

**In the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**APPEAL NO. 87 OF 2015**

**Dated: 26<sup>th</sup> May, 2016.**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of :**

**Gulbarga Electricity Supply Company Limited  
Gulbarga Main Road,  
Gulbarga, Karnataka**

**...Appellant(s)**

**Versus**

**1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
No. 9/2, M.G. Road,  
Bangalore - 560 001**

**2. M/s Tungabhadra Power Company Private Limited  
No. 9/1, Classic Court,  
2<sup>nd</sup> Floor, Richmond Road,  
Bangalore - 560025**

**...Respondent(s)**

Counsel for the Appellant(s) : Ms. Manasi Kumar  
Ms. Pankhuri Bhardwaj

Counsel for the Respondent(s) : Mr. S. Pati Joshi, Sr. Adv.  
Mr. Shubhranshu Padhi  
Mr. Kush Chaturvedi  
Mr. Dhaval for R.2

## **J U D G M E N T**

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

1. The Appellant is the distribution licensee within the State of Karnataka. Respondent No.1 is Karnataka Electricity Regulatory Commission (“**the State Commission**”). Respondent No.2 is M/s Tungabhadra Power Company Private Limited a generating company which owns and operates a Mini Hydrel Power Generating Station of 7 MW capacity on the right bank of Tungabhadra and on the downstream of Singatalur barrage, Thimmalapur Village, near Hadagalli, Bellary.

2. Vide its order dated 25/8/2003 the Government of Karnataka enhanced the allotted capacity of Respondent No.2’s project from 7 MW to 18.00 MW. Accordingly, Respondent No.2 entered into an agreement with the Government of Karnataka (Energy Department) on 01/9/2003. Based on the approval of the Government of Karnataka Respondent No.2 entered into a Power Purchase Agreement (“**PPA**”) with Karnataka Power Transmission Corporation Limited (“**KPTCL**”) on 25/10/2004.

**3.** The Government of Karnataka vide its order dated 10/05/2005 stipulated that all companies constructing power projects in the State are required to enter into PPAs with distribution companies based on the geographical areas within which they were located. In view of the same the project in question was assigned to the Appellant and a PPA was entered into between Respondent No.2 and the Appellant on 16/8/2006. The said PPA was duly approved by the State Commission on 22/9/2006. As per the PPA the tariff fixed for the first ten years was Rs.2.80/KW hr without any escalation for the energy delivered for the first 10 years from the COD and thereafter tariff as determined by the Commission for next ten years. The said tariff was determined based on the generic tariff fixed by the State Commission vide its generic tariff order dated 18/01/2005. The Mini Hydel project was linked with the construction of a barrage by the Karnataka Neeravari Nigama Limited ("**KNNL**") so that power could be generated from Respondent No.2's Plant by utilising water released from the barrage.

4. Respondent No.2 had prepared a Detailed Project Report (“**DPR**”) according to which the cost of project was estimated at Rs.70.28 crores and the cost of generation was Rs.2.88 per unit. While giving technical clearance the Karnataka Renewable Energy Department Limited (“**KREDL**”) estimated project cost at Rs.60.59 crores.

5. The construction of the project was commenced during the beginning of 2005. The Plant was ready for commissioning by August, 2008. However, the barrage work had not been completed. As the commissioning of the project was dependent on completion of barrage, Respondent No.2 sought extension of time from the Government for commissioning the Plant. The time was extended by one year vide Government Order dated 14/11/2007 assuming that by that time the barrage work would have been completed. Respondent No.2 had to request for further extension of time as the barrage work had not been completed within that one year period due to agitation by farmers. The Government of Karnataka extended the time on 20/3/2009 permitting Respondent No.2 to commission the Plant

within six months from the date of completion of the barrage work by KNNL.

**6.** It is Respondent No.2's case *inter alia* that its Plant was ready for commissioning by August, 2008. However, the completion of the construction of the barrage was delayed by almost four years. Therefore, only in the month of August, 2012, the project was able to commence generation of electricity. This delay in the actual generation of electricity from Respondent No.2's project was beyond its control.

**7.** According to Respondent No.2 on the date of completion of the project i.e. in August, 2008, the total project cost incurred by Respondent No.2 was 68.98 crores including the balance of payment to its suppliers. Respondent No.2 could not make timely re-payments to its financiers due to enormous delay in generation of electricity from its project. According to Respondent No.2 the lending Banks had initiated coercive steps against Respondent No.2 for recovery of their dues and it had to pay a huge amount towards interest to them. Therefore, the total project cost escalated to Rs.88.18 crores as on the COD i.e. in

August, 2012. It is Respondent No.2's case that it incurred losses due to non-receipt of CDM revenues from September, 2008 to August, 2012 amounting to Rs.10.33 crores. Respondent No.2 also contended that it incurred loss of interest on MNRE subsidy, amounting to Rs.1.38 crores. Respondent No.2 estimated the loss of revenue due to loss of generation for four years at Rs.58.64 crores. Respondent No.2 therefore filed a petition before the State Commission praying for determination of tariff specific to its Mini Hydel Power Project from the COD duly considering the actual project cost incurred by it at Rs.7.05 per KWhr instead of Rs.2.80 KWhr mentioned in the PPA dated 16/8/2006 entered into between Respondent No.2 and the Appellant.

**8.** The State Commission by the impugned order partly allowed the petition filed by Respondent No.2. The State Commission held that Respondent No.2 shall be entitled to the tariff of Rs.3.40 per KWhr from the date of filing of the petition i.e. 13/9/2013 for the first ten years from the COD instead of the tariff indicated in Article 5.1 of the PPA dated 16/8/2006. The

State Commission directed the parties to effect the necessary amendment to the PPA dated 16/8/2006.

9. We have heard Ms.Manasi Kumar learned counsel appearing for the Appellant. We have carefully perused the written submissions filed by her. Gist of the Appellant's submissions is as under:

a) The State Commission did not have the power to re-determine the tariff. The present appeal is covered by the judgement of the Supreme Court in **Bangalore Electricity Supply Co. Ltd v. Konark Power Projects Ltd.**<sup>1</sup>. (**Konark** for convenience).

b) Regulations 5.1 & Regulations 5.7 and 5.8 of the KERC(Power Procurement from Renewable Sources by Distribution Licensee) Regulations 2004 (**"2004 Regulations"**) make it clear that the State Commission does not have the power to re-determine the tariff once the same has been fixed.

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<sup>1</sup> 2015 SCC On line SC 1089

c) Judgment of this Tribunal in **Gujarat Urja Vikas Nigam Ltd. v. Green Infra Corporate Wind Power Ltd. & Others in Appeal No.198/2014 and batch of Appeals (GUVNL v. Green Infra** for short) does not apply to this case because the facts of both the cases differ. The generic tariff order dated 18/01/2005 applicable in the State of Karnataka does not contain any provision enabling the parties to approach the State Commission as was the case in **GUVNL v. Green Infra.**

d) The 2<sup>nd</sup> Respondent's case for revision of tariff on account of increase in capital costs is wholly untenable. Under Section 63 of the said Act the State Commission has power to record evidence. The 2<sup>nd</sup> Respondent has failed to discharge the burden of proof in order to establish its claim.

e) The barrage was to be constructed by KNNL. The 2<sup>nd</sup> Respondent can raise claim of damages against KNNL if it is so advised. There being no privity of contract between KNNL and the Appellant, the Appellant cannot in any



manner be held responsible for losses allegedly incurred by Respondent No.2 on account of inaction of KNNL.

**f)** If the impugned order is not set aside, the consumers will be ultimately charged a higher price for electricity. The consumers' interest ought to be safeguarded.

**g)** Without prejudice to the above if this Tribunal comes to a conclusion that the State Commission has power to re-determine tariff then the matter may be remanded to the State Commission for reconsideration after calling upon the parties to lead evidence.

**10.** We have heard Mr. S. Pati Joshi, learned senior counsel appearing for Respondent No.2 and perused the written submissions filed by him. Gist of the written submissions is as under:

**a)** This case is covered by the judgment of this Tribunal in **GUVNL v. Green Infra.** The State Commission has the power under the provisions of the said Act to modify the tariff even after the execution of the PPA in the given facts and circumstances of the case.

**b)** Reliance placed on the Supreme Court's judgment in **Konark** is misplaced. In that case the Supreme Court placed reliance on Regulation 5.1 of the 2004 Regulations. As per the said regulation PPAs which had been approved prior to the notification of the 2004 Regulations i.e. on 27/9/2004, would continue to operate for the period as mentioned in the said PPAs. The PPA in the said case was approved in the year 2002. Therefore, the State Commission could not have altered the tariff therein. In the present case the PPA was entered into after the regulations came into force. Therefore, the State Commission could have altered the tariff fixed therein.

**c)** Respondent No.2 had placed all the relevant materials on record. The Appellant failed to controvert the same by leading any cogent evidence. The State Commission has considered the material on record in its proper perspective and partly allowed the petition.

**d)** While under implementation the project faced problems which were beyond the control of the 2<sup>nd</sup> Respondent.

Though the power project of Respondent No.2 was ready for commissioning in August 2008 Respondent No.2 could commission it only in August 2012 because barrage was not completed by KNNL. Consequently there was both cost and time overrun. The capitalised cost of the project as on the date of commissioning escalated to Rs.88.18 crores. These facts were rightly taken into consideration by the State Commission. The State Commission has relied on the 11/12/2009 generic tariff order as a reference point to award the revised tariff to the Appellant. The method adopted by the State Commission is proper and plausible.

**e)** Section 86(1) of the Electricity Act 2003 ( **“the said Act”** ) indicates the legislature’s anxiety to protect and encourage renewable sources of energy. Respondent No.2’s project is also renewable energy project and merits the revised tariff to protect it. This Tribunal has held in a number of judgments that State Commissions can revisit the PPAs to safeguard the projects in the renewable energy sector. The impugned order therefore merits no interference and appeal is liable to be dismissed.

11. While dealing with the rival contentions we must bear in mind that Respondent No.2 has established a Hydel Power Project on the right bank of River Tungababhadra in Bellary District of Karnataka. One of the functions of the State Commission as noted in Section 86(1)(e) of the said Act is to promote cogeneration and generation of electricity from renewable sources of energy. Therefore, if on the basis of uncontroverted data it is felt that any project generating electricity from renewable sources of energy is likely to become economically unviable and may have to be closed down, the State Commission may have to lend a helping hand, by balancing the interest of the project owners and the other stakeholders including the consumers. This view has been taken by this Tribunal in several judgements. In this connection it is necessary to refer to judgment of this Tribunal in **GUVNL v. Green Infra** where this Tribunal has referred to the judgment of the Supreme Court in **Transmission Corporation of Andhra Pradesh Limited & Anr. v. Sai Renewable Power Private Limited & Ors.**<sup>2</sup> (**Sai Renewable**) and judgments of this

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<sup>2</sup>(2011) 11 SCC 34

Tribunal in Appeal No. **111 of 2012 in Gujarat Urja Vikas Nigam Ltd. v. Gujarat Electricity Regulatory Commission & Anr. (Rasna)**; in Appeal No. **132 of 2012 in Junagadh Power Projects Private Limited v. Gujarat urja Vikas Nigam Limited & Ors**<sup>3</sup>; in Appeal No. **252 of 2013 in Gujarat Urja Vikas Nigam Limited v. EMCO & Anr**<sup>4</sup> and in **Rithwik Energy Systems Limited vs. Transmission Corporation of Andhra Pradesh Ltd & Ors**<sup>5</sup>. This Tribunal distinguished the judgment of the Constitution Bench in **PTC India Limited v. Central Electricity Regulatory Commission**<sup>6</sup> (**PTC India**) and **Konark** and after relying on **Sai Renewable** and other relevant judgements held that the Appropriate Commission can entertain a petition for modification of tariff after execution of the PPA. This Tribunal further held that the Appropriate Commission has power to re-open the PPA and modify the tariff in the given circumstances.

**12.** Since reliance is placed by the Appellant on **Konark** we must re-produce the relevant paragraphs of **GUVNL v. Green Infra** where **Konark** has been discussed. We shall however

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<sup>3</sup> 2014 ELR(APTEL) 0521

<sup>4</sup> 2015 ELR (APTEL) 0269

<sup>5</sup> 2008 ELR (APTEL) 0237

<sup>6</sup> (2010) 4 SCC 603

discuss the Appellant's submission based on **Konark** at the appropriate stage. Following are the relevant paragraphs of **GUVNL v. Green Infra** where **Konark** is discussed.

*“61. We must now refer to the decision of the Supreme Court in Konark on which reliance is placed by the Appellant. In that case PPA dated 4/4/2002 was entered into between Konark who had established a biomass based power generating plant and Karnataka Power Transmission Corporation Limited (KPTCL). In the said PPA, tariff was decided among the parties in Clause 5.1 and 5.2. By a supplemental agreement dated 29/10/2005, the tariff was slightly increased. In 2004, the State Commission notified the KERC (Power Procurement for Renewable Sources by Distribution Licensees) Regulation 2004 (“2004 Regulations”). In the said regulations in proviso to Regulation 5.1 it was provided that the PPAs approved by the State Commission prior to the notification of these regulations shall continue to apply for such period as mentioned in those PPAs. In 2011, the State Commission framed a new set of regulations viz KERC(Power Procurement from Renewable Sources by Distribution Licensees and Renewable Energy Certificate Framework) Regulations (“2011 Regulations”). The proviso to Regulation 9 thereof was identical to the proviso to Regulation 5.1 of the 2004 Regulations. As the price of Biomass Fuel increased Konark filed a petition before the State Commission seeking amendment to PPA so as to increase the tariff. The petition was dismissed. Konark filed appeal to this Tribunal. This Tribunal allowed the*

*appeal holding that the State Commission has power to modify the tariff despite concluded PPA in larger public interest. The Bangalore Electricity Supply Co. Carried the matter to the Supreme Court. The argument of the Bangalore Electricity Supply Co. was that once PPA is entered into between the parties and approved by the State Commission in view of the first proviso to Regulation 9 of the 2011 Regulations, tariff approved by the State Commission would continue to remain as it is till the end of the contract period. It cannot be varied as there was no power vested in the Commission under 2004 Regulations. Konark's case was that Regulations 5.2, 5.3, 5.4 and Sections 61, 62 and 86(1)(b) and 86(1)(c) of the Electricity Act empower the State Commission to do so. The Supreme Court upheld the contention of the Bangalore Electricity Supply Co. entirely on the interpretation of the regulations. The Supreme Court, in our opinion, did not consider the larger question whether concluded PPAs can be reopened by the State Commission by resorting to statutory provisions namely, Section 62(4) and 64(6) of the Electricity Act. The Supreme Court observed that the whole issue lies within the narrow compass of power of the Commission under Regulation 5.1 of the 2004 Regulations as well as Regulation 9 of the 2011 Regulations. The Supreme Court further observed that Regulation 5.1 does not empower the Commission to vary the tariff after its determination. Proviso to Regulation 9 of the 2011 Regulations creates embargo in so far as PPAs approved by the Commission which were covered by the previous regulations ("2004 Regulations"). The Supreme Court further observed that while reading Regulation 5.1 of the 2004 Regulations along with Regulation 9 of the 2011 Regulations and its*

*provisos, what emerges is, whatever terms agreed between the parties should continue to remain in force without any alteration at least for a period of ten years as provided under Paragraph 5.1 of the original agreement dated 4/4/2002 at the rate at which it was agreed and modified under Supplemental Agreement dated 29/10/2005. The Supreme Court referred to Regulations 5.2, 5.3 and 5.4 of 2004 Regulations as well as Sections 61 and 62 of the Electricity Act to examine Konark's contention that power to vary the tariff vests in the Commission and observed that under the said regulations such power will operate prior to fixing the tariff. Having regard to the embargo placed on the Commission by the said regulations the Supreme Court observed that once PPAs are concluded the tariff cannot be varied. It is pertinent to note that the Supreme Court expressed its distress in the penultimate paragraph that the Commission as well as the Tribunal had failed to apply the stipulations contained in the regulations. We may quote the relevant portion of the said paragraph as under.*

*“Unfortunately, the Commission as well as the Tribunal have failed to apply the stipulations contained in the Regulations in the proper perspective. In fact, the Tribunal even while making reference to Regulation 9 has completely omitted to refer the proviso and has gone by the substantive part of Regulation 9(1) of the 2011 Regulations. The said glaring omission of the Tribunal, in applying the proviso, has resulted in the passing of the impugned order of remand to the Commission.”*



***Thus, this judgment rests on interpretation of the regulations and embargo contained therein. It is not applicable to the instant case because there are no regulations framed by the State Commission for determination of tariff for renewable energy sources. The State Commission while determining tariff vide its Order No.1 of 2010 dated 30/1/2010 has clearly provided for a liberty to those wind energy generators who do not avail of the benefit of accelerated depreciation to approach the State Commission with a petition to determine the tariff on that basis. The said order was never challenged by the Appellant and hence has assumed finality. The wind energy generators therefore rightly filed a petition Appeal Nos.198, 199, 200, 291/14 Page 119 of 154 before the State Commission. The said order had already granted liberty to the wind energy generators. Hence, there was no need for them to insist on any term in the PPAs expressing the liberty. It was the Appellant who should have insisted on such term. Facts of this case are totally different. Konark has no application to it.”***

**13.** Bearing this legal position in mind, we shall revisit the relevant facts of this case. Admittedly, Respondent No.2's Mini Hydel Power Project was linked with construction of a barrage by the KNNL because power could be generated from the said project by utilising water released from the said barrage. It is also an admitted position that Respondent No.2 prepared a DPR, according to which the cost of the project was estimated at

Rs.70.28 crores and the cost of generation was estimated at Rs.2.88 per unit. In the technical clearance issued by KERDL the project cost was estimated at Rs.60.59 crores. Respondent No.2 entered into PPA with KPTCL on 25/10/2004. The tariff agreed under the said PPA was Rs.2.90 per unit with 2% escalation per year from the COD for the first ten years and thereafter tariff as determined by the State Commission for the next ten years. It is also an admitted position that after coming into force of the said Act as per the Government's direction since the said project was assigned to the Appellant a fresh PPA dated 16/8/2006 was executed by Respondent No.2 with the Appellant. Under this PPA the tariff was fixed at Rs.2.80 per unit without any escalation for the first ten years from the COD and thereafter as determined by the State Commission for the next ten years. Indisputably, Respondent No.2's Plant was ready for commissioning by August, 2008. However, the barrage work had not been completed. Respondent No.2 thereafter sought extension of time from the Government for commissioning of its Plant because the commissioning was dependent on completion of the barrage. The time was extended by the Government by one year. However, the barrage work was not completed.

Respondent No.2 had to request for further extension of time. The Government of Karnataka extended the time on 20/3/2009 permitting Respondent No.2 to commission the Plant within six months from the date of completion of barrage work by KNNL. According to Respondent No.2, the completion of construction of the barrage was delayed by almost 4 years and therefore though Respondent No.2's Plant was ready for commissioning by August,2008 it could commission it only in the month of August,2012. This delay was beyond the control of Respondent No.2. It is further the case of Respondent No.2 that Respondent No.2 could not make timely repayments to its financiers due to enormous delay in generation of electricity from its Plant. The lending Banks therefore initiated coercive steps against Respondent No.2 for recovery of their dues. Respondent No.2 had to pay a huge amount of interest to them. The total project cost escalated to Rs.88.18 crores as on the COD i.e. in August 2012. Respondent Nos. 2 also incurred loss due to non receipt of CDM revenue from September 2008 to August 2012 amounting to Rs.10.33. crores. Respondent No.2 also incurred loss of interest on MNRE subsidy amounting to Rs.1.38 Crores. Respondent No.2 estimated the loss of revenue due to loss of

generation for four years at Rs.58.64 crores. In support of its claim Respondent No.2 produced copies of the audited Balance Sheet along with Auditor's Report from 2002-03 to 2011-12 . The comparative statement to substantiate its claim for tariff of Rs.7.05 per unit was also furnished by Respondent No.2. It is as under:

<b>Parameters</b>	<b>As per KERC Order dated 11-12-2009</b>	<b>Tariff for petitioner's plant at capital cost of Rs.88.18 Crores</b>	<b>Tariff for petitioner's plant considering the investment of Rs.158.53 Crores</b>
Capital Cost/MW	Rs.4.75 Crores	Rs.4.90 Crores	Rs.8.80 Crores
Plant Load Factor	30%	34%	34%
Debt Equity Ratio	70%:30%	47%:53%	26%:74%
O&M Expenses	1.50% with annual escalation of 5%	1.50% with annual escalation of 5%	1.50% with annual escalation of 5%
Return on equity	16%	16%	16%
Interest on Term Loan	11.75%	14.75%	14.75%
Interest on Working Capital	12.80%	12%	12%
Depreciation	7%	7%	7%
Auxiliary Consumption	1%	1%	1%

First Year Tariff as per CEA norms	Rs.3.99	Rs.4.41	Rs.8.33
Average Tariff over a period of 10 years	Rs.3.40	Rs.3.74	Rs.7.05

**14.** We have no reason to disbelieve Respondent No.2's case based on audited Balance Sheet along with Auditor's Report from 2002-03 to 2011-12. The Appellant has not been successful in disproving this case by producing any data. In our opinion Respondent No.2 has produced sufficient material to substantiate its case and therefore the submission of the Appellant that the matter needs to be remanded to the State Commission with a direction to the parties to lead evidence deserves to be rejected.

**15.** The thrust of the submission of Ms. Manasi Kumar learned counsel for the Appellant is that the State Commission had no power to reopen the concluded PPA and re-determine the tariff. Learned counsel accepted that this Tribunal has in **GUVNL v. Green Infra** held that the Appropriate Commission has power to reopen the PPA and re-determine tariff if circumstances so demand and this is more so when it is dealing with projects

which generate electricity from renewable sources of electricity. Counsel however submitted that the present case is covered by the Supreme Court's judgement in **Konark** and in **GUVNL v. Green Infra**, this Tribunal has distinguished **Konark**. Counsel submitted that **Konark** squarely applies to this case because in **Konark** the Supreme Court has interpreted 2004 Regulations and we are concerned here with 2004 Regulations.

**16.** We have already referred to the relevant paragraphs of **Konark** hereinabove. It is true that in **Konark** the Supreme Court was concerned with 2004 Regulations which are applicable here. The Supreme Court considered Regulation 5.1 of the 2004 Regulations as well as Regulation 9 of the KERC (Power Procurement from Renewable Sources by Distribution Licensees and Renewable Energy Certificate Framework Regulations 2011 ("**2011 Regulations**") and observed that Regulation 5.1 does not empower the Commission to vary the tariff after its determination. The Supreme Court noticed that proviso to Regulation 9 of the 2011 Regulations creates embargo in so far as PPAs approved by the Commission which were covered by 2004 Regulations. The Supreme Court noted that while reading

Regulation 5.1 of the 2004 Regulations along with Regulation 9 of the 2011 Regulations what emerges is, whatever terms agreed between the parties should continue to remain in force without any alteration at least for a period of ten years as provided under the PPAs between the parties therein. Having regard to the embargo placed on the Commission by the 2004 Regulations & 2011 Regulations the Supreme Court observed that once PPAs are concluded tariff cannot be varied. It is argued that since the same regulations are applicable here the State Commission could not have reopened the PPA.

**17.** Shri Pati Joshi has countered this submission by drawing our attention to Regulation 5.1 of the 2004 Regulations. The said Regulation reads thus:

***“5. Determination of Tariff for electricity from Renewable sources:***

***5.1 The Commission shall determine the tariff for purchase of electricity from renewable sources by a Buyer.***

***Provided that, the PPAs approved by the Commission including the PPAs deemed to have been approved under Section 27(2) of the Karnataka Electricity Reforms Act, 1999, prior to the notification of these***

***regulations shall continue to apply for such period as mentioned in those PPAs.***

***Provided further that the Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”***

The first proviso makes it clear that PPAs approved by the Commission, prior to the notification of 2004 Regulations shall continue to apply for such period as mentioned in those PPAs. Admittedly, 2004 Regulations were notified on 27/9/2004. The PPA in the case before the Supreme Court was approved in the year 2002. In this case the PPA is approved after 27/9/2004. The Supreme Court has in **Konark** also observed that proviso to Regulation 9(1) of 2011 Regulations creates an embargo in so far as the PPAs approved by the Commission which were covered by the 2004 Regulations. In view of this as rightly contended by Shri Pati Joshi counsel for Respondent No.2 **Konark** will not be applicable to this case. The argument of the counsel for the Appellant based on **Konark** therefore deserves to be rejected.

**18.** Having considered the rival contentions in their proper perspective we find no merit in the appeal. Though Respondent No.2's Plant was ready for commissioning it could not be



commissioned because the barrage was not constructed by KNNL in time. We have detailed the difficulties faced by Respondent No.2 on account of four years delay in construction of the barrage for which it was not responsible. Respondent No.2 prayed for determination of tariff at Rs.7.05 per KWhr instead of Rs.2.80 per KWhr. But the State Commission adopted a very balanced approach and enhanced the tariff to Rs.3.40 per KWhr from the date of filing of the petition i.e. 13/9/2013, for the first ten years from the COD. In the peculiar facts and circumstances of the case we find no reason to interfere with this balanced approach.

**19.** The submission of the Appellant that it was not responsible for delay and therefore tariff should not be enhanced and that Respondent No.2 should be driven to file a suit for damages against KNNL deserves to be rejected. We began by saying that the fact that Respondent No.2 generates electricity by using renewable sources of energy must be kept in mind while dealing with this case. While parting we reiterate the same observation. There can be no dispute that the object of the said Act and the relevant Government policies is to encourage projects based on renewable sources of energy. If an acceptable and genuine case

is made out such projects should be helped. If such projects close down; that will deprive the consumers of environmentally benign power. In the long run such approach will be harmful to the power sector and to the consumers. It must however be made clear that not in all cases can tariff be enhanced by reopening the PPA. The Appropriate Commission will have to examine facts and circumstances of each case to see whether the generator has made out a strong case for reopening the PPA and enhancing the tariff. In the present case the impugned order strikes a proper balance between the interests of all stakeholders. In the circumstances no interference is necessary with the impugned order. Appeal is dismissed.

**20.** Pronounced in the Open Court on this **26<sup>th</sup> day of May,**  
**2016.**

**I.J. Kapoor**  
[Technical Member]

**Justice Ranjana P. Desai**  
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**