

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.80 of 2012

Dated: 07th Oct, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

- 1. VBC Ferro Alloys Limited.,
3rd Floor, Progressive Towers,
Khairatabad,
Hyderabad-500 004**

- 2. Progressive Constructions Limited.,
7th Floor, Raghava Ratna Towers,
Chirag Ali Lane,
Abids, Hyderabad**

- 3. Konaseema Gas Power Limited.,
No.6-2-913/914,
3rd Floor, Progressive Towers,
Khairatabad,
Hyderabad-500 004**

..... Appellant(s)

Versus

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

- 2. Bangalore Electricity Supply Company Limited,
Corporate Office, K.R. Circle,
BANGALORE-560 001**

..... Respondent(s)

Counsel for the Appellant : Mr.V.T. Gopalan, Sr. Adv.
Mr. Ramji Srinivasan, Sr Adv
Mr. K Ravindranath,
Mr. Sanjay Bhatt
Mr. Amardeep Jaiswal
Mr. Zafar Alam,
Mr. Vivek P Oriel
Mr. Kawaljit

Counsel for the Respondent(s): Mr. M.G ramachandran
Mr. Anand K Ganesan
Mrs. Swapna Seshadri
Ms. Priya Pathania for R-1
Mr. S Sriranga
Mr. Raghavendra S Srivatsa
Mr. Sumana Naganand
Mr. D Nagarajan
Mr. Venkata Subramaniam for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. (1) VBC Ferro Alloys Limited (2) Progressive Constructions Limited and (3) Konaseema Gas Power Limited are the Appellants herein.
2. They have filed this Appeal as against the impugned order dated 13.1.2012 passed by the Karnataka State Commission allowing the Petition filed by BESCOM by directing the Appellants to supply power to BESCOM as per the Power Purchase Agreement dated 27.2.2009 entered into between BESCOM and the Appellants.

3. The short facts are follows:

(a) The Appellants are engaged in the business of owning, operating and maintaining Generating Station. The Appellants 1 and 2 have jointly formed a Special Purpose Company by the name of M/s. Konaseema Gas Power Limited, the 3rd Appellant with the objective of generating power.

(b) The 1st Appellant namely VBC Ferro Alloys Limited, is the leader of the said consortium.

(c) The Power Company of Karnataka which is a Government Company had invited bids on 27.5.2007 for purchase of 1500 MW of power on behalf of the Distribution Companies including BESCO, the 2nd Respondent, in the State of Karnataka.

(d) In response to the said invitation, the 1st Appellant in its capacity as a leader of the consortium submitted its bid for supplying 600 MW of power after getting it from Konaseema Gas Power Limited, the 3rd Appellant.

(e) The Power Company, after scrutiny of the bids and further negotiation, accepted the bid of the 1st Appellant to procure the firm power from the 1st Appellant for the quantum and rate indicated therein.

(f) The Appellant was also called upon to furnish and perform the Bank Guarantee at the rate of Rs.4.00 lacs per MW, three months prior to commencement of the first day of supply of power.

(g) Simultaneously, the Power Company submitted the bids received before the State Commission on 10.6.2008 for its approval.

(h) Ultimately, the State Commission after getting some clarification conveyed its approval on 7.10.2008 to the Power Company for purchase of power from the 1st Appellant at the rate of Rs.3.7338 per unit.

(i) Prior to that, the Letter of Intent dated 16.2.2008 was issued in favour of the 1st Appellant.

(j) At this stage, the 1st Appellant filed a Civil Suit in the City Civil Court, Hyderabad seeking for an order of permanent injunction restraining the procurers from invoking the Bid Bond submitted by the 1st Appellant. However, the said suit was withdrawn by the 1st Appellant on 9.2.2009 after some negotiation with BESCO (R-2).

(k) Subsequent to the withdrawal of the suit, the 1st Appellant, the leader of the consortium on 27.2.2009, signed a Power Purchase Agreement with BESCO and other Distribution Licensees for supply of 80 MW of

power at the base rate of Rs.3.65 per unit from 1.12.2008 to 31.9.2009, 300 MW for 1.10.2009 to 31.12.2009 and 600 MW from 1.1.2010 to 31.12.2014.

(l) Even after signing the PPA due to non-availability of Fuel to generate power, the 1st Appellant was not able to supply 80 MW of power to the BESCO.

(m) The 1st Appellant on 28.3.2009, requested the BESCO (R-2) to revise the schedule of quantum of power agreed to be supplied by giving several reasons. However, the BESCO rejected the said request and insisted that the 1st Appellant has to supply power as per the schedule of the power.

(n) On 8.6.2009, the 1st Appellant wrote to BESCO stating that the Appellant could not agree to supply 80 MW of power as the Appellant was not in a position to supply power due to acute shortage of natural gas and again sought for revision of schedule of power.

(o) In view of the above, the BESCO filed an Arbitration Application before the City Civil Court, Bangalore and sought for a direction against the Appellants by way of mandatory injunction directing them to commence and continue to supply power as per the schedule agreed to in the PPA. However, this

Application was subsequently withdrawn by BESCO (R-2).

(p) Thereupon, the 1st Appellant insisted the Power Company and BESCO to facilitate execution of supplementary agreement duly revising the supply schedule. There was no positive response.

(q) Therefore, the Appellants filed a Petition on 24.4.2010 before the State Commission in OP No.21 of 2010 and sought declaratory and injunctory relief as against the Power Company and Distribution Licensees including the BESCO. However, this Petition was subsequently withdrawn.

(r) In the meantime, the BESCO also filed the Petition in OP No.48 of 2010 initiating the present proceedings, seeking for the specific performance of the PPA for a direction to the Appellants for supplying the power as per the PPA. The Appellants, objecting to this prayer, filed statement of objections.

(s) Ultimately, the State Commission passed the impugned order dated 31.1.2012 allowing the BESCO's Petition by directing the Appellants to supply the power to the BESCO as per the PPA.

(t) Aggrieved over this order, the Appellants have filed this Appeal.

4. The grounds raised by the Senior Learned Counsel for the Appellants in this Appeal, are as follows:

(a) The First Issue framed by the State Commission is as to whether the State Commission has got the jurisdiction to adjudicate upon the dispute raised by the BESCO (R-2) which involves the inter State sale of electricity. The State Commission, on this issue, has held that the State Commission has got the jurisdiction since this would relate to the supply of power to the Distribution Companies in Karnataka for supply of power to the consumers of Karnataka. This finding is wrong since the PPA contemplated that the Appellants would sell power to the Distribution Companies on a guarantee after getting it from Andhra Pradesh Distribution Companies from their plant and that therefore, the State Commission cannot have the jurisdiction to approve the procurement in question or adjudicate upon the dispute between the BESCO and Appellants since the procurement in question comes within the ambit of Section 79 (1) (b) and (f) of the Electricity Act, 2003 and so, the Central Commission alone has got the jurisdiction.

(b) The Second Issue is as to whether the PPA dated 27.2.2009 signed between the parties is binding on the parties. The State Commission, on this issue,

has erroneously held that the PPA executed pursuant to the power purchase made in accordance with Section 63 of the Electricity Act, 2003 and as such, it does not require to be approved by the State Commission.

(c) The State Commission did not appreciate the fact that the procurement process in question was not carried out in accordance with Section 63 of the Electricity Act, 2003. In any event, Section 63 of the Electricity Act read with bidding guidelines and read with condition of licence for Distribution Companies Regulations, 2004 and Section 175 of the Electricity Act requires that the PPA shall be submitted to the appropriate Commission for its approval.

(d) The bidding guidelines requires that the procurer to intimate the State Commission before initiating the bidding process. In the present case, the Distribution Company did not send any such intimation to the State Commission. The approval dated 7.10.2008 is only with reference to the tariff and quantum. The bidding guidelines provide that signed PPA shall be sent to the State Commission for adoption of tariff as per Section 63 of the Electricity Act.

(e) In the present case, the State Commission did not approve the PPA as the Distribution Licensee admittedly did not submit the PPA before the State Commission for approval. Even the approval dated 7.10.2008 would reveal that there was only conditional approval of the procurement process and the tariff.

(f) Further, the State Commission while passing the conditional order dated 7.10.2008 has not followed the mandatory procedure u/s 63 of the Electricity Act by verifying that the tariff has been determined through transparent process of bidding and in accordance with the guidelines issued by the Central Government.

(g) In addition to this, the State Government has failed to follow Section 86 (1) (b) of the Electricity Act, 2003 as well as Section 185 (3) of the Electricity Act. Therefore, the conditional approval dated 7.10.2008 cannot be construed to be the approval u/s 63 of the Electricity Act especially when the mandatory procedure had not been followed. Therefore, the PPA was not valid.

(h) The 3rd issue decided by the State Commission is whether the BESCO is entitled to seek for the enforcement of the PPA as the contract is binding on the parties. The State Commission cannot decide this

issue without considering the question as to whether non approval of the PPA after compliance of the conditions provided in the bidding guidelines would tantamount to approval of the Agreement or not. The State Commission without application of mind and without giving proper reasons wrongly held that the PPA is valid and as such the State Commission can direct for the enforcement of the said Agreement. Even assuming that the State Commission has got the powers to grant a decree for specific performance of the contract, the provisions of the specific Acts cannot be said to be attracted in the facts of the case especially when the BESCO itself sent a notice to the Appellant terminating the said PPA. The State Commission ignoring the letter sent by the BESCO to the Appellant terminating the PPA has wrongly allowed this claim especially when the PPA provides that the invocation of the bid bond guarantee by the BESCO can be made only after the termination.

5. Reply made by the learned Counsel for the Respondent is as follows:

- (a) In regard to the issue of jurisdiction, the State Commission has correctly held that it has got the jurisdiction on the strength of the ratio laid down by this Tribunal in Appeal No.200 of 2009 and 15 of 2011.

The jurisdiction issue cannot be raised by the Appellant in view of the fact that the Appellants themselves have approached the State Commission seeking injunctory relief in respect of the same PPA. Therefore, the contention raised on this issue is liable to be rejected.

(b) With regard to the 2nd issue that the PPA has not been approved by the State Commission and as such the same is not binding on the parties, it is to be stated that there is no requirement in law for the State Commission to approve the PPA entered into after following the bidding guidelines. In terms of the competitive bidding guidelines, the PPA was in terms of Standard Bidding Documents. There is no need for the approval of the State Commission. The approval contemplated only when there are deviations in the bid documents. The only requirement is that the tariff discovered through the bidding process has to be accepted and adopted by the State Commission u/s 63 of the Electricity Act. In the present case, there is no substantive deviation from the bidding guidelines. The requirements of the guidelines are that in case of material deviation, the approval of the State Commission has to be obtained. The State Commission has approved the request to consider the single bid. Therefore, the Appellants cannot take an

exception with regard to validity of the PPA on this ground. Therefore, the tariff and quantum referred to in the PPA have been approved by the State Commission. Therefore, the PPA is binding on the parties.

(c) With regard to the contention that the PPA is not enforceable, it is to be stated that this aspect has been considered by this Tribunal in the case of Adani Power in RP No.6 of 2011 in Appeal No.184 of 2010 through the order dated 30.2.2012 and held that the PPA is specifically enforceable. In view of the same, the contention that the PPA cannot be specifically enforced is untenable.

6. The State Commission also through its learned Counsel has made elaborate submissions in justification of the impugned order.

7. In the light of the above rival contentions made by the parties, the following questions would arise for consideration:

(a) Whether the State Commission has got the jurisdiction to adjudicate upon a dispute raised by the BESCOM in the Petition?

(b) Whether the PPA dated 27.2.2009 signed by the parties would be binding on the parties before the approval of the said PPA by the State Commission?

(c) Even assuming that the PPA is binding on the parties, then whether further direction of the State Commission directing the Appellants to perform the PPA for supply of electricity as agreed to can be sustained in law?

8. Now let us discuss the issues one by one. The First Issue is relating to jurisdiction.
9. At the outset, it shall be stated that apart from the fact that the jurisdiction issue has already been decided by this Tribunal on the basis of which the State Commission has held that it has got the jurisdiction, the learned Senior Counsel for the Appellants himself ultimately did not press this issue.
10. In view of the above, we hold that the State Commission has got the jurisdiction to adjudicate upon the dispute in question.
11. Accordingly, the **1st Issue** is decided in conformity with the findings rendered by the State Commission.
12. Now let us deal with the **Second Issue**.

13. This issue relates to the question as to whether the PPA dated 27.2.2009 signed by the parties, is binding on the parties before the approval of the said PPA by the State Commission?
14. On this issue, the State Commission has held in the impugned order that the said PPA, being valid, is binding on the parties.
15. According to the Appellants, the PPA, having been not approved, is not valid and as such, the said PPA would not be binding upon the parties.
16. Before analysing this issue, we would refer to the findings which have been rendered by the State Commission by quoting the discussions and findings on this issue. The same is as follows:

“27.1 It is submitted by the Petitioner that the PPA signed by the parties on 27.02.2009 has to be performed by the Respondents. Per contra, it is contended by the Respondents that the PPA dated 27.02.2009 has not been approved by the Commission; it does not create any right in favour of the Petitioner to enforce the same. The Respondent’s Counsel, in support of his argument, referred to Section 25 of the Electricity Reforms Act, 1999. Further, he referred to the Judgment of the Hon’ble Appellate Tribunal for Electricity in appeal No.125/2010, wherein it is held that, “in the absence of approval of the State Commission, the Power Purchase Agreements cannot be held as valid and binding.” He has drawn our attention to the decision

of the Hon'ble Supreme Court in **TATA POWER case (2009) 16 SCC 659**. He has also relied on the Judgments of the Hon'ble Supreme Court in **M.V. SHANKAR BHAT (AIR 2004 SC 636)** and in **VALJI KHIMJI's case (2008) 9 SCC 299**, in this regard.

27.2 It is submitted by the Respondents that, even assuming that the PPA dated 27.02,2009 is valid, the same has been terminated by the Petitioner as per Article 3.3.2, by its letter dated 22.06.2009 and has encashed the Bank Guarantee, therefore the said PPA would no longer survive for enforcement. It is also contended by the learned Counsel for the Respondents that as the PPA stipulates supply of power from 01.12.2008, which date is prior to the signing of the PPA, the PPA cannot be enforced, as it is impossible to perform from a date which has gone by.

27.3 In our view, the arguments advanced on behalf of the Respondents, though look attractive, deserve to be rejected on closer examination. It is observed from the records that when Power Corporation of Karnataka Ltd. (PCKL) on behalf of the Petitioner sought for approval for purchase of power at the rates obtained through the Bid from the Respondents, this Commission considered the same and has accorded approval for the same, vide its letter dated 7.10.2008. This has also been informed to the Respondents by the PCKL, vide its letter dated 18.10.2008. The tariff and quantity of power are the heart and soul of any PPA. When this Commission has given its approval for these two, it amounts to approval of the Commission to the PPA. The stand taken by the Respondents that the PPA is not binding on it, as the Commission has not approved it, therefore, is contrary to the facts on record. Under Section 63 of the Electricity Act, 2003, when tariffs are obtained through Bids, the Commission cannot

again determine the tariffs for incorporating the same in the PPA. In our view, the Contract between the parties for supply and purchase of electricity has come into existence, once the bid of the Respondents was accepted and this Commission has approved the quantity to be purchased according to the tariff obtained through the Bid. The reliance placed by the Respondents on the provisions of the Karnataka Electricity Reforms Act, 1999, has no application, so far as the power purchase under section 63 is concerned. The provisions of the Electricity Act, 2003 prevail over the Karnataka Electricity Reforms Act, 1999, and all power purchases have to be done only in accordance with the Electricity Act, 2003. Reference made by the learned Counsel for the Respondents to the Order of the Hon'ble Appellate Tribunal for Electricity in **Ind Bharath Energies Ltd.** case has no application to the present case, as the said Judgment was rendered in the context of Electricity Regulatory Commissions Act, 1998. Reference to the Judgment of the Hon'ble Supreme Court of India in **Tata Power Corporation Ltd. -Vs- Reliance Energy Ltd. and others** is of no help to the Respondents in any way, as the power purchase has been approved by this Commission. Similarly, reference to the other Judgments will also not help the Respondents to support their case.

27.4 The contention of the Respondent is that, assuming that the PPA is a valid Agreement, since has been terminated by the Petitioner as per Clause 3.2.2 of the PPA, by its letter dated 22.6.2009 addressed to the State Bank of India, Hyderabad (Annexure-R28) and by encashing the Bank Guarantee, cannot seek enforcement of the Contract. We do not subscribe to this contention of the Respondent, as the letter written by the Petitioner

to the State Bank of India, Hyderabad does not state that the PPA is terminated, as asserted. The said letter reads as follows :

“M/s VBC Ferro Alloys Ltd. are not maintaining the timeliness in terms of the Power Purchase Agreement (PPA) and are yet to obtain necessary approvals and clearances wherever required from RLDC, SLDC and other statutory bodies for supply of power. Further, the company has yet to furnish ‘Performance Guarantee as per clause 3.1.11 of the PPA’.

In view of the inordinate delay on the part of M/s.VBC Ferro Alloys Ltd., the Bank Guarantee bearing No.0910309-BG0000195 for Rs.15 Crore issued by State Bank of India, Industrial Finance Branch, Hyderabad in favour of BESCO and furnished by the above-mentioned company is hereby invoked. The proceeds of the Bank Guarantee may please be handed over to the bearer of this letter Shri H. Madhusudana Sharma, Deputy Director, PCKL, Bangalore, whose signature is attested below. This letter shall be treated as the written demand by the ‘Lead Procurer’ in terms of the Bank Guarantee issued by the Bank.”

The above letter does not mean that the Contract is terminated. It only means that one of the terms of the PPA is being enforced. This becomes further clear from the letter addressed to the Respondent-M/s VBC Ferro Alloys Limited, vide BESCO’s letter dated 2.7.2009, produced as Annexure–R29. The interpretation tried to be placed by the Respondents

on clause 3.2.2. also cannot be accepted, as the Petitioner has not terminated the PPA. On the contrary, the Petitioner is enforcing the Contract, which is evident from this Petition. Encashment of the Bid Bond is not the same as claim for Liquidated Damages. Clause 3.2.2 of the PPA confers a right on the Petitioner to claim Liquidated Damages, if it elects to terminate the PPA, and not otherwise. When the Petitioner is seeking enforcement of the Contract, termination of the same does not arise. It is also the contention of the Respondents that financial closure would not be achieved because of inordinate delay by the Petitioner in signing the PPA. This also carries no substance; since soon after approval of tariff by the Commission, the Petitioner has invited the Respondents for signing the PPA as early as in October, 2008; procedural delays occurred only due to actions by the Respondents, before signing the PPA on 27.2.2009.

27.5 Before we conclude our finding on this issue, we may observe that the stand of the Respondents cannot be appreciated on the validity of the PPA. It is observed from the correspondence that the Respondent No.1 was keen to sign the PPA to get the funding from financial institutions and vigorously persuaded the PCKL to get the PPA executed by the Petitioner and others. Having got the PPA signed, the Respondents thereafter cannot turn around and contend that the PPA is not valid and binding on them. The contentions of the Respondents that the PPA was signed under fraudulent inducement and the bidding process followed by PCKL was contrary to the Public Policy, etc., cannot hold water. The Respondents being professionally managed Companies, in our view, cannot plead fraudulent inducement, etc., that too when no material is also placed on record in support of the same. The

Respondents, who are all Companies of repute and having participated in the Bidding process, outplaying the other Bidders, shall not be allowed to raise such contentions. If at all there is any inducement in signing of the PPA, it is by the Respondent No.1 and not by the Petitioner and others.

27.6 Accordingly, Issue No.2 is answered against the Respondents.

17. The crux of the findings of the State Commission referred to above is as follows:

(a) It is mainly argued by the Generating Companies that the PPA dated 27.2.2009 has not been approved by the State Commission and that therefore, it does not create any right in favour of the procurer to enforce the same. It is also argued that even assuming that the PPA is valid, the same has been terminated by the procurer by the letter dated 22.6.2009 and has encashed Bank Guarantee and therefore, the said PPA would no longer survive for enforcement. These arguments do not deserve acceptance.

(b) On considering the request made on behalf of the procurer seeking for the approval for purchase of power at the rate obtained through the bid, this Commission considered the said request and accorded the approval for the same through its letter dated 7.10.2008. When the tariff and quantity of power which

are heart and soul of the PPA have been given approval by the State Commission, it would amount to approval of the PPA as well. Therefore, the stand taken by the supplier of the power that the PPA is not binding is misconceived.

(c) Under Section 63 of the Electricity Act, 2003, when the tariffs are obtained through bids, the State Commission cannot again determine the tariff for incorporating the same in the PPA. Once the bid of the supplier of the power is accepted and this Commission approved the quantity and the rate, the contract between the parties has come into the existence.

(d) The reliance placed by the Generating Companies on the provisions of the Karnataka Electricity Reform Act, 1999 has no application in regard to the power purchase u/s 63 of the Act, 2003 since the provision of the Electricity Act, 2003 would prevail over the Karnataka Electricity Reforms Act, 1999.

(e) The contention of the Generating Companies is that assuming that the PPA is a valid Agreement, the said Agreement has been terminated by the procurer as per Clause 3.2.2 of the PPA by its letter dated 22.6.2009 addressed to the State Bank of Hyderabad

and on that basis, the Bank Guarantee was encashed and once it is terminated, the procurer cannot seek for enforcement of the contract. We do not accept this contention since the letter dated 22.6.2009 addressed to the State Bank of Hyderabad does not state that the PPA is terminated. On the contrary, the letter would show that the Procurer is enforcing the contract by encashment of the bid bonds. When the procurer is seeking enforcement of the contract, the question of termination of the PPA does not arise.

(f) Having got the PPA signed, the Generating Company cannot turn around and contend that the PPA is not valid and binding on the parties. Therefore, we hold that the PPA is valid and binding on the parties.

- 18.** In the light of the above findings, let us now discuss the issue in detail.
- 19.** It is the case of the Procurer (R-2) as well as the State Commission (R-1) that the letter dated 7.10.2008 sent by the State Commission to the procurer should be construed to be the approval of the PPA. According to the State Commission, this approval has been granted u/s 63 of the Electricity Act, 2003.

20. Now let us refer to relevant provision of the Act, as well as the bid guidelines. Section 63 of the Electricity Act, 2003 clearly provides that:-

“Determination of tariff by bidding process – Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government”.

21. As per this provision, the State Commission shall adopt the tariff projected by the procurer only on two conditions: (1) if the said tariff has been determined through the transparent bidding process (2) the bidding process should be in accordance with the guidelines issued by the Central Government. This provision would make it clear that even though it is mandatory for the State Commission to adopt the tariff as projected, the same shall be done only when it is satisfied that this tariff has been determined through the transparent process of bidding and such a determination has been done according to the guidelines issued by the Central Government.

22. Let us now examine the competitive bidding guidelines issued by the Government of India under Section 63 of the Electricity Act, 2003. The provisions relating to approval by the State Commission and other conditions in the

competitive bidding guidelines for medium term procurement where location, technology or fuel is not specified (Case 1) relevant to this case are as under:

i) The bid documentation shall be prepared in accordance with the bidding guidelines and in case there is any deviation from the standard bid documents, the approval of the State Commission shall be obtained by the procurer. However, if the bid documents are as per the standard bid documents, the procurer of power has to send an intimation to the State Commission about initiation of the bidding process. The bid documents include the model Power Purchase Agreement.

ii) If the number of qualified bidders responding to the bid is less than two and the procurer of power still wants to continue with the bidding process, the same may be done with the consent of the State Commission.

iii) If there is any deviation from the process defined in the guidelines, the same shall be subject to approval by the State Commission.

iv) A suggested time table for the bid process has been indicated but the procurer may give extended time frame on the prevailing circumstances and such alteration shall not be considered to be deviation from these guidelines. The suggested time for single stage bid for signing of agreements is 240 days from publication of RFQ/RFP.

v) The procurer shall make public all contracts signed with the successful bidders by displaying the same on its website.

vi) The final PPA signed with the successful bidder consequent to the selection process along with the certification by the evaluation committee shall be forwarded to the State Commission for adoption of tariff in terms of Section 63 of the Act.

23. According to the Appellants, the standard bidding guidelines have not been complied with and, therefore, the PPA arising out of such non-compliance cannot be considered as valid PPA and binding on the parties. The

Appellants have pointed out the following deviations from the bidding guidelines:

i) Bidding guidelines require execution of PPA within 195 days from the publication of RFQ, whereas the PPA was executed after 635 days after the publication of RFQ.

ii) Approval of Appropriate Commission has to be sought in the event of deviations from the bidding conditions contained in bidding guidelines whereas no such approval was taken by the Distribution Licensees for a) continuing with the bidding process wherein the number of qualified bidders has fallen below two, b) not displaying the final PPA on the website of the procurer and not forwarding the signed PPA along with certification from the evaluation committee and by procurer to the State Commission.

24. The Appellant has not contended that there was any deviation in the bidding documentation from the standard bidding document specified by the Government of India under the bidding guidelines. However, the Appellant has pointed out deviation in the procedure relating to not keeping

the timeline for signing the PPA, and not obtaining approval of the State Commission for deviating from the procedure laid down in the bidding guidelines of Government of India viz. continuing the bidding process when there was only one qualified bidder without obtaining the approval of the State Commission, not displaying the PPA on website and not forwarding the signed PPA along with the certification from the evaluation committee and the procurer to the State Commission.

25. According to the Learned Counsel for the Distribution Licensee, so long the bid documents, namely the PPA in the present case is in terms of the Standard Bidding Documents, no approval of the State Commission is required. What the Appellants are contending is on the procedural aspect of the bidding process for which prior approval is not required. On the various deviations in procedure pointed out by the Appellants, the Learned Counsel for the Distribution Licensee has given the following explanation.

i) Non-execution of the PPA within 195 days:

Having signed the PPA on its own, the Appellant at this stage cannot raise a contention that the document was executed after a delay. The delay in completion of process was caused due to receipt of a single bid due to which the time for invitation of bids had to be extended upto 15.12.2007. Thereafter, since only a single bid was received the negotiations were held with the Appellants on 17.1.2008 and 23.1.2008 and therefore, there was delay in issuing the Letter of Intent ('LOI'). The State Commission approved the tariff only on 7.10.2008. Further, the bid guidelines state that any extension of time granted does not constitute deviation from the guidelines.

ii) Continuing bidding process when the number of qualified bidder has fallen below two:

In view of the fact that the state was reeling under severe power shortage and retendering would be time consuming and may not serve the purpose of meeting immediate power requirement, decision was taken to open the financial bid on

18.2.2007 and subsequently obtain the approval of the State Commission. Accordingly, after issuing of LOI, the RFQ-cum-RFP and PPA documents were submitted to State Commission for approval on 10.6.2008. The State Commission by its letter dated 7.10.2008 approved the bidding process. The State Commission had sought the various documents and after examination approved the process and adopted the tariff proposed. This order has attained finality and, therefore, raising the question in the present Appeal does not arise. Therefore, the contention with regard to prior approval does not remain for consideration.

iii) Final PPA not displayed on the website of the procurer:

The Appellant failed to supply power as per agreed terms and the performance guarantee was encashed. In the meeting held on 6.7.2009, the Appellant agreed to supply power revising the schedule for period and quantum. The revised schedule agreed by the Appellant necessitated execution of supplemental PPA. However, the Appellant did

not come forward to sign the supplemental PPA by furnishing fresh performance guarantee for the revised schedule for period and quantum. Hence, the copy of the PPA was not displayed on the website of the distribution licensee.

iv) Submission of signed PPA along with certificate from evaluation committee to the State Commission:

PPA has been forwarded to the State Commission vide letter dated 17.4.2009.

26. According to the Learned Counsel for the State Commission, in case of procurement of electricity by the procurer distribution licensee under Section 63, after the bidding process, the tariff is required to be adopted by the State Commission. This aspect was duly accomplished. The Appellants having participated in the bidding process and agreed to supply electricity at a particular tariff and signed the PPA based thereon, cannot now claim that the bidding process was not correctly followed or there was some illegality in the bidding process. The State Commission

having approved the bidding documents including the draft PPA, the quantum of power , the tariff being adopted, the objections now raised are higher technical in nature.

27. It is admitted that the documents including the PPA were as per the Standard Bidding Documents. Hence, there was no necessity for the procurer to obtain the approval of the State Commission for the bid documents including PPA. The model PPA is a part of the standard bidding documents. According to the bidding guidelines of Government of India, the model PPA proposed in the Request for Qualification (RFQ) stage may be amended based on the inputs received from the interested parties, and shall be provided to all parties responding to the Request for Proposal (RFP) and no further amendment shall be carried out beyond the RFP stage. In the present case, no change in the proposed PPA is reported to have been made. Thus, no change could be possible after the RFP stage. If the PPA is as per the model PPA and the same has been made available to the prospective bidders and the bids were based on the same,

we feel that it was not open to the State Commission to make any charges at the time when the proposal is put up before the State Commission for adoption of tariff in terms of Section 63 of the Electricity Act.

28. It is admitted that the procurer had not followed certain procedural conditions viz. not signing the PPA within 195 days from publication of RFQ, continuing with the process when only one bid was received without the approval of the State Commission, not displaying the PPA on the website and not submitting the signed PPA to the State Commission at the time of taking consent under Section 63 for adoption of tariff. Let us examine if because of these deficiencies the PPA became invalid.

29. Let us examine the letter dated 10.6.2008 by which the Power Company of Karnataka (“PCKL”) sought approval of the State Commission for RFQ cum RFP and PPA documents.

30. The contents of the letter dated 10.6.2008 are summarized as under:-

i) SPPCC, the predecessor of PCKL invited tenders on 27.5.2007 for procurement of power to the extent of 1500 MW in blocks of 100 MW on medium term.

ii) As per the suggestions of the prospective bidders in the pre-bid conference, amendments to the bid documents were issued.

iii) The response to the medium term procurement was very poor despite extension of last date of opening of bids. Only two bids were received and out of these only one bid of M/s. VBC Ferro Alloys Ltd. was as per the bid conditions.

iv) Negotiations were held with the only successful bidder and rates as indicated were finalized. Letter of Intent has been issued to the bidder on 16.2.2008 subject to the approval of the State Commission to power procurement as well as the rates.

v) The tariff offered by the successful bidder is comparatively lower and is competitive when compared with the rates prevailing in the market for similar purchases.

vi) The RFP cum RFP and PPA documents are enclosed for the consideration and approval of the State Commission.

Thus, a copy of unsigned PPA was furnished to the State Commission on 10.6.2008 by M/s. PCKL, instead of a signed copy.

31. The State Commission by letter dated 2.7.2008 returned the subject draft PPA as PCKL had proceeded with the negotiation and issued Letter of Intent (“LOI”) without the consent of the State Commission even though the qualified bidders responding to the bid was less than two which is not in conformity with the procedure laid down under the bidding guidelines of Government of India.

32. PCKL vide letter dated 18.8.2008 again took up the matter with the State Commission requesting for approval of the documents for procurement of power.

33. Consequently, the State Commission by letter 29.8.2008 sought some documents from PCKL regarding the procurement process. The requisite information was furnished by PCKL to the State Commission by letter dated 12.9.2008.

34. The State Commission again sought some information from PCKL by letter dated 18.9.2008 and also held meeting with PCKL officers. Finally, on 7.10.2008, the State Commission gave its approval subject to certain condition. The relevant extracts of the letter dated 7.10.2008 from the State Commission are as under:

“Inviting your reference to the correspondence cited above, I am directed by the Commission to convey approval for procurement of power at an indicated price of Rs.3.7338 per unit to be supplied at KPTCL periphery including short term open access charges and losses for the base rate of Rs. 3.65 per unit as per the negotiated tariff and terms detailed by PCKL in its letters. The approval is subject to the condition that due provisions will be made in the PPA to be submitted to the Commission for approval that in case of surplus power in future, the ESCOMs will trade any excess power within the State (Intra-ESCOM) or outside the State as may be required during the currency of the PPA.”

35. By the above letter, the State Commission approved the procurement of power from the Appellants at the negotiated tariff and terms detailed by PCKL in its letter. The above approval was given subject to certain conditions regarding trading of the surplus power by the Distribution Licensees to be provided in the PPA to be submitted to the State Commission for approval. In our opinion the additional condition for provision in the PPA regarding trading of excess power within or outside the State imposed by the State Commission would not in any way affect the terms of PPA between the Appellant and the Respondent distribution licensee as it is only a direction to the distribution licensees to trade surplus power within and outside the state. There were some procedural deviations in the process but the State Commission after examination of the requisite documents approved the procurement of power from the Appellants. This approval was never challenged by the Appellants or any other party. We feel that with the above letter dated 7.10.2008, the requirement of adoption of the tariff by the

State Commission under Section 63 of the Electricity Act was satisfied.

- 36.** After the approval by the State Commission, the Distribution Licensee requested the Appellant on 18.11.2008 to sign the PPA on 21.11.2008 as per the term of supply and rates approved by the State Commission. However, the Appellants raised certain issues relating to supply of gas and price of gas and wanted revision in schedule and price from that offered by them earlier based on which the approval of the State Commission was obtained.
- 37.** As the Appellants were not coming forward to sign the PPA without amendment in schedule of supply and price, the Distribution Licensee by letter dated 26.11.2008 informed the Appellant that they were invoking the bid bond/bank guarantee submitted by the Appellant. On 3.12.2008, the Distribution Licensee made a request to the Bank for invocation of the bid bond. However, the Appellant obtained stay from the High Court against invocation of the Bid Bond by the Distribution Licensee.

38. After prolonged communication between the Appellant and the Distribution Licensee, the Appellant withdrew this suit filed before the High Court on 9.2.1009. The Appellant also renewed the bank guarantee for bid bond by one year on the condition that PPA and supplemental PPA incorporating the changes will be signed. Finally on 27.2.2009, the Appellant and the Distribution Licensees of Karnataka signed the PPA on the same terms of supply and rate as approved by the State Commission.

39. It is seen that the Appellants have never challenged the approval of the State Commission dated 7.10.2008 and have in fact acted on the same by signing the PPA dated 27.2.2009. It is now not open to the Appellant to find fault with the PPA and contending that it is not valid pointing out some deviation in the process of competitive bidding process. Difficulty faced by the Appellant for not being able to perform as per the terms of the PPA due to reason of non-availability of gas and delay in execution of the project would not make the PPA invalid. However, inability of the

Appellants to perform according to the PPA due to reasons beyond their control has to be dealt with as per the terms of the PPA.

40. PPA was a part of the Bidding Document in tariff based competitive bidding conducted by the procurer according to Section 63 of the Electricity Act. The competitive bidding guidelines of the Government of India provide that the PPA shall be signed with the selected bidder consequent to the selection process in accordance with the terms and conditions specified in the bid documents as finalized before the RFP stage. Only after signing the PPA with the successful bidder, the procurer has to approach the State Commission for adoption of tariff in terms of Section 63 of the Act. After selection of the successful bidder following the process of competitive bidding, it is not open for the State Commission to make changes in the terms of conditions of the PPA. Under Section 63 of the Electricity Act, the State Commission has to only adopt the tariff if the tariff is

determined through transparent process in accordance with the guidelines issued by the Central Government. The Commission can only reject the tariff if it comes to the conclusion that the tariff is high and procurement of power at that high tariff will not be in the interest of the consumers.

41. The Tribunal in its judgment dated 16.12.2011 in Appeal no. 82 of 2011 in the matter of Essar Power Ltd. Vs UPERC & Others held as under:

“(A) The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act.

The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central government’s guidelines, standard document of Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff.

Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission.”

- 42.** In the above judgment the Tribunal held that the powers of the State Commission are limited under Section 63 of the Electricity Act, 2003. The State Commission while dealing with the petition under Section 63 could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff discovered by the transparent process conducted as per the Government of India guidelines. Determination of tariff under section 62 is totally different from the determination of tariff under Section 63. However, competitive bidding process under Section 63 should be as per the Government of India guidelines. Any deviation from RFP or model PPA notified by the Government of India must be approved by the State Commission.

43. The findings of the Tribunal in the above Appeal will be applicable to the present case. In the present case, it is not contented by the Appellants that there is any deviation from the model PPA or RFP or any material or substantive deviation from the guidelines but certain technical procedural deviations are being pointed out.

44. In the present case although only one bid was received in the bidding but the State Commission adopted the tariff as negotiated between the parties after the process of competitive bidding finding it reasonable.

45. Learned Counsel for the Appellant has referred to the following citations in support of its arguments for invalidity of the PPA.

i) Judgment of this Tribunal dated 26.7.2011 in Appeal no. 125 and 126 of 2010.

ii) (2009) 16 SCC 659

iii) (2003) 4 SCC 86

iv) (2008) 9 SCC 299

v) AIR 1998 Mad 150

- vi) (2003) 9 SCC 731
- vii) (1973) 1 SCC 446
- viii) 2006 (1) CTC 577
- ix) AIR 1964 SC 477
- x) 1994 Writ L.R. 316
- xi) (2004) 1 SCC 195

46. Judgment of the Tribunal in Ind Barath case (Appeal no. 125 and 126 of 2010) will not be applicable to the present case where the procurement of power was done under Section 63 of the Act. In Ind Barath case the procurement was made under Section 62 of the Act and the approval of the State Commission was not obtained. In the present case the State Commission adopted the tariff under Section 63 of the Act.

47. In the case of Tata Power Company referred to above at citation (ii), the State Commission had allocated power from a power plant of a generating company to a distribution licensee even though no PPA was entered into between the

parties. The Hon'ble Supreme Court held that the activities of generating company are beyond the preview of the licensing provisions and the generating companies have the freedom to enter into contract with a distribution company subject to the regulating provisions contained in the 2003 Act, but while supplying electricity to a distribution agency, in turn the generating company would be subject to approval and directions of the Commission. In the present case the Appellant generating company has willingly participated in the tariff based competitive bidding and entered into the PPA with the distribution licensee. The State Commission also gave approval for procurement of power at the price agreed between the parties in the negotiations held after the completion of competitive bidding and thereafter the Appellant entered into the PPA with the distribution licensee. Therefore, Tata Power case will also not be of any help to the Appellants.

48. In (2003) 4 SCC 86, an agreement to sell the property was entered into by the Respondent executor with proposed

Appellant purchaser not as sole executer of will but as one of the heirs and the agreement was made subject to ratification of terms and conditions by the co-heirs who were not parties to the agreement. It was held that by Hon'ble Supreme Court that when an agreement is entered into subject to ratification by others, a concluded contract is not arrived at and whenever ratification by some other persons who are not parties to the agreement is required such a clause must be held to be condition precedent for coming into force of a concluded contract. This finding will not be applicable to the present case where the State Commission approved the procurement of power by the distribution licensees and adopted the tariff under Section 63 of the Act. There is no requirement of approval of the PPA under Section 63 of the Act if it is in confirmity with the Standard Bidding guidelines. There is also no clause in the PPA entered into between the Appellant and the distribution licensee in the present case regarding ratification by any other person.

49. The next citation (2008) 9 SCC 299 in the matter of Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Others will not also be applicable in the present case in view of the same reason as given above.

50. The rulings in (2003) 9 SCC 731 and AIR 1998 Mad 150 of Madras High court that if the statute requires a particular thing to be done in particular manner then it should be done either in that manner or not at all will not be applicable in view of the approval granted by the State Commission for procurement of power under Section 63 of the Act in the present case.

51. The authorities quoted in 1973 1 SCC 446 and (2006) 1 CTC 577 of High Court of Madras are relating to principle that subordinate courts cannot ignore the settled decisions rendered by the High court and Supreme Court. In this particular case no finding of the Tribunal on procurement of power by distribution licensee under Section 63 of the Act

was cited by the Appellant and the citation from the judgment of the Tribunal in Ind Barath case quoted by the Appellant before the State Commission were in the matter of procurement of power under Section 62 of the Act.

52. In 1994 Writ L.R. 316 of Madras High court in which it as held that Regional Transport Authority, a quasi judicial authority is not a person aggrieved and therefore cannot challenge the order of the Tribunal. This authority is referred to by the Appellate to argue that the State Commission could not represent its case in the Appeal filed against its order. This plea is not valid on the ground that Sub Section 2 of Section 124 of the Electricity Act, 2003 provides for presentation of the case with respect to any appeal before the Appellate Tribunal by the Appropriate Commission. Further, the Appellant itself has made the State Commission as a Respondent in the Appeal.

53. Next ruling is in (2004) SSC 195 in the matter on BSES Ltd. Vs Tata Power Company Ltd. and Others in which the Hon'ble Supreme Court held that the procedure adopted by

the Commission was not fair in as much as the Chairman did not participate in the meetings which the other two members had with the consultants where under the formula was devised and remitted the case to the Commission for de novo consideration. In the present case, the State Commission has approved the procurement of power by the distribution licensee under Section 63 of the Act and there is no fact on record that the approval communicated by letter dated 7.10.2008 was granted by the State Commission without the quorum being complete.

- 54.** We are also in agreement with the Distribution Licensees that the delay in execution of the PPA beyond the period stipulated in the bidding documents in this case will make the PPA invalid. The Distribution Licensee has explained the reason for delay as inadequate response to the bid due to which the last date of submission of the bid was extended, negotiations with the Appellant being the only qualified bidder and the delay on part of the Appellants for

not signing the PPA after the adoption of the tariff by the State Commission. This is a case of a single successful bid being recommended in competitive bidding process. Once the State Commission has adopted the tariff under Section 63 of the Act and the Appellant having acted on the same willingly by signing the PPA, the Appellant at this stage cannot raise the issue of delay in execution of the PPA.

55. According to the Appellant, the distribution licensees committed breach of Section 25 (3) of the Karnataka Electricity Reforms Act by not submitting the PPA for approval. We do not find any force in this argument. Firstly, Section 25(3) of the State Reforms Act does not deal with procurement of power by the distribution licensee through competitive bidding process covered under Section 63 of the Electricity Act, 2003: Secondly, the State Commission approved the procurement of power under Section 63 of the Act in the present case. As already stated, the PPA being based on the model PPA as per Government of India guidelines could not have been altered after the RFP stage

and there was no requirement of approval of PPA under Section 63 if there was no deviation from the model PPA as per the guidelines of Government of India. In this case no deviation in the contents of the PPA from the model PPA has been pointed out by the Appellants.

56. In view of above we hold that the PPA entered into between the Appellant and the distribution licensees is valid and binding on the parties.

57. The third issue is regarding enforcement of the PPA.

58. According to the Appellant the PPA is invalid as the same was not approved by the State Commission and therefore could not be enforced on the parties. Further, the prospective qualified Units of the power plant from which supply was to be made is yet to be established. Immediate supply of power is also not possible as Andhra Pradesh State Commission has not permitted supply of power to the third party from the Stage I of the power plant which is existing. The supply of gas to the stage I plant has also reduced substantially which

is beyond the control of the Appellant. In view of the non-availability of gas the whole contract has been frustrated. Even assuming that the PPA is valid, the same stands terminated in view of the invoking of the bid bond by the Respondent Distribution Licensee.

59. On the issue of termination, the State Commission has held that the Distribution Licensee's letter to the bank for invoking the bid bond does not state that the PPA is terminated and in fact the Distribution Licensee was enforcing the PPA.

60. Let us first examine the issue whether the PPA stands terminated on invocation of bid bond.

61. According to RFQ cum RFP document floated by the Respondent, the bid bond can be invoked by the procurers on account of failure to execute the PPA or failure to furnish the performance guarantee. Simultaneously, with the execution of the PPA, the seller or selected bidder had to provide performance guarantee. As the maximum contracted capacity was 600 MW, the Appellant had to furnish performance guarantee of Rs. 24 crore @ Rs. 4 lacs per MW

as per the PPA. However, the Performance Guarantee was not furnished by the Appellant. Therefore, the bid bond was invoked by the Distribution Licensee, in terms of the RFQ cum RFP document.

62. The reason communicated by the Distribution Licensee to the Appellant by letter dated 2.7.2009 is also non-furnishing of the performance guarantee as per the PPA.

63. We have examined the letters dated 5.3.2008 and 25.3.2009 from PCKL to the Appellant and letter dated 22.6.2009 by the Distribution Licensee to the State Bank of India for invocation of bid bond. None of the letters indicate any intention of the Appellant to terminate the PPA. On the other hand the Respondent has been requesting the Appellant to initiate necessary action and start commencing supply of power as per the PPA. In view of above, we feel that the PPA does not stand terminated automatically just because the Distribution Licensee has invoked the bid bond

due to failure of the Appellant to furnish performance guarantee as per the terms of the PPA.

64. The PPA is valid for supply upto 31.12.2014. However, till now supply has not commenced and the prospective qualifying unit of the generating plant of stage II has not been commissioned.

65. According to the Appellant the PPA is now impossible to be acted upon as the prospective qualifying unit of the generating plant from which they had to supply power has not been commissioned and the Andhra Pradesh State Commission has not permitted sale of power from the stage I of the power plant which is existing and from which 80 MW of power supply was envisaged. Also there is shortage of gas.

66. As already held by us, the PPA is valid and effective till 31.12.2014. If as per the Appellants the PPA has become impossible to be performed or acted upon, the Appellants are at liberty to seek the remedy as per the provisions of the PPA as per law by filing necessary petition seeking for the appropriate relief. In that event, the State Commission will

entertain the same and decide the matter in accordance with law after hearing the parties. Accordingly, decided.

67. Summary of our findings

i) The State Commission has the jurisdiction to adjudicate upon the dispute in question between a generating company and distribution licensees.

ii) The present case is a case of procurement of power by Distribution Licensees under Section 63 of the Act and is distinct from the procurement of power under Section 62 of the Act. There is no requirement of approval of the PPA by the State Commission in procurement of power by a distribution licensee under Section 63 of the Act if the PPA is according to the model PPA as per the Government of India guidelines. No deviation in the content of the PPA with respect to the model PPA has been pointed out by the Appellants. The only requirement of adoption of the tariff after

examining the process of procurement of power through competitive bidding process under Section 63 has been completed by the State Commission by granting approval by letter dated 7.10.2008. This approval of the State Commission was not challenged by the Appellants. On the other hand the Appellants acted upon the same by entering into the PPA with the distribution licensees on 27.2.2009. It is now not open to the Appellants to find fault with the PPA and the procedure followed. No material or substantive deviation in procedure has been pointed out by the Appellants and the deviations pointed out by the Appellant are technical deviations in procedure which are not relevant after the approval granted by the State Commission under Section 63 of the Act which was not challenged. In view of above we have held that the PPA is valid & binding on the parties.

iii) The Distribution Licensee has not terminated the PPA. On the other hand the bid bond was invoked by the

Distribution Licensee in terms of the RFQ cum RFP documents as the Appellant failed to submit performance guarantee as per the terms of the PPA. The same was duly communicated by the Distribution Licensee to the Appellant. According to the Appellant, the PPA has become impossible to be acted upon due to reasons beyond their control. In our view the PPA is valid till 31.12.2014. However, if according to the Appellants, the PPA has become impossible to be performed or acted upon, the Appellants are at liberty to seek the remedy as per the provisions of the PPA as per law by filing a petition before the State Commission praying for the relief on that ground. If such a petition is filed the State Commission will entertain the same, hear the parties and decide the matter in accordance with law. Accordingly, decided.

68. With these observations, the Appeal is disposed of. However, there is no order as to costs.

69. Pronounced in the open court on this 7th day of
October, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 07th Oct. 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~