IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 42 OF 2023 & IA No. 1386 OF 2022 &
IA No. 1431 OF 2022

Dated: 13th September, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

M/s Hasan Thermal Power Private Limited
Having its administrative office at:
S-327, Greater Kailash-II, New Delhi – 110 048
Through its authorized representative
Nalini Vijay Kumar, Director … Appellant(s)

Versus

1. **Government of Karnataka**
Department of Energy
2nd Floor, Vikasa Soudha,
Bengaluru – 560 001
Through Additional Chief Secretary
(Shri G. Kumar Naik, IAS) … Respondent No.1

2. **The Karnataka Power Transmission Corporation Limited**
Cauvery Bhavan, K.G. Road
Bengaluru – 560 009
Through Managing Director,
(Dr. N. Manjula, IAS) … Respondent No.2

3. **Karnataka Electricity Regulatory Commission**
C-1, Millers Tank Bed Area, Vasanth Nagar,
Bengaluru – 560 052
Represented by its (Secretary)

(Dr Siddaramaiah) … Respondent No.3

Counsel on record for the Appellant(s)	:	R.K. Naroola Akansha Choudhary
Counsel on record for the Respondent(s)	:	Prateek Chadha for Res. 1 Sumana Naganand Garima Jain Nidhi Gupta Tushar Kanti Mohindroo Arnav Khanna for Res. 2

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

The present appeal has been filed, under Section 111 of the Electricity Act, 2003, against the order passed by the Karnataka Electricity Regulatory Commission (*"*KERC*"* for short) in OP No. 91 of 2018 dated 17.12.2018, pursuant to the order of the on the basis of the liberty granted by the Supreme Court in SLP (C) No. 17062-17063/2021 and SLP (C) No.19190-19191/2021 dated 04.08.2022.

I. FACTS IN BRIEF:

A Power Purchase Agreement was entered into between the Appellant and the 2nd Respondent on 22.04.1999 ("the 1999 PPA" for short). Clause 14.3 of the 1999 PPA provided for the mechanism of arbitration of disputes between the parties. Arbitration of any dispute, if required, was to be conducted under the UNCITRAL Rules. The Appellant raised a dispute on 13.01.2003, under the UNCITRAL Rules, as per the Arbitration mechanism provided in Clause 14.3 of the 1999

PPA. An Arbitration Tribunal was constituted by the Permanent Court of Arbitration at the Hague ("The PCA"). The 2nd Respondent participated in the hearings. A joint written representation dated 04.08.2004 was submitted, both by the Appellant and the 2nd Respondent, to the Arbitral Tribunal praying for termination of the ongoing "Arbitral proceedings reserving liberty to either of the parties to initiate Arbitration proceedings against the other on the same cause of action if it became necessary. Based on the joint representation of the parties, the Arbitral Tribunal passed a Consent Award on 05.08.2004. In the year 2007 the parties (ie the Appellant and the 2nd Respondent), in terms of Article 16.1 of the 1999 PPA, executed a Revised and Restated PPA *("RRPPA"*) dated 25.06.2007.

The Appellant again invoked arbitration, under the UNCITRAL Rules, on 25.06.2018. The Permanent Court of Arbitration at the Hague (The PCA) issued notice to the Respondents on 29.06.2018. In their response dated 28.08.2018, the Respondents contended that, under Art 4.2 (a) of the Rules, the Tribunal, proposed to be constituted, lacked jurisdiction and should not be constituted. Despite the objections raised by the Respondents, the PCA appointed a two member Arbitral Tribunal which, in turn, nominated a Chairman. In response, the Respondents filed Original Petition No. 91 of 2018 before the Karnataka Electricity Regulatory Commission ('KERC' for short) seeking stay and declaration that KERC alone had the power and jurisdiction to adjudicate upon disputes between the Appellant and the Respondents in terms of the Electricity Act, 2003. The Respondents, in their common Petition, *inter alia,* also challenged the jurisdiction of the PCA, to nominate arbitrators and formally commence arbitration, by praying for a declaration that communications dated 29.06.2018, 11.09.2018 and 26.09.2018 of the PCA were illegal and opposed to the mandate of the Electricity Act,2003.

The KERC, by its order dated 17.12.2018, allowed OP No. 91 of 2018 declaring that the dispute between the Appellant and Respondent Nos.1 and 2 was not arbitrable under the aegis of the PCA, and was exclusively triable by the KERC under Section 86(1)(f) of the Electricity Act,2003. The KERC further declared that the communications of PCA dated 29.06.2018, 11.09.2018 and 26.09.2018, appointing Arbitrators, were illegal and opposed to the mandate of the Electricity Act, 2003.

II. ORDER OF KERC IN OP.NO.91 OF 2018:

In OP 91/2018 dated 17.12.2018, the KERC passed an order (a) declaring that the dispute, said to have been involved in PCA Case No.AA 716, between Hassan Thermal Power Private Limited (formerly known as 'Euro India Power Canara Private Limited') –Vs- The Government of Karnataka and the Karnataka Power Transmission Corporation Limited, is exclusively triable by this Commission, under Section 86(1)(f) of the Electricity Act, 2003, and not before any other Forum; (b) consequently, declaring that, the communications dated 29.06.2018, 11.09.2018 and 26.09.2018, appointing Respondents 4 to 6 as Arbitrators, were illegal and opposed to the mandate of the Electricity Act, 2003; and, (c) that the appellants before this Tribunal be restrained from proceeding with the above-mentioned arbitral case.

III. ORDER OF THE SINGLE JUDGE OF THE KARNATAKA HIGH COURT IN THE WRIT PETITION FILED BY THE APPELLANT CHALLENGING THE ORDER OF THE KERC:

The Appellant filed W.P. No. 1633 of 2019 before the Single Judge of the Karnataka High Court challenging the aforesaid order passed by the KERC in OP No. 91 of 2018 dated 17.12.2018. The Single Judge of the Karnataka High Court allowed W.P. No. 1633 of 2019, and quashed

the order dated 17.12.2018 passed by the KERC holding that the KERC had exceeded its jurisdiction under Section 86 (1)(f) of the Electricity Act, 2003 to entertain OP No. 91 of 2018 since neither was the Appellant a 'generating company' nor the 1st Respondent a 'licensee' under Section 2(28) and 2(29) of the Electricity Act, 2003; Section 2(4A) of the repealed Electricity (Supply) Act, 1948 could not be applied after the Electricity Act, 2003 came into force; KERC lacked plenary powers, under the Electricity Act, 2003, to examine and frame issues pertaining to the arbitration proceedings which was commenced under UNCITRAL Rules; the only remedy, in case of a dispute between the parties, was Arbitration due to the existence of the Consent Award dated 05.08.2004; and the Statutory Appeal under Section 111 of the Electricity Act, 2003 was not a remedy, as the order passed by the KERC was without competence/jurisdiction, and lacked source of power or locus to interfere with the PCA proceedings.

IV. JUDGMENT OF THE DIVISION BENCH OF THE KARNATAKA HIGH COURT:

In its judgement, in **Karnataka Transmission Corporation Ltd vs Hassan Thermal Power Pvt Ltd (Judgement in W.A. No. 3893 of 2019 & W.A. No. 190 of 2020 dated 12.03.2021)**, (preferred against the afore-said judgement of the Single Judge), the Division Bench of the Karnataka High Court held that the earlier PPA dated 22.04.1999 came to an end when the revised PPA was signed on 25.06.2007; the terms and conditions, agreed between the parties, made it clear that, after conducting detailed negotiations, the parties had entered into a self-contained revised and re-stated Power Purchase Agreement in terms of Article 16.1 of the original 1999 PPA; an altogether new agreement was entered into between the parties which contained a dispute resolution

mechanism in terms of which, in case of any dispute, it shall be resolved in accordance with the Electricity Act, 2003 as modified from time to time.

After taking note of the contents of Sections 86, 142 and 149 of the Electricity Act 2003, the Division Bench held that the said statutory provisions made it clear that, after enforcement of the Electricity 2003, a dispute had to be resolved keeping in view the statutory provisions as contained in the Electricity Act, 2003; against the order passed by the KERC, there was a remedy of appeal provided before the Appellate Tribunal under Section 111 of the Electricity, 2003, and the writ petition ought not to have been entertained by the Single Judge in view of the alternative remedy.

On the contention urged on behalf of the Appellant before this Tribunal, that they cannot be considered to be a “generating company” under the Electricity Act, the Division Bench took note of the definition of the “generating company” under Section 2(28) of the Electricity Act, and held that it was a settled proposition of law that, in case any literal interpretation resulted in absurdity, such an interpretation should not be adopted; the 1st Respondent had been incorporated for the purposes of setting up of a power plant, and it was bound to generate electricity in future after establishment of the power plant; by no stretch of imagination could an interpretation be given to the definition of “generating company” excluding the Appellant before this Tribunal; when once it is a “generating company” and there is a power purchase agreement, which includes a dispute resolution mechanism, such resolution of the dispute must be as per Section 86 of the Electricity Act, 2003; and the question of resolving the dispute, through arbitration proceedings, would not arise.

The Division Bench also noted that the Appellant herein had filed various Writ Petitions before the Karnataka High Court, i.e. WP Nos. 30351-52 of 2015, 30954 of 2016 and 41677 of 2017, which were pending adjudication before the Court; in all those Writ Petitions, a specific averment had been made by projecting the appellant herein as a "generating company" and, therefore, the appellant herein had rightly claimed itself to be a "generating company" as it was going to set up a generating station (power plant); the Single Judge had erred in law and on facts, in relying upon the PPA dated 22.04.1999 and the consent award dated 05.08.2004, to conclude that arbitral proceedings had been correctly initiated; various developments, which had taken place after termination of the earlier PPA dated 22.04.1999, had been lost sight of; the parties had entered into a fresh PPA which provided for a fresh and altogether new arbitration dispute resolution mechanism; the dispute, if any, must therefore be resolved in terms of the PPA of the year 2007; once there is a subsequent agreement between the parties providing for resolution of their disputes in terms of Section 86, it must be held that the dispute if any, after execution of the subsequent/ fresh PPA dated 25.06.2007, must be resolved keeping in view Section 86 of the Electricity Act, 2003.

The Division Bench, while rejecting the contention that alteration of the contract only meant modification of the terms of the contract and the amendment should be read as supplementary to the original contract as it becomes a part thereof, held that, in the present case, Article 14 of the earlier agreement of the year 1999 provided for a dispute resolution mechanism, in terms of which the dispute was required to be resolved under the UNCITRAL Rules; the said Article 14 had been, subsequently, substituted by another dispute resolution mechanism under the PPA

dated 25.06.2007 executed between the parties; if the contention of the appellant before this Tribunal were to be accepted, there would be two parallel dispute resolution mechanisms in existence in view of the PPA dated 25.06.2007; and any dispute arising after 25.06.2007 must be resolved in terms of Section 86 of the Electricity Act, 2003.

The Division Bench further held that, since the scope and ambit of Sections 58 and 59 of the Disabilities Act was not in *parimateria to* Section 86(1)(f) of the Electricity Act, 2003; it was only KERC which could adjudicate the dispute keeping in view the subsequent agreement executed between the parties; the contention that the definition of "generating company" could not include a company which had not started generation of electricity could not be accepted as that would bring about an anomalous situation in existence; the dispute between the generating companies and the transmission companies, which have started generation and have executed PPAs, would be adjudicated by the Regulatory Commission, and companies which had not started generation will have a different forum; there cannot be such type of situation where two forums would be in existence; therefore, any company which was established or was going to establish a generating unit would fall within the definition of "generation company" under the Electricity Act, 2003; the word "generating company", in a wider sense, includes a company which had signed a PPA with the Transmission company or with the Electricity Board for setting up of a power plant with an intention to generate electricity; once the appellant before this Tribunal fell within the meaning and definition of "generation company", KERC would have jurisdiction to decide any kind of dispute existing between the parties keeping in view the subsequent agreement executed between the parties on 25.06.2007 and Section 86 of the Electricity Act; as parties had accepted, in the

subsequent agreement dated 25.06.2007, that disputes should be adjudicated keeping in view Section 86 of the Electricity Act, the question of referring the dispute to the Arbitration Tribunal, constituted under the non-existent 1999 PPA, did not arise; in the present case, there was a specific contract dated 25.06.2007 executed between the parties; the subsequent contract provided for a dispute resolution mechanism; after the enactment of the Electricity Act, the statutory provisions therein would prevail and there cannot be an estoppel against the law; and therefore, as the subsequent agreement provided for a dispute resolution mechanism, the same must be adhered to.

The Division Bench also observed that, while there was an alternative remedy, the fact remained that the Single Judge had exercised his discretion by deciding the matter on merits and, therefore, they (ie the Division Bench) were also deciding the writ petition on merits; the only issue involved in the present case was whether KERC was jurisdictionally competent to decide the dispute between Hassan Thermal power Pvt. Ltd. and KPTCL; the subsequent agreement executed between the parties on 25.06.2007, read with the Electricity Act, 2003, made it clear that KERC alone had jurisdiction to decide all kinds of disputes between the said parties; as the matter was decided on merits, the issue of alternative remedy was left open; and, since the matter had already been decided by the Single Judge on merits and they (ie the Division Bench) were deciding the matter again on merits, the question of availability of alternative remedy did not arise.

The Division Bench further held that it was the KERC which had jurisdiction in the matter; KERC was jurisdictionally competent to take up the disputes between licensees and generating companies; the Commission is constituted under the Electricity Act, and once a forum was

provided for adjudicating disputes arising between a generating company and the licensees/ transmission companies, it was only KERC which could decide the matter; the arbitration agreement, under the old PPA of the year 1999, would not supersede the statutory provisions as contained under the Electricity, 2003; as the appellant before this Tribunal fell within the meaning and term of the definition “generating company”, and there was an agreement dated 25.06.2007 executed between the parties, any dispute arising out of such an agreement must be decided only by the KERC, and no other forum was available to the appellant before this Tribunal keeping in view Section 86 of the Electricity Act, 2003; Clause (vi) of the 2007 PPA clearly stated that the provisions of the 1999 PPA had been re-stated and revised; further, Article 7 of the 2007 PPA provided for a dispute resolution mechanism in terms of the provisions of the Electricity Act, 2003; therefore, appointment of Arbitrator, if any, can only be done under the provisions of the Electricity Act, 2003; a perusal of the provisions of the PPA would indicate that the term “generating company” was not merely a company which is generating power, but also includes a company which intends to generate power, and is not confined to a company which has actually commenced generation or which has already set-up or owns a generating station; the appellant before this Tribunal is covered under the definition of “generating company”; once it is covered under the said definition, any dispute has to be adjudicated keeping in view Section 86 of the Electricity Act, 2003; the entire regulatory framework provides for resolution of disputes between “licensees” and “generating company”, and the provisions of the Electricity Act provided for resolution of disputed by KERC; there was a remedy of appeal also against the order passed by the KERC; and, therefore, the Single Judge had erred in law and on facts in allowing the writ petition.

The order passed by the Single Judge was set aside, and the Writ Appeal was allowed reiterating that it was only the KERC and the appellate authority which were competent to look into all disputes between "licensees" and "generating company", meaning thereby any dispute between the parties had to be resolved by the KERC in terms of Section 86 of the Electricity Act, 2003.

V. ORDER PASSED BY THE DIVISION BENCH OF THE KARNATAKA HIGH COURT IN THE REVIEW PETITION FILED BY THE APPELLANT:

Against the aforesaid order passed by the Division Bench, the Appellant herein filed Review Petition No. 146 of 2021. The Division Bench of the Karnataka High Court, in its order in R.P. No. 146 of 2021 dated 13.08.2021, took note of the submission that the review petitioner was not a generating company and reference to the three Writ Petitions, as being pending, was erroneous, since all the three writ petitions had been disposed of. The Division Bench held that pendency or the disposal of the aforesaid cases had no relevance, as reference was made, to the said writ petitions, to establish that the writ petitioner had projected itself as a generating company in the aforesaid cases.

On the challenge to the jurisdiction of the KERC to interfere with the arbitration proceedings, initiated under UNCITRAL Rules, the Division Bench observed that the agreement executed between the parties made it clear that they had agreed, under the dispute resolution mechanism, that the dispute should be resolved under the Electricity Act, 2003.

With respect to the other grounds, which had already been raised earlier, the Division Bench observed that it was not sitting in appeal in respect of its own judgment, and the review petitioner had the right to approach the Supreme Court, if they were so aggrieved; the scope of

review was only to correct an error apparent on the face of the record, and there was no error apparent in the present case warranting review. The Division Bench referred to certain judgments of the Supreme Court to hold that the scope of a review petition was extremely limited, and they did not find any reason to review the earlier judgment passed in W.A Nos. 190 of 2020 and 3893/2019. The review petitions were, accordingly, dismissed.

VI. ORDER OF THE SUPREME COURT IN THE SPECIAL LEAVE PETITION FILED BY THE APPELLANT AGAINST THE ORDER PASSED BY THE KARNATAKA HIGH COURT DIVISION BENCH:

In the Special Leave Petition filed by the Appellant before the Supreme Court challenging the validity of the order passed by the Division Bench of the Karnataka High Court, both against the original order dated 12.03.2021 and the order passed in review dated 13.08.2021, the Supreme Court, by its order in Special Leave to Appeal (C) Nos. 17062-17063 of 2021 dated 04.08.2022, held that they found no reason to interfere with the impugned judgment passed by the Division Bench of the Karnataka High Court and, consequently, the Special Leave Petition stood dismissed.

The Supreme Court, thereafter, took note of the submission urged on behalf of the Petitioner (ie the Appellant herein) that the issues/ legal questions raised by it be permitted to be raised before the Appellate Tribunal. It is in this context that the Supreme Court observed that it is open to the Petitioner to raise all contentions available under law before the Appellate Tribunal and, if raised, may be examined on its own merits in accordance with law. The Supreme Court further observed that, if the appeal was preferred before the Appellate Tribunal within four weeks, it

hoped and trusted that the appeal would be disposed of expeditiously in accordance with law.

VII.RIVAL SUBMISSIONS:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri R.K. Narula, Learned Counsel for the appellant, would submit that the afore-said Order of the Supreme Court is not a dismissal simpliciter; the said order effectuated a clear mandate for this Tribunal to examine the matter on merits, and in accordance with law ie all lawful contentions raised by the Appellant; therefore, dismissal of the then ongoing proceedings by the Supreme Court was an unequivocal and unambiguous judicially mandated prelude to the consideration of all contentions and decision thereon by this Tribunal; the Supreme Court "saw no reason to interfere with the impugned judgment passed by the Division Bench" for the simple reason that it found it fit to entrust this Tribunal with examination of the issue/legal question "on its own merits in accordance with law"; neither of the two paragraphs of the Order of the Supreme Court exist in isolation; if it is not up to the Appellate Tribunal to adjudicate the matter "in accordance with law", but by what has previously been ruled by the Division Bench, then there was no point of hearing before this Tribunal; paras 2 & 3 of the Order of the Supreme Court has to be honored in examining the issues raised before this Tribunal; and the essence of the Supreme Court ruling is that the Appellate Tribunal is tasked with only examining the order passed by the KERC "in accordance with law" and "on its own merits", and nothing else.

Sri R.K. Narula, Learned Counsel for the appellant, would further submit that WA Nos. 3893/2019 and 190/2020 were allowed, by the Division Bench of the Karnataka High Court, on a completely erroneous interpretation of the law, on incorrect findings of facts, and a new and

separate case was made out for the Respondents; and the Division Bench wrongly concluded that the Appellant falls within the definition of 'generating company', it enlarged the definition of generating company as contained in the 2003 Act, and it did not consider the findings of the Single Judge that KERC did not have the power to issue declaratory Orders/Decrees, etc.

Sri R.K. Narula, Learned Counsel for the appellant, would also submit that the power and authority of KERC is confined to adjudicate disputes only between "the licensees and generating companies" as defined under the Electricity Act, 2003; a "generating company" under the Electricity Act cannot be any and all companies which have only a hope or an objective of establishing a generating station, because a "generating company" must either own or operate or maintain a "generating station" which has been defined in Section 2 (30) of the Act; the KERC erred in relying on the definition of "generating company" in Section 2(4A) of the repealed Electricity Supply Act,1948 to hold that, without existence of a generating station, the Appellant is a *"generating company"*; the Appellant does not come within the definition of "Generating Company", and is thus outside the limits of the dispute resolution powers vested in the KERC under the Electricity Act, 2003; the option to raise a dispute, under the Electricity Act, 2003, is restricted purely between the "Generating Company" and the "Licensee" under Section 86 (1) (f); the Appellant is not a "Generating Company" as per the definition in clause 2(28) of the Electricity Act, 2003; the Electricity Act does not confer jurisdiction or power on KERC to pass declaratory orders or mandatory injunctions; the KERC ignored the fact that instead of raising jurisdictional issue before the Arbitral Tribunal under Article 23 (pari materia to Section 16 of the Arbitration and Conciliation Act,1996) of the UNCITRAL rules, the Respondents rushed to the

KERC; and KERC failed to appreciate that, since Arbitration proceedings had already commenced, there could not have been any judicial or quasi-judicial intervention at this stage.

Reliance is placed on behalf of the Appellant on **All India Power Engineer Federation & Ors. Vs. Sasan Power Ltd. & Ors: (2017) 1 SCC 487,** in support of their submission that alteration of a contract means amendments i.e. modification of the terms of the contract, and these amendments have to be read as supplementary to the original contract as it becomes a part thereof. Reliance is placed on **State Bank of Patiala vs. Vinesh Kumar Bhasin: (2010) 4 SCC 368,** in support of the submission that the Disabilities Act, which clothes them with certain powers of the Civil Court for discharge of their functions, does not enable them to assume other powers of a Civil Court. Reliance is placed on **Ajudh Raj vs. Moti: (1991) 3 SCC 136,** in support of the submission that an order passed without jurisdiction is a nullity, it is un-necessary to set it aside and it can be ignored. Reliance is placed on **Dwaraka Prasad Agarwal vs. B. D. Agarwal: (2000) 3 SCC 230,** in support of the submission that an order passed by a Court without jurisdiction is a nullity, and any order passed pursuant thereto would also be a nullity. Reliance is place on **A. Ayyasami's vs. A. Parmasivam & Ors: (2016) 10 SCC 3,** in support of the submission that, when arbitration proceedings are triggered by one of the parties, no judicial intervention is permissible to scuttle such arbitration proceedings. Reliance is placed on **Gujarat Urja Vikas Nigam vs. Essar Power Ltd: (2008) 4 SCC 755,** in support of the submission that a dispute between a licensee and a generating company can be resolved by a State or Central Commission or an Arbitrator nominated by it, and all other disputes would be decided in accordance with Section 11 of the Arbitration & Conciliation Act, 1996. Reliance is placed on **Vidya Drolia & Ors. vs. Durga Trading Corporation: (2021)**

2 SCC 1, in support of the submission that, when parties to arbitration adopt delaying tactics, Court should not interfere. Reference is made to **All India Indian Overseas Bank SC & ST Association vs. Union of India & Ors: (1996) 6 SCC 606,** to submit that the powers of the Civil Court to grant injunctions do not inhere in the Commission. Reliance is placed on **State of Gujarat and Others vs. Utility Users' Welfare Association and Others: (2018) 6 SCC 21,** to content that only adjudicatory functions are provided in Section 86(1)(f) of the Electricity Act in terms of which the Commission has the option of adjudicating the dispute between licensees and generating companies or to refer such disputes to arbitration. Reliance is also placed on **Maharashtra Electricity Regulatory Commission vs. Reliance Energy Ltd: (2007) 8 SCC 381,** to submit that the State Commission, under Section 86(1)(f), has only the power to adjudicate upon disputes between licensees and generating companies, and the Commission cannot adjudicate disputes relating to grievances of individual consumers.

Tata Power Co. Ltd. vs. Reliance Energy Ltd: (2008) 10 SCC 321, is relied upon, on behalf of the appellant, in support of the submission that MERC has overstepped its jurisdiction to make out a third case which had not been made out by the Respondents. Reliance is placed on **Malay Kumar Ganguli vs. Dr. Sukumar Mukherjee: (2009) 9 SCC 221,** to submit that proceedings before the Commission, although quasi-judicial proceedings, would not make it a Civil Court under the Civil Procedure Code. Reliance is placed on **Hindustan Zinc Limited (HZL) vs. Ajmer Vidyut Vitran Nigam Limited: (2019) 17 SCC 82,** to submit that Section 86(1)(f) is a special provision for adjudication of disputes between licensees and generating companies. Reference is made to **Jaiprakash Power Ventures Ltd. vs. Haryana Electricity Regulatory Commission**

and Ors. (Order of APTEL in APL No. 130 of 2011) to contend that the State Commissions have jurisdiction to adjudicate upon the PPA between the generating company and an inter-state trader only if nexus or privity is established between them.

B. SUBMISSIONS URGED ON BEHALF OF RESPONDENT NO. 1:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 1st Respondent, would submit that the judgement of the Division Bench of the Karnataka High Court, in Writ Appeal Nos. 3893 of 2019 and 190 of dated 12.03.2021, dealt with the same arguments pressed by the Appellant before this Tribunal, after framing the same questions of law; the said judgement establishes Karnataka Electricity Regulatory Commission ('**KERC**') as the entity having sole jurisdiction to hear the dispute between the parties involved in the present appeal; the argument of the Appellant, that it was not a generating company, was dealt with and decided by the Division Bench holding that, in view of Section 86(1)(f) of the Electricity Act, no arbitral proceeding subverting the jurisdiction of the KERC is permissible; as the Division Bench of the Karnataka High Court has adjudicated the exact question of law and dispute involving the same parties, and the Supreme Court has upheld the same, it is no longer "open to the Appellant" to raise these disputes since they cease to be contentions that are "available under law" before this Tribunal; the contention, that it is open to the Appellant to re-agitate the said issues before this Tribunal would effectively render the order of the Supreme Court otiose; the liberty given to the Appellant, in the aforesaid order, only allows it to raise contentions on points of law that were not urged before the Division Bench of the Karnataka High Court; and, in the present appeal, the Appellant has not raised any such contentions.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 1st Respondent, would submit that the Electricity Act, 2003 takes precedence over the arbitration agreement between the parties; the Supreme Court has laid down that, in disputes involving a generating company and a licensee, the Electricity Commission has the sole jurisdiction (Refer: ***Gujarat Urja Vikas Nigam Ltd v. Solar Semiconductor Power Company:*** (2008) 4 SCC 755; ***Chief General Manager (IPC) Madhya Pradesh Power Trading Company Ltd v. Narmada Equipments Pvt. Ltd :*** (2021) 14 SCC 548; and ***Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd :*** (2019) 17 SCC 82); the Division Bench of the Karnataka High Court noted, in its order dated 12.03.2021, that the Appellant, in other Writ Petitions filed before it, had itself claimed to be a generating company; these observations have not been refuted in the Appellant's Review Petition No. 146/2021, except to state these petitions were no longer "pending adjudication"; the State Government was not a party to either the PPA of 1999, or the RRPPA of 2007; the State Government had only initiated the competitive bidding process in the first instance; the PPA of 1999 provides for the approval by the State Government; it was in the arbitration proceedings, initiated under the UNICITRAL Rules, that the Appellant impleaded the State Government as a party, and the Permanent Court of Arbitration issued a notice to the State Government; the State Government along with Respondent No. 2 was, therefore, constrained to file the proceedings before the State Commission.

C. SUBMISSIONS URGED ON BEHALF OF THE SECOND RESPONDENT:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the primary challenge, in

the present Appeal, is that the KERC had no jurisdiction to entertain and decide the matter, as the Appellant falls outside the scope and ambit of a "generating company" as defined under Section 2(28) of the Electricity Act; the appellant has not established a generating station to become a generating company, and Section 2(8) of the Electricity Act requires the generating company to be a company which owns, operates or maintains a generating station; this precise issue was raised by the Appellant in WA 3893/2019 and WA 190/2020, and in Review Petition No. 146/2021, before the Division Bench of the Karnataka High Court, in support of its plea that KERC has no jurisdiction; the same has been considered and rejected vide Orders dated 12.03.2021 and 13.08.2021, to hold that KERC has jurisdiction; in SLP (C) No. 17062-17063/2021 and connected matters, the Supreme Court, vide order dated 04.08.2022, held that they found no reason to interfere with the impugned judgment passed by the Division Bench of the High Court of Karnataka, and consequently the special leave petitions stand dismissed; the latter part of the order of the Supreme Court dated 14.08.2023 cannot be interpreted and applied in a manner to set at naught the foundation of the Division Bench decision; the very purpose for which the Appellant company was incorporated was to establish a power plant to generate and sell electricity; the Appellant defined itself as a generating company in the writ petitions that it had filed before the High Court of Karnataka; in the said petition, the Appellant herein specifically referred to itself as an Independent Power Producer; and the Appellant's contention that it is not a generating company, and therefore the State Commission has no jurisdiction over it, is wholly untenable.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would further submit that the issue with

regard to whether the Appellant could be considered as a “generating “company, within the ambit of the Electricity Act 2003, has since attained finality; the Division bench of the High Court of Karnataka has, while allowing WA No. 3893/2019 vide order dated 12.03.2021, conclusively held that the Appellant herein is a generating company; if the interpretation canvassed by the Appellant is accepted, it will have an absurd outcome as no company which is formed with the objective of setting up a generating unit will be amenable to the jurisdiction of the State Commission, prior to setting up of the project and until the commissioning of the same; and a combined reading of the two definitions contained in Section 2(28) and Section 2(30), would lead to the inescapable conclusion that a company, which is operating a generating station or intends to use the items mentioned in the definition of generating station, would be construed to be a generating company under the provisions of the Electricity Act.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would also submit that Section 86(1)(f) of the Electricity Act vests power of adjudication of all disputes between distribution licensees and generating companies/ power or to refer the dispute to arbitration, with the State Commission; a combined reading of the dispute resolution mechanism provided under the Electricity Act 2003 and Article 7 of the RRPPA would make it amply clear that it is the State Commission that has exclusive jurisdiction to adjudicate the dispute on hand, and the question of continuing with an arbitration proceeding, which has been instituted by the Appellant before any other Tribunal by bypassing the dispute resolution mechanism provided for in the contract, would not arise; and, even if it is assumed that the PPA of 1999 is still subsisting, the effect would be the same in as much as the dispute

resolution mechanism under the old PPA should be held to have been substituted by the provisions of the Electricity Act.

Sri C. S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would state that the issues raised by the Appellant in the present Appeal have already been adjudicated upon, and have also attained finality; the very same issues were considered by the Division Bench of the High Court of Karnataka in Writ Appeal No. 3893/2019, and a detailed order was passed on 12.03.2021 arriving at the following findings, amongst others: (a) the earlier PPA dated 22.04.1999 came to an end when RRPPA dated 25.06.2007 was signed by the parties; (b) the new RRPPA contains a dispute resolution mechanism which specifically provides for resolution in accordance with the Electricity Act, 2003, as modified from time to time; (c) the Appellant is a generating company; (d) after execution of the subsequent agreement dated 25.06.2007, disputes between the parties have to be resolved keeping in view Section 86 of the Electricity Act, and Article 14 of the PPA of 1999 has been replaced by the dispute resolution mechanism under the RRPPA; (e) it is the State Commission alone that has the jurisdiction to decide all kinds of disputes between the Appellant and the 2nd Respondent; and , therefore, the questions raised in the present Appeal have already attained finality, and the question of re adjudicating the very same issues would not arise.

VIII. ANALYSIS:

As noted hereinabove, the Supreme Court had, in its order dated 04.08.2022, held that it found no reason to interfere with the judgment of the Division Bench of the Karnataka High Court. The challenge mounted by the Appellant herein, to the judgment of the Division Bench of the

Karnataka High Court, was rejected and the Special Leave Petition was dismissed. It is only because the Appellant had sought permission to raise issues/legal questions before this Tribunal, that the Supreme Court observed that it was open to them to raise all such contentions as were available to them under law before this Tribunal.

It is only such issues/legal questions, which were not adjudicated by the Division Bench of the Karnataka High Court, which are open to be raised before this Tribunal, since the Judgment of the Division Bench of the Karnataka High Court which, in effect, has been affirmed by the Supreme Court, is binding on this Tribunal. The Division Bench of the Karnataka High Court passed the said judgment in the exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India. The power of judicial review, conferred on High Courts under Article 226 of the Constitution of India, has been held by the Supreme Court, in **L. Chandra Kumar vs. Union of India: (1997) 3 SCC 271,** to form part of the basic structure of the Constitution of India. As Articles of the Constitution of India, which form part of its basic structure, cannot even be subjected to a constitutional amendment, it goes without saying that such powers cannot be curtailed or circumscribed by plenary legislation. As High Courts continue to exercise the power of judicial review over orders passed by Statutory Tribunals (including both the KERC and this Appellate Tribunal), the law laid down by the Division Bench of the Karnataka High Court is binding on this Tribunal.

Further, the said judgment of the Division Bench of the Karnataka High Court is a judgment inter-parties and is binding both on the Appellant and the Karnataka Transmission Corporation Limited. An order or judgment of a Court/Tribunal, even if erroneous, is binding inter-parties. The binding character of judgments, of Courts of competent jurisdiction,

is in essence a part of the rule of law on which administration of justice is founded. (**The Direct Recruit Class-II Engineering Officers' Association v. State of Maharashtra : (1990) 2 SCC 715; U.P. State Road Transport Corporation v. State of U.P. : (2005) 1 SCC 444; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473).** Matters in controversy, in writ proceedings under Article 226, decided after full contest, after affording fair opportunity to the parties to prove their case, by a Court competent to decide it and which proceedings have attained finality, is binding inter-parties. (**Gulabchand Chhotalal Parikh v. State of Bombay (Now Gujarat) : AIR 1965 SC 1153; State of Punjab v. Bua Das Kaushal : (1970) 3 SCC 656 : AIR 1971 SC 1676; State of Uttarakhand v. Rajeshwari Sharma, 2019 SCC OnLine Utt 228).** Once a matter, which was the subject-matter of a lis, stood determined by a competent Court, no party can thereafter be permitted to reopen it in a subsequent litigation. (**Swamy Atmananda v. Sri. Ramakrishna Tapovanam : (2005) 10 SCC 51 : AIR 2005 SC 2392; Ishwar Dutt v. Land Acquisition Collector : (2005) 7 SCC 190; Dhananjay Verma v. State of Uttarakhand, 2019 SCC OnLine Utt 373).** Issues which have been concluded inter-parties cannot be raised again in proceedings inter-parties. (**State of Haryana v. State of Punjab : (2004) 12 SCC 673).**

As noted hereinabove, the order of the KERC has been affirmed by the judgement of the Karnataka High Court Division Bench. The Supreme Court has, in the appeal preferred by the appellant there-against, made it clear that it was not interfering with the said order of the Division Bench of the Karnataka High Court, and the said judgement inter-parties has attained finality on the SLP having been dismissed. The validity of the order of the KERC cannot, thereafter, be again re-agitated by way of an

appeal to this Tribunal. As a judgment inter-parties, which has attained finality, is binding on the parties thereto, it is also not open to the Appellant to question the correctness of the judgment of the Division Bench of the Karnataka High Court, much less before this Tribunal in an appeal under Section 111 of the Electricity Act.

In this context, it is relevant to note that the Supreme Court, while leaving it open to the Appellant to raise legal questions before this Tribunal, did not set aside the judgment of the Division Bench of the Karnataka High Court. On the other hand, the Supreme Court has, in dismissing the SLP, affirmed the said judgment. It is impermissible for this Tribunal, therefore, to take a view contrary to the law declared by the Division Bench of the Karnataka High Court or to re-examine the contentions which the Appellant had raised and which were rejected by the Karnataka High Court Division Bench.

But for the liberty granted by the Supreme Court, the Appellant may not have even been entitled to raise a fresh dispute on merits, including with respect to the underlying dispute for which they had earlier invoked arbitration proceedings, in view of principles analogous to Section 11 of the Civil Procedure Code. While it may be open to the Appellant to raise contentions, not urged before the Karnataka High Court or those which would not result in a view being taken contrary to the opinion of the Division Bench of the Karnataka High Court, the contention urged before us are only those which were urged before, and were rejected by the Division Bench of the Karnataka High Court.

The submissions urged on behalf of the Appellant that the judgment of the Division Bench of the Karnataka High Court, in W.A Nos. 3893/2019 and 190/2020, suffers from several errors is a contention which cannot be

examined in the present appeal, as this Tribunal does not sit in appeal over the judgment of High Courts. Further, on dismissal of the SLP preferred there-against, the order of the Karnataka High Court Division Bench must be held to have been affirmed by the Supreme Court and it is, therefore, not open to the Appellant to re-agitate the very same issues to contend that the order of the Division Bench suffers from infirmities. As the order passed by the Single Judge of the Karnataka High Court has been set aside by the Division Bench, the said order of the Single Judge can neither be relied upon nor is it open to the Appellant to now rely on certain observations made therein to submit that such aspects have not been considered by the Division Bench.

As noted hereinabove, the Division Bench of the Karnataka High Court has held that the Appellant would fall within the ambit of a "generating company" under the Electricity Act, and the dispute between them and the 2nd Respondent, can only be adjudicated by the KERC and not by way of independent arbitral proceedings. The Karnataka High Court Division Bench, by setting aside the order of the Single Judge, has affirmed the order passed by the KERC holding that the dispute between the Appellant and the 2nd Respondent was exclusively triable by it under Section 86(1)(f) and not before any other forum, and that appointment of arbitrators is contrary to the mandate of the Electricity Act. These issues cannot now be re-opened or re-agitated in appellate proceedings under Section 111 of the Electricity Act.

The effect of the order of the Supreme Court is only that the Appellant has been permitted to agitate issues which were not the subject matter of examination by the Division Bench of the Karnataka High Court. As the Karnataka High Court Division Bench has held that the Appellant is a generating company, and the dispute between it and the 2nd

Respondent can only be adjudicated by the KERC and not before an arbitral tribunal, these contentions have attained finality and cannot be re-agitated in subsequent proceedings. The contention that the order of the KERC is without jurisdiction, a nullity and should be ignored is again a contention which is not available to be urged before us, as the said order has been affirmed by the Division Bench of the Karnataka High Court, and the Supreme Court has refused to interfere with the said order, in the SLP preferred there-against.

While the underlying dispute between the Appellant and the 2nd Respondent, which was hitherto the subject matter of arbitration proceedings, can be agitated by the Appellant, the fact remains that the Appellant has chosen not to do so, and has confined its challenge, before the KERC, the Karnataka High Court, the Supreme Court and before this Tribunal, only to the jurisdiction of the KERC to entertain and adjudicate the dispute on the ground that the Appellant is not a generating company. Since this is the only issue which has been raised even in the appeal before us, and as this and other issues have been conclusively determined by the Division Bench of the Karnataka High Court which order binds us, it is impermissible for us to undertake a re-examination of these issues.

IX. CONCLUSION:

The present appeal is devoid of merits. Suffice it to observe that the order now passed by us shall not disable the Appellant, if they so choose, from agitating the underlying dispute, (with respect to which they had availed the remedy of arbitration), before the KERC. In case any such dispute is raised, the KERC shall consider the same on its merits and in

accordance with law. The Appeal, however, fails and is accordingly dismissed. All other pending IAs also stand disposed of accordingly.

Pronounced in the open court on this ***13th day of September, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

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REPORTABLE/NON-REPORTABLE