

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 143 of 2008

Dated: 28th January, 2009

Present: **Hon'ble Mr. Justice M.Karpaga Vinayagam, Chairperson**
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

M/s. Reliance Power Limited,
1st Floor, H-Block,
Dhirubhai Ambani Knowledge City,
Thane Belapur Road, Navi Mumbai-400 710 Appellant

Vs.

1. Uttar Pradesh Electricity Regulatory Commission,
IInd Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand, Lucknow-226010.
2. UP Rajya Vidyut Utpadan Nigam Limited,
7th Floor, Shakti Bhawan Extension,
14, Ashoka Marg, Lucknow
3. UP Power Corporation Limited,
7th Floor, Shakti Bhawan Extension,
14, Ashoka Marg, Lucknow
4. Lanco Anpara Power Private Limited,
Plot No. 229, Phase-I,
Udyog Vihar,
Gurgaon
5. Shri Arvind Kumar Singh,
J-2 Park Road,
Lucknow. Respondents

Counsel for the Appellant : Mr. Vikas Singh, Sr. Advocate with
Mr. Mansoor Ali, Mr. Shoket &
Mr. Shreshth Sharma

Counsel for the Respondent(s): Mr. Krishnan Venugopal, Sr. Adv., with Mr. Kavin Yulati, Ms. Rashmi Singh & Mr. Avnish Pandey for Resp. 3
Mr. Jayant Bhusan, Sr. Adv. with Mr. Sanjay Sen, Ms. Ruchika Rathi & Ms. Shikha Ohri for Resp. 4

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

The Uttar Pradesh Power Corporation Ltd. (UPPCL), the third Respondent herein filed a petition before the U.P. State Commission praying for two reliefs; (i) for determination of tariff for the enhanced capacity of 200 MW for the Anpara 'C' project, which was granted by the State Government in favour of M/s. Lanco, the fourth Respondent herein; and (ii) for issuance of direction to M/s. Lanco-the fourth Respondent herein to approach the State Commission for seeking approval of the financial and technical changes for the said enhanced capacity.

2. The State Commission passed the Impugned Order dated 20/10/2008 in this petition, giving approval in favour of M/s. Lanco the fourth Respondent herein for undertaking financial and technical changes for the enhanced capacity, after having rejected the objection to such an approval raised by M/s. Reliance Power Ltd., the Appellant herein. Aggrieved by the same, the Appellant has filed this Appeal.

3. The facts which are required for the disposal of this Appeal are narrated as under:

- i) The UP Government, to meet the power requirements of the State, decided as a matter of policy to have a 2 x 500 MW power plant at Anpara. On 1/10/04, the UP Genco which is the nodal agency for the bidding process, communicated this proposal to the UP State Commission.
- ii) On 19/1/05, the Central Government under Section 63 of the Electricity Act, 2003 notified the guidelines for determination of tariff by the bidding process for procurement of power by the distribution licensees for the Anpara 'C' project. On 19/10/05, on the strength of these guidelines notified by the Central Government, the U.P. State Commission approved the RFP (Request for proposal) bidding documents without any change in the capacity of the plant.
- iii) Thereafter, the bids were invited following the prescribed procedure. A number of organizations including the Appellant herein, the fourth Respondent herein and others sent their bids. On 6/6/06, the bids were opened. The fourth Respondent, M/s Lanco being the bidder with the lowest tariff was found to be the successful bidder.
- iv) Consequently, the project was awarded to M/s. Lanco by letter of acceptance dated 27/09/06. On 12/11/06, the PPA for the 2 x 500 mw project was executed by the UP Genco in favour of M/s Lanco.
- v) This was intimated to the State Commission by UP Genco, who made a request to adopt the tariff for the 2 x 500 mw Anpara 'C' project as per the competitive bidding process. Accordingly, the order was passed by the Commission on 31/12/06. Thereupon, the project was started.
- vi) On 5/2/07, the Ministry of Power, Government of India issued an Office Memorandum directing all State Governments to follow the CEA guidelines of 18/3/05 which provided for flexibility in generation capacity.
- vii) In the light of the said office memorandum, the UP Government took a general policy decision on 24/7/07 to allow all future as well as previously approved thermal power projects in the State

to increase their capacity. The range of flexibility in the 500 MW capacity was specified to be 500 MW capacity was specified to be 500 MW+20%. This policy decision was taken at the highest level keeping in view the acute shortage of power in the State. The same was also published in the newspapers.

- viii) In the meantime, as indicated above, the project was commenced by M/s. Lanco. Subsequently on seeing the newspapers and learning of the new policy direction, M/s.Lanco sent a request on 11/8/07 to UP Genco to allow enhancement of capacity from 2 x 500 mw to 2 x 600 mw. On receipt of this letter, the UP Genco forwarded the same to the State Government for approval.
- ix) The State Government, after having considered the request and the policy decision which had already been taken on 24/7/07, allowed and approved the request of Lanco to enhance the capacity by letter dated 20/8/07. In the said letter, the State Government stipulated a condition for the said approval that M/s. Lanco should obtain all statutory clearances as per the enhanced capacity, and obtain the approval from the State Commission for undertaking technical and financial changes in respect of the enhanced capacity. This order dated 20/8/07 was intimated to M/s. Lanco by UP Genco through a letter dated 22/8/07.
- x) At this stage, one Arvind Kumar Singh, a Member of the Legislative Assembly filed a PIL by way of a Writ Petition in the Allahabad High Court, challenging the Government order dated 20/8/07 for enhancement of capacity in favour of M/s. Lanco and praying for directions to invite fresh bids. In that Writ Petition, M/s. Lanco, the successful bidder as well as the Appellant were made parties. The High Court, however, dismissed the said petition giving the petitioner the liberty to move the State Commission by its order dated 10/9/07 for the appropriate relief.
- xi) Accordingly, the said Arvind Kumar Singh filed a petition before the State Commission with the said prayer. The State Commission entertained the said petition and heard both Arvind Kumar Singh, the petitioner and the Respondents, namely M/s. Lanco and the Appellant herein. After considering their submissions, the Commission dismissed the same by the order dated 13/8/08, holding that the Commission has no jurisdiction to decide the legal validity of the order on enhancement of capacity passed by the State Government. In the said order, it also recorded the submission made on behalf of both Arvind Kumar Singh, the petitioner therein, as well as the Appellant

herein M/s. Reliance Power to the effect that in view of the shortage of power in the State, they had given up the challenge to the enhancement of capacity in public interest.

- xii) Thereupon, the UP Power Corporation filed a petition before the State Commission for determination of tariff for 200 mw additional capacity, enhanced through the approval of the Government for the Anpara 'C' project in favour of M/s Lanco and for issuance of direction to M/s. Lanco for seeking approval of technical and financial changes on the enhanced capacity from the State Commission. In that petition, both M/s Lanco and the Appellant herein were made parties.
- xiii) The State Commission entertained the said Petition and issued notice to the parties. On receipt of the notice, M/s. Lanco filed the affidavit in the said petition requesting for approval in respect of financial and technical changes for the enhanced capacity. Appellant then made an objection with regard to the request made by M/s. Lanco. The State Commission, having heard all the parties concerned in the petition filed by the UP Power Corporation Ltd., passed the interim order dated 20/10/08 approving the technical and financial changes as requested by M/s. Lanco. After passing the said order, the State Commission adjourned the matter for fixing the tariff as per the request of UP Power Corporation Ltd., the 3rd respondent herein
- xiv) Aggrieved by the said interim order, the Appellant has approached this Tribunal through this Appeal, challenging the same.

4. Shri Vikas Singh, the Learned Senior Counsel appearing for the Appellant, assailing the Impugned Order dated 20/10/08 has made detailed submissions. The gist of the same is as follows:

- (A) The order of the UP Government dated 20/8/07 granting approval for enhancement of capacity in favour of M/s. Lanco is not valid as the UP Government has no authority to pass such an order enhancing the capacity of the power plant that too after the bidding process was over.
- (B) Even assuming that was the policy decision taken by the UP Government for approving the enhancement of capacity, it was an approval with the condition to the effect that M/s. Lanco shall

obtain the approval of the State Commission for the enhancement of capacity for financial and technical changes. Despite this, M/s. Lanco had not filed the petition before the Commission in pursuance of the order dated 20/8/07 from the State Commission seeking for such an approval. Hence, the order of the Government dated 20/8/07 loses its validity.

(C) Once the successful bidder was selected, no change in the specification could be made as the same would amount to changing the conditions of the bid after the award of contract. State Commission alone can change the conditions of the bid and grant approval and not the State Government. By virtue of the policy direction issued by the State Government, the statutory powers of the State Commission cannot be usurped. Similarly, the State Commission cannot abdicate its duties by observing that the policy direction of the Government granting approval cannot be interfered with. Therefore, the Order dated 20/08/07 of the State Government giving a policy direction for approval in favour of M/s Lanco cannot be treated to be valid in law.

(D) The final order passed on 13/8/08 by the State Commission in the Petition filed by Arvind Kumar Singh has been misinterpreted by the State Commission in the impugned order dated 20/10/08, by observing that the challenge to the enhancement of capacity has been given up by the Counsel for the Appellant Reliance company. This is factually wrong. Therefore, the said finding is not binding on the Appellant”.

On these grounds, the impugned order dated 20/10/08 is sought to be set aside by learned Senior counsel for the Appellant.

5. In reply to the above, Shri Jayanth Bhushan, Senior Counsel and Mr. Krishnan Venugopal, Senior Counsel appearing for M/s. Lanco-fourth respondent herein and the UP Power Corporation Ltd., the third respondent herein respectively have made elaborate submissions which are common. The crux of these submissions is as follows:-

a) The decision to enhance the capacity from 2 x 500 MW to 2 x 600 MW was a policy decision taken by the State Government

under the circular dated 24/7/07. On that basis, the specific approval was granted by the State Government for enhancement of capacity to M/s. Lanco on 20/8/07. This was conveyed by the UP Genco to M/s Lanco by letter dated 22/8/07. The State Commission does not have the power to grant approval for the enhancement of capacity. The State Government alone is vested with the powers to approve enhancement of capacity of a generating station in pursuance of a policy decision taken on 24/7/07. Accordingly, the approval has been validly granted.

- b) The jurisdiction of the State Commission is limited to the functions conferred u/s 86 of the Act. These functions do not extend to regulating the setting up of generating stations or regarding enhancement of capacity. As such, the State Commission has no jurisdiction either to approve or to reject proposals for the enhancement of capacity of the project. The approval has already been granted by the State Government for enhancement of capacity by letter dated 20/8/07. This was in pursuance of the policy decision which was taken in terms of the guidelines dated 18/3/05 issued of the Central Electricity Authority.
- c) It is true that in the order dated 20/8/07 granting approval issued by the UP Government, a condition was imposed to the effect that M/s. Lanco should seek approval of the State Commission for undertaking financial and technical changes due to enhancement of capacity. This letter merely indicates that the Commission should be approached for the approval of financial and technical changes in respect of the enhanced capacity and not for the approval of enhancement of capacity.
- d) As a matter of fact, the Petition was filed by one Arvind Kumar Singh, a private party, before the State Commission challenging the grant of approval by the Government in favour of M/s. Lanco, and not by the appellant. The State Commission dismissed the said petition by the order dated 13/8/08 holding that the Commission has no power to interfere with the decision of the State Government granting approval for the enhancement of capacity in favour of M/s. Lanco. Further in the very order, the State Commission has clearly recorded the concessions made by the counsel for all parties including Reliance Power Ltd., the Appellant herein to the effect that they had no objection to the enhancement of capacity of the project, because the same is in public interest.

- e) Admittedly, no party including the Appellant herein made any challenge to the said findings rendered by the State Commission. So, the order of the Commission dated 13/8/08 holding that it does not have jurisdiction to question the order of the Government granting the enhancement of capacity, and recording the concession given by the Counsel for the Appellant herein, making no objection for the enhancement of capacity remains binding on the parties. Thus, M/s. Reliance Power, the Appellant herein, who neither filed a review before the Commission nor filed any Appeal before the appropriate authority with reference to the above finding has allowed the said order to become final.
- f) The tender for the project was floated on 1/10/04 and was awarded in favour of Lanco on 6/6/06 because M/s. Lanco quoted a rate that was almost 20% lower than its nearest competitor. M/s. Lanco has already commenced the project and has spent around Rs. 998 crores in setting up the project. If the award of contract to Lanco at this stage is set aside, it will lead to an irreparable damage to the industrial development of the State of U.P”.

On these grounds, the impugned order was sought to be confirmed.

6. We have heard the learned Senior counsel for the parties and have given our anxious consideration to their rival contentions urged on behalf of both the parties.

7. The main question that arises for consideration is with regard to the validity of the grant of approval for the enhancement of capacity in favour of M/s. Lanco, the fourth respondent herein by the State Government on having usurped the powers of the State Commission.

8. While we deal with this question, it would be appropriate to bear in mind some important factual aspects which are more relevant in this case.

They are as under:

- i) As early as on 20/8/07, the State of U.P. on the request of M/s. Lanco, who is the successful bidder for this project, granted approval in respect of enhancement of the capacity.
- ii) Instead of the Appellant challenging the aforesaid order of the UP Government before any forum, it chose to become a party supporting a PIL filed by one Arvind Kumar Singh, MLA. in the Allahabad High Court challenging the said order of approval and questioning its validity and praying for directions for fresh bids. But, the High Court dismissed the said petition directing the said Arvind Kumar Singh, the petitioner to approach the State Commission for the appropriate relief.
- iii) Accordingly, the petitioner moved the State Commission with a similar prayer. During the said proceedings, the Appellant supported the claim of the petitioner objecting to the jurisdiction of the State and the validity of its order for enhancement. Ultimately, the State Commission dismissed the petition by the order dated 13.8.08 with the specific finding that the State Commission has no jurisdiction to decide over the validity of the policy decision on enhancement of capacity taken by the State Government. The State Commission further recorded in the said order that both Shri Arvind Kumar Singh the petitioner therein as well M/s. Reliance Power, the Appellant herein, had given up their challenge to the order for the enhancement of capacity of the project passed by the State Government in public interest.
- iv) Thus, the above claim of both the petitioner in the said petition, as well as one of the Respondents therein, who is the Appellant herein M/s. Reliance Power, questioning the validity of the order by the State Government on enhancement, had been finally given up. Not only that, the State Commission had specifically held that it has no jurisdiction to decide on the legal validity of the decision taken by the State Government on enhancement of capacity. The said finding by the State Commission through its order dated 13/8/08 had reached finality as there is no challenge against the same before the appropriate forum.
- v) The UP Power Corporation Ltd., the third respondent herein filed a petition before the Commission for determination of tariff for the enhanced capacity and for giving a suitable direction to M/s Lanco for seeking approval of technical and financial changes from the State Commission. In the very

same proceedings, M/s. Lanco filed an affidavit before the State Commission requesting the approval for such changes. It was at that time, the Appellant herein raised an objection with regard to validity of the order of the Government granting approval for capacity enhancement as well as against the request for approval for undertaking financial and technical changes.

- vi) Rejecting the said objection raised by the appellant herein, the Commission passed the order impugned on 20/10/08, holding that the said objection cannot be entertained, especially when the very same objection made in the earlier petition by the Appellant as well as the private party were rejected by the Commission by the order dated 13/8/08 on the reasons that it has no powers to go into the legality of the Government's policy direction. That the same has become final, as there was no challenge before the appellate forum and that more so when both the Appellant and the private party being the petitioner, themselves have given up their claim regarding validity of the order of the Government.

9. Keeping these facts in our mind, we shall now consider the question that has been raised in the present case.

10. Shri Vikas Singh, the Learned Senior Counsel appearing for the Appellant Reliance Power, has raised the main ground of attack on the impugned order dated 20/10/08 by contending that the State Government has no power to grant approval for the enhancement of capacity of 200 MW in favour of M/s Lanco, by the order dated 20/8/07 as the said power is vested only with State Commission and not with the State Government.

11. Let us first look into the order dated 20/8/07 passed by the State Government through a letter, the validity of which is questioned in this Appeal.

12. The relevant portion of the order by the State Government is as follows:

“In pursuance of a letter dated 11/8/07, the request for conversion of Anpara ‘C’ project from 2 x 500 MW to 2 x 600 MW has been fully considered and the approval is granted to install the machines of 2 x 600 MW in place of 2 x 500 MW in the Anpara ‘C’ project. M/s. Lanco shall be liable to get all legal formalities as per the enhanced capacity and obtain approval of the State Commission, for financial and technical changes.”

13. The above order specifically mentions about the grant of approval for the enhanced capacity by the State Government and also about the condition to be complied with by M/s Lanco to the effect that it shall seek approval for financial and technical changes in respect of the enhanced capacity from the State Commission. It is not disputed that this order dated 20/08/07 had been passed by the State Government in pursuance of the policy decision taken by the State Government on 24/7/07.

14. The Office Memorandum dated 5/2/07 issued by the Ministry of Power, Government of India would reveal that the direction had been given to Secretary (Power) of all the State governments to follow the CEA guidelines dated 18/3/05 which provide for flexibility in generation capacity. Only on the basis of the guidelines issued by CEA and the Office Memorandum issued by the Central Government a policy decision on 24/7/07 was taken by the State Government to allow all future as well as previously approved thermal power projects in the State to increase their capacity. This policy decision was taken at the highest level keeping in

view the acute shortage of power in the State. This policy decision dated 24/7/07 was published in the newspapers also.

15. Only, thereupon, M/s. Lanco the fourth Respondent herein requested the UP Genco by letter dated 11/8/07 to allow enhancement of capacity. The same was forwarded by the UP Genco to the State Government for consideration. The State Government, then considered various aspects including the earlier policy decision taken on 24/7/07 and allowed the request of M/s Lanco and granted the approval for enhancement of capacity, with a direction to M/s Lanco to obtain the approval of the State Commission on financial and technical changes.

16. It is clear from these facts that the approval for enhanced capacity was granted by the State Government on 20/8/07 on the basis of the policy decision taken by the State Government on 24/7/07. This policy decision was taken on the basis of the Office Memorandum issued by the Government of India on 5/2/07. This Office Memorandum was issued by the Government of India on the basis of the guidelines issued by CEA on 18/3/05. All these documents are public documents, published in the Newspapers. The Appellant, who claims to be aggrieved against the order dated 20/8/07 which was passed on the strength of various earlier proceedings issued by both Central and State Government, has failed to challenge before any forum at any point of time. No explanation has been

offered by the Learned Senior Counsel for the Appellant as to why challenge was not made against these orders before the appropriate forum.

17. It is the strenuous contention by the learned Senior Counsel appearing for the Appellant that the approval for enhancement of capacity cannot be granted by the State Government and that the proper authority for grant of such Approval is only the State Commission which has not been approached by M/s. Lanco for the said approval. This submission in our view does not merit consideration as there is no basis to substantiate this contention.

18. State Commissions have been constituted under Section 82 of the Act. The jurisdiction of the Commission is limited to functions conferred under Section 86 of the Act only. These functions do not extend to regulating the setting up of generating stations or regarding enhancement of capacity. In fact, generating companies are free to set up generating stations, even without obtaining license as provided u/s 7 of the Act.

19. Further it is noticed in this case that instead of the Appellant challenging the order dated 20/8/07 granting enhancement of capacity, one Arvind Kumar Singh, an MLA has filed a PIL in the Writ Petition No. 6606/2007 in the form of a PIL challenging the said order. As indicated above, there is no reason as to why the Appellant herein, having been aggrieved over the order of enhancement of capacity had not chosen to file any Writ Petition challenging the Government order especially when the

private party as a PIL had chosen to file the Writ Petition against the said order.

20. Ultimately, the High Court dismissed the said PIL giving liberty to the private party, the petitioner to approach the State Commission for seeking necessary relief, if so advised under law. Even then, the Appellant neither chose to file a separate Writ Petition challenging the Government order before the High Court nor to file any petition before the Commission for necessary relief. On the other hand, the Appellant merely chose to stand as one of the respondents therein to support the case of the said private party who pleaded for quashing the Government order before the High Court as well as before the Commission.

21. In the final order dated 13/8/08 passed by the State Commission in the Petition filed by the Private Party, the MLA the Commission had specifically held that there is no provision empowering the Commission to interfere with the order of the Government granting approval by the order dated 20/8/07. This is a clear finding given by the State Commission giving answer to the very same question, relating to the validity of the Government order granting approval for enhancement of capacity in the order dated 13/8/08.

22. The said finding is as follows:

“The decision of the government to allow enhancement of capacity came on 20/8/07, much after the completion of the bidding process and award of contract. There is no provision

in the Act which allows the State Commission to interfere with the decision of the Government approving enhancement of capacity after award of contract and execution of the PPA.

23. The above categorical finding indicate that the issue, raised by the Appellant in the instant proceedings has already been raised and the same has been decided by the State Commission by the order dated 13/8/08. Admittedly, in the said proceedings, the Appellant was a party. Even then, the Appellant did not choose to challenge the said finding before any forum. Admittedly, there is no explanation from the side of the Appellant as to why that finding was not challenged.

24. The Learned Senior Counsel appearing for the Appellant would cite the following authorities in order to show that the change in material condition of the tender, after the contract had been awarded would deprive the other parties of a fair opportunity to compete, and that this opportunity cannot be denied to the other parties in public interest; and therefore, the award has to be quashed and fresh bids have to be called for. The cited authorities are: *1993 1 SCC 445; 2000 5 SCC 287; and AIR 2005 KERALA 14 = 2005 2 CTLJ 103 (Kerala)*. These decisions in our view, would not apply to the present facts of the case.

(a) The Hon'ble Supreme Court, in *1993 1 SCC 445 i.e. Sterling Computers Vs. M.N. Publications Ltd.* has held that once a State decides to grant any right or a privilege to others, then it cannot escape from the

rigours of Article 14 and certain precepts and principles have to be followed, the public interest being the paramount consideration.

(b) In the case *Monarch Infrastructure Pvt.Ltd. Vs. Commissioner, Uttaranchal Municipal Corporation & Ors. in 2004 5 Scc 587*, the Hon'ble Supreme Court held that if a term of tender is delayed after the players entered into the arena, it is like changing the rules of the game after it had begun and hence, the only course available to the Government and the Corporation is to initiate a fresh process of tender.

(c) In *AIR 2005 Kerala pg 14=2005 2 CTLJ 105 (Kerala) Mundakayan Sadasivam Vs. Greater Cochin Development Authority*, the Hon'ble Kerala High Court has held that the change in material conditions of tender after the contract had been awarded deprives the other parties of a fair opportunity to compete and hence, the same cannot be in public interest.

The above decisions would clearly indicate that the terms cannot be changed after the bids had been invited and evaluated and the contract had been awarded and once such terms are challenged, there is an obligation to invite fresh bids for the project. All the above decisions have been rendered by the Hon'ble Supreme Court and also by the Hon'ble Kerala High Court while dealing with the powers under Article 226 of the Constitution, in the light of the ratio decided under Article 14 of the Constitution by both the High Court and the Supreme Court.

In these very same decisions, it is held that even under Article 226 of the Constitution, the High Court or the Supreme Court is not expected to act as a Court of Appeal while examining an administrative decision of the Government in respect of contracts entered into on behalf of the State. It is also held and broadly stated in these decisions that the Courts would

not interfere under Article 226 of the Constitution in the matter of administrative action unless the Government's action is arbitrary or discriminatory or is *mala-fide*.

From these observations of the Supreme Court, it is clear that the High Court under Article 226 is empowered to go into the question as to whether the terms of the contract have been changed after the bids have been invited and the contract has been awarded arbitrarily, with a mala-fide motive, and if it is so, the High Court can certainly quash the award and invite fresh bids for the project. In other words, even the High Court would not normally interfere in the administrative action of the Government issuing a policy direction, if it is not established to be arbitrary or mala-fide.

25. In this case, the Appellant has never challenged the order of the Government dated 20/8/07 which was passed on the basis of the policy decision taken on 24/07/07 and also on the basis of the OM issued by the Ministry of Power, Govt. of India on 5/2/07 before the appropriate forum. On the other hand, the Appellant merely chose to stand as one of the Respondent parties in the petition filed by the private party before the State Commission seeking for the invitation of fresh bids. Therefore, the decision cited by the Appellant as referred to above, would not be of any use to the Appellant as neither the State Commission, nor the Tribunal is clothed with the powers under Article 226 of the Constitution, to quash the Government order, that too in the absence of any material to show that the said Government order is arbitrary or mala-fide.

26. On the other hand, the learned Senior Counsel appearing for Respondents, M/s Lanco and UP Power Corporation Ltd. pointed out that

in the order dated 13/8/08 in the Petition filed by MLA, the private party, it has been specifically observed by the State Commission that both the Petitioner as well as the Appellant herein have given up their claim against the legality of the order of the Government regarding the enhancement of capacity as well as their claim for inviting fresh bids in the interest of the Public and the State of U.P. The relevant observation in the order dated 13/8/08 is as follows:

“In the present petition before the Commission, the petitioner has already stated that he is not questioning the issue relating to enhancement of capacity. From the order of the Hon’ble High Court as well as from the record of the proceedings, it is clear that the Government order dated 22/8/07 has provided that the enhancement of capacity is permissible subject to the approval of the Commission on technical and financial matters. It is quite clear that the Government order was issued almost after the expiry of one year after conclusion of the bid process and award of contract. Further, in the present proceedings, all the parties including the petitioner have stated that they have no objection to the increase in capacity of the project because the same is in public interest. The decision of the Government to allow enhancement of capacity came on 20/8/07, much after the completion of the bid process and award of contract. Further, the petitioner has given up the point relating to enhancement of capacity and its prayer for cancellation of award of contract and inviting fresh bids in the interest of the State/public.”

27. The above observation would clearly indicate that there is a specific finding rendered by the State Commission in the order dated 13/8/08 that already, the Government has allowed enhancement of capacity on 20/8/07 and that the private party as well as Reliance Power (Appellant herein) as one of the Respondents have not pursued the point relating to enhancement of capacity. This finding in the order dated 13/8/08 has

become final, as there was no challenge before the Appellate forum as indicated above.

28. Now, it is submitted by the learned Senior Counsel for the Appellant that the concession giving no objection for the enhancement of capacity had not been actually given by their Counsel before the State Commission and such order dated 13/8/08 has been misinterpreted in the impugned order dated 20/10/08.

29. On perusal of the order dated 13/8/08, it is clear that a categorical observation has been made by the State Commission, that the Appellant Reliance Power as well as the petitioner, a private party and all the other parties submitted before the Commission that they have no objection with regard to the enhancement of capacity in public interest, and they are only concerned with the determination of tariff. Therefore, the contention made on behalf of the Appellant does not deserve acceptance.

30. If the Appellant felt that the above finding is not factually correct, and if no such concession was given by his counsel, then the Appellant ought to have filed a review before the State Commission immediately for expunging those remarks, that there was an apparent error as no such concession was given; admittedly, this had not been done. There is no reason given on behalf of the Appellant as to why such steps were not taken. In such a situation, the Commission has observed in the order impugned dated 20/10/08 that the parties cannot be allowed to plead the

case differently from the one pleaded by them earlier, which have been already decided. The relevant portions of the said observation in the order impugned dated 20/10/08 is as follows:

***“The Reliance company in this petition is pleading for invitation of fresh bids. The order passed on 13/8/08 earlier would make it clear that similar issues have been raised by the company earlier and Shri Arvind Kumar Singh and the same was not entertained for the fact that the Counsels concerned have not pursued the matter. Therefore, the parties cannot plead the case differently than the one pleaded by them earlier, which have been decided and dealt with by the order dated 13/8/08.*”**

This observation, in our opinion, is perfectly justified. In this context, it would be appropriate to refer to the ratio on this aspect decided by the Supreme Court in some of the decisions cited by the learned Senior Counsel appearing for the Respondent. They are as follows:

In (1982) 2 SCC 463 (para 4), (State of Maharashtra vs. Ramdas Srinivas Naik, Hon’ble Supreme Court observed as follows:

***“We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been in error. That is the only way to have the record*”**

corrected. If no such step is taken, the matter must necessarily end there.”

In (2006) 8 SCC 279 (para 20) (B.S.N.L. & Ors. Vs. Subhash Chandra Kanchan & Anr., Hon’ble Supreme Court has held as follows:

“Furthermore, in terms of Order 3 Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom.

In view of the above ratio, it may not be proper on the part of the learned Senior Counsel for the Appellant to contend that no such concession was given before the Commission.

31. The learned Senior Counsel for Respondents pointed out one more aspect for consideration. Admittedly, the tender for the project was floated on 1/10/04 and was awarded in favour of Lanco as early as on 6/6/06. Immediately thereafter, the PPA was entered into between the parties. Then, M/s. Lanco commenced the project and have spent so far, approximately Rs. 998 crores in setting up the project. It is contended on behalf of the Respondents that if the award of the contract in favour of Lanco at this stage is set aside, it will lead to irreparable damage to the industrial development of the State of U.P.

32. The fact that M/s Lanco has already commenced construction of the project after obtaining all the clearances in November 2007 and that the project construction activities are progressing as per schedule, has not

been disputed by the Senior Counsel for the Appellant. The Learned Senior Counsel for M/s. Lanco submitted that it has already incurred an expenditure of Rs. 998 crores as on date on this project and for showing this expenditure, it has produced the Auditor's Certificate before this Tribunal. This is also not disputed.

33. The learned Senior Counsel for the Respondent has cited a decision in *Ramana Dayaram Shetty vs. International Airport Authority of India & Ors.* (1979) 3 SCC 489 (para 36) in order to show that when construction of the project has already commenced and a lot of amount has been invested, the prayer for quashing of the award cannot be entertained that too after a lapse of more than one year.

34. The relevant portions of the observations by the Supreme Court in the above-cited case are as follows:

“Moreover the writ petition was filed by the appellant more than five months after the acceptance of the tender of respondents 4 and during this period, respondents 4 incurred considerable expenditure aggregating to about Rs. 1,25,000 in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitable to set aside the contracts of respondents 4 at the instance of the appellant set inside the contracts of respondents 4 at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of respondents 4 but the appellant allowed a period of over five months to elapse during which respondents 4 altered their position. We are, therefore, of the view that this is not a fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under Article 226 of the Constitution.”

The above dictum laid down by the Hon'ble Supreme Court in our view would squarely apply to the present facts of the case as in this case, the construction has already been started in November 2007 itself. So far, the Respondent No.4 has spent about Rs. 998 crores on this project and at this stage, if the contract is cancelled, that too in the absence of any valid reason, it will lead to a gross negative effect as well as an irreparable damage to the industrial development of the State of Uttar Pradesh.

35. In view of the foregoing discussions, we are unable to see any reason to interfere in the impugned order passed by the Uttar Pradesh State Commission. Hence the appeal is liable to be dismissed as devoid of merits. Accordingly, the Appeal is dismissed. No costs.

(A.A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th January, 2009.

REPORTABLE/NON-REPORTABLE