (2005) 4 SCC 480,*** as under:-

> *"13. At this point the question arises: when does the trial of an election petition commence or what is the meaning to be assigned to the word "trial" in the context of an election petition?* ***In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence.*** *All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word "trial".*

4.30 In other words, the trial is deemed to commence when the issues are settled, which in the facts of the instant case arose once the replies and rejoinders were filed by the parties. In any case, the present Appeal has been listed for 'Final Hearing' since 26.08.2015.

4.31 As regards the delay in filing the present Amendment Application, the management of the company was changed in 2018, however, AEML has not provided any justification of delay from 28.11.2014 till change in management in 2018 and from 2018 till 09.12.2019 when the Amendment Application was filed, which shows lack of diligence and bona-fide on the part of AEML.

4.32 In any case, it is a settled principle of corporate law that a company is considered separate legal entity from its shareholders. It is submitted that, in the year 2018, merely the shareholders of the company (earlier known as R-Infra) have changed, whereas the

company continues to act as a successor in interest. In other words, the company continues to operate as a going concern, even after change in shareholders. This understanding is also reflected in the Scheme of Arrangement R-Infra and Reliance Electric Generation and Supply Limited (taken over by AEML), relevant part of which is extracted below:-

*"1.1.9 "**Mumbai Power Division" means Mumbai Power Generation, Transmission and Distribution of the transferor Company on a going concern basis** along with all related assets, liabilities, employees as follows:*

..

*(e) **all legal, tax, regulatory, quasi-judicial, administrative proceedings**, suits, appeals, applications **or other proceedings of whatsoever nature initiated by or against the Transferor Company in connection with the Mumbai Power Generation, Transmission and Distribution business.***

….

*3.1.**1 Upon the Scheme becoming effective and with effect from the Appointed Date, the Mumbai Power Division of the Transferor Company shall stand transferred to and vested in or deemed to be transferred to and vested in the Transferee Company**, **as a going concern**, in the following manner:*

…

6.4 LEGAL PROCEEDINGS

*6.4.1 **All legal proceedings of whatsoever nature by or against the Transferor Company pending and/or arising before the Effective Date and relating to the Transferred Divisions, shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme or by anything contained in this Scheme but shall be continued and enforced by or against the Transferee Company, as the case may be in the same manner and to the same extent as would or might have been continued and enforced by or against the Transferor Company.***

..

*6.4.3 **The Transferee Company undertake to have all respective legal or other proceedings initiated by or against the Transferor Company as referred above transferred into its name and to have the same continued, prosecuted and enforced by or against the Transferee Company as the case may be**, to the exclusion of the Transferor Company."*

4.33 It is further pertinent to note that vide Letter dated 29.09.2018, MERC has assigned Distribution License No. 1 of 2011 (formerly granted to R-Infra) to Reliance Electric Generation and Supply Ltd.

Vide the same letter, MERC also recognized change of name from Reliance Electric Generation and Supply Ltd. to M/s Adani Electricity Mumbai Limited.

4.34 As is evident from the above, AEML cannot at all present a fig leaf of change in management, as R-Infra was transferred as a going concern to it. This has been argued by AEML itself in Appeal No. 223 of 2015 and Batch and has been validated by this Tribunal vide its Judgment dated 06.08.2019. AEML is even duty bound to continue legal proceedings of R-Infra *in the same manner and to the same extent R-Infra would have done*.

4.35 It is a settled principle of law, that change in counsel cannot be a ground for seeking amendment or justifying the delay in filing of application. In this regard, the judgment of the Hon'ble Rajasthan High Court in the case of ***Kanta Rani v. The Addl. Civil Judge (S.D.) No. 1: 2015 SCC OnLine Raj 5099*** is noteworthy, wherein it has held as under:-

"9. A bare look at the order dated 24.02.2015 reveals that as many as four applications were filed on behalf of the plaintiff and all the applications are in the nature of filling up the so called lacuna in the proceedings; ***the reason for the same appears to have only been the change of the counsel*** *and it appears that after pendency of the suit for over ten years and the same having not progressed beyond filing of the affidavits by the plaintiff under Order XVII, Rule 4 CPC, two applications under Order VII, Rule 14 and applications under Order XIII, Rule 10 and Order VI, Rule 17 CPC were filed, which came to be disposed of by the trial court.* ***The so called reason indicated for due diligence i.e. the change of counsel and his having detected the so called mistake cannot be taken as a sufficient reason to comply with the requirements of proviso to Order VI, Rule 17 CPC. If the change of counsel and detection of certain mistake, lacuna and deficiency in the proceedings on part of his client/previous counsel and action pursuant thereto is accepted as acting by due diligence, the same would result in an unending exercise and every time that a counsel is changed the same would result in giving a cause under proviso to Order VI, Rule 17 CPC to seek amendment in the pleadings, which proposition cannot be accepted."***

4.36 Thus, there is no justifiable reason provided by AEML for delay in filing the present Amendment Applications.

C. Miscellaneous issues

Re. No nexus of pleadings and prayers sought by AEML

4.37 The IA No. 288 of 2020, has been filed by AEML to seek amendment of the prayers sought by AEML in its Amendment Application (being IA No. 2183 of 2019). However, similar/ consequential amendments have not been sought by AEML in the facts, questions of law and the grounds of appeal, whereby AEML continues to challenge the grant of licence to Tata Power. In the absence of the consequential amendments to the question of law/ grounds of Appeal to Appeal No. 201 of 2014, there is no nexus between the modified pleadings and the reliefs sought by AEML. This has been repeatedly pointed out by Tata Power.

4.38 The amended relief sought by AEML is vague and not in lines with the grounds sought to be raised by it. The Amendment Application filed by AEML ought to be summarily dismissed on the ground that a prayer de-hors the pleadings ought not be granted [**Ref: *Kalyan Singh Chouhan*** v. ***C. P. Joshi: (2011) 11 SCC 786* (Para 19)**]. In fact, AEML in its Rejoinder dated 16.03.2020 has conceded that its prayers and pleadings have no nexus and accordingly submitted that, it will not press any facts, questions of law or grounds which could run contrary to the modified prayer, and AEML will not incorporate the abovementioned facts, questions of law and grounds if the amendment of the prayer is allowed . It was reiterated by AEML during the hearing that, it would not include any grounds/ question of law which relates to challenge to the grant of licence of Tata Power. In view of the above it is stated that, the present

Amendment Application is not in proper form (no nexus of prayers with the grounds which are sought to be added et al) and ought to be dismissed on this count alone.

Re. Judgments referred by AEML are not relevant

4.39 Along with its Written Note, AEML has filed compilation of Judgment, on the following propositions:-

(a) **Moulding of relief**: AEML has submitted that the relief be moulded on account of passing of the Judgment dated 28.11.2014. In this regard, reliance is placed on *Pasupuleti Venkateswarlu v. Motor and General Traders:* [(1975) 1 SCC 770 (Paras 4 and 5] and *Gaiv Dinshaw Irani v. Tehmantan Irani :* [(2014) 8 SCC 294 (Paras 48-50 and 53]. These Judgments provides that, the court (including an Appellate Court) in the interest of justice can mould the relief if the subsequent events have a bearing on the prayers sought. These Judgments cannot be made applicable in the facts of the present case since after filing of the Appeal, Judgment dated 28.11.2014 was passed which, admittedly, rendered Appeal No. 201 of 2014 infructuous. Further, the Judgment dated 28.11.204 was implemented by MERC vide its Order dated 12.06.2017 where this issue was raised, dismissed by MERC and the said issue was not assailed by AEML. Therefore, there is no basis of moulding relief and Appeal No. 201 of 2014 ought to be dismissed being infructuous.

(b) **Merits of amendment sought**: AEML has submitted that merits of the amendments cannot be looked at the time of amendment application. In this regard, reliance has been placed on *Rajesh Kumar Aggarwal v. K.K. Modi* [(2006) 4 SCC 385 (Paras 18 and 19], *Lakha Ram Sharma v. Balar Mktg. (P) Ltd.* [(2008) 17 SCC 671

(Para 4] and *Mohinder Kumar Mehra v. Roop Rani Mehra* [(2018) 2 SCC 132 (Para 29]. The said judgments are not applicable in the facts of the present case since Tata Power has raised the issues on the basis of the salutary principles laid down by the Hon'ble Supreme Court qua deciding amendment application.

(c) **Limitation**: AEML submitted that the issue of limitation is not applicable. In this regard, reliance is placed on:-

(i) *Andhra Pradesh Power Coordination Committee & Ors. v. Lanco Kondalli Power & Co.:* (2016) 3 SCC 468. The said Judgment deals with the issue whether limitation act is application to cases relating to Section 86(1)(e) of the Electricity Act. The said judgment has no applicability since it does not deal with the issue of delay in filing amendment application.

(ii) *Sampath Kumar v. Ayyakannu & Anr.:* (2002) 7 SCC 559 (Paras 8, 9, 11). Reliance was placed on the said Judgment since delay of 11 years were condoned and amendment application was allowed. In the present case, during the pendency of the case the plaintiff was forcibly dispossessed the plaintiff and consequently amendment of plaint was sought. The court permitted the amendment since no trial had begun and permitting amendment would avoid multiplicity of suits. However, in the present case, the order implementing the Judgment dated 28.11.2014 has already been passed and the same has been assailed by various parties including AEML by way of Appeal No. 195 of 2017.

(iii) *Pankaja v. Yellapa*: (2004) 6 SCC 415 (Para 14), in the said judgment the Hon'ble Supreme Court had held that permitting

amendment is a discretionary remedy and the courts ought not dismissed the amendment application if the same is barred by limitation. This judgment is not applicable in the facts of the present case since AEML has admitted that its Appeal has become infructuous.

Re. BEST's argument of non-applicability of Order 6 Rule 17 of CPC

4.40 During the course of the hearing, an argument was advanced by BEST (who is not a party to the present lis and whose submissions ought to be ignored) that in terms of Section 120 of the Electricity Act, this Tribunal is not bound by CPC. In this regard, it is submitted that, Section 120(1) states that this Tribunal is not bound by the *'procedure laid down'* by CPC. It is stated that, CPC provides for substantive as well as procedural law. Order 6 Rule 17 of CPC deals with substantive law re amendment of pleadings. In any case, the Amendment Applications were filed under Order 6 Rule 17 of CPC.

4.41 In light of the above, it is most respectfully prayed that the amendment application filed by AEML be dismissed with exemplary costs.

5. **<u>Our Consideration & Findings</u>:-**

5.1 The Captioned IAs have been filed seeking amendment of the present appeal (IA No. 2183 of 2019), along with modification of prayer (IA No. 288 of 2020), to the extent of modifying the Impugned Order dated 14.08.2014, so as to align the same with the Tribunal's judgment dated 28.11.2014 in Appeal Nos. 229 & 246 of 2012. Learned counsel for the Appellant contended that the prayers made in the Appeal became inappropriate and could not be granted on account of the subsequent judgment dated 28.11.2014 passed by

this Tribunal. Accordingly, applications were filed by the Appellant/ Applicant seeking amendment of the present appeal along with prayers. As per the Appellant/Applicant, the present amendment is necessitated on account of the change in interpretation of law by this Tribunal, qua settling the position of law as regards network roll-out for the purpose of fulfilling the mandate of Section 43 of the Electricity Act, 2003. The original prayers of the present appeal were as under :

> *"a) Set aside the impugned order to the extent it grants license to the 2nd Respondent for supply of electricity by using the Appellant's network, in the licensed area covered by the Appellant's license;*
>
> *b) Without prejudice to the aforesaid direct the 2nd Respondent not to connect to any of the existing consumers or changeover consumers or new consumers in the Appellant's licensed area till the 2nd Respondent has laid its own network in the said area to be USO ready."*

5.2 Learned counsel for the Appellant brought out that the impugned order challenged in the appeal was passed by the State Commission on 14.08.2014 and the appeal was filed on 19.08.2014. Accordingly, the prayers were framed in the appeal with respect to the understanding of law that, a parallel licensee should lay down its own network in the entire distribution area, and that TPC cannot be allowed to use the network of AEML. However, the above understanding of law was subsequently changed when this Tribunal passed the judgment dated 28.11.2014 i.e. after the filing of the present appeal on 19.08.2014. As such, on account of the aforesaid subsequent development, the prayer(s) made by AEML could not be granted, i.e. the prayers became infructuous/ inappropriate, thereby requiring moulding of relief by permitting AEML to amend the present appeal/prayers. The amended prayer which is being

sought is as follows:-

> *"modify the Impugned Order and license dated 14.08.2014, passed in Case No. 90 of 2014, so as to align the same with the judgment dated 28.11.2014 passed by Hon'ble APTEL in Appeal Nos. 229 & 246 of 2012."*
>
> *(Underline Supplied)*

5.3 Learned counsel for the Appellant also submitted that in the application seeking amendment of the present appeal (IA No. 2183 of 2019), the Appellant initially sought complete setting aside of the impugned order, thereby also seeking cancellation of the license granted to TPC. However, this Tribunal objected to the said prayer, and required the Appellant to modify the same suitably. Thereafter, the Appellant filed the subsequent application (IA No. 288 of 2020), seeking the aforementioned modified prayer. Learned counsel for the Applicant/Appellant fairly submitted that the arguments of TPC that AEML in its preliminary written submissions dated 17.09.2020, contended that the prayer(s) made in the present appeal have become infructuous pursuant to the subsequent judgment dated 28.11.2014, are fundamentally flawed. Learned counsel was quick to submit that the aforesaid argument of TPC is erroneous on account of the fact that the prayers framed in the appeal became inappropriate, and that the same could not be granted in the light of the subsequent development of the passage of the judgement dated 28.11.2014. Moreover, the impugned order gives an independent right to the Appellant to challenge the same by filing the present appeal on account of the subsequent development, which the Appellant could not at all have foreseen when the present appeal was filed. It would be against equity, propriety and justice if the appellant is denied the opportunity to amend the present appeal/prayers.

5.4 Learned counsel for the Applicant/Appellant placed reliance on the following judgments of the Hon'ble Supreme Court to contend that in the events, the prayers become inappropriate and could not be granted, on account of the subsequent change in fact or law, then the said prayers are required to be moulded by way of amendment:-

a) *Pasupuleti Venkateswarlu v. Motor and General Traders*, reported in *(1975) 1 SCC 770*,
b) *Gaiv Dinshaw Irani v. Tehmtan Irani*, reported in *(2014) 8 SCC 294*,
c) *Jai Prakash Gupta v. Riyaz Ahamad*, reported in *(2009) 10 SCC 197*
d) *Sheshambal v. Chelur Corpn. Chelur Building*, reported in *(2010) 3 SCC 470*,
e) Om Prakash Gupta v. Ranbir B. Goyal, reported in *(2002) 2 SCC 256,*
f) Kedar Nath Agrawal v. Dhanraji Devi, reported in *(2004) 8 SCC 76,*
g) Mahila Ramkali Devi v. Nandram, reported in *(2015) 13 SCC 132*

Learned counsel further submitted that from the aforementioned judgments, the principle which is culled out is that a court of law has to take into account subsequent events while deciding the case. In this regard, the impact of the subsequent development is to be seen on the right to relief claimed by a party and, if necessary, mould the relief suitably so that the same is tailored to the situation that obtains on the date the relief will be granted. Learned counsel pointed out that applying the aforesaid principle in the present case, it is submitted that when the impugned order was passed on 14.08.2014 and the present appeal was filed on 19.08.2014, the legal position/ understanding of law with respect to laying down of parallel distribution network in the license areas of the Appellant and the TPC, was governed by an order dated 22.08.2012 passed in Case No. 151 of 2011 by the MERC. Accordingly, the appeal and the prayers, were drafted and filed as per the said legal position. However, after the present appeal was filed, this Tribunal passed the judgment on 28.11.2014, whereby the entire legal position/ understanding of law qua laying down of distribution network was

interpreted. Further, MERC passed an order dated 12.06.2017 for implementing the aforesaid judgment of this Tribunal. The said subsequent developments, read with the law laid down vide the judgment dated 28.11.2014 of this Tribunal, requires that the present appeal be permitted to be amended so as to do complete justice between the parties, and to safeguard the right of the Applicant/Appellant.

5.5 Learned counsel for the Applicant/Appellant further submitted that it is a settled principle of law that while granting permission for amendment, the merits of the proposed amendment cannot at all be looked into. The only aspect which is to be looked by a Court of Law, is that whether the amendment would help in deciding the real controversy between the parties. In this context, reference be made to the following judgments:

a) *Rajesh Kumar Aggarwal v. K.K. Modi, reported in (2006) 4 SCC 385,*
b) *Lakha Ram Sharma v. Balar Mktg. (P) Ltd., reported in (2008) 17 SCC 671,*
c) *Mohinder Kumar Mehra v. Roop Rani Mehra, reported in (2018) 2 SCC 132,*

5.6 Learned counsel for the Applicant/Appellant on the issue of the present amendment to be allowed on account of delay submitted that the principle of amendment on pleadings as provided under Order 6 Rule 17 of CPC, 1908 is not binding on this Tribunal. In this context, he referred to Section 120(1) of the Electricity Act, 2003 which provides as under:-

"Section 120. (Procedure and powers of Appellate Tribunal): ---

(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure."

Learned counsel for the Applicant/Appellant further submitted that the amendment which really subserves the ultimate cause of justice and avoids further litigation, should be allowed. Learned counsel, in this regard, made reference to the following judgments:-

a) *Andhra Pradesh Power Coordination Committee and Ors. v. Lanco Kondapalli Power Ltd. & Ors.*, reported in *(2016) 3 SCC 468*,

b) *Sampath Kumar v. Ayyakannu & Anr.,* reported in *(2002) 7 SCC 559*,

c) *Pankaja v. Yellappa***,** reported in *(2004) 6 SCC 415.*

5.7 Learned counsel emphasized that the complex nature of the dispute between the parties in the facts and circumstances of the present appeal warrants a special approach to be taken by this Tribunal in order to be able to effectively adjudicate the issues between the parties. As such, prime consideration ought to be accorded to the law laid down by this Tribunal itself while adopting any approach in dealing with the *lis* at hand. Accordingly, as the present amendment is to align the original appeal with the law laid down vide judgment dated 28.11.2014 passed by this Tribunal, the amendments as sought in IAs ought to be allowed.

5.8 ***Per contra,*** learned counsel for the second Respondent/TPC submitted that the issue for consideration before this Tribunal is "*whether in the facts and circumstances of the instant case, the present Application seeking amendment of original prayers in Appeal No. 201 of 2014, can be allowed".* Learned counsel pointed out that the present IAs have been filed after a period of 5 years and after 65 hearings have taken place in the batch of appeals, purportedly to place on record this Tribunal's Judgment dated 28.11.2014 in Appeal No. 246 of 2012 & batch and to test the Impugned Order dated 14.08.2014 passed by MERC. In view of

these facts, the present Amendment Applications ought to be dismissed with exemplary cost, inter-alia, on account of the following:-

(a) The Amendment Applications fails to meet the test of Order 6 Rule 17 of CPC. It is stated that, the onus is on AEML to demonstrate that its application is bona-fide and meets the requirement of Order 6 Rule 17, which it has failed to demonstrate.

(b) The Amendment Applications seeks to modify the 'cause of action' for filing Appeal No. 201 of 2014 before this Tribunal. Once the Appeal/ prayers sought therein become infructuous, the interest of justice demands that the said Appeal be disposed off.

(c) The Amendment Application lacks bona-fide, is an abuse of process of law and causes extreme prejudice to Tata Power, since by way of the present Amendment Application AEML is seeking modification of terms of Distribution Licence No. 1 of 2014 granted to Tata Power.

(d) The entire basis of filing the present Amendment Applications is faulty since the Judgment dated 28.11.2014 was implemented by MERC by passing Order dated 12.06.2017 in Case No. 182 of 2014. During the proceedings in Case No. 182 of 2014, AEML had taken a position that in order to implement this Tribunal's Judgment dated 28.11.2014, Tata Power's conditions of Distribution Licence No. 1 of 2014 will have to be amended. The said contention of AEML was rejected by MERC**.** AEML had filed an Appeal before this Tribunal challenging MERC's Order dated 12.06.2017, inter-alia, on the basis that the Order dated 12.06.2017 is not in line with this Tribunal's Judgment dated 28.11.2014. However, in the Appeal No. 195 of 2017, AEML chose not to challenge MERC's findings which rejected AEML's submissions qua amendment of Tata Power's licence. Having not challenge the said issue in Appeal No. 195 of 2017, there is bar on AEML to raise the same in that Appeal. Thus, to wriggle out of this bar, the present Amendment Applications have been filed to resurrect AEML's challenge qua modification of terms of Tata Power's Distribution Licence No. 1 of 2014, which was rejected in

MERC's Order dated 12.06.2017.

5.9 Learned counsel further submitted that in view of the factual matrix of the case, AEML itself had admitted that pursuant to the judgment dated 28.11.2014, the Appeal No.201 of 2014 has become infructuous. Learned counsel was quick to submit that it is a settled position of law, if by a subsequent event, the original proceedings have become infructuous, then it is in the interest of justice that the said proceedings be dismissed as infructuous. In this regard, the scope of enquiry of the Court is restricted only to determine whether such appeal/ proceedings have become infructuous. Further, the continuation of an infructuous proceedings causes prejudice to the other side. In this regard, the Hon'ble Supreme Court's Judgment in the case of *Shipping Corpn. of India Ltd. v. Machado Bros.*: (2004) 11 SCC 168. Learned counsel further emphasized that the amendment applications are contrary to Order 6 Rule 17 of CPC which reads as under :-

> *"**17.Amendment of pleadings**.—The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and **all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties**:*
>
> ***Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial**."*

5.10 Learned counsel for the second Respondent/TPC contended that, AEML's Amendments Applications have to be tested on the touchstone of the salutary principles, qua amendment of pleadings, laid down by the Hon'ble Supreme Court. In fact, amendment cannot be claimed as a matter of right and under all circumstances. Normally, amendments are to be allowed:- (i) If the same is required

to determine the real controversy between the parties; and (ii) To avoid multiplicity of litigations. To substantiate his contentions, learned counsel referred to following judgments of Hon'ble Supreme Court:-

(a) ***Revajeetu Builders and Developers v. Narayanaswamy and Sons and Ors.*:** (2009) 10 SCC 84 (35, 58 and 63).

(b) ***State of Madhya Pradesh v. Union of India*:** (2011) 12 SCC 268 (Paras 16, 20, 22)

(c) ***M. Revanna v. Anjanamma*** : (2019) 4 SCC 332 (Para 7).

(d) ***Modi Spinning & Weaving Mills Co. v. Ladha Ram & Co***: (1976) 4 SCC 320 (Para 10).

(e) ***Ganesh Trading Co. v. Moji Ram***: (1978) 2 SCC 91 (Para 5)

5.11 Learned counsel further submitted that even otherwise, the Tribunal's judgment dated 28.11.2014 was implemented by MERC vide its order dated 12.06.2017. During the proceedings in Case No. 182 of 2014, AEML had taken a position that in order to implement this Tribunal's Judgment dated 28.11.2014, Tata Power's conditions of Distribution Licence No. 1 of 2014 will have to be amended. Further, the said contention of AEML was rejected by MERC**.** Subsequently, AEML had filed an Appeal before this Tribunal challenging the MERC's Order dated 12.06.2017, inter-alia, on the basis that the Order dated 12.06.2017 is not in line with this Tribunal's Judgment dated 28.11.2014. However, in the Appeal No. 195 of 2017, AEML has not challenged MERC's findings rejecting AEML's submissions that this Tribunal's Judgment dated 28.11.2014 requires MERC to amend Tata Power's licence. Therefore, having not challenged the said issue in Appeal No. 195 of 2017, AEML is barred from raising the said issue in Appeal 195 of 2017 by way of an amendment in terms of Order 6 Rule 17 of

CPC. Learned counsel pointed out that the present Amendment Applications have been filed to resurrect AEML's submissions/ challenge qua amendment of Tata Power's Distribution Licence No. 1 of 2014.

5.12 Learned counsel for the second Respondent/TPC further submitted that by seeking amendment to Appeal No.201 of 2014, AEML is seeking to revise/change the cause of action of Appeal No.201 of 2014. It is a settled position of law that amendment of pleadings cannot be permitted for introducing a totally different case or to fundamentally change the scope of appeal. To strengthen his contentions, learned counsel placed reliance on the Hon'ble Supreme Court judgment in the case of ***Ganesh Trading Co. v. Moji Ram***, (1978) 2 SCC 91. In addition, he also referred to some other judgments of the Hon'ble Supreme Court to emphasize that, the amendment applications deserve to be dismissed. Learned counsel further submitted that amendment application cannot be permitted to address the inherent contradictions or concessions in the pleadings. Learned counsel in this regard placed reliance on the judgment of the apex court in the case of ***Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co.*****, (1976) 4 SCC 320,** which held that:-

*"**10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants**. The High Court rightly rejected the application for amendment and agreed with the trial court."*

He pointed out that there is no proper justification for filing the amendment applications belatedly. Besides, there is no nexus of

pleadings and prayers sought by AEML. Learned counsel also pointed out that the various judgments referred to by the AEML are not relevant to the case in hand.

5.13 Learned counsel pointed out that during the course of hearing, an argument was advanced by BEST (who is not a party to present lis and whose submissions ought to be ignored) that in terms of Section 120 of the Electricity Act, this Tribunal is not bound by CPC. In this regard, it is submitted that, Section 120(1) states that this Tribunal is not bound by the *'procedure laid down'* by CPC. However, CPC provides for substantive as well as procedural law and Order 6 Rule 17 of CPC deals with substantive law regarding amendment of pleadings. Learned counsel submitted that in light of the above, the amendment applications filed by the Applicant ought to be dismissed with exemplary cost.

5.14 We have carefully considered the submissions of the learned counsel for the Applicant/Appellant and the learned counsel for the second Respondent/TPC and also taken note of the various rulings rendered by the Hon'ble Supreme Court in their judgments relied upon by the parties. It is not in dispute that the Appeal No.201 of 2014 was filed by the applicant challenging the impugned order of MERC dated 14.08.2014. In fact, the appeal was filed on 19.08.2014 after which this Tribunal passed the judgment on 28.11.2014. In other words, the prayers made by AEML could not be granted i.e. the prayers become infructuous/inappropriate, thereby requiring moulding of reliefs by permitting AEML to amend the present appeal. The original modification proposed by the Applicant *inter alia* included complete setting aside of the impugned order granting licence to TPC were not allowed / objected by this

Tribunal and the Appellant was directed to modify the same suitably in line with the directions of this Tribunal. The Applicant amended the prayers as under:-

> *"modify the Impugned Order and license dated 14.08.2014, passed in Case No. 90 of 2014, so as to align the same with the judgment dated 28.11.2014 passed by Hon'ble APTEL in Appeal Nos. 229 & 246 of 2012."*
>
> *(Underline Supplied)*

It is also submitted by the Applicant that it will not incorporate/ press some of the amended grounds, being Paras 9.13, 9.15, 9.17, 9.18, 9.19, 9.20 and 9.21, as contained in I.A. No. 2183 of 2019.

5.15 We are inclined to accept the submissions of the Applicant that the only premise for seeking the present amendment is the subsequent developments which occurred after the present appeal was filed. Therefore, we find not much substance in the argument of second Respondent/TPC that the present amendment is being sought on account of the change in shareholding / management of the Appellant including the counsel etc.. From a reading of Para 2 to 6 of the Application seeking amendment, it is evident that the sole reason for seeking the present amendment is the occurrence of subsequent event which happened after the present appeal was filed, by way of the law laid down by this Tribunal in its judgment dated 28.11.20214 passed in Appeal No.229 & 246 of 2012. The change of shareholding / management of the Applicant/Appellant including counsel, among others, is a fact which were narrated in the matter only to explain the events which took place after the present appeal was filed. Therefore, the objections of second Respondent/TPC cannot be considered while adjudicating the

applications for seeking the present amendment.

5.16 From the various judgments relied upon by the Applicant, it is crystal clear that a court of law has to take into account subsequent events *inter alia* in the various circumstances including the impact of the subsequent development is to be seen on the right to relief claimed by a party and if necessary, mould the relief suitably so that the same is tailored to the situation that obtains on the date the relief will be granted. Moreover, as per the settled position of law, the merits of the present amendment cannot be looked into and the only aspect which has to be looked into by a court of law is that whether the amendment would help in deciding the real controversy between the parties? In this regard, Hon'ble Apex Court has rendered a catena of judgments. Further, it is relevant to note that this Tribunal is not bound by the procedure laid down by the Civil Procedure Code, 1908. In this context, the Section 120(1) of the Electricity Act, 2003 reads as under:-

"Section 120. (Procedure and powers of Appellate Tribunal): ---

(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure."

5.17 We note from the stipulation in Order 6 Rule 17 of the Civil Procedure Code, 1908 that amendment is to be normally allowed before commencement of trial and has to be seen from the context of commencement of final hearings/ arguments in an appellate proceedings. In the present case, the present appeal was never argued, and that the application for amendment was made before any commencement of final arguments. Therefore, we are not

inclined to agree with the arguments of TPC that around 65 hearings have been conducted in the present batch of appeals for the reason that not once any hearing in the present appeal (i.e. Appeal No. 201 of 2014) has taken place.

5.18 From the records placed before us in the proceedings, we note that in the instant case, the amendment is required to determine the real controversy between the parties and amendment application has been filed before commencement of trial/hearing. Further, amendment application have been filed to align the appeal with this Tribunal's judgment dated 28.11.2014 which is considered proper and necessary to determine the real controversy between the parties. Moreover, the proposed amendment is not introducing afresh any different case or any fundamental change in the scope of appeal or otherwise, introducing a different cause of action. On this account too, as per settled position of law laid down by Hon'ble Apex Court, the application for amendment deserves to be allowed.

5.19 Having regard to the various decisions of the Hon'ble supreme Court and the submissions of the parties, it is relevant to note that the application proposing amendment in the appeal/prayers is covered under the settled legal position and we find no reason to not allow the same for consideration in the adjudication of the appeal (Appeal No.201 of 2014). While the original prayers have been duly amended by the applicant vide its subsequent IA (IA No.288 of 2020), we find no case of prejudice to the second Respondent/TPC on account of the proposed amendments which is intended to align with the judgment dated 28.11.2014 of this Tribunal in Appeal No.246 of 2012 & batch.

5.20 In light of the above, we are of the considered opinion that the present IAs being IA No. 288 of 2020 & 2183 of 2019 have merits and deserve to be allowed.

Pronounced in the Virtual Court on ***this 17th day of November, 2020.***

The Appellant is directed to file amended memo of parties and also carry out consequential amendments in the main appeal within two weeks from today with advance copy to the other side. Thereafter, additional reply, if any, shall be filed by the Respondents within one week i.e. on or before 08.12.2020 with advance copy to the other side.

List the batch of Appeals being Appeal Nos. APL No. 201 of 2014, APL No. 296 of 2015, APL No. 243 of 2017, APL No. 195 of 2017, APL No. 250 of 2017 on **14.12.2020** ***(through video conferencing).***

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

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