

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
(Appellate Jurisdiction)

**APPEAL No. 167 OF 2020**

Dated : 25<sup>th</sup> September, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member

**In the matter of:**

**ADANI POWER LIMITED**

Registered address:

Adani Corporate House,  
Shantigram, Near Vaishno Devi Circle,  
S. G. Highway, Khodiyar, Ahmedabad,  
Gujarat – 382421, India

... Appellant

*Versus*

**1. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**

Through its Secretary  
SCO No. 220-21, Sector 34 A,  
Chandigarh – 160022

Email: [registrarpsercchd@gmail.com](mailto:registrarpsercchd@gmail.com)

... Respondent No. 1

**2. PUNJAB STATE POWER CORPORATION LIMITED**

Through its Managing Director  
The Mall, Patiala, Punjab – 147001

Email: [cmd-ppscpl@ppscpl.in](mailto:cmd-ppscpl@ppscpl.in)

... Respondent No. 2

Counsel for the Appellant(s)

: Amit Kapur  
Poonam Verma Sengupta  
Saunak Kumar Rajguru  
Aparajita Upadhyay  
Adishree Chakraborty  
Sakshi Kapoor for App. 1

Counsel for the Respondent(s) : Gargi Kumar for Res.1  
M.G. Ramachandran Sr. Counsel  
Ranjitha Ramachandran  
Poorva Saigal  
Anushree Bardhan  
Tanya Sareen  
Arvind Kumar Dubey for Res. 2

## **JUDGMENT**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. This appeal is directed against the order dated 7<sup>th</sup> August, 2020 passed by the 1<sup>st</sup> Respondent- Punjab State Electricity Regulatory Commission (hereafter referred to as "Commission") whereby it refused to grant approval to the Power Purchase Agreement (PPA) dated 29<sup>th</sup> September, 2006 signed by Udupi Power Corporation Limited with 2<sup>nd</sup> Respondent- Punjab State Power Corporation Limited (in short "PSPCL").

2. The Appellant, Adani Power Limited (in short "APL") is the successor in interest of M/s Udupi Power Corporation Limited (in short "Udupi Power") which had approached the Commission by way of Petition No. 41 of 2018 seeking approval of the PPA dated 29<sup>th</sup> September, 2006. The instant appeal also was initially filed by Udupi Power. Subsequently, vide order dated 1<sup>st</sup> June, 2023 of the Tribunal,

the name of the Appellant has been substituted as Appellant in place of Udupi Power.

3. Udupi Power Corporation Limited (now APL) is a generating company and has a 2 x600 MW imported coal-based power project in Udupi District of Karnataka. It supplies power to Distribution Licensees in the State of Karnataka, Punjab and Gujarat.

4. The 2<sup>nd</sup> Respondent-PSPCL (formerly known as Punjab State Electricity Board) is the principal distribution company in the State of Punjab and is discharging the functions of distribution/retail supply of the electricity to the consumers/public at large within the State.

5. The brief facts of the case are as under :-

- (i) On 25<sup>th</sup> October, 2005, Central Electricity Regulatory Commission (CERC) granted an “in principle” approval to Nagarjuna Power Corporation Limited (subsequently Udupi Power) for the 1015 MW (2x507.5 MW) project located in Udupi District, Karnataka. Udupi Power and 2<sup>nd</sup> Respondent-PSPCL signed Power Purchase Agreement (PPA) dated 29<sup>th</sup> September, 2006 for supply of 101.5 MW of power (10% of the then proposed installed capacity of the project).

- (ii) Udupi Power had filed a Petition No. 40 of 2005 before CERC on 11<sup>th</sup> April, 2005 for determination of tariff for generation and sale of electricity from the said power project in Udupi to the Distribution Licensees in the State of Karnataka (90%) and to Kerala State Electricity Board (remaining 10%). At that time, the Udupi Power had no agreement with 2<sup>nd</sup> Respondent-PSPCL for supply of electricity to it. Vide order dated 25<sup>th</sup> October, 2005, the Central Commission approved the capital cost of the project including IDC and finance charges subject to certain terms and conditions for generation and sale of electricity from the project.
- (iii) In pursuance to the said order dated 25<sup>th</sup> October, 2005, Udupi Power entered into a PPA dated 26<sup>th</sup> December, 2005 with Distribution Licensees of Karnataka for sale of 90% of the electricity generating the project. Similarly, Udupi Power entered into a PPA dated 29<sup>th</sup> September, 2006 with 2<sup>nd</sup> Respondent-PSPL for the sale of remaining 10% capacity of the project.
- (iv) Thereafter, the Udupi Power filed Tariff Petition No. 160/GT/2012 before CERC for determination of tariff for supply

of electricity to the Karnataka Discom, PSPCL and Kerala. PSPCL contested the petition and filed its response to various issues raised therein. Vide order dated 24<sup>th</sup> December, 2012, the Commission while determining the tariff also noted that the PPAs between the petitioner and the respondents will be approved by the respective State Commissions as part of power procurement process. Vide subsequent order dated 20<sup>th</sup> February, 2014, the Central Commission determined tariff of the Udupi Power Project for the period from 11<sup>th</sup> November, 2010 to 31<sup>st</sup> March, 2014 for Unit-I and from 19<sup>th</sup> August, 2012 to 31<sup>st</sup> March, 2014 for Unit-II.

- (v) It appears that after commissioning of the two units of Udupi Power project on 11<sup>th</sup> November, 2010 and 19<sup>th</sup> August, 2012 respectively, the 2<sup>nd</sup> Respondent-PSPCL did not enter into the Transmission Service Agreement for withdrawal or evacuation of power from the project. Accordingly, the entire power of 1200 MW was being sold to the Karnataka Discoms and no part of it was being sold to or purchased by PSPCL.
- (vi) Vide letter dated 23<sup>rd</sup> November, 2015, PSPCL informed Udupi Power that it be allowed to opt out of PPA dated 29<sup>th</sup>

September, 2006. In response thereto, the Udupi Power proposed to divert the share of PSPCL (101.5 MW) to 3<sup>rd</sup> parties for a period of three years without any financial implications to PSPCL. The proposal was agreed to by PSPCL vide letter dated 21<sup>st</sup> December, 2015.

(vii) On 21<sup>st</sup> September, 2018 Udupi Power informed PSPCL that the period of three years will expire on 21<sup>st</sup> December, 2018 and requested it to start scheduling 101.5 MW power w.e.f. 22<sup>nd</sup> December, 2018. However, PSPCL requested Udupi Power continue to selling power to 3<sup>rd</sup> parties as it would not be possible for it to avail power at the cost at which the power was being made available. The request of PSPCL was denied by Udupi Power.

(viii) Subsequently, vide letter dated 17<sup>th</sup> December, 2018, PSPCL informed Udupi Power that no power could be scheduled under the PPA dated 29<sup>th</sup> September, 2006 till the same is approved by the Commission.

6. It appears that thereafter PSPCL approached the 1<sup>st</sup> Respondent-Commission by way of Petition No. 41 of 2018 seeking approval of the PPA dated 29<sup>th</sup> September, 2006 entered into by it with

Udupi Power upon considering the need for purchase of power by PSPCL at the tariff determined by the Central Commission for the Udupi Power Project.

7. Petition was vigorously contested by Udupi Power i.e. Appellant herein on the contention that as per the settled position of law, the parties are bound to discharge their respective obligations under the PPA, irrespective of the date of approval of the PPA and the lack of approval of PPA by the Commission does not affect the validity of the agreement. It was further contended that the stand of PSPCL that it cannot commence scheduling of power under the PPA till its approval by the Commission, is incorrect or erroneous. It was stated that PSPCL's contention that PPA is a contingent contract and not enforceable until approved by the Commission is totally mis-placed and untenable. It was stated that once the parties have entered into a PPA, PSPCL cannot approach the Commission after unjustified and unreasonable delay of 12 years showing its unwillingness to perform its obligations under the same. It is further stated that PSPCL cannot use the power surplus situation or Udupi Power's current standing in the merit order list, as an excuse to renege out its obligations under the PPA for the reason that prudent conduct of a procurer is to be

considered at the time of signing of the PPA and not at the time of seeking its approval after a gap of around 12 years.

8. On the basis of the rival contentions of the parties, the Commission had framed following issues for its consideration :-

- “A. Whether there is delay on the part of PSPCL in obtaining approval of the PPA by the Commission,*
- B. Whether the PPA is enforceable/binding on the parties without the Commission’s approval thereof,*
- C. Whether shifting of stand by PSPCL would negate the requirement of approval of PPA by the Commission,*
- D. Whether the approval of the Commission for the purchase of power from UPCL project in the Tariff Orders of PSPCL tantamount to approval of the PPA,*
- E. Whether scheduling of power from other projects for which PPAs have not been formally approved by the PSERC entitles PSPCL to draw power from UPCL project without the approval of the Commission,*
- F. Whether various communications by PSPCL amount to acquiescence by way of conduct of PSPCL,*
- G. Whether there is a requirement of power by PSPCL and the rate of power is economical.”*

9. The Commission, vide impugned order, rejected all the contentions of the Appellant (Udupi Power) and held that the need for PSPCL to procure power from Udupi Power on long-term basis is not established and it would not be economically viable propositions for PSPCL to purchase power from Udupi project at the given price determined by the Central Commission particularly when much cheaper power is available in the market. It further held that if the PPA is



approved, the capacity charges would have been paid by PSPCL without scheduling of any power which would not be in the interest of consumers in the State of Punjab. Accordingly, it did not approve PSPCL's proposal regarding procurement of power (101.5 MW) from Udupi Power Project in terms of the PPA dated 29<sup>th</sup> September, 2006.

10. Learned Counsel for the Appellant argued that the impugned order of the Commission is absolutely erroneous and unsustainable in the eyes of law. He would submit that the findings of the Commission that the PPA would come into effect only after approval by it and that PSPCL cannot commence scheduling of power under PPA till the same is approved by it, contravenes the settled position of law that parties are bound to discharge their respective obligations under the PPA, irrespective of approval of the same. It is his submission that the impugned order is 'per incuriam' as having been passed contrary to the settled law declared by this Tribunal in Hinduja National Power Corporation Limited vs. APERC & Ors. 2020 SCC Online Aptel 3 [which was upheld by Hon'ble Supreme Court in Southern Power Distribution Power Co. Ltd. of Andhra Pradesh &Anr. v. M/s/ Hinduja National Power Corporation Ltd. & Anr. (2022) 5 SCC 484], Rithwik Energy Generation Pvt. Ltd. v. KPTCL & Ors., 2011 SCC OnLine

APTEL 163 and , M/s. DB Power Ltd. vs. RERC in A. Nos. 191 and 295 of 2015.

11. According to the Learned Counsel, it is not correct to say that PPA is a contingent contract and it cannot be acted upon until approved by the appropriate Commission. He argued that as per the settled position of law whenever a contracting party is obligated to obtain approval/permission to give effect to the agreement, the contract cannot be construed as being contingent upon such obligation being complied with. It is argued that Section 32 of Contract Act, 1872 applies only where the contract itself provides for the contingencies upon happening of which contract cannot be carried out and provides the consequences.

12. It is argued that the Commission failed to appreciate that the PPA stood approved in terms of its Tariff Orders passed by the Commission itself where both quantum as well as rate of procurement of power from Appellant's power project were approved for three consecutive years in terms of Section 86(1)(b) of the Electricity Act, 2003. It is his submission that these tariff orders dated 16<sup>th</sup> July, 2012, 10<sup>th</sup> April, 2013 and 22<sup>nd</sup> August, 2014 tantamount to approval of the

power procurement by PSPCL and despite that, the Commission has erroneously held that provisional approval of projections of power procurement cannot be construed as approval of the PPA.

13. Learned Counsel further argued that it was the responsibility of Respondent-PSPCL to obtain approval of the PPA dated 29<sup>th</sup> September, 2006 from the Commission and no such responsibility is cast upon the power generator i.e. the Appellant in this regard either under the PPA or under the Electricity Act, 2003. It is stated that by taking advantage of such legal position, PSPCL had drafted the petition in such a manner which shows that effectively it was praying against the approval of the PPA. In support of his submissions he has cited judgement of this Tribunal in Gagan Narang v. DERC & Ors. 2023 SCC OnLine APTEL 28 and judgement of the Hon'ble Supreme Court in Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659. He further argued that PSPCL indicated for the first time in December, 2018 that to offtake power from Udupi project, specific approval of the PPA was required. It is submitted that PSPCL expressed unwillingness to perform obligations under the PPA after an unjustified and unreasonable lapse of 12 years which cannot be

permitted. It is argued that the commission has failed to consider the shifting stand of PSPCL qua scheduling of power from Udupi Power Project and has ignored the facts that PSPCL has been procuring power from different power projects irrespective of the fact that PPAs were or were not approved. It is his submission that the Commission has erroneously held that PSPCL could not have placed PPA before it for approval prior to the determination of final tariff for the project by CERC. According to the Learned Counsel, the impugned order is contrary to the principles of Promissory estoppel and violates the vested rights as well as legitimate expectations of the Appellant.

14. Per contra, Learned Counsel appearing for the 2<sup>nd</sup> Respondent-PSPCL refuted the submissions made on behalf of the Appellant. He argued that the PPA dated 29<sup>th</sup> September, 2006 is a contingent contract as envisaged under Section 31 of the Contract Act, 1872 and in terms of Section 32, it would have become enforceable only on the happening of the contingency/event which, in this case, is the approval of the State Commission. He submitted that since the contingency of the approval of the PPA did not occur, no rights under the PPA vested in any of the parties and there are no obligations upon them under the same. He submitted that approval of the PPA by the Commission is

statutory mandate which cannot be waived by the parties to the PPA either expressly or by conduct.

15. Learned Counsel further argued that even otherwise also the approval of quantum and rate of power procurement from the Appellant in terms of tariff orders passed by the Commission for the financial years 2012-13, 2013-14, 2014-15 do not tantamount to constructive approval of the PPA. It is pointed out that the petition for ARR and determination of tariff is dealt by the Commission under the relevant Tariff Regulations, which are distinct from the 'Conduct of Business Regulations 2005'. He further submitted that the information in respect of power procurement submitted by PSPCL in the ARR petition is considered only for the purpose of Energy balance and determination of cost of power for the relevant year, and therefore, it cannot be considered as approval of the power procurement on long term basis as intended in Section 86(1)(b) of the Electricity Act.

16. It is further argued by the Learned Counsel that PSPCL has nowhere denied at any point of time the existence of PPA dated 29<sup>th</sup> September, 2006. The case of PSPCL is that the PPA is enforceable and effective only after the approval of the Commission. It is submitted

that as a necessary consequence, the obligation of PSPCL including to scheduling the power and to pay the transmission charges as provided under PPA would arise only if the Commission had granted sanction for such procurement of power from the Appellant's power project.

17. It is further submission of the Learned Counsel that there has been no delay on the part of the PSPCL in seeking approval of the PPA. He argued that the occasion for filing petition by PSPCL for approval of the PPA arose only in December, 2018 as till then the Appellant was selling the 10% power out of the total capacity of 101.5 MW to others. It is stated that the duty of PSPCL was to place on record before the Commission entire material for its consideration and it was for the Commission to consider the approval of the PPA upon taking into account all the relevant factors. It is submitted that the grant of approval of the power purchase from the Appellant's power project have to be considered with reference to the situation prevalent in December, 2018 when the petition was filed. It is pointed out that the Appellant also did not, at any point of time prior to December, 2018, call upon PSPCL to obtain approval of the PPA from the Commission.

18. Learned Counsel would further submit that there cannot be any legitimate expectation contrary to the terms of PPA, regulations framed by the Commission, orders of the Central Commission as well as the provisions of the Electricity Act, 2003 and rules frames there under.

19. We have considered the rival submission of the Learned Counsels and have perused impugned order as well as the entire record. We have also gone through the written submissions filed by the Learned Counsels.

20. At the very outset, we may say that we are unable to countenance the arguments raised on behalf of the Appellant to the effect that the parties to a PPA are bound to discharge their respective obligations under the same irrespective of its approval by the appropriate Commission. In other words, it was sought to contend that a PPA has to be acted upon even if it does not get approval from the appropriate Commission. We do not agree. To explain this legal position we need to refer to Section 86(1)(b) of the Electricity Act, 2003 which is quoted herein below :-

*“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -*

*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”*

21. We may also note that in exercise of power conferred upon the Central Government by Section 176 of the Electricity Act, 2003, the Electricity Rules, 2005 were notified on 8<sup>th</sup> June, 2005. Rule 8 of these Rules is material and is reproduced herein below:-

*“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”*

22. As per Section 86(1)(b) of the Act, the State Commission is empowered to regulate the electricity purchase and procurement process of the Distribution Licensees including the price at which electricity is procured from the generating companies through power purchase agreement. Therefore, a Distribution Licensee can



procure/purchase power only in the manner and at the price as approved by the State Commission upon satisfying the Commission about its requirement for such power. It is for the Commission to determine whether Distribution Licensee actually requires the power for supply to its consumers and whether the rate quoted in the PPA is reasonable as well as in consonance to the market conditions and whether the Distribution Licensee can obtain such power from other cheaper sources. Thus, it is the State Commission which regulates the entire process of purchase and procurement of power by each Distribution Licensee in the State by virtue of power conferred upon it under Section 86(1)(b) of the Electricity Act, 2003. In this regard, we also find it relevant to refer Regulation 46 of Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 which is quoted herein below :-

#### **46. POWER PROCUREMENT AND PURCHASE**

*1. In accordance with the provisions of the Act and the licence conditions, every Distribution Licensee shall purchase and procure electricity required for the Licensed Business of the Distribution Licensee in an economical and efficient manner and under a transparent power purchase and procurement process and generally based on the principles of purchase of electricity at the least cost.*

*2. The power purchase by a Distribution Licensee may be classified by the Commission as short term power purchase and long term power purchase on terms as may be decided by the Commission from time to time.*

3. The Commission may, from time to time, issue guidelines, practice directions and orders governing the short term purchases and long term purchases which the Distribution Licensee can undertake for the purpose of the Licensed Business.

**4. (a) The Distribution Licensee shall satisfy the Commission as to the need for additional power procurement on a long term basis**

**(b) The Distribution Licensee shall not enter into a binding or enforceable contractual commitment of such long term power purchase till the Commission by a general or special order approves the procurement of electricity by the Distribution Licensee.**

5. Unless otherwise approved by the Commission by a general or special order, a long term power purchase or procurement by the Distribution Licensee shall be done through a competitive procurement process approved by the Commission.

**6. (a) The Distribution Licensee shall satisfy the Commission that the electricity procured under long term power purchase otherwise than through a competitive bidding process or any short term power purchase is economical in the prevalent circumstances and that the Distribution Licensee has made prudent and best efforts to minimise the cost of purchase.**

**(b) The Commission may not permit any such long term purchase if the manner or method proposed for such procurement of electricity is not conducive to the objective of least cost purchase or for any other reason the purchase is not economical or efficient.....**

*(Emphasis Supplied)*

23. This Regulation also makes it mandatory for Distribution Licensee within the State of Punjab to satisfy the Commission about its need for additional power procurement on a long-term basis and that such procurement is economical and that Distribution Licensee has made prudent and best efforts to minimize the cost of purchase.

24. Having regard to the clear legal position indicated by the above noted legal provisions, we cannot agree with the arguments made on behalf of the Appellant that there is no need for approval of the State Commission in respect of a power purchase agreement and the same has to be acted upon irrespective of such approval. Such an interpretation certainly militates against the very object of Electricity Act, 2003 in general and Section 86(1)(b) of the Act in particular. In our such view, we are fortified by following judgements of the Hon'ble Supreme Court as well as of this Tribunal.

25. In Tata Power Company Limited vs. Reliance Energy Limited, (2009) 16 SCC 659, the Hon'ble Supreme Court has held as under :-

*“108. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. **Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted.***

.....

115. A PPA may be a long-term one or a short-term one. Regulations have been made by the Commission by making the MERC (Terms and Conditions of Tariff) Regulations, 2005. Short-term power procurement refers to an agreement for procurement of power for a period of less than one year. Regulation 23.1 requires the distribution licensee to prepare a five-year plan inter alia upon taking into consideration the sources for procurement thereof. **Regulation 24.1 mandates obtaining of prior approval of the Commission therefor. Approval by the Commission is granted upon examining the process of procurement having regard to the factors specified in Regulation 24.2.** It is in the aforementioned context that grant of approval of PPA by and between TPC (G) on the one hand and BEST and TPC (D), on the other hand, necessitated. The proposal of TPC (G) that Rinfra should enter with it into a long-term agreement assumes significance.”

(Emphasis supplied)

26. This Tribunal as in the case of Rithwik Energy Generation Pvt. Limited vs. Karnataka Power Transmission Corp. Limited and others, 2011 ELR (APTEL) 1651 held as under :-

“10. Let us take up the first issue regarding the validity of the PPA.  
10.1 According to the learned counsel for the appellant, the PPA is not enforceable by law as the respondents no. 2 had already exceeded the permissible limit of power purchase from the renewable sources of energy as per the State Commission’s Regulations and for this reason the PPA was returned by the State Commission on 6.6.2007. The approval of the State Commission was mandatory under Section 25 (3) of the Karnataka Electricity Reform Act, 1999. The PPA became void on account of the approval not having been given by the State Commission.

.....

10.3. Let us first examine the Section 25(3)(4) of the Karnataka Reform Act referred to by the appellant. The relevant extracts are reproduced below:

“25 (3) A holder of a supply or transmission licence may, unless expressly prohibited by the terms of its licence, enter into arrangements for the purchase of electricity from,-

(a)The holder of a supply licence which permits the holder of such licence to supply energy to other licensees for distribution by them; and

(b)Any person or generating company with the consent of the Commission”.

“25(4) Any agreement relating to any transaction of the nature described in sub-sections (1), (2), or (3) unless made with, or subject to, such consent as aforesaid, shall be void”.

Section 185(3) of the 2003 Act specifically stipulates that the provisions of the enactments specified in the schedule, which includes the Karnataka Reform Act, not inconsistent with the provisions of the 2003 Act, shall apply to the States in which such enactments are applicable.”

**10.4. According to Section 86 (b) of the 2003 Act, the State Commission is empowered to regulate electricity purchase and procurement process of the distribution licensees including the price at which electricity is procured from the generating companies through agreement for purchase of power.**

**10.5. In view of above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA.**

**Thus, the PPA will come into effect only after obtaining the consent of the State Commission. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Reform Act and Section 86(b) of the 2003 Act.** Accordingly, the second respondent had submitted the PPA dated 3.5.2007 signed with the appellant before the State Commission on 25.5.2007 for its consent.

(Emphasis supplied)

27. Again this Tribunal in Appeal No. 41 of 2018 - Hinduja National Power Corporation Limited vs. Andhra Pradesh Electricity Regulatory Commission and others decided on 7<sup>th</sup> January, 2020 held as under:-

*“75.If the State Commission fails in discharging its duties by deciding the matter without proper reasoning and justification, it is nothing but failure of its duty. Since proceedings before the State Commission are not in the nature of a lis as in the case of a Civil Suit, it has to take within its fold the interest of various stakeholders concerned. **Therefore, utmost duty of the State Commission while discharging its functions must be public interest and decide the matter on merits so far as adoption of capital cost and Continuation Agreement. The functions provided under Section 86(1)(b) of the Act is not merely a formality to approve the Power Purchase Agreement.** In other words, it does not mean one of the parties to the petition can interdict the implementation of Power Purchase Agreement at its whims and fancies totally ignoring the fact that **the Commission’s duty is to regulate electricity purchase and procurement process of a distribution licensee including the price at which electricity shall be procured from generating companies through agreements.**”*

.....

80.As stated above, so far as the procurement of power is concerned, it must be in the interest of the consumer. Between April 2017 to January 2018 as against the declared capacity, 3273.83 million units were delivered to the Respondent DISCOMs from the Appellant's project. Since it was conducive for AP DISCOMs to schedule and take delivery of electricity for maintaining the retail supply to its consumers the above number of units was taken by the DISCOMs. **To decide the matter pertaining to capital cost or approval of Continuation Agreement, one has to see whether it is in the interest of the consumers at large. The State Commission is the ultimate authority to decide procurement of power including the price, but unfortunately the Commission declined to decide the matter on merits.** In this process what Commission ought to have done in OP No. 21 of 2015 is to determine whether the capital cost and resultant tariff would be conducive to the interest of the consumers at large, since it is incumbent to do so as a regulatory authority. Therefore it was possible to first decide O.P. No. 21 of 2015 on merits, and based on its decision it should have proceeded to consider Continuation Agreement instead of passing the impugned order

.....

99.The Respondents contend that approval of Continuation Agreement so that PPA of 1998 could get revived is based on the principle enunciated in contingent contracts. According to Respondents, the right if any to Appellant gets created only on approval of Continuation Agreement dated 28.04.2016. They contend that happening of approval is happening of some future event, therefore question of neither of parties making any offer and acceptance would arise. In a contingent contract happening of something marks the moment at which a right is created, so that the contract becomes enforceable. As against this, Appellant contends that no doubt status of agreement dated 28.04.2016

can be treated as a contingent contract. **The contract comes in to effect once approval is given by the Commission.** It is also not the case of Appellant that approval of the state Commission is unnecessary. It is seen that agreement for the purchase of energy was duly finalised and agreed between the parties, which came in the form of a document pertaining to confirmation of terms agreed. By virtue of this agreement parties agreed to continue the amended and restated PPA dated 15.04.1998 with modifications which are clearly mentioned in the agreement. Parties also had consensus that tariff will be as determined by the State Commission in Petition No. 21 of 2015 filed by the Appellant. **The Continuation Agreement in a way becomes concluded terms and conditions subject to approval by the State Commission.** It was not an inchoate or incomplete contract as contended by AP DISCOMs.”

(Emphasis supplied)

28. In Eswari Green Energy LLP Vs. Karnataka Electricity Regulatory Commission and Ors., Appeal No. 180 of 2018 and batch decided on 13<sup>th</sup> November, 2020, it was held by this Tribunal

**“42.We do not agree with the broad argument of the appellants that there is no need for separate approval of the State Commission in respect of initialed PPAs simply because the general format of the PPA had been approved by the Commission on 22.7.2015.** It cannot be overlooked that the Commission regulates the purchase and procurement process of each distribution licensee by virtue of the power conferred on it under Section 86(1)(b) of the Electricity Act, 2003. The statute saves the operation of the Karnataka Electricity Reforms Act, 1999 by virtue of Section 185(3). The provision



contained in Section 17(1) of the Karnataka Electricity Reforms Act, 1999 reads as under:

.....

44.A perusal of the statutory provisions and Rules formulated thereunder shows that the distribution licensee can procure power only in the manner approved and it is required to place a proposed Power Purchase Agreement for approval of the State Commission. The Regulation also prescribes a timeframe for approval of the PPA. It also requires final version of the PPA to be provided to the State Commission

.....

47.In above context, reference may be made to following observations of the Supreme Court in Tata Power Company Limited vs Reliance Energy reported in (2009) 16 SCC 659, while construing the functions of the Regulatory Commission under Electricity Act, 2003:

.....

**48.The documents produced show that all concerned have throughout been of unanimous view that the power purchase agreements which had been initialed required the approval of the State Commission.** Having sought such approval through HESCOM, it is not permissible for the appellants to now contend that no approval was required. **There is no doubt that approval of the State Commission in respect of individual PPA is a condition precedent without which the PPA cannot come into existence though,** the respondent HESCOM concedes, with post-facto approval the PPA becomes operational retrospectively from the date of the PPA.

49.The respondents are also right in submission that there is no vested right to get approval of the PPA from the Commission which is duty-bound to consider it in light of statutory provisions and within regulatory framework.”

(Emphasis supplied)

29. In view of the clear law laid down by this Tribunal and the Hon'ble Supreme Court in the above noted judgements, there is no escape from well founded conclusion that a PPA becomes effective only upon getting approval from the State Commission and till then the parties are precluded from enforcing any rights or obligations under the same.

30. Referring to Section 31 of the Contract Act, 1872, it was argued on behalf of the Appellant that the PPA dated 29<sup>th</sup> September, 2006 executed between it and 2<sup>nd</sup> Respondent cannot be termed as a Contingent Contract for the reason that it does not provide for any contingency upon happening of which the Contract would become enforceable. The argument has been noted only to be rejected. Even though, the PPA does not specifically state that approval of the State Commission is necessary for it to become enforceable, such a contingency is evident from the provisions of Section 86(1)(b) of the Electricity Act, 2003 as well as Rule 8 of the Electricity Rules, 2005 and also Regulation 46 of Punjab State Electricity Regulatory Commission Regulations 2005. Approval from State Commission is a statutory mandate and such a contingency has to be read into every PPA even if it is not mentioned specifically in the PPA.

31. The judgements quoted by Appellant's Counsel on the above aspect are not relevant at all. The judgement in Hinduja National Power Corporation Limited vs. APERC has already been referred to herein above. It no longer advances the arguments on behalf of the Appellant. It merely says that amended and re-stated PPA is not inchoate or incomplete contract but is subject to the approval of the State Commission.

32. The judgement of Karnataka Commission in Rithwik Energy Generation Pvt. Limited(OP No. 29 of 2009), also does not support the case of the Appellant. It specifically lays down that the approval of a PPA by the Commission is a condition applicable to the Distribution Licensees for the reason that the Distribution Licensees have to purchase the Electricity with prior approval of the Commission as per Section 86(1)(b) of the Electricity Act, 2003.The judgement of this Tribunal in the appeal against the said order of the Karnataka Commission also does not support the Appellant's submissions. The same has already been noted herein above. That was the case where generating company had sought to withdraw from the PPA unilaterally which was denied by this Tribunal. Similarly, the another judgement of this Tribunal in M/s DBP vs. RERC in Appeal No. 191 of 2015 cited by

the Appellant's Counsel is also not material to the aspect under consideration.

33. Thus it cannot be said that the impugned order of the Commission is per incurium, as contended on behalf of the Appellant.

34. We, therefore, reiterate the basic legal proposition that the approval of Power Purchase agreement by the State Commission is mandatory, condition precedent without which the PPA executed between a generating company and Distribution Licensee cannot become enforceable or effective. The rights and obligations under the PPA would flow only after it is approved or consented to by the State Commission.

35. Learned Counsel for the Appellant has also argued that the PPA dated 29<sup>th</sup> September, 2006 executed between the Appellant and 2<sup>nd</sup> Respondent stood approved in terms of the tariff orders dated 16<sup>th</sup> July, 2012, 10<sup>th</sup> April, 2014 and 22<sup>nd</sup> August, 2014 for the financial years 2012-13, 2013-14 and 2014-15 respectively for the 2<sup>nd</sup> Respondent and despite that the Commission has erroneously held that the provisional approval of projections of power procurements cannot be construed as approval of the PPA. We do not find any force

in these arguments made on behalf of the Appellant. We concur with the observations of the Commission in this regard that the provisional approval of projections of procurement of power in the annual tariff orders for a distribution utility cannot be construed as approval of PPA which has to be done in accordance with the provisions of Section 86(1)(b) of Electricity Act, 2003. At best, these tariff orders can be taken as approval of the Commission with regards to the projection of sources of power by the Distribution Licensee as well as the quantity of power, it intends to purchase in the year. In none of these tariff orders has the Commission discussed or ascertained as to whether the Appellant actually requires the power sought to be purchased from the Appellant for supply to its consumers and whether the rate quoted by the Appellant is reasonable and whether the 2<sup>nd</sup> Respondent can obtain such power from other cheaper sources. In the absence of consideration of these basic parameters for grant of approval of the PPA, it would be atrocious to say that the tariff orders tantamount to constructive approval of the PPA between the Appellant and the 2<sup>nd</sup> Respondent. In view of the specific provisions of Section 86(1)(b) of the Electricity Act, 2003, we find that there is no scope of any constructive approval of the PPA and it is mandatory for a Distribution

Licensee to obtain specific approval of the Commission of the PPA without which the PPA cannot be acted upon.

36. Since the approval of the PPA by the State Commission is a mandatory statutory requirement under Section 86(1)(b) of the Electricity Act, 2003 before it would be enforceable, it logically follows that such a requirement cannot be waived off by any of the parties to the PPA. It is for the reason that there can be no waiver, either by conduct or expressly, on the part of any of the parties to the PPA to such statutory requirement. We may note that the basic object of the requirement of approval of PPA by the State Commission under Section 86(1)(b) of the Electricity Act, 2003 is to safeguard the public interest by ascertaining whether the projected need for power by the Distribution Licensee is genuine and the rate quoted in the PPA is reasonable as well as economical. Therefore, waiver of the requirement of approval of PPA by the State Commission would certainly go against the public interest and for that reason also, waiver is not permissible.

37. In so far as the another limb of arguments on behalf of the Appellant regarding delay on the part of the 2<sup>nd</sup> Respondent in seeking

approval of the PPA, is concerned, same too does not hold any water. It is to be noted that even though the PPA was executed between the Appellant and the 2<sup>nd</sup> Respondent on 29<sup>th</sup> September, 2006, the Appellant did not sell any power to the 2<sup>nd</sup> Respondent till the year 2018. It sold entire power of 1200 MW from the Udupi Power Project of Karnataka Discoms till November, 2015. Vide letter dated 23<sup>rd</sup> November, 2015, 2<sup>nd</sup> Respondent called upon the Appellant to allow it to opt out the PPA. However, the Appellant in response there too, proposed to divert the share of 2<sup>nd</sup> Respondent (101.5 MW) to 3<sup>rd</sup> parties for a period of three years without any financial implications upon the 2<sup>nd</sup> Respondent. Said proposal was accepted by the 2<sup>nd</sup> Respondent vide letter dated 21<sup>st</sup> December, 2015 and accordingly, the Appellant continued to sell the 2<sup>nd</sup> Respondent's share of power also to 3<sup>rd</sup> parties. Thus, from the conduct of the Appellant itself, it is manifest that it was happy in selling the 2<sup>nd</sup> Respondent's share of power also to 3<sup>rd</sup> parties which it probably found commercially advantageous. The Appellant never called upon the 2<sup>nd</sup> Respondent till September, 2018 to get the PPA approved and start scheduling of power from Appellant's Udupi power project.

38. When the Appellant wrote to the 2<sup>nd</sup> Respondent on 21<sup>st</sup> September, 2018 that period of three years is going to expire on 21<sup>st</sup> December, 2018 and requested it to start scheduling its share of power w.e.f. 22<sup>nd</sup> December, 2018, the 2<sup>nd</sup> Respondent again requested it to continue selling power to 3<sup>rd</sup> parties. However, this time the Appellant rejected the said request of 2<sup>nd</sup> Respondent. In these circumstances, the need and occasion arose for the 2<sup>nd</sup> Respondent to approach the Commission for approval of the PPA as it could not have started scheduling of power from Appellant's power project without getting the PPA approved from the State Commission.

39. In these facts and circumstances of the case, even if we accept the Appellant's contention that there was delay on the part of the 2<sup>nd</sup> Respondent in seeking approval of the PPA, the conduct of the Appellant itself needs to be noted. It continued to sell power, with or without the consent of PSPCL, throughout. It did not take any steps to initiate legal process against PSPCL for claiming its rights under the PPA executed with PSPCL. Given the fact that the State Commission, while determining the retail tariff of PSPCL has projected the source and quantum of power as contracted between the Appellant and the



PSPCL, it was appropriate for the Appellant also to approach the Commission to claim its rights under the PPA.

40. The conduct of PSPCL during the entire period is also necessary to note. It continued with the PPA and did not seek its termination at any point of time. Even the Central Commission in its order dated 27<sup>th</sup> June, 2016 in Petition No. 307/MP/2015 in Udupi Power Corporation Limited Vs. KPTCL & Ors., while determining the tariff for Appellant's project, noted that PSPCL has not given its right to purchase 101.5 MW power from Appellant's project, especially to retain the Mega Power project status. The relevant extract of the said order is as under:-

*“6. Punjab State Power Corporation Ltd (PSPCL) in its reply dated 18.3.2016 has submitted that PSPCL entered into an agreement with the petitioner for 10% of 1015 MW. Being a power surplus State, PSPCL has no requirement of power from the project of the petitioner as of now and PSPCL through its various communications intimated to the petitioner to sale its share of power to any other utility. PSPCL has further submitted that the dispute in the present case is only with regard to 18.5 MW of untied power which was generated after the enhancement of generation from 1050 MW to 1200 MW. PSPCL has not given up or surrendered its right of 101.5 MW of power (10% of 1015 MW). As Punjab is the power surplus State and is therefore, not in need of any excess power, PSPCL vide its letter dated 21.12.2015 accepted the proposal of the petitioner to*

allow for diversion of its share of 101.5 MW to a third party for a period of three years without any liability on either of the parties during this period. **As regards the Mega Power status of the project, PSPCL has submitted that PSPCL may consider for scheduling the power from the petitioner's project after a period of two to three years and in that eventuality, if the project would not be having the benefits of Mega Power status, then the power from the project could not be supplied to the customers of PSPCL and as a result, PSPCL would suffer with heavy loss for no reasons.**

15. PSPCL has submitted that **it has not given up its right on the capacity of 101.5 MW and only allowed the petitioner to divert the same to a third party for a period of three years.** PSPCL has further clarified that it may consider scheduling of its power capacity share from UPCL after three years as the demand for power is likely to increase in the next couple of years in the State of Punjab. During the course of hearing, **learned counsel for PSPCL supported the contention of the petitioner regarding retention of Mega Power status.**

16. We have considered the submissions of the petitioner, PCKL and PSPCL. It is noticed that non-scheduling of power to PSPCL by the petitioner was not deliberate and the benefits of the Mega Power status are ultimately being passed on to the end consumers by way of lower tariff due to reduction in capital cost arising from Mega Power benefits. PCKL has submitted that Mega Power status of the project needs to be retained at any cost. **PSPCL has submitted that it would retain its share in the generating station of UPCL.** Since the view of PSPCL was not available at the time of passing the impugned order, the Commission was unable to ascertain the correct position regarding inter-State supply of power from the petitioner's

*project. Based on the statement made by PSPCL on affidavit that it retains its right over the 101.5 MW capacity and permits the petitioner to sell it to third parties for a period of three years, we are of the view that the Mega Power status of the generating station continues to subsist and our direction to the Ministry of Power to review the mega power status of the project shall remain suspended for a period of three years...”*

41. Considering the above noted conduct of both the Appellant as well as PSPCL, we hold that they continue to be bound by the PPA dated 29<sup>th</sup> September, 2006 but the provisions of the PPA can be implemented only after it is approved by the State Commission.

42. For these very reasons also, we are of the opinion that there has been no shifting of stand by the 2<sup>nd</sup> Respondent, as alleged by the Appellant. It is manifest that the 2<sup>nd</sup> Respondent never expressed its desire to take power from the Appellant's Udupi Power Project and had been requesting the 2<sup>nd</sup> Respondent to sale its share of power also to 3<sup>rd</sup> parties. In December, 2018 also, same request was made by the 2<sup>nd</sup> Respondent to the Appellant which was not acceded to by the Appellant. In the wake of such denial of 2<sup>nd</sup> Respondent's request by the Appellant, the 2<sup>nd</sup> Respondent constrained to approach the State Commission for seeking approval of the PPA so that it could schedule taking of power from the Appellant's Udupi Power Project.

We are unable to see any shift of stand on the part of the 2<sup>nd</sup> Respondent through out from the date of execution of the PPA till it filed petition before the State Commission for approval of PPA.

43. It was also argued on behalf of the Appellant that since the responsibility to obtain approval of the PPA is upon the Distribution Licensee only, the 2<sup>nd</sup> Respondent took advantage of such legal position and drafted the petition in such a manner which shows that effectively it was praying against the approval of the PPA. We find such an argument from the Appellant unconscionable. While seeking approval of the PPA from the State Commission, it was the duty of the 2<sup>nd</sup> Respondent to place before the Commission entire relevant material for Commission's consideration and it was for the Commission to consider the approval of PPA upon taking into account for the relevant factors. From the perusal of the impugned order of the Commission, particularly, the portion from its page Nos. 68 to 78, it is evident that the entire relevant material was placed before the Commission by either of the parties. It was not a unilateral petition of the 2<sup>nd</sup> Respondent. The Appellant was a party to it and the Appellant's contentions have also been considered by the Commission. The Commission has duly proceeded to ascertain the need of additional power procurement by the 2<sup>nd</sup> Respondent on long-term basis and

whether the same would be economical as well as in the interest of the consumers in the State of Punjab in the prevalent circumstances. It is upon consideration of these two basic parameters envisaged under Section 86(1)(b) of the Electricity Act, 2003, the Commission concluded that the need to procure power from the Appellant by the 2<sup>nd</sup> Respondent on long-term basis is not established. The Commission also came to the conclusion that at the given price the power from Udupi Power Project of the Appellant would not be economical & viable proposition particularly so when much cheaper power is available in the market. Thus, the Commission did not approve the request of the 2<sup>nd</sup> Respondent for approval of the PPA. It would be preposterous to say that the 2<sup>nd</sup> Respondent had filed a defective petition or had not placed before the Commission the entire relevant material. In case, it is assumed that the petition filed by the 2<sup>nd</sup> Respondent was not accompanied by all the relevant material, we fail to comprehend what precluded the Appellant from bringing all such material to the notice of the Commission at the time of hearing of the petition. Thus, we do not agree with the Appellant on this aspect also.

44. Having said so, we also feel constrained to note from the facts and circumstances of the case, detailed herein above, that PSPCL

was never interested in scheduling the power from the Appellant's project right since the commercial operation of the project. It neither exited from the PPA dated 29<sup>th</sup> September, 2006 nor sought procurement of power from the Appellant's project in terms of the clauses of the PPA. Even if the observations of the Commission to the effect that the petition for approval of PPA can only be filed once a firm tariff is determined, is accepted then also PSPCL should have approached the Commission for approval of the PPA in 2014 itself when CERC had determined the final tariff for the Appellant's project. However, it did not do so. At the same time, as already noted herein above, the Appellant also did not proceed to take timely legal recourse in case of non-compliance of the provision of the PPA by PSPCL as claimed by it in this appeal. It did nothing except requesting PSPCL to schedule the power.

45. In these circumstances, we are constrained to not that the PPA dated 29<sup>th</sup> September, 2006 executed between the Appellant and the 2<sup>nd</sup> Respondent, PSPCL still exists as none of the parties has terminated or proceeded to terminate the same. However, it cannot be acted upon till it is approved by the State Commission.

## **Conclusion**

46. In the light of the above discussion, we do not find any error or infirmity in the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed. All pending IAs stand disposed off.

Pronounced in the open court on this 25<sup>th</sup> day of August, 2024.

(Virender Bhat)  
Judicial Member

*Js*

(Sandesh Kumar Sharma)  
Technical Member (Electricity)