

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 12 of 2010 & 116 of 2010

Dated: 7th March, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 12 of 2010

In the matter of

Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600 002

... Appellant(s)

Versus

1. M/s TCP Limited
No. 4 (Old No. 10)
Karpagambal Nagar
Mylapore
Chennai-600 004

2. Tamil Nadu Electricity Regulatory Commission
19A, Rukmani Lakshmi Pathy Road,
Egmore,
Chennai-600 008

....Respondent(s)

**Counsel for Appellant : Mr. P.S. Raman,
Advocate General
Mr. H.S. Mohammed Rafi**

**Counsel for Respondent(s) Mr. Senthil Jagadesan &
Mr. Munawwar Nasem
for R-2**

Appeal No. 116 of 2010

In the matter of

**Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600 002**

... Appellant(s)

Versus

**1. M/s Chennai Petroleum Corporation Ltd.
No. 536, Anna Salai, Teynampet
Chennai-600 018**

**2. Tamil Nadu Electricity Regulatory Commission
19A, Rukmani Lakshmi Pathy Road,
Egmore,
Chennai-600 008**

....Respondent(s)

**Counsel for the Appellant Mr. P.S. Raman,
Advocate General
Mr. H.S. Mohammed
Rafi**

**Counsel for Respondent Mr. Senthil Jagadesan &
Mr. Munawwar Nasem
for R-2**

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

Tamil Nadu Electricity Board (TNEB) is the Appellant in both these Appeals in Appeal No. 12 of 2010 and Appeal No. 116 of 2010. Since common issues have been raised in these Appeals, the common judgment is being rendered though the impugned orders are different.

2. The Appeal 12/2010 has been filed as against the impugned order dated 14.10.2009. The Appeal 116/2010 has been filed as against the impugned order dated 25.2.2010.

3. Let us now deal with the relevant facts in each of the Appeals.

Appeal No. 12 of 2010

4. Tamil Nadu Electricity Board (TNEB) is the Appellant. M/s TCP Limited is the 1st Respondent. This Appeal filed by the TNEB is directed against the order passed by the State Commission (R-2) dated 14.10.2009 in the Petition DRP No. 18 of 2008 filed by the M/s TCP Limited, the 1st Respondent as against the Appellant.

5. The 1st Respondent, M/s TCP Limited is having a captive power plant at Gummidipoondi, Thiruvallur District in Tamil Nadu. M/s TCP Limited was accorded permission under section 44 of the Electricity (Supply) Act, 1948 for establishing a coal-based captive power plant of 63.5 Megawatt capacity subject to certain conditions.

6. On 29.01.1999, M/s TCP Limited, the 1st Respondent entered into a Power Purchase Agreement (PPA) with the Appellant (TNEB) whereby the Appellant agreed to purchase surplus power from 63.5 Megawatt coal-based captive generation plant of the first respondent. The term of the period of the PPA was 15 years i.e. till 2014. The rate of power purchase as per the PPA was Rs. 2.25 per unit for the year 1998-99, with 5% escalation for every year up to the FY 2007-08. Thereafter, for the balance years, i.e. up to 2014 the price was to be fixed on mutual agreement basis after review.

7. In pursuance of this agreement, the Appellant (TNEB) accorded approval to the M/s TCP Ltd (1st Respondent) to set up the captive power plant of 63.5 Megawatt capacity at Gummidipoondi agreeing for the first respondent to wheel the power to its sister concern services through the TNEB grid and agreeing to purchase the surplus power from the 1st Respondent.

8. Initially, the Appellant had been paying the agreed rate as per the agreement. However, the Appellant (TNEB) sent a letter dated 21.06.2005 to the State Government requesting for issue of Notifications freezing the rate of power purchase from the captive power plants from FY 2005-06 at Rs. 3.01 per unit instead of 5% escalation for every year.

9. Since the Electricity Act, 2003 came into force on 10.06.2003 by which the State Government had no power to fix the rate, the Government did not pass any orders nor issued any notification on the basis of the request made by the Appellant. Although, the State Government did not issue any notification, the Appellant started paying only at the rate of Rs. 3.01 per unit from the year 2005, in violation of the condition agreed upon by both the parties by the agreement dated 29.01.1999 with regard to 5% escalation every year up to 2007-08.

10. In fact, for the FY 2005-06, invoices were raised at agreed contractual rate by the 1st respondent. However, the payments were made by the Appellant only at an ad-hoc rate of Rs. 3.01 per unit, even though the invoices sent at the rate fixed as per the agreement dt 29.01.1999 on the basis of the 5% escalation for every year, were received by the Appellant. Despite the receipt of these invoices, neither the objection was raised by the Appellant with regard to rate mentioned in the invoices, nor the said receipts were returned to the 1st Respondent. On the other hand, the Appellant, continued to make payment @ Rs. 3.01 per unit without making any escalation as per the agreement.

11. At this stage, the M/s TCP Ltd (1st respondent) was called by the Appellant for negotiation in the meeting to be held on 18.05.2007 regarding the price acceptance of

commitment of power for the FY 2007-08 and PPA terms and conditions.

12. At the meeting held on 18.05.2007, the Appellant offered to purchase the power @ Rs. 2.32 per unit for Firm Power. To the said offer, the 1st respondent did not agree by explaining the difficulty in accepting such a rate and requested the Appellant to continue at least the existing freezed rate of Rs. 3.01 per unit for that year also. Accordingly, the Minutes of the Meeting were signed. However, no steps were taken by the Appellant either for amending the payment obligation, either by seeking for an amendment in line with the tariff order or for entering into an amendment of the terms of the agreement earlier entered into and by filing the same for approval from the State Commission.

13. At this stage, Appellant again called the 1st Respondent to be held on 8.4.2008 to be held on 8.4.2008

for reviewing the agreement from 1..4.2008, through the letter dated 31.03.2008 for negotiation. Accordingly, M/s M/s TCP Ltd (R1) attended the meeting. In the said meeting held on 08.04.2008, the Appellant offered to purchase the power @ Rs. 3.01 per unit from 01.04.2008, whereas the 1st Respondent demanded a rate of Rs. 4.50 per unit. Since the mutual agreement could not be reached, in respect of the rate, the Appellant (TNEB) directed the 1st Respondent to approach the State Commission for fixing the power purchase rates.

14. Thereafter, on 04.09.2008, the 1st Respondent, M/s TCP Limited filed a Petition in DRP 18/2008 praying for the direction to the Appellant to pay to the TCP Ltd (1st respondent) a sum of Rs. 44,62,67,540/- in terms of clause 3.26 of the agreement with interest for the period from 01.04.2005 to 31.03.2008. The State Commission, after hearing the parties, passed the impugned order on 14.10.2009 directing the Appellant to pay to the 1st

Respondent, the sum claimed by it in 6 equal monthly instalments, with interest. In the meantime, Appellant also filed Petition, PPAP 3/2008 before State Commission with a prayer to fix the rate at Rs.3.01 from 1.4.08. This petition was dismissed by the State Commission on 25.2.09. This has not been challenged by the Appellant before the Appellate forum. However, the Appellant has challenged the order dated 14.10.2009 passed by the State Commission in the present Appeal No. 12/2010 as against the order passed in favour of the Respondent M/s TCP Ltd (R-1).

15. Let us now refer to the facts of the Appeal No. 116 of 2010. This is as against the impugned order dated 25.2.2010.

16. Tamil Nadu Electricity Board (TNEB) is the Appellant. Chennai Petroleum Corporation Limited is the 1st Respondent. The State Commission is the 2nd Respondent.

17. The 1st Respondent, namely Chennai Petroleum Corporation Limited is having a captive power plant at Manali, Chennai with a total installed capacity of 107.4 Megawatt. The Government of Tamil Nadu had framed its policy of captive power generation as per its order G.O. Ms. 48 Energy dated 22.04.1998 providing for the purchase of surplus power by the Appellant (TNEB) over its own/sister company usage.

18. In accordance with this policy, the Chennai Petroleum Corporation (1st Respondent) established a captive power generating facility at Manali to generate power for its own use including by wheeling through grid. It also decided to sell the surplus power to the Appellant as per the policy. Accordingly, Power Purchase Agreement (PPA) was entered into between the Appellant (TNEB) and the 1st Respondent Chennai Petroleum Corporation on 31.03.1999. The PPA was valid for a period of 15 years,

i.e. up to 31.03.2014. As per the PPA, the rate for Firm Power for the year 1998-99 was fixed at Rs. 2.25 per unit and for the following 9 years, the parties agreed to escalation of 5% every year on the rates of previous year up to the year 2007-08 and thereafter from 01.04.2008, upto 31.3.2004, the rates will be fixed on mutual agreement basis after review.

19. Initially, The Appellant had been paying for the power to the Chennai Petroleum Corporation (R1) after supply at the rates specified in PPA up to 31.03.2005. Thereupon, contrary to the PPA, the Appellant had begun to pay @ Rs. 3.01 per unit for the FY 2005-06, FY 2006-07 and FY 2007-08, despite the fact that the PPA specifies the escalated rate of Rs. 3.16, 3.32 and 3.49 respectively for the said years. Even though the 1st Respondent received invoices at the above rates, which were sent by the Chennai Petroleum Corporation, the Appellant

continued to pay only at the reduced rate of Rs. 3.01 per unit and not as per the rate mentioned in the Invoice.

20. The 1st Respondent sent a letter on 05.05.2006 to the Appellant demanding for the escalation of rates as per the PPA, but the Appellant rejected the said claim. The rejection was on the ground that already the Appellant addressed a letter to the Government of Tamil Nadu on 21.06.2005 requesting freezing of rates at Rs. 3.01 per unit.

21. However, as per the terms of PPA, the Appellant called for a meeting through a letter dated 31.03.2008 to review the power purchase price for the period commencing from 01.04.2008. The 1st Respondent participated in the meeting held on 04.04.2008. At the meeting held on 04.04.2008, the 1st respondent requested for an increase of at least 5% from the present rate of Rs. 3.01 per Kwh This was not accepted by the Appellant.

22. Thereupon, On 07.09.2009, the Appellant filed a Petition PPAP No.4/2009, before the State Commission (2nd Respondent) seeking approval for the rate of Rs. 3.01 per unit commencing from 01.04.2008 on the basis that the said rate had been accepted by the 1st Respondent at the meeting held on 04.04.2008. The said Petition, filed by the Appellant was ultimately dismissed by the State Commission on 25.2.2010.

23. In the meantime, the Chennai Petroleum Corporation (R-1) also filed Petition in DRP 27/09 on 13.10.2009 praying for a direction to be issued to the Appellant to pay the arrears as per the rates mentioned in the PPA to the 1st respondent for FY 2005-06, FY 2006-07 and FY 2007-08, along with interest. The State Commission ultimately, passed the impugned order on 25.02.2010 directing the Appellant to pay to the 1st Respondent, the difference between the contracted rate of

Rs. 3.15 per unit, Rs. 3.32 per unit and Rs. 3.49 per unit for the FY 2005-06, FY 2006-07 and FY 2007-08 respectively and the actual payment already made at Rs. 3.01 per unit for these years, together with interest. Aggrieved by this impugned order dated 25.2.2010 of the State Commission, directing the Appellant to make payment of arrears as per the PPA for these years, Appellant has preferred this Appeal 116 of 2010. However, the Appellant has not chosen to file any Appeal as against the order dated 25.2.2010 rejecting the petition filed by the Appellant in PPAP No. 4/2009.

24. The Learned Counsel for the Appellant in these two Appeals have raised following common grounds:

- (i) The Claim Petitions filed by the Respondents are barred by period of limitation. Even assuming that there is no period of limitation prescribed under the

Indian Electricity Act 2003, the claim petitions are to be dismissed on the grounds of delay and laches.

(ii) The Appellant conducted negotiations to persuade the Respondents to accept for the reduced rates based on mutual terms and conditions in terms of clause 3.24 and 3.26 enabling the parties to fix the rates and the rates were fixed on the basis of the said negotiations. Therefore the fixation of rates which was fixed on the basis of mutual agreement cannot be challenged as it is fixed as per the terms of the PPA.

(iii) The Respondents are estopped from making any claim over and above the rates of Rs.3.01 after having agreed for the said rate. The Respondents have never raised any objections for the payment of Rs.3.01 and actually they received the payment at the said rates without any protest. Thus the

Respondents have waived the right to make any excess claim beyond Rs.3.01. By accepting the existing rates of Rs.3.01 as on 1.4.2008, the Respondents can not make any claim in the eye of law beyond Rs.3.01 for the period 2005-2008.

25. On these three grounds, elaborated arguments were advanced by the Learned Counsel for the Tamil Nadu Electricity Board. In reply to these submissions the learned counsel for the Respondents in both these Appeals have pointed out various reasoning given in the impugned order while allowing the petition filed by the Respondents and made elaborate submissions in justification of the impugned orders.

26. In the light of the above rival contentions, the following questions could arise for consideration:

(i) Whether the State Commission is right in holding that the limitations Act would not apply to the present proceedings and that there is no delay and laches on the part of the Respondent ?

(ii) Whether the State Commission ought to have dismissed the Petition filed by the Respondents on the ground that the Respondents are estopped from making a claim after remaining silent for a number of years after having waived their right of claim ?

(iii) Whether the Appellant is empowered to hold any negotiations meeting for pressing the Respondents in respect of fixing the tariff per unit at the rate of Rs.3.01 in terms of clause 3.24 and 3.26 of the PPA.?

27. Let us now consider each issue one by one. According to the Appellant, the claim Petitions are barred by limitations and even assuming that there is no period

of limitations under the Electricity Act, 2003 for claiming the relief, the claim Petitions ought to have been dismissed on the ground of delay and latches. There can not be any dispute whatsoever in the fact that the Hon'ble Supreme Court, has held that the limitation Act would apply only to the Courts and not to the other bodies such as quasi-judicial authorities like State Commission. This has been laid down in AIR 1976 SC 177, AIR 1985 SC, 1279, AIR 2000 SC 2023 2004 (11) SCC 456 and 1985 (II) SCC 590. Therefore, the contention urged on Appellant that the claim made before the State Commission which is a quasi judicial authority was barred by limitations does not merit consideration. Alternatively, it was contended that the claim Petitions ought to have been dismissed by the State Commission on the ground of delay and latches on the part of the Respondents. Let us now deal with the facts of each case in order to find out whether there is any delay and latches on the part of the Respondents. The relevant

facts in Appeal 12/2010 in regard to issue of delay in approaching the State Commission are as follows:

28. On 29.1.99, the Appellant entered into a Power Purchase Agreement with M/s TCP Limited (R-1) for sale of surplus power. As per this Agreement, the rate for the year 1998-99 was fixed at Rs.2.25 per unit and for the next nine years the price would be escalated at 5% every year on the rate of previous year. The relevant year in this case is 2005 to 2008. The Power Purchase Agreement fixed on the rate of Rs.3.17 for the year 2005-06, Rs. 3.32 for 2006-2007 and Rs.3.49 for the year 2007-2008. From 1.4.2008, the rate of purchase was to be fixed on mutual agreement, after review. The terms of this Agreement was for 15 years i.e till 2014. Upto FY 2004- 2005, the Appellant had made the payment to the Respondent TCP Limited as per the Agreement.

29. On 21.6.2005, the Appellant sent a letter to the State Government for freezing the rate of Power Purchase Agreement at the rate of Rs.3.01 per unit from the year 2005-2006. The State Government did not pass any order on this since Electricity Act 2003 which came into force on 10.6.2003 took away the power of the State Government fix any price as per the request of the Appellant. Even though no orders were passed by the Government, the Appellant started paying only at the rate of Rs.3.01 despite receipt of invoices sent by the Respondent indicating the rate mentioned in the Power Purchase Agreement. The Appellant called the Respondent M/s TCP Limited for discussion for a fixation of rates in respect of the period 2007-2008. Accordingly, a meeting was held on 18.5.2007. The Appellant offered to pay a rate of Rs.2.32 per unit. But Respondent M/s TCP Ltd. did not accept the offer and requested the Appellant to continue atleast the existing freezed rates of Rs.3.01 per unit. Accordingly, minutes were prepared.

However, no steps were taken by the Appellant to approach the Commission to enter into an agreement with regard to change of rates and for approval before the State Commission. The several letters have been sent by the Respondent M/s TCP Ltd. to the Appellant between 13.8.2007 and 25.3.2008. The Appellant called for negotiations again through letter 31.3.2008. This meeting was intended to review the price for the year 2008-09. At the said meeting held on 8.4.2008, no agreement was reached. As a matter of fact, the Respondent M/S TCP Limited which was asked by the Appellant to approach the State Commission for reviewing the rate of power purchase from 1.4.2008, filed a Petition for the payment of arrears. The State Commission ordered for the payment of arrears as per the PPA rate by the order dated 14.10.2009.

30. The above facts in this Appeal would not show that there is any delay and latches on the part of the Respondent M/S TCP Limited.

31. Let us now go into the facts in the Appeal 116 of 2010 to consider this issue. In this case, M/S Chennai Petroleum Corporation Ltd is the Respondent. The agreement was entered into by the Respondent on 31.3.1999. The Power Purchase Agreement is valid for a period of 15 years i.e upto 31.3.2014. As per the PPA, the rate for the year 1998-1999 was fixed at Rs.2.25 per unit and for the following nine years, the parties agreed for escalation of 5% every year up to the year 2007-2008 and thereafter, from 1.4.2008, the rates will be fixed after review. The Appellant initially paid for the power to the Respondent at the rates prescribed in Power Purchase Agreement up to 31.3.2005. Thereafter, contrary to Power Purchase Agreement, the Appellant paid only Rs.3.01 per unit for the year 2005-2006, 2006-2007,

2007 - 2008. On 5.5.2006, the Respondent M/S Chennai Petroleum Corporation Ltd wrote a letter demanding for the escalation of rates as per Power Purchase Agreement but the same was rejected by the Appellant. On 21.6.2005, the Appellant addressed a letter to the Government of Tamil Nadu requesting freezing of rates on Rs.3.01 per unit. No orders were passed by the State Government as it did not have the powers as per the Act, 2003. Then on 31.3.2008, the Appellant called the Respondent to review the Power Purchase price for the period commencing from 1.4.2008. Accordingly, a meeting was held on 4.4.2008. The Respondent requested for the escalated rates, but the Appellant did not accept the same. On the other hand, the Respondent was directed to approach the State Commission for seeking the relief. Thereafter, on 13.10.2009, the Respondent filed a Petition seeking for the arrears. The State Commission allowed the petition on 25.2.2010 and granted the relief to the Ist Respondent.

32. The details given in the earlier paragraph would not show that there was any delay or latches on the part of the first Respondent M/s Chennai Petroleum Corporation Ltd in the present case.

33. On perusal of the relevant records, it is noticed that the Appellant never produced any material to establish that there was an unexplained delay or latches on the part of the Respondents in both these matters in approaching the State Commission. Hence there is no merit in contention, regarding the delay and latches urged by the Appellant. Thus, the above point is answered accordingly in favour of the Respondents.

34. The second issue is relating to Waiver & Estoppel. In order to decide the issue, it will be appropriate to consider the various documents filed by the parties to decide whether there was any waiver of its right by the

Respondent with regard to the claim. As indicated above, as per the agreements in both these Appeals dated 29.1.1999 and 31.3.1999, the rate was fixed for the year 1999 for Rs.2.25 per unit and for the next nine years the price would be escalated on 5% every year from the rates of previous year. The Appellant had been paying at the Power Purchase Agreement Rates i.e. at the escalated rates as mentioned in the PPA up to 31.3.2005. But the Appellant contrary to the PPA, unilaterally had begun to pay at the rate of Rs.3.01 per unit. Thereafter the Respondent did not agree for the same but sent the invoices indicating the rates as per the PPA.

35. In Appeal dated 12/2010, the Respondent, M/S TCP Limited through letter dated 13.8.2007 reminded the Appellant that for the year 2007-2008, the rate mentioned in PPA was Rs.3.49 and sought 5% escalation. No reply was sent by the Appellant. Similarly, letter was sent on 26.10.2007 also. Again, another letter was sent on

29.11.2007 demanding for an escalated rate. Again, another letter was sent on 25.3.2008 pointing out the existing rate contract expiring on 31.3.2008 and rate after 1.4.2008 have to be fixed after review. Till then the Respondent had been sending invoices only on the escalated rates mentioned in the PPA. It is not disputed that though invoices had been received by the Appellant, periodically no objection was raised with respect to the rates mentioned in the invoices by the Appellant. It is also noticed that the invoices received by the Appellant have never been returned to the first Respondent.

36. At that stage, the Appellant called the Respondent, M/S TCP Limited for review of the price for the year 2008-2009 and accordingly a meeting was held on 8.04.2008. No agreement was reached for the rates with effect from 01.04.2008. Then the Appellant through letter dated 21.4.2008 directed the Respondent to approach the State Commission to seek for fixation of

the rates from 1.4.2008. Only thereafter, M/S TCP Limited, the Respondent filed Petition in DRP No. 18/2008 on 04.09.2008 seeking for the directions for the payment of the arrears for the period 1.4.2005 to 31.3.2008. In the mean time, the Appellant also filed a Petition in PPAP 3/2008 seeking for fixation of tariff for the period from 1.4.2008. On 14.10.2009, the State Commission passed an order in the Petition DRP No 18/2008 filed by M/s TCP Limited (Respondent) directing the Appellant to pay the Respondent the sums claimed. However, the State Commission passed an order in PPA 3/2008 on 20.10. 2009 dismissing the said application filed by the said Appellant and fixed the tariff for the period beyond 1.4.2008 as per the PPA entered on 29.01.1999.

37. Now let us see the documents brought on record by the parties in Appeal No.116 of 2010. In this case there was agreement entered between the first Respondent

Chennai Petroleum Corporation Limited and the Appellant on 31.3.1999. This PPA was also valid for a period of 15 years upto 31.3.2014. As per the clause 3.24 of the PPA, the rate for the year 1998-1999 was fixed at Rs.2.25 per unit and for the following nine years the parties agreed to an escalation of 5% rate every year on the rates of previous year upto the year 2007-08 and thereafter from 1.4.2008, the rates will be fixed after review. As in the other case, the Appellant had paid for power on the rates and escalated rates specified in the PPA upto 31.3.2005 and thereafter contrary to the PPA, the Appellant started paying the amount on the Rs.3.01 per unit despite the fact that the PPA specified escalation rate for each year. The Respondent raised invoices at the PPA rates and sent them to the Appellant. The Appellant even though received and acknowledged the same, continued to pay on the rates of Rs.3.01 per unit. The Respondent sent a letter on 5.5.2006 demanding for the escalated rates as per PPA but however, there was no response from the

Appellant. The Appellant simply sent a letter to the Government on 26.6.2005 requesting freezing of rates at Rs.3.01 per unit but this request was not acceded to by the Government. Even then, the Appellant paid only the reduced rates. At that stage, the Appellant called the Respondent for a meeting through letter dated 31.3.2008 to review the PPA for the period commencing on 1.4.2008. Accordingly, the Respondent participated in the negotiation meeting on 4.4.2008 for the purpose of fixing the adhoc rate for the period subsequent to 1.4.2008, pending determination of the rates by the State Commission. At the meeting held on 4.4.2008, the Respondent requested for increase of at least 5 % of the present rate. This was not acceded to by the Appellant. When the letter was sent by the Respondent on 31.3.2009 demanding for escalated rates, the Appellant vide reply dated 14.7.2009 indicated the rate fixed at the meeting on 4.4.2008 from 1.4.2008. According to the Respondent, there was no agreement between the

Respondent and Appellant in fixing the rate beyond Rs.3.01 per unit for the year 2005-2006, 2006-2007, 2007 and 2008 as per the agreement. Consequently, the Respondent approached the Commission to seek further relief. At the same time, the Appellant also approached State Commission on 7.9.2009 and filed PPAP No.4/2009 to fix the rate commencing from 1.4.2008 on the basis of the rate fixed by the parties at a meeting on 4.4.2008. On 13.10.2009, the Respondent filed a Petition No.27/2009 seeking for the direction to make the payment of the arrears for the period from 2005-2006, 2006-2007, 2007 and 2008 stating that no such agreement was arrived at by the parties at the meeting held on 4.4.2008.

38. The State Commission ultimately dismissed the Petition filed by the Appellant in PPAP Petition No.4/2009 holding that a negotiation said to be held on 4.4.2009 was ab initio void and accordingly fixed the rate in PPAP

No.4/09 as per PPA escalated rates for subsequent period beyond 1.4.08. On the basis of said findings, the State Commission allowed the petition filed by the Respondent in DRP No.27/09 holding that the Respondent is entitled to get the escalated rates as specified in the PPA and accordingly directed the Appellant to pay the balance amount to the Respondent.

39. Thus the details given in both the matters would indicate that the Respondent in both the Appeals have been sending invoices specifying escalated rates, mentioned in the PPA but even then the Appellant had been making the payment only at the reduced rates.

40. None of the documents would indicate that the Respondents have abandoned their right of claim, the amount through waiver. On the other hand as correctly pointed out by the State Commission, the invoices sent by the Respondents in these Appeals for all these years,

indicate the escalated rates specified in the PPA. As indicated above, the Appellant neither raised any objection with regard to the rate mentioned in the invoices nor returned those invoices to the Respondents. Therefore, it could not be said that the right of the Respondent have been waived. The Appellant has raised the plea of waiver and estoppel relying upon the minutes of the meeting held on 18.5.2007 and 4.4.2008. whereunder, it claims that the Respondent had conveyed acceptance of a rate of Rs.3.01 per unit for the year 2005 and 2008 and thus waived their rights to claim the escalated rates and thereby they are estopped from claiming the payment.

41. With regard to claim of the Appellant that the minutes of the meeting dated 18.5.2007 constituted an acceptance by the Respondent to receive payment of Rs.3.01 for 03 years, the State Commission in its order dated 14.10.2009 has held that the said negotiations is

ab initio void since Electricity Act 2003, had come into force in the meantime. The relevant paragraph of the observations is as follows:-

“6. (I) The TNEB contends that there were discussions between the petitioner and the TNEB on 18.5.2007 for the tariff applicable for the period from 1.4.2007. The TNEB offered a rate of Rs.2.32 per kwh but the petitioner demanded Rs.3.01 per kwh. The TNEB indicated that the tariff for the period from 1.4.2008 could be fixed later. The two sides signed the minutes of the discussions. But, the PPA was not amended pursuant to the minutes of the meeting. The TNEB submits that having suggested Rs.3.01 per kwh, the petitioner is estopped from agitating for a higher rate.”

“6. (J) It is curious how the TNEB took upon itself the task of determining the tariff on 18.5.2007, four years after the commencement of the Electricity Act, 2003, which conferred this authority under Section 86 on the State Electricity Regulatory Commissions. We are constrained to hold that the whole exercise of TNEB conducting tariff negotiation after the commencement of the Electricity Act, 2003 is ab initio void. We have no hesitation in setting aside the tariff negotiations.

As per Section 185 of the Electricity Act, 2003 the PPA entered into between the petitioner and the TNEB before the commencement of the Act is saved and is valid in so far as it is not inconsistent with the provisions of the Electricity Act, 2003”.

42. Significantly, in the connected proceedings for fixation of tariff beyond 1.4.2008, in the Petition filed by the Appellant in PPAP No.3 of 2008, the State Commission has fixed the rates beyond 1.4.2008 as per the PPA already in practice. The relevant portion in State Commission’s order dated 25.2.2009 are:

“5.6. While Order No.4 protects the agreement finalized before 15.05.2006, at the same time, it enables the two parties to re-negotiate the existing agreement in accordance with the Order. In this particular case, neither the petitioner nor the respondent moved for re-negotiation with the result that the PPA of 1999 continued to operate. The life of the PPA is for a period of 15 years upto 29.1.2014. The only open question is the tariff applicable from 1.4.2008.”

“ 5.8..... The PPA provides for annual escalation of 5% every year beginning from 1998-99. If this formula is adopted, the tariff for the period beyond 1.4.2008 will be as follows: 2008-09 Rs.3.66 per unit, 2009-10 Rs.3.85 per unit, 2010-11 Rs.4.04 per unit, 2011-12 Rs.4.24 per unit, 2012-13 Rs.4.45 per unit, 2013-14 Rs.4.67 per unit.”

43. This order passed by the State Commission in the application i.e PPAP 3/2008 filed by the Appellant would show that the State Commission has held that the negotiations were ab initio void and rate was fixed for the period after 1.4.2008 only as per the PPA. Admittedly, no Appeal has been filed by the Appellant against this order fixing the tariff on the basis of the 5% escalation for the period beyond 1.4.2008 . Therefore, the findings on this aspect has attained the finality. Accordingly the Appellant is bound by the findings which would apply to the present proceedings also. That apart, it has been noticed that the principle of Waiver & Estoppel which has

been incorporated in the decision in Appeal No. 744 in 176/2010 dated 18.5.2010 in case of Bangalore Electricity Supply Company Ltd Vs Davangere Sugar Co. Ltd And ors would not apply to the present case. In this decision, number of decisions of the Hon'ble Supreme Court have been quoted and various principles have been laid down. The relevant portion is as follows:

“36. Before dealing with this contention, let us quote the decisions of the Hon'ble Supreme Court and various High Courts on the point of waiver:

- 1) P Dasa Muni Reddy Vs. P Appa Rao (AIR 1974 SC 2089)*
- 2) Waman Shrinivas Kini S Ratilal Bhagwandas & Co (AIR 1989 SC 689)*
- 3) Krishna Bahadur Vs. Puna Theatre and Others (2004 (8) SCC 229)*
- 4) Jagan Bandhu Chatterjee Vs. Smt Nilima Rani & Ors (1970 (2) SC 925)*
- 5) Punjab & Sind Bank and Ors Vs. Mohidner Pal Singh and Ors.) AI 2006 SC 533)*
- 6) Sikkim Subba Association Vs. State of Sikkim (2001 (5) SCC 629).*

37. In the above decisions, various principles have been laid down with regard to waiver which are as follows:

(1) Waiver is a matter of intention and can be either expressed or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. In order to hand over a waiver some positive act on the part of the party which is supposed to have waived his right.

(2) Waiver is an intentional relinquishment of known right or advantage, abandoning claim or privilege, which except for such waiver, the party would have enjoyed. The waiver is a voluntary surrender of right. It implies the meeting of the minds. It is a matter of mutual intention. The essential element of waiver is that there must be a voluntary and intentional relinquishment of right.

(3) Whenever waiver is pleaded, it is for the parties claiming the same to show that an agreement waiving the right in consideration of some compromise came into being.

(4) Waiver actually requires two parties; one party waiving and the other party receiving the benefit of waiver. There can be waiver so intended by one party and was sought by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. The waiver is a voluntary, conscious act which must be an affirmative act on its part. A mere omission to assert

its right or insist upon its right can not amount to a waiver or dispensation within the meaning of section 63 of the Indian Contract Act.

(5) A person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the court to arrive at a conclusion that he did so with knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right.”

44. Similarly, the State Commission while dealing with negotiations made in 4/4/2008, the State Commission rejected the Appellant prayer to fix the tariff decided in the meeting held on 4.4.08 holding that the said fixation in the negotiations ab initio void and set aside the said proceedings dated 4.4.2008 and State Commission fixed the tariff rates for the period subsequent to 1.4.2008 as per the PPA escalated rates. These orders have been passed in the application filed by the Appellant in PPAP No.4/2009 by the order dated 25.2.10. This order has not been challenged by the Appellant. On the other hand, it is reported that these orders of 3/2009 and PPAP

of 04/2009 have been implemented by the Appellant thereafter.

45. Under those circumstances, the question of waiver does not arise in these matters. In the light of the present facts of the case, on the basis of the decision of the Supreme Court and this Tribunal, it is further contended by the Appellant that the Respondent is excluded from the PPA price on the basis of doctrine of estoppels have been specified in various judgements of the Hon'ble Supreme Court . For instance, in Dr. Karan Singh v. State of J&K and Another, (2004) 5 SCC 698, the Supreme Court applied the principle laid down in Gyarsi Bai V. Dhansukh Lal, AIR 1965 SC 1055, and held that in order to invoke the doctrine of estoppels, three conditions must be satisfied:

- (1) Representation by a person to another,
- (2) The other shall have acted upon the said representation, and

(3) Such action shall have been detrimental to the interest of the person to whom the representation has been made.

46. In the instant case, the Respondent did not make a representation to the Appellant that it is willing to accept the price unilaterally. On the contrary, the first Respondent consistently, raised invoices at the PPA rates for the entire three years period and called upon the Appellant to pay at the PPA rates through the letters. Therefore, there was a representation that the Respondent expects to be paid at the PPA rates and there was no admission that the rate of Rs.3.01 per unit was acceptable. The contention that the minutes of the meetings held on 4.4.2008 amounts to an estoppel is untenable for reasons set out in detail in the light of the findings given by the State Commission in the PAP 3/2008 and 4/2009.

47. The next issue is with regard to the fixation of price as agreed by the parties as provided in the clause 3.24 and 3.26 of the PPA. Even though there is a provision for fixation by mutual agreement, the PPA specifically states that the alternatively the terms of agreement shall be carried out based on the mutual agreement. In this context the clause 3.24 is to be quoted. The procedure for amending the PPA is contained in clause 3.24 which provides as under:-

“Any alteration or deletion in terms and conditions of this agreement shall be carried out based on mutual agreement by the Board and the Company”

48. In the present case, the Appellant had paid the PPA rates upto 31.3.2005. Thereafter, the Appellant contrary to the PPA rates paid only the reduced rates at Rs.3.01 per unit. The Respondent did not agree to the amendment to the price clause in the PPA. Consequently, the documents available on record do not

show any amendment to the said agreement. On the other hand, the records would disclose that the Respondent raised its monthly invoices and throughout this three year period at the PPA prices. It further discloses that the Respondent protested against the failure of the Appellant to pay the escalated rates as per the PPA through letters of various dates. The only document with the Appellant to show that there was agreement on the part of the Respondent through payment of Rs.3.01 as per the minutes of the meeting held on 4.4.2008. The purpose of this meeting will be evident from the letter dated 31.8.2008 conveying the minutes. From the letter, it is clear that the said meeting was conveyed for the limited purpose of fixing ad-hoc prices for the period commencing from 1.4.2008. This is evident from the minutes of the meeting as also the letter dated 5.8.2009 and 14.7.2009 from the Appellant sent to Chennai Petroleum Corporation Limited.

49. In other words, it was not a meeting conveyed for the purpose of retrospectively agreed prices payable for power supply by the Respondent during the Financial Years 2005-06, 2006-2007 and 2007-2008. Nowhere in the minutes or in any other document is Rs.3.01 per unit referred to as the agreed rates for the Financial Years 2005-06, 2006-2007 and 2007-2008. Even otherwise, as indicated above, the State Commission by order dated 25.2.2010 in PPAP No.4/2009 rejected the prayer of the Appellant to fix the tariff as fixed in the negotiation meeting held that the said negotiations were ab initio void and consequently set aside the negotiation proceedings held on 4.4.08. In PPAP 3/08 the State Commission by order dated 25.2.2009 also held the same. Under those circumstances, we give the following findings:

50. SUMMARY OF OUR FINDINGS:

(I) It is settled law that the Limitation Act would apply only to Courts and not to the other bodies

such as quasi-judicial Authorities as held by the Hon'ble Supreme Court. Therefore, the contention of the Appellant that the claim made by the Respondent before the State Commission which is a quasi judicial authority was barred by limitation does not merit consideration. Even with regard to the contention, that there was a delay and latches on the part of the Respondents in approaching the State Commission for making the claim for payment of arrears it is to be held that both the Respondents had consistently claimed their rates as well as escalated rates as per the Power Purchase Agreement (PPA) and they had regularly sent the invoices mentioning the PPA rates and the Appellant admittedly had received the same but did not choose to either to raise the objection or to return those invoices to the Respondents and only when the Appellant rejected their claims, the Respondents approached the Commission and sought the relief. Under those circumstances the plea that

there was delay and latches on the part of the Respondents has got to be rejected. Accordingly the same is rejected.

(II) The details of the facts and materials given in both the Appeals would not show that there was a waiver or estoppel on the part of the Respondents. On the other hand, the documents would show that there was a regular and continuous demand by the Respondents requesting the Appellant to make the payment as per the agreement. None of the documents available on record would indicate that the Respondents have given up their rights of claim. Whenever waiver is pleaded, it is for the party who pleads to establish that there was an agreement between the parties giving up their right in consideration of some same compromise came into force. The essential element of waiver is that there must be voluntary intentional relinquishment of

rights. The mere omission to assert their rights or to insist upon their rights may not amount to waiver. In this case these essential ingredients have not been established. Therefore, there is neither waiver nor estoppel by the Respondent.

(III) Even though Clauses 3.24 and 3.26 of the PPA provide for the mutual agreement with regard to the fixation of rates, the minutes of the meeting produced by the Appellant before the State Commission would not indicate that there was mutual agreement in respect of the rates modified in terms of the PPA in the negotiation meeting. Further the State Commission has specifically held while dismissing the petition in PPAP 3 of 2008 and PPAP No. 4 of 2009 filed by the Appellant rejecting for determining the tariff as fixed in the negotiations meeting that those negotiations meetings are ab initio void. These findings given in those orders passed

by the State Commission in the application filed by the Appellant, have not been challenged. Therefore, the plea on the basis of the so called mutual agreement as per the Clauses 3.24 and 3.26 of the PPA cannot be upheld.

50. In view of the above findings we do not find any reason to hold that both the impugned orders suffer from any infirmity. Accordingly, both the Appeals are dismissed on the merits. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 7th March, 2011

REPORTABLE/NON-REPORTABLE