

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY

Appellate Jurisdiction, New Delhi

Appeal No. 107 of 2006 & Interlocutory Application No. 149 of 2006

Dated, this 19th day of October, 2006

Present : **Hon'ble Mr. Justice E. Padmanabhan – Judicial Member**
Hon'ble Mr. H. L. Bajaj – Technical Member

1. Karnataka Power Transmission Corp. Ltd.
2. Bangalore Electricity Supply Co. Ltd.
3. Mangalore Electricity Supply Co. Ltd.
4. Hubli Electricity Supply Co. Ltd.
5. Gulbarga Electricity Supply Co. Ltd. ... Appellants

Versus

1. Karnataka Electricity Regulatory Commission
2. Mr. D. Subrahmanya Bhat
Hegdekodi, Veerakambha Village,
Bantval Taluk Kodapadavu – 574 269
Dakshina Kannada Dist.
3. Mr. D. Vijaya Krishan Bhat
Vijayashree, kemminje, Darbe Post,
Puttur, Dakshina Kannada District
4. Mr. R. K. Rangrej
Chairman, Chairman of Commerce & Industry,
APMC Road, Gadag District, Gadag
5. Consumer Care Society
Bangalore
6. Mr. N. Subanna Shetty Sarapady
President
Bantwal Taluka Vidyuth Balakedarara hitaraksana Samithi,
Dakshina Kannada District
7. Mr. Y. G. Muralidharan
Consultant (Consumer Advocacy), KERC
Bangalore

8. Mr. Sathanarayana Udupa
Secretary,
Bahritiya Kissan Sangha, Udupi
9. Mr. Suresh Naik
Mohala, Udupi Taluk & District
10. Mr. B. R. Subramanya Aithal
Shankarnarayana Grama,
Udupi District
11. Mr. H. D. Panduranga Hegde
Hosangadi Grama, Udupi District
12. Mr. P. K. Balachandra Rao,
Kundapura Taluk, Udupi District
13. Mr. B. Venkatakrishna Bhat
Kollur, Kundapura Taluk, Udupi District
14. Mr. Shankarnarayana karanth
Kundapura Taluk, Udupi District
15. Mr. B. Manjaiah Master
Kundapura Taluk, Udupi District
16. Mr. T. R. Shetty
Kundapura Taluk, Udupi District
17. Mr. Ramachandra Bhandarkar
Kundapura Taluk, Udupi District
18. Mr. K. Sudhakar Shetty
Kundapura Taluk, Udupi District
19. Mr. B. Surya Bhat
Kundapura Taluk, Udupi District
20. Mr. B. Ganapaiah Shetty
Kundapura Taluk, Udupi District
21. Mr. H. Bhoja Shetty
Kundapura Taluk, Udupi District

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22. Mr. B. Chakresh Yadiyal
Kundapura Taluk, Udupi District
23. Mr. K. Mohan Shetty
Kundapura Taluk, Udupi District
24. Mr. K. Narayana Rao
Kundapura Taluk, Udupi District
25. Mr. P. V. Shashidhar
Kundapura Taluk, Udupi District
26. Mr. K. Mahabalashetty
Kundapura Taluk, Udupi District
27. Mr. Subramanya Udupa
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28. Mr. V. Shivaram Shetty
Kundapura Taluk, Udupi District
29. Mr. S. Ramachandra Alse
Kundapura Taluk, Udupi District
30. Mr. Y. Balakrishan Bhat
Kundapura Taluk, Udupi District
31. Dr. Atual Kumar
Kundapura Taluk, Udupi District
32. Mr. K. Padmanabha Adiga
Kundapura Taluk, Udupi District
33. Mr. S. Narayana Shetty
Kundapura Taluk, Udupi District
34. Mr. A. Mahabala Bayari
Kundapura Taluk, Udupi District
35. Mr. Krishna Murthy Adiga
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36. Ms Susheela B Shetty
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37. Mr. K. V. Srinivasa Hande
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38. Mr. Vasudeva Shanbagh
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Kundapura Taluk, Udupi District
43. Mr. Manjunath Kannanth
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44. Mr. Subraya Nayak
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45. Mr. Rajarama
Kundapura Taluk, Udupi District
46. Mr. Rudoff D Souza
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47. Mr. Srinivasa Rao
Kundapura Taluk, Udupi District
48. Mr. Gracian D Atmedu
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51. Mr. F. Benjmin D Souza
Kundapura Taluk, Udupi District
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53. Mr. M. Ajit Kumart
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54. Mr. K. Prakash Upadhaya
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55. Mr. Jayaprakash Hegde
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62. Ms Geetha Samanth
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63. Mr. Hariyappa Poojary
Pangala Grama, Udupi Taluk and District
64. Mr. Sundhara Shetty
Havanjee Grama, Udupi Taluk and District
65. Mr. M. R. Deshpande
Secretary, FKCCI, K.G.Road, Bangalore – 560 009. ... Respondents

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Counsel for the Appellants : Mr. M. G. Ramachandran, Advocate

Counsel for the Respondents : Mr. Amit Kapur, Advocate for
Respondent No.1
Mr. P. Narasimha, Advocate with
Mr. Rohit Rao, Mr. Ananga
Bhattacharya and Mr. Somiran Sharma,
Advocates for Respondent No.65

J U D G M E N T

1. The five utilities have jointed together and preferred the present appeal challenging the order dated 24.4.2006 passed by the first respondent, Karnataka Electricity Regulatory Commission, in so far as the said State Commission has rejected the application filed by the appellant for the approval of enhancement of Bulk Supply Tariff (BST) and retail supply tariff consequent to the arbitral award dated 19.5.2003 passed by Arbitral Tribunal directing the appellant to pay fixed charges to M/s. Tanir Bhavi Power Company Ltd., at US\$ 0.04 per KWH.
2. Heard Mr. M.G. Ramachandran Learned Counsel appearing for the appellant, Mr. Amit Kapoor for respondent No. 1, Mr. P. Narasimha advocate for Mr. Rohit Rao advocate for respondent No. 65 Mr. Anaga

Bhattacharyya for respondent No. 2, Mr. D. Vijay Krishan Bhatt, the third respondent, Mr. R.K. Rangrej, Chairman Gadga district Chambers of Commerce fourth respondent and Mr. Satya Narayan Udappa, Secretary Bhartiya Kisan Sangh, Uduppi, respondent No. 8 filing their written submissions in this appeal, which were taken into consideration even though the said persons expressed difficulties to appear in person before this Appellate Tribunal.

3. Most of the arguments advanced on behalf of the respondents are common and we have taken into consideration of the entire written submissions submitted by the respondents or arguments submitted on their behalf by their respective counsel, who appeared before us and made their submissions.

4. Elaborate arguments were heard on different days and the learned counsel appearing for the respondents made detailed submissions while contesting the appeal. Mr. M.G. Ramachandaran learned counsel appearing for the appellant made detail submissions. The appeal lies in a narrow compass, the dispute relates to the only, controversy namely, fixed charges payable to generator in terms of arbitral award passed by Arbitral Tribunal consisting of three former Judges of Supreme Court, is to be passed on to consumers through the tariff.

5. The first appellant, is a Government of Karnataka Undertaking engaged in transmission of power throughout the State of Karnataka while appellants 2 to 5 are also Government undertakings engaged in distribution of power in the state of Karnataka. In terms of the provisions the Karnataka Electricity Reforms Act 1999 (hereinafter referred to as Reforms Act, for Brevity), Karnataka State Electricity Board was reorganized and as a result of this, the first appellant herein became the transmission and distribution licensee w.e.f. 1.4.2000. The first appellant was further unbundled and segregated of its transmission and distribution function. On and after 1.6.2002, the distribution functions were transferred to appellant 2 to 5 in terms of transfer scheme formulated by the State of Karnataka under the said Reforms Act. The appellant No. 1 carries out transmission function. The first respondent, The State Regulatory Commission was constituted in the state of Karnataka in terms of The Karnataka Electricity Reforms Act 1999 and continues to function under The Electricity Act 2003.
6. The first appellant and M/s. Tanir Bhavi Corporation Ltd., a generating company entered into a Power Purchase Agreement (PPA) on 15.12.97 for sale and purchase of energy. M/s. Tanir Bhavi agreed to establish,

operate a generating station and sell electricity to the first appellant at the tariff agreed and on the terms and conditions of PPA. Article 7 of the said PPA deals with payment of fixed charge and variable charges payable by the first appellant to M/s. Tanir Bhavi.

7. The said PPA entered on 15.12.97, was amended by first supplemental agreement dated 29.5.99, second supplementary agreement dated 13.9.99 and the third supplementary agreement dated 25.1.2001. Closely following the first supplemental agreement concluded on 25.9.99, on 1.6.1999, the Karnataka Electricity Reforms Act 1999 came into force. On 15.11.99 in terms of the said Karnataka Electricity Reforms Act 1999, the Karnataka Electricity Regulatory Commission, the first respondent herein was constituted.

8. During the middle of the year 2001, disputes arose between KPTCL, the first appellant, on one side and M/s. Tanir Bhavi, the generator with respect to fixed charges payable in terms of Clause 7.3 of PPA dated 15.12.97. The dispute being, whether fixed charge payable by KPTCL to M/s. Tanir Bhavi under the PPA, is at the fixed rate of US\$ 0.04 per KWH as claimed by M/s Tanir Bhavi or it is based on actuals subject to maximum of US\$ 0.04 as contended by KPTCL. The dispute relates to interpretation of Clause No. 7.4 of the PPA dated

15.12.1997. The said Clause No. 7.4 of the PPA dated 15.12.97 has not been altered or amended by the two Supplementary Agreement dated 13.9.1999 and 25.1.2001 entered between the first appellant and M/s. Tanir Bhavi.

9. The Government of Karnataka on advice, given by the Advocate General on 1.12.2001, decided that KPTCL should pay fixed charges to M/s. Tanir Bhavi at US\$ 0.04 per kwh.
10. KPTCL moved the first respondent Regulatory Commission for approval of ARR for the financial year 2001-02 and 2002-03 on 15.2.2002. On 8.5.2002, the first respondent Regulatory Commission while approving the ARR determined the tariff for the year 2002-03. In the said tariff order the commission took note of the PPA entered between KPTCL and M/s. Tanir Bhavi and directed the KPTCL to seek appropriate judicial determination of the dispute through self contained mechanism provided in the PPA. The commission also directed KPTCL not to take any further action on the claims of M/s. Tanir Bhavi without following the disputes resolution mechanism incorporated in the PPA.
11. After the determination of tariff, the KPTCL moved O.P. No. 18 of 2002 before the State Commission seeking clarifications as to whether

KPTCL is liable to pay the amount disputed by KPTCL to M/s. Tanir Bhavi, before the dispute is resolved by the Arbitral Tribunal. On 2.8.2002 the Commission passed an order issuing certain directions while making certain observations. The details of the order will be referred at the relevant juncture.

12. The dispute between KPTCL and M/s. Tanir Bhavi, was referred to the Arbitral Tribunal consisting of three former Judges of Supreme Court on 17.9.2002 and the issue being the extent of the fixed charge payable by KPTCL to M/s. Tanir Bhavi in terms of Clause 7.3 and 7.4 of the PPA. The Arbitral Tribunal after following the procedure prescribed and affording opportunity to either side passed an award on 19.5.2003. In terms of the Arbitral Award M/s. Tanir Bhavi is entitled for payment of fixed charges at US\$ 0.04 per kwh in terms of the interpretation placed on Clause 7.3 and 7.4 of the PPA by the Arbitral Tribunal.
13. The Electricity Act 2003 came into force on 10.6.2003 and the Karnataka State Regulatory Commission is deemed to be a Commission constituted in the year 2003 in terms of Section 82(1) proviso of the said 2003 Act.

14. KPTCL filed an application before the State Commission to allow the amount paid and payable by it to M/s. Tanir Bhavi as a pass through in the applicable tariff, which payment KPTCL is liable as per the award passed by the Arbitral Tribunal. The said request to pass through was rejected by the Commission on 15.12.2003. The commission refused to allow the fixed cost to be paid/payable to M/s. Tanir Bhavi in terms of arbitral award on the view that the KPTCL had not chosen to further challenge the arbitral award, besides pointing KPTCL has not acted transparently.
15. Being aggrieved, KPTCL preferred appeal MFA No. 481 of 2004 on the file of the Karnataka High Court. The Division Bench of the of the Karnataka High Court while examining the challenge to the order dt. 15.12.2003 passed by the State Commission, remanded the entire matter by its judgment dt 02.12.2005 to the State Commission for de-novo consideration as the consumers were not afforded an opportunity. After remand, further pleadings were submitted before Karnataka Regulatory Commission apart from filing written submissions in detail.
16. The Commission after hearing the appellants as well as the respondents herein and their representatives by order dt. 28.4.2006,

rejected the claim of KPTCL to include additional cost paid to M/s. Tanir Bhavi in the ARR, consequent to the award passed by Arbitral Tribunal primarily on two grounds namely (i) KPTCL has not challenged the award passed by the Arbitral Tribunal by preferring an appeal and (ii) the first supplemental agreement was entered after the constitution of the State Commission and therefore, the PPA dated 14.12.1997 as well as supplemental agreement could not be treated as a validly concluded contract and the same are not saved by proviso to Section 27 (2) of The Karnataka Electricity Reforms Act 1999.

17. The present appeal has been preferred by the appellants 1 to 5 herein, which are State Utilities challenging the said order dated 20.4.2006 passed by the State Commission. In this appeal, the appellants challenged the order of the Karnataka Electricity Regulatory Commission on various grounds and sought for inclusion of the additional cost paid by KPTCL to M/s. Tanir Bhavi, in terms of the arbitral award in the ARR and pass through the consumers. Concedingly, the said award has reached finality.

18. In this appeal the following points arise for consideration:

- (A) Whether the disallowance of full fixed charges payable by KPTCL in terms of the arbitral award by the State Commission, is sustainable?
- (B) Whether the claim of KPTCL to include the difference in fixed charge, it is liable to pay as per award, in the ARR and consequently pass on same to the consumers through tariff, is legally sustainable?
- (C) Whether the State Regulatory Commission has acted with illegality and material irregularity in rejecting the claim of appellants to pass through the additional payment made by it to M/s. Tanir Bhavi in terms of binding arbitral award?
- (D) Whether the decision of KPTCL to accept the arbitral award in any way reflects on KPTCL? and whether the KPTCL has acted bonafide and reasonably in accepting the award without preferring an appeal challenging the award?
- (E) To what relief, the parties are entitled to?

19. Points A to D can be considered together as they overlap each other and the facts are interlinked and interwoven.

20. Under Section 27 of the Karnataka Electricity Reforms Act, an application was moved by the first appellant KPTCL requesting the

commission to take note and include the additional payment of Rs. 271.60 crores for the power supply recovered for the year 2002-03 and projected additional expenditure of Rs. 147.34 crores for F.Y. 2004 with interest burden of Rs. 34.10 crores, in all aggregating to Rs. 453.04 crores and to enhance the Bulk Supply Tariff (BST) and consequential retail tariff increase for F.Y. 2004 suitably. The request to restrain the generator Company from realizing the disputed fixed charge did not find favour and the first appellant was directed to follow the dispute resolution mechanism provided in the PPA.

21. On facts it is noticed that a three members Arbitral Tribunal constituted in terms of PPA framed the following five issues for consideration :

A. Whether the fixed charge payable by the Respondent to the Claimant as per the terms of the Power Purchase Agreement dated 15.12.97 is US\$ 0.04 per kwh, and whether the claimant is entitled to receive payment on the said basis in respect of the monthly bills sent by it to the Respondent?

B. Whether the respondent proves that it is entitled to receive from the claimant a sum of Rs. 190.31 crores and further sums which may have been realized by the claimant from 1.11.2002 onwards

by recourse to escrow mechanism along with interest thereon at 24% p.a.?

C. Are the parties entitled to interest, if so at what rate and for what period?

D. Whether and if so, which of the parties is entitled to costs of these proceedings/

E. What final order?

22. After stiff contest, the arbitral Tribunal passed an award holding that M/s. Tanir Bhavi is entitled to fixed charges @ US\$ 0.04 per KWH for the electricity generated and supplied by it to the KPTCL in terms of PPA dated 16.7.97 and M/s. Tanir Bhavi is entitled to Rs. 191.31 crores being fixed charge together with interest @ 24% per annum from the date of default to the date of payment. Concedingly, a conscious decision was taken by the appellant to accept the award. The award has reached finality.

23. It is not the case of the respondents that the arbitral proceedings is a collusive one. There is no challenge to the award either directly or indirectly alleging either collusion or fraud or any other vitiating circumstances, with respect to the arbitral award. The arbitrators

interpreted the terms of PPA and they have passed an award in favour of M/s. Tanir Bhavi the claimant before the Arbitral Tribunal. In the absence of any collusion, fraud or want of bonafides, it is not open to the contesting respondents, much less to the Regulatory Commission to ignore the legal effect of the award, which came to be passed in terms of PPA after following the procedure. The PPA, which came to be concluded before the commencement of The Karnataka Electricity Reforms Act 1999 is saved by Section 27 of the said Act. Proviso to sub-section (2) of Section 27, provides that the contract concluded by the Government of Karnataka and/or by the Board with generation and transmission companies, prior to commencement of Act, shall be deemed to have been approved by the commission under the provisions of act and the same shall be given effect by the Commission. By the said statutory fiction the contract is deemed to have been approved by the Commission, and in law such a fiction should be taken to its logical end, which means that the terms of PPA are binding and it is obligatory for the commission to give effect to terms of such a contract including the consequence of award passed in terms of the PPA, which provides for regulation of dispute by the mechanism of arbitration.

24. Therefore, it follows that the PPA which is deemed to have been approved by the commission, has to be given effect by the commission and there is no valid reason to act otherwise. In terms of PPA, arbitration was resorted to and result being the first appellant is liable to pay the fixed charges, as claimed by the generator M/s. Tanir Bhavi. Though it is contended that arbitral award is not part of the contract, yet in law it is consequent to the PPA and the liability in terms of arbitral award is fastened on the appellant only in terms of the PPA. The Commission is mandated to give effect to the contract as well as the consequential adjudication by an Arbitral Tribunal, a redressal forum constituted under the PPA. In the absence of any allegations or averments of collusion or fraud or such other vitiating factor, it is futile on the part of the contesting respondent to contend that the appellants are not liable to pay the fixed charges, which the appellant has to pay in terms of the award. Such a liability cannot in law be ignored or brushed aside by KERC, but has to be allowed as a cost directly incurred in the acquisition of power and justifiably such an expenditure has to be passed on to the consumers through tariff.
25. Had there been a converse position and if the KPTCL had succeeded, respondents may not have any murmur or grievance and they will be ready to have the benefit of such a contingency. There is no reason to

doubt the decision taken by KPTCL in accepting the award and such a conscious decision has certain consequences of its own.

26. It may be recalled that the award, based upon which the first appellant seek for additional amount is a bonafide action initiated as directed by the commission and not being a collusive or fraudulent award, automatically the liability incurred by the appellants are for and on behalf of the consumers alone and the consumers cannot avoid the same nor the commission could turn down the request without any legal basis. The stand of the consumers that they should have been appraised and consulted about the arbitral proceeding and decision to accept the award. Such a contention has neither a basis nor legal basis at all. It is rather too remote, as they have no such role in the internal administration and commercial decision which the officials in management of KPTCL had taken in their wisdom.

27. Mr. Narasimha learned counsel appearing for respondent No. 65 contended that the award is not ipso-facto binding on the Regulatory Commission and that before the commission, no other independent material has been placed to sustain the claim and to order pass through the tariff. In our considered view, such a contention is nothing but a fancy and it cannot be sustained. Whatever steps taken right from

inception either in entering contract was with the approval of State Government, after calling for open tenders and contract which is deemed to have been approved is binding on KPTCL and the consumers who stand to gain by such PPA. The resolution of dispute by arbitration, which arose between the generator and KPTCL and the decision to accept the award in the absence of any fraud or collusion deserved to be accepted as a bonafide decision taken by the appellants after taking into consideration of the entire matter and the resultant of the decision will be that the consequences of the award, have to be passed on to the consumers.

28. Our attention was drawn to the pronouncement of the Supreme Court in West Bengal State Electricity Board Vs. Calcutta Electric Supply Ltd. reported in 2002 Vol. 8 SCC 715. In the said pronouncement, the Hon'ble Supreme Court had occasion to consider an identical situation, as to whether the cost incurred by the utility in installing and commissioning its new generating units, which was a subject matter of dispute and referred for arbitration, has to be accepted or not the Supreme Court though held that the power of commission cannot be restricted and it cannot be mandated to be bound by finding any collateral proceeding, however, but such an award or finding is a piece of evidence before the commission for its consideration. In that context, it has been held thus:

“ 75. Under Section 29 of the 1998 Act, we have already noticed that it is the Commission which has the authority to determine the tariff taking into consideration the principles enunciated in the said section, as also in the Regulations framed by the Commission in this regard. In this process, the Commission will have to take into consideration the findings recorded in collateral proceedings. However, it is not correct to state that the said finding in the collateral proceedings will be ipso facto binding on the Commission. This is because of the fact that the object of determination of the cost of the project by CEA and the fixation of tariff by the Commission are not entirely the same. There is no obligation on the part of CEA to take into consideration the efficiency of the Company which is putting up the project as also the interest of the consumers while determining the cost of the project, whereas the Commission while determining the tariff has to take into consideration these factors also. Therefore, in our opinion, the power of the Commission to determine the correct value, of the factors to be taken note of by it, cannot be restricted by mandating the Commission to be bound by a finding in a collateral proceeding. Such finding is a piece of evidence before the Commission, which even though has a strong evidentiary value, is ipso facto not binding on the Commission. The Commission could for good reasons decide to differ from it. The Commission is an independent autonomous body, therefore, its power to examine a piece of evidence cannot, in any manner, be restricted.

76. We are not inclined to accept this argument of the appellants. It is true that the figure arrived at by CEA is not ipso facto or as a matter of rule binding on the Commission, but, as stated above, the Commission will have to take into consideration the finding of CEA giving due weight to that piece of evidence. The Commission could, of course, disagree with

the finding of CEA for compelling reasons but not on the ground on which the Commission has done in the instant case. The Commission while arriving at the above figure of Rs. 2075 crores took into consideration the project costs of the Budge-Budge project as projected by the Company, the Board, CEA and the consultants, and took an average of all these figures to come to the conclusion that the cost of the Budge-Budge project could be Rs. 2075 crores. In this process, we think that the Commission has not rejected the finding of CEA for any compelling or acceptable reasons. It did not have before it any other material to hold that the estimated cost of the project by CEA is otherwise erroneous. In the absence of any such material, in our opinion, the Commission ought to have accepted the said finding of CEA and ought not to have indulged in taking the average of the various figures given by different authorities, as stated above. Therefore, we think that the Commission not having given any acceptable reason based on the material before it to differ from the finding of CEA, the figure arrived at by the Commission in regard to the Budge-Budge cost by rejecting the finding of CEA is erroneous. In this view of the matter, we are of the opinion that though the Commission was not bound by the finding of CEA, still, it having not differed from the said finding for good reasons, the High Court was justified in accepting the figure of Rs.2295.57 crores as the cost of the Budge-Budge project.

29. The above dictum of the Supreme Court applies on all the fours to the facts of the case on hand. It is true that no other material was made available except placing of the award of the arbitral tribunal. Factually, there could be no other material and no other material could be placed at all by the appellant except the award. In this case, there could be no

other material excepting the award. There are no want of bonafides at all on the part of appellant. In the absence of collusion or fraud, or other vitiating circumstance, the commission ought to have allowed the claim of the appellant. At the risk of repetition, we are to point out that whatever the appellant has done in the acquisition of power generated by M/s. Tanir Bhavi, on the direction and approval of the State Government, were initiated and sought to be accomplished as a commercial decision in the interest of consumers, to whom the appellant had taken steps to supply power. Had there been a benefit, the contesting respondent could not have turned down the benefit and when the rates of acquisition of power increased as a result of the award. The same cannot be wished away because it is disadvantageous. Hence, the contesting respondents, namely the consumers are liable to make good or reimburse the extra expenditure, which the appellants had incurred consequent to the award, it cannot be avoided also. Further, it is not necessary to challenge all the arbitral award as the scope of interference with the award is very limited in the absence of misconduct or otherwise impropriety on the part of arbitral Tribunal. The composition of arbitral Tribunal and choosing of members of arbitral Tribunal affords remote interference. Hence, the contesting respondents, namely the consumers are liable to make good or reimburse the extra expenditure, which the appellant had to incur consequent to the award.

30. The decision to accept award taken was bonafide by the appellant with above object of securing power and supplying the same to the consumers and consumers shall not be allowed to disown the consequence of contract and award. Being a binding contract upon the appellants and binding adjudication, the consequence follow and it will be equally binding the consumers, for whose benefit the PPA has been entered.
31. The approach of the commission on the facts of the case, we are unable to appreciate. The view that the arbitration award and the consequences thereof could not be passed on to the consumers, is a total misconception, apart from being a misdirection in law and cannot be sustained . As already pointed out, whatever the appellant have done, is for the benefit of the consumers or on their behalf as the agency is entrusted with generation, transmission and distribution of power and it follows that all the consequences are normally and necessarily to be borne by the consumers, unless it is vitiated by collusion or fraud etc.
32. The hyper-technical contentions advanced on behalf of the consumers deserve to be rejected and the commission in this respect, has proceeded on a misconception of law and misdirection. It is pointed out that the appellant is not liable to pay fixed charge as claimed by M/s. Tanir Bhavi

and the same could not be taken as final or a binding gospel, when ultimately the Arbitral Tribunal has sustained the claim of M/s. Tanir Bhavi and over-ruled the stand of the appellant. It may be that the award may not be to the liking of consumers, but on the facts of the case, there is no escape except to take and accept the award as the sole ground and reason for the utility to pay the amount claimed in terms of the PPA. Such payment having been made by the utility in the usual course of its business and management, and in the absence of any collusion or fraud, such liability or extra sum to be paid to M/s. Tanir Bhavi and claimed by appellants deserves to be sustained and it has to be passed on to the consumers. The consumers can not be allowed to contend that they are entitled to the benefit of the contract which is favorable to them and they may not be allowed to contend that the liability so incurred, arising out of contract, is that of the utility alone and it has to bear it. Such a stand is unsustainable in law and on equity.

33. In our considered view, whatever utility has done in entering into a contract with M/s. Tanir Bhavi after following the procedure prescribed, all the consequences including the enhancement, the cost of acquisition of power and the liability thereof has to be included in the ARR and passed on in the revision of tariff to the consumers. There is no escape in this respect.

34. Even assuming that the decision of the appellant to accept the award without a challenge to the award by filing an appeal is taken as a wrong decision or erroneous view, the same cannot be avoided. On facts, as already pointed out, in the absence of fraud or collusion, it follows the decision and the consequences thereof cannot be avoided by the consumers and the commission will not be justified in negating the claim of the utility on that score.
35. Various grievances with respect to arbitral proceedings or failure to prefer an appeal or no notice has been given to the consumers at large with respect to passing of the award and the decision to accept the award, was not intimated to the consumers are no reasons at all in the eye of law nor they could be sustained nor there is logic or justification behind it. The utility is managed by well qualified and experienced officials and all the action or decision taken in the usual course of carrying on the business of utility, if it is made dependent on consumers' likes or fancies and there could be no end to such grievances. However, as we have held that the action of utility is bonafide and in the absence of vitiating factors, the consumers who have the benefit of the decision of the utilities, should also bear the consequences of the award.

36. The conclusive nature of the agreement entered between the appellant and M/s. Tanir Bhavi is not challenged in any manner in the arbitration proceedings. Clauses 7.3 and 7.4 of the PPA is part of the concluded contract, which is deemed to have been approved by the statutory fiction and the award of the arbitral Tribunal has resolved the dispute in respect of fixed charges. The view of the Regulatory Commission that it is only bound by the concluded contract and not by the consequences of award as already held, is a misdirection and suffers with illegality. The effect of section 27 (2) of the Karnataka Electricity Reforms Act would mean that the consequences of the award is not only binding on M/s. Tanir Bhavi but also on the utilities and its liability has to be necessarily be passed on to the consumers. It is not open to the consumers to pick holes or point out that the award is not to their convenience or disadvantage and desist the legal consequences. Such imaginary right and be it a grievance could not be sustained not it could be justified.

37. In law the award is binding on the utility and the consequences that flow from the award, in the absence of malafides or negligence or misfeasance or fraud or other vitiating circumstances, the State Commission in our considered view on the materials placed, has misdirected itself in law in rejecting the claim of the appellant.

38. The tariff in this case was determined through a competitive bidding and the commission is bound to allow and as well as the consumers are bound to bear the consequences. Section 63 of The Electricity Act 2003, which provides for determination of tariff by a competitive bidding process. Hence it is too late for the Regulatory Commission to go into the reasonableness of the tariff or to otherwise examine and whether the consequences of the award would be in the interest of the consumers to allow such tariff. Our attention was drawn towards Section 158 of The Electricity Act 2003, where arbitration is provided for and award of such arbitration proceedings coming on a later date, cannot be avoided in law merely because it is against the utility and consequently against the consumers. When the appellant is claiming charges on the basis of actual payment of charges of power purchased from M/s. Tanir Bhavi as per the concluded contract and in terms of the award of the Arbitral Tribunal, it is too puerile for the commission to disallow the same.

39. In Fasil Chaudhary Vs. D.G. Doordarshan reported in (1989) 1. SCC 89, the Supreme Court held that fair play in the joints is also a necessary concomitant for an administrative body functioning in the sphere of contract and administration. In Burman Krishna Bose Vs. United India Insurance Co. Ltd. 2001 (6) SCC 477, the Supreme Court held thus:

“Even in an area of contractual relations, the State and its instrumentalities are enjoined with the obligation to act with fairness and in doing so can take into consideration only the relevant materials. They must not take any irrelevant and extraneous consideration while arriving at a decision. Arbitrariness should not appear in their actions of decisions.

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In U.P. State Road Transport Corporation Vs. Mohd. Ismail, (1991) 3, SCC 239, it has been held thus:

“ The Corporation is a public utility organization where mediating motion is efficiency and effectiveness of public service are the basic concepts which cannot be sacrificed in public administration by any statutory corporation. The Corporation has to render this public service within the resource use and allocation. Within these constraints the Corporation has to exercise its discretion and perform its task. The second aspect relates to the manner in which statutory discretion is to be exercised. The discretion allowed by the statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion;..according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

In the light of the above pronouncements, on the facts of the present case, it cannot be held that KPTCL has acted malafide or arbitrarily or collusively.

40. The liability to pay interest as per the terms of the award could not also be held to be an illegality as the Arbitral Tribunal is competent to award the interest as held by the Hon'ble Supreme Court in Hindustan Construction Company Vs. State of J&K reported in 1992 (4) SCC 217. Further it is not as if every award should be challenged and there is neither illegality or impropriety in accepting an award, when challenged is considered too remote.
41. In the light of our discussions the various contentions advanced by the respondents are not sustainable and the view of the Karnataka Electricity Regulatory Commission, cannot be sustained legally and deserves to be reversed as it is a misdirection and illegality.
41. Hence on point A, we hold that the disallowance of full fixed charges payable/paid by the appellant in terms of the arbitral award, by the State Commission is liable to be reversed and charges claimed deserve to be allowed. On point B, we hold that the appellants are entitled to include the difference in fixed charges in the ARR, which, it is liable to pay as per the award and included and the same has to be passed on to the consumers through tariff. On point C, we hold that the view of Regulatory Commission in disallowing the claims of the appellants is not only a misdirection, but also an illegality. Hence the entire claim of the

appellants deserved to be sustained. On point D, we hold that the acceptance of the arbitral award without any further challenge by the appellants, in no manner reflects on the managerial and commercial decision taken by the appellant and we do not find any want of bonafides in this behalf.

43. In the result, the appeal deserves to be allowed and we direct the first respondent Commission to allow the claim of the appellant as prayed for, with a consequential direction that the said liability can be passed on to the consumers through tariff. However, as such a direction to include the past arrears, may result in steep increase in tariff, it would be eminently fit and proper to direct KPTCL to create regulatory asset to the value of the differential amount payable by it for five years, which the appellants are liable to pay to M/s. Tanir Bhavi and amortize the same by gradual increase of tariff in the course of next five years or so sooner thereof as the financial position may warrant.

44. We place it on record the valuable assistance rendered to us by P.Narasimha, Mr. Amit Kapoor and Mr. M.G. Ramachandran the learned advocates, who appeared in this appeal and made submissions.

45. The appeal is allowed in the above terms and consequently I.A. No. 149 of 2006 is dismissed as having become infructuous. The parties shall bear their respective costs.

Pronounced in the open court on this 19th day of October, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member