

**HIGH COURT OF GUJARAT (D.B.)****ESSAR STEEL LTD & ANOTHER***Versus***EXECUTIVE ENGINEER (O & M), DAKSHIN GUJARAT VIJ COMPANY LIMITED &  
ANOTHER****Date of Decision:** 30 August 2011**Citation:** 2011 LawSuit(Guj) 859**Hon'ble Judges:** [S J Mukhopadhaya](#), [Anant S Dave](#)**Case Type:** Letters Patent Appeal**Case No:** 254 of 2007**Subject:** Civil, Constitution, Electricity**Acts Referred:**[Constitution Of India Art 226](#)[Electricity Act, 1910 Sec 27\(d\)](#), [Sec 27B](#), [Sec 27A](#), [Sec 27C](#)[Electricity \(Supply\) Act, 1948 Sec 49](#), [Sec 54](#)[Electricity Act, 2003 Sec 42\(3\)](#), [Sec 39](#), [Sec 40](#), [Sec 62](#), [Sec 42\(2\)](#), [Sec 38](#), [Sec 2\(18\)](#),  
[Sec 2\(73\)](#), [Sec 2\(74\)](#), [Sec 38\(2\)\(c\)](#), [Sec 39\(2\)\(c\)](#), [Sec 2\(72\)](#)[Electricity Rules, 1956 R 65\(7\)](#), [R 63\(2\)](#), [R 63](#)**Final Decision:** Appeal dismissed**Advocates:** [K S Nanavati](#), [Kamal Trivedi](#), [Keyur Gandhi](#), [Mihir Joshi](#), [Nanavati Associates](#), [Premal R Joshi](#)**Cases Referred in (+): 5****Anant S. Dave, J.**

**[1]** Both the Letters Patent Appeals arise out of the judgment and order dated 15th January 2007 delivered by the learned Single Judge in Special Civil Application No. 13886 of 2006 by the appellant-petitioner, Essar Steel Limited [for short, 'ESL'] whereby various prayers challenging legality and validity of demand of 'Wheeling Charges', as defined under Section 2(72) and Section 62 of the Electricity Act, 2003, raised by the respondents vide demand notice dated 18th January 2006 as well as 5th

June 2006 and the bills for the period from May 2005 to May 2006, came to be rejected.

**[2]** The appellant of Letters Patent Appeal No.254 of 2007 is a Company incorporated under the provisions of the Companies Act, 1956 and is engaged in manufacture and sale of steel and steel products. Essar Power Limited ['EPL' for short] was granted leave by this Court to file appeal and, accordingly, Letters Patent Appeal No.321 of 2007 was filed challenging the said judgment and order dated 15th January 2007 as the outcome of the petition as well as the appeal under consideration would affect substantially EPL.

**[3]** By virtue of the Gujarat Electricity Industry (Reorganization and Regulation) Act, 2003, [for short, 'GEI Act, 2003] the Government of Gujarat has transferred and vested its distribution assets in the respondent No.1 i.e. Dakshin Gujarat Vij Company Limited [for short 'DGVCL'] and also transferred and vested its transmission assets in Gujarat Energy Transmission Corporation Limited [for short 'GETCO'] respondent No.2 herein, in terms of Notification dated October 24, 2003. The erstwhile Gujarat Electricity Board was supplying electricity to the appellant-ESL upto 44.5 MVA as per the terms and conditions of the agreement dated December 1, 1989. By letter dated January 18, 2006, respondent No. 1 claimed Wheeling charges of Rs.6.63 crores from the appellant-ESL for the period from May 11, 2005 to December 31, 2005. The appellant-ESL, by its letter dated January 27, 2006, replied that it was not liable to pay those charges. Finally, the respondent No.1 issued Bill-cum-Disconnection notice dated June 5, 2006, demanding Wheeling Charges aggregating Rs.13,18,35,735/-. Therefore, the appellant-ESL invoked jurisdiction of this Court by filing writ petition, Special Civil Application No. 13886 of 2006, under Article 226 of the Constitution. In the petition, following reliefs were claimed:

(A) Your Lordships may be pleased to issue a writ of or a writ in the nature of Mandamus and/or any other appropriate writ, order or direction quashing and setting aside the Bill-cum-Disconnection Notice dated 5.6.2006 at Annexure-A;

(B) Your Lordships may be pleased to issue a writ or a writ in the nature of Mandamus directing the Respondents to issue permission/ approval for parallel operation of additional 240 MW CPP in pursuance of the application dated 9th May 2006 at Annexure-J on such usual terms and conditions as are applicable for the same and without insisting for payment of wheeling charges under the Bill-cum-Disconnection Notice;

(C) Pending the hearing and final disposal of this Petition, Your Lordships may be pleased to-

(i) restrain the respondent No.1, its servants and agents from disconnecting power supply to the Petitioner Company on the ground of non-payment of wheeling charges claimed under the Bill-cum-Disconnection Notice;

(ii) direct the Respondents to issue permission/ approval for parallel operation of additional 240 MW CPP in pursuance of the application dated 9th May 2006 at Annexure-J on such usual terms and conditions as are applicable for the same and without insisting for payment of wheeling charges under the Bill-cum-Disconnection Notice;

(D) An ex-parte ad-interim reliefs in terms of prayer (C) above may kindly be granted; and

(E) Pass such other and further order or orders as may be deemed just and proper on the facts and in the circumstances of the present case

**[4]** It is necessary to refer to the issues decided by the learned Single Judge so as to decide the appeals finally. Learned Senior Counsel for the appellants as well as the learned Senior Counsel for the respondents have raised certain contentions based on the statutory provisions under the Electricity Act, 2003, GEI Act, 2003, Rules and Regulations made thereunder including the Supply Code and, the provisions of the Indian Electricity Act, 1910 and the Electricity Supply Act, 1946, etc. etc.

4.1 The issue decided by the learned Single Judge is about the ownership of 220 KV Bus-Bar shown in the maps produced by the parties between points `X' and `Y', which is 400 meter long and is connected to 220 KV transmission line leading to Ichhapur sub-station and Sachin sub-station of the respondent No.2. The learned Single Judge has held that 48 kilometer long 200 KV line is from Ichhapur sub-station to Sachin sub-station. The learned Judge has referred to clause 6(b) of the Agreement dated December 1, 1989, as well as Agreement dated May 25, 1994, and held that the Bus-Bar which is shown in the maps produced by the parties between the points `X' and `Y' belongs to the respondents. As per the finding recorded by the learned Single Judge, electricity passes through the service line beyond the premises of the appellants whereas the length of the Bus-Bar is only 1% of the total length of service line which is 48 kilometers. The contention raised by the appellants that the distribution system belonging to the respondent No.1 is only upto the metering point is negated and it is held that notwithstanding the contribution made by the appellant-ESL for Bus-Bar, the same vests in the respondents because the ownership of service lines is of Gujarat Electricity Board and the Board would be entitled to bring upon accommodation, cables, equipments, etc. for giving connections to other consumers. According to the learned Single

Judge, 220 KV line from the generating station to Ichhapur sub-station was being owned, operated and maintained by the respondents for evacuation of electricity from generating plant of Essar Power Limited and also for supply of electricity to the appellant-ESL. It is further found that the generating station of Essar Power Limited was commissioned in the year 1996 and till 2001, evacuation of power was through Ichhapur sub-station and that the respondents, at their own costs, had extended line upto Sachin sub-station in the year 2001 to enable them to evacuate and supply power from Ichhapur sub-station to Sachin sub-station and vice-versa. According to the finding recorded by the learned Single Judge, both sub-stations are also connected to other sub-stations. The learned Single Judge took into consideration the decisions rendered in

(1) [Calcutta Electric Supply Corporation v. Commissioner of Wealth Tax, West Bengal](#), 1972 3 SCC 222

(2) [Hoshiarpur Electric Supply Company v. Commissioner of Income-tax, Simla](#), 1961 AIR(SC) 892

(3) The [Upper Ganges Valley Electricity Supply Co. Ltd. v. The U.P. Electricity Board](#), 1973 AIR(SC) 683

(4) The [Caxton Press Pvt. Ltd., New Delhi v. Municipal Corporation of Delhi](#), 1976 AIR(Del) 30, and

(5) M/s. [Sagar Art Service, New Delhi v. Municipal Corporation, Gwalior and another](#), 1988 AIR(MP) 46, and has held that the principle emerging therefrom that even if payment of cost of service line is made by the consumer, the ownership of service line as well as the distribution system vests in the licensee. After noticing the fact that other powers are being transmitted through 220 KV line in addition to transfer of Essar's power, it is held that the power is distributed beyond metering points of the appellants, and therefore, the respondents are entitled to levy Wheeling charges. The learned Judge noticed that tariff of Wheeling charges was not in dispute. In view of the aboveresferred to conclusions, the learned Single Judge has dismissed the petition. The operative part of the judgment reads as under:

12. In view of the aforesaid facts, reasons and judicial pronouncements, the demand notice dated 18th January, 2006 as well as 5th June, 2006 and bills for the month of May, 2005 to May, 2006 is true and correct and the petitioners are liable to make the payment of Wheeling charges for transmission of electricity. There is no substance in this Special Civil Application and, therefore, the same is hereby dismissed. Rule is discharged. Interim relief, if any, stands vacated.

**[5]** When Civil Application No.3676 of 2007 was filed by the appellant-ESL for stay, a question about interim relief was considered and, referring to the earlier order of interim relief in appeal, a Division Bench noticed that the appellant-ESL was permitted to commence generation of additional power on depositing 50% of the amount demanded by the respondent-company and the appellant-ESL was directed to file undertaking accordingly. However, in spite of filing undertaking by the appellant-ESL, the remaining amount, as ordered, was not paid and, therefore, by reasoned order dated 14th March 2007, the above application for interim relief came to be dismissed. However, the appellant-ESL was granted time of three weeks to make payment of the amount mentioned in the bill dated 23rd February 2007.

**[6]** Upon filing Civil Appeal No.1873 of 2007, the Apex Court requested the High Court to see that the matter is disposed of by 31st July 2007 and, in the meanwhile, the appellant-ESL was directed to pay 30% of the demand raised in February 2007 and granted stay of recovery of balance 70% of the demand, reserving liberty to the Electricity Company to raise demand for subsequent months, but the amount of demand was not to be realized. It appears that the matters were heard from time to time and finally heard accordingly.

#### FACTS

**[7]** In view of the applications dated 31st December 1987 and 19th July 1988 addressed by the appellant-ESL to the GEB on 12th September 1988, the appellant-ESL was called upon to deposit Rs.190 lakhs towards estimated cost of laying service line of 66 KV from Ichhapur sub-station to the premises of the Company. On 1st December 1989, an agreement was entered into between the GEB and the appellant-ESL for supply of 66 KV electrical energy wherein clause 5(a) provides for point of delivery; clause 6(b) provides for service line; clause 15(a) prescribes that Conditions and Miscellaneous Charges for Supply of Energy would be deemed to be part of the agreement under which clause 4 deals with service line and clause 9 provides for point of supply. In 1990-1991, the appellant-ESL proposed to set up a plant for manufacturing HRC for which it required 220 KV supply. On 22nd January 1990, the GEB called upon the appellant-ESL to deposit an amount of Rs.5,45,10,000/- for laying down service line from Ichhapur sub-station. On 28th December 1993, the Electrical Inspector approved the plan of Electric Sub Station/Switch Yard of ESL set up at new location within the premises. The upgraded switch yard included bus bars which were rigid across the premises of the company and flexible across the road running through the premises. On 25th May 1994, second agreement was arrived at between the GEB and the appellant-ESL whereunder the capacity of the aforesaid service line came to be increased from 66 KV to 220 KV on the same terms and conditions as contained in the first agreement. In 1994-1995, the appellant-ESL erected electrical sub-station/switch

yard from Bay Nos. 1 to 6 within the premises of the appellant-ESL on western side of Surat-Hazira road and from Bay Nos. 11 to 13 on eastern side of the road where 30 MW CPP of Essar Steel was set up and adjacent thereto, 3 generators of Essar Power were under contemplation for initial generation of 310 MW with the overhead lines, i.e. Bus Bar passing across the aforesaid road. On 5th June 1995, the State Government granted approval for the supply of 215 MW of power to the appellant-ESL and 300 MW of power to the GEB, subject to certain conditions. On 21st July 1995, the CEA, in its 131st meeting, considered the proposal of Essar Power for setting up of 515 MW power project. On 8th August 1995, CEA, while according techno economic clearance to the aforesaid project, wrote a letter to Essar Power conveying various conditions subject to which the said clearance was granted. On 25th September 1995, the GEB addressed a communication to CEA informing that for evacuation of power from Essar Power's generating station of 515 MW, four 220 KV lines [existing two 220 KV and proposed two 220 KV] would be available. On 30th May 1996, power purchase agreement between the GEB and Essar Power came to be executed providing for the supply of 300 MW of power by Essar Power to the GEB and the balance 215MW of power by Essar Power to the appellant-ESL out of the total 515 MW capacity of its generating station. On 22nd January 1998, revised final bill was issued by the GEB for the service line laid from Ichhapur sub-station to the appellant-ESL for an amount of Rs.11,05,15,765/-. On 3rd September 2001, 220 KV service lines from Essar Power came to be extended and commissioned upto Sachin Sub-Station, whereby the entire 48 kms lines along with 400 meters of Bus Bars became an integrated 220 KV line from Ichhapur sub-station to Sachin Sub-Station as approved by CEA and transmission lines were laid down from Sachin to Essar for evacuation of power. In 2001-2005, differences between the GEB and Essar Power came to surface in respect of the meeting of various power flow on the 220 KV lines passing through Essar facilities, since there was no suitable metering system existing for real time measurement of energy generated, energy consumed by the appellant-ESL and energy traversed from Ichhapur to Essar Steel to Sachin and also at the other inter-connection points on the 220 KV lines of power flow from 30 MW CPP of Essar Steel and 515 MW generating stations of Essar Power. It was, therefore, not possible to measure and maintain the energy account of GEB's power on the 220 KV lines and the power flowing from Essar Power's generating station to the 220 KV line and the power consumed by Essar Steel. On 21st February 2005 the aforesaid differences between Essar Power and the GEB came to be sorted out by the CEA and communicated vide letter dated 21st February 2005 directing the installation of suitable metering equipments at various inter-connection points on the 220 KV lines as the desired results could be achieved from proper metering. In February-March 2005, metering at various inter-connection points on 220 KV line came to be completed as per the decision of the CEA, with the result, the delivery point for different input and output energy on the 220 KV line between Ichhapur and Sachin to

measure and account for about 27 different types of energy of different ownership flowing through Ichhapur and Sachin came to be changed. On 24th March 2005, after installation of suitable meters in February 2005, Essar Steel and Essar Power were categorically informed by the GEB vide its letter dated 24th March 2005 about effective date for consideration of new metering system for tariff billing purpose and further explaining the methodology for preparation of monthly bill. On 1st April 2005, the State Government restructured the erstwhile GEB under the provisions of the Gujarat Electricity Industry (Reorganization and Regulation) Act, 2003, into six corporate entities to carry out the Generation, Transmission and Distribution businesses of the GEB as below:

- [i] Gujarat State Electricity Corporation Limited (GSECL) A Generation Company;
- [ii] Gujarat Energy Transmission Company Limited (GETCO) A transmission Company; And four Distribution Companies:
- [iii] Dakshin Gujarat Vij Company Limited
- [iv] Madhya Gujarat Vij Company Limited
- [v] Utter Gujarat Vij Company Limited
- [vi] Paschim Gujarat Vij Company Limited

On 21st April 2005, finally, an agreement in the above connection came to be reduced into writing duly signed by GETCO, Essar Power and Essar Steel in the above connection. On 29th September 2005, Open Access Regulation came to be notified vide Notification No.13/2005 by Gujarat Electricity Regulatory Commission (GERC) constituted under the Electricity Laws. Open Access Regulation further stipulates for GETCO to recover appropriate transmission charges decided under the tariff order from all Open access consumers using transmission network. The tariff order dated 28th February 2006 issued by GERC also provides to recover the said charges on postage stamp method and not on contract path method. The tariff order stipulates to recover the charges based on per MW per day. In January 2006, GETCO claimed applicable transmission/wheeling charges from Essar Steel for conveyance of power generated from their CPPs as well as 215 MW of power from Essar Power through the integrated transmission network of GETCO for the period from 11th May 2005 onwards viz. subsequently to the installation of the appropriate metering system on new locations as directed by CEA. On 18th January 2006, the respondent No.1 issued a bill for wheeling charges as per CPP policy of the State Government for the period from 11th May 2005 to 31st December 2005 to the appellant-ESL for the reimbursement thereof to GETCO. On 5th May 2006,

the appellant-ESL sought connectivity of its new CPPs of 240 MW to the 220 KV lines. On 14th July 2006, the writ petition, Special Civil Application No. 13886 of 2006 came to be filed by the appellant-ESL before this Honourable Court for the relief mentioned hereinabove.

7.1 During pendency of the proceeding, in October 2008 new CPP of 110 MW came to be established by Essar Steel whereby it got total capacity of 535 MW of CPPs. On 1st February 2010, Essar Steel approached GETCO for resolving the issue of wheeling through the 220 KV integrated network from its new CPPs [now owned by Bhandar Power Limited] aggregating to the tune of 505 MW to the manufacturing plant of Essar Steel with an alternative route of shifting Ichhapur line so that grid connectivity from GETCO becomes radial to Essar Steel and thereby GETCO's power flow directly from Ichhapur and Sachin.

#### SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE APPELLANTS

**[8]** A Busbar scheme is an essential feature of a typical Electrical Sub-station. The classification of the Substation is based on voltage and a range of 220 KV, 400 KV is considered Extra High Voltage [EHV}. Such Substations may be located in generating stations, transmission and distribution systems or in consumers premises. Busbars are conductors/conducting bars to which a number of incoming or outgoing circuits are connected. The Busbar system is a very important aspect in the Substation design as it directly affects the entire Substation design, the location of equipment, and operation of Substation during normal, emergency and post-fault condition, maintenance and also the Substation cost. The Substation upon erection is finally commissioned after final checks, subsystem tests, system tests and load tests.

8.1 The entire distribution system and associated facilities including the dedicated transmission lines are built, maintained and operated by the company at its own costs for the purpose of conveyance of electricity generated by the CPPs to its plant through load centre. The plans submitted by the appellant-ESL, approved by the Electrical Inspector, clearly indicate that the subject Busbar are a part of the electrical installation of ESL and quite distinct from the service line laid by the GEB. Pursuant to the approval of plans, the appellant-ESL through a turn-key contract executed with Siemens Ltd. set up an entirely new Electrical Substation at a completely different location on the western side of the Surat Hazira Road opposite the site of the 66 KV Substation on the eastern side of the said road. The earlier Substation/switch yard was entirely scrapped. The 220 KV electrical Substation/switch yard including the subject Bus Bars was engineered, procured and constructed by the appellant-ESL at its own cost and the investment was to the extent of Rs.54 crore. The subject Busbars constitute an integral component of the



switch yard of Essar Steel, which is entirely beyond the metering point of the Board. The 220 KV double circuit service line was laid by the Board from Ichhapur sub-station upto the new 220 KV Switchyard Gantry of ESL. The electrical lines leading from the Gantry to the metering point and thereafter onward to the Bus Bars were also installed by ESL. It is submitted that maintenance of the Bus Bars has been undertaken by the Companies in accordance with Rule 65(7) of the Indian Electricity Rules, 1956. It is further submitted that the premise of there being an integrated line of 48 kms is incorrect and, therefore, the proposition that a segment thereof cannot be of a different ownership based on such premises, is without valid foundation. It is further submitted that in any case it is undisputed that the electrical Substation including the subject Bus Bars is of the ownership of the Companies and even if the Bus Bars inter-alia transmit electricity as contended by GETCO, the same does not validate a claim of ownership by GETCO and in fact it would be GETCO which would be liable to compensate Essar Steel and Essar Power for use of its property.

8.2 Rule 63 of the Indian Electricity Rules, 1956 provides for approval by Inspector and stipulates that the supply of energy shall not be commenced by the supplier unless and until the Inspector is satisfied that the provisions of Rules 65 to 69 have been complied with by the consumer and the approval in writing has been obtained by the consumer that his electrical installation complies with the requirements of the said Rules. It is submitted that on 28th December 1983, the Electrical Inspector approved the plan of Electric Substation/switchyard Essar Steel had set up at a new location within the premises after scrapping the earlier switch yard and later on the electrical installation extending the Bus Bar base was also approved by the Electrical Inspector on 15th December 1997. It is submitted that for energizing the 100 MW CPP, an approval was granted on 12th May 2005 after expansion of 100 MW CPP and 220 KW switchyard and other equipments.

8.3 It is submitted that the notification regarding Reorganization of the GEB dated 24th October 2003 provides for transfer of assets, liabilities and proceedings from the Board to the State Government under clause 4 and subsequent transfer of assets, liabilities and proceedings by the State Government to GETCO, etc. under clause 5. Clause 5(2) provides that all assets, liabilities and proceedings forming part of the Transmission Undertaking specified in Schedule B shall stand transferred to and vest with the Board by transfer, sale, lease or otherwise, but excluding such constructions or installations lawfully owned and operated by others. It is further submitted that as on this date the Bus Bars had been entirely put up and commissioned by the Companies and the transmission lines had also been laid by the GEB from Sachin Sub-Station to the delivery point of Essar Power on 3rd

September 2001. However, the GEB had not even attempted to claim ownership of the Bus Bars at this time. Therefore, the question of GETCO now in 2006 claiming to be the owner of the assets-Bus Bars, on the purported ground of their being connected with the transmission lines laid from Sachin Sub-Station which event had happened on 3rd September 2001, does not arise at all.

8.4 It is further submitted that DGVCL levied wheeling charges in respect of wheeling of electrical energy through the Bus Bars from 34 MW and 155 MW (100 MW plus 55 MW) captive power plants of Essar Steel to the load side of Essar Steel itself. Apart from the principal contention that the Bus Bars are not a service line or an extension thereof, as contended by DGVCL, such charges were even otherwise unsustainable since the supply of electricity is neither from a generating company nor any licensee other than the distribution licensee but from the CPPs to Essar Steel to itself. The term 'generating company' is defined u/s.2(28) as a company which owns or operates or maintains a 'generating station' which term is defined u/s.2(30) of the 2003 Act. Essar Steel does not own or maintain a 'generating station' but has a 'captive generating plant' which is defined u/s.2(8) of the Act and is not therefore a generating company as covered u/s.42(3) of the 2003 Act. It is submitted that the Bus Bars cannot be considered as service line which could vest in the Board by virtue of the provisions of clause VI of the Schedule to the Indian Electricity Act, 1910, or the terms of the agreement for supply of electricity between the GEB and Essar Steel more particularly clause 6(b) thereof or the Condition and Miscellaneous Charges for Supply of Energy more particularly clause 4 thereof. These provisions do not provide for any deeming fiction or any transfer of ownership of an electrical line from the consumer to the licensee. It is further submitted that in the facts of the case, the service line was laid by the GEB from Ichhapur sub-station to the Tower/Gantry of Essar Steel being a distance of 18 km. and the GEB called upon Essar Steel to reimburse the cost of Rs.11.05 crores for the same. This line is the service line contemplated under the aforesaid provisions/agreements. The Bus Bars being an integral part of switchyard which is a part of the consumer's installation as stated above, having been designed, engineered, procured, constructed and commissioned by Essar Steel even prior to the service line being charged (with electricity) by the GEB, the same cannot be considered to be a service line laid down by the GEB for which costs had been recovered from the consumer. It is submitted that the placement of meters by the GEB at different points on the electrical installation of the consumers subsequent to the erection and commissioning of the installation including the Bus Bars does not result in a deeming fiction that the Bus Bars become a service line and thereby the ownership thereof is divested from Essar Steel and transferred to the GEB. The

purpose of connecting meters is for proper measurement of the electricity for the purpose of the Acts as stipulated in S.54 of the Electricity (Supply) Act, 1948.

8.5 As regards 'transmission charges', it is submitted that the term 'transmit' means conveyance of electricity by means of transmission lines and expression 'transmission' should be construed accordingly as provided u/s.2(74) of the 2003 Act. 'Transmission Lines' are defined in S.2(72). GETCO is a State Transmission Utility u/s.39 of the 2003 Act and deemed to be a transmission licensee under the Act by virtue of the 2nd proviso to S.14. Transmission charges as may be determined by the Appropriate Commission u/s.62 of the Act can be levied u/s.40[c][i] or [ii]. Such charges are to be levied for providing non-discriminatory open access to the transmission system of the transmission licensee to any other licensee or generating company or to any consumer as and when such open access is provided by the State Commission u/s.42(2) of the 2003 Act. It is submitted that apart from the principal objection that the Bus Bars cannot be considered as a transmission line at all, the claim for transmission charges by GETCO is unsustainable since the purported 'transmission line' has not been built, maintained or operated by GETCO and is not its transmission system at all. The term 'Transmission System' has not been defined under the Act but is defined under the Grid Code notified by the Gujarat Electricity Regulatory Commission as being the system consisting of high pressure cables and overhead lines of Transmission Licensee for transmission of electrical power, from the Generating Station upto Connection Point/Interface Point with the Distribution System. It is further submitted that the Bus Bars even if considered to be transmission lines are dedicated transmission lines of Essar Power and Essar Steel. The term 'dedicated transmission lines' has been defined u/s.2(16). It is further submitted that there is no provision under the Statute authorizing the transfer of such dedicated transmission lines from the person who has constructed, operated and maintained the same as contemplated in Ss.9 and 10 of the 2003 Act to any transmission licensee, far from authorizing such transmission licensee to levy transmission charges for use of the dedicated transmission lines from the persons who had constructed the same in the first place.

8.6 It is submitted that in any case the 2003 Act opens up generation, transmission and distribution of electricity for the private sector. In view of the fact that the electricity grid is seamless and electrical energy flowing through the grid does not bear the imprimatur of its generator/source, the contention that use of the distribution/transmission systems set up by any person by another for conveyance of electricity, would divest ownership thereof in favour of the person claiming 'ownership' of the electricity flowing through it, is absolutely irrational and

untenable. In any case the electrical energy stated to be flowing through the Bus Bars can not belong to GETCO at all since it is not a generating company and is only a transmission licensee.

#### SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE RESPONDENTS

**[9]** At the outset, it is submitted by the learned counsel appearing for the respondents that the judgment and order passed by the learned Single Judge does not call for any interference and the appeals deserve to be dismissed. It is further submitted that the total outstanding wheeling charges as on the date payable by the appellants works out to approximately Rs.349.17 crores.

9.1 Learned counsel for the respondents has referred to the provisions of clause 6(a) and (b) of the agreement dated 1.12.1989 and submitted that notwithstanding that a portion of service line is paid for by the consumer, the entire service line including the portion paid for by the consumer shall vest in the supplier and will be maintained at the supplier's cost and no refund is permissible to the consumer on account of any service line cost contributed by the consumer.

9.2 It is submitted that on 8th August 1995, Central Electricity Authority, while according techno economic clearance of the project of Essar Power, wrote a letter to Essar Power conveying various conditions subject to which the said clearance was granted. One of the conditions in the said letter was meant for the GEB to be complied with is that 'the submission of associated the transmission system scheme by the GEB to CEA and its completion to match with the commissioning of the steam-turbine generator'. While responding to the aforesaid, the GEB addressed a communication dated 25th September 1995 to CEA informing inter-alia that for evacuation of power from Essar Power's generation station of 515 MW, four 220 KV lines would be available as under:

[i] existing two number of 220 KV lines from Essar Power Project to 220 KV Ichhapur sub-station i.e. including the Bus Bar in question;

[ii] two number of 220 KV lines from Essar Power Project to 220 KV Sachin Sub-Station to be laid.

9.3 It is submitted that the Electricity Act, 2003 came into force on 10th June 2003 whereas [i] the service line between Ichhapur and Essar Steel Factory, [ii] the overhead line i.e. the Bus Bars passing across the Surat-Hazira State Highway from Essar Steel to Essar Power; [iii] the facilities under the Bus Bar such as Isolator, switchyard, Substation etc. and [iv] the lines from Essar Power to Sachin Sub-Station, were all constructed prior to the coming into force of the Electricity Act,

2003, when the applicable Electricity laws were the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Under the Indian Electricity Act, 1910, the erstwhile GEB was recognized as State Transmission Utility as provided under S.27B thereof which was vested with the principal function of not only undertaking transmission of energy through transmission system but also exercising supervision and control of inter as well as intra-State including planning and coordination. It is further submitted that when the Electricity Act, 2003 came into force, the GEB and the companies re-organised as successors of the GEB became authorized to undertake the same functions as GEB was earlier undertaking. Under the Electricity Act, 2003, there are three entities which are recognized to undertake transmission of electricity, namely:

[a] The Central Transmission Utility (CTU) as per S.38;

[b] The State Transmission Utility (STU) as per S.39;

[c] The Transmission Licensees as per S.38;

It is further submitted that similar provisions as contained in S.27A and 27B of the Indian Electricity Act, 1910 stand incorporated in S.38 and 39 of the Electricity Act, 2003 with minor additions dealing with prohibition of trading, cross subsidy etc. It is further submitted that the CTU and STU are those which had an existing transmission system and not those which have built a transmission system. S.38(2) [c] and S.39(2)[c] of the Electricity Act, 2003 speak about CTU and STU to ensure development of efficient, coordinated and economical system for smooth flow of electricity and not building up transmission system for the first time. It is further submitted that S.40 of the Electricity Act, 2003 is similar to S.27C and 27D of the Indian Electricity Act, 1910. Under 2003 Act, if a person wishes to establish a transmission line, i.e. if a person wants to built a transmission line, he has to apply for and obtain the transmission licence u/s.14 of 2003 Act and he will be governed by S.40. In contrast, the second proviso to S.14 specifically states that the CTU and STU shall be deemed to be a transmission licensee. It is further submitted that S.38 and 39 of 2003 Act comprehensively and fully cover all aspects specified in S.40 and, in fact, state that the CTU and STU have many more powers. There is absolutely no need for the CTU and STU to refer to and rely on any part of the provisions of S.40 for undertaking its functions.

9.4 There was no provision such as S.42(2) of the Electricity Act, 2003 dealing with open access and cross subsidy surcharge, etc. in the earlier legislations. This aspect has been recognized in the Electricity (Removal of Difficulties) Second Order, 2005 which was issued by the Central Government u/s.183 of the Electricity Act,

2003. The recital to the said Order clearly shows the existence of open access prior to 10.6.2003 and the intention was not to subject them to S.42(2). In view of the above, whosoever had open access prior to 10.6.2003 could very well continue with the same thereafter without any implication of S.42(2) or cross subsidy provided therein. In this regard, the Gujarat Electricity Regulatory Commission (Open Access for Intra-State Transmission and Distribution) Regulation, 2005 having been framed under various provisions including S.42(2) of the Electricity Act, 2003 and having come into force from 29.9.2005, clearly provides in Regulation (4)(ii) to the effect that the existing beneficiaries of a inter-State transmission system owned or operated by STU, shall be deemed to be long-term open access users.

9.5 S.42(2) of the Electricity Act, 2003 only provides that the State Commission shall introduce open access in such phases and subject to such conditions as it deems appropriate. S.40[c] states that the open access to the consumers will be allowed as and when such open access is provided by the State Commission under sub-section (2) of S.42 on payment of charges, etc. As mentioned above, the Gujarat Electricity Regulatory Commission has framed a detailed Open Access Regulation in the year 2005, which also contains the procedure etc apart from the charges to be paid.

9.6 In fact, Regulation 14 of the Open Access Regulations provides for charging provisions in as much as it provides for the Open Access Charges to be paid by Open access users. Not only this, the said regulation also provides for calculation of transmission charges and other charges. Accordingly, as provided under Regulation 14 of the Open Access Regulation, the Commission has issued a Tariff Order dated 28.2.2006 determining charges, etc. payable by the generating company, consumers, etc.

**[10]** At the threshold, we may notice some of the important provisions of the agreements entered into between the parties and statutory provisions, as under:

Clause 6(a) and 6(b) of the agreements dated 1.12.1989 and 25.5.1994 entered into between the parties read as under:

(6)(a) The consumer shall provide and continue to provide during continuance of this agreement, without any charge, accommodation to be approved by the General Manager (Com) for the housing of Supplier's equipment apparatus necessary for the performance of this Agreement.

The supplier shall be at liberty to bring upon the accommodation so provided at the consumer's premises not only the cables, required for the supply of electrical energy to the consumer but also the cables, accessories and equipment necessary

for giving connections to other consumer through the cables and terminals situated on the consumer's premises, provided the supply to the consumer shall in no way be interfered with or its continuity jeopardized as a result of such action on the part of the supplier.

[b] notwithstanding that a portion of service line is paid for by the consumer, the entire service line including the portion paid for by the consumer shall vest in the supplier and will be maintained at his (supplier's) cost. The consumer shall not be entitled to any refund on account of any service line cost contributed by him.

Clauses 4(F) and 11(d) of the Conditions of supply of electric energy, framed in exercise of the powers conferred u/s.49 of the Electricity (Supply) Act, 1948 and applicable to the appellants, are as under:

Service lines.

4(F) The service line, notwithstanding that a portion of the cost has been paid for by the consumer, shall be and remain the property of the Board by whom it is to be maintained.

Board's Supply Main and Apparatus

11(d) The Board shall have the right to use meters and apparatus provided under condition (a) and (b) above for a similar supply to other premises in the neighborhood, provided the supply to the consumer is not thereby affected. Permission to lay cables under, across or over the consumers premises or for fixing apparatus upon the said premises by the Board shall be deemed to be implied and vested in the Board.

Sub-clauses (2) of Clause VI of the Schedule of the Indian Electricity Act, 1910 is set out hereunder:

(2) Any service line laid for the purpose of supply in pursuance of a requisition under sub-clause (1) shall, notwithstanding that a portion of it may have been paid for by the person making the requisition, be maintained by the licensee who shall also have the right to use it for the supply of energy to any other person.

Rule 63 deals with approval by Inspector in respect of electricity supply line, etc. which in its sub-rule (2) provides as under:

(2) The owner of any high or extra-high voltage installation shall, before making application to the Inspector for approval of his installation or additions thereto, test of every high or extra-high voltage circuit or additions thereto, other than an

overhead line, and satisfy himself that they withstand the application of the testing voltage set out in sub-rule (1) of rule 65 and shall duly record the results of such tests and forward them to the Inspector:

Provided that an Inspector may direct such owner to carry out tests as he deems necessary or, if he thinks fit, accept the manufacturer's certified tests in respect of any particular apparatus in place of the tests required by this sub-rule.

Rule 64(2) relating to use of electricity at high and extra-high voltage reads as under:

64(2) The following provisions shall be observed where energy at high or extra-high voltage is supplied, converted, transformed or used:-

(a) (i) clearances as per Indian Standard Code shall be provided for electrical apparatus so that sufficient space is available for easy operation and maintenance without any haphazard to the operating and maintenance personnel working near the equipment and for ensuring adequate ventilation.

Provided that the owner of the transformer installation shall not allow any encroachment below such installations. The Electrical Inspector shall direct appropriate law enforcing authorities to remove such encroachments, if in his/her opinion, such encroachments pose a danger to the life of the operating personnel/public person or property.

[ii] The following minimum safety working clearances shall be maintained for the bare conductors or live parts of any apparatus in outdoor sub-stations, excluding overhead lines of HV and EHV installations.:

S.2(18) of the Electricity Act, 2003 defines the term 'Distributing Main', as under:

(18) 'distributing main' means the portion of any main with which a service line is, or is intended to be, immediately connected.

S.2(19) defines the term 'Distribution System', as under:

(19) 'distribution system' means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

S.2(32) defines the term 'grid', as under:

(32) 'grid' means the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants;



S. 2(42) defines the term 'Main', as under:

(42) 'main' means any electricity supply-line through which electricity is, or is intended to be, supplied.

S. 2(61) defines the term 'Service-line', as under:

(61) 'service line' means any electric supply-line through which electricity is, or is intended to be, supplied to a single consumer either from a distributing main or immediately from the Distribution Licensee's premises; or from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main.

S.2(63) defines the term 'stand alone system', as under:

(63) 'stand alone system' means the electricity system set-up to generate power and distribute electricity in a specified area without connection to the grid

S. 2(72), 2(73) and 2(74) of the Electricity Act, 2003, defining 'transmission lines', 'transmission licensee' and 'transmit', respectively, read as under:

(72) 'transmission lines' means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works.

(73) 'transmission licensee' means a licensee authorized to establish or operate transmission lines.

(74) 'transmit' means conveyance of electricity by means of transmission lines and expression 'transmission' shall be construed accordingly.

S. 2(76) defines the term 'wheeling', as under:

(76) 'wheeling' means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.

S.14 second proviso reads as under:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act.

S.39 of the Electricity Act, 2003 reads as under:

39. The State Government may notify the Board or a Government Company as the State Transmission Utility:

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

Provided further that the State Government may transfer, vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the State Transmission Utility shall be

[a] to undertake transmission of electricity through intra-State transmission system;

[b] to discharge all functions of planning and co-ordination relating to intra-State transmission system with

[i] Central Transmission Utility;

[ii] State Governments;

[iii] generating companies;

[iv] Regional Power Committees;

[v] Authority

[vi] licensees;

[vii] any other person notified by the State Government in this behalf;

[c] to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres.

[d] to provide non-discriminatory open access to its transmission system for use by

[i] any licensee or generating company on payment of transmission charges; or

[ii] any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission;

Provided that such surcharge shall be utilized for the purpose of meeting the requirement of current level cross-subsidy;

Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission.

Provided also that the manner of payment and utilization of the surcharge shall be specified by the State Commission.

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

S.40 of the Electricity Act, 2003 lays down duties of transmission licensee, the relevant portion whereof is set out hereunder:

40. Duties of transmission licensees It shall be the duty of a transmission licensee

[a] to build, maintain and operation an efficient, coordinated and economical inter-State transmission system or Intra-State transmission system, as the case may be;

[b] xxx xxx xxx

[c] to provide non-discriminatory open access to its transmission system for use by

The term 'transmission system' as defined under the Gujarat Electricity Grid Code framed under the provisions of the Electricity Act, 2003 reads as under:

The system consisting of high pressure cables and overhead lines of Transmission Licensee for transmission of electrical power from the Generating Station upto Connection Point/Interface Point with the Distribution System. This shall not include any part of the Distribution System.

S.42(2) and (3) of the Electricity Act, 2003 read as under:

42. Duties of distribution licensees and open access:

[1] xxx xxx xxx

[2] The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constrains:

Provided xxx xxx xxx

[3] Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

S.62(1) of the Electricity Act, 2003 reads as under:

62. Determination of tariff:-

[1] the Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -

[a] supply of electricity by a generating company to a distribution lincensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.

[b] transmission of electricity

[c] wheeling of electricity

[d] retail sale of electricity

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition

among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

S.185. Repeal and saving.

Relevant definitions under the Power Purchase Agreement dated 30.5.1996 between Essar Power and the GEB:

'Board System' shall mean the Transmission Line and all other equipments, facilities, communication systems and Grid of the Board associated with the evacuation of power from the Generating Station in respect of the Allocated Capacity.

'Delivery Point' shall mean the dead-end structure to be installed within the Company's switchyard provided by the Company and to which the Board is to interconnect the Transmission Lines.

'Interconnection Point' shall mean the physical point(s) where the Generating Station and the Board System are interconnected at the site.

'Commissioning of Interconnection Facilities : For evacuation of power equivalent to Allocated Capacity, two lines of 220 KV exist. The backup additional 220 KV line shall be constructed within 24 (twenty four) month from the Effective Date.

Map:

xxx xxx xxx

**[11]** On perusal of the submissions based on the record of the case, which include additional pleadings in the form of affidavits and the materials supplied about technical aspects of the matter along with graphic and photographic narration, approximately 48 kms long 220 KV transmission lines with division of 18 kms long transmission lines to GEB to Ichhapur sub-station and 30 kms long transmission lines to GEB to Sachin sub-station, in between is connected with the busbar, which is the subject matter of these appeals.

11.1 On perusal of the pleadings and submissions, it further transpires that the origin of 220 KV busbar then constructed relates back to the first agreement dated 1st December 1989 and the second agreement dated 25th May 1994 entered into between ESL and GEB for supply of power by the GEB to ESL. We have perused the provisions of clauses 6(a) and 6(b) of the agreement dated 1st December 1989 which specifically mentions that the entire service line including the portion paid for by the consumer shall vest in the supplier and will be maintained at the supplier's

cost irrespective of the fact that the consumer has paid for a portion of such service line. The above clause was in consonance with the provisions of sub-clause (2) of clause VI of the Schedule to the Indian Electricity Act, 1910. In the second agreement dated 25th May 1994, the above clauses were to govern power sharing relationship between Essar Power Limited, Essar Steel Limited and the GEB in view of proposal of 515 MW of generating station of Essar Power being established and capacity of service line came to be increased from 66 KV to 220 KV. On 5th June 1995, the Government of Gujarat granted approval for supply of 215 MW power to Essar Steel and 300 MW power to GEB on certain conditions and one of such conditions included payment of 'wheeling charges' for the transmission of power as per the rate which may be decided by GEB according to sound commercial principles. Upon further communication on 25th September 1995, about GEB addressing a letter for evacuation of power from Essar Power's generating station of 515 MW, four 220 KV lines would be available as stated in the above communication as under:

[i] Existing two number of 220 KV lines from Essar Power Project to 220 KV Ichhapur sub-station i.e. including the busbar in question;

[ii] Proposed two numbers of 220 KV lines from Essar Power Project to 220 KV Sachin sub-station;

The basis for above four 220KV lines was for following arrangement as agreed

[i] For evacuating power from 515 MW generating station of Essar Steel through the busbar;

[ii] For evacuating about 215 MW power from Essar Power to Essar Steel through the busbar;

[iii] After connection to Sachin sub-station, for evacuating 300 MW power from Essar Power to the alternative route upto Sachin sub-station i.e. about 30 kms away from point 'X' for the sell thereof to GEB;

[iv] Supply of electricity by GEB to Essar Steel as an additional service line similar to service line from Ichhapur to Essar Steel; and

[v] Transfer of power of GEB from Ichhapur to Sachin and vice versa;

Thereafter, on 30th May 1996, Power Purchase Agreement between GEB and Essar Power and on 29th June 1996 Power Purchase Agreement between Essar Power and Essar Steel came to be executed which govern the relationship between the parties. In view of the above agreement, 220 KV service line from Essar Power

came to be extended and commissioned upto Sachin sub-station finally in 2001 whereby the entire 48 kms lines along with 400 meters of the busbar became an integrated 220 KV line from Ichhapur sub-station to Sachin sub-station as approved by the Central Electrical Authority and the above entire line became an integral part of the Gujarat Transmission Network of GEB. It is to be noted that continuous uninterrupted power flow through the busbar from Ichhapur sub-station to Sachin sub-station of the GEB and vice-versa including evacuation of power from the generating line of Essar Power to GEB and Essar Steel and the said 220 KV line supplies power to other consumers. The entire transmission net-work became one and 220 KV line was not broken at two points i.e. two ends of the busbar. Thus, the entire transmission system for evacuation of power from 515 MW Essar Power Station was planned and finalized based on 220 KV line being connected between Ichhapur sub-station and Sachin sub-station of GEB [now GETCO] and 220 KV Busbar formed a part of the above and, even as per the definition of 'sub-station' u/s.2(69) of the Electricity Act, 2003, it means a station for transforming or converting electricity for the transmission or distribution thereof and includes transformers, converters, switchgears, capacitors, synchronous condensers, structures, cable and other appurtenant equipment and any buildings used for that purpose and the site thereof. If the above definition is seen along with definition of 'transmission lines' as contained in S.2(72), as shown in the maps at Annexure G,G-1 & G-2 of the counter affidavit filed by GETCO on 16th August 2007, it would go to show that mainly in the western region, Gujarat State Transmission System, transmission system of network, relevant integrated system of Essar Power with GETCO, which has further connection with the National Grid, which is not in dispute, and, thus, transmission and supply line from Ichhapur sub-station to Sachin sub-station and vice-versa is part of the 'grid' as defined u/s.2(32) and, therefore also, the claim of the appellants that the busbar is a severable and separate component and not part of the service line cannot be accepted. We have also noticed definition of S.2(63) 'stand alone system' to mean the electricity system set-up to generate power and distribute electricity in a specified area without connection to the grid, and considering the set-up of 220 KV line in the back-drop of two agreements of 1st December 1989 and 25th May 1994 and the clauses contained therein and the nature of power supply including evacuation of power as per the agreements as above, the busbar is not a separate component or any apparatus but is a part of integrated transmission line from Ichhapur sub-station to Sachin sub-station and vice-versa and part of grid. Even the minutes of the meeting with CEA held on 17th February 2005 was also for the reason that the Essar Steel at that time had only 185 MW (i.e.30+155) capacity of power from its CPPs and it was necessary for Essar Steel to remain in grid (i.e. Ring Mains

System) in view of the fact that when the arc furnace of Essar Steel is started, it required a lot of power in the order of 700 to 1000 MW.

**[12]** The ownership, operation and maintenance of the busbar and the system for all purposes remained with the respondents in view of the fact that, even before issuance of Notification dated 24th October 2003, by virtue of the provisions of Schedule VI of the Indian Electricity Act and the Electric Supply Act, 1946 and clauses 6(a) and (b) of the agreement dated 1.12.1989 and subsequent agreement dated 25.5.1994, the GEB, the predecessor of GETCO, was the owner of the above busbar, etc and, therefore, passing of such property to GETCO is automatic. The busbar was never owned or vested into the consumer irrespective of incurring cost for such busbar or even for supply line. As per clauses 4(f) and 11(d) of Conditions of Supply of Electric Energy framed in exercise of power conferred under Section 49 of the Electricity (Supply) Act, 1948 which defines service line and sub-clause (2) of clause VI of the Schedule to Indian Electricity Act, 1910, and Rule 64(2), the 'service line' never vested into consumer, but it remained under the ownership of GEB and later on GETCO as per S.39(1) of the Act 2003. Notification dated 24th October 2003 issued by the Government of Gujarat in exercise of powers conferred by Sections 28, 29 and 30 of the Gujarat Electricity Industry (Reorganisation and Regulation ) Act, 2003, provides various provisions for transfer and vesting. Clause 2(a) defines 'assets'; clause 5 provides for transfer of assets, liabilities and proceedings by the State Government to GSECL, GETCO and DISCOMS and sub-clause (2) states that all the assets, liabilities and proceedings forming part of Transmission Undertakings specified in Schedule B shall stand transferred to and vest in GETCO on and from the date of transfer subject to the terms and conditions of this scheme and sub-clause (5) provides that on the transfer and vesting of all the assets, liabilities and proceedings in terms of sub-clauses (1) to (3) to the respective transferee, the GSECL, GETCO, or as the case may be, DISCOMS shall be responsible for all functions, contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature relating to the respective assets, liabilities and proceedings transferred to it to which the Board was a party, subsisting or having effect on the date of transfer, in the same manner as the Board was liable immediately before the date of transfer, and the same shall be in force and effect against or in favour of the respective transferee and may be enforced effectively as if the respective transferee had been a party thereto instead of the Board . Schedule B provides that 'Transmission Undertaking' shall comprise of all Assets, Liabilities and proceedings belonging to the Gujarat Electricity Board concerned the transmission of electricity including but not limited to the following:

#### I. Transmission Assets:



All the transmission lines having the capacity to carry electricity at voltages of 33, 66 KV and above on double circuit/single circuit/ single circuit on double circuit towers with Grid sub-stations of various capacities with all associated and related equipment, including step-up, step-down transformers, circuit breakers, metering arrangements and other protective devices with power-line communication system, allied control rooms, lands (including right of way), buildings, diesel generating sets, roads and other auxiliary assets spread over within and outside the territory of the State including such assets under construction and assets acquired, transferred or rights of which were vested with the Board by transfer, sale, lease or otherwise but excluding such constructions or installations lawfully owned and operated by others.

In addition to the above, below 66 KV distribution system, which are in the 66 KV and above Grid Sub-stations and are integral part of the transmission shall be part of the transmission system and they shall not found part of the distribution undertakings notwithstanding anything contained in any other schedule.

The aforesaid Schedule 'B' also provides definitions of General Assets, Liabilities and Miscellaneous, Proceedings and General. On perusal of the above, it is apparent that all the transmission lines having the capacity to carry electricity at voltages of 33, 66 KV and above and connected with Grid sub-stations with all associated and related equipments, apparatus, devices and other paraphernalia including buildings, general assets, roads, etc. will be 'transmission assets' but it will exclude such construction or installation lawfully owned and operated by others. Since we have already noticed that the construction and installation were not lawfully owned and operated by the appellants by virtue of operation of electricity laws prior to the Act of 2003, the exclusion clause will be no help to the appellants. Even on perusal of the definition of Sections 2(17) 'distribution licensee', 2(19) 'distribution system', 2(42) 'main', 2(61) 'service line', 2(72) 'transmission lines', 2(73) 'transmission licensee' and 2(74) 'transmit, it is clear that transmitting electricity from a generating station to another generating station together with transformers with gear used for the control of cables or over-head lines, is the property and under the ownership of the Board.

12.1 The contention about 'dedicated transmission lines' as defined u/s.2(16) that the Essar Steel Limited had a captive power plant and, therefore, is out of purview of S.42(3) of the Act, is again based on presumption that 'captive power plant' is exclusively connected with the Essar Steel Limited and electricity generated out of such plant is exclusively consumed by Essar Steel Limited and does not convey through the transmission line. As we have seen in the earlier paragraphs that the points from 'X' to 'Y' are well connected on both sides to Ichhapur sub-station and

Sachin sub-station and the power flows to and fro and even is supplied to other sub-stations and consumers and Essar Power evacuates it for the GEB, such contention of 'dedicated transmission lines' as defined u/s.2(16) deserves to be rejected. Further, the grant of approval by Electrical Inspector in respect of electricity supply line under sub-rule (2) of Rule 63 of the Indian Electricity Rules, 1956 clearly excludes an over-head line and so is the case with sub-rule (2) of Rule 64. Therefore, mere approval by the Electrical Inspector of electricity supply line itself is not a ground to claim exclusive ownership.

12.2 That, incurring expenditure of Rs.54 crores, though disputed by the respondents stating that expense for the busbar could not be more than Rs.50 lakhs, for laying the busbar, which is an essential feature of a typical Electrical Sub-station and a very important aspect in the Substation design as it directly affects the entire Substation design, the location of equipment, and operational aspects, etc., is in respect of the entire sub-station, namely, 515 MW switch-yard. The busbar is created at the top of the sub-station for connectivity to the transmission lines to enable injection of power or taking delivery of power and the said busbar as such excluding the substation is only 'wires' for about 400 meters of length. Besides, 220 KV lines was connected with other facilities, namely, switchyard, transformers, etc. and the above facilities had to be made for evacuation of power from generating station or for taking delivery at the place of use and these other facilities and apparatus are quite different from the above busbar.

**[13]** Part VII in Electricity Act, 2003 is about 'Tariff' and S.61 is about Tariff Regulations and S.62 empowers the Appropriate Commission to determine the tariff in accordance with the provisions of the said Act for

[a] supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.

[b] transmission of electricity

[c] wheeling of electricity

[d] retail sale of electricity

Part V is about 'Transmission of Electricity' and S.39 states about State Transmission Utility and its functions and S.40 is about duties of transmission licensees. It is not in dispute that as provided in second proviso to S.14 about 'Grant of licence' the State Transmission utility is deemed to be a transmission licensee under the Act. S.42 makes a provision with respect to duties of distribution licensees and open access and sub-section (2) of S.42 empowers the State Commission to introduce open access.

13.1. The above provisions are seen and examined in juxtaposition to the then applicable electric laws namely, Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and the Regulations prevailed thereunder. It is to be noted that

[i] the service line between Ichhapur and Essar Steel Factory, [ii] the overhead line i.e. the Bus Bars passing across the Surat-Hazira State Highway from Essar Steel to Essar Power; [iii] the facilities under the Bus Bar such as Isolator, switchyard, Substation etc. and [iv] the lines from Essar Power to Sachin Sub-Station, were all constructed prior to the coming into force of the Electricity Act, 2003, when the Electricity laws as above were applicable.

**[14]** As noted earlier, STU is a deemed transmission licensee. It is governed by the provisions of S.39 of the Act. It may function as STU as well as transmission licensee by issuance of notification dated 29th May 2004 by the Government of Gujarat declaring GETCO as STU apart from the functions as provided in sub-section (2) of S.39 as 'STU'. S.39(2)(d) stipulates the functions of the STU to provide non-discriminatory open access to its transmission system. S.39(2)(d)[ii] is similar to S.40[c][ii] and STU functioning as a transmission licensee will not be governed by the provisions of S.40 and 'transmission licensee' defined U/s.2(73) will apply to private persons or parties or companies other than STU which is defined U/s.2(67). The provisions of Ss.38 and 39 clearly show that the Legislature never wanted to empower CTU or STU as transmission licensee u/s.40.

14.1 Giving open access prior to enactment of the Electricity Act, 2003, was governed by the agreement between the parties in absence of the provisions like S.42(2) of the Electricity Act, 2003. The above aspect is also reflected and recognized in the Electricity (Removal of Difficulties) Second Order, 2005 issued by the Central Government in exercise of powers u/s.183 of the Electricity Act, 2003 which shows the existence of open access prior to 10.6.2003 and the intention not to subject them to S.42(2). It is also to be noted that the Gujarat Electricity Regulatory Commission (Open Access for Intra-State Transmission and Distribution) Regulation, 2005 has already been framed under various provisions including S.42(2) of the Electricity Act, 2003.

14.2 S.42(2) of the Electricity Act, 2003 provides that the State Commission shall introduce open access in such phases and subject to such conditions as it deems appropriate. S.40[c] states that the open access to the consumers will be allowed as and when such open access is provided by the State Commission under subsection (2) of S.42 on payment of charges, etc. As mentioned above, the Gujarat Electricity Regulatory Commission has framed a detailed Open Access Regulation in the year 2005, which also contains the procedure etc apart from the charges to be paid.

14.3 Thus, when Essar Steel and Essar Power are not transmission licensees and are not authorized to build, maintain and operate intra-State transmission system and the busbar has become integral part of 220 KV lines and GETCO has authority u/s. 62 of the Act to determine the tariff and the provisions are made by introducing Open Access Regulations of 2005 and Regulation 14 which provides to determine charges, the findings of the learned Single Judge based on the decisions of the Apex Court referred to in the judgment about rejecting prayers of the appellants cannot be said to be in any manner contrary to law, namely, the provisions of the Indian Electricity Act, 1910, the Electricity Act, 2003 and the Rules, Regulations and Supply Code made thereunder.

14.4 S.62 of the Electricity Act, 2003 empowers the STU to determine tariff as STU for supply of electricity by a generating company to a distribution licensee for transmission of electricity and also for wheeling of electricity and having framed Open Access Regulation, Regulation 14 empowers for charges to be paid by open access user like the appellants, therefore, issuance of the Bill-cum-Disconnection Notice dated 5.6.2006 cannot be said to be in any manner illegal and we are in agreement with the findings of the learned Single Judge.

**[15]** We have also noticed system of reading of meters about consumption of electric energy by Essar Steel at different points and such consumption is not based upon reading of meters at points 'A-2' and 'B-1' as indicated and submitted, but the same is based upon the summation of all energy recorded in meters installed at A-2, B-1, G-1, G-2, G-3, and G-4 and after equating the said summation with the reading in meters at G5 to G7, the ultimate analysis can be cross-verified with the reading of the meters at Z-1 to Z-6 to ensure accuracy and, therefore, the above system of meter reading at various points is also in consonance with the minutes of the meeting held with Central Electrical Authority.

**[16]** The learned Single Judge, while exercising extraordinary jurisdiction under Article 226 of the Constitution of India, has given elaborate findings based on discussion of facts, various provisions of electrical laws as applicable from time to time and the case-

law and, relying on the pleadings of the petitioners-appellants that the quantum of 'wheeling charges' was not disputed and alternative remedy before the State Electricity Regulatory Commission was not a bar for exercising power under Article 226 of the Constitution of India and it was not necessary for the petitioner-Company to approach the State Electricity Regulatory Commission. We have considered the case on hand in detail on merits as well as law on the basis of extensive contentions advanced by learned counsels for both the parties, and having found that the busbar for which the expenses might have been incurred by Essar Steel but it being a part of the whole distribution system, we are of the view that the appellants cannot escape from their liability to pay 'wheeling charges' since 'wheeling' as defined in S.2(76) to mean 'the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity' for which the charges determined under section 62 will have to be paid, and Essar Steel has used and is using distribution system and associated facilities of a transmission licensee namely GETCO and Dakshin Gujarat Vij Company Limited (DGVCL) and as per the approval granted on 5th June 1995 by the Government of Gujarat on the condition to pay 'wheeling charges' and, therefore, for such conveyance of electricity, the appellants are duty bound to pay the charges demanded.

**[17]** Considering the overall conspectus of facts discussed hereinabove, we are not persuaded on any of the grounds urged by the learned counsel for the appellants to interfere with the judgment and order of the learned Single Judge and we fully concur with the same along with additional reasons assigned in this judgment.

18. Consequently, Letters Patent Appeal No. 321 of 2006 filed by the Essar Power has no merit and deserves to be dismissed for the reasons mentioned above.

**[18]** In the result, the appeals are dismissed. The judgment and order dated 15th January 2007 delivered by the learned Single Judge in Special Civil Application No. 13886 of 2006 is confirmed. The interim relief stands vacated. There shall be no order as to costs.

In view of the reasons given in the judgment, the oral prayer made by the learned Senior Counsel for the appellants for extension of interim order is rejected.