

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO.50 OF 2015

Dated: 30th March, 2015

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.
Hon'ble Shri Rakesh Nath, Technical Member.**

IN THE MATTER OF:

**DB Power Ltd.,
Having its registered office at
Office Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I
Bhopal-462016.**

... Appellant

Versus

- 1. Central Electricity Regulatory
Commission
3rd & 4th Floor, Chanderlok
Building, 36, Janpath, New Delhi.**
- 2. Power Grid Corporation of India
Limited,
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi-
110016.**
- 3. Kerala State Electricity Board
Vydyuthi Bhavanam
Pattom, Thiruvananthapuram
Kerala-695004.**

**4. Tamil Nadu Generation and Distribution Corporation Ltd.,
NPKRR Maaligai, 144, Anna Salai
Chennai-600002.**

**5. Karnataka Power Transmission Corporation Ltd.,
Kaveri Bhawan, K.G. Road
Bangalore-560009.**

... Respondents

Counsel for the Appellant(s) : Mr. Krishnan Venugopal Sr. Adv.
Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Deepak Khurana
Mr. Vikas Mishra
Mr. Vikas Adhia
Mr. Himanshu Sharma
Mr. Kartik Nagarkatti
Mr. Gaurav Ray
Mr. Kaushik Mishra

Counsel for the Respondent(s) : Mr. S.B. Upadhyay, Sr. Adv.
Ms.Sakie Jakharia for R.2

Ms. Suparna Srivastava
Ms. Nishtha Sikroria
Mr. Kumar Harsh for R.3

Mr. G. Sreenivasan for KSEB

Mr. Vallinayagam for R.4

Mr.Anand K. Ganesan
Ms. Swapna Seshadri for KSK

Mr. Sitesh Mukerjee
Mr. Jafar Alam
Mr. Aditya Mathur & Ms. Payal
Chandra for EMCO

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. The Appellant is a generating Company incorporated under the Companies Act 1956. Respondent No.1 is the Central Electricity Regulatory Commission (**CERC**) which has issued the impugned order dated 16/2/2015 in Petition No.MP/376/2014. Respondent No.2, Power Grid Corporation of India Ltd (**PGCIL or CTU**) is the Central Transmission Utility which owns and manages the inter-state transmission system across India. PGCIL is a body corporate, which is vested with the functions of Central Transmission Utility as provided under Section 38 of the Electricity Act 2003 (**the said Act**). PGCIL is an inter-state transmission licensee, which is having power to grant connectivity to the generators and also to allot open access for evacuation of power from the generating station to the Grid. By order dated 01/10/2014 CERC had directed the Appellant to implead Respondent Nos. 3 to 5. Hence, they are impleaded as parties to the instant appeal.

2. The Appellant's case is as under:

- a) The Appellant executed a long term Power Purchase Agreement(PPA) dated 19/8/13 with Tamil Nadu Generation & Distribution Corporation(**TANGEDCO**) for supply of a quantum of 208 MW from 01/2/14 to 30/9/2028. The PPA was signed pursuant to a competitive bidding process through issue of RFP for procurement of power for long term under case I bidding procedure issued by TANGEDCO. The Appellant was selected by TANGEDCO as a successful bidder for supply of 208 MW of power as required by TANGEDCO.

- b) The Appellant had originally been granted Long Term Access (LTA) to the Western Region & Northern Region Grid from PGCIL for 705 MW in 2009. However, subsequently the Appellant wanted to shift 208 MW to Southern Region Grid because it had entered into PPA with TANGEDCO for supply of 208 MW of power from its 600 MW X 2 power plant in Chhatisgarh starting from 01/2/14. Accordingly, the

Appellant submitted a copy of the PPA to PGCIL in August 2013 thereby requesting for allocation of LTA of 208 MW.

- c) In November 2013, the Appellant was informed by PGCIL that a fresh application for LTA would have to be filed. Accordingly, the Appellant submitted its LTA application on 25/11/2003 in the prescribed form as per the “Detailed Procedure for Making Application for Grant of Connectivity in ISTS” (Detailed Procedure) along with a cheque dated 24/11/2013 for Rs. 3 lakhs towards the application fee, which was accepted by PGCIL without objection. The LTA application was made in the Format-LTA-2 provided under Detailed Procedure formulated by PGCIL which was approved by CERC pursuant to Regulation 27(1) of the Central Electricity Regulatory Commission(Grant of Connectivity, Long Term Access & Medium Term Open Access in inter-state Transmission and related matters Regulations,2009 **(Connectivity Regulations)**). Under this application the Appellant had applied for grant of LTA of 208 MW with effect from 01/2/2014 till 30/9/2028. Entry 6 of the Format-LTA-2

of the Detailed Procedure provides for furnishing of details of “DD/Cheque-e-transaction (application fees)”. Accordingly, the Appellant had provided details of the cheque deposited by it along with the LTA application.

- d) In furtherance of the application for grant of LTA made by the Appellant PGCIL vide letter dated 20/12/13 granted LTA for 208 MW in favour of the Appellant. Additionally vide letter dated 20/12/2013 PGCIL granted LTA to three more applicants i.e.(i) Jindal Power, (ii) BALCO & (iii) Ind-Bharat Energy which had applied for energy in November 2013 on a pro rata basis, subject to signing of formal LTA agreements vide letter dated 20/12/13. The Appellant was granted LTA for 36 MW from 01/6/14 to 31/7/14. Further the Appellant was granted LTA for 208 MW from 01/8/14 to 30/9/28. The LTA was granted for the full quantum of 208 MW from 01/8/14 to the Appellant on the ground that CTU was commissioning the newly built 765 KV Solapur-Raichur D/c line as a result of which there was an additional Available Transmission Capacity(ATC) of 1250 MW from the NEW Grid

to the Southern Grid. This is evident from PGCIL's letter dated 20/12/13.

- e) On 22/01/14 the Appellant received an e-mail communication issued by Mr. Prashant Pandey of PGCIL. It contained an attachment in the name of "ICICI Bank-DB Power LTA Fees.pdf". Upon perusal of this attachment it was found that ICICI Bank had sent a computer generated letter dated 19/12/13 addressed to PGCIL stating that cheque No.126341 for Rs.3,00,000/- presented in clearing by PGCIL is returned unrealized on 19/12/13 with the reason "Drawers Signature Differs". The letter also provided a copy of the cheque dated 24/11/13 bearing No.126341 of Rs.3,00,000/- issued by the Appellant to PGCIL towards application fees for grant of LTA.
- f) Upon receipt of the above e-mail the Appellant immediately on the very day i.e. on 22/01/14 submitted a demand draft of Rs,3,00,000/- in favour of PGCIL in substitution of the cheque submitted by the Appellant. It was duly accepted by PGCIL towards application fees without any protest. Pertinently,

though PGCIL had received letter from ICICI Bank on 19/12/13, PGCIL communicated the factum of return of the cheque to the Appellant vide communication dated 22/01/14 i.e. after a lapse of more than a month.

- g) On 22/9/14 PGCIL issued a letter to the Appellant treating the LTA application of the Appellant as having been filed in January 2014 as against that of November 2013 on the sole ground that the cheque submitted by the Appellant along with application dated 29/11/13 had been returned for technical reason. PGCIL by that letter cancelled LTA granted to the Appellant on 20/12/13. LTA granted to M/s Ind-Bharat Energy, M/s BALCO & M/s Jindal Power was also cancelled.
- h) The decision of PGCIL deferring the Appellant's LTA application to January 2014 taken vide letter dated 22/9/2014 has serious civil consequences. The Appellant is suffering a huge financial loss of Rs.40 crores per month arising out of stranding of its generation capacity. The Appellant therefore challenged the validity of the decision of

treating the Appellant's LTA application as having been filed in January 2014 as against November 2013 and validity of the cancellation letter dated 22/9/14 before the CERC vide a petition under section 79(1)(e) read with Sections 79(1)(f) & 79(1)(k) of the said Act.

3. By the impugned order CERC disposed of various petitions. So far as the Appellant's petition is concerned CERC *inter alia* held that requirement of payment by cheque contemplated under the Format-LTA-2 should be read as payment by Banker's Cheque since in all respects it is as good as a demand draft (DD). CERC held that cheque is not an acceptable mode of payment of application fee and therefore non-payment of application fee on account of dishonour of cheque has to be borne by the Appellant. CERC further held that the application of the Appellant has rightly been considered by CTU as an application made in January 2014. CERC further held that the Appellant was aware about the dishonour of cheque; CTU had given cogent reasons for not considering the application of the Appellant and therefore it was not necessary to give personal

hearing to the Appellant. Being aggrieved by this order the Appellant has preferred this appeal.

4. We have heard Mr. Krishnan Venugopal, learned Senior Counsel appearing for the Appellant at some length. Written submissions have been filed on behalf of the Appellant. We may give gist of the written submission of the Appellant:

a) A cheque can never mean a 'Banker's Cheque'. A Banker's Cheque is an entirely different negotiable instrument that works like a demand draft. A cheque has to be understood in a popular and commercial parlance(**State of UP v. Kores¹& MSCO Pvt. Ltd. v. Union of India²**).

b) CERC erred in holding that cheque is not an acceptable mode of payment of LTA application fee. PGCIL had accepted the payment by cheque. It did not reject it under clause 22.10 of the Detailed Procedure as being incomplete. On this issue

¹ (1976)4 SCC 477

² (1985) 1 SCC 51

PGCIL has taken contradictory stand before the CERC and in this Tribunal.

- c) A cheque cannot be read together with e-transaction because there is no 'or' or 'slash' between them. An 'e-transaction' using internet is always made without the intervention of a cheque. The term 'cheque' has to be read independently. The failure to introduce a slash between cheque and e-transaction is just an error made by PGCIL in framing Format-LTA-2.
- d) On being orally informed that its August 2013 application was not sufficient and a fresh LTA application was necessary the Appellant was forced to file its application in a huge hurry on 25/11/13. The cheque was returned on 19/12/13 solely on the technical ground of a signature mismatch. The Appellant had the funds in the account. PGCIL informed the Appellant only on 22/01/14 i.e. one month after the return of the cheque. The Appellant showed its *bona fides* by replacing the cheque with a demand draft on the same day on which it was informed by PGCIL. All these circumstances must be taken

into account. The Appellant cannot be punished for return of cheque on technical grounds.

- e) Payment of the application fee by cheque does not violate Connectivity Regulations or Detailed Procedure. Contention that clause 23.5 must prevail over Format-LTA-2 is without merit. Clause 23.1 of the Detailed Procedure states that the Applicant shall make an application in prescribed format. Form provides for payment by “DD/Cheque e-transaction”.
- Commissioner of Income Tax V. Tulsyan Limited³& Modi Spinning & Weaving Mills Co.Ltd V. Commissioner of Sales Tax⁴** have no application to the present case. They differ from the facts of the present case. **In Polestar Electronic V.Addl.C.S.T (1978) Modi Spinning** is distinguished and it is held that no liability could be foisted on an assessee who complies with the terms of his declaration in a prescribed form.

³ (2011) 2 SCC 1

⁴ AIR 1965 SC 957

- f)** As Connectivity Regulations did not prescribe a mode of payment the Appellant's LTA application was in conformity with the Connectivity Regulations.
- g)** PGCIL is barred by waiver and promissory estoppels from treating the Appellant as a January 2014 applicant.
- h)** PGCIL's contention that the LTA grant order of 20/12/13 was not based on 25/11/13 LTA application is being raised for the first time. Admittedly this issue is being litigated by various applicants before the Madras High Court. In the event it is held in those proceedings that there is no need for a fresh LTA application in case of existing LTA customers, the Appellant would be entitled to LTA based on its 23/8/13 request for change of LTA by enclosing PPA with TANGEDCO.
- i)** PGCIL never revoked 20/12/13 grant of LTA and continued to treat all of them as November 2013 applicants. In view of the ratification of the 20/12/13 LTA grant order repeatedly by PGCIL it cannot say now that it is void.

- j) Because of the grant of LTA in favour of the Appellant on 20/12/13, the Appellant proceeded to alter its position to its detriment.
- k) The present case is clearly covered by judgments **in Krishna Kumar Meditratta v.Phulchand Agarwala⁵& State of Punjab V. Nestle India Ltd⁶.**
- l) Issue of estoppel against statute does not arise in this case because the present case involves only interpretation of two clauses of the Detailed Procedure. **M.L. Sharma V. Principal Secretary⁷ & M.I. Builders Pvt. Ltd. V. Radhey Shyam Sahu⁸** concern violation of express statutory provisions.
- m) PGCIL's order is in breach of principles of natural justice. When exercise of power results in serious civil consequences hearing must be given **(State of Haryana v. Ram Kishan⁹, Sahara India (Firm) (1) V CIT¹⁰**. It was wrong to hold that

⁵ (1977) 2 SCC 5

⁶ (2004) 6 SCC 465

⁷ (2014) 9 SCC 614

⁸ (1999) 6 SCC 464

⁹ (1988) 3 SCC 416

¹⁰ (2008) 14 SCC 151

hearing was a useless formality. This theory applies only in cases where there are admitted or indisputable facts leading to only one conclusion **(S L Kapoor v. Jagmohan & Others** ¹¹, **M C Mehta v. Union of India & Others**¹²). If the Appellant was heard CERC's conclusion would have been different because CERC has while holding against the Appellant, severely commented on PGCIL's handling of the case.

n) The Appellant should not be made to suffer because of the ambiguity created by the inconsistency between Clause 23.5 & the Format-LTA-2. The ends of justice would be met by treating the Appellant as a November 2013 applicant.

5. We have heard learned Mr. S.B. Upadhyay, learned counsel appearing for Respondent No.2. We have also perused the written submissions filed by him. Gist of the submissions of Respondent No.2 is as under:

¹¹ (1980) 4 SCC 379

¹² (1999) 6 SCC 237

- a) As per Regulation 6 of the Connectivity Regulations fee accompanying LTA application is non refundable and the fee is payable in the name and in the manner to be laid down by the CTU in the Detailed Procedure. Paragraph 23.5 of the Detailed Procedure states that “bill payments are to be paid through DD or directly credited to POWERGRID account electronically through RTGS “(Real-Time Gross Settlement)”. Paragraph 22.10 thereof states that all incomplete applications not found in conformity with the Detailed Procedure & Regulations shall be rejected.
- b) The Appellant is relying on the Format-LTA-2. However at the same time the Appellant is submitting that Detailed Procedure has no statutory force. Detailed Procedure is formulated under Regulation 27 of the Connectivity Regulations 2009 which has a statutory force.

- c) **In PTC India Ltd v. CERC**¹³ the Constitution Bench has held that a Regulation under Section 178 of the said Act as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations.
- d) Only payments made by way of DD or RTGS as provided in the Detailed Procedure could be accepted as proper mode of payment of fee for LTA application because such payments are 'firm and secure'.
- e) As per Regulation 6 of the connectivity Regulations and Clauses 23.4 & 23.5 of the Detailed Procedure since the cheque accompanying LTA application dated 25/11/11 was dishonoured, and was replaced by the Appellant by DD on 22/01/14, the application filed by the Appellant can only be treated as application filed in January 2014.

¹³ 2010 (4) SCC 603

f) Fifth proviso of Regulation 12 (1) of the Connectivity Regulations mandates a fresh application for a change in Target Region by an applicant seeking LTA. CTU asked clarification from CERC whether as the Appellant has already been granted LTA, it qualifies as an 'LTA Applicant' and therefore whether there is a need for a fresh application from the Appellant. However, CERC did not address the issue. Thereafter in view of Standing Committee meeting dated 03/10/13 PGCIL proceeded to consider the earlier request of the Appellant filed on 23/8/13 and granted Supplementary Intimation dated 20/12/13 for 208 MW from 01/8/14 to 30/9/28.

g) Thereafter pursuant to Standing Committee meetings which were held on 28/3/14 and 21/5/14, and which were duly attended by the Appellant it was decided that the application filed by the Appellant for change of region shall be considered as fresh application under Regulation 12 of the Connectivity Regulations. Since the cheque accompanying application dated 25/11/13 was dishonoured, application dated

25/11/13 with which DD was deposited was treated as a fresh application. Since no LTA was granted pursuant to application filed in month of November 2013 there was no question of cancellation of LTA granted pursuant thereto by letter dated 22/9/14.

- h) There is no estoppel against statutory provisions. **Kishori Lal V. DEO**¹⁴; **M.L. Sharma V. Principal Secretary (Coal Allocation Case)**¹⁵; **M.L. Sharma V. Principal Secretary**¹⁶; **M.I. Builder Pvt. Ltd v. Radhey Shyam Sahu & Ors**¹⁷.
- i) A person cannot be permitted to take undue & unfair advantage of his own wrong to gain favourable interpretation of law. **K.P. Singh v. State of Bihar**¹⁸.
- j) No right can be claimed to have accrued in favour of the Appellant by the Supplementary Intimation letter dated 20/12/13 which was null and void. Plea of the Appellant that

¹⁴ **1989(9) SCC 395**

¹⁵ 2014(9) SCC 516

¹⁶ 2014(9) SCC 614

¹⁷ 1999(6) SCC 464

¹⁸ 2007(11) SCC 447

PGCIL was estopped from declaring letter dated 20/12/13 as null and void must be rejected.

k) On the basis of admitted facts of this case incompleteness of the application is the only conclusion which can be drawn and this infirmity would relate back to the date of application made in November 2013. Thus any opportunity of hearing would be an empty formality. **Aligarh Muslim University V. Mansoor Ali Khan¹⁹; Jagdish Mandal V. State of Orissa²⁰; Siemens Public Communication Network Private Limited & Anr V. Union of India & Ors²¹.**

l) Appeal is devoid of substance and must be dismissed. If the impugned order is not upheld, illegality shall be perpetuated.

6. Intervener K.S.K Mahanandi Power Company Ltd who had entered into a PPA with TANGEDCO for 500 MW and applied for LTA in November 2013 has been permitted to assist the court only on the questions of law involved in this case. Gist of the

¹⁹ 2000(7) SCC 529

²⁰ 2007(14) SCC 517

²¹ 2008(16) SCC 215

submissions filed by the intervener so far as it relates to legal submissions is as under:

- a)** The procedures prescribed are statutory in nature. The procedures are notified by the Central Commission in exercise of powers under Regulation 27 of the Connectivity Regulations. The Regulations are binding on all **PTC India Ltd.**
- b)** It is settled principle of law that when any action is contrary to law it needs to be quashed and corrected. Hence, if open access is wrongly granted when it ought to have been rejected, upon detection of wrongful grant it needs to be cancelled.
- c)** Reliance placed on **Krishna Kumar Mendiratta** is wrong.
- d)** The settled principle of law is that when particular methodology is provided all others are barred, Article 23.5 provides for payment by DD or electronically to Powergrid

account directly. These are the only two methods permitted.

e) Format-LTA-2 does not provide for cheque. It only provides for DD or electronic transfer. Form can never have the effect on interpretation or operation of the parent statute (**Commissioner of Income Tax V. Tulsyan Limited, Modi Spinning**).

f) The contention that the dishonour was due to 'signature mismatch' which cannot be the same as insufficiency of funds etc. is not correct. Signature mismatch is treated in the same manner as any other dishonour even under Section 138 of the Negotiable Instruments Act (**Laxmi Dyechem V. State of Gujarat**²²).

7. Counsel for Respondent No.1 has supported the impugned order.

²² (2012) 13 SCC 375

8. The impugned order turns more on facts. It is therefore necessary to revisit the material facts. Admittedly the Appellant had originally been granted LTA to the Western Region & Northern Region Grid from PGCIL for 705 MW in 2009. On 19/8/2013 the Appellant executed a long term PPA dated 19/8/2013 with TANGEDCO for supply of a quantum of 208 MW from 01/2/2014 to 30/9/2028. After execution of the PPA on 23/8/2013, the Appellant submitted a copy of the PPA to PGCIL in the month of August 2013 thereby requesting for allocation of LTA of 208 MW to the Southern Region Grid out of 705 MW LTA granted in 2009 for Western and Northern Regional Grid. The Appellant was verbally informed by PGCIL that a fresh LTA application would have to be filed for allocation of LTA to Southern Region. Accordingly, the Appellant filed its LTA application on 25/11/2013 in Format-LTA-2 for grant of LTA of 208 MW for Southern Regional Grid with effect from 01/02/14 till 30/9/28. Format-LTA-2 is the form prescribed under the Detailed Procedure. Along with the application the Appellant sent a cheque dated 24//11/2013 for Rs.3 lakhs towards application fee, which was accepted by PGCIL without any objection. On 19/12/2013 ICICI Bank sent a computer generated

letter to the PGCIL. The letter was addressed to PGCIL stating that cheque issued by the Appellant along with LTA application presented in clearing by PGCIL had returned unrealised on 19/12/2013 with the reason "Drawers Signature Differs". It is necessary to note that despite the knowledge of return of the Appellant's cheque, PGCIL vide letter dated 20/12/2013 granted LTA for 208 MW in favour of the Appellant vide letter dated 20/12/2013. PGCIL also granted LTA to three more applicants on pro rata basis. From the copy of the letter dated 20/12/13 issued by PGCIL to the Appellant to which our attention is drawn by the Appellant it appears that the Appellant's application was granted after an indepth study of all relevant considerations. It was stated in the letter that since no margins were available on the existing corridor, it was proposed to grant LTA with the commissioning of Solapur-Raichur 765 KV corridor. The letter further stated that in the joint standing committee meeting it was agreed that LTA may be granted after six months of synchronization of Southern Region with New Grid i.e. 11/8/14. The letter stated that the Appellant's request was examined by CTU along with other such requests and studies were carried out for the same and the request for LTA for 26

MW in favour of the Appellant was granted from 01/6/14 to 31/7/14. The Appellant was also granted LTA for 208 MW from 01/8/14 to 30/9/28. Pertinently during all this there was not a whisper from PGCIL about any infirmity in the application for LTA submitted by the Appellant. From the certificate of the total transfer capability for August & September 2014 issued by PGCIL, copy of which is annexed to the appeal memo, it appears that LTA was granted after conducting system augmentation and study of the available transmission corridor by PGCIL.

9. On 22/01/2014 the Appellant received an e-mail communication issued by PGCIL which conveyed to the Appellant that its cheque had returned unrealized on 19/12/2013. On 22/01/2014 itself, the Appellant submitted a DD for Rs.3,00,000/- in favour of PGCIL in substitution of the cheque submitted by it. It is important to note that it was duly accepted by PGCIL without any protest. PGCIL never made it known to the Appellant that dishonour of its cheque because of signature mismatch was a criteria for disqualifying the Appellant for grant of LTA or would lead to revoking of the grant of LTA.

10. At this stage it is relevant to note that PGCIL held a number of meetings with concerned parties including Western Regional Load Dispatch Centre (WRLDC) & LTA applicants to discuss LTA allocations and operationalization for Southern Region. PGCIL appears to have issued three agenda notes on 13/3/2014, 15/5/2014 & 22/8/2014 and held three meetings on 28/3/14, 21/05/14 & 1/9/2014 respectively in this regard. In each of these meetings, PGCIL treated the Appellants LTA application as having been made in November 2013 and acknowledged that it had already granted LTA to the Appellant for the Southern Region vide letter dated 20/12/2013. This is evident from the agenda notes and minutes of meetings annexed to the appeal memo by the Appellant.

11. It appears that based on the grant of LTA the Appellant declared the commercial operation date of its Unit-1 as 19/6/14 and informed WRLDC of this. Pursuant to PGCIL's decision that LTA would be allocated only after a dedicated transmission line had been commissioned the Appellant also completed and declared the

commercial operation of its dedicated transmission line on 20/6/14.

12. Despite all this surprisingly by letter dated 20/9/14 i.e. eight months after having received a DD of Rs.3 lakhs in place of cheque PGCIL treated the LTA application of the Appellant as having been filed in January 2014 as against that of November 2013 on the ground that the cheque submitted by the Appellant along with the application dated 25/11/13 had been dishonoured for signature mismatch. It was observed in the said letter that though the application was received in the month of November,2013, the requisite fee was submitted in the month of January 2014 and therefore PGCIL had treated the application of the Appellant as having been filed in the month of January 2014. How far the action of PGCIL is correct and legal is the question.

13. It is necessary to note certain events which the Appellant has brought to our notice. While the proceedings before the CERC were going on the Appellant communicated to PGCIL vide its letter dated 24/2/14 that it had achieved full load on 23/2/14. The Appellant also responded to the letter dated 21/2/14 issued by PGCIL seeking

information in relation to commissioning of Unit-I and status of dedicated line. It appears that though Unit-I was technically ready for generation from 23/2/14, the Appellant could not declare commercial operation in February 2014 because of non-availability of transmission corridor against the long term PPA signed with TANGEDCO.

14. As already noted, CERC by the impugned order affirmed the decision of CTU to consider the Appellant's application as having been made in January 2014. While coming to this conclusion the CERC framed three issues. They are as under:

A. **Issue No.8** – Whether cheque is an acceptable mode of payment of application fees while applying for LTA under the Connectivity Regulations and Detailed Procedure?

B. **Issue No.9** – Whether the application of DB Power has been correctly considered by CTU as an application made in January 2014?

C. **Issue No.10** – Whether DB Power had a right of hearing before CTU/PGCIL?

15. Before we consider whether the reasoning of the CERC is correct or not, we must go to the relevant provisions of the Connectivity Regulations and the Detailed Procedure.

16. Connectivity Regulations are framed by the CERC under Section 178 of the said Act. Regulation 5 thereof states that applications for grant of connectivity or long-term access or medium-term open access shall be made to the nodal agency. Regulation 6 says that the application referred to in Regulation 5 shall be accompanied by a non-refundable application fee specified thereunder, payable in the name and in the manner to be laid down by the CTU in the Detailed Procedure. Regulation 10 speaks of Relative priority. So far as it is relevant it reads thus:

“10. Relative Priority

- (1) Applications for long-term access or medium-term open access shall be processed on first-come-first-served basis separately for each of the aforesaid types of access:
Provided that applications received during a month shall be construed to have arrived concurrently;***

.....”

17. Regulation 12 refers to application for long term access. So far as it is relevant it reads thus:

“12. Application for long-term access

(1) The application for grant of long-term access shall contain details such as name of the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured along with the quantum of power and such other details as may be laid down by the Central Transmission Utility in the detailed procedure:

.....”

Regulation 27 relates to Detailed Procedure. It reads thus:

“27. Detailed Procedure

(1) Subject to the provisions of these regulations, the Central Transmission Utility shall submit the detailed procedure to the Commission for approval within 60 days of notification of these regulations in the Official Gazette:

Provided that prior to submitting the detailed procedure to the Commission for approval, the Central Transmission Utility shall make the same available to the public and invite comments by putting the draft detailed procedure on its website and giving a period of one month to submit comments;

Provided further than while submitting the detailed procedure to the Commission, the Central Transmission Utility shall submit a statement indicating as to which of the comments of stakeholders have not been accepted by it along with reasons thereof.”

Pertinently the Connectivity Regulations do not provide the mode and manner of payment of application fee.

18. The importance and primacy of the Regulations framed under Section 178 of the said Act has been highlighted by the Constitution Bench in **PTC India Ltd.** While emphasizing its importance the Constitution Bench has said that a Regulation framed under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations. Regulation 27 of the Connectivity Regulations framed under Section 178 of the said Act provides for Detailed Procedure. As per Regulation 27 of the Connectivity Regulations CERC has prepared the Detailed Procedure. Respondent No. 2 has accepted that the Detailed Procedure has a statutory force. It must be borne

in mind that we are concerned herewith LTA and not Medium Term Open Access (MTOA).

19. It is now necessary to refer to relevant clauses of the Detailed Procedure. Clause 22.10 thereof says that an incomplete application and/or an application not found to be in conformity with the Detailed Procedure and Regulations shall be rejected. Under Clause 23.1, the LTA applicant has to make an application in prescribed format i.e., Format-LTA-2 to the CTU. Clause 23.4 says that the application shall be accompanied by a non-refundable application fee as per details given thereunder. Clause 23.5 says that all payments are to be paid through DD or directly credited to Powergrid account electronically through RTGS (Real Time Gross Settlement) (emphasis supplied). Since Clause 23.1 requires the applicant to make applications in the prescribed formats we must now go to the relevant portion of Format-LTA-2. At column 6 of Format-LTA-2 following information is sought for.

**“6. Details of DD/Cheque e- transaction
(Application Fee)**

Amount (in Rs.)

DD / Cheque transaction No.

Date:

Bank Name

Branch Name”

20. Thus we have here a situation where as per the Regulations the application for LTA has to be accompanied by a non-refundable fee payable in the name and in the manner to be laid down by the CTU in the Detailed Procedure. Further as per the Regulations such applications have to be processed on first-come-first served basis, but all applications received during a month have to be construed to have arrived concurrently. While Clause 23.5 says that all payments are to be made through DD or directly credited to Powergrid account electronically or through RTGS, Format-LTA-2 which the applicant is required to fill as per Clause 23.1 requires the applicant to furnish information about details of DD / Cheque e-transaction and DD / Cheque transaction number. Therefore apart from payment through DD or electronically directly in the

account of the Powergrid or through RTGS, Format-LTA-2 contemplates payment through cheque also. It is not understood what is meant by cheque e-transaction. It is submitted that there is no or or a stroke between the words cheque and e-transaction and therefore it is one word. Assuming it to be one word, it makes no sense. There can be payment through internet banking, but that is always made without the intervention of a cheque. It is also pertinent to note that in case of application for MTOA, Clause 13 says payment could be made through DD or RTGS but Format – MTOA 3 which has to be filled in by MTOA applicants provides for payment only by DD / Cheque and the term ‘e-transaction’ is missing. Therefore the term cheque and the term e-transaction cannot be clubbed together. The term cheque has to be read independently of the term e-transaction. This leads us to conclude that the Appellant was not wrong in submitting a cheque. The Appellant was led to believe that payment could be made through a cheque. Even PGCIL was content with cheque payment. We have narrated the details about the various meetings of PGCIL, the agenda notes issued by it and the correspondence between the Appellant and PGCIL, which clearly indicate that PGCIL found no

irregularity in cheque payment and it accepted it without any grievance. In fact in the counter affidavit filed before CERC, PGCIL admitted that LTA application fee can be paid by cheque but because it was dishonoured the Appellant must bear the consequences. It must be noted here that in the affidavit filed in this Tribunal, PGCIL has taken a contrary stand. It has stated that cheque is not an acceptable mode of payment but this is without prejudice to its contention that cheque is acceptable so long as it is honoured in the first instance.

21. We are unable to accept the contention of Respondent No. 2 that the Appellant is a wrongdoer and is trying to take undue advantage of its own wrong. It is PGCIL who adopted a casual approach. It is the ambiguity between Format-LTA-2 and Clause 23.5 of the Detailed Procedure which has created this situation. It is not possible to hold that the Appellant is making profit out of his own wrong. Reliance placed on **K. P. Singh** is therefore misplaced.

22. We will now see how the CERC dealt with this issue. CERC has stated that Clause 23.5 of the Detailed Procedure provides

payment by DD or RTGS only. This is to ensure that payment made by the applicant is firm and secure. CERC has further observed that in case of cheques there is an element of uncertainty on account of non-availability of funds in the account of the person who issues the cheque. CERC has posed a question as to why cheque transaction number is sought for in the Format-LTA-2. CERC itself is not certain about the answer because it has observed that “this could be possibly on account of the reason that for intra-city transactions where Banks issue Banker’s cheque instead of DD, since in all respects a Banker’s cheque is as good as a DD”. On this possibility CERC has concluded that cheques other than Banker’s cheque cannot be an acceptable mode of payment of application fees under the Detailed Procedure. Neither the Connectivity Regulations nor the Detailed Procedure mention the expression “Banker’s cheque”. It was wrong therefore for the CERC to introduce this requirement. Besides Banker’s cheque is analogous to DD. Since DD is already mentioned in the Format-LTA-2 there is no need to introduce Banker’s cheque in it. In this connection it would be advantageous to refer to **State of U.P. &**

Anr. V. M/s Kores (India) Ltd.²³ where the Supreme Court has observed that a word which is not defined in an enactment has to be understood in its popular and commercial sense with reference to the context in which it occurs. Again in **M/s Misco Pvt. Ltd** the Supreme Court has observed that while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. The word 'cheque' therefore, in our opinion, cannot be replaced by the words 'Banker's cheque. In the facts of this case. Given the not so clear clauses of the Detailed Procedure leading to ambiguity and confusion and absence of any procedure in the Connectivity Regulations, it is not possible to concur with the CERC that cheque is not acceptable mode of payment of fees. In fact the CERC in the impugned order gave some directions to CTU regarding acceptance of application and application fee and to make suitable amendment to the Detailed Procedure in this regard.

²³ (1976 (4) SCC 477)

23. The cheque which was sent along with application dated 25.11.2013 was accepted by PGCIL without demur. On 19.12.2013 ICCI Bank sent letter dated 19.12.2013 addressed to PGCIL stating that the said cheque was dishonoured because of signature mismatch. However, in spite of this on 20.12.2013 the appellant's application was granted and the appellant was granted LTA. On 23.1.2014 when the Appellant received e-mail communication about the dishonour, it sent a DD in the sum of Rs 3 lakhs which was accepted by PGCIL. But on 22.9.2014, PGCIL sent a letter to the Appellant stating that its application of November 2013 is being treated as one filed in January 2014 as its cheque was dishonoured for technical reasons. This shows that PGCIL itself was not sure what was the acceptable mode of payment. It gave an impression to the Appellant that all was well. It cannot then turnaround and take a completely different and new stand.

24. Now the next question which was rightly framed by CERC is whether the Appellant's application has been correctly considered by PGCIL as an application made in January 2014. In our opinion

the answer to this question must be in the negative. For this we have to only refer to certain observations made by CERC about the conduct of PGCIL. CERC has observed that PGCIL should have as per Clause 3.6 of the Detailed Procedure rejected the Appellant's application as being incomplete. PGCIL by accepting the cheque created an impression that payment through cheque is permissible. CERC further observed that ICICI bank had sent a mail to PGCIL about signature mismatch on 19.12.2013. PGCIL should have immediately informed the Appellant about the dishonour of the cheque and rejected its application. Instead vide its letter dated 20.12.2013 PGCIL intimated about the grant of LTC to the Appellant. PGCIL obviously did not link the non realization of cheque with the issue of letter granting LTA. CERC further observed that PGCIL intimated about non realization of cheque to the Appellant only on 22.1.2014 i.e. more than one month after it was returned by ICICI Bank. CERC further observed that PGCIL accepted a DD submitted on the same day. Even at that stage, it was incumbent on PGCIL to inform the Appellant that the priority of its application has been shifted from November 2013 to January 2014 when the draft was received and its LTA application would be

considered accordingly. CERC further rightly commented that PGCIL did not do so and in the minutes of the meetings held on 28.3.2014 & 21.5.2014 and in the agenda for the meeting dated 01.9.2014 PGCIL treated the application of the Appellant as having been made in November 2013.

25. We concur with the above observations of the CERC. If according to the PGCIL cheque was not correct mode of payment, it ought to have rejected it at the outset. It not only accepted it, but in its various meetings raised no issue about it, granted LTA on submission of DD in place of cheque and as late as on 22.9.2014 sent a letter to the Appellant intimating to it about shifting its priority. We are also of the opinion that Respondent No. 2 has placed undue reliance on the word “non-refundable” appearing in Regulation 6. The word non-refundable only means that the fee will not be refunded. It does not suggest any particular mode of payment.

26. Reliance is placed by the Appellant on **Krishna Kumar Mediratta**. In that case the Appellant therein had applied for

mining license in the requisite Form B under rule 9(1) of the Mineral Concession Rules 1960 made under 513 of the Mines and Minerals (Regulation & Development) Act 1957. The application was filed correctly but the license fee accompanying the application was deficient. The Appellant therein paid the deficit fee later on. Respondent No.1 therein also applied for license. Respondent No. 1 was given license for mining which included license for disputed land. On 12.4.73 the Central Government accepted the Appellant's objection to 272 acres. The High Court quashed the Central Government's order on the ground that the original application of the Appellant was no application at all in the eyes of law as it was not accompanied by correct fee as per the mandatory provisions of law. The Supreme Court set aside the High Court's order holding that it may be that a license cannot be granted without making good the deficiency in fee which should accompany the application, but that does not mean that a bonafide application accompanied by an incorrectly calculated fee or a fee which is deficient by oversight could not be made at all or if made must be treated as void.

27. This judgment, according to the Respondents is not applicable to this case because that case involved deficient fee which was ultimately paid. We feel that because of this dissimilarity in the facts, **Krishna Kumar Mediratta** cannot be held to be inapplicable. Bonafides of the Appellant herein are also not doubted. The application was made bonafide. It was accepted without demur. Action was taken thereon. Request for grant of LTA was granted. On that basis the Appellant declared commercial operation date of its Unit 1 and informed the authorities about it. The Appellant also completed & declared the commercial operation of its dedicated transmission line as required by PGCIL. Moreover cheque was given because it was specifically mentioned in Format-LTA-2 and if there was no clarity only PGCIL could be held responsible for it and not the Appellant. PGCIL's conduct has rightly been adversely commented upon. It is true that dishonour of cheque due to mismatch of signature is also dishonour for the purpose of Sec. 138 of the Negotiable Instruments Act. But in the peculiar facts of this case, when on the basis of grant of LTA, the Appellant has taken action and when it is nobody's case that there was no money in the Appellant's account, or that it wanted to

cheat, and when the Appellant on the same day when it got to know about the dishonour submitted a DD which was accepted & LTA was granted thereafter, we do not see how it could be stated that the Appellant's application dated 25/11/13 was no application at all and it must be treated as application made in January 2014. In the circumstances of the case bonafide application made by the Appellant on 25/11/13 cannot be treated as no application in the eyes of law. Ratio of **Krishna Kumar Mediratta** would be applicable to this case.

28. It is sought to be contended for the first time by Respondent No. 2 that LTA grant order was not based on 25/11/13 application, but it was pursuant to earlier application made on 23/8/13. This was not Respondent No. 5's stand either before CERC nor is it reflected in order dated 22/9/13. In any case we do not find any substance in it. It is an admitted position that there was some confusion over this issue and it was agitated before the Madras High Court. But the fact remains that PGCIL deliberated over this issue with stakeholders including the Appellant and came to a conclusion that fresh application was necessary and hence fresh

application was filed. Besides we find substance in the contention of the Appellant that if it is held as a matter of law that there is no need for a fresh LTA application in case of existing LTA customers, obviously the Appellant would also be entitled to change of LTA based on its 23/8/13 request for change of LTA by enclosing PPA with TANGEDCO.

29. It is contended by the Appellant that PGCIL is barred by waiver & promissory estoppel from treating the Appellant as a January 2014 applicant. On the other hand, it is submitted by the Respondents that there is no estoppel against statutory provision. This proposition cannot be disputed. But in the present case neither the said Act nor the Connectivity Regulations provide for payment by DD or RTGS. The option to pay LTA application fee by cheque is provided for in Format-LTA-2 which is an integral part of the Detailed Procedure. If Clause 23.5 thereof which provides for payment by DD or RTGS has statutory force, so does Format-LTA-2 which is prescribed thereunder. **M.L.Sharma** and **M.I. Builders** have no application to the present case. In **M.L. Sharma** the Supreme Court was concerned with cancellation of coal block

allotments on account of violation of Section 3(3) of the Coal (Nationalization) Act 1973 and in **M.I. Builders** the Supreme Court was concerned with demolition of a shopping mall on account of various statutes. Thus in both these cases there is violation of statutory provisions. Such is not the case here. Here there is inconsistency between Clause 23.5 and Format-LTA-2.

30. It is contended by the Respondents that Clause 23.5 must prevail over Format-LTA-2. Reliance is placed on **Commissioner of Income Tax V Tuslyan** Limited where the Supreme Court has held that a Form prescribed under the Rules can never have any effect on the interpretation or operation of parent statute. This judgment has no application to this case because here Format-LTA-2 in the Detailed Procedure is not being used to interpret the provisions of the said Act or the Connectivity Regulations. Similarly **Modi Spinning** has also no application to this case because there the Supreme Court was concerned with inconsistency between the parent statute & rules, on the one hand, and a Form prescribed under the statutory rules, on the other. In this case alleged

inconsistency is between Clause 23.5 and Format-LTA-2 which is also part of the Detailed Procedure.

31. In the view that we have taken we see no need to discuss whether the Appellant had a right of hearing or whether there is any breach of principles of natural justice.

32. We must make it clear that we respectfully agree with the Supreme Court's observation in **M.L. Sharma** that where the statute requires that a certain thing must be done only in a certain way, it must be done in that way only. But here as already discussed by us the provisions of the Detailed Procedure indicate that cheque is an acceptable mode of payment of fees to be paid along with LTA application. Clause 23.5 on which reliance is placed by Respondent No. 2 is not consistent with Format-LTA-2 prescribed under the Detailed Procedure. Therefore it appears that this is not a case where the statute clearly and in unambiguous words requires certain thing to be done in a certain manner. Therefore **M. L. Sharma** will not be applicable to this case.

33. Before closing, we must note that CERC in the impugned order has recommended that in future applications should be accepted only if application fees are made in advance through RTGS or NEFT. Thus CERC has acknowledged that ambiguity is created by the inconsistency between Format-LTA-2 and Clause 23.5. We have come to a conclusion that a cheque, in the circumstances of the case, will have to be treated as an acceptable mode of payment. But we do feel that more clear, totally unambiguous Detailed Procedure should have been in place. CERC has rightly ordered PGCIL to amend the Detailed Procedure to provide for advance payment of the requisite fees by electronic transfer through RTGS or NEFT.

34. In the circumstances we set aside the impugned order to the extent it holds that cheque is not an acceptable mode of payment of application fee while applying for LTA under the Connectivity Regulations & Detailed Procedure. We set aside the finding of the CERC that the application of the Appellant has been correctly considered by PGCIL as an application made in January 2014. We

are of the opinion that the Appellant, in the peculiar facts of this case is entitled to be treated as November 2013 applicant.

35. We make it clear that this view is taken by us in the peculiar facts of this case. This judgment should not be interpreted to mean that where a Statute or Regulations or Detailed Procedure contain clear provision as regards mode and manner of payment it can be relaxed in favour of the applicant. This judgment obviously therefore does not create a precedent. Payment of fee is a precondition for grant of LTA and no allowance can be made in that behalf. We hope and trust that such a situation is not created in future.

36. In the circumstance the appeal is allowed to the extent stated hereinabove.

37. Pronounced in the Open Court on this 30th **day of March, 2015.**

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE/~~NON-REPORTABLE~~**