

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 51 OF 2015

Dated: 16th April, 2015

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.
Hon'ble Shri Rakesh Nath, Technical Member.**

IN THE MATTER OF:

Essar Power M.P. Ltd., Having its)
registered office at Prakash Deep)
Building 10th Floor, 7 Tolstoy Marg New)
Delhi – 110 001.) ... Appellant

Versus

1. Central Electricity Regulatory)
Commission, 3rd & 4th Floor,)
Chanderlok Building, 36, Janpath,)
New Delhi.)
2. NTPC Vidyut Vyapar Nigam Ltd.,)
NTPC Bhawan, Core 7, SCOPE)
Complex, 7 Institutional Area,)
Lodhi Road, New Delhi – 110 003.)
3. PTC India Limited, 2nd Floor,)
NBCC Tower, 15 Bhikaji Cama)
Place, New Delhi – 110 066.)
4. Kerala State Electricity Board)
Vaidyuthi Bhavanam, Pattom,)
Trivandrum – 695 004, Kerala.)

5. Power Grid Corporation of India)
Ltd., B-9, Qutab Institutional Area,)
Katwaria Sarai, New Delhi -)
110016) ... Respondents

Counsel for the Appellant(s) : Mr. Gopal Jain
Mr. Jayant Mehta
Mr. Alok Shankar

Counsel for the Respondent(s) : Mr. Nikhil Nayyar
Mr. Dhananjay Bajjal for **R-1**

Ms. Suparna Srivastava
Mr. Kumar Harsh
Mr. G. Sreenivasan for **R-2 & R-4**

Mr. Ravi Kishore for **R-3**

Mr. S. B. Upadhyay Sr. Adv.
Ms. Sakie Jakharia for **R-5**

JUDGMENT

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Appellant has challenged order dated 16/2/2015 passed by Respondent No.1 - the Central Electricity Regulatory Commission ("**the CERC**") in Petition No.92/MP/2014 which was filed under Section 79(1) of the Electricity Act, 2003 ("**the said Act**") and Regulations 32 of the CERC (Grant of Connectivity, Long-Term & Medium Term Open Access in Inter-State

Transmission & Related matters) Regulations, 2009 (**“the Connectivity Regulations”**).

2. Facts of the case, as narrated by the Appellant, need to be stated in short. The Appellant signed a Power Purchase Agreement (**“PPA”**) with Power Company of Karnataka Ltd. (**“PCKL”**) on 21/3/2013 for sale of power of 210 MW from 1/8/2013 to 3/6/2015. The Appellant filed an application for Medium Term Open Access (**“MTOA”**) on 27/6/2013 with Respondent No.5 i.e. the Central Transmission Utility (**“CTU”**) in accordance with the Connectivity Regulations. The Appellant’s application was rejected by the CTU and this was communicated to the Appellant vide letter dated 8/8/2013.

3. It appears that on behalf of Kerala State Electricity Board Limited (**“KSEB”**), Respondent No.2 (**“NVVN”**) and Respondent No.3 (**“PTC”**) had filed applications for MTOA. Their applications were rejected. Therefore, KSEB filed Petition No.92/MP/2014 before the CERC challenging the denial of MTOA.

4. Vide order dated 8/8/2014 the CERC declared that CTU has not acted in accordance with the Connectivity Regulations while granting MTOA to D.B. Power Ltd. (“**DB Power**”). The CERC further directed that the applications for MTOA made during the month of June, 2013 should be considered afresh within a week of the date of the order. The CERC directed that MTOA applications should be considered in accordance with the Connectivity Regulations and the Detailed Procedure. Relevant paragraph of the said order reads as under:-

“57 We direct that CTU shall process the applications received in June 2013 including the application of the petitioner in accordance with the existing Connectivity Regulations & Detailed Procedure. The applicants for MTOA shall be provided with detailed justification of the decision on their application along with results of system study wherever required. This exercise should be completed within seven days from the date of this order.”

5. CTU vide its affidavit dated 22/8/2014 sought clarification on the following issues from the CERC:

- a) Whether CTU can process MTOA applications received in June, 2013 for MTOA starting later than one year

violating Connectivity Regulations as an exception to honour the order of the Commission.

b) Define the documents that can qualify as Sale Purchase Agreement.

6. By order dated 5/9/2014, the CERC clarified that the applications for MTOA made during June, 2013 are not being considered by CTU in normal course but in compliance with the directions of the CERC dated 8/8/2014. The CERC in the circumstances ordered that considering the fact that the period of one year as prescribed in Regulation 19(2) of the Connectivity Regulations for operationalisation of MTOA is over as on the date of consideration of the applications, as a special case CTU shall allow a reasonable time of one week to the successful applicants after declaration of the result for operationalisation of MTOA. The CERC made it clear that its order shall not be cited as a precedent. The CERC further observed that as regards clarification regarding the documents

which shall qualify as the Sale Purchase Agreement the issue will be dealt with in the final order.

7. Pursuant to order dated 8/8/2014 and order dated 5/9/2014, CTU considered all the applications made in the month of June, 2013 and granted MTOA to PTC for (Chhatisgarh-Kerala) and to Ideal Energy Projects Ltd. ("**Ideal**") for (Maharashtra-Karnataka). MTOA was granted after all the applications made during June, 2013 were considered by CTU and priority chart was prepared on the basis of Connectivity Regulations. Reasons appended to the communication dated 22/9/2014 indicate that application of NVVN was rejected because NVVN had enclosed Letter of Intent ("**LoI**") in place of PPA. Priority chart is as under:

S. No.	Applicant Name	No of months sought for MTOA	PPA/ SPA	NOC of SLDCs	Proof of payment	MTOA sought (MW)
1.	PTC India Limited	36	✓	✓	✓	100
2.	NVVNL	36	LOI	✓	✓	300
3.	Ideal Energy Projects	19	✓	✓	✓	140
4.	Essar Power M.P.	13	✓	✓	✓	210
5.	Sterlite Energy Limited	11	✓	✓	✓	200
6.	PTC India Limited	11	✓	✓	✓	250

8. The Appellant was No.4 on the priority list. The grant of MTOA was published by CTU vide communication dated 22/9/2014. The MTOA application of NVVN, who was at priority No.2, though was received during June, 2013, was not considered as being incomplete because PPA which is a mandatory requirement to be submitted with the application was not submitted. It was held to be not in terms of the Connectivity Regulations as interpreted by the CERC in its order dated 8/8/2014. NVVN had only furnished LoI of both the seller and the purchaser i.e. CSPT Tradeco and KSEB.

9. Vide letter dated 29/9/2014 addressed to CTU, PTC expressed its inability to operationalise the MTOA and prayed that MTOA may be deferred till 10/1/2015. It appears that this was done after a letter was received by PTC expressing inability to schedule power using MTOA from 1/10/2014. Thus, on 1/3/2014 which was the start date in MTOA application, PTC was not ready to commence supply of power using the MTOA.

10. Ideal vide its letter dated 25/9/14 informed CTU that the connectivity line would be ready only by January, 2015 and, therefore, it was not in a position to operationalise the MTOA.

11. After both parties, to whom MTOA was granted i.e. PTC and Ideal, failed to operationalise the MTOA granted to them, CTU moved the CERC for clarification as to whether a) To re-process the MTOA applications of June 2013 month and allocate 211 MW to next eligible applicants or b) The 211 MW of quantum should be considered for allocation to LTA applications which are also under process.

12. Since the Appellant was next on the priority list, the Appellant made an application for impleadment which was allowed by the CERC. The Appellant thereafter filed an application seeking direction to CTU to grant MTOA to it.

13. By impugned order dated 16/2/2015, the CERC rejected the prayer of the Appellant. The CERC held that the corridor

allocated to PTC and Ideal cannot be allocated to the Appellant upon the failure of PTC and Ideal to operationalise the MTOA. The CERC further held that on a harmonious consideration of the provisions of PPA which is a part of the standard Bidding Documents, it was felt that an unconditionally accepted LoI can be considered as a Sale Purchase Agreement in Case-I bidding for applying for MTOA. In partial modification of its order dated 8/8/2014, the CERC directed that in Case-I bidding, an unconditionally accepted LoI can be accepted as a Sale Purchase Agreement for applying for MTOA. The CERC clarified that the Sale Purchase Agreement shall satisfy the basic conditions of an agreement under the Indian Contract Act 1876. The Appellant has challenged the said order to the extent it rejects its prayer.

14. We have heard, at some length, Mr. Gopal Jain, learned counsel appearing for the Appellant. We have carefully perused the written submissions filed by him. Gist of the written submissions of the Appellant is as under:-

- a) Clause 15 of the Detailed Procedure deals with documents which are to be submitted along with MTOA application. Those documents *inter alia* include a PPA or a Sale Purchase Agreement of Power.
- b) The CERC by its order dated 8/8/2014 has held that an application for MTOA pursuant to a Case-I bid shall be accompanied by a PPA. CERC further observed that a contractual relationship between a seller and a procurer in Case-I bidding can only come into existence after signing of PPA. This decision was in conformity with the Connectivity Regulations and it was final so far as issues decided by it were concerned. However by the impugned order, the CERC has modified the order dated 8/8/2014 and added that an unconditionally accepted LoI can be treated as Sale Purchase Agreement for applying for MTOA. Thus, the CERC has taken a completely contradictory stand in the impugned order.
- c) The impugned order is illegal because:-

- (i) The CERC had already passed an order on 8/8/2014 (which had finally decided the issues) and it cannot partially modify its order.
- (ii) While partially modifying the order, it has fully overturned and substituted the earlier order by a new order.
- (iii) The impugned order is contrary to Connectivity Regulations.
- (iv) In law, a LoI cannot be treated at par with a concluded contract (PPA) or a Sale Purchase Agreement.
- (v) LoI requires completion of formalities like furnishing of contract bank guarantee and execution of PPA. If these conditions are not satisfied LoI can be revoked. LoI is therefore not a concluded contract for sale and purchase of power.
- (vi) In this case, PPA has not been signed and, therefore, has no legal or probative value.

- (vii) Clause 4.2.1 of such a PPA only stipulates that on receipt of LoI corridor should be applied under MTOA. It does not treat LoI equivalent to a PPA.
- d) In any event, in law, statutory Regulations supersede a contract **(PTC India Ltd. v. Central Electricity Regulatory Commission¹)**. Precedence cannot be given to the terms of the Model PPA over the Connectivity Regulations.
- e) The Connectivity Regulations and the Detailed Procedure approved by the CERC are a complete code in itself. An unconditionally accepted LoI is alien to this code.
- f) The impugned order is arbitrary. While LoI issued pursuant to a Case-I bid has been deemed to be sufficient to enable processing of application for MTOA, the same is not the case for LoI that is issued for Case-II bid or LoI issued pursuant to a mutual negotiation between the parties for a sale and purchase of power.
- g) Though at one stage, the CERC states that the procedure laid down by it shall operate prospectively, the CERC

¹ (2010) 4 SCC 603

holds that the application for the month of June, 2013 shall be treated as valid even though the same was not accompanied by a PPA as required by the Connectivity Regulations and Detailed Procedure.

- h) Pursuant to the impugned order all eligible applicants were required to furnish an affidavit that they are ready to operationalise the MTOA by 1/3/2015. This direction is illegal and contrary to the Connectivity Regulations. The impugned order to the extent it modifies earlier order dated 8/8/2014 and directs MTOA applicants to furnish affidavit in relation to readiness to operationalise MTOA from 1/3/2015 and not the intended start date, lacks judicial approach, suffers from a basic fallacy which goes to the root of the matter and it being illegal and contrary to Regulations is *non-est* in the eyes of law. (**ONGC Ltd. v Western Geco International Ltd.**²).

- i) On the one hand, the CERC holds that an unconditionally accepted LoI can be accepted as a Sale Purchase Agreement and yet, in the same breath, it holds that

² 2014(9) SCC-263

MTOA applicant seeking access on the basis of unconditionally accepted LoI should submit a copy of the PPA within 35 days from the last date of the month in which the application is made. Implicit in this conclusion is the finding that unconditionally accepted LoI is not synonymous with the Sale Purchase Agreement.

- j) It is not correct to say that there was no finding on the issue as to whether or not a Sale Purchase Agreement comes into existence after issuance of LoI in order dated 8/8/2014. In the event the same was correct, there would have been no reason for the CERC to direct partial modification of order dated 8/8/2014.
- k) Connectivity Regulations require execution of a PPA or Sale Purchase Agreement. Admittedly, LoI requires execution of a PPA and RFP recognizes that the supply of power would be under PPA and not in terms of LoI. Therefore, LoI is not a self contained document to be treated as a Sale Purchase Agreement for Power.

- 1) Grant of MTOA to PTC pursuant to the impugned order is also illegal and not as per the Connectivity Regulations and Detailed Procedure for the following reasons:-
- (i) MTOA start date for any applicant cannot be after a maximum of 12 months from the date of application. Application was made by PTC in June, 2013 for start of power flow from 01/03/2014. Vide communication dated 22/09/2014, PTC was granted open access for 100 MW to be operationalised from 01/10/2014. PTC vide letter dated 29/09/2014 expressed its inability to operationalise MTOA from 01/10/2014 and requested to start supply from 10/01/2015. The application on behalf of PTC was speculative and inconsistent with the provisions of Regulation 19 of the Connectivity Regulations.
 - (ii) MTOA granted pursuant to the impugned order has not been operationalised and, accordingly, CTU has approached the CERC for clarification. The petition for

direction filed in the CERC by CTU is produced as Annexure-A to the Written Submissions.

- (iii) Clause 15.1 of the Detailed Procedure requires that in the event the generating company is not already connected to the grid, documentary evidence to show that it would be ready prior to the intended start date of MTOA is required to be furnished. Since the generating station was not ready, application for MTOA could not be accepted without such documentary evidence. Accordingly, the application filed by PTC was incomplete and was liable to be rejected.

In the circumstances MTOA granted to NVVN and PTC be declared illegal and the available capacity be granted to the Appellant.

15. Mr. Nikhil Nayyar, learned counsel for Respondent No. 1 has supported the impugned order.

16. We have heard Mrs. Suparna Srivastava, learned counsel appearing for Respondent Nos.2 and 4. We have perused the written submissions filed on behalf of Respondent Nos.2 and 4. The gist of the written submission is as under:-

- a) Clause 15.1 of the Detailed Procedure states the documents that are to be filed along with the application. One of the requirements is described as PPA or Sale Purchase Agreement of Power. It is settled law regarding statutory interpretation that the word 'or' is normally disjunctive (**G.P. Singh's Principles of Statutory Interpretation, 12th Edition 2010, pages 477-480**). In this connection reference can be made to **State of Bombay v Ali Gulshan**³. When positive conditions are prescribed by a statute for acquiring a right or a benefit and they are separated by 'or' then they are to be treated in the alternative.
- b) It is settled principle of law regarding statutory interpretation that it is not permissible to add words or to

³ AIR 1955 SC 810

fill in a gap or lacuna in a statute, but at the same time effort should be made to give meaning to each and every word used by the legislature. (**G. P. Singh's Principle's of Statutory Interpretation, 12th Edition 2010, pages 75 to 77**).

- c) It is well settled rule of interpretation that the Court should, as far as possible, construe a statute so as to avoid tautology or superfluity. When the Detailed Procedure uses the words “PPA or Sale-Purchase Agreement of Power”, then the document(s) envisaged as Sale Purchase Agreement of Power are not the same as PPA but are something which are distinct from a PPA but which record an agreement for sale and purchase of power (**Shri Umed v Raj Singh & Ors**)⁴.
- d) Three applications made on behalf of Respondent No.4 during April, 2013 to June, 2013 were rejected by CTU on the ground of non-availability of ATC under MTOA route as the same has already been exhausted till November, 2015. The Appellant's application was also rejected on the

⁴ (1975) 1 SCC 76

ground that the entire ATC for import of power to Southern Region under MTOA had already been allocated for the period till June, 2015. Being aggrieved by the continuous and arbitrary denial of MTOA by CTU, Respondent No.4 filed a petition in the CERC. The Appellant neither chose to challenge rejection of its MTOA application nor sought its impleadment in Respondent No.4's petition.

- e) In the proceedings before the CERC, Respondent No.4 submitted that the grant of MTOA to DB Power was illegal *inter alia* on the ground that there was no valid PPA or a Sale-Purchase Agreement between DB Power and the procurer at the time when MTOA was applied for or was granted. At the relevant time, negotiations were still underway between DB Power and the procurer for finalizing the financial bid wherein the alignment of rates offered with prevailing market prices was yet to take place so as to arrive at a definitive and binding Sale Purchase Agreement, failing which the Evaluation Committee had

the right to reject all price bids received in the bidding process. However, CTU construed the mere selection of DB Power as bringing into existence a Sale Purchase Agreement for purchase of power, which was not in accordance with the Detailed Procedure of CTU.

- f) The CERC by order dated 8/8/2014 arrived at a finding that the processing of the application of DB Power for the month of May, 2013 without proper documents and grant of MTOA w.e.f. 1/6/2014 was in violation of the Connectivity Regulations and Detailed Procedure and was invalid. Since the corridor was available w.e.f. 1/6/2014, CTU was directed to consider the applications received for MTOA during June, 2013 and decide the allocation of MTOA within one week if the applicants otherwise met the requirements. On other prayers made by Respondent No.4, the CERC was to pronounce its order in due course. From the reasoning of the CERC, it is clear that the issue as to what constituted a Sale Purchase Agreement for Power for the purposes of filing a MTOA application was examined,

considered and adjudicated by the CERC in the context where only a L-1 bidder had emerged and the price negotiation with such L-1 bidder for aligning with market prices was yet to take place; in case of failure of such negotiations, all price bids were liable to be rejected. The CERC came to a conclusion that L-1 bidder did not have a vested right for award of the contract unless the Evaluation Committee certified that its bid is in alignment with prevailing market prices and the bidder has been issued the LoI. Since acceptance of the bid of DB Power based on the recommendations of the Evaluation Committee had been communicated by the power procurer in the letter dated 18/7/2013, the CERC while holding that in a Case-1 bidding, only PPA was envisaged, also held that with the issuance of a LoI a Sale Purchase Agreement 'technically' came into existence. The examination of there being a Sale Purchase Agreement for Power or not, was in the context of the emergence of a L-1 bidder to whom LoI was yet to be issued. There was no

occasion whatsoever to consider the legal status of a LoI for qualifying as a Sale Purchase Agreement for Power as the same was not the issue for consideration before the CERC.

- g) The Appellant chose to join the proceedings only when CTU sought clarification from the CERC whether to re-process the MTOA application of June, 2013 or to allocate 211 MW to next eligible applicant. The Appellant sought grant of MTOA against the capacity that had become available due to non-operationalisation of MTOA granted for June, 2013, being the next in priority list. The Appellant did not agitate the issue as regards the legal status of LoI. The Appellant is, therefore, estopped from raising the same at a later stage.
- h) While seeking grant of MTOA against the capacity that had become available, the Appellant chose not to agitate the issue regarding LoI and Sale Purchase Agreement. The Appellant, therefore, cannot raise the same issue before

this Tribunal. Order II Rule 2 of the Code of Civil Procedure and Principles of *constructive res judicata* bar the Appellant from doing so (**Gujarat Electricity Board v Saurashtra Chemicals⁵, State of U.P. v Nawab Hussain⁶**).

- i) A combined reading of Clauses 2.2.9 and 2.8.2 of the Request for Proposal issued by CTU show that while the PPA was to be signed within 20 days of issuance of LoI, the Contract Performance Guarantee could be furnished within 30 days of issuance of LoI. This meant that furnishing of Contract Performance Guarantee was not a condition precedent for signing of the PPA but was a condition under the contract so that once a LoI was issued and unconditionally accepted, signing of necessary PPA was a mere formality.

- j) The PPA to be signed between the parties was as per the model PPA approved by the Ministry of Power and had

⁵ AIR 2004 Guj 63

⁶ (1977) 2 SCC 806

been issued along with the RFP documents. The arrangement of power purchase envisaged under the Model PPA of the Ministry of Power for power transactions through MTOA as amended based on inputs received from interested parties was that as soon as LoI was granted, the seller was to apply for MTOA without awaiting completion of the formality of PPA execution.

- k) When the LoI issued was unconditionally accepted by NVVN and acting upon such acceptance NVVN applied to CTU for grant of MTOA, a concluded contractual bargain as between Respondent No.4 and NVVN (being the successful bidder) came into existence and the signing of PPA became a mere formality. When an unconditionally accepted LoI was acted upon with only a formal execution of PPA pending, and the same was submitted along with the MTOA application, it qualified for consideration under the requirement of “Power Purchase Agreement / Sale Purchase Agreement of Power” as prescribed in Clause 15.1 of the Detailed Procedure. The stipulation in the LoI

that in case, any of the conditions specified in Clauses 2.2.8 and 2.2.9 were not fulfilled, Respondent No.4 reserved the right to annul the award of the LoI is meaningless as the signing of PPA became a mere formality.

- 1) In **Karamchand Thapar & Bros V M/s MP Power Trading Co. Ltd. (Appeal No. 46/2012)** this Tribunal found that with the issuance and unconditional acceptance of LoI, a legally enforceable contract in terms of the relevant provisions of the Indian Contract Act came into force. Judgment of this Tribunal dated 30/6/14 **in Appeal No.62/2013 in PTC India Ltd. v Gujarat Electricity Regulatory Commission and judgment dated 20/1/2010 in Appeal No.156 of 2009 in Lanco Kondapalli Power Pvt. Ltd & Anr. v Haryana Electricity Regulatory Commission & Anr.** also reiterate the same view. In **Trimax International FZE Ltd v Vedanta Aluminium Ltd.**⁷, the Supreme Court has held that once a contract was concluded orally or in

⁷ (2010) 3 SCC 1

writing, the mere fact that a formal contract had to be prepared and initialed by the parties was not to affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract had never been initialed.

- m) The CERC has rightly held that in case there was availability of corridor in view of cancellation of MTOA, then the available capacity could not be allocated to the Appellant as the Appellant could no longer be considered to be in the queue of priority applicants and that the said capacity was now to be included in the next relevant month. If by reason of order passed by this Tribunal, some capacity becomes available against the applications made in June, 2013, the Appellant is still ineligible for grant of MTOA for the said capacity against the application made by it in June, 2013 as the 'window' for that month has now been closed. NVVN had not been a MTOA applicant who was to step in only when capacity became available due to non-operationalisation of granted MTOAs and as

such the CERC has rightly directed CTU to grant MTOA to it by treating the unconditionally accepted LoI as a Sale Purchase Agreement for Power. In the circumstances, there is no infirmity in the impugned order. The appeal is liable to be dismissed and may be dismissed as such.

17. On behalf of Respondent No.3, written submissions have been filed. The gist of the written submissions is as under:

- a) In June, 2013 Respondent No.3 applied for MTOA for 100 MW for 36 months period. CTU vide its letter dated 22/9/2014 approved grant of MTOA for supply of power from BALCO to KSEB for the period from 01/10/2014 to 28/02/2015. BALCO requested for three and half months time for supply of power. BALCO said that it will be able to supply power w.e.f. 10/01/2014. Respondent No.3 therefore forwarded the letter of BALCO to CTU for consideration. CTU, in turn, filed an affidavit before the CERC enclosing the request of Respondent No.3 and BALCO and informed Respondent No.3 vide its letter dated

25/11/2014 that its matter is under consideration of the CERC. The CERC vide its order dated 16/02/2015 gave new time-line for signing and operationalisation of MTOA. Based on the CERC order dated 16/02/2015, Respondent No.3 immediately submitted affidavit to CTU vide its letter dated 19/02/2015 conveying willingness and readiness to operationalise the MTOA. CTU vide its letter dated 25/02/2015 approved the grant of MTOA for 58 MW for supply of power from BALCO to KSEB for the period from 01/3/2015 to 28/02/2017. Subsequently, MTOA Agreement was executed between Respondent No.3 and CTU on 26/02/2015. However, power flow could not start w.e.f. 01/03/2015 owing to WRLDC not granting permission on the ground of non-commissioning of the machine by BALCO. However, the power from BALCO to KSEB through Respondent No.3 started from 0400 hrs. on 11/03/2015 and currently power is being scheduled on continuous basis. Thus, it is clear that Respondent No.3

- had acted in a *bona fide* manner and as per the regulations in force.
- b) The contention of the Appellant that Respondent No.3 was not willing to supply power from 01/10/2014 is not tenable as Respondent No.3 had approached the CERC for extension of time as per the regulations.
- c) The Appellant never opposed the request of Respondent No.3 before the CERC. It cannot be said that earlier order dated 08/08/2014 was final and binding and that Respondent No.3 was obliged to supply power w.e.f. 01/10/2014 under the said order which was under review by the CERC.
- d) By the impugned order Respondent No.3's request was finally decided and Respondent No.3 immediately complied with the said order. Respondent No.3 confirmed to CTU that it was ready and willing to supply the power as per the decision of the CERC.
- e) Respondent No.3 was never in default in respect of supply of power as it is well settled legal principle that any person

has the legal right to approach judicial authority for clarification or relief on the basis of its *bona fide* belief and in such a scenario if a person has approached the judicial body, he cannot be said to be in default till such time as the matter is *sub-judice* and the final decision is pronounced in that matter. Till such time the CERC decided the request of Respondent No.3 for additional time for supply of power, Respondent No.3 cannot be said to be in default in any respect.

- f) In the appeal while framing the facts in issue/question of law the Appellant had not questioned the grant of MTOA to Respondent No.3. Accordingly, question of grant of MTOA to Respondent No.3 cannot be agitated by the Appellant in this appeal. Prayer of the Appellant needs to flow out of the facts in issue/question of law. The Appellant will have to therefore confine his submissions only to the facts in issue/question of law which he has raised in the appeal.
- g) The appeal challenging the grant of MTOA to Respondent No.3 is without substance and may be dismissed.

18. Further discussion will involve status of LoI i.e., whether it can be treated as concluded contract. Before we proceed further, we must note that it is contended by counsel for NVVN and Respondent No.4 that before the CERC, the Appellant did not raise any issue as to whether LoI has the status of a concluded contract. Hence, it cannot raise it now. We find no merit in this submission. It is admitted in the written submissions filed in this Tribunal that this issue had already been raised before the CERC. It is also admitted that the Appellant was directly affected by adjudication of this issue. Counsel for NVVN and Respondent No.4 was unable to contest the submission that this issue is a legal issue. It is well settled that a legal issue can be raised at any stage. We therefore reject the submission that the Appellant is estopped from raising it at this stage. In any case as this issue was agitated before the CERC, whether the Appellant had raised it before the CERC or not, we will have to deal with it. Arguments based on Order II Rule 2 of the Code of Civil Procedure and doctrine of *constructive res judicata*, are therefore

rejected. It is not necessary for us therefore to refer to the judgments cited by Respondents' counsel in this connection.

19. On the question whether an unconditionally accepted LoI can be treated as a concluded contract, a number of judgments have been cited before us. The present case, however, turns on its own facts. However, since judgments have been cited before us, we will first see what is the law on this point and then proceed further.

20. We may first reproduce definition of LoI from **K. J. Aiyer's Judicial Dictionary (Fifteenth Edition 2011)**. It reads thus:

“A Letter of Intent is customarily employed to reduce to writing a preliminary engagement of parties who intend to enter into a contract whether such a letter constitutes a binding contract in law or whether it is a mere inchoatic transaction, depends on its terms as well as other circumstances of the case”.

21. It is also necessary to refer to certain important provisions of the Indian Contract Act.

*“Section 7: **Acceptance must be absolute.**- In order to convert a proposal into a promise the acceptance must-*

(1) *be absolute and unqualified;*

(2) *be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.*

Section 8: Acceptance by performing conditions, or receiving consideration.- *Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.*

Section 9: Promises, express and implied.- *In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”*

A reading of these Sections makes it clear that for a concluded contract to come into effect, there must be an offer or proposal and there must be absolute, unconditional and unqualified acceptance of the offer. The acceptance need not

always be express. It may be implied or inferred from the conduct of the parties.

22. We shall now refer to the judgments of the Supreme Court to which our attention is drawn by the parties. In **Trimax**, it was *inter alia* argued before the Supreme Court that in the absence of a concluded and binding contract between the parties, the arbitration clause contained in draft agreement cannot be relied upon by the petitioner therein. The Supreme Court considered the minute to minute correspondence exchanged between the parties regarding offer and acceptance and held that offer contained all essential ingredients for a valid acceptance i.e. offer validity, product description, quantity, price per tonne, delivery terms, payment terms, shipment lots, discharge port, discharge rate, demurrage rate etc. The Supreme Court also considered the nature of acceptance. After detailed analysis of the facts, the Supreme Court held that all the details clearly establish that both the parties were aware of various conditions and understood the terms and finally the charter was entered into a contract. The Supreme Court further observed in the facts of the

case before it that once the contract is concluded orally or in writing the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof even if the formal contract has never been initialled.

23. In **Hansa v Gandhi**, the Appellant-Plaintiff had not entered into any formal agreement of purchase of flats with the developer. A mere letter of intent was issued in his favour. The question was whether the letter of intent could be said to be an agreement to sell. The Supreme Court held in the facts of the case before it that the letter of intent cannot be said to be an agreement to sell.

Relevant paragraphs need to be quoted:

“18. It is not in dispute that the letter of intent was issued by the developer to the plaintiffs wherein certain conditions had been incorporated and upon fulfillment of those conditions, agreements for sale of the flats were to be executed. Upon perusal of the letter of intent closely, one would find that certain conditions had been incorporated in the letter of intent. The said conditions clearly imposed a duty on the part of the intended purchasers to make payment of all the instalments payable in respect of the purchase price of the flat. It is also not in dispute that it was open to the developer to vary the price of the area to be covered by a flat in

certain cases. It is not in dispute that the developer had raised the price because of the delay caused on account of the litigation faced by the Society. On account of the delay caused in construction of the flats, the cost had gone up and therefore, the developer had asked for a rise in the price which was approved by the majority of the intended purchasers of the flats. Accordingly, all the other purchasers had started paying the increased price of instalments but the plaintiffs had refused to the same and in fact they had stopped paying the instalments which were becoming due and payable after the price had been increased. It is also worth noticing that the plaintiffs did not make payment even as per the rate prescribed under the letter of intent and the terms and conditions agreed upon by them with the developer.

21. The letter of intent cannot be said to be an agreement to sell for the simple reason that according to the contents of the letter of intent only upon payment of the entire purchase price, the developer and the plaintiffs were to enter into an agreement with regard to sale of the flats. This fact clearly denotes that no agreement to sell had been entered into between the plaintiffs and the developer and in absence of such agreements, in our opinion, there cannot be any right in favour of the plaintiffs with regard to specific performance of any contract. Thus, in our opinion, the High Court did not commit any error while coming to the conclusion that there was no binding contract or agreement in existence between the plaintiffs and the developer and therefore, the trial court could not have decreed the suit for specific performance.”

24. It is also necessary to refer to the judgment of this Tribunal in **M/s Karamchand** on which reliance is placed by NVVN and

Respondent No.4. The question which fell for consideration before this Tribunal was whether on the basis of the correspondence between the parties through various documents it can be said that a concluded contract came into existence between them. This Tribunal referred to guidelines laid down by the Supreme Court and various High Courts. Relevant guideline reads as under:

“(a) It is well settled that a letter of intent merely indicates a party’s intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. However, a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is common in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties.”

Following observations of this Tribunal are also material.

“51. At the outset, it shall be stated that this contention urged by the Appellant deserves outright rejection as it

is a settled law that valid contract can also exist between the parties by way of conduct as per Section 8 of the Contract Act. Mere signing of the PPA, does not conclude a contract. Signing of contract is only a formality. The interpretation clause of the relevant provisions of the contract Act clearly indicates that the agreement can be reached by the process of offer and acceptance through the conduct as well. Therefore, we have to consider the issue on the basis of available materials on record and decide as to whether the elements of offer and acceptance have been established in this case through the conduct of the parties.”

We shall again advert to this judgment a little later.

25. In **Lanco Kondapalli** on which reliance is placed by learned counsel for NVVN and Respondent No.4, this Tribunal again examined the same issue. In that case the Appellant had stated in the offer that all decisions regarding the matter arising out of the RFP shall be binding on it and that it had waived all claims in respect of bid process. The Appellant gave undertaking for bid and confirmed the acceptance of terms and conditions of RFP. LoI was issued to the Appellant. This Tribunal held that the Appellant had already accepted the RFP Project document unconditionally and the LoI was issued on 17/7/2008 and the same was accepted by the Appellant. A concluded contract

therefore came into existence from that date onwards. Relevant portion of the judgment reads as under:

“(IV) It is true that a LOI may be construed as a letter of acceptance. It is common in contracts involving detailed procedure in order to save time, LOI is issued communicating the acceptance of the offer and asking the contractor to start the work. If such a letter had been issued to the contractor, it may amount to acceptance of the offer resulting in a concluded contract between the parties. The question as to whether the LOI is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract is a matter which has to be decided with reference to the terms of the said letter.”

We shall again advert to this judgment a little later.

26. Having regard to the definition of the term LoI as given in **K. J. Aiyer’s Judicial Dictionary** and having regard to the relevant provisions of the Indian Contract Act and the Connectivity Regulations and the Detailed Procedure and judgments of the Supreme Court and of this Tribunal, which we have referred to hereinabove, we must conclude that whether an unconditionally accepted LoI reflects a concluded contract, whether it can take place of a PPA must depend on facts and circumstances of each

case. There must be a clear offer. There must be an unequivocal, unambiguous and unconditional acceptance of the offer. The recitals of the LoI are of great significance. The LoI must make the intention of the parties apparent. Conduct of the parties is also relevant. If LoI merely imposes conditions to be complied with in future, it may not fall in the category of concluded contracts. If the LoI communicates the acceptance of the offer and goes further and asks the contractor to start work, in a given set of circumstances, it may amount to a concluded contract between the parties. The question as to whether the LoI is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract, is a matter which has to be decided with reference to the terms of the said letter and having regard to the facts and circumstances of each case.

27. Reliance is placed on **Lanco Kondapalli** in support of the submission that after issue of LoI, signing of PPA is only a ministerial act. In that case, the buyer had issued LoI in favour of the seller. However, in spite of the best efforts taken by the

buyer, the seller did not come forward to sign the PPA. The seller had argued that there was no concluded agreement between the buyer and the seller. The buyer filed a petition before the State Commission which was contested by the seller that the State Commission did not have jurisdiction to entertain the petition under Section 86(1) (f) of the Act. The Tribunal held that the State Commission had the jurisdiction to go into the dispute under Section 86 (1) (f) of the Act. The findings of the Tribunal in the circumstances of that case would not be applicable to the present case.

28. Reliance placed on **Karamchand Thapar** is misplaced. In that case, the Respondent (seller) had issued a LoI in favour of the Appellant therein (trading company) for sale of its surplus power and sought the acceptance of the LoI by the Appellant within 3 days. The Appellant within 3 days responded stating that it would make all efforts to sell the surplus power of the Respondent on the basis of the said LoI. The Respondent also participated in various competitive biddings for procurement of power and submitted its bids for sale of surplus power. The

Appellant also by various letters kept the Respondent informed that it was making efforts for sale of surplus power of the Respondent. However, the Appellant was not successful in any bidding process and failed to sell the surplus power of the Respondent as per the LoI. The Respondent claimed compensation in terms of the LoI and filed petition before the State Commission. The State Commission held that the contract between them was a concluded contract. The Appellant came in appeal against the State Commission's order. In the circumstances of the case where the Appellant had acted on the LoI it was held by this Tribunal that the contract had come into existence. The findings of this Tribunal in the above case will not apply to the present case where the CERC had to decide the issue in terms of its Regulations and the approved Detailed Procedure for grant of MTOA by CTU. In the present case, as we shall soon see, the CERC has modified the Detailed Procedure under the Connectivity Regulations without following the procedure laid down in the Connectivity Regulations and applied

it retrospectively for processing of MTOA applications for June, 2013.

29. Let us now examine the provisions of the Connectivity Regulations, so far as they are relevant to the present case. The “medium-term open access” (MTOA) is defined in the Connectivity Regulations as the right to use inter-State transmission system for a period exceeding 3 months but not exceeding 3 years. Time frame for processing the application for MTOA by the CTU has been specified as 40 days. According to the Connectivity Regulations, the applications for MTOA shall be processed on first cum first serve basis. The applications received during the month have to be considered to have arrived concurrently. Sub Clause (1) of Regulation 19 regarding application for MTOA provides that the application for grant of MTOA shall contain such details as may be laid down under the Detailed Procedure and shall in particular include the point of injection into the grid, point of drawal from the grid and quantum of power for which MTOA has been applied for.

Regulation 27(1) provides that subject to the provisions of these regulations, CTU shall submit the Detailed Procedure to the CERC for approval within 60 days of notification of the Regulations. The first proviso to Regulation 27(1) provides that prior to submitting the Detailed Procedure to the CERC, the CTU shall make the same available to the public and invite comments by putting the draft Detailed Procedure on its website and giving a period of one month to submit comments. The second proviso to Regulation 27(1) provides that while submitting the Detailed Procedure to the CERC, the CTU shall submit a statement indicating as to which of the comments of stakeholders have not been accepted by it along with reasons therefor.

30. The CERC by its order dated 31/12/2009 approved the Detailed Procedure of CTU under Regulation 27(1) of the Regulations. Clause 15 of the Detailed Procedure is relevant here.

The same is reproduced below:

“15. APPLICATION

15.1. Documents to be submitted alongwith the application:

- *Duly filled in Application in specified format. Incomplete application shall be rejected.*
- *Proof of payment of Application fee*
- *Concurrence from SLDC / SLDCs as applicable.*
- *PPA or Sale-purchase agreement of power*
- *In case of generating station or consumer not already connected to grid, documentary evidence for completion of the connectivity showing that the same shall be completed before intending date of MTOA.*

*** Note - Incomplete application shall be rejected.***

Thus the application for MTOA has to be submitted, inter-alia with PPA or Sale Purchase Agreement of Power.

31. We shall now turn to the facts of this case. Respondent No.4 had initiated a bidding process for procurement of 300 MW power from March 2014 to February 2017 by issuing a RFP. In response thereto, NVVN submitted its bid. NVVN was declared as the successful bidder and its offer for 300 MW power from CSPDCL was accepted to the extent of 260 MW at the revised rates. Accordingly, LoI dated 25/04/2013 was issued by

Respondent No.4 to NVVN. In terms of the said LoI, NVVN was required to submit a Contract Performance Guarantee within 30 days of receipt of LoI and convey a suitable date for signing the PPA in accordance with Clauses 2.2.9 and 2.13 of the RFP document. As a token of acceptance of LoI, NVVN was required to record on one copy of the LoI “Accepted Unconditionally” under the signature of the authorized signatory of NVVN and return such copy to Respondent No.4 within 7 days of issuance of the LoI. The LoI further stated that in case any of the conditions specified in Clauses 2.2.8 and 2.2.9 were not fulfilled, Respondent No.4 reserved the right to annul the award of the LoI and as per provisions of Clause 5.2 (b) Respondent No.4 could either annul the entire bid or issue LoI to the next lowest financial bid. Also, Respondent No.4 had the right to invoke the bid bond in case of failure to provide the Corporate Bank Guarantee as per provisions of Clause 2.13. Thus, the LoI issued to NVVN was conditional. Relevant paragraphs of the LoI need to be quoted.

“Please submit the Contract Performance Guarantee (CPG) within 30 (thirty) days of receipt of this LoI as per Format 5.7 (without any alterations in the wording) and convey a suitable date for signing the PPA, in accordance with Clause 2.2.9 and 2.13 of the RFP document.

It may please be noted that in case any of the conditions specified in Clauses 2.2.8 and 2.2.9 are not fulfilled, KSEB reserves the right to annul the award of the Letter of Intent and the provisions of Clause 2.5(b) shall apply. Also, KSEB shall be entitled to invoke the Bid Bond, in case of failure to provide the CPG as per provisions in Clause 2.13.

As a token of acceptance of this LOI, please record on one (1) copy of the LOI, “Accepted Unconditionally”, under the signature of the authorized signatory of your company and return such copy to KSEB within seven (7) days of issue of LOI, as mentioned in Clause 3.5.10.”

32. NVVN noted the unconditional acceptance on the copy of the LoI. NVVN conveyed its unconditional acceptance of the LoI to Respondent No.4 on 01/05/2013. The said letter carried signature of the authorized signatory of NVVN recording “Accepted Unconditionally”. Based on such unconditional acceptance, the application for MTOA was filed by NVVN on behalf of Respondent No.4 on 27/06/2013.

33. On 17/05/2013, Respondent No.3 i.e., PTC had forwarded a draft PPA suggesting inclusion of provisions *inter alia* for applying for MTOA upon receipt of LoI. This was done keeping in mind Clause 5.6 (II) of the guidelines of Ministry of Power. The said guideline read as under:

“The model PPA proposed in the bidding documents may be amended based on the inputs received from the interested parties, and shall be provided to all parties responding to the RFP.”

34. On 12/06/2013 Respondent No.4 accepted the insertions suggested by Respondent No.3 and also decided to apply the same to PPA issued to NVVN. Clause 4.2.1(c), which was inserted, states that on receipt of the LoI, the corridor shall be applied under MTOA if due to the transmission constraint the corridor is partially or not cleared at all. Admittedly, the PPA was signed between NVVN and Respondent No.4 on 18/07/2013.

35. It is the contention of NVVN and Respondent No.4 that the arrangement of power purchase envisaged under the model PPA was that as soon as LoI was granted, the seller was to apply for

MTOA without awaiting completion of the formality of PPA execution. It is submitted by the Respondents that when LoI issued was unconditionally accepted by NVVN and acting upon such acceptance NVVN applied to CTU for grant of MTOA, a concluded contractual bargain as between Respondent No.4 and NVVN came into existence and the signing of PPA became a mere formality. It is submitted that when an unconditionally accepted LoI was acted upon with only a formal execution of PPA pending and the LoI was submitted along with MTOA application, it qualified for consideration under the prescribed requirement of “Power Purchase Agreement/ Sale Purchase Agreement of Power” as prescribed in Clause 15.1 of the Detailed Procedure.

36. We must now go to the impugned order to see how the CERC dealt with this argument. One of the issues framed by the CERC was whether for the purpose of application for MTOA, an unconditionally accepted LoI should be considered as a Sale Purchase Agreement or not. The CERC considered Article 4.2.1(c) of the PPA between Respondent No.4 and NVVN which provided that on receipt of LoI the corridor shall be applied under

MTOA. The CERC felt that since PPA is a part of Standard Bidding Documents issued by Ministry of Power under Section 63 of the Electricity Act, 2003, non-acceptance of an unconditionally accepted LoI as a Sale Purchase Agreement for the purpose for application for MTOA would render the provisions of Article 4.2.1(c) of the PPA otiose. The CERC on consideration of the provisions of the PPA which is a part of the Standard Bidding Document and the provisions of the Detailed Procedure held that an unconditionally accepted LoI could be considered as Sale Purchase Agreement in Case-1 bidding for applying for MTOA. Accordingly, the CERC in partial modification of its order dated 8/8/2014 directed that in Case-1 bidding, an unconditionally accepted LoI can be accepted as a Sale Purchase Agreement for applying for MTOA. However, CERC made it clear that MTOA applicant shall submit a copy of the PPA within 35 days from the last date of the month in which the application is made. The CERC further held that acceptance of application for MTOA on the basis of unconditionally accepted LoI in respect of Case-1 bidding will be strictly subject to

production of PPA before the stipulated time and in case the applicant failed to submit the copy of the signed PPA by the stipulated date, the CTU shall consider the application as incomplete and remove the application from the list of eligible applications. It was held that the procedure will operate prospectively. The CERC also directed its staff/CTU to make necessary changes in the Detailed Procedure.

37. The CERC also considered the question as to what will be considered as Sale Purchase Agreement. The CERC held that in Case-1 bidding either a PPA or an unconditionally accepted LoI, which is in consonance with the provisions of paragraph 4.2.1(c) of the model PPA issued by the Ministry of Power as part of Standard Bidding Document under Section 63 of the Electricity Act will be accepted for applying for MTOA. However, in case of sale and purchase of power other than through Case-1 bidding, LoI will not be allowed for the purpose of applying for MTOA and in such case MTOA applicant shall be required to submit a duly signed Sale Purchase Agreement while applying for MTOA.

38. We find that the CERC has deviated from the approved procedure in the following respect:

- (i) In Case-1 bidding an unconditionally accepted LoI can be accepted as Sale Purchase Agreement for applying for MTOA.
- (ii) MTOA applicant under Case-1 bidding whose application has been submitted with only unconditionally accepted LoI will submit a copy of the PPA within 35 days from the last date of month in which the application is made. If PPA is not produced before the stipulated time, the applicant will become ineligible for grant of MTOA for that month.
- (iii) The above procedure shall apply prospectively and CERC staff/CTU shall make necessary changes in the Detailed Procedure.

- (iv) LoI will not be accepted as Sale Purchase Agreement in case of sale and purchase of power other than Case-1 bidding.

39. We find that the main reason for making deviation from the approved procedure was that the PPA which is part of Standard Bidding Document issued by Ministry of Power under Section 63 of the Electricity Act contains a provision that the successful bidder can apply for MTOA on receipt of LoI and therefore unconditionally accepted LoI should be accepted as Sale Purchase Agreement. CERC felt that if it is not accepted as Sale-Purchase Agreement, it could render that provision of the PPA otiose. Thus, the CERC deviated from the Detailed Procedure approved by it for the CTU and interpreted the Detailed Procedure in a manner so that the condition given in the PPA, which is a part of Standard Bidding Document of Government of India regarding application for MTOA to be given on receipt of LoI, can be given effect to. It has come to our notice that the Standard Bidding Document of the Ministry of Power issued

under Section 63 of the Electricity Act, 2003 does not contain such provision for making application for MTOA on receipt of the LoI. It has been brought to our notice by learned counsel for NVVN and Respondent No.4 that this condition was inserted in the PPA entered into between NVVN and Respondent No.3 with Respondent No.4 at the request of Respondent No.3 as a deviation from the model PPA issued by the Ministry of Power. We feel that the CERC should not have deviated from its Regulation to satisfy the condition inserted in the modified PPA in a particular contract that after receipt of LoI, MTOA can be applied for. If the CERC wanted modification of the Detailed Procedure for Case-1 bidding, it could have done so by changing the procedure prospectively after following due process of law. The CERC erred by modifying the procedure by the impugned order to give effect to the condition in the PPA entered between the parties in this particular case and applying the same to the MTOA applications of June, 2013.

40. As discussed above, Regulation 27 provides that the Detailed Procedure has to be submitted by CTU for approval of the CERC after seeking comments from the public. In the present case, the CERC has modified the Detailed Procedure without fulfilling the requirement of seeking objections/suggestions from the public by CTU as laid down in the Connectivity Regulations. Thus, the Detailed Procedure has been modified without following the procedure laid down in the Connectivity Regulations and it has been applied retrospectively for proceedings of MTOA applications for June, 2013. This is not as per the Connectivity Regulations. Due process of law has not been followed by the CERC. The course followed by the CERC is not legal. We want to make it clear that the CERC can revise the Detailed Procedure for Case-I bidding after following process of law, which can be made applicable prospectively so that there is clarity in the procedure and nothing is left to the discretion of the CTU regarding completion of the application.

41. In the circumstances, we set aside the impugned order to the extent it permits the LoI to be treated as Sale Purchase Agreement/PPA in Case-I bidding. We direct that all June, 2013 applications for MTOA be processed afresh by the CTU as per the Detailed Procedure for making application for grant of MTOA to ISTS and, MTOA be granted to the eligible applicants as per the Connectivity Regulations keeping in view the findings in the present judgment within 7 days from the date of communication of this judgment.

42. Another issue raised by the Appellant is that the grant of MTOA to PTC pursuant to the impugned order is illegal and not as per the provisions of Connectivity Regulations and Detailed Procedure for the following reasons:

- (a) MTOA start date for any applicant cannot be after a maximum of 12 months from the date of application. Application was made by PTC in June, 2013 for start of power flow from 01/3/2014. Vide communication dated

22/9/2014, PTC was granted open access for 100 MW to be operationalised from 1/10/2014. PTC vide letter dated 29/9/2014 expressed its inability to operationalise MTOA from 1/10/2014 and requested to start supply from 10/1/2015. The application on behalf of PTC was speculative and inconsistent with the provision of Regulation 19 of the Connectivity Regulations.

- (b) Clause 15.1 of the Detailed Procedure requires that in the event the generating company is not already connected to the grid, documentary evidence that it would be ready prior to the intended start date of MTOA is required to be furnished. Since the generating station was not ready, application for MTOA could not be accepted without such documentary evidence. Accordingly, the application filed by PTC was incomplete and was liable to be rejected.

43. We find that this is a new issue raised in the present appeal. In the petition before the CERC, the contention raised by the Appellant was that since the condition specified for grant of MTOA to Ideal has not been fulfilled and Ideal is not entitled for grant of MTOA, the Appellant which is next on the priority list having fulfilled all conditions for grant of MTOA is an affected party and also sought directions to the CTU to grant open access to the Appellant for the corridor which is unutilized as the applicants who have been granted MTOA have failed to meet the conditions for operationalisation of MTOA.

44. Accordingly, the CERC considered whether the unutilized MTOA capacity can be granted to the next eligible applicant considered in a month in order of priority due to cancellation of MTOA. The CERC gave findings on this issue which have not been challenged by the Appellant.

45. In view of the above, we do not want to give any finding regarding ineligibility of PTC as the issue has not been raised

and, therefore, not dealt with in the impugned order. We have already directed the CTU to process all applications for MTOA received during June, 2013 afresh and grant MTOA to the eligible applicants as per the Regulations and findings in this judgment.

46. The appeal is disposed of accordingly.

47. Pronounced in the Open Court on this 16th day of April, 2015.

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE / ~~NON-REPORTABLE~~**