

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

Appeal No. 31 of 2011

Date: 15th February, 2012

**Present :Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta Judicial Member**

In the Matter of;

M/s Narayanpur Power Company Private Ltd.
Having its Registered Office at
Ground Floor, No. 44, Bharat Apartments.
Race Course Road,
Bangalore 560 001
(Represented by its Managing Director)

... Appellant

Versus

1. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road
Bangalore – 560 001
(Represented By Its Chairman)

2. Gulbarga Electricity Supply Company Ltd.
Having its Registered Office at
Station Road, Gulbarga- 585 102
(Represented by its Managing Director)

.... Respondents

JUDGMENT
HON'BLE MR. JUSTICE P.S. DATTA JUDICIAL MEMBER

M/s Narayanpur Power Company Private Limited, a generating company has preferred this appeal against the order dated 23rd December 2010, passed by the Karnataka Electricity Regulatory Commission, respondent no. 1 herein whereby it declared the Power Purchase Agreement dated 16th January, 2004 purported to have been executed between the appellant and the Karnataka Power Transmission Corporation Ltd(KPTCL), a government company which is the by product of the Karnataka Electricity Reform Act,1999 to be valid.

2. For the purpose of appreciation of the merit of the appeal it is necessary to say that prior to coming into force of the Electricity Act of 2003 that came into effect from 10th of June, 2003 the Karnataka Legislative Assembly passed Karnataka Electricity Reform Act 1999 (for short, the State Act, 1999) which by a Government Notification came into force on 1st June, 1999 and, which according to the appellant, had overriding effect over the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act 1948 (for short, the 1948 Act). Under the 1948 Act the Karnataka State Electricity

Board was formed and under the State Act, 1999 the said Board was dissolved and the job of transmission, bulk supply, retail distribution business of the erstwhile Board were vested with the Karnataka Power Transmission Corporation Limited with effect from 1st April, 2000 under a transfer scheme in terms of section 18 (4) of the Reforms Act, 1999. The Electricity Regulatory Commission 1998 Act, came into force on 25th April, 1998, and it was repealed along with the Electricity Act, 1910 and the Electricity (Supply) Act 1948 by the Electricity Act, 2003 which came into force from 10th June, 2003.

3. On 16.8.2000 the State Commission passed an order directing KPTCL to obtain a transmission license despite it being a State Transmission Utility under the 1910 Act, on the ground that a transmission license under the State Reforms Act, 1999 is different and distinct from being a State Transmission Utility under the 1910 Act. On 6.12.2000 the State Commission granted transmission licence to KPTCL and on 7.12.2000 it granted supply licence to the said KPTCL under the State Reforms Act, 1999.

4. Pursuant to continuation of Reforms Scheme the Government of Karnataka created four electricity distribution companies for supply of retail distribution business and the KPTCL came to be primarily a

transmission licensee although for a considerable period of time it continued to be a bulk purchaser in Karnataka. The respondent no. 2 Gulbarga Electricity Supply Company Limited was granted distribution and retail supply licence for a period of 5 years by the State Commission under an order dated 28.01.2003.

5. Under the first proviso to section 14 of the Electricity Act, 2003 the supply license granted to the 2nd respondent under the State Reforms Act. 1999 was made applicable for a period of five years as stipulated in the license itself and it got terminated on 27th January, 2008, according to the appellant.

6. Under the first proviso to section 39 of the Act, 2003 the STU has been prohibited from engaging in the business of the trading in electricity, while under the 3rd proviso to section 41 of the Act, the transmission licensees are prohibited from entering into any contract or otherwise engage in the business of the trading in electricity .

7. It is the case of the appellant that though section 39 (1) of the Act, 2003 empowers the State Government to notify a Government Company as STU the Government of Karnataka did not bring about any such notification and even then under section 172 (b) of the Act ,

2003 the KPTCL was empowered to act as STU for a period of one year from 10.6.2004. According to the appellant, this provision of section 172 (b) which enabled the KPTCL to act as STU only for one year w.e.f. 10th June, 2004 did not empower the KPTCL to execute PPA because its status as STU under the 1910 Act, was only incidental and actually it was a transmission licensee that cannot in view of section 41 of the Act, 2003 enter into any PPA. Therefore, from 10.6.2003, the KPTCL was legally incompetent to enter into any contract under section 172 (d) of the Act, 2003. The Government of Karnataka did not exempt the operation of section 39 and 41 of 2003 Act in the case of transmission licensees and the STUs under the repealed laws for a period of one year from 10.6.2003.

8. It is pointed out by the appellant that though the Central Government by an order dated 9th October, 2004 under section 183 authorised the STU to engage in the activity of bulk purchase and sale of electricity to distribution company for a further period of one year on and from 10th June, 2004 it did not authorise any STU and transmission utility to engage in the business of trading in electricity. Therefore, the order dated 9th October, 2004 enabled the KPTCL to engage in the activity of bulk purchase and sale of electricity and

it did not confer any power to the KPTCL to enter into any contract at any time after 10.6.2003.

9. Such is the understanding of law of the appellant, and now it says that with approval of the Government of Karnataka by the order dated 22.6.2004 the appellant started the first unit of 6MW mini hydro power plant and on 16.1.2004 the KPTCL entered into Power Purchase Agreement with the appellant despite prohibition under the Act, 2003. According to the appellant, the only obligation incurred under the PPA on the part of the KPTCL/ 2nd respondent to make payments for the delivered energy at the rate stipulated under the PPA which provides for a payment security mechanism in the form of opening a letter of credit which the 2nd respondent has not yet done and there has been a continuous default of payment for more than three months under the PPA.

10. The 2nd proviso to section 39 (1) of Act, empowers the State Government to transfer, and vest any property or interest in any property, rights and liabilities connected with, and persons involved in transmission of electricity of such STU to a company under the Companies Act, to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part -

XIII of the Act, but it is alleged that without following this procedure the Government of Karnataka issued an order on 10.5.2005 and assigned the existing PPA to the respective Electricity Supply Companies without obtaining approval of the generators . The appellant did not give its consent as provided for under article 12.9 of the PPA for such assignment.

11. The State Reforms Act, 1999 was not repealed in view of section 185 (3) of the Act but the KPTCL illegally continued to trade in electricity purportedly claiming authority under section 172 (b) of Act. The KPTCL had no authority to continue with the execution of agreements in view of the prohibition under section 41 of the Act. It is further, contended that despite the enabling frame work created by the notification issued by the Central Government on 9.6.2004 the Government of Karnataka did not issue any notification extending the continuance of the licenses for further period of one year from the appointed date as required under section 172 of the Act, or issued any notification for inapplicability of sections 39 and 41 of the Act. Therefore, the extension for further period of one year from the originally extended period was not at all applicable in the case of KPTCL. Thus, the PPA was opposed to public policy and void. At best, the KPTCL was empowered as bulk supply licensee under

section 18 of the State Reforms Act, 1999. Thus, presuming that the KPTCL continued as STU under section 172 (b) of Act, the license granted to it under section 19 (b) of Reforms Act. 1999 expired.

12. According to the appellant, even assuming that the PPA was valid for two years from 10.6.2003, the period of two years expired on 10.6.2005. . Since the PPA was void as on 10.6.2005 there was no question of assigning a void PPA to the 2nd respondent by the KPTCL. .

13. The contentions of the appellant having been rejected by the respondent no. 1 the appellant preferred this appeal.

14. The 2nd respondent in its counter affidavit contends as follows:

- a) All payments as per agreement had been made with no dues remaining outstanding.
- b) The contention of the appellant before the Commission that it was impossible on the part of the appellant to perform obligations under the contract due to frustration of the contract is untenable.
- c) The State Commission correctly held that by virtue of notification dated 9.6.2004 issued by the Government of India

under section 183 of the Electricity Act, 2003 the KPTCL was allowed to continue with the function of bulk purchase and sale of electricity for one more year , that is from 9.6.2004 to 9.6.2005 and as such the PPA it having been executed on 16.1.2004 which was well before 9.6.2005 was therefore, a validly executed document which the appellant cannot challenge after a lapse of 4 years.

- d) The Commission correctly observed that the contract can still be performed and there are remedies available against breach of contract and this cannot be a ground for urging frustration of contract or impossibility to perform a contract.
- e) The assignment was made under a statutory transfer scheme issued under section 14 of the Karnataka Electricity Reforms Act, 1999 and consent of a party is not necessary.
- f) The KPTCL was authorised to contract at the time when the PPA was executed on 16.1.2004 and the KPTCL was granted a transmission license on 6.12.2000 in exercise of the power under section 19 of the State Reforms Act. 1999. Under the terms of the license the KPTCL was empowered under clause 5.1.3 to engage in any non –core activity so long as such activity was likely to result in gainful employment of the assets

and infrastructure comprising the transmission system subject, however, to certain conditions.

- g) A non-core activity has been defined as “an activity which is not essential to, part of, related to or reasonably incidental to the transmission business”. Proviso to section 41 only prohibits trading in electricity by entering into contract and execution of the PPA can by no stretch of imagination be construed as an agreement to trade in electricity.
- h) Section 172 of the Act, 2003 provides for extension of all licences, agreements for a period not exceeding one year from the specified date. Until 10.6.2004 the KPTCL was empowered to contract under section 172 of the Act, 2003. The agreement having it been entered into on 16.1.2004 was therefore, valid.
- i) The contention of the appellant that KPTCL was barred from entering into PPA under section 41 of the Act is untenable. The KPTCL was incorporated in the year 2000. It took over the functions of transmission and distribution of power from the Karnataka Electricity Board. Thereafter, pursuant to the establishment of the electricity supply companies in the year 2005 the function of distribution was transferred to the electricity supply companies. However, during the interregnum, prior to the transfer of distribution functions the KPTCL was

empowered by law to contract with generators for purchase, supply and transmission of power. The contentions to the contrary are denied as false.

- j) Section 172(b) provides for extension of all licenses, agreements for a period not exceeding one year. Thus, the Act 2003 having been given effect to on 10.6.2003 the prohibition would not have any effect until 10.6.2004.
- k) The contention that Central Government's order dated 9.10.2004 under section 183 did not confer on the KPTCL any authority to execute fresh PPA is not tenable.
- l) The appellant was under obligation to supply power to the respondent no. 2.
- m) The plea of continuous default for more than three months under the PPA is not true.
- n) Averment that the PPA was not assigned in terms of article 12.9 with the consent of the appellant is untenable.
- o) Averment that the KPTCL was barred in law from trading in view of its status being a STU under section 39 is not tenable.

15. The appellant filed a rejoinder to the counter affidavit filed by the respondent no. 2 almost reiterating its contentions in the memorandum of appeal. It contains that termination of the PPA by

the appellant was in terms of the observations of the Commission's order dated 23.12.2010 and even if, it is presumed that PPA was valid the same could be terminated by the appellant in terms of the very order particularly in view of breach of the terms of the PPA. The 2nd respondent has not challenged the letter of termination issued by the appellant and the same has attained finality. The second respondent itself in its official website and before the Commission admitted that there were amounts outstanding for payment, yet the Commission ignored this aspect completely and did not direct the 2nd respondent to make payment. The appellant refers to the decisions of this Tribunal in Appeal No. 176 of 2009, 180 of 2009 and 104 of 2010. Since, as per the Act 2003 the license granted under the repealed laws was valid for the terms contained therein, the licence so granted under the State Act, 1999 for a limited period of five years stood expired without renewal and any agreement with a non- licensee cannot be termed as valid.

16. The respondent no. 1, the State Commission did not file any counter affidavit.

17. The points for consideration are as follows:

- a) Whether the Power Purchase Agreement dated 16.1.2004 is valid and according to law?
- b) Whether the KPTCL had competency to enter into any Power Purchase Agreement in the context of the provisos to section 39 and section 41 of the Electricity Act 2003 ?
- c) Whether section 14 of Karnataka Electricity State Act, , 1999 is consistent with the 2nd proviso to section 39 read with section 131 of Act and is saved in terms of section 185 (3) of the Act 2003?
- d) Whether the Power Purchase Agreement dated 16.1.2004 could be assigned in favour of the respondent no. 2 without the consent of the appellant and in the absence of any valid transfer scheme under the Karnataka State Act, , 1999 Act, 1999 as alleged by the appellant ?
- e) Whether performance of the Power Purchase Agreement dated 16.1.2004 is consistent with specific performance of any contract involving movable property under the Specific Relief Act, 1963?
- f) Whether the appellant has any obligation to supply power even if payment for the delivered energy remains outstanding for more than 90 days continuously?

g) Whether the agreement has been validly terminated by the appellant because of alleged breach of the terms of the agreement?

18. We have heard Mr. Sashi Sridhar appearing with Mr. G. Joshi, learned advocates for the appellant and Mr. S. Sriranga appearing with Mr. Venkat Subramaniam, learned advocates for the respondent no. 2. The Commission has not assisted through any counsel.

19. Now it is necessary to take notice of arguments of the parties.

The view points of the appellant are as follows:

- a) On the date of execution of the PPA i.e. 16.1.2004 the KPTCL was prohibited under law from executing agreements and trading in power. As such, the PPA executed by the KPTCL with the appellant is illegal.
- b) According to the Government of India's notification dated 10.6.2003 sections 1 to 120 and section 122 to 125 would come into force on 10.6.2003.
- c) On the date of execution of the PPA the KPTCL which is a transmission licensee and an STU was statutorily barred from entering in to PPA and trading in electricity by virtue of the provisos to sections 39 and 41 of the Act 2003.

- d) The transitory provision contained in section 172 of the Act 2003 enabled continuance of the licenses, permissions, and sanctions, granted under the repealed laws namely, Indian Electricity Act, 1910 (the “ 1910 Act”) , Electricity (Supply) Act, 1948 (“1948 Act”) and the Electricity regulatory Commission Act, 1998 (the “1998 Act”).
- e) The KPTCL was formed in the year 1999 and was a creature of the State Act, 1999.
- f) It was the case of the KPTCL before the Commission that since it was a successor - in- interest of the Karnataka Electricity Board and as such it did not require any license and that it was a deemed licensee. This contention of the KPTCL was rejected by the Commission.
- g) When the Act, 2003 came into existence, the Government of Karnataka ought to have transferred and vested the property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a Company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part- XIII of the Act and such company or companies would have been a deemed

transmission licensee under the Act. However, no such thing happened.

- h) The respondent no. 2 was formed under the Reforms Act, 1999 in the year 2002 and was functioning as distribution licensee from 10.6.2003. It was the second respondent which should have executed PPA with the appellant from 10.6.2003. When the second respondent came into existence and started functioning from 10. 6.2003 there was no point in KPTCL to enter into PPA with the appellant for the purpose of trading in electricity which is barred under the law with the appellant.
- i) Without framing transfer schemes for transferring the transmission business of KPTCL to some other companies, the Government of Karnataka issued an order No. EN 131 PSR 2003 dated 10th May, 2005 and assigned the existing PPAs to respective Electricity Supply Companies (ESCOMs) in the State of Karnataka, based on their respective geographical area, without seeking any approval from any of the generators, including the appellant. Hence, without a transfer scheme in place, the PPA has lost its validity.
- j) The Government of Karnataka issued notification dated 23rd June, 2003 under section 172 (d) of the Act declaring that sections 84,85and 89 of the Act shall not apply in the State of

Karnataka till 9.12.2003. However, the Government of Karnataka did not exempt the operation of sections 39 and 41 of the Act for any period after coming into force of the Act on 10.6.2003. Further, it is pertinent to note that none of the provisions of the Act exempt the operation of the sections 39 and 41 of the Act to the companies licensed under the laws specified in the Schedule to the Act. However, section 172 (b) of the Act clearly exempted the operation of section 39 and 41 of the Act on the transmission licensees and STUs under the Repealed Laws, for a period of one year from 10th June,2003. Thus, it is clear that KPTCL was barred under the Act to enter into any contract for purchase of power after 10th June, 2003.

- k) The whole basis of the impugned order of the 1st Respondent is section 172 of the Act and the Notification issued by the Central Government, in exercise of the powers conferred by section 183 of the Act dated 9th October, 2004. It is submitted that section 172 and the said Central Government's notification protected the licenses under the Repealed Laws and not the entities such as KPTCL formed under the KER Act.
- l) The appellant did not give its written and prior consent as per article 12.9 of the PPA for assignment of the PPA in favour of the respondent no. 2 .

- m) The provisions of the KER Act which were not inconsistent with the Act, 2003 could not be repealed even after coming into effect of the Act, 2003 in view of section 185 (3) of the Act, 2003. However, KPTCL illegally continued to trade in electricity, purportedly claiming authority under section 172 (b) of the Act which allowed the continuance of the all licenses, authorizations, etc, granted under the repealed laws only for a period of not exceeding one year from the date of appointed date or such period as may be notified by the Appropriate Government.
- n) Since, the KPTCL was not a licensee under the repealed laws as required under section 172 (b) of the Act but a licensee under the State Act, 1999 Act, which is not a repealed laws; it had no authority in law to enter into any PPA and license issued to KPTCL had no force of law in view of the statutory prohibition contained in section 41 read with the section 39 of the Act.
- o) The Government of India's Notification of 9th June, 2004 is applicable to the "Repealed Laws" only. However, assuming without admitting that KPTCL could trade and execute PPAs, as per the Government of India's Notification of 9th June, 2004, it is submitted that the Government of India's notification only created an

enabling framework under which the Government of Karnataka was to issue a notification. Admittedly, the Government of Karnataka did not issue any notification extending the continuance of licenses etc., for a further period of one year from the appointed date as required under section 172 of the Act or issued notification for inapplicability of Section 39 and 41 of the Act for any time. Hence, the extension for further period of one year from the originally extended period was not at all applicable in case of the KPTCL. Therefore, the PPA was opposed to law and public policy on the very date it was executed. Therefore, the PPA was *ab initio* void under the law.

p) KPTCL was empowered as a bulk supply licensee under section 18 of the State Reforms Act and was operating under a license granted under section 19 (1) (b) of the State Reforms Act. Section 27 B of the 1910 Act did not empower the KPTCL to enter into Power Purchase Agreement and section 172 (b) of the Act did not empower the licensees under the State Reforms Act to continue in trading electricity. Thus, even if it is argued that the KPTCL continued as STU under section 172 (b) of Act, the license granted to it under section 19 (b) of State Reforms Act lapsed .

q) The PPA stood automatically terminated by operation of law with effect from 10.6.2005. Since the PPA itself was non est or void as

on 10.6.2005 there was no question of assigning a void PPA to the second respondent by the KPTCL.

r) Supply of power to the second respondent was under a initial bonafide belief that the PPA was validly executed with KPTCL.

s) The authority of the KPTCL was derived from the State Act, 1999 and not under the repealed laws. Hence, taking benefit of transitional provisions to validate the illegal and void the PPA is bad in law. The first respondent granted the distribution and Retail Supply License as per Annexure C to the memorandum of appeal in favour of the second respondent under the KER Act, for a period of five years ending on 27th January, 2008. Neither the second respondent has applied for renewal of the license, either under the KER Act or the Act, 2003 nor has the first respondent renewed the license on its own volition. Hence, the 2nd respondent has no license to operate as the distribution licensee. Therefore, the PPA is void in law. Once it is settled that the second respondent is not a licensee under the Act,2003 it cannot enter into any PPA .

t) The 1st respondent has illegally acted as the performance guarantor for the due performance of the PPA by the appellant to favour the 2nd respondent. The PPA could not have been enforced by the 1st respondent as the subject matter of the PPA

is electricity viz. unascertainable movable goods and abundantly available for price. Hence, the impugned order is opposed to the Specific Relief Act, 1963.

u) PPA has been validly terminated by the appellant for default in payment and the same is not challenged by the 2nd respondent.

20. The arguments advanced by the second respondent are as follows;

a) The appellant attempted to advance and develop its case from stage to stage and even during this appeal a number of issues on law as also on facts have been ventilated as the hearing progressed from day to day which is not permissible . Before the Commission it filed more than one amendment petition, and strictly speaking, the Commission did not allow in express term the second amendment petition filed before it. The enforceability of Power Purchase Agreement has been raised for the first time in this appeal.

b) The appellant approached the State Commission by filing the original petition praying for a declaration that the Power Purchase Agreement stood cancelled due to violation and breach of the condition. Such original petition was thereafter

amended and it was contended that the doctrine of frustration of contract applied to the facts of the present case . Such doctrine is not applicable at all.

- c) The State Act, 1999 Act, 1999 introduced a regulatory framework in the matter of transmission and distribution of electricity. Part-V of the said Act deals with re-organisation of the Karnataka Electricity Board and the transfer of Board's functions and properties as well as liabilities. Section 13 of the Act provides for Constitution of the separate company by the name of the KPTCL. On formation of the said company the assets of the Karnataka Electricity Board were vested with the State Government and re-vested in KPTCL. Section 14 of the Act deals with reorganization of Karnataka Electricity Board. 14 (3) of the Act specifically provides that the functions, duties, rights and powers exercisable by the Board under the Indian Electricity Act 1910 and electricity (Supply) Act,1948or any rule framed thereunder as the State Government may by notifications specify, shall be exercisable by the Board or the KPTCL or any generating companies as the case may be from the effective date of first transfer. Sub- section (5) of section 14 stipulates that the State Government may after consulting KPTCL, require KPTCL to draw up a transfer

scheme to vest in a further licensee any of the functions including distribution function, any property, interest in property, rights and liabilities which have been vested in KPTCL under this section and publish the same as per the scheme of transfer under this Act.

- d) Under the provision of the Reforms Act of 1999 Karnataka Electricity Reform (Transfer Scheme) Rules 1999 were framed. Under the said rules, as per schedule B, transmission, distribution and general assets also got transferred initially to the State Government and by virtue of Rule 5 of the said rules, the assets, liabilities and all matters, arrangements, dealings and things forming part of transmission and distribution undertakings, as set out in the schedule, vested in KPTCL on the effective date of first transfer.
- e) The activity of entering into an agreement for purchase of power cannot be construed as trading activity. It cannot be said that the PPA is void because of the bar contained in section 39 of the Act, 2003.
- f) The PPA signed by the KPTCL had the approval of the Commission, as such there is no infirmity in the action of the KPTCL in entering into PPA.

g) The Electricity Act 2003 contains a transitory provision in section 172. The said clause begins with a non obstante clause. Section 172 (b) provides that all licenses, authorizations, approvals, clearances and permissions granted under the repealed laws may for a period not exceeding one year from the appointed date or such earlier date as may be notified by the Appropriate Government, continue to operate as if the repealed laws were still in force and as such will be deemed a licensee for the said period. Section 172 also introduces a deeming fiction of recognizing a State Electricity Board to be the State Transmission Utility and licensee under the provisions of the Electricity Act 2003 for a period of one year or from the effective date. The Government of India's notification dated 9.6.2004 issued under section 183 of Act 2003 enabled the KPTCL to continue with the function of bulk purchase and sale of power for a period of one year from 10.6.2004, while the agreement was signed on 16.1.2004. Therefore, it is very clear that the activity being undertaken by the KPTCL was the activity of the erstwhile Electricity Board and therefore, the contention that the KPTCL not being a licensee under the repealed laws is not entitled to the benefit of the transitory provision contained in section 172 of the

Electricity Act 2003 is wholly unsustainable and devoid of any merits.

- h) The assignment of the PPA in favour of the respondent no. 2 is by virtue of the provisions of the State Act, 1999 and the transfer schemes formulated thereunder.
- i) The appellant has acquiesced in the assignment of PPA and has supplied power under the very same PPA for over four years.
- j) The doctrine of frustration of contract is not applicable. The contention that the PPA has been terminated is wholly untenable.
- k) The second respondent is a deemed licensee and is not required to obtain a license under the 2003 Act. It is a Government Company which is a deemed licensee.

21. The Commission held as follows:

- a) The KPTCL had competency to enter into a PPA .
- b) The contract is not terminable.
- c) There has been valid assignment of contract.
- d) The appellant has a right to third party sale as well as to put and end to the contract in case of breach of the contract.

22. It is necessary to refer to the documents relied on by the parties. While Annexure – A is the certified copy of the impugned order dated 23.12.2010 passed by the Commission in O.P. No. 10 of 2009 which we will analyse as we will proceed with this judgment. Annexure- B which is an order dated 16.8.2000 passed by the Commission is relevant in the sense that by this order the Commission granted transmission license to the Karnataka Power Transmission Corporation Limited which is a creature of the Karnataka Electricity Reform Act, 1999 which came into force on and from 1.6.1999. We will have occasion to go through the relevant provisions of this State Act, 1999 in the sequel. Now, on 6.12.2000 the Commission granted transmission license to the KPTCL (Annexure-C) in terms of the order dated 16.8.2000 under the State Reforms Act. 1999. Then, importantly KPTCL which is a creature of the said Act 1999 entered into a Power Purchase Agreement on 16.1.2004 the contents of which we have mentioned earlier and we will have occasion to mention further as we will be proceeding with the discussion (Annexure- D). On 10.5.2005 the Government of Karnataka brought out an order principally conveying two things namely: a) with effect from 10.6.2005 the electricity supply companies would purchase power from the various generating companies and

the KPTCL will not trade in power, and b) the PPAs in respect of renewable energy projects would be assigned to the said supply companies based on geographical location of the projects. (Annexure- E). On 30th January 2009 the appellant wrote a letter to the respondent no. 2 namely Gulbarga Electricity Supply Distribution Company Limited ventilating grievance that letter of credit was still not being opened and that the said respondent no. 2 had become defaulter liable to pay penal interest (Annexure-F). Annexure –G is a copy of the legal notice dated 4.3.2009 issued by the learned Advocate of the appellant to the respondent no. 2 contending inter alia that the PPA dated 16.1.2004 stood cancelled because of breach of the terms of the agreements. Then on 13.4.2009 the appellant moved the Commission by a petition praying for a declaration that the agreement dated 16.1.2004 stood cancelled and for direction upon the respondent no. 2 to make payment of Rs. 69, 23,198 which stood outstanding as on 31.12.2008. (Annexure-H). Annexure – I is a copy of the written submission filed before the Commission by the respondent no. 2 in O.P. No. 10 of 2009 raising a point that in absence of PPA providing for supply of power of 6.6.MW the question of making payment for 6.6. MW would not arise and that the question of making payment of penal interest did not arise because all payments had been made in terms of the PPA. On

6.8.2009 the respondent no. 2 (Annexure -J) filed a statement of objections in connection with O.P. 10 of 2009. On 17.8.2009 the appellant filed an amendment petition (Annexure- K) adding certain new points of facts namely that it had become virtually impossible for the appellant to discharge its obligations under the agreement, and that the Commission did not as yet approve the PPA. Other averments as were made in the original petition before the Commission were of course retained. Then, under Annexure-L the respondent no. 2 on 11.11.2009 filed additional written objection. On 17th March, 2010 the appellant wrote to the KPTCL with copy to the respondent no. 2 asking for wheeling and banking facility as per article 9.3 of the PPA dated 16.1.2004 allegedly because of the agreement having become void and cancelled (Annexure-M). Annexure- N is a copy of an application dated 18.3.2010 under section 94 (2) of Act,2003 made by the appellant praying for wheeling and banking facility as an interim measure pending final adjudication of the O.P. No. 10 of 2009. On 4.5.2010 the appellant swore an affidavit before the Commission in connection with the application (Annexure-O). What has been objected to by the respondent no. 2 in course of hearing of the appeal before us is an application of the appellant dated 4.5.2010 under Order 6 Rule 17of the CPC seeking for amendment of the petition filed before the

Commission whereby the appellant raised certain legal issues which we shall consider in course of deliberation (Annexure- P). The respondent no. 2 filed a written objection to such amendment petition on 8.7.2010 (Annexure- Q), while Annexure- R is additional written objection of the respondent no. 2 dated 16.9.2010 to the amendment petition of the appellant. On 13.1.2011 which is a month before filing of this appeal against the impugned order of the Commission the appellant wrote to the respondent no. 2 intimating that because of default of article 9.3 and article 6.6 of PPA the contract stood terminated and the appellant was not longer obliged to supply power under the contract to the respondent no. 2. (Annexure- S). This letter was replied to by the respondent no. 2 on 18.1.2011 (Annexure –T) saying that PPA was still valid. On 13.1.2011 on which date the appellant communicated to the respondent no. 2 that PPA stood terminated also wrote to the Chief Engineer, State Load Dispatch Centre to grant “in principle approval’ of the wheeling and banking facility (Annexure- U). The KPTCL by reply dated 19.1.2011 (Annexure-V) communicated to the appellant that the PPA was not void and that process fee of Rs. 5000/- advanced by cheque was being returned. In course of hearing of the appeal the appellant filed certain documents called “payment schedule” (Annexure-W) and also certain other documents (Annexure- X) said to be statement of the

payment outstanding. Annexure- Y is a copy of the distribution and retail supply license granted by the Commission to the respondent no. 2 on 28.1.2003 . It is important to remember that this license was issued by the Commission in terms of Karnataka Electricity Reform Act, 1999 and before the Parliamentary enactment came into force on 10.6.2003. In course of hearing of the appeal the appellant further filed a copy of license granted by the Commission on 14.11.2006 (Annexure-Z) to Hukkeri Rural Electric Cooperative Society Limited in terms of section 14 of the Electricity Act 2003 read with section 19 of the State Reforms Act1999. This is a distribution license issued to a different distribution licensee.

23. The appeal presents both the questions of law and facts. Once the legal complexity is resolved the factualities which are not too much in dispute will not deter us to find out as to where the parties stand as on the day in respect of the agreement dated 16.1.2004. For, if the Power Purchase Agreement, as alleged by the appellant, is found to be not valid allegedly because of being inconsistent with the provisions of the Electricity Act, 2003, then the agreement in question would stand negatived. It is therefore, necessary to go through the relevant provisions of certain relevant Acts in this regard. Before that, it is necessary to refer to the agreement in question and the

correspondences which were exchanged by and between the parties. It is necessary to remember that when the Power Purchase Agreement was executed by and between the parties on 16.1.2004 the Electricity Act 2003 was being in operation, it having been in force since 10.6.2003. The agreement between the appellant and the KPTCL dated 16.1.2004 was to the effect that the appellant who was granted approval by the Government of Karnataka to install a mini hydro electric power generating station of 12 MW capacity at Narayanpur in two stages would transmit electricity to the appellant at the delivery point on certain terms and conditions and against payment as elaborated in the agreement itself for a period of 20 years from the scheduled date of the completion with option for renewal unless terminated earlier pursuant to the other provisions of the agreement. The agreement has a clause to the effect that in the event of any default of payment by the Corporation for a continuous period of three months the generating company shall be permitted to sell power to third parties through the grid system by entering into a wheeling and banking agreement with the Corporation and paying wheeling to the Corporation at such rates as may be applicable from time to time. The agreement also has a clause to the effect that in the event of default by the Corporation in off taking power produced by the company for a continuous period of three months or due to

default on the part of the Corporation in making payments for a continuous period of three months, the company would be entitled to be compensated by the Corporation.

24. The Karnataka Electricity Reforms Act, 1999 (Act no. 25 of 1999) finds its berth in the schedule under serial no. 5 in terms of sub – section (3) of section 185 of the Electricity Act 2003 . This section 185 in its sub-section (3) provides that “*the provisions of the enactments specified in the schedule, not inconsistent with the provisions of this Act, shall apply to the states in which such enactments are applicable.*” Therefore, save the inconsistencies the provisions of State Reforms Act, 1999 are applicable so far as the State of Karnataka is concerned. The State Act, 1999 came into force from 1st June, 1999, while both the Indian Electricity Act, 1910 and the Electricity (Supply) Act. 1948 stood repealed with effect from 10th June, 2003 when the Electricity Act, 2003 (Act 36 of 2003) came into force. The Electricity Regulatory Commissions Act 1998 also stood repealed on and from 10.6.2003. Notwithstanding such repeals, acts done or taken under these Acts shall be deemed to be done under the 2003 Act provided they are not inconsistent with the provisions of this Act. Again, so long as rules were not framed under the 2003 Act the rules made under sub-section (1) of section 69 of the Supply Act

1948 would continue to have effect. For better understanding of the relevant Acts it is worthwhile to see the provisions of section 185 of the Act, 2003.

185. (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

(2) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made there under shall have effect until the rules under section 67 to 69 of this Act are made;.

(c) Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910). as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.”.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, (10 of 1897) with regard to the effect of repeals.

25. When the question arises as to whether the KPTCL had the legal competency to enter into contract with the appellant on 16.1.2004 or whether such a contract is as on the day still binding on the appellant it is necessary to examine as to what legal status has been accorded to the KPTCL by the State Act, 1999 Act, 1999 and whether rights, duties, powers and functions of the authority or authorities under the Electricity Act 1910 and those of the State Electricity Board under the Electricity (Supply) Act, 1948 were still available to the KPTCL when it was formed after dissolution of the Karnataka Electricity Board in January, 2000 consequent upon enactment of the State Reforms Act that came into force with effect from 1.6.1999. It is fairly clear that the KPTCL is not the product of the Electricity Act 2003. It is a product of the State Act, 1999 which in terms of sub-section (3) of section 185 of the Act, 2003 can continue to be operative to the extent of consistency with the provisions of the Electricity Act 2003. In a word, the provisions of the State Reforms Act, 1999 have practically become superfluous in view of the fact

that only those provisions of the said Act can be applied only when they find support in languages, or spirit or theme or content in Electricity Act 2003. We will elaborately notice that certain inconsistencies existing between the Electricity Act 1910, Electricity (Supply) Act 1948, and Electricity Regulatory Commissions Act 1998 on the one hand and the Electricity Act 2003 on the other have been validated for a period of one year initially and then extended for a period of another one year under section 183 of the Act which operates in a field different from the field adumbrated in section 185 which we have reproduced earlier and which in fact carries the spirit of the General Clauses Act, 1897. There is also a provision namely, section 172 which we shall notice shortly herein afterwards as both the parties rely on different provisions of this section in support of their respective cases.

26. The Indian Electricity Act 1910 which was born on 1.1.1911 and died on 10.6.2003 and which in fact was an amending law relating to the supply and use of the electrical energy still haunts us in the same manner almost as the Electricity (Supply) Act 1948 which, we must carefully note, is not an Act amending the Act 1910 and which survived from 10.9.1948 to 10.6.2003. Both these two Acts have commonality in this that both dealt with supply of electrical energy but

unlike the Act, 1910, the 1948 Act, basically dealt with rationalisation of the production of the electrical energy. The 1910 Act, underwent certain major amendments but two amendments, - one that took place in 1959 and the other that took place in 1998 are noticeable. For the purpose of disposal of this appeal the Amendment Act, 22 of 1998 which came into force from 31.12.1998 is relevant in view of the fact that the concepts like Government Company, Inter-State Transmission System, State Commission, State Electricity Board, State Transmission Utility, Transmission License etc. were introduced in this 1910 Act through the aforesaid amendment. This 1910 Act, which was put to death on the same day as the 1948 Act, and the Electricity Regulatory Commissions Act 1998 subject to certain transitional savings had got in itself incorporated sections 27 A, 27-B, 27-C, 27-D, 27-E and 27-F under the chapter called 'Transmission of Energy' by amendment with effect from 31.12.1998 and these provisions were not incorporated in the 1948 Act, wherein for the first time we find section 5 by which State Electricity Board could be constituted by the State Governments. By the same Amending Act, 22 of 1998 that came into force from 31.12.1998 certain amendments different from those incorporated in the 1910 Act, were incorporated in the 1948 Act in order that a cohesiveness between these two Acts could be read and found out and these Acts with such cohesiveness

was further found to be cohesive with the Electricity Regulatory Commission Act 1998 which had a very short spell of survival from 25.4.1998 to 10.6.2003. The Electricity Act, 2003 can be called loosely a Code putting into it all the earlier concepts which were found necessary to be retained and a host of new concepts foreign to the earlier ones. So far as the original Act, 1910 is concerned, it was the Government of a State which in fact owned, operated and maintained the function of generations, transmission and distribution of electrical energy and so far as the present appeal is concerned the 1910 Act is not relevant vis -a -vis the KPTCL and what is only relevant is Part II A of the 1910 Act by which section 27 B was inserted by means of which mandate was given to the State Government to notify the State Electricity Board or any Government Company as the State Transmission Utility the function of which was to undertake transmission of energy through intra-state transmission system in coordination with different functionaries as enumerated in section 27 B (2) (b). The integrated functions of generations, transmission, and distribution were still retained in one hand, now with State Electricity Board and in fact there was no functional divergence worthnoting in the 1948 Act. By Amending Act, 115 of 1976 which came into force from 8.10.1976 the general duty of the Electricity Boards was remodelled in section 18 of 1948 Act, and

these duties comprised comprehensively generation, transmission, distribution, supply amongst others. Under section 19 of 1948 Act, the Board was required to supply electricity to any licensee and the word “ licensee ” carries the same meaning as conveyed in Part -II of the 1910 Act i.e. to supply energy or a person who has obtained sanction under section 28 of that Act to engage in the business of supplying energy .

27. Under section 26 of 1948 Act the State Electricity Board shall have all the powers and obligations of licensee under Indian Electricity Act 1910. and we reproduce section 26 and 26 A of the 1948 Act which are as follows:

“26. BOARD TO HAVE POWERS AND OBLIGATIONS OF LICENSEE UNDER ACT 9 OF 1910. *-Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under The Indian Electricity Act, 19 10 (9 of 19 1 0), and this Act shall be deemed to be the licensee of the Board for the purposes of that Act:*

Provided that nothing in Sees. 3 to 1 1, subsections (2) and (3) of Sec. 21 and [Sec. 22, sub-section (2) of Sec. 22-A and Secs. 23 and 271 of that Act or in [CIS. I to V, Cl. VII and Cls. IX to XII] of the Schedule

to that Act relating to the duties and obligations of a licensee shall apply to the Board: [Provided further that the provisions of Cl. VI of the Schedule to that Act shall apply to the Board in respect of that area only where the Board has laid distribution mains and the supply of energy through any of them has commenced.

**26-A. APPLICABILITY OF THE PROVISIONS OF ACT 9 OF 1910
TO
GENERATING COMPANY. –**

(1) Notwithstanding anything contained in sub-section (2), nothing in The Indian Electricity Act, 1910 (9 of 1910)", shall be deemed to require ire a Generating Company to take out a licence under that Act, or to obtain sanction of the State Government for the purpose of carrying on any of its activities.

(2) Subject to the provisions of this Act, Sections. 12 to 19 (both inclusive) of The Indian Electricity Act, 1910 (9 of 19 1 0), and Clauses. XIV to XVII (both inclusive) of the Schedule there to, shall, as far as may be, apply in relation, to a Generating Company as they apply in relation to a licensee under that Act (hereafter in this section referred to as the licensee) and in particular a Generating Company may, in connection with the performance of its duties, exercise-

(a) all or any of the powers conferred on a licensee by subsection (1) of Sec. 12 of The Indian Electricity Act, 1910 (9 of 19 10), as if –

(i) The reference therein to licensee were a reference to the Generating Company;

(ii) The reference to the terms and conditions of licence were a reference to the provisions of this Act to the articles of association of the Generating Company; and

(iii) The reference to the area of supply was a reference to the area specified under sub-section (3) of Sec. 15-A in relation to the Generating Company;

(b) all or any of the powers conferred on a licensee by subsection(1) of Sec. 14 of the Indian Electricity Act, 19 10 (9 of 19 1 0), as if-

(i) The references therein to licensee were references to the Generating Company; and

(ii) The Generating Company had the powers of a licensee under the said Act.

(3) The provisions of Sec. 30 of the Indian Electricity Act, 1910 (9 of 1910) shall not apply to the transmission or use of energy by a Generating Company.

(4) For the removal of doubts, it is hereby declared that Sees. 31 to 34 (both inclusive) of The Indian Electricity Act, 1910 (9 of 1910), shall apply to a Generating Company.”

28. Since the State Electricity Board is a creature of the Supply Act, 1948 and the powers, functions and the duties of the Board have been delineated in that Act it may be necessary to trace out as to how the functions of supply and distribution of the electrical energy were being carried out under that Act although, as already stated, the Part IIA was inserted by the Amendment Act 22 of 1998, effective from 31.12.1998, in the 1910 Act whereby the State Electricity Boards were specified by Government notification to be the STU. There is, however, a non-obstante clause in section 2 (6) of the Supply Act 1948 whereby notwithstanding what has been contained in section 26 or 26 A of Supply Act 1948 a licensee does not include the Board or generating company. Section 18 of the 1948 Act provides that the duties of the Board comprised arranging in coordination with the generating companies for the supply of electricity that may be

required within the State and for the transmission and distribution of the same . For better understanding of the duties and powers of the erstwhile Board we reproduce below section 18 and 19 of the Act, 1948.

18.” GENERAL DUTIES OF THE BOARD”. –*Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely:*

(a) To arrange, in co-ordination with the Generating Company or Generating Companies, if any, operating in the State, for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity;

(b) To supply electricity as soon as practicable to a licensee for other person requiring such supply if the Board is competent under this Act so to do;

(c) To exercise such control in relation to the generation, distribution and utilisation of electricity within the State as is provided for by or under this Act;

(d) To collect data on the demand for, and the use of, electricity and to formulate perspective plans in co-ordination with the Generating

Company or Generating Companies, if any, operating in the State for the generation, transmission and supply of electricity within the State;

(e) To prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the State; and

(f) To operate the generating stations under its control in co-ordination with the Generating Company or Generating Companies, if any, operating in the State and with the Government or any other Board or agency having control over a power system.

19. POWERS OF THE BOARD TO SUPPLY ELECTRICITY. –

(1) The Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force: Provided that the Board shall not, -

(a) Supply electricity for any purpose directly to any licensee for use in any part of the area of supply of a bulk-licensee without the consent of the bulk-licensee, unless the licensee to be supplied has an absolute right of veto on any right of the bulk-licensee to supply electricity for such purpose in the said part of such area, or unless the bulk-licensee is unable or unwilling to supply electricity for such purpose in the said part of such area, on reasonable terms and conditions and within a reasonable time, or

(b) Supply electricity for any purpose to any person, not being a licensee for use in any part of the area of supply of a licensee without the consent of the licensee, unless, -

(i) The actual effective capacity of the licensee's generating station computed in accordance with Para. IX of the First Schedule at the time when such supply was required was less than twice the maximum demand asked for by any such person; or

(ii) The maximum demand of the licensee, being a distributing licensee and taking a supply of energy in bulk is, at the time of the request less than twice the maximum demand asked for by any such person; or

(iii) The licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time.

(2) After the Board has declared its intention to supply electricity for any purpose in any area for which purpose and in which area it is under this section competent to supply electricity, no licensee shall, the provisions of his licence notwithstanding, at any time, be entitled without the consent of the Board to supply electricity for the purpose in that area.

(3) For the purposes of sub-section (1) "absolute right of veto" means an unqualified right vested in a licensee by virtue of any law, licence

or other instrument whereby a bulk-licensee is prevented from supplying electricity in any specified area without the consent of the licensee in whom the right of veto vests.

(4) If any question arises under sub-section (1) as to the reasonableness of the terms or conditions or time therein mentioned, it shall be determined [by arbitration] as provided in Sec. 76.

29. Under the 1910 Act licensee means any person licensed under Part II of that Act to supply energy. The definition of “ licensee” in section 2(6) of the Act, 1948 is that he is one licensed under Part II of the Act, 1910 to supply energy or a person who has obtained sanction under section 28 of that Act to engage in the business of supplying energy, but , as already noticed, it does not include the Board, the provision of section 26, or 26A of the Act, 1948 notwithstanding; and under the present law (Act 36 of 2003) supply means the sale of electricity to a licensee or consumer [section 2(70)] and licensee means one who has been granted a license under section 14[section 2(39)]. Section 14 of the Act, 2003 speaks of requirement of license in the case of transmission, distribution and trading although a distribution licensee does not require a license to undertake trading in electricity in terms of the ninth proviso to section 14 of the Act, 2003.

30. Thus, under section 27B of the Act,1910 the State Governments were given the power to specify by notification a State Electricity Board as the State Transmission Utility with effect from 31.12.1998 and under the second proviso to section 14 of the Act,2003 the State Transmission Utility does not explicitly require a transmission license as it is now deemed to be a transmission licensee. The Karnataka State Electricity Board until the formation of the KPTCL under the State Reforms Act,1999 was a State Transmission Utility , and so far as the principal job of intra-state transmission is concerned the KPTCL has been formed for the said purpose consequent upon dissolution of the Karnataka State Electricity Board and admittedly the KPTCL is a STU in terms of the notification dated 28.1.2000 issued by the Government of Karnataka under sub-section (1) of section 27B of the Indian Electricity Act,1910. So far so there is no controversy, although controversy arose in course of the proceeding before the Commission as to whether the KPTCL required a transmission license in view of the relevant provisions of the State Reforms Act, 1999 which we would now quote to ascertain the powers and functions of the KPTCL. Be it only stated for the present that the State Commission decided by an order dated 16.8.2000 that the KPTCL although it is a STU cannot discharge the function of transmission without a license being granted by the Commission after

the formation of the Commission under the Electricity Regulatory Commission Act, 1998 in terms of the relevant provision of the State Reforms Act, 1999. It is not our purpose to examine the correctness or otherwise of the order dated 16.8.2000 whereby the Commission viewed that even for the KPTCL a transmission license is required as it is not necessary for disposal of the appeal. Our purpose is to critically examine the relevant provisions of the State Reforms Act, 1999 together with those of the Electricity (Supply) Act, 1948 so as to ascertain the powers and functions of the KPTCL and whether in terms of the provisions of the State Reforms Act, 1999 it is exactly a replica of the erstwhile State Electricity Board and can claim to be so.

31. Under the 1910 Act, as it originally stood after repeal of the Indian Electricity Act 1903, it was the State Government who was competent to regulate supply, and distribution of electrical energy and this 1910 Act provided for issuance of license to any person under Part-II of that Act so as to enable that person to supply energy. Under the 1948 Act the Board was given the duty to arrange for transmission, supply and distribution of electrical energy and it also had power to supply electricity to any licensee. Thus, any State Electricity Board that was formed under section 5 of the 1948 Act had the power and duties to undertake transmission, distribution and

supply of electrical energy . It can not be questioned that the Karnataka Electricity Board until it was dissolved with effect from 1.4.2000 was competent to generate and/ or regulate generation, and undertake the function of transmission, distribution and trading of electricity by virtue of the provisions of the Act 1910 and the Act 1948 themselves and not under any scheme or rule framed under the two aforesaid Acts.

32. The concept of Central Transmission Utility or State Transmission Utility originated, as we noticed earlier, by the Amending Act 22 of 1998 with effect from 31.12.1998 and prior to this date neither of the two Acts as aforesaid had ordained any institution like CTU or STU. The function of STU is to regulate primarily intra-state transmission of electrical energy. Therefore, legally speaking, it is the State Electricity Board which by virtue of being a government organisation was designated and notified as State Transmission Utility.

33. It is, therefore, the State Electricity Board that became the STU, it being Government Organisation, and it is not the other way round. It is common knowledge that when the State Electricity Board discharges the function of supervision of intra-state transmission of

electrical energy it does not do so in the capacity of being the State Electricity Board. Again, when the State Electricity Board carries on function of supply and distribution of electrical energy it does so as Board and while doing so it loses its character of being a STU .That is to say, one entity performed two functions but in different capacities but no license was required for the erstwhile Board to undertake and regulate the functions of supply and distribution of electrical energy in the capacity as Board under the 1910 Act as also the 1948 Act, and at the same time no license was required to carry on the function of STU under the said two Acts.

34. It is the case of the respondent no. 2 that the KPTCL it being a successor entity of erstwhile State Electricity Board did not require any license to carry on the business of supply and distribution as it did not require any license to carry on the function of STU. It is therefore, necessary to see how far and to what extent the KPTCL can be said to be the successor entity of the erstwhile Board. A transfer scheme was initiated by the Government of Karnataka and as result thereof the State Act, 1999 was enacted and it came into force on 1.6.1999. Under section 3 of the State Act, 1999 the Government was to establish State Regulatory Commission and the powers and function of the Government in relation to regulation of

generation, transmission, distribution and trading came to vested in the Commission . Part-V of the Act has four sections namely 13,14,15 and 16 . This part deals with re-organisation of the Karnataka Electricity Board and transfer of Board's functions, transfer of properties, and liabilities etc., while Part-VII deals with license. It is necessary therefore to reproduce sections 13 and 14 of Part-V and sections 18 and 19 of Part-VII which we do

13. Karnataka Power Transmission Corporation.- (1) *Not later than sixty days from the date of commencement of this Act, the State Government shall cause a company to be incorporated under the provisions of the Companies Act, 1956 to be known as the Karnataka Power Transmission Corporation, (KPTC) with the principal objects of engaging in the business of purchase, transmission, sale and supply of electrical energy.*

(2) *Subject to the provisions of section 12, KPTC shall be the principal company to undertake all planning and co-ordination concerning the electricity. KPTC shall also be the principal company to undertake transmission and work connected with transmission, determining the electricity requirements in the State in co-ordination with the generating companies, State Government, the Commission, the Regional Electricity Board and the Central Electricity Authority.*

(3) The KPTC shall be responsible for the extra high voltage transmission system operation and shall operate the power system in an efficient manner.

(4) The KPTC shall undertake the functions specified in this section and such other functions as may be assigned to it under the license to be granted to it by the Commission under this Act.

(5) Upon the grant of license to the KPTC under chapter VII, the KPTC shall discharge such powers, duties and functions of the Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder, as may be specified in the license and it shall be the obligation of the KPTC to undertake and duly discharge the powers, duties and functions so assigned.

(6) Subject to sub-sections (1), (2) and (3) and subject to the overall supervision and control of the KPTC, a number of subsidiary or associated transmission companies may be established in the State and the Commission may grant licenses under the terms of this Act to such transmission companies, in consultation with KPTC.

14. Reorganisation of the Karnataka Electricity Board.- *(1) On and with effect from the date on which a transfer scheme prepared by the State Government to give effect to the object and purposes of this Act is published or such further date as may be prescribed*

(hereinafter referred to as the effective date of the first transfer), any property, interest in property, rights and liabilities which immediately before the effective date of first transfer belong to the Board shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) or part thereof may be re-vested by the State Government in the KPTC or any generating company or companies in accordance with the transfer scheme published under sub-section (1) along with such other property, rights and liabilities of the State Government as may be specified in such scheme, on such terms and conditions as may be agreed between the State Government and the KPTC or any generating company or companies, as the case may be.

(3) From the effective date of first transfer of properties etc., to the KPTC, the Board shall stand dissolved. The Chairman and Members of the Board shall be deemed to have vacated their office. Such of the functions, duties, rights and powers exercisable by the Board under the Indian Electricity Act, 1910 or Electricity (Supply) Act, 1948 or any rule framed thereunder as the State Government may by notification specify shall be exercisable by the KPTC or any

generating company or companies, as the case may be, from the effective date of first transfer.

(4) Notwithstanding anything in this section, where,-

(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall give effect to the transfer only for fair value to be paid by the transferee to the State Government; and

(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties.

(5) The State Government may, after consulting the KPTC or a licensee as the case may be], KPTC require the a licensee as the case may be to draw up a transfer scheme to vest in a further licensee (the “transferee licensee”), any of the function including a distribution function, any property, interest in property, rights and liabilities which have been vested in the KPTC or a licensee as the case may be under this section and publish the same as the scheme of transfer under this Act. The transfer scheme to be notified under this sub section shall have the same effect as the transfer scheme under sub section (2) and shall be effective from the date specified (effective date of second transfer).

(6) A transfer scheme under this section may, amongst others,-

(a) define the property, interest in property, rights and liabilities to be allocated,-

(i) by specifying or describing the property, rights and liabilities in question;

(ii) by referring to all the property, interest in property, rights and liabilities comprised in a specified part of the transferor's undertaking;

or

(iii) partly in the one way and partly in the other;

(b) provide that any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor, or the transferee, as the case may be;

(c) impose on KPTC or any licensee, an obligation to enter into such written agreements with, or execute such other instruments in favour of, any person as may be specified in the scheme;

(d) impose on any transferee licensee the obligations to comply with the power procurement and purchase arrangements with KPTC; and

(e) make such supplemental, incidental and consequential provisions as transferor licensee considers appropriate including provision specifying the order in which any transfer or transaction is to be regarded as taking effect.

(7) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the Board,

or the KPTC or generating company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by the Board, with the Board or for the State Government or the KPTC or the transferee, and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or by or against the State Government or the concerned transferee, as the case may be.

(8) If pursuant to a transfer scheme framed by the State Government, the KPTC or a licensee as the case may be is required to vest any part of its undertaking in another company or body corporate or person, the Commission shall amend the licence granted to enable the transferee to carry out the functions and activities assigned to the transferee.

18. Requirement of licence.- *(1) No person, other than those authorised to do so by license or by virtue of exemption under this Act or authorised to or exempted by any other Authority under the Electricity (Supply) Act, 1948, shall engage in the State in the business of,-*

(a) transmitting electricity; or

(b) supplying electricity, including bulk supply.

(2) Where any difference or dispute arises as to whether any person is or is not engaged or about to engage in the business of transmitting or supplying electricity as described in sub-section (1), the matter shall be referred to the Commission and the decision of the Commission shall be final.

(3) The Commission shall have the power to order any unlicensed person to cease to operate and disconnect its apparatus.

(4) Notwithstanding anything contained in the other provisions of this Act and until the establishment of the Commission in terms of section 3, the State Government shall have the power to grant provisional licenses under this section having a duration not exceeding twelve months to any person or persons to engage in the State in the business of transmission or supply of electricity on such terms and conditions as the State Government may determine consistent with the provisions of this Act, subject however, to the following conditions:-

(a) upon the establishment of the Commission, each of the provisional licenses granted by the State Government shall be placed before the Commission and shall be deemed to constitute an application for grant of a license by the Commission under the provisions of this Act ; and

(b) each provisional license granted under this section shall cease to be valid and effective on the date on which the decision of the Commission is communicated to the provisional licensees.

(5) The State Government shall be entitled to confer on the provisional licensees under sub-section (4) such powers, rights and authorisation as the Commission is entitled to grant to the licensees under this Act.

(6) All licenses issued under the provisions of Indian Electricity Act, 1910, by the State Government or any competent authority shall be deemed to be a provisional licence and shall be subject to the conditions provided under sub-sections (4) and (5). All power purchase agreements, transmission services agreements and other contracts entered into shall continue in full force and effect and will be transferred to the successor entities.

19. Grant of licenses by the Commission.- *(1) The Commission may on an application made in such form and on payment of such fee as may be specified by regulations, grant a license authorising any person to,-*

(a) transmit electricity in a specified area of transmission; and/or

(b) supply electricity in a specified area of supply or supply in bulk to the licensees or any person.

(2) In respect of the grant of any such license, the following provisions shall apply:-

(a) Any person applying for a license shall publish a notice of his application in such manner and with such particulars as may be specified by regulations within fourteen days after making the application;

(b) The Commission shall not grant a license until,-

(i) all objections received relating to the application for the license have been considered by the Commission, provided that no objection shall be considered by the Commission unless it is received within such time from the date of the first publication of the notice under clause (a), above as may be specified by regulations, which shall not be less than forty-five days; and

(ii) in the case of an application for a license to supply or transmit in an area which includes the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Central Government for defence purposes, the Commission has ascertained that there is no objection to the grant of the license on the part of the Central Government;

(iii) the KPTC is consulted in the matter.

(c) Where an objection is received from any local authority concerned, the Commission shall, if in its opinion the objection is

insufficient, record in writing and communicate to such local authority its reasons for such opinion; and

(d) No application for a license shall be made by any local authority except pursuant to a resolution passed at a meeting of such authority held after one month's previous notice of the same specifying the purpose thereof has been given in the manner in which notices of meetings of such local authority are usually given.

(3) There shall be specified in the license the duration, extent to which and the terms and conditions under which the transmission or supply of energy is to be made and it shall also contain such other conditions as the Commission may consider appropriate for achieving the purposes of the Act.

(4) Without prejudice to the generality of sub-section (3), the conditions included in a license by virtue of that sub-section may require the licensee to,-

(a) enter into agreements on specified terms with other persons for the use of any electric lines, electrical plant and associated equipment operated by the licensee;

(b) comply with any direction given by the Commission;

(c) act in accordance with the terms of the license;

(d) refer all disputes arising under the license for determination by the Commission;

(e) furnish information, documents and details which the Commission may require for its own purpose or for the purposes of the Central or State Government or Central Electricity Authority or Central Electricity Regulatory Commission;

(f) comply with the requirements of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or rules framed thereunder in so far they are applicable;

(g) undertake such functions and obligations of the Board under the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 as the Commission may specify by regulation; 1999: KAR. ACT 25] Electricity Reform 421(h) obtain the approval of the Commission of such things that are required under the license conditions or for deviation from the same;

(i) notify the Commission of any scheme that he is proposing to undertake including the schemes in terms of the provisions of the Electricity (Supply) Act, 1948;

(j) purchase power in an economical manner and under a transparent power purchase procurement process;

Explanation.- *The contracts concluded by the State Government or the Board with generating companies and transmission companies prior to the date of commencement of the Act shall stand assigned to the KPTC in terms of section 14 and the KPTC may continue the purchase or transmission of power under such contracts for effecting bulk sales, distribution and supply to other licensees;*

(k) the purchase of power from the KPTC to the extent necessary to enable the KPTC to perform its obligations under the contracts concluded by the State Government or the Board referred to in clause (j);

(l) supply of electricity in bulk to other licensees or to customers.

(5) Without prejudice to the generality of sub-section (3), conditions included in a license granted by the Commission may require the holder of such a license to establish a tariff or to calculate its charges from time to time in accordance with the requirements specified by regulations by the Commission.

(6) The provisions contained in the Schedule to the Indian Electricity Act, 1910 shall be deemed to be incorporated with and form part of, every supply license granted under this Part save in so far as they are expressly varied or excepted by the supply license and shall, subject to any such additions, variations or exceptions which the Commission is empowered to make having regard to the purposes of

the Act , apply to the undertaking authorised by the license in relation to its activities in the State:

Provided that where a supply license is granted by the Commission for the supply of energy to other licensees for distribution by them, then in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the said Schedule shall not be deemed to be incorporated within the supply license.

(7) The conditions included in a license may contain provision for the conditions to cease to have effect or be modified at such times, in such circumstance as may be specified in, or determined by or under, the conditions.

(8) Any provisions included by virtue of sub-section (7) in a license shall have effect in addition to the provisions made under sections 22(5) and 23 with respect to the amendment of the conditions of a license.

(9) Unless if so indicated in the terms of a license, the grant of a license under this section to a person shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose and the licensee shall not claim any exclusivity.

(10) The license granted by the Commission in terms of this Act may provide that the licensee shall have the powers and authority to take appropriate actions for revenue realisation, prosecution for theft, meter tampering, diversion of electricity and all such and similar matters affecting the distribution and supply of electricity to the consumer.

(11) The Commission shall be entitled to authorise the licensees and persons to exercise such power and authority as the licensees and persons could be given under the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948.

35. As the State Act, 1999 Act came into being with effect from 1.6.1999 it is not difficult to discern that to all intents and purposes and until further unbundling of the KPTCL into different distribution companies after different names and for different geographical locations the KPTCL subject to certain necessary variations as necessitated under the law came to be an entity to carry out the functions of the erstwhile State Electricity Board although, this KPTCL by its very nature and composition is a transmission company fully owned by the Government of Karnataka. Section 2 (m) of the Act, 1999 clearly provides that it is a transmission company under the Companies Act 1956 and with effect from 28.1.2000 on

which date a Government notification came into being this KPTCL whose origin is traced to the 1999 Act it became an STU in terms of sub-section (1) of section 27 B of Indian Electricity Act 1910 .This reasoning is fortified by section 58 of State Act,1999 which we reproduce below:

58. Effect of the Act on the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948.- (1) *Except as provided in section 59 of this Act, the provisions of this Act, notwithstanding that the same are inconsistent with or contrary to the provisions of the Indian Electricity Act, 1910, or the Electricity (Supply) Act, 1948 shall prevail in the manner and to the extent provided in sub-section (3).*

(2) *Subject to sub-section (1) in respect of all matters in the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, with which the Board has been concerned or dealing with, upon the constitution of Commission the functions of the Board shall be discharged by the Commission and the KPTC:*

Provided that,-

(a) *the State Government shall be entitled to issue all policy directives and shall undertake overall planning and co-ordination as specified in section 12 of this Act and to this extent the powers and functions of the Karnataka Electricity Board as per the provisions of the Indian*

Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or rules thereunder shall vest in the State Government and the State Government shall co-ordinate and deal with the Central Government and the Central Electricity Authority;

(b) in respect of such matters which the Commission directs in terms of a general or special order, or in the regulations or in the licence as the case may be, the generating company or companies, the licensees or other body corporate as may be designated by the Commission shall discharge the functions of the Board under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 to the extent directed by the Commission or specified in the licences.

(3) Subject to sub-sections (1) and (2), upon the establishment of the Commission, the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 shall, in so far as the State is concerned, be read subject to the following modifications and reservations:-

(a) All references to State Electricity Board in the Indian Electricity Act, 1910 in so far as the State is concerned shall be read as reference to the Karnataka Electricity Regulatory Commission or the KPTC or other licensees or wherever it relates to general policy matters the State Government in accordance with the provisions of this Act;

(b) In respect of matters provided in sections 3 to 11, 28, 36(2), 49-A 50 and 51 of the Indian Electricity Act, 1910, to the extent this Act has made specific provisions, the provisions of the Indian Electricity Act, 1910 shall not apply in the State;

(c) The provisions of all other sections of the Indian Electricity Act, 1910 shall apply except that,-

(i) the terms "licence", "licensee" and "license holder" shall have the meaning as defined under this Act and the licenses shall be construed as having been issued under this Act

(ii) the reference to the sections of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 in the provisions of the Indian Electricity Act, 1910 shall be taken as reference to the corresponding provisions of this Act to the extent modified by the said Act.

(iii) the reference to arbitration in these provisions except where it is by the Central Electricity Authority shall be taken as reference to the proceedings under section 39 of this Act and the arbitration procedure specified under the Indian Electricity Act, 1910 shall not apply;

(d) The Schedules to the Indian Electricity Act, 1910 shall be applicable only with reference to the provisions in this Act wherein the applications of the Schedules are specified and not otherwise;

(e) All references to State Electricity Board in the Electricity (Supply) Act, 1948 in so far as the State of Karnataka is concerned shall be read as reference to the Karnataka Electricity Regulatory Commission or the KPTC or other licensees or where it relates to general policy matters, the State Government in accordance with the provisions of this Act;

(f) In respect of matters provided in sections 5 to 18, 19, 20, 23 to 26, 27, 37, 40 to 43, 44, 45, 46 to 54, 56 to 69, 72 and 75 to 83 of the Electricity (Supply) Act, 1948, to the extent this Act has made specific provisions, the provisions of the Electricity (Supply) Act, 1948 shall not apply in the State;

(g) The provisions of all other sections of the Electricity (Supply) Act, 1948 shall apply except that,-

(i) the terms "licence", "licensee" and "license holder" shall have the meaning as defined under this Act and the licenses shall be construed as having been issued under this Act ;

(ii) the reference to the sections of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 in the provisions of the Electricity (Supply) Act, 1948 shall be taken as reference to the corresponding provisions of this Act to the extent modified by this Act;

(iii) the reference to arbitration in these provisions except where it is by the Central Electricity Authority shall be taken as reference to the

proceedings under section 39 of this Act and the arbitration procedure prescribed under the Electricity (Supply) Act, 1948 shall not apply.

(h) The provisions of sections 72, and 73 of the Electricity (Supply) Act, 1948 shall be restricted to generating companies and reference to the State Electricity Board in these sections shall stand deleted.

(i) The Schedules to the Electricity (Supply) Act, 1948 shall be applicable only with reference to the provisions in this Act wherein the applications of the Schedules are specified and not otherwise.

36. Therefore, the KPTCL is a STU under the Act 1910 which together with the Supply Act 1948 and Electricity Regulatory Commissions Act, 1998 has become laws repealed in terms of section 185 of the Electricity Act 2003 although the KPTCL cannot be said to be the exact image of the erstwhile Electricity Board for two principal reasons namely a) certain functions of the erstwhile Electricity Board came to be discharged by the State Commission in terms of the Electricity Regulatory Commissions Act, 1998 and that of the requisite provisions of the State Act, 1999 and b) while the State Electricity Board was not a licensee in legal parlance although, it had the authorisation to carry out the function of supply and distribution of electrical energy, the KPTCL was under the Act 1999

legally barred to carry out the function of supply and distribution of electrical energy without a license under section 13 (5) of Act, 1999. Though, the principal object of KPTCL was to become a STU, at the initial stage of unbundling the business of purchase, sale and supply of electrical energy was entrusted with the KPTCL under requisite license which was granted to it, and section 14 of the Act, 1999 paved the way of further unbundling so as to divest the KPTCL of the job of business of purchase, sale and supply of electrical energy. The moot point is as to how the KPTCL by virtue of being a State Transmission Utility could execute a contract with the appellant on 16.1.2004 when the first proviso to section 39 of Act, 2003 says “*provided that the State Transmission Utility shall not engage in the business of trading in electricity*”. Strictly speaking, entering into agreement with a private company for acquisition by purchase of electrical energy for the purpose of sale cannot be totally divorced from the concept the act of trading which is why under the 9th proviso to section 14 of the Act, 2003 a distribution licensee does not require a license to undertake trading in electricity. The State Commission gave a too literal interpretation of the State Act, 1999 to reject the argument of the KPTCL before the Commission that as it had already become a STU it did not require a separate transmission license. In fact, on 6.12.2000 the Commission granted

transmission license to the KPTCL, and on the very next day that is 7.12.2000 the Commission granted to the KPTCL a license for supply and distribution of electrical energy, although, the document of license dated 7.12.2000 has not been produced. It is very clear that had not the Commission granted license under section 13 of Act 1999 to the KPTCL to undertake of business of purchase, distribution and supply of electrical energy there would not have been any difficulty for us to say that the agreement dated 16.1.2004 executed by the KPTCL and the appellant under the State Act, 1999 was void *ab initio*. It is because of being authorised under section 13 (5) read with section 14 (3) of the Act 1999 that the KPTCL assumed the jurisdiction to enter into Power Purchase Agreement with the appellant although, it was primarily and principally a STU.

37. The appellant banks upon the first proviso to section 39 and the third proviso to section 41 which respectively prohibit a STU and a transmission licensee to engage in the business of trading in electricity. The KPTCL entered into agreement with the appellant on the footing that it is engaged in the purchase, transmission and supply of electricity. The agreement was entered into ostensibly to purchase electricity in bulk for the purpose of distribution which was the function of the integrated utility as the State Electricity Board was.

38. The question now is whether since the KPTCL was formed to act as STU it can even after 10.6.2003 go on doing the business of purchase, supply, distribution and trading of electricity.

39. It is the basic case of the appellant that section 185 (3) does not save the agreement dated 16.1.2004 entered into by and between the appellant and the KPTCL .In this respect a notification of the Government of India in the Ministry of Power being no. S.O.672 (E) dated 09th. June, 2004 filed by the appellant is relevant and it reads as follows:-

“ Whereas the first proviso to sub-section(1) of section 39 of the Electricity Act,2003 (36 of 2003) (hereinafter referred to as the Act) provides that all licensees, authorisations, approvals, clearances and permission granted under the provisions of the Indian Electricity Act,1910, the Electricity (Supply)Act,1948 and the Electricity Regulatory Commissions Act,1998(hereinafter referred to as the repealed laws) may, for a period not exceeding one year from the appointed date or such earlier period , as may be notified by the Appropriate Government, continue to operate as if the repealed laws were in force;

And whereas under the repealed laws and consequent amendments effected through the enactments specified in the

Schedule to the Act, the State Transmission utilities have the authorisation to engage in the activity of purchase and sale of electricity;

And whereas 10th June,2003 being the appointed date for the Act, in terms of the provision of clause (b) of section 172 of the Act, the authorisations of the State Transmission Utilities to engage in the activity of purchase and sale of electricity can continue to operate till 9th June,2004 after which as per provision of first proviso to sub-section (1) of section 39 of the Act, the State Transmission Utilities have to disengage themselves from trading in electricity, that is, from the activity of purchase and resale of electricity;

And whereas States of Orissa and Karnataka have expressed difficulties in giving effect to the provision contained in the first proviso to sub-section (1) of section 39 of the Act by 9th june,2004;

Now, therefore, the Central Government , in exercise of the powers conferred by Section 183 of the Act hereby makes this order and authorises the State Transmission Utilities having authorisation under the provisions of the repealed laws, to engage in the activity of bulk purchase and sale of electricity to distribution companies for a further period of one year on and from the 10th day of June,2004.” (emphasis ours).

40. According to the appellant, since section 172 of the Act , 2003 and the order dated 9th June,2004 issued by the Central Government do not refer to the State Reforms Act, 1999 and they only refer to the 'repealed laws' which do not include the State Reforms Act, 1999 the activity of bulk purchase and sale of electricity or of trading through entering into an agreement is not saved, as such the agreement being inconsistent with the Act, 2003 has to be rendered as invalid. Charming, though, apparently the argument is, it is not sustainable. By the Central Government notification dated 9.6.2004 the activity of the STU in purchase and sale of electricity and trading therein is saved. The Government of Karnataka notified the KPTCL to be the State Transmission Utility under section 27 B of the Act, 1910 Therefore, KPTCL gets its initial jurisdiction to act as STU from the 1910 Act. Secondly, we have noticed that to all intents and purposes the KPTCL is the successor in interest of the Karnataka Electricity Board. Thirdly, the KPTCL has the authorisation to engage in the activity of purchase and sale of electricity under the State Act, 1999 in spite of being it a STU. Fourthly, the notification of 9th June, 2004 uses the words "*and whereas under the repealed laws and consequent amendments effected through the enactments specified in the Schedule to the Act, the State Transmission Utilities have the*

authorisation to engage in the activity of purchase and sale of electricity. “. Fifthly, the Schedule to the Act, 2003 has reference to the Karnataka Electricity Reforms Act, 1999. Sixthly, that Karnataka along with Orissa was finding it difficult to disengage its Board/ KPTCL from the activity of purchase and sale of electrical energy has been specifically mentioned in the notification. Seventhly, the Board and the KPTCL had no difference between them except that the former did not have requirement of license to carry out the function of purchase, transmission, distribution and supply of electricity, while for the KPTCL under the State Reforms Act, 1999 it was necessary and it was granted. Eighthly, If, the Board’s activity ‘of purchase, transmission, distribution and supply of energy in spite of it being STU is saved for one year from 10.6.2004 then it goes beyond logic as to why the same dispensation would not be available for the KPTCL, the successor of the Board which had been permitted to engage in the business of purchase, transmission, supply and distribution of electrical energy through license granted under the Act, it also being a STU. Ninthly, the absence of the name of the Act, 1999 in the last paragraph of the order does not alter the situation because the section 58 of State Reforms Act, 1999 provides that reference to the 1910 Act, and 1948 Act, in so far as the KPTCL discharges the function of the Board, and which it truly does shall be

deemed to be the references to the Act, 1999. Accordingly, we hold that the agreement is not void *ab initio*.

41. The next question is whether the agreement could be validly assigned to the respondent no. 2 by the KPTCL. According to the appellant, clause 12.9 of agreement provides that neither party shall assign the agreement or any portion thereof without the prior written consent of the other party which consent shall not be unreasonably withheld or delayed, provided that any assignee expressly assumes the assignor's obligation under this agreement. There cannot be any second opinion to the proposition that assignment of a contract must be under the prior consent of the other party to the contract. Admittedly, the consent of the appellant was not taken; given therefore, a plain meaning of the clause the assignment in favour of the respondent no. 2 does not get validated. But the matter of the fact is that when the agreement was executed by and between the appellant and the KPTCL the State Reforms Act, 1999 had already come into force. It can not but be the fact that under the transfer scheme codified in section 14 of the Act, 1999 the State Government may after consulting the KPTCL transfer the function including a distribution function, any property, interest in property, rights and liabilities which have been vested in the KPTCL in favour

of another licensee and such transfer scheme to be notified under section 14 (5) of the Act shall have the same effect as the transfer scheme under subsection (2) and shall be effective from the date specified. Now, since the authority of the KPTCL to continue in the function of purchase, distribution, sale and trading in electricity would cease to operate from 10.6.2005 the Government of Karnataka brought out a notification being no. EN 131 PSR 2003, Bangalore , dated 10th May,2005 purportedly under the State Act, 1999 whereby the Government accorded approval to the effect that with effect from 10th June, 2005 the PPAs in respect of renewable energy project would stand assigned to ESCOMs based on geographical location of the project and accordingly it is the respondent no. 2 to whom in consideration of the geographical location of the project the agreement stood transferred . Moreover, the appellant acted upon such assignment for a number of years without demur and when the agreement was executed by the appellant with the KPTCL it had full knowledge that under the provisions of section 14 of the Act,1999 the Government retained its right to assign the contract to another Government Company which it in fact did although the existence of the respondent no 2 was much prior to that of the agreement between the appellant and the KPTCL. In this circumstance, the provisions of the Reforms Act, 1999 and notification made thereunder

in so far as assignment is concerned have to be read as if they have been incorporated in the contract itself . The appellant, as noted earlier, continued to supply power under the same PPA for four years after assignment and now it cannot be argued that in the premises as aforesaid the assignment is illegal.

42. As to the question whether the licence granted to the respondent no.2 can be said to have expired or not the answer lies in the fifth proviso to section 14 of the Act 2003. A Government Company formed under the Companies Act is a deemed licensee. The respondent no 2 is a Government Company wholly owned by the State Government for the purpose of purchase and distribution of electrical energy within the State of Karnataka.

43. Though the appellant has argued that it was impossible for it to continue with the performance of contract and invoked the doctrine of frustration of contract it can be said that the doctrine of frustration of contract cannot be made applicable because the doctrine signifies a certain set of circumstances after the formation of the contract, the occurrence of which is due to no fault of either of the parties and which renders performance of the contract by one or both the parties physically and commercially impossible.

44. The non-application of the doctrine of frustration of contract does not necessarily mean that the Commission or the Tribunal is precluded from going into the question as to whether there has been breach of the contract in order that it can rightly be said that the contract is liable to termination and has been, as claimed by the appellant, rightly terminated. Thus, the doctrine of frustration of contract is different from termination of contract by one party because of alleged default committed by the other in performance of its part of the contract.

45. In this connection, a point raised by the respondent no. 2 has to be resolved. It has been pleaded and argued by the respondent no. 2 before the Commission and also before this Tribunal that the appellant developed its case stage by stage by introduction of more and more facts and of more and more legal issues. It is contended that before the Commission the appellant filed more than one amendment petition but the Commission did not pass any order as to whether it was allowing those amendment petitions or not. The law is very clear that so far as legal issues are concerned, they can be raised before any ladder in the judicial structure and even before the higher court of appeal. So far as amendment of pleading is

concerned, the law requires of the statutory authority to dispose of such petitions either by affirmation or negation. In the instant case, the Commission observed that the amendment petitions would be considered together with the original petition and it passed an order now impugned before us covering the original petition as also the amendment petitions although on the question of breach of contract and on the question of termination of contract which was pleaded in the original petition itself it did not record any finding and avoided decision on it. Therefore, so long as the cause of action does not change the pleading can be amended more than once though, of course, the provision of Order 6 Rule 17 of the CPC which was quoted in the amendment petitions before the Commission may not be religiously adhered to. It is also common knowledge that even before the Appellate Court pleading can be amended subject to the leave of the court.

46. The point was also raised by the respondent no 2 that before this Tribunal the appellant filed a copy of legal notice dated 13.1.2011 terminating the contract for the first time which must not this Tribunal take cognizance of and it is also argued that the appellant filed before this Tribunal certain statements showing payment schedule only through rejoinder to the counter affidavit of the respondent no. 2. It

has to be said that ordinarily an appellate forum does not permit introduction of new fact which has the effect of changing the cause of action. It is also an accepted proposition of law that an appellate forum may take into cognizance of subsequent development and subsequent conduct of the parties in relation to the self-same cause of action. The question whether there has been breach of contract and whether the contract has been legally terminated is a mixed question of law and fact. It is fair enough to say that before the Commission the appellant in the original petition dated 13.4.2009 had expressly pleaded that since there has been breach of condition the agreement stood cancelled. Paragraph 9 and 10 of the original petition very exhaustively pleaded that because of the breach of the condition of the contract regarding payment the contract stood terminated. It is not that this fact has been introduced before this Tribunal for the first time. In the appeal this fact has again been re-agitated. Yes, a copy of the legal notice dated 13.1.2011 addressed to the respondent no. 2 terminating the contract has been filed. This document can not be thrown away as it was filed through an affidavit annexed to the rejoinder on 28.11.2011 and the Tribunal accepted it. The matter of the fact is that this legal notice has been replied to by the respondent no. 2 to the appellant on 18.1.2011 and the copy of the reply has been filed before this Tribunal by the appellant itself so

that it cannot be pleaded by the respondent no. 2 before this Tribunal that the respondent no. 2 has been taken aback by filing a copy of the legal notice. Secondly, this legal notice is in connection with the plea of termination of contract because of alleged breach of the terms of the contract which was pleaded before the Commission as is pleaded before us.

47. Subject to the factum of assignment of contract which took place by operation of law a contract lawful is binding on the parties and it is sacrosanct so far as the parties are concerned. It cannot be loosely constructed so as to defeat the very meaning and purpose of the contract to the advantage of one of the parties whatsoever its legal status might be. Courts do not interfere with the breach if it is manifest and apparent. Now, clause 9.3 of the agreement reads as follows:

“In the event of any payment default by the Corporation for a continuous period of three months, the Company shall be permitted to sell power to third parties through the Grid System by entering into a wheeling and Banking Agreement with the Corporation for which it shall pay Wheeling charges to the Corporation at the rates applicable from time to time in addition to banking charges at the rate applicable from time to time as approved by the Commission”.

48. The clause 9.3 appears under Article 9 which deals with 'TERM, TERMINATION AND DEFAULT'. The clause in question gives the clear meaning that when the Corporation commits default for a continuous period of three months the company shall be permitted to sell power to third parties through the grid system, meaning thereby that the contract would stand terminated for such default. No other meaning can be attributed to it. Now, clauses 6.2, 6.3 and 6.6 are relevant. They are quoted below:

"6.2 Payment: Corporation shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated official of Corporation".

" 6.3 Late Payment : If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI medium term Lending rate per annum for such payment from the date such payment was due until such payment is made in full "

"6.6 Letter of Credit: Corporation shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the company.

The Letter of Credit shall be established in favour of, and issued to the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by Corporation at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both Parties and shall be issued by any Scheduled Bank and to provided on the basis that:

- i) In the event a Tariff Invoice or any other amount due and payable by Corporation pursuant to the terms of this Agreement it not paid in fully by Corporations as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Tariff Invoice or any such other unpaid amount.*
- ii) The foregoing as determined pursuant hereto, upon presentation of such Tariff Invoice or other invoice or claim for such other amount by he Company on the due date there for or at any time thereafter , without any notification, certification or further action being required.*
- iii) The amount of the Letter of Credit shall be equal to one month's projected payments payable by the Corporation based on the average of the annual generation.*

- iv) The Corporation shall replenish the LC to bring it to the original amount within 30 days in case of any valid draw down .*
- v) The Company shall allow a rebate of 1.8% of the Tariff Invoice amount or actual expenditure/charges for the LC account incurred which ever is lower, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.*
- vi) The Letter of Credit shall be renewed and /or replaced by the Corporation not less than 60 days prior to its expiration”*

49. In the original petition dated 13.4.2009 it was alleged that a sum of Rs. 69, 23,198 was remaining outstanding for payment in terms of the invoice and a chart was annexed to the petition and the said chart was sent to the Corporation. A legal notice was issued on 31.1.2009 which was also annexed to the petition before the Commission. The appellant sent another legal notice on 4.3.2009 alleging that there was breach of condition of agreement and as there was breach of condition the agreement stood cancelled. In the amended petition dated 17.8.2009 breach was also alleged. In the reply before the Commission the respondent no. 2 contended that payments were made in terms of the PPA. The respondent no. 2 has raised a dispute that payment was not due for supply of 6.6 M.W. of power. The respondent no. 2 denied that the sum as alleged was not

due for payment. That Letter of Credit was not opened was a fact. Again, in the additional reply the respondent no. 2 contended that non opening of Letter of Credit was at the instance of the appellant and it amounted to waiver. When an issue on fact as to whether there has been breach of the terms of the contract was raised before the Commission the Commission was required to deal with the issue but it did not. The impugned order of the Commission itself shows that it was contended before the Commission by the appellant that the contract was liable to be terminated because of breach of terms of payment. The Commission itself observed: “ *If there is a breach of terms of payment or other terms, the petitioner has a right to third party sale as well as to put an end to the contract*”. It is not that breach of terms of contract was not alleged before the Commission; yet the Commission avoided a decision although, documents were laid before the Commission through annexure allegedly showing breach of contract. In the rejoinder before us the appellant annexed certain charts showing pending bills said to have been derived from the web site of the respondent no. 2 itself and these schedules were dated 6.3.2010 which was long before the Commission passed the impugned order. Again, there are certain other statements drawn on 24.11.2011 showing allegedly non payment of the invoice. These statements are of course post impugned order. Yet these documents

require study and examination by the Commission so as to reach a decision as to whether there has been breach of the terms of the contract and whether consequently the contract stood terminated. It is not prudent on the part of this Tribunal to embark for the first time on a decision on a point of fact which for the reasons not known to us the Commission as a court of first instance did not render. It is only on this issue that the Commission should be asked to render a finding and accordingly on this count alone the matter should be remanded back to the Commission.

50. Thus, the issue nos. a) to e) are decided as follows:
- i) The PPA 16.1.2004 is valid and according to law.
 - ii) The provisos to section 39 and 41 did not constitute bar to the KPTCL to enter into PPA with the appellant.
 - iii) Section 14 of the Karnataka Electricity Reform Act, , 1999 did not have any impact in relation to section 39,41,131 and section 185 (3) of the Electricity Act 2003 in view of the Government of India's notification dated 9.6.2004 which has direct bearing on the provisions of the State Act,
 - iv) The act of assignment of the PPA was by virtue of the provision of section 14 of the State Act, 1999 read with the

Government of Karnataka's notification dated 10th May, 2005.

- v) In view of the discussion rendered in the preceding paragraphs of this judgment the question as to whether performance of the PPA dated 16.1.2004 is consistent with specific performance of contract involving movable property under the Specific Relief Act 1963 does not arise.

51. As the Commission did not render any finding on issue nos. f) and g) it is found necessary for this Tribunal, it being an appellate forum, to ask the Commission to give finding on analysis of facts and figures as were produced and as may be produced further before the Commission by the parties and on hearing them. Since the original petition was filed by the appellant before the Commission as far back as 13th April, 2009 justice demands that Commission give its finding on factual issues which it omitted to render despite the facts having been lodged with the Commission, by two months from the date of receipt of a copy of this judgment from the appellant or from the date of noticing this decision through web-site of this Tribunal whichever is earlier without indulging in grant of adjournments to either of the parties.

52. The result is that the appeal is allowed in part but without costs. On the two issues as aforesaid the case is remanded back to the Commission for its decision.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

KS

REPORTABLE /NON- REPORTABLE