NORTH DELHI POWER LIMITED

v.

GOVT. OF NATIONAL CAPITAL TERRITORY OF DELHI & ORS.

(Civil Appeal No. 4269 of 2006)

MAY 03, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Service Law:

Re-organization of Delhi Vidyut Board (DVB) – Statutory transfer scheme – Tripartite agreements between Govt. of National Capital Territory of Delhi, DVB and DVB Joint Action Committee (consisting of various Unions etc.) – DVB unbundled into private companies including appellants-DISCOMs w.e.f. 1-7-2002 – All employees transferred – Plea of appellants that they had no liability relating to employees, who ceased to be employees of the erstwhile Delhi Electric Supply Undertaking (predecessor of DVB) prior to 1-7-2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of the Act – Held: The plea is not tenable – The Rules indicated that the liability was innate and accepted by the appellants-DISCOMS – Appellants, being the transferee companies, had taken over the liabilities of the erstwhile staff also – Delhi Electricity Reforms Act, 2000 – ss.14, 15, 16, 57 and 60 – Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 – rr.3, 6, 8 and 12.

From 1-7-2002, Delhi Vidyut Board (DVB) was unbundled into private companies including the appellants DISCOMs. Another company called DPCL (holding company) was also constituted with the aim and object of holding shares in the DISCOMs.

A Since the employees of DVB had displayed their apprehension and reservations to the effect that on emergence of the private companies their services may not be protected, therefore, these employees were taken into confidence by assuring them that their services will B be protected by entering into Tripartite Agreements which were executed between Government of National Capital Territory of Delhi (GNCTD), DVB and DVB Joint Action Committee (which consisted of various Unions as well as Junior Engineer Officer Association).

C The question which arose for consideration in the present appeals was whether the appellants DISCOMs are responsible for meeting the liabilities relating to employees, who ceased to be the employees of the erstwhile Delhi Electric Supply Undertaking (predecessor D of DVB) prior to 1-7-2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of the Delhi Electricity Reforms Act, 2000.

E Dismissing the appeals, the Court

HELD: 1.1. It is difficult to accept the contention that any prejudice was caused to the appellants DISCOMS. On the other hand, the question of liability seems to have been thrashed very minutely by the High Court in the light F of the provisions of the Delhi Electricity Reforms Act, 2000, the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001, Tripartite Agreements and the other agreements including the bid documents. It cannot be said that clothing appellant-NDPL with a liability regarding G the personnel who were retired, compulsorily retired or otherwise dead, dismissed etc. could be termed as "additional liability". In fact the reading of the said Rules and, more particularly, Rule 6(8) would indicate that liability was innate and accepted by the DISCOMS. [Paras 21 and 23] [1065-E-F; 1066-C]

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2. Rule 6(8) not only specifies the employment related matters but also clarifies what those matters would be which include pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners. The words 'existing pensioners' are extremely important. A plain reading of this Rule would leave no manner of doubt in respect of the liability having been transferred to transferee company and the NDPL is certainly the one. The language is broad enough to include all dismissed, dead, retired and compulsorily retired employees. As if that was not sufficient, sub-Rule (9) requires the Government to make appropriate arrangements in terms of the Tripartite Agreements in regard to the fund of terminal benefits to the extent it is unfunded on the date of transfer from the Board. A glance at the sub-rules 9(a) and 9(b) is sufficient to come to the conclusion that the liabilities have undoubtedly been transferred to the DISCOMS which include both NDPL as well as the BSES. No employees were ever transferred to the DPCL. All transferees came only to the DISCOMS like the NDPL under the transfer scheme. The High Court has correctly interpreted these Rules and has correctly come to the conclusion that the liabilities would rest with the DISCOMS including NDPL and BSES. [Paras 26, 27 and 28] [1068-A-D; 1069-A-D]

3.1. The purpose of Rule 8(3) is to cap any liability arising out of litigation, suits, claims etc. either pending on the date of transfer and/ or arising due to events prior to the date of transfer to be borne by the relevant DISCOM 1, DISCOM 2 or DISCOM 3, respectively. The nature of the liability and its being imposed on the DISCOMS alone is as clear as sunshine. To that extent, there can be no doubt that it includes all the liabilities including the liabilities on account of the personnel. The capping of the liability was at the instance of the DISCOMS only. They

A were more aware of the language brought in. They were also aware of the liabilities which arose, particularly, in view of Rule 6 (8) and they had open eyedly accepted Rule 8(3). They cannot now find fault with the constitutionality of the provisions. [Paras 29 and 31]
B [1069-F-H; 1070-A-G; 1071-A]

3.2. The suggestion that the *non obstante* clause in Rule 8(3) if widely construed, would render the clause unconstitutional, is not acceptable. The language of the clause is clear, unambiguous and must be given its
C natural meaning. If such a meaning is given, any other interpretation is not possible except the one rendered by the High Court. The constitutionality of Rule 8(3) cannot be doubted under any circumstances. [Paras 30 and 31] [1070-B-C; G]

D *M. Rathinaswami & Ors. v. State of Tamil Nadu & Ors.* 2009 (5) SCC 625; *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Others* ***2006 (10) SCC 452;*** *Ramdev Food Products (P) Ltd.v. Arvindbhai Rambhai Patel* 2006 (8) SCC 726; *Madan Mohan Pathak & Anr. v. Union Of India & Ors.* 1978 (2) SCC
E 50; *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* 2008 (4) SCC 190 and *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr.* 2005 (7) SCC 234, distinguished.

F 4. The argument raised that the liability in respect of existing pensioners would devolve on the Holding company, i.e. DPCL and not on the appellant is clearly incorrect. The transfer of personnel and all the principles are governed by Rule 6 alone. As provided in Rule 6(2), there are lists wherein the personnel have been classified
G into five groups based on the principle of "as is where is", where a specific reference is to be found to GENCO, TRANSCO and three DISCOMS. Very significantly, there is no reference to DPCL. Thus, no employee was transferred to DPCL. This is in case of the existing
H employees. Sub Rule (8), however, takes into sweep not

only the existing employees, who find the reference in the lists prepared under Rule 6(2), but also makes a reference to the employment related matters including provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of personnel and the existing pensioners. There was no question of existing pensioners being covered under the lists prepared under Rule 6(2). By using the words "existing pensioners" and by providing that the relevant transferee would stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters, the legislative intention is very clearly displayed to the effect that the existing pensioners on the day of transfer were also covered and stood transferred to the DISCOMS and not to DPCL and it is only the transferee DISCOM, who would substitute for the Board. Once these Rules are read in proper perspective, there is hardly any doubt about the liability of DISCOMS in respect of existing pensioners on the day of transfer. There can be no dispute that those who retired and those who were serving with the Board would stand transferred in respect of their liabilities etc. to the successor company. The High Court has correctly appreciated this position. [Paras 32 and 33] [1072-G-H; 1072-A, E-H; 1073-A-C]

5.1. Under Rule 12(1), a finality is given to the decision of the Government in respect of any doubt, dispute, difference or issue as regards the transfers under these Rules. The Rule provides that under any such eventuality, the decision of the Government shall be final subject to the provisions of the Act. Sub Rule (2) of Rule 12 provides that the Government may, by order, publish in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, which provisions may appear to be necessary for removing the difficulties arising in implementing the transfers under

A these Rules. Section 57 of the Act is also clear and provides power to the Government to remove any difficulties. [Para 34] [1073-C-F]

5.2. As an answer to the letter received from Delhi TRANSCO Ltd., a 100 per cent Government company, B seeking clarifications from the Government with respect to the competent authority/new entity to deal with vigilance/disciplinary/court cases in relation to the employees of erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the C Rules, the Governnment had issued a letter to Delhi TRANSCO Ltd., The letter pertained to removal of doubts, disputes and differences under the provisions of the Rules and issue of clarificatory order of the Government under Rule 12. It was then conveyed that the vigilance, D disciplinary and Court cases in respect of employees of the then DVB who could not become part of any of the companies, namely, DPCL, Delhi TRANSCO, Indraprastha Power Generation Co. Ltd., BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd. and NDPL on 01.07.2002 i.e. E on the date of restructuring due to retirement/dismissal / removal/ compulsory retirement shall be processed and decided by such company which would have been the controlling authority of the employee but for their retirement/dismissal/removal/ compulsory retirement etc.. F It is absolutely clear that by this letter the whole liability was put on the head of the DISCOMS. [Para 34] [1074-B-G]

5.3. The argument made that the Government had already exhausted its power under Rule 12(1) while G taking the earlier decision dated 17.09.2002 and, hence, it had lost the power to pass any fresh orders, is clearly incorrect. There can be no finality in the matter of removal doubts or the removal difficulties and also taking the decisions under Rule 12(1). The argument that once the H Government has exercised the powers under the Rule

12(1), the power gets exhausted and the decision becomes final and binding on all the parties, including the Government, is clearly incorrect. The argument that there is no further power under the Rule in the Government to issue any letter dated 21.01.2004, is also an incorrect argument. Nothing stopped the Government from taking any decision and it has taken a clearest possible decision by letter dated 21.01.2004 which is binding on all the parties. This is apart from the fact that the Government has not dealt with the subject in its earlier decision dated 17.09.2002 as regards the controversy which has fallen for consideration in this matter. [Para 42] [1079-C-F]

Case Law Reference

2009 (5) SCC 625	**distinguished**	**Para 30**
2006 (10) SCC 452	**distinguished**	**Para 31**
2006 (8) SCC 726	**distinguished**	**Para 31**
1978 (2) SCC 50	**distinguished**	**Para 31**
2008 (4) SCC 190	**distinguished**	**Para 31**
2005 (7) SCC 234	**distinguished**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4269 of 2010.

From the Judgment & Order dated 30.03.2006 of the High Court of Delhi at New Delhi in LPA No. 98 of 2005.

WITH

C.A. No. 4270 of 2006.

P.P. Malhotra, ASG, P.P. Rao, Sudhir Nandrajog, P.S. Patwalia, Jayant Nath, Anupam Verma, Abhay Kumar, Abhishek Munot, Ashish Kumar, Vibha Datta Makhija, Mansoor Ali Shoket, A. Ahlawat, Rani Chhabra, S.K. Dubey, Rakesh K. Sharma, Jamal Akhtar, Ashok Gurnani (for Rachna Gupta), Devashish Bharukha for the appearing parties.

The Judgment of the Court was delivered by

A **V.S. SIRPURKAR, J.** 1. This judgment shall dispose of the two appeals being CA No. 4269 of 2006 and CA No. 4270 of 2006. Civil Appeal No.4269/2006 has been filed on behalf of North Delhi Power Limited and Civil Appeal No.4270 of 2006 has been filed by BSES Rajdhani Limited. Since a common
B question falls for consideration in both the appeals, the same are disposed of by this common judgment. The question can be framed as under:

> "Whether the appellants are responsible for meeting the liabilities relating to employees who ceased to be the
C employees of erstwhile Delhi Electric Supply Undertaking (Predecessor of Delhi Vidhyut Board – DVB) prior to 1.7.2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of Delhi Electric Reforms Act, 2000?"

D

By the impugned judgment dated 30.3.2006 passed by the Delhi High Court, the High Court has held that the appellants alone would be responsible to meet such liabilities.

2. In order to understand the nature of controversy and the
E ramifications thereof, some facts common to both these appeals would be necessary.

Common Facts:

3. The Legislative Assembly of the National Capital
F Territory of Delhi passed the Act on 23.11.2000 being Delhi Electric Reforms Act, 2000 (hereinafter called the "Act, 2000"). This Act came into force on 8.3.2001. The Preamble of this Act reads as under:

> G "An Act to provide for the constitution of an Electricity Commission, restructuring of the electricity industry (rationalization of generation, transmission, distribution and supply of electricity), increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and

H

management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matter connected therewith or incidental thereto.

BE it enacted by the Legislative Assembly of the National Capital Territory of Delhi in the Fifty-first year of the Republic of India as follows:"

Section 2 pertains to definitions of relevant terms used in the Act and sub-section (1) contains the definitions clauses. Sub-sections (2) and (3) of Section 2 run as under:

"(2) Words and expressions used but not defined in this Act and defined in the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) have the meanings respectively assigned to them in that Act.

(3) Words and expressions used but not defined either in this Act or in the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) and defined in the Indian Electricity Act, 1910 (Central Act 9 of 1910) have the meanings respectively assigned to them in that Act."

Thus the definitions of relevant terms under Electricity (Supply) Act, 1948 and Electricity Act, 1910 were incorporated in the Act, 2000. Section 3 of the Act, 2000 provides for establishment of Delhi Electricity Regulatory Commission. The functions of this Commission are provided in Section 11. Some of the functions, amongst others, as provided in Section 11 (1) are as under:

"(c) to regulate power, purchase and procurement process of the licensees and transmission utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the

A National Capital Territory of Delhi;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act;

B (e) to aid and advise the government in matters concerning electricity generation, transmission, distribution and supply in the National Capital Territory of Delhi;

C (h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the National Capital Territory of Delhi and also to ensure a fair deal to the customers;

(k) to regulate the assets, properties and interest in D properties concerned or related to the electricity industry in the National Capital Territory of Delhi including the conditions governing entry into, and exit from the electricity industry in such manner as to safeguard the public interest;

E

(l) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;"

F 4. Under Section 14 of the Act, 2000, the subject of incorporation of companies for the purposes of generation, transmission or distribution of electricity was dealt with. Sub-sections (1), (2) and (6) of Section 14, which are relevant for our purposes provide as under:

G "14(1) The government may, as soon as may be after the commencement of this Act, cause one or more companies to be incorporated and set up under the provisions of the Companies Act, 1956 (Central Act 1 of 1956) for the purpose of generation, H transmission or distribution of electricity, including

companies engaged in more than one of the said activities in the National Capital Territory of Delhi and may transfer the existing generating stations or the transmission system or distribution system, or any part of the transmission system or distribution system, to such company or companies. A B

14(2) The government may designate any company set up under sub-section (1) to be the principal company to undertake all planning and coordination in regard to generation or transmission or both; and such company shall undertake works connected with generation or transmission and determine the requirements of the territory in consultation with the other companies engaged in generation or transmission for the National Capital Territory of Delhi, the Commission, the Regional Electricity Board and the Central Electricity Authority and any other authority under any law in force for the time being, or any other government concerned. C D

14(6) The government may convert the companies set up under this Act to joint venture companies through a process of disinvestment, in accordance with the transfer scheme prepared under the provisions of this Act." E

Section 15 of the Act, 2000 provides for Reorganisation of Delhi Vidyut Board and transfer of properties, functions and duties thereof. Sub-sections (3), (6), (7) and (9) of Section 15, which are relevant for purposes provide: F

"15(3) Such of the rights and powers to be exercised by the Board under the Electricity (Supply) Act, 1948 (Central Act 54 of 1948), as the government may, by notification in the official gazette, specify, shall be exercisable by a company or companies established as the case may be, under Section 14, G H

A for the purpose of discharge of the functions and duties with which it is entrusted.

15(6) A transfer scheme may –

B (a) provide for the formation of subsidiaries, joint venture, companies or other schemes of divisions, amalgamation, merger, reconstruction or arrangements;

C (b) define the property, interest in property, rights and liabilities to be allocated –

(i) by specifying or describing the property, rights and liabilities in question,

D (ii) by referring to all the property, interest in property, rights and liabilities comprised in a specified part of the transferor's undertaking, or

(iii) partly in one way and partly in the other:

E Provided that the property, interest in property, rights and liabilities shall be subject to such further transfer as the government may specify;

F (c) provide that any rights, or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee;

G (d) impose on any licensee an obligation to enter into such written agreements with, or execute such other instruments in favour of any other subsequent licensee as may be specified in the scheme;

H (e) make such supplemental, incidental and consequential provisions as the transferor licensee considers appropriate including provision specifying the order in which any transfer or transaction is to be regarded as taking effect;

(f) provide that the transfer shall be provisional subject to the provisions of Section 18.

15(7) All debts and obligations incurred, all contracts entered into and all matters and things done by, with or for the Board, or a company or companies established as the case may be, under Section 14 or generating company or distribution company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by, with or for the government or the transferee and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the government or concerned transferee, as the case may be.

15(9) The Board shall cease to exist with the transfer of functions and duties specified and with the transfer of assets as on the effective date."

Section 16 is extremely important which deals with the subject of Personnel. It provides:

"(1) The government may by a transfer scheme provide for the transfer of the personnel from the Board to a company or companies established as the case may be, under Section 14 and distribution companies (hereinafter referred to as "transferee company or companies") on the vesting of properties, rights and liabilities in a company or companies established, as the case may be, under Section 14 or the distribution companies.

(2) Upon such transfers the personnel shall hold office in the transferee company on terms and conditions that may be specified in the transfer scheme

A subject, however, to the following, namely:

(a) that the terms and conditions of the service applicable to them in the transferee company shall not in any way, be less favourable than or inferior to those applicable to them immediately before the transfer;

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(b) that the personnel shall have continuity of service in all respects; and

C (c) that the benefits of service accrued before the transfer shall be fully recognized and taken in account for all purposes including the payment of any and all terminal benefits."

D Section 57 of the Act, 2000 which deals with the Power to remove difficulties reads as under:

"(1) If any difficulty arises in giving effect to the provisions of this Act or rules, regulations, schemes or orders made thereunder, the government may, E by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removing the difficulty:

F Provided that no order shall be made under this section after the expiry of two years from the date of the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made before the G Legislative Assembly of the National Capital Territory of Delhi."

5. In accordance with the above provisions a Transfer Scheme called "Delhi Electricity Reforms (Transfer Scheme) H Rules, 2001" (hereinafter referred to as "the Scheme, 2001")

came into existence. Rule 2 of the Scheme, 2001 deals with the definitions of various terms. Relevant Clauses (b), (c), (h) and (k) of Rule 2 read as under:

> "(b) "assets" includes all rights, interests and claims of whatever nature as well as block or blocks of assets of the Delhi Vidyut Board;
>
> (c) "Board" means the Delhi Vidyut Board constituted under Section 5 of the Electricity (Supply) Act, 1958 (54 of 1948);
>
> (h) "DISCOMS" means and includes DISCOM 1, DISCOM 2 and DISCOM 3 collectively.
>
> (k) "liabilities" include all liabilities, debts, duties, obligations and other outgoings including contingent liabilities, statutory liabilities and government levies of whatever nature, which may arise in regard to dealings before the date of the transfer in respect of the specified undertakings;"

Rule 3 of the Scheme, 2000 provides for transfer of assets, etc., of the Board to the Government as defined in Rule 2(c) above. It provides that all the assets, liabilities and proceedings of the Board shall stand transferred to and vest in the government absolutely. Sub-Rule (2) of Rule 3 is significant and provides as under:

> "3(2) Nothing in Sub-rule (1) shall apply to rights, responsibilities and obligations in respect of the personnel and personnel related mattes, which have been dealt in the manner provided under Rule 6."

Rule 4 is connected only to Rule 3(1) and has nothing to do with Rule 3(2) which deals with the personnel which subject is exclusively dealt with in Rule 6. Sub-rule (8) of Rule 6 is very significant and runs as under:

A "6(8) Subject to sub-rule (9) below, in respect of all statutory and other schemes and employment related matters, including the provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit
B of the personnel and the existing pensioners, the relevant transferee shall stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters shall become those of such
C transferee and the services of the personnel shall be treated as having been continuous for the purpose of the application of this sub-rule."

Sub-rule (9) of Rule 6 provides:

D "6(9) The government shall make appropriate arrangements as provided in the tripartite agreements in regard to the funding of the terminal benefits to the extent it is unfunded on the date of the transfer from the Board. Till such arrangements
E are made, the payment falling due to the existing pensioners shall be made by the TRANSCO, subject to appropriate adjustments with other transferees.

F For the purpose of this sub-rule, the term –

(a) "existing pensioners" mean all the persons eligible for the pension as on the date of the transfer from the Board and shall include family members of the personnel as per the applicable scheme; and

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(b) "terminal benefits" mean the gratuity, pension, dearness and other terminal benefits to the personnel and existing pensioners."

6. It is an admitted case that while the government was
H contemplating unbundling of Delhi Vidyut Board (hereinafter

referred to as "DVB") for handing over the distribution of electricity to private companies as also for restructuring the electricity industry and rationalization of generation, transmission and supply of electricity by increasing the avenues for participation of private sector in the electricity industry in the National Capital Territory of Delhi, the erstwhile employees of the DVB displayed their apprehension and reservations to the effect that on emergence of the private companies their services may not be protected. Therefore, these employees were taken into confidence by assuring them that their services will be protected by entering into Tripartite Agreements which were executed on 28.10.2000 and 9.11.2000 between Government of National Capital Territory of Delhi ("GNCTD"), DVB and Delhi Vidyut Board Joint Action Committee. The said committee consisted of various Unions as well as Junior Engineer Officer Association. Under these Tripartite Agreements, the existing pensioners as well as the employees were protected. All the existing welfare schemes and benefits to the retired employees were allowed to continue.

7. After the Act and the scheme came on the anvil, as a first step of privatization, the Request for Qualification (RFQ) Documents for privatization of electricity distribution in Delhi was floated on 15.2.2001 giving in detail the status of the DVB, the manner of the privatization where it was specifically provided that DVB is being offered to private companies as a going concern on business valuation method, transferring all the past, present and future liabilities including that of existing employees as well as the retirees. The details of the employees as on 1.1.2000 were also provided. Para 11.6 of the RFQ Document mentions about the fact that apart from existing employees which were 24,634 in number as on 1.1.2000, there were about 9200 retired employees. The aforementioned transfer scheme was notified on 21.11.2001. Under the scheme the distribution companies, generation, transmission and holding companies were identified. At the time when the bids were put in by the companies who were in consideration and

A the negotiations were on, the DISCOMS put in revised bids. The present appellants which were South-West Delhi Electricity Distribution Company Ltd. (now known as BSES Rajdhani Power Ltd.), as also North-West Delhi Distribution Company Ltd. (now known as NDPL) were amongst those who submitted
B the revised bids documents. Their demand was that the contingent liability arising out of any event including any legal proceedings prior to the transfer should be limited to Rs.1 crore per annum considered individually or collectively during the first five years. Based on that sub-rule (3) in Rule 8 came to be
C added in the Scheme, 2001 on 26.6.2002 which is as under:

> "Notwithstanding anything contained in these Rules including the schedules, the liabilities arising out of litigation, suits, claims, etc., pending on the date of the transfer and/or arising due to events prior to the date of
D the transfer shall be borne by the relevant distribution company, viz., DISCOM 1, DISCOM 2 and DISCOM 3 respectively, subject to a maximum of Rs.1 crore per annum. Any amount above this shall be to the account of the holding company in the event for any reason the
E Commission does not allow the amount to be included in the revenue requirement of the DISCOM."

Resultantly from 1.7.2002, the DVB unbundled into six companies, they being DISCOM 1 (BSES Yamuna Power Ltd.),
F DISCOM 2 (BSES Rajdhani Power Ltd.)-appellant and DISCOM 3 (North Delhi Power Ltd.)-appellant, Delhi Power Supply Company Ltd. (TRANSCO) and generation company (GENCO). Another company called "DPCL" (holding company) was also constituted with aims and objects to hold shares in
G the aforementioned DISCOM companies. The said DPCL holds 49% shares in DISCOM 1, 2 and 3 and holds 100% shares in GENCO and TRANSCO. For all practical purposes DVB ceased to exist from 1.7.2002.

8. There are various schedules attached to the Scheme,
H 2001. The distribution undertaking its assets, liabilities and

proceedings concerning the distribution areas are specified in Part III of Schedule H. Relevant Schedules are Part I for DISCOM 1, BSES and Part III for DISCOM 3, NDPL. A

9. Rule 12 of the Scheme, 2001 provides that the decision of the Government shall be final and sub-Rule (1) stipulates that if any doubt, dispute, difference or issue shall arise in regard to the transfers under these Rules, subject to the provisions of the Act, the decision of the government thereon, shall be final and binding on all parties. B

10. On the backdrop of these legal provisions it will now be proper to see the individual facts in the two appeals. C

11. The Letters Patent Appeal filed by the appellant before the High Court was dismissed. It so happened, that respondent No.3 herein Shri K. R. Jain, who was an erstwhile employee of the Delhi Electric Supply Undertaking (DESU), superannuated from service on 31.07.1996. Eventually, Delhi Vidyut Board (DVB) became successor of Delhi Electricity Supply Undertaking (DESU). NDPL was incorporated on 04.07.2001 and inherited the distribution undertaking on 01.07.2002 along with the assets, liabilities, personnel and proceedings in pursuance of statutory transfer scheme notified by the Government pursuant to Sections 14-16 and 60 of the Delhi Electricity Reforms Act, 2000. It was much before that, that respondent No. 3 was superannuated. His pension was paid from the Terminal Benefit Fund, 2002 of DVB. The DVB had floated Time Bound Terminal Scale Scheme by its Office Order dated 23.07.1997 and Resolution No. 216 dated 16.07.1997. Claiming that though he had superannuated on 31.07.96, still he was covered by the scheme, respondent No.3 filed a Writ Petition No. 2337 of 2004 seeking appropriate direction against Delhi Government, Delhi Power Co. Ltd. and Delhi Power Supply Company and claimed benefits arising out of the Scheme. Significantly enough, NDPL was not made a party nor was there any claim against it. This Writ Petition was allowed by the Learned Single Judge, holding that respondent No.3 was D E F G H

A entitled to avail the benefits under Time Bound Promotional Scale Scheme (TBPS) and that DVB had unjustly denied him his dues. Holding the present appellant as a successor, Mandamus was issued against the appellant who was not a party and was not given an opportunity of hearing. This was B based on the statement of an advocate appearing for respondent Nos. 1 and 2 herein to the effect that it was the appellant-petitioner who was the successor and was as such responsible to implement the judgment dated 23.03.2004.

C 12. On 23.11.2004 an application was filed for recall/ modification of the judgment before the Learned Single Judge of the Delhi High Court. This application was, however, allowed holding that:

(a) respondent No.3 had retired from DVB on 31.07.96 D from Ashok Vihar

(b) All liabilities of DVB, other than those specifically transferred in terms of Schedules 'B' to 'F' of the Transfer Scheme shall be the liability of the holding E company.

(c) In terms of the Rule 6 (2) and (8) of the transfer scheme, only such proceedings were transferred to successor companies as were pending on 01.07.2002. Since no proceedings were pending F qua the entitlements of respondent No.3, hence it was the holding company and not the present appellant who would be liable to pay the arrears and other entitlements of respondent No. 3 under the TBPS Scheme.

G 13. Respondent No.1 and 2 filed a Letters Patent Appeal against the modified order of the Learned Single Judge dated 23.11.2004 vide LPA No. 98/2005. This appeal came to be allowed by the Division Bench of the High Court. The High H Court held that the appellant-petitioner alone was responsible

for the payments claimed by respondent No.3. A

14. The second matter has emanated out of the judgment and order dated 25.05.2006 wherein the Learned Single Judge of the High Court has dismissed the Writ Petition filed by the appellant-petitioner being Writ Petition No. 5110 of 2005 [BSES Rajdhani Power Ltd. v. Govt. of NCT of Delhi & Another]. By that Writ Petition, validity and legality of the letter dated 21.01.2004 issued by the Government of NCT of Delhi was challenged. By this letter, a clarification was issued by the Government to the effect that vigilance/ disciplinary/ Court cases in respect of employees of erstwhile DVB, who could not become part of any of the companies on the date of restructuring due to retirement/dismissal/removal/compulsory retirement shall be processed and decided by the successor company like the appellant-petitioner who would have been the controlling authority of the employees but for their retirement/ removal/dismissal/compulsory retirement as per the Schedule in the Transfer Scheme. In pursuance of this letter, all the cases were forwarded with records involving employees who, due to their retirement/suspension/ termination or death were allegedly not transferred to DISCOMS on 01.07.2002. This was resisted by DISCOMS including the appellant herein on the ground that such employees who were not transferred to them were in fact liability of the holding company. Representations were sent against this clarificatory letter dated 21.01.2004. Such representations were sent even by NDPL. However, in K.R. Jain's case, the Division Bench deciding the LPA, took the view that such employees were the liability of the transferee DISCOMS like NDPL or, as the case may be, the BSES. Relying on that judgment, the Writ Petition of the petitioner was dismissed by judgment dated 25.05.2006 by the Learned Single Judge of the High Court. Since it would have been futile for the appellant to go to the Division Bench, it has straightaway moved this Court by way of the present appeal.

B C D E F G

15. In the impugned judgment, the whole history of the H

A legislation was traced by the Division Bench and after noting Rules 2 (k), (n) and (l), and Rule 3 along with Rule 12, it was observed that the assets and liabilities as given in Schedule A to G to different companies did not relate to the liabilities regarding the personnel vide Rule 3 (2). Rule 6 was noted to B be dealing with the responsibilities of the personnel and a categorical finding was recorded that the Schedules under Rule 4 were not helpful to determine the liabilities in respect of the personnel, even if they were retired personnel and pensioners. Noting Section 16 of the DERA, 2000 and Rule 6 of the DERR, C 2001 and, more particularly, noting Rule 6 (8), the High Court chose not to agree with the contentions raised before it that the responsibility of the NDPL was only with respect to those personnel who had been transferred to the NDPL as per the list mentioned in Appendix E. It located the following categories D of the personnel required to be dealt with:

"16. There would be the following categories of personnel required to be dealt with:

(a) existing employees of DVB on the date of E transfer scheme who were on roll and working;

(b) employees under suspension and facing disciplinary/ departmental proceedings at the time of the transfer scheme.

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(c) employees terminated, dismissed as a consequence of departmental proceedings and who had initiated litigation/cases, proceedings against DVB and such G proceeding/ litigation was pending at the time of disbanding of DVB.

(d) retired employees who after retirement filed cases in courts claiming some benefits or dues, and such cases were pending at the

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time of the transfer scheme.

(e) retired/dismissed employees of DVB who filed court cases after the transfer scheme and such case got decided in their favour."

There is no dispute in respect of personnel at (a). However, Mr. Raj Birbal, learned Senior Counsel for NDPL contends that the responsibility of NDPL is only in respect of those personnel who have been transferred to NDPL as per the list mentioned in appendix E. We do not agree with this contention.

16. The High Court also noted that except for Rule 6 (8), (9) and (11), other provisions dealt with existing working personnel of DVB at the time of transfer and that Rule 6 (11) took care of the categories (b) and (c) shown earlier. It also noted Rule 8 regarding the pending suits and proceedings and refuted the contention raised on behalf of NDPL that Rule 8 covers litigations only in respect of cases between DVB and consumers, contractors and third parties and not those cases which were between DVB and its retired employees. For that purpose, the High Court noted the phraseology "*all proceedings*" appearing in Rule 8 (1). It also refuted the argument that if the liability created in Rule 8 (3) had been of the employees, it would not have limited the liability only to DISCOMS to rupees one crore and it would have mentioned TRANSCO and GENCO also, and held that the limit of rupees one crore in that provision was fixed at the representation of DISCOMS like the NDPL, only in their respect. The High Court then noted Rule 5(2), clothing the transferee with the responsibility of all contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature relating to respective undertaking and assets and liabilities transferred to it, to which 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 respective transferee and may be enforced effectively as if the respective

A transferee had been a party thereto instead of the Board. Interpreting it in the light of various judgments of this Court, the High Court concluded that not only the assets and liabilities were transferred to the transferee company but the entire past and future litigation were also transferred to the transferee
B company and such litigation could have been in respect of the employees, consumers and other parties. It reiterated that the scheme of the Rules provided that all corresponding employees were transferred by way of forming list in respect to employees who were working in the respective area while all employees
C who were under suspension or termination and in respect of whom any kind of proceedings defined in section 2 (n) were pending at that stage, were also specifically made the responsibility of the transferee company under Rule 6 (11). The High Court again referred to Rule 5(2) to note the responsibility
D of the transferee company and also made reference to Section 15 of the Act.

17. Lastly, the High Court has relied on the letter dated 21-22.01.2004 which was issued by the Government for removal of doubt, dispute and difference under its power under Rule 12
E (1) which clearly fixed the responsibility on the DISCOMS. In that letter, on a reference having been made by the Delhi TRANSCO seeking clarification from the Government with respect to the competent authority to deal with vigilance, disciplinary and Court cases in relation to the employees of the
F erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the transfer scheme due to retirement/dismissal/removal/compulsory retirement by the then DVB, the Government clarified that such cases would be processed and decided by such company who would have
G been the controlling authority of the employee but for their retirement/removal/ dismissal/compulsory retirement etc. as per Schedule 'B', 'C', 'D', 'E' and 'F", thereby clearly fixing the responsibility on the DISCOMS like the present appellant herein.

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18. This judgment was severely criticized by the learned Senior Counsel Shri P.P. Rao as well as Shri P.S. Patwalia. They firstly attacked the procedural aspect of the matter. They pointed out that in the initial Writ Petition i.e. WP (C) 2331/2004 by Shri K.R. Jain, the present appellant was not a party and as such it had no opportunity to put its say. They pointed out that in his judgment dated 23.03.2004, the Learned Single Judge, even in the absence of the appellant, came to the erroneous finding that the appellant was the successor-in-interest of the DVB. They then referred to the two applications made on behalf of the appellant i.e. one for impleadment and the second for recalling the order dated 23.03.2004 and pointed out that by its order dated 23.03.2004 the Learned Judge was pleased to recall his earlier order and held that the order dated 23.03.2004 would stand issued against the Delhi Power Company Ltd. i.e. the holding company and the appellant would stand relieved of the Mandamus issued. They referred to the Letters Patent Appeal filed by the Government of NCT and the Delhi Power Company Ltd. (DPCL) which was entertained by the High Court. It is obvious that in this LPA the appellant was impleaded as a party. The contention raised is that instead of deciding the whole controversy itself, the Division Bench should have remanded back the matter to the Single Judge giving the opportunity to the present appellant to raise all the questions, and in proceeding straightaway to decide the controversy involved, the Division Bench has caused injustice to the appellant. The Learned senior counsel pointed out that this was done in the absence of the pleadings inasmuch as, in the first instance, no written statement was filed by the three impleaded respondents while there was no question of filing the written submission on behalf of the present appellant who was not a party to the said Writ Petition. Again, it is pointed out that in the recall application, the respondents, namely, the Government of NCT of Delhi and the DPCL had not filed any reply whatsoever so also in LPA no opportunity was given to any of the parties to file pleadings with respect to the claims made against the appellant herein.

19. The Learned Counsel also relied on Rules I and I-A of the Delhi High Court rules for issue of various writs which require every application for the issue of a direction to set forth all facts on which the relief is sought and to file an affidavit in support thereof. Our attention was also invited to Rule 6 which requires filing of an answer to *rule nisi* and Rule 7 which provides for ordering the *rule nisi* to be served on any party to be affected by any order which the Court may make in the matter. It was pointed out that no such applications were filed by the Government of NCT and DPCL claiming relief against the appellant and the Division Bench had no jurisdiction to entertain the claim of both for the first time in their Letters Patent Appeal No.98/2005. They, therefore, demanded remand on that basis.

20. There can be no dispute that the procedure in this case was slightly unusual. There was no justification in the order of the Learned Single Judge accepting a statement to the effect that the appellant herein was the successor-in-interest of the DVB and then to fix the liability on the same without even hearing the appellant. That was certainly incorrect in law as well as in practice. However, once the recall application was made before the learned Single Judge, the Learned Single Judge recalled its order and proceeded to hold the DPCL responsible in place of the appellant, thereby exonerating the present appellant completely. Once a Letters Patent Appeal was filed against the order of the Learned Single Judge to that effect, it would have been in the fitness of things for the Division Bench to remand the matter back, perhaps issuing the direction that a *de novo* hearing should be done after impleading the NDPL in their initial pleadings. But that was not done. In stead, the Division Bench gave an opportunity to the appellant herein to file their written submissions. We find these written submissions on record. Very significantly, however, in the written submissions, the appellant herein has not insisted on remand on the technical issue of the absence of pleadings and the loss of opportunity to it. In stead, detailed submissions were filed

predominantly raising the question that the appellant-NDPL was not in any way liable to pay for the past liability of the retired employees who were not the employees on the date of transfer. In the said written submission, the appellant has taken a complete survey of the relevant provisions of DERA and the Transfer Scheme Rules, 2001 and every effort was made to show from the said proceedings that the NDPL could not be made liable for the dues, if any, of the retired employee who was not on the rolls on the date of transfer.

21. We have seen these submissions very carefully only to find that this question was not raised. The order of the Division Bench is also silent about any such procedural question having been raised by the appellant. Perhaps, had such question been raised, the Division Bench would have been justified in remanding the matter to the Learned Single Judge for deciding all the issues afresh after joining the NDPL as a party to the original petition. The question not having been raised before the High Court, cannot be considered at this stage of litigation when much water has flown under the bridge. Considering the submissions before the Division Bench which are *in extenso*, it is difficult to accept the contention that any prejudice was caused to the appellant. On the other hand, the question of liability seems to have been thrashed very minutely in the light of the provisions of the DERA, the Transfer Scheme, Rules, Tripartite Agreements and the other agreements including the bid documents. If all this is insufficient, we do not find this question to have been raised in the present appeal also. The contention raised is, therefore, rejected.

22. Shri Rao and Shri Patwalia then urged that the whole scheme of disinvestment brought in by the DERA, 2000 was based on the consent of the interested private parties. The Act had postulated joint venture companies with private investment and participation to take over the task of entire distribution of electricity. For that purpose, bids were invited and the terms of the transfer were settled by mutual consent taking note of the

A Tripartite Agreements and the bid agreement and it was then that the scheme was notified in the shape of Rules under the Act. Under such circumstances, there can be no further amendment to the scheme involving additional liability which has to be essentially only with the consent of the partners of
B the joint venture.

23. We have absolutely no quarrel with this proposition. However, this could be true if there was no "additional liability" brought in. For the reasons which follow, we do not think that in clothing the NDPL with a liability regarding the personnel
C who were retired, compulsorily retired or otherwise dead, dismissed etc. could be termed as "additional lilability." In fact the reading of the Rules and, more particularly, Rule 6(8) would indicate that liability was innate and accepted by the DISCOMS.

D 24. Reliance was made on Sections 15 (1) and, more particularly, sub-Section (6) and (7) by Shri Rao. That Section deals with the subject of reorganisation of DVB and transfer of properties, functions and duties. Sub-rule (6) refers to the transfer scheme while sub-section (7) specifically provides that
E the obligations incurred by the Board or companies established under Section 14 or generating company or distribution company before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by, with or for the
F government or the transferee. Section 16 deals with the provisions relating to the transfer of personnel. Shri Rao tried to contend that, therefore, for resolution of the controversy, transfer scheme alone would have to be considered in the light of the provisions of the Act. He is, no doubt, correct. However, in order to show that the transfer scheme does not contemplate
G such liabilities as are in question, Shri Rao relied on Rule 3(1). In our opinion, Rule 3(1) has got nothing to do with such liabilities. That Rule is independent of Rule 3(2) which reads as under:

H "Nothing in sub-rule (1) shall apply to rights, responsibilities

and obligations in respect of the personnel and personnel related matters, which have been dealt in the manner provided under Rule 6."

25. By necessary reference, therefore, Rule 4 would also be pushed to the background as that Rule specifically relates to the assets and liabilities and proceedings transferred to the Government under sub-Rule (1) of Rule 3. Therefore, Rule 4 (a) to (g) would have no application whatsoever when it comes to consideration of the liability in question of personnel and personnel related matters. For that matter, even Rule 5 would be of no consequence for such matters as it specifically provides that all the rights, responsibilities and obligations in respect of personnel and personnel related to matters have been dealt with in Rule 6 alone. The reliance of the learned counsel on Rules 4 and 5 is, therefore, uncalled for. The only relevant Rule which would have to be considered for this purpose is Rule 6 which is a complete code by itself in relation to personnel and personnel related matters. The words used in Rule 3(2), namely, personnel related matters are sufficiently broad to take into their sweep the matters regarding the retired, dismissed or dead personnel also. Rule 6(8) which we have already quoted but would repeat again for the ready reference is as under:

"(8) Subject to sub-rule (9) below, in respect of all statutory and other schemes and employment related matters, including the provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners, the relevant transferee shall stand substituted for the Board for all purposes and all the rights, powers and obligations of the board in relation to any and all such matters shall become those of such transferee and the services of the personnel shall be treated as having been continuous for the purpose of the application of this sub-rule."

A 26. The language is extremely clear. It not only specifies the employment related matters but also clarifies what those matters would be which include pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners. The words
B 'existing pensioners' are extremely important. A plain reading of this Rule would leave no manner of doubt in respect of the liability having been transferred to transferee company and the NDPL is certainly the one. The language is broad enough to include all dismissed, dead, retired and compulsorily retired
C employees. As if that was not sufficient, sub-Rule (9) requires the Government to make appropriate arrangements in terms of the Tripartite Agreements in regard to the fund of terminal benefits to the extent it is unfunded on the date of transfer from the Board. Rule 9(a) and (b) are also very significant and are as under:

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"9. The Government shall make appropriate arrangements as provided in the tri-partite agreements in regard to the funding of the terminal benefits to the extent it is unfunded on the date of
E transfer from the Board. Till such arrangements are made, the payment falling due to the existing pensioners shall be made by the TRANSCO, subject to appropriate adjustments with other transferees.

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"For the purpose of this sub-rule, the term-

(a) "existing pensioners" mean all the persons eligible for the pension as on the date of the transfer from the Board and shall include family members of the
G personnel as per the applicable scheme; and

(b) "terminal benefits" mean the gratuity, pension, dearness and other terminal benefits to the personnel and existing pensioners."

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27. A glance at these sub-rules is sufficient to come to the conclusion that the liabilities have undoubtedly been transferred to the DISCOMS which include both NDPL as well as the BSES. A feeble argument was raised that sub-rule (8) does not contemplate pension or any liability on account of the revised pay-scale or interpretation of respective scheme of promotion so far as existing pensioners or the erstwhile DVB are concerned to the DISCOMS. Considering the broad language of the Rule, we do not think that such contention is possible.

28. Again relying on Rule 2 (r) it was feebly tried to be suggested that the DISCOMS were not the only transferees but it was also the holding company, namely, the Delhi Power Company Ltd (DPCL). The argument is obviously incorrect as no employees were ever transferred to the DPCL. All transferees came only to the DISCOMS like the NDPL under the transfer scheme. The High Court has correctly interpreted these Rules and has correctly come to the conclusions that the liabilities would rest with the DISCOMS including NDPL and BSES.

29. The learned counsel next contended that the High Court had erred in interpretation of Rule 8(3) of the transfer scheme. It was urged that if the Rule is construed widely, it will be arbitrary and affect the foundation of the privatisation which is mutual agreement. We do not think so. On the other hand, the purpose of sub-Rule (3) is to cap any liability arising out of litigation, suits, claims etc. either pending on the date of transfer and/ or arising due to events prior to the date of transfer *to be borne by the relevant DISCOM 1, DISCOM 2 or DISCOM 3, respectively. However, it will be subject to a maximum of rupees one crore per annum and any amount above this shall be to the account of the holding company* and, even for any reason the Commission does not allow the amount to be included in the revenue requirements of the DISCOMS. The language is extremely clear. All that it obtains is capping of the liability. However, the nature of the liability and its being imposed on the DISCOMS alone is as clear as sunshine. To

that extent, there can be no doubt that it includes all the liabilities including the liabilities on account of the personnel. Unlike Rule 3, Rule 8 (3) does not make any difference between the liabilities arising out of the transfer under Rule 4 or the liabilities contemplated in Rule 6. The contention is clearly incorrect.

30. It was suggested that the *non obstante* clause in Rule 8(3) if widely construed, would render the clause unconstitutional. We do not think that the clause can be rendered unconstitutional in any manner. The language is clear, unambiguous and must be given its natural meaning. If such a meaning is given, we do not think that any other interpretation is possible except the one rendered by the High Court. Shri Rao and Shir Patwalia relied on paragraphs 28 and 29 of the reported judgment in *M. Rathinaswami & Ors. v. State of Tamil Nadu & Ors.* [2009 (5) SCC 625]. In the said paragraphs, it is reiterated that in order to save a statutory provision from the vice of unconstitutionality sometimes a restricted or extended interpretation of the statute has to be given. Since we don't agree that the clause can be rendered unconstitutional in any manner, in our opinion, the judgment is not apposite.

31. Similarly reliance was made by Shri Rao on *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Others* [2006 (10) SCC 452], *Ramdev Food Products (P) Ltd.v. Arvindbhai Rambhai Patel* [2006 (8) SCC 726], *Madan Mohan Pathak & Anr. v. Union Of India & Ors.* [1978 (2) SCC 50], *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* [2008 (4) SCC 190] and *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr.* [2005 (7) SCC 234]. We have absolutely no quarrel with the principles in all these reported decisions. However, since the constitutionality of Rule 8(3) cannot be doubted under any circumstances, all these decisions do not apply to the present controversy. We must, however, point out that the capping of the liability of one crore of rupees was at the instance of the DISCOMS only. They were more aware of the language brought in. They were also aware of the liabilities

which arose, particularly, in view of Rule 6 (8) and they had open eyedly accepted Rule 8(3). They cannot now find fault with the constitutionality of the provisions. A

32. It was tried to be suggested by Shri Rao, learned Senior Counsel that under Section 15(1) of the Act, any property, interest in property, rights and liabilities which immediately before the effective date belonged to the Board, stood vested in the Government with effect from the date on which the Transfer Scheme came into existence by way of its publication. It was also suggested that under sub-Section (2) of Section 15 of the Act, it was for the Government to transfer such property and interest in the property, rights and liabilities to any company established under Section 14 of the Act. It was then tried to be urged that such transfer of undertaking has been taken care of in Rule 5 of the Transfer Scheme Rules, 2001. It was then pointed out that as per the Schedules, the transfer was effected and in case of the present appellant, the transfer was effected as per Schedule 'F'. The learned Senior Counsel very earnestly suggested that this was all that was transferred and, therefore, a liability which was not covered under Schedule 'F' could not be said to have been transferred to the appellant. It was then pointed out by reference to Rule 2(t) that 'undertaking' includes "wherever the context so admits the personnel". It was, therefore, urged that the personnel transferred to the appellant company were only the ones who were included in the lists. It was also suggested that under Rule 2(r), the 'transferee' includes not only DISCOMS, like the present appellant, but also the Holding company like Delhi Power Company Limited. It was, therefore, urged that considering the provisions of Rule 5 read with Rule 2(r), 2(t), Schedules 'F' and 'G', was be all and end all of the matter. It was urged that in the absence of any liability allocated to DISCOM 3 in Schedule 'F' and in terms of para 2 of Schedule 'G', allocating of residuary liabilities to the Holding company, the liability in respect of existing pensioners would devolve on the Holding company, i.e. DPCL and not on the present B C D E F G H

A appellant. The argument is clearly incorrect. We have already pointed out that Schedule 'F' cannot be read as the exhaustive list of transfers as regards the assets and liabilities. This is because of the peculiar language of Rule 3(1) and Rule 3(2). Rule 3(2) very specifically provides that in the matter of
B personnel and personnel related matters, Rule 3(1) would be of no consequence. What is provided in Rule 4, on which the heavy reliance was being placed, is relatable to Rule 3(1) alone. Same logic applies to Rule 5, which provides for transfer of undertaking. It flows only from Rule 4. A reading of Rule 5 and,
C more particularly, Clauses (a) to (g) of Rule 5(1) correspond to Clauses (a) to (g) in Rule 4(1). Rule 4(1) is again specific and takes into sweep only sub Rule (1) of Rule 3. It is very clear that Rule 3(2) makes all the difference and in the clearest possible language, Rules 4 and 5 relate to the assets, liabilities
D and proceedings covered only under Rule 3(1). Rule 5 also has to be read in that context.

33. The transfer of personnel and all the principles, therefore, are governed by Rule 6 alone. As provided in Rule 6(2), there are lists wherein the personnel have been classified
E into five groups based on the principle of "as is where is", where a specific reference is to be found to GENCO, TRANSCO and three DISCOMS. Very significantly, there is no reference to DPCL. Thus, no employee was transferred to DPCL. This is in case of the existing employees. Sub Rule (8),
F however, takes into sweep not only the existing employees, who find the reference in the lists prepared under Rule 6(2), but also makes a reference to the employment related matters including provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of
G personnel and the existing pensioners. There was no question of existing pensioners being covered under the lists prepared under Rule 6(2). By using the words "existing pensioners" and by providing that the relevant transferee would stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters,
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the legislative intention is very clearly displayed to the effect that the existing pensioners on the day of transfer were also covered and stood transferred to the DISCOMS and not to DPCL and it is only the transferee DISCOM, who would substitute for the Board. Once these Rules are read in proper perspective, there is hardly any doubt about the liability of DISCOMS in respect of existing pensioners on the day of transfer. There can be no dispute that those who retired and those who were serving with the Board would stand transferred in respect of their liabilities etc. to the successor company, i.e. DISCOM-3. The High Court has correctly appreciated this position.

34. This takes us to the next contention of Shri Rao and Shri Patwalia that the decision given by the Government on such liability was without any authority or *non est* in the light of the provisions of the Act and the Rules. In that behalf, Shri Rao, Learned Senior Counsel invited our attention to Rule 12(1), whereunder a finality is given to the decision of the Government in respect of any doubt, dispute, difference or issue as regards the transfers under these Rules. The Rule provides that under any such eventuality, the decision of the Government shall be final subject to the provisions of the Act. Sub Rule (2) of Rule 12 provides that the Government may, by order, publish in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, which provisions may appear to be necessary for removing the difficulties arising in implementing the transfers under these Rules. Section 57 of the Act is also clear and provides power to the Government to remove any difficulties. However, there is a rider to the effect that no such order to remove difficulties could be made by the Government after expiry of two years from the date of commencement of the Act. It is also provided by sub-Section (2) of Section 57 that every such order after it is made shall be laid before the Legislative Assembly. Heavily relying on Section 57, Shri Rao and Shri Patwalia, learned Senior Counsel contended that the Government's power to make any such order had already come to an end with the expiry of two years after the date of notification. This argument and the reliance of the Learned

A Senior Counsel on Section 57 can be understood, as in this matter, the Government has issued the letter dated 21.01.2004 i.e. after more than two years of the relevant date. This letter is authored by one Shri Y.V.V.J. Rajashekhar, Deputy Secretary (Power) and is addressed to Delhi TRANSCO Ltd. which is a B 100 per cent Government company. The subject thereof is removal of doubts, disputes and differences under the provisions of Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 and issue of clarificatory order of the Government under Rule 12. It is an answer to the letter received from Delhi C TRANSCO Ltd. seeking clarifications from the Government with respect to the competent authority/new entity to deal with vigilance/ disciplinary/court cases in relation to the employees of erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the Delhi Electricity D Reforms (Transfer Scheme) Rules, 2001. In that, a reference was made in the second paragraph to Section 6 of the Act read with Section 15 and 16 of the DERA read with Rule 12 of the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. It was then conveyed that being empowered by the directions issued vide No.11 (94)/2003/Power/103 dated 09.01.2004, it is E clarified that the vigilance, disciplinary and Court cases in respect of the employees of the then DVB who could not become part of any of the companies, namely, DPCL, Delhi TRANSCO, Indraprastha Power Generation Co. Ltd., BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd. and NDPL on F 01.07.2002 i.e. on the date of restructuring due to retirement/ dismissal/ removal/compulsory retirement shall be processed and decided by such company which would have been the controlling authority of the employee but for their retirement/ dismissal/removal/compulsory retirement etc. as per Schedule G 'B', 'C', 'D', 'E' and 'F' of the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. It is absolutely clear that by this letter the whole liability was put on the head of the DISCOMS. The appellant is only one of the DISCOMS who would have been the controlling authority of the employees had those employees H continued.

35. This position was, however, opposed by the Learned Senior Counsel for the appellants pointing out the two earlier letters i.e. a letter dated 17.09.2002 authored by one Shri Jagdish Sagar, Principal Secretary (Power) to DISCOM 1 and DISCOM 2 as also the subsequent Office Order dated 30.09.2002 issued by one G. Srinivas, Administrative Officer (G) of Delhi Power Supply Ltd. In the aforementioned letter dated 17.09.2002, Shri Jagdish Sagar, Principal Secretary (Power) had informed one Shri Chalasani, Chief Executive Officer, BSES Rajdhani Power Ltd. that a copy of the advice of the Law Department of the Delhi Government which had been accepted by the Government was enclosed with that letter. Amongst the other liabilities, Part II of this Government decision concerns the liabilities relating to distribution, business for the tasks undertaken in the period immediately before the date of transfer but payment against which would have been made after the date of transfer.

36. A question has been posed in the following form:

> "Whether the DISCOMS are under obligation to discharge liabilities in respect of any works completed or liabilities incurred in respect of staff pertaining to the period before 30.06.2002 on the basis that such payments are normally made in the month of July?"

Answer to this question is to be found to have been given in the negative. Learned Senior Counsel insists that the words in the question regarding the liabilities incurred in respect of staff pertaining to the period before 30.06.2002 would clearly show that the Government had taken a decision that such liabilities could not be put on the head of the DISCOMS and, therefore, it was clearly the liability of the holding company in terms of the answer given to this question. Learned counsel further pointed out that in pursuance of that, a further Office Order came to be issued under the signatures of one Shri G. Srinivas, Administrative Officer on 30.09.2002 in the following

A manner:

"Consequent upon unbundling of DVB, a doubt has been raised by Finance Department regarding payment of arrears of pay and allowance to retired employees to which company has to pay the same.

B

It is now clarified that all such liabilities of erstwhile DVB have been transferred to the Holding Company as per Transfer Scheme Rule. Therefore, such payment of arrears pay and allowances to the retirees on account of revision

C of pay/court orders, etc. for the period up to 30.06.2002 i.e. prior to unbundling of DVB will be borne and paid by the Holding Company.

All such claims will be prepared by APO(B) concerned and after duly auditing the same, will be forwarded to Holding

D Company for effecting the payment."

37. Now relying on this office order very heavily, Learned Senior Counsel pointed out that the liabilities would be only that of the holding company and not of the DISCOMS, like the

E appellant herein. In our opinion, the argument is clearly incorrect. Firstly, a query made and answered in the letter dated 17.09.2002 does not, in our opinion, pertain to the liability which is in question. The query is simple and it raises a question, whether, if any, work is completed or liabilities are incurred in

F respect of the staff pertaining to period before 30.06.2002, in which case the payments have to be made in the month of July, would the DISCOMS be under obligation to discharge such liability. The liability covered under second query, does not, in our opinion, take into its sweep the liabilities like the present

G liability. The answer which was provided when construed closely would bring about the following:

"This interpretation is further supported by the provision in

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Schedule 'G' by which all the receivables from sale of power to the consumer of the erstwhile Board other than to the extent specifically included in schedules D, E and F shall be to the account of the Holding Company. The Schedule 'G' further goes on to say that the DISCOMS will be authorized to release the receivable of the holding company and it is apparently for that reason they retain its 20 % share in such receivables as are collected, which are over and above the amounts included in Schedule D, E and F in respect of which no such share in the nature of collection charges is payable. It would not be reasonable to interpret the rules as assigning the liabilities for any period to the company which was not also entitled to the receivables pertaining to the same period, in the absence of any specific provision to the contrary. Therefore, my answer to the first question is in the negative."

In our opinion, therefore, the reliance on this would be uncalled for.

38. The office order dated 30.09.2002 is undoubtedly clear in support of the appellants. However, this office order does not show on what basis this was issued and under what authority. This seems to have been issued by an Administrative Officer of the DPCL. However, the last letter dated 21.01.2004 which has been issued by the Deputy Secretary (Power) very clearly spells out the liability and the said decision has the authority of Section 60 read with Section 15 and 16 read with Rule 12 of the Transfer Scheme Rules. It has superseded the earlier direction dated 09.01.2004. However, it has not been made available to us. Be that as it may, the clarification is more than clear which puts the responsibilities of the erstwhile staff on the DISCOMS.

39. It was tried to be argued that under Section 57 of the Act such decision could not be taken after two years of the transfer. This argument is clearly incorrect. Section 57 operates in entirely different sphere. It speaks about the power of the

A Government to remove doubts. It is the power to make provisions for the smooth operation of the Act and the Rules which have to be brought into effect by passing orders which are required to be published in the Official Gazette and such orders would then be given effect by making provisions which B are not inconsistent with the Act. It is for such kind of orders that the Rules apply. What is referred to in the aforementioned decision is in pursuance of the power of the Government to make rules under Section 60 pertaining to Section 15 and 16 of the Act. It was tried to be argued that even if Section 60 was C referred to in the aforementioned order, such rules had to be notified.

40. It is then argued that Section 60 does not empower rule making by a letter. It was also suggested that the letter dated 21.01.2004, the purpose of which was mentioned as D 'removal of doubts' which could not only be done by Section 15 of the Act and, therefore, that was not question of the letter being effective, particularly, because it has been passed after two years of the relevant date and would clearly be hit by provision of Section 57 which does not empower any rules to E be made after two years of the date of transfer. Learned Senior Counsel, therefore, very heavily relied on this Section, which argument, in our opinion is incorrect. There is a clear reference made to Rule 12 which runs as under:

F 12. Decision of Government-Final:

(1) If any doubt, dispute, difference or issue shall arise in regard to the transfers under these rules, subject to the provisions of the Act, the decision of the government thereon, shall be final and binding on G all parties.

(2) The government may by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, as may H appear to be necessary for removing the difficulties

arising in implementing the transfers under these rules." A

41. It must be said that the powers under sub-Rule (1) and (2) are of different kinds. The finality of the Government decision is writ large from the provisions of sub-Rule (1) of Rule 12, while under the provisions of sub-Rule (2), the Government has the power to make provisions by order published in the Official Gazette. Therefore, in our opinion, the position taken by the Government in the letter dated 21.01.2004 is clear and doubtless. B C

42. One feeble argument was made that the Government had already exhausted its power under Rule 12 (1) while taking the decision dated 17.09.2002 and, hence, it had lost the power to pass any fresh orders. The argument is clearly incorrect. There can be no finality in the matter of removal doubts or the removal difficulties and also taking the decisions under Rule 12(1). The argument that once the Government has exercised the powers under Rule 12(1), the power gets exhausted and the decision becomes final and binding on all the parties, including the Government, is clearly incorrect. The argument that there is no further power under Rule in the Government to issue any letter dated 21.01.2004, is also an incorrect argument. In our opinion, nothing stopped the Government from taking any decision and it has taken a clearest possible decision by letter dated 21.01.2004 which is binding on all the parties. This is apart from the fact that the Government has not dealt with the subject in its earlier decision dated 17.09.2002 as regards the controversy which has fallen for consideration in this matter. It was in respect of other liabilities which were covered by Schedules 'D', 'E', 'F' and 'G'. We have already clarified that those liabilities were different from the liabilities which arose on account of the employees who could not become the employees of the DISCOMS on the date of transfer due to their retirement, dismissal, death etc. In our opinion, therefore, the view taken by the Delhi High Court is the correct view. We have D E F G H

A already clarified about the so-called Office Order dated 30.09.2002 which is overridden by the final decision taken by the Government in its letter dated 21.01.2004.

43. On the overall consideration, we are of the clear opinion, that these appeals do not have any merits and must be dismissed. There shall be no order as to costs.

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B.B.B. Appeals dismissed.