

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

(APPELLATE JURISDICTION)

APPEAL NO. 329 OF 2013

Dated: 9th January, 2015

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF

PTC India Ltd.,
2nd Floor, NBCC Towers,
15, Bhikaji Cama Place,
New Delhi-110066

.... Appellant/Petitioner

VERSUS

1. Punjab State Electricity Regulatory Commission
SCO No. 220-221, Sector 34-A,
Chandigarh-160022

2. Punjab State Power Corporation Ltd.,
Shed No. F-4, Shakti Vihar,
Patiala-147001

3. J & K Power Development Corporation Ltd.,
Head Office, Hotel Shaw Inn,
The Boulevard, Sri Nagar,
J & K – 190001

.... Respondents

Counsel for the Appellant(s) ... Mr. Ravi Kishor
Mr. Rajiv Bhardwaj

Counsel for the Respondent(s)... Ms. Shikha Ohri for R-1
Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-2

J U D G M E N T**PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. The present Appeal under Section 111 of the Electricity Act, 2003, has been preferred by PTC India Ltd. (in short, the '**Appellant**'), against the impugned order, dated 10.10.2013, passed by the Punjab State Electricity Regulatory Commission (in short, the '**State Commission**') in Petition No. 15 of 2013, passed under Section 86(1)(f) of the Electricity Act, 2003 read with Regulation 9 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, whereby the State Commission has rejected all the claims as prayed by the Appellant, which are as under:

- (i) For a compensation amounting to Rs.124,51,53,525/- for illegally and abruptly terminating the Power Purchase Agreement (PPA);
- (ii) To pay the amount of Rs.49,45,18,742/- towards water usage charges levied by the State Water Resources Authority under J&K Water Resources (Regulation and Management) Act, 2003;
- (iii) To pay the amount of Rs.3,88,16,750/- plus late payment surcharge as the trading margin as per the PPA; and
- (iv) To pay the interest @ 15% per annum from 19.8.2011 till the time of receipt of payment.

2. The learned State Commission, in the impugned order, has observed as follows:

“9. Observations & Findings of the Commission

- (i) *The Commission notes that the PSA document filed by the petitioner vide its application, dated 12.4.2013, is not initialled by either party. More importantly, the Commission did not approve the said PSA for the long term purchase of power from Baglihar HEP in its Order, dated 19.1.2011, in Petition No. 15 of 2009 filed by PSPCL. In the absence of a valid PSA, at best, the letter, dated 31.3.2009, together with the record of discussions, dated 26.3.2009,*

mentioned therein, only could be the guiding documents for supply of the aforementioned 100 MW power from Baglihar HEP. These documents do not have any provision for payment of any charges for discontinuation of supply of power, by either party. The Commission is of the view that to calculate the demand charges by PTC on the basis of a non-existent document (unsigned PSA) is not justifiable.....

- (ii) *The Commission notes that the calculation of the amount of Rs.3,88,16,750/- on account of alleged short payment of trading margin is based on the non-existent PSA. In view of the above, the Commission holds that the aforementioned amount is not payable by PSPCL to PTC and the payment of trading margin has been rightly made by PSPCL as per the letter, dated 31.3.2009, vide which, PSPCL conveyed its acceptance to PTC for supply of 100 MW power from Baglihar HEP from 1.4.2009 @ Rs 3.65 per kWh plus trading margin @ 4 paise per kWh on day-ahead reservation of open access corridor basis.”*

3. The learned counsel for the Appellant States that as regards the claim of Rs 49,45,18,742/- for water usage charges consisting of Rs. 22,58,31,086/- for the supply of 100 MW made between 10.11.2010 to 8.6.2011 and Rs.26,86,87,656/- for the supply of 75 MW made between 1.4.2011 and 15.10.2011 under the short-term PPA signed on 31.3.2011, the State Commission observed as under:-

- (a) PSPCL has contended that the 100 MW power purchased from Baglihar HEP was not based on cost plus tariff.
- (b) PSPCL has submitted that the record of discussions, dated 26.3.2009, provide only for payment of Cess/Tax/Duty imposed on generation, sale and trading of electricity and not other aspects such as water usage, etc.
- (c) PSPCL has further asserted that before making a claim for water usage charge, PTC has to establish that it is a tax on generation of electricity.

- (d) PSPCL has submitted that even though the provision for pass-through of taxes, duties, cess, levy, fees or other imposition existed in the PPA with NHPC, an amendment to Tariff Regulation, 2009 was carried out by CERC to allow reimbursement of water usage charges.
- (e) *Considering the detailed submissions made by the parties, the Commission is convinced of the submissions put-forth by PSPCL and the water charges amounting to Rs.22,58,31,086/-, in respect of the supply of 100MW power from Baglhar HEP, are not payable by PSPCL.*
- (f) *Perusal of the copy of the said order, dated 1.2.2011, of SWARRA, filed by PTC in the petition, reveals that the said order was received in the office of JKSPDCL on 3.2.2011, vide receipt no. 1963. However, for reasons best known to JKSPDCL, the same is stated to have been communicated to PTC on 4.1.2012. This being a case of sale of power through competitive bidding, the inclusion of these charges by PTC would have altered the merit order and PTC's offer may have been rejected. Therefore, in view of the above, and the submission and argument put-forth by PSPCL, the Commission is convinced that the water usage charges amounting to Rs.26,86,87,656/-, in respect of supply of 75 MW power from Baglihar HEP by PTC as per PPA, dated 31.3.2011, based on competitive bidding process, are also not payable by PSPCL.*

4. According to the Appellant, the State Commission erred both in fact and in law and failed to appreciate that there was a concluded contract between the Appellant and Respondent No.2 (PSPCL) for purchase of power from 1.4.2009 on a long term basis, for a period of 12 years. The Respondent No-2 had not only agreed for the Power Sale Agreement (PSA) with the Appellant, but had acted upon it thereby making the PSA as concluded and binding on both the parties. This is clearly evident from the

correspondence exchanged between the Appellant and the Respondent No-2 and the conduct of the parties.

5. The relevant facts giving rise to the instant Appeal are as under:
- (a) that the Appellant, PTC India Ltd. (formerly known as Power Trading Corporation of India Ltd) is a public limited company incorporated in the year 1999 under the Companies Act, 1956 at the initiative of Government of India. The Appellant is a Trading Licensee under Section 14 of the Electricity Act, 2003 and was granted a license for trading in electricity by the Central Electricity Regulatory Commission (hereinafter referred to as **The Central Commission**) in the year 2004. The Appellant deals in sale and purchase of all forms of electric energy and act as an agent for the development of market for electricity. PTC is the pioneer in implementing the power trading concept in India and has successfully demonstrated its efficacy in optimally utilizing the existing infrastructure within the country to the benefit of all.
 - (b) that the Respondent No-2 is Punjab State Power Corporation Ltd (hereinafter referred to as **"PSPCL"**), successor-in-interest of the erstwhile Punjab State Electricity Board (hereinafter referred to as **"PSEB"**), is one of the companies formed after the unbundling of the **PSEB** by the Government of Punjab in the year 2010.
 - (c) that the Respondent No-3, Jammu and Kashmir Power Development Corporation Ltd (hereinafter referred to as **"JKPDCL"**), is a company incorporated under the Companies Act, 1956. The JKPDCL was incorporated to takeover, execute complete, operate and maintain all power stations and power projects of the State of J & K.

- (d) that the Appellant had entered into Power Purchase Agreement (**PPA**) with the Respondent No.3 (**JKSPDCL**) for purchase of 225 MW of electricity out of 450 MW generated by its Baglihar Hydro Electricity Plant (**HEP**), and the said PPA was signed on 13.10.2008 and as per the clause E of the PPA, Respondent No-3 JKSPDCL had desired that out of 225 MW gross capacity sold to PTC for a period of 12 years, PTC shall arrange to sell 150 MW gross capacity on long term basis for a period of 12 years and balance 75 MW gross capacity to be sold on short term basis. As per the said PPA, the Appellant was obliged to sell 150 MW gross capacity on a long term basis and 75 MW gross capacity on short term basis.
- (e) that clause F of the recital of the said PPA, reads as under: -
- “terms and condition of the purchase of 150 MW power by PTC from JKPDCL for the purpose of sale on long term basis has been stated in this agreement. PTC will enter into suitable arrangement with one or more purchaser, for sale of contracted capacity from the project on the long term basis”.*
- (f) that as per the said PPA entered between the Appellant and the Respondent No-3, it was incumbent upon the Appellant to enter into one or more suitable arrangements for sale of 150 MW of power on a long term basis.
- (g) that the Appellant and the Respondent No-2 held negotiations and consultations for almost 5 to 6 years for sale and purchase of electricity on a long term basis from Baglihar HEP of Respondent No-3.
- (h) that in response to the said enquiry of the Respondent No-2, the Appellant vide letter, dated 13.10.2008, offered to sell 100 MW of power from the Baglihar HEP of the Respondent No-3 on a long term basis i.e. for a period of 12 years.
- (i) that after extensive discussions and negotiations between the Appellant and the Respondent No.2 (PSPCL), a Power Sale

Agreement (**PSA**) was agreed between the Appellant and Respondent No-2, stating the exact terms and conditions for sale and purchase of electricity on a long term basis for 12 years from the Commercial Operation Date (COD) of the project.

(j) that subsequently, a meeting was held on 26.3.2009, between the Appellant and the Respondent No.2 regarding sale of power, whereby the terms of the said PSA were further crystallized and reiterated. In the meeting, the modalities of sale and purchase were agreed in detail especially with respect to the trading margin, payment of compensation Cess/Tax/Duty etc. **The Minutes of the Meeting were signed by the Appellant and the Respondent No-2 which are as under:**

- The Tariff would be Rs 3.65 per kWh
- PTC would charge a trading margin of 3% in case there is no cap by CERC on the Trading Margin. However it was agreed that the trading margin would be CERC prescribed ceiling or 3% of the Tariff whichever is lower
- The tariff was net of all taxes and duties
- **PSA would be initialed after approval of PSEB and signed after approval by State Regulatory Commission**
- The supply of power shall commence from 1.4.2009

(k) that the PSA and subsequent Minutes of Meeting, dated 26.3.2009, left no doubt that the intention of the parties was to enter into a long term agreement for sale and purchase of power, and the intention of the parties was put down in writing in the form of PSA and the Minutes of Meeting, dated 26.3.2009.

(l) that the Respondent No.-2, vide Memo, dated 31.3.2009, confirmed the minutes of the meeting and requested for supply

of power from 1.4.2009. Accordingly, the Appellant started supplying the agreed quantum of power i.e. 100 MW from 1.4.2009 to the Respondent No-2 (PSPCL), after obtaining Open Access on day ahead basis where the underlying contract was the said PSA between the Appellant and the Respondent No.2.

- (m) that the Appellant being the Inter-State Trader was entitled for a trading margin as agreed between the parties for long term agreement and clause 2.2 of the Schedule of the said PSA specified the trading margin as under:-

“2.2. PTC TRADING MARGIN

2.2.1 PTC trading margin shall be capped trading margin as notified by CERC for contract of such nature of duration from time to time (“Trading Margin”).

2.2.2. In case, there is no cap on the trading margin by CERC then PTC’s trading margin shall be 3% of the tariff rate (Rs.3.65 per KWH) as given at section 2.1 of Schedule-B

- (n) that at the time of the said PSA and Minutes of the Meeting (MOM), dated 26.3.2009, the governing regulation was the Trading Margin Regulation of 2006, according to which there was no cap on the Trading Margin on sale and purchase of electricity on a long term basis. The new Trading Margin Regulation as notified by CERC on 11.1.2010 too did not put a cap on trading margin on long term agreement(s). Accordingly, under the said PSA between the Appellant and the Respondent No-2, being a long term agreement, no cap on the trading margin was applicable.
- (o) that after the notification of the “Fixation of Trading Margin Regulation 2010 by CERC on 10.1.2010, the Appellant, vide its letter, dated 9.4.2010, wrote to the Respondent No.2 that since there was no cap on trading margin, the Appellant was entitled for a trading margin of 3% the tariff as per the said PSA and the Minutes of Meeting. However, keeping in view the good and long-term relation between the Appellant and the Respondent

No-2, PTC-the Appellant agreed for a Trading Margin of 9 paise/kWh for the electricity sold under the said PSA w.e.f. 1.4. 2010. Accordingly, the Appellant raised the invoice for the electricity supplied with a trading margin of 9 paise/kWh. **The Respondent No.2, vide its Memo, dated 19.4.2010, replied to the Appellant that the long term rates for the trading margin would be applicable once long term agreement is signed.**

- (p) that immediately, the Appellant vide its letter, dated 23.4.2010, categorically informed the Respondent No.2 that power being supplied was on the long term basis and as per the said PSA, the trading margin which was agreed between the parties is 9 paise/kWh. Thereafter, on several occasions, the Appellant vide its letters/communication, dated 29.6.2010 and 24.2.2011, reiterated its stand on the issue of trading margin and called upon the Respondent No.2 to make the payment immediately with 9 paise/kWh trading margin along with the late payment surcharge. However, Respondent No.2 failed to respond to these letters of the Appellant, which the Respondent No.2 failed to respond.
- (q) that on 31.3.2011, the Appellant entered into a fresh PPA with the Respondent No-2 for supply of additional power from the Baglihar HEP on a short term basis for the period 1.4.2011 to 15.11.2011 at a tariff ranging between Rs 3.60/kWh to Rs 4.57/kWh inclusive of trading margin of 7 paise/kWh.
- (r) that to the utter shock and surprise of the Appellant a communication, dated 8.6.2011, was received from the Respondent No.2 being Memo No.236/PTC/Long-term stating that the Respondent No.2 had decided to discontinue the 100 MW Round the Clock (RTC) power from the Baglihar HEP from J & K through the Appellant with immediate effect without specifying any reason for discontinuation of purchase of power.

- (s) that the Appellant immediately, vide its letter, dated 9.6.2011, protested this discontinuance of power as the power was being sold and purchased under a long term contract and cannot be discontinued arbitrarily. The Appellant also requested Respondent No.2 to indicate the reason for the discontinuation of purchase of power from Baglihar HEP which was on a long term basis. The Appellant further requested the Respondent No-2 to accept 100 MW power from Baglihar HEP till the Appellant was able to find a suitable procurer of power on a long term basis.
- (t) that the Appellant vide its letter, dated 24.6.2011, informed the Respondent No.2 that it was not able to locate the order, dated 19.1.2011, passed by the State Commission, whereby the State Commission had disposed of the petition filed by the Respondent No.2 being Petition No.15 of 2009 for approval of the PSA entered into between the Appellant and the Respondent No.2 for purchase of 100 MW from the Baglihar HEP and had observed as under: -
- “In these circumstances, the Commission observes that it would be advisable for PSPCL to consider initiating the process of obtaining power to the requisite extent under the competitive bidding route and then determine whether it would still be beneficial to go for the PSA under consideration. Having undertaken this exercise, PSPCL would be free to again approach the Commission for approval of this PSA”*
- (u) that in its letter, dated 24.6.2011, the Appellant had categorically informed the Respondent No-2 that
- the discontinuance of the power was illegal and arbitrary.
 - the Respondent No-2 kept on purchasing power even after disposal of the application for approval of the PSA by the State Commission on 19.1.2011, which fact had never been informed by the Respondent No.2.

- (v) that the Respondent No.2 had approached the State Commission for approval of the said PSA entered into between the Appellant and the Respondent No-2 by way of filing the petition being Petition No. 15 of 2009, but the Appellant was neither informed by the Respondent No.2 about the application nor the Appellant was made a party in the said petition before the State Commission. Moreover, the Respondent No.2 even after disposal of the petition vide State Commission's order, dated 19.1.2011, did not inform the Appellant and kept on purchasing power till 8.6.2011 i.e. almost for five months. The conduct of the Respondent No-2 clearly speaks of the *malafide* intention of the Respondent No.2 to enjoy the benefit of purchase of electricity at lower rate than what was prevalent at that point of time. Respondent No.2 decided to discontinue the purchase the electricity on 8.6.2011, only when the rates in the market had crashed and had fallen below the rate in the said PSA at which the Respondent No-2 was buying power and the Appellant was raising invoices on Respondent No-2.
- (w) that the Appellant vide letter, dated 19.8.2011, addressed to the Respondent No.2 reiterated that the Respondent No-2 had been purchasing 100 MW of power from the Appellant from the Baglihar HEP since 1.4.2009 at a rate which was for long term contract. The rate was much lower than those prevalent for the short term bilateral contracts. The said letter also indicated that the action of the Respondent No.2 in discontinuing the purchase of power w.e.f. 8.6.2011 was not only arbitrary and illegal but also in breach of the terms of the agreed PSA and also the Minutes of the Meeting, dated 26.3.2009. Accordingly, the Respondent No-2 was liable to make a payment of Rs.119,20.43,463 (subsequently revised to Rs 124,51,53,525) as compensation, as the Appellant has suffered serious financial loss and is entitled for compensation as per the clause 11.6 of the PSA.

- (x) **that the Respondent No-2, vide Memo, dated 30.9.2011, refuted the claim of the Appellant for compensation mainly on the ground that the PSA was not approved and signed between the Respondent No-2 and the Appellant.**
- (y) that the Respondent No-3 (JKPDCL), vide letter, dated 3.10.2011, wrote to the Appellant pointing out the *malafide* intention on the part of Respondent No-2 indicating that Respondent No.3 had suffered loss of more than Rs 358.80 crores on account of non-scheduling and scheduling at lower rates and demanded payment for the same.
- (z) that as per clause 11,6 of the PSA the calculation for the purpose of damages in the instant matter is as under:

•	Energy made available to the Purchaser in the preceding year:	634.15 MUs
•	Average energy made available to purchaser in six months of the preceding year	

- (aa) that the Appellant received a letter, dated 4.1.2012, from the Respondent No.3 (JKSPCL) whereby it informed the Appellant that State Water Resources Authority, Jammu has imposed water usage charges under the J & K Water Resources (Regulation and Management) Act, 2010. Accordingly, water usage charges were payable for the power being generated from 450 MW Baglihar HEP. The Appellant in turn immediately informed the Respondent No.2 about the levy of this additional water usage charges by the state of J&K and requested the Respondent No.2 for payment of the water usage charges for the power consumed by the Respondent No.2/PSPCL which was supplied from Baglihar HEP. The Respondent No.2, however, ignored the letter of the Appellant and had not paid the water usage charges as yet. A total amount of Rs.49,45,18,742/- is due towards water usage charges applicable on electricity supplied by the Appellant for the period

from 10.11.2010 to 31.3.2011 (long term), 1.4.2011 to 30.6.2011 (long term) and 1.4.2011 to 31.10.2011 (short term).

- (bb) that 50% of power generated from the Baglihar Power Project is being supplied to J & K Power Development Department pursuant to which J&K State Electricity Regulatory Commission, vide its order, dated 16.7.2011, on determination of Annual Revenue Requirement and Tariff for FY 2011-2012 of Respondent No.3, has allowed re-imburement of water usage charges payable to State Water Resources Regulatory Authority and the same is being paid by J&K Power Development Department to State Water Regulatory Authority.
- (cc) that even sale of power from NHPC's HEPs located in the state of J&K, CERC, vide its order No 106/2011, dated 21.10.2011, had allowed reimbursement of water usage charges levied by State Water Regulatory Authority from the beneficiaries.
- (dd) that as the Respondent No-2 failed to make the payment for the genuine trading margin and on the agreed rate, compensation as per the Compensation Clause of the said PSA for illegal termination of PSA and the Water Usage Charge, the Appellant in March 2013 filed the impugned petition being Petition No 15 of 2013 before the State Commission which petition has been dismissed by the impugned order, dated 10.10.2013, details of which have been mentioned above.

6. We have heard Mr. Ravi Kishore, the learned counsel for the Appellants and Ms. Shikha Ohri and Mr. Anand K. Ganesan, the learned counsel for Respondent No. 1 and 2 respectively. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and written submissions filed by the rival parties.

7. The following issues are involved in the instant Appeal:
- (A) Whether the agreement reached between the Appellant and the Respondent No-2, finalization of terms and conditions of PSA, signing of the minutes of the meeting, dated 26.3.2009, and the subsequent act of Respondent No.2 in purchasing power, had made the PSA as final, conclusive and binding on the parties?**
 - (B) Whether the power sold by the Appellant to the Respondent No-2 under the said unsigned and unapproved PSA, and in terms of the Minutes of the Meeting, dated 26.3.2009, was on a long term basis?**
 - (C) Whether not acting on the directions of the order, dated 19.1.2011, of the State Commission, made the PSA void?**
 - (D) Whether by its own conduct, Respondent No.2 had agreed for all the terms and conditions of the PSA and the Minutes of the Meeting, dated 26.3.2009?**
 - (E) Whether the Appellant is entitled for the compensation, outstanding payments including the trading margin along with the interest and the Water Usage charges as prayed in the petition before the State Commission?**

8. Since, all the issues are inter-connected; we are taking and deciding them together.

9. The following submissions have been made by the Appellants on these issues:

- a. that the State Commission in the impugned order has failed to appreciate the correct factual position that there was a concluded contract between the Appellant and the Respondent No.2, for supply of 100 MW electricity on a long term basis for a period of 12 years.

- b. that the State Commission has failed to appreciate the fact that the Respondent No.2 had agreed to terms and conditions of the PSA, which was subsequently confirmed in the Minutes of Meeting, dated 26.3.2009, which established the intention of the Appellant and the Respondent No-2 to enter into agreement for sale and purchase of power on a long term basis i.e. for the period of 12 years.
- c. that the State Commission has failed to appreciate that the Respondent No.2 after agreeing for the terms and conditions of the PSA had not only agreed to purchase the power but had also acted in the same manner and had purchased the power for a period of almost 27 months at a rate which was as per PSA for a long term agreement.
- d. that the State Commission has failed to appreciate the fact that after agreeing for the terms and conditions of the PSA, the parties to the PSA (Appellant and Respondent No.2) had reiterated the same in the meeting held on 26.3.2009.
- e. that the State Commission has also failed to appreciate the fact that the Respondent No-2 had acted as per the Minutes of the Meeting, dated 26.3.2009, and started drawing power w.e.f. 1.4.2009.
- f. that the State Commission has also failed to appreciate the fact that, it was the responsibility of Respondent No.2 to get the PSA approved from the State Commission and keep the Appellant informed about the same. The Respondent No.2 had never informed the Appellant about filing of the application/petition for approval of PSA before the State Commission and its disposal by the State Commission, vide order, dated 19.1.2011.
- g. that the State Commission has also failed to appreciate the fact that the Respondent No-2 by its conduct of availing power from

1.4.2009 had not only concluded the contract on a long term basis but had also approved the said PSA by making a petition being petition no. 15 of 2009 before the State Commission. As per clause (6) of the Minutes of the Meeting, dated 26.3.2009: *“PSA shall be initialed after approval of Punjab State Electricity Board & signed after approval of the State Regulatory Commission”*. Hence it was agreed by the Respondent No-2 that application would be made to the State Commission after the PSA is approved by the PSEB (State Electricity Board). Thus, the Respondent No-2 had approved the PSA and after the approval the Respondent No-2, approached the State Commission.

- h. that the State Commission has failed to appreciate the fact that the Respondent No.2 even after disposal of the petition for approval of the PSA on 19.1.2011, had continued to draw power under the said PSA for almost 5 months, which conduct of the Respondent No.2 clearly speaks of the intention of the Respondent No.2 to take benefit under the agreed PSA which was on the long term basis and discontinued the same when it did not suit them.
- i. that the State Commission has also failed to appreciate the fact that the State Commission, in its order, dated 19.1.2011, in Petition No. 15 of 2009 did not reject the PSA, which was agreed between the Appellant and the Respondent No.2 but advised the Respondent No.2 to consider initiating the process of obtaining power to the requisite extent under the competitive bidding route and then approach the State Commission for approval of the said PSA. Since, the said PSA was never rejected as such by the State Commission but Respondent No.2 was only advised to go in for competitive bidding process and then approach the State Commission for approval of the said PSA. This clearly indicates the fact that the intention of the State

Commission was to determine whether the tariff in the said PSA was in commensurate with the prevalent market rates. If the Appellant would have been given an opportunity to plead its case then the Appellant could demonstrate to the State Commission that the tenure of the said PSA was on long term basis i.e. 12 years, and the tariff being charged under the PSA was as applicable for long term basis and not for the short term basis.

- j. that the State Commission has failed to appreciate the fact that the Appellant was never given a chance to represent its stand before the State Commission and present its case. More so, the fact that the Respondent No.2 had already started purchasing power under the said PSA which was agreed to be on a long term basis.
- k. that denying an opportunity for hearing and representing its case, is against the principles of natural justice
- l. that the State Commission has failed to appreciate the fact that after its earlier order, dated 19.1.2011, the Respondent No.2 should have initiated the competitive bidding process as advised by the State Commission for approval of the said PSA. But the Respondent No.2 not only ignored the advice of the State Commission, but continued to draw power for almost five months thereafter, under the said PSA, which conduct of the Respondent No.2 is violative of all the tenets of law and equity.
- m. that the rates prevailing in the market at that point of time was beneficial to Respondent No.2 and, accordingly, it continued to draw power till 8.6.2011. When the rates in the market fell and the Respondent No.2 realized that the power was available at a lower tariff than that was under the PSA, the Respondent No-2 arbitrarily, illegally and unilaterally decided to discontinue the purchase of power by terminating the PSA.

- n. **The termination of PSA without assigning any reason clearly indicates the fact that the Respondent No.2 wanted to take unjust benefit.** The Respondent No.2 continued to draw power till such time as it suited them vis-a-vis the prevalent market rates.
- o. that the State Commission has further failed to appreciate the fact that the abrupt termination of PSA by the Respondent No.2 has caused serious financial loss to the Appellant as the Appellant could not locate an alternate buyer which becomes more difficult as the decision of discontinuation was informed to the Appellant on 8.6.2011 at the onset of monsoon by when most of HEPs had already sold power for next 3-4 months and bilateral rates/power exchange rates had drastically fallen in view of onset of monsoon.
- p. that the State Commission has also failed to appreciate the fact that the Appellant with great difficulty was able to sell 100 MW power from the Baglihar HEP to Power Company of Karnataka and Vedanta and MSEDCL in September, 2011 and AP/Chandigarh/WBSEDCL in October, 2011 at a tariff which was much lower than the tariff agreed in the said PSA. The Appellant, accordingly, had suffered substantial financial loss on account of illegal act of Respondent No.2 in abruptly discontinuing the purchase of power. The Appellant had suffered genuine and *bonafide* loss, and accordingly, has sought the compensation from the Respondent No-2 on account of short scheduling and scheduling at lesser rates which is attributed to the illegal act of Respondent No.2 in suddenly discontinuing the purchase of power.
- q. that the State Commission has also failed to consider the fact that it was agreed between the Appellant and the Respondent No-2 that the Trading Margin would be 3% of the tariff in case there was no cap on trading margin by the Central

Commission. It was further agreed that the trading margin will be Central Commission prescribed ceiling or 3% whichever is lower. As per the Regulation on Trading Margin as notified by the Central Commission in January 2010, it did not prescribe a cap on Trading Margin for long term contracts.

- r. that Hon'ble Supreme Court of India in case of Bharat petroleum Corporation vs Great Eastern Shipping Co Ltd (2008) 1 SCC 503 had held: *"That in certain circumstances, offeree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance---an agreement sub silentio. The terms of the Contract between the parties can be proved only by their words but also by their conduct."*
- s. that the State Commission has failed to appreciate that immediately after notification of Regulation on Trading Margin by the Central Commission in January 2010, the Appellant wrote to the Respondent No-2 for payment of trading margin as per the agreed terms i.e. 3% of the tariff. However, keeping in view the good relations with the Respondent No.2, the Appellant agreed to charge a lower trading margin of 9 paise/kWh, to which the Respondent No.2 kept silence over the matter.
- t. that the Appellant and the Respondent No.2 on 31.3.2011, had entered into a fresh PPA for short term where the trading margin was 7 paise/kWh.
- u. that the State Commission has failed to appreciate that the State Water Resources Authority, Jammu had imposed water usage charges under the J& K Water Resources (Regulation & Management) Act, 2010 and the same was payable for the power which was generated from the Baglihar HEP.
- v. that the State Commission has failed to appreciate the fact that the 50% of the power generated from the Baglihar HEP was

being supplied to J & K Power Development Department pursuant to which J & K, State Electricity Regulatory Commission vide its order, dated 16.7.2011, on determination of Annual Revenue Requirement and Tariff for FY 2011-12 of Respondent No-3 i.e. JKSPDCL, had allowed re-imbusement of water usage charges payable to State Water Resources Regulatory Authority and the same is being paid by J & K Power Development Department to State Water Regulatory Authority.

- w. that the State Commission has failed to consider the fact that even for the sale of power from NHPC's HEPs located in the State of J&K, the Central Commission, vide its order No 106/2011, dated 21.10.2011, had allowed reimbursement of water usage charges levied by State Water Regulatory Authority from the beneficiaries.
- x. that the State Commission has further failed to appreciate the fact that the Respondent No.2 had defaulted, it was liable to pay compensation and damages as per the agreed PSA

10. **Per contra, relating to the issue of claim for compensation**, the following submissions have been made on behalf of the contesting Respondent No.2 (PSPCL):-

- (a) that each of the claims of the Appellant was misconceived and was liable to be rejected and the same has rightly been rejected by the State Commission by the impugned order, dated 10.10.2013.
- (b) that the said compensation was claimed by the Appellant as damages for the non-off-take of electricity by PSPCL under an alleged agreement with the Appellant. **The said claim of compensation is liable to be rejected on a preliminary ground itself because the said claim of the Appellant is that**

the Appellant has a contract with Respondent No.3/M/s J&K Power Development Corporation, which owns the generating company in Jammu & Kashmir and that the non-purchase of electricity has caused a loss to the Appellant.

- (c) that the Appellant is only a trading licensee and does not generate and supply electricity on its own. If at all any loss is caused (even assuming any breach), it is only of the generator which is to generate and supply the electricity. The generator has not initiated any action nor is it the case of the Appellant that the Appellant has paid any damages or compensation to the generator for any alleged breach of contract. The generator was the Respondent before the State Commission and also before this Appellate Tribunal in the instant Appeal. The generator has not chosen to appear and claim compensation for any alleged loss or damages suffered by it.
- (d) that the claim of the Appellant as a trading licensee claiming compensation on that score is ex-facie incorrect because it is not even the case of the Appellant that it has paid compensation to the said extent of the amount claimed, which is liable to be compensated to the Appellant by the Respondent-PSPCL.
- (e) that in any event, there is no actionable claims or right available to the Appellant to claim the said amount of compensation from the Respondent No.2/PSPCL as there was no long-term agreement between the parties wherein there was an obligation for PSPCL to purchase electricity from the Appellant for a specified period of time. The Appellant has to first establish the contractual agreement between the parties where under Respondent No.2/PSPCL is under an obligation to purchase electricity for which default the compensation has been claimed by the Appellant.

- (f) that the Appellant is an inter-state trading licensee purchasing and selling electricity in the present case on principal to principal basis. The Appellant and Respondent-PSPCL had entered into negotiations to explore the purchase of electricity by PSPCL from the Appellant. **The electricity was proposed to be procured by PSPCL based on the representation of the Appellant that it has an agreement with Jammu & Kashmir for purchase of electricity.**
- (g) that, however, the purchase of electricity on long term basis being subject to the regulatory jurisdiction of the State Commission, it was not open to Respondent-PSPCL to tie-up purchase of electricity on long term basis without the specific approval of the State Commission. In these circumstances, the Appellant and Respondent-PSPCL had executed a minutes of meeting, dated 26.3.2009, prescribing certain modalities for purchase of electricity by Respondent-PSPCL.
- (h) that it was specifically agreed between the parties that the power will be purchased by the Appellant on day-ahead basis from 1.4.2009. It is also agreed that as and when Medium-Term Open Access Regulations are finalized by the Central Commission, the parties will once again discuss for an agreement for future procurement of electricity. The Power Sale Agreement (PSA) would, however, be executed only after the approval of the State Commission. In this regard, the minutes of the meeting, dated 26.3.2009, inter alia reads as under:

"5. the Appellant has agreed for Day-ahead open access booking for flow of power from 1st April, 2009 till CERC finalizes regulations for Medium-Term open access. The matter will again be discussed with the Appellant as and when Medium-Term regulations are finalized by CERC. However, Open Access charges after delivery point including application fee shall be borne by PSEB.

6. *PSA shall be initialed after the approval of Punjab State Electricity Board & signed after approved by the State Regulatory Commission."*

- (i) that pursuant to the above, the Letter of Intent, dated 31.3.2009, was issued by Respondent-PSPCL to the Appellant, which provided for the details of the power to be procured on day ahead basis by the Respondent-PSPCL, which communication, dated 31.3.2009, inter alia, reads as under:

"PSEB hereby gives its acceptance as detailed below:

<i>Source</i>	<i>Period</i>	<i>MW</i>	<i>Rate</i>
<i>Baglihar HEP in J&K</i>	<i>From 1st April, 2009</i>	<i>0000-2400 = 100 MW</i>	<i>Rs 3.65/KWH Plus Trading Margin (presently 4 Paise/Unit)</i>

The other terms & conditions shall be as per your offer & Minutes of Meeting mentioned above.

You are requested to schedule the power from 1st April-09 on day-ahead reservation of open access corridor basis.

Please acknowledge the receipt of this letter."

Thus, both as per the minutes of the meeting, dated 26.3.2009, and the communication dated, 31.3.2009, the power was to be procured by Respondent-PSPCL from the Appellant only on the day ahead basis and the above was also acted upon by the Appellant and the electricity was sold only on day ahead basis.

- (j) that as per the minutes of the meeting, even after the Medium-Term Open Access Regulations were framed by the Central Commission, the same would not become automatically applicable. It was for the parties to once again discuss and agree upon the procurement of electricity on medium-term basis. The parties namely; the Appellant and the Respondent-PSPCL never discussed and agreed for procurement of electricity on medium-term basis and, therefore, the procurement was only on day ahead basis.

- (k) that only draft of the PSA was discussed between the parties. In the meanwhile, the Respondent-PSPCL had approached the State Commission for approval of the procurement of electricity from the Appellant. However, by order dated, 19.1.2011, the State Commission did not approve the said procurement of electricity or the PSA.
- (l) **that in view of the above, and as agreed to between the parties, the PSA was never signed. The PSA was specifically agreed to be executed only after the approval from the State Commission. In any event, by operation of law, the PSA could not have been signed and enforced without the specific positive approval of the State Commission.**
- (m) that the legal effect of the power procurement not being approved and the non-execution of the PSA is that there are no rights or obligations vested in the parties for continued purchase of electricity. The procurement was agreed to only on short-term day ahead basis in the meanwhile.
- (n) that Respondent-PSPCL had continued to draw electricity on day ahead basis from the Appellant till 8.6.2011. However, by communication, dated 8.6.2011, Respondent-PSPCL informed the Appellant that it shall not be purchasing electricity for the future period. The electricity being procured on day ahead basis, the contract between the parties was only when the electricity was to be procured for the following day. There is no vested right whatsoever in the Appellant to claim continued purchase of electricity by PSPCL or for payment of compensation on failure to purchase electricity.
- (o) that Appellant's contentions that there was a contract between the parties by conduct and, therefore, PSPCL is liable to pay compensation for breach of the contract is misconceived. **The contract between the parties specifically and expressly**

states that purchase of power will only be on day ahead basis. The long-term contract was to be executed only after the approval from the State Commission, which did not happen. In the circumstances, there can be no dispute for the fact that the long-term contract did not come into force between the parties.

- (p) **that with regard to the short-term day ahead contract, PSPCL has fulfilled its obligation for payment of the agreed tariff for the electricity procured. The decisions on contract by conduct and payment of consideration thereof relied on by the Appellant would have any application only if the PSPCL had refused to pay the consideration for the electricity procured.** In such an event, it could not have been the contention of PSPCL that since no PSA was executed; PSPCL would draw the electricity for free and not pay the consideration to the Appellant. However, PSPCL having paid the agreed consideration for the day ahead basis electricity drawn, there can be no claim for any implied contract or contract by conduct as claimed by the Appellant to give any right to the Appellant to claim compensation for non-procurement of electricity by PSPCL for the future.
- (q) that in the circumstances, when the contract between the parties specifically being only on day ahead basis, the condition for execution of long-term PSA not being fulfilled, there can be no question of any claim for compensation by the Appellant for non-procurement of electricity by PSPCL.
- (r) that the contention of the Appellant that it was not aware of the order, dated 19.1.2011, passed by the State Commission whereby the approval to the procurement of electricity on long-term basis was not granted is misconceived. Since, the order passed by the State Commission is a public document and is available on the website of the State Commission. It is not that

the Appellant was not aware of the proceedings before the State Commission.

- (s) that in any event being aware or not aware of the order of the State Commission is of no consequence. The contract between the parties being contingent upon the approval by the State Commission, there can be no actionable claims of the contract to be executed or any claim thereon by the Appellant without the specific positive approval of the State Commission.
- (t) that, in case, the Appellant came to be aware of the order, dated 19.1.2011, passed by the State Commission in the month of June, 2011, no action whatsoever was taken by the Appellant till the filing of the present impugned petition before the State Commission in March, 2013. No legal action was taken by the Appellant in the year 2011 immediately upon coming to know of the order, dated 19.1.2011 passed by the State Commission. Further, the Appellant approached a wrong forum, namely Central Commission (CERC), which had no jurisdiction to entertain the petition. When the Appellant has failed to take any action whatsoever for more than 20 months by its own admission, there can be no question of the Appellant claiming any relief for not being aware of the order for a period of about 6 months. Consequently, there is no merit whatsoever in the claim for compensation made by the Appellant and the same is liable to be dismissed.

11. ***Per contra***, the learned counsel for the Respondent No.2/PSPCL, **on the issue of alleged short payment of trading margin**, has made the following arguments:-

- (a) that the Appellant has claimed the trading margin at the rate of 3% of the tariff, on the premise that the supply of electricity was on long term basis and that the Agreement between the parties provided was for payment of long-term trading margin for which

there was no cap of the Central Commission (CERC). This contention of the Appellant is misconceived.

- (b) that the Agreement between the parties is captured in the Minutes of the Meeting, dated 26.3.2009, and the Letter of Intent/Acceptance of the Appellant, dated 31.3.2009, based on which the electricity supply commenced from 1.4.2009. In the said documents the trading margin was agreed only at 4 paise/kWh. The trading margin on 3% was to be applicable only after removal of cap by the Central Commission.
- (c) that on 26.3.2009, when the Minutes of the meeting was signed, and on 31.3.2009, when the Letter of Intent was issued, the trading margin as per the Central Commission's Regulations was only 4 paise/kWh, which was also applicable to short term day ahead transactions. This was duly captured in the communication, dated 31.3.2009, of the PSPCL. PSPCL had not agreed to any amendment of the 4 paise/kWh trading margin.
- (d) that, subsequently, the trading margin cap was removed only for long term transactions and not for short term transactions. For short term transactions, the trading margin was only increased from 4 to 7 paise/kWh. This stipulation of trading margin at 7 paise/kWh was the maximum ceiling. The Regulations stated that the short term trading margin shall not exceed 7 paise/unit. It could be at any level from 0 paise to 7 paise/unit.
- (e) that in the present case, the communication, dated 31.3.2009, stipulated the trading margin at 4 paise/unit which was then prevalent. The same had to be revised only when the trading margin cap was removed in which case it was 3% of the tariff. The trading margin was never removed for short-term transactions and, therefore, the trading margin continued to be 4 paise/unit, which was duly paid by the Respondent-PSPCL.

- (f) that the Agreement between the parties was not that the trading margin will be the Central Commission's cap as applicable from time to time, but was specific to 3% of the tariff or the Central Commission's cap. The parties to an agreement enter into the agreement need to have a consensus on the commercial terms. The trading margin is a commercial term and is not statutory in nature. The law only prescribes the ceiling and there is no prohibition for the parties to agree to a very low trading margin or even zero trading margin.
- (g) that at the time when the parties had agreed to the trading margin, the same was 4 paise/unit, which was agreed to. The Letter of Intent also recognizes 4 paise/unit, which then existed. There is no particular clause in the Minutes of the Meeting or the Letter of Intent that the trading margin will vary from time to time. The expression '*CERC prescribed ceiling or 3% of the tariff whichever is lower*' is in the context of the contention of the Appellant that there was no ceiling prescribed by the Central Commission.
- (h) that in the circumstances, the parties had agreed that if there was a ceiling by the Central Commission on the trading margin which was lower than 3% of the tariff, the same would be applicable. The fixation of the trading margin was at the time of the agreement and was not made subject to change from time to time. **It was never agreed that the trading margin would vary from time to time based on the applicable trading margin regulations. If otherwise, the clause would have read as '*trading margin will be CERC prescribed ceiling as applicable from time to time or 3% of the tariff whichever is lower*'.** This would require addition of words to the contract which is impermissible.
- (i) that the claim for trading margin by the Appellant at 11 paise/unit is illegal. The trading margin for short-term

transactions was never withdrawn by the Central Commission and only the trading margin on long term agreements was removed. The present transaction between the Appellant and PSPCL being on day-ahead basis, does not qualify as long term supply for the trading margin to be claim at 11 paise per unit. The Appellant has not established the legal basis for the claim and the non-applicability of the trading margin Regulations, which onus is on the Appellant.

12. ***Per contra***, the learned counsel for the Respondent No.2/PSPCL, **on the issue of additional water usage charges in the State of Jammu & Kashmir**, has made the following submissions:-

- (a) that the said claim of the Appellant for payment of water charges, is misconceived. At the outset, the said cess is to be paid by the generator, which is Respondent No.3. The Appellant has not even paid the said cess, or it is not even the case the Appellant that the Appellant is required to pay it.
- (b) that in any event, even the merits of the said claim for payment of water charges is misconceived. Firstly, the contract between the parties was not for purchase of electricity on cost plus basis. It was not that individual cost and expenditure are identified and only a reasonable regulated tariff was being paid by PSPCL, wherein for additional cost and expenditure to be claimed as passed through. There was no restriction or provision for the total amount of profit that can be earned by the generator on generation of electricity. In such circumstances, claiming additional costs as alleged tax paid is not tenable.
- (c) that, further, the minutes of the meeting between the parties provided for only cess, tax or duty imposed on generation, sale or trading of electricity to be additionally payable by PSPCL.

Before claiming any amount under the said clause, the Appellant has to first establish that the tax is on generation of electricity.

- (d) that the Appellant has neither placed the relevant provisions of law based on which the additional amount is claimed as a tax, nor the basis on which the same constitutes a tax on generation or trading or sale of electricity. The claim of the Appellant is that the tax is only on water that flows and not on the generation of electricity. The chargeability of tax appears to be on water and not on generation, though the calculation may be based on generation. The nature of a tax is based on the chargeability provision and so long the Appellant does not establish that the source and chargeability of tax is on generation, trading or sale of electricity, the claim cannot be entertained. The mere claim that the tax is payable, without producing the relevant provisions to establish that the said statutory provisions fulfill the conditions mentioned in the PPA for payment of tax cannot be considered.
- (e) that, further, even assuming that the tax is payable and is on generation of electricity, unless the Appellant establishes that the tax has been actually paid and produces evidence to show the payment, the same cannot be claimed by the Appellant from the Respondent-PSPCL.
- (f) that Section 64A of the Sale of Goods Act does not apply to the present case because the said provision applies only if there is no agreement between the parties to the contrary. In the present case, the Agreement specifically provides for specific elements to be a pass through, which automatically implies that other elements are not a pass through. In case all taxes are pass-through, there is no purpose of specifying specific elements.
- (g) that the said claim of the Appellant is misconceived by the fact that hydro stations in Jammu & Kashmir, the reimbursement of

water cess in the tariff was occasioned not based on being a tax on generation of electricity, but by a separate regulation which was required to be framed by the Central Commission. The Respondent-PSPCL has certain allocations from the Hydro Plants of National Hydro Power Corporation (**NHPC**) in the State of Jammu & Kashmir. NHPC is presently supplying power to PSPCL from ten hydro power plants as per share allocation by Ministry of Power/Government of India.

- (h) that in October 2010, the State Govt. of J & K passed the Jammu & Kashmir Water Resources (Regulation & Management) Act, 2010. In terms of the said Act, water usage charges have been levied on usage of water including generation of electricity by any user and the user is required to obtain license. The State Water Resources Regulatory Authority established by Jammu & Kashmir Govt. by its order, dated 1.2.2011, fixed the water usage charges for generation of electricity @ Rs. 0.25/cu.mtr. of water w.e.f. November 2010, valid for a period of 2 years.
- (i) that NHPC filed a Writ Petition, vide OWP No. 604/2011, in the High Court of Jammu & Kashmir at Jammu challenging the provisions of Jammu & Kashmir Water Resources (Regulation & Management) Act, 2010, wherein the Hon'ble High Court in its interim order, dated 4.5.2011, has directed the NHPC to apply for license and deposit the water usage charges raised by the J & K State Water Resources Regulatory Authority.
- (j) that, thereafter, NHPC filed a petition before the Central Commission bearing Petition No.106/2011 for reimbursement of these charges from the beneficiary states. The Central Commission, vide its Order, dated 21.10.2011, allowed reimbursement of these charges from beneficiary states. Since there was no provision of recovering water usage charges in the Central Commission's Tariff Regulations 2009, the Central Commission, further, directed for an appropriate amendment to

the Tariff Regulations 2009. The said amendment was issued by the Central Commission on 31.12.2012 providing further that said amendment shall be subject to the decision of the Hon'ble High Court of Jammu & Kashmir in the aforesaid petition and the same shall stand modified in accordance with the decision of the Hon'ble High Court.

- (k) that pursuant to the aforesaid amendment, the amounts paid by NHPC to J & K State Water Resources Regulatory Authority, Jammu was billed to PSPCL in six equal monthly installments along with interest. However, the crucial aspect in respect to the above is the relevant clause in the PPAs entered into between PSPCL and NHPC on 23.10.2012, which PPA contains the clause that any taxes, duties, cess etc in respect of generation and supply of electricity would automatically result in revision in tariff. However, the water cess, which was levied, was not covered by the above clause and it is for this reason that the regulation had to be amended by the Central Commission rather than by application of the change in law provision in the PPA.
- (l) that the claim of the Appellant is in fact not pursuant to the arrangement in issue wherein the electricity was procured on day ahead basis in terms of the minutes of the meeting, dated 26.3.2009, and letter, dated 31.3.2009, but under a separate PPA, dated 31.3.2011, for a capacity of 75MW and, hence, the said claim is also misconceived.
- (m) that the disputes under a separate PPA is a different cause of action and cannot be clubbed in one petition, wherein the claim was in relation to the 100 MW for which the PSA was not signed.
- (n) that in any event, the claim of water charges was prevalent even when the said PPA was entered into. Even assuming the water charges to be a tax on generation, the said tax was prevalent when the PPA was entered into and does not apply even as per

Clause 3.7. It was only for taxes which were applicable after the date of the PPA. The water charges were prior to the date of the PPA and the same cannot be claimed.

- (o) that the tariff for the 75 MW was pursuant to a competitive bidding process which included all taxes upto the said date.
- (p) That in view of the above, the Appeal is liable to be dismissed.

13. The learned counsel for the Respondent No.1/State Commission has endeavored to justify the findings recorded in the impugned order by saying that the said findings are based on correct, factual and legal appreciation of the evidence and other material available on record. The instant Appeal is without merit and is liable to be dismissed.

14. We have given details of the rival submissions made by the parties on the aforesaid issues. In the beginning of the judgment, we have also cited the relevant part of the impugned order, dated 10.10.2013, to test the correctness and legality of the findings or conclusion drawn by the State Commission while passing the impugned order. After perusal of the material on record including rival submissions, the following facts are undisputed:

- (a) that the Appellant-PTC India Ltd. is a trading licensee dealing with sale and purchase of electricity. The Respondent No-2-PSPCL is a distribution licensee being successor of the erstwhile PSEB as a result of unbundling of the PSEB by the Government of Punjab in the year 2010. The Respondent No.3 is a power project developer in the State of J&K.
- (b) that the Appellant, power trader and the Respondent No.2, distribution licensee held negotiations and consultations for sale and purchase of electricity on a long term basis from Baglihar HEP of Respondent No-3. The Appellant, vide letter, dated

13.10.2008, offered to sell 100 MW of power from the said hydro project of the Respondent No-3 on a long term basis i.e. for a period of 12 years. After discussions and negotiations between the Appellant and the Respondent No.2 (PSPCL), a Power Sale Agreement (PSA) was agreed stating the exact terms and conditions for sale and purchase of electricity on a long term basis for 12 years from the Commercial Operation Date (COD) of the project.

- (c) that a meeting on 26.3.2009, between the Appellant and the Respondent No.2 regarding sale of power was held and after the meeting, Minutes of the Meeting (MOM), dated 26.3.2009, were signed by the Appellant and the Respondent No.2. The details of the MOM, dated 26.3.2009, have been quoted by us above in this judgment. As per the MOM, the Power Sale Agreement (PSA) would be initialed after approval of PSEB and signed after approval by State Regulatory Commission. The supply of power shall commence from 1.4.2009.
- (d) that the Respondent No.-2/PSPCL, vide letter of intent, dated 31.3.2009, confirmed the minutes of the meeting and requested for supply of power from 1.4.2009. Accordingly, the Appellant started supplying the agreed quantum of power i.e. 100 MW from 1.4.2009 to the Respondent No-2-PSPCL, after obtaining Open Access on day ahead basis.
- (e) that the Respondent No.2 had approached the State Commission for approval of the aforesaid PSA for purchase of 100 MW entered into between the Appellant and the Respondent No-2 by filing the petition, being **Petition No. 15 of 2009, which was disposed of by the State Commission, vide its order, dated 19.1.2011, observing that it would be advisable for PSPCL to consider initiating the process of obtaining power to the requisite extent under the competitive bidding process and then determine whether it would be beneficial to go for the**

PSA under consideration. Further, suggesting the Respondent No.2-PSPCL that having undertaken this exercise, PSPCL would be free to again approach the State Commission for approval of the aforesaid PSA entered into between the Appellant and the Respondent No.2 for purchase of 100 MW of electricity.

- (f) that, though, the Respondent No.2 approached the State Commission for approval of the aforesaid PSA, but the State Commission advised the Respondent No.2 to initiate the process for obtaining power under competitive bidding route. In short, the aforesaid PSA entered into between the Appellant and the Respondent No.2 was not signed by the parties because its approval was not granted by the State Commission. Consequently, the said PSA remained unexecuted and unsigned by the Appellant and Respondent No.2.
- (g) that the Respondent No.2 discontinued the purchase the electricity from the Appellant on 8.6.2011, allegedly causing the aforesaid losses to the Appellant and for recovery of the said compensation, the instant petition being Petition No. 15 of 2013 was filed by the Appellant before the State Commission, which petition has been dismissed by the impugned order, which is under consideration before this Appellant Tribunal.

15. The facts, as emerged from the above are that the Minutes of the Meeting, dated 26.3.2009, were signed by the Appellant (Power Trader) and the Respondent No.2 (Distribution Licensee) and the Letter of Intent, dated 31.3.2009, accepting the Minutes of the Meeting, dated 26.3.2009, as stated above, was issued by the Respondent No.2 to the Appellant. Accordingly, the purchase of electricity was started by the Appellant from the Respondent No.2 from 1.4.2009, under the impression that the PSA would be initialed after the approval of the draft PSA by PSEB, the erstwhile predecessor of the Appellant. Thereafter, the petition for approval of the said PSA was filed before the State Commission by the Respondent No.2 but the approval of

the said PSA was not granted by the State Commission. Consequently, the said PSA remained unsigned by the parties. There are only two documents i.e. Minutes of the Meeting, dated 26.3.2009, and the Letter of Intent, dated 31.3.2009, and on the basis of these two documents, both the parties proceeded further and the 100 MW electricity was purchased by the Respondent No.2 from the Appellant relying on the Minutes of the Meeting, dated 26.3.2009. As per clause 5 of the Minutes of the Meeting, the Appellant has agreed for Day-Ahead open access booking for flow of power from 1.4.2009 till CERC finalizes regulations of Medium-Term- open access. The matter will again be discussed with PTC as and when the Medium-Term regulations are finalized by CERC. It has been provided in the said Minutes of the Meeting, dated 26.3.2009, that PSA shall be initialed after the approval of PSEB and signed after the approval by the State Commission. It is evident from the Letter of Intent, dated 31.3.2009, issued by the Respondent No.2 to the Appellant that the power was to be procured on Day-ahead basis by the Respondent No.2 @ Rs. 3.65/KWH plus trading margin (presently 4 paise/unit). The Respondent No.2 requested the Appellant to schedule the power from 1.4.2009 on day-ahead basis reservation of open access corridor basis. The transaction was on day-ahead basis of open access. The power was to be procured by the Respondent No.2 from the Appellant on day-today basis only on the day-ahead basis and the same was acted upon by the Appellant and the electricity was sold on day-ahead basis by the Appellant to the Respondent No.2.

16. It is further evident from the Minutes of the Meeting, dated 26.3.2009, that even after the framing of Medium-Term Open Access Regulations by the Central Commission, it was for the parties to once again discuss and agree upon the procurement of electricity on medium-term basis, which occasion did not arise. The Appellant and the Respondent No.2 have never discussed and agreed for procurement of electricity on medium-term basis even after framing of the Medium-Term Open Access Regulations by the Central Commission.

17. The position further emerges is that only the draft of PSA was discussed between the Appellant and the Respondent No.2. In the meanwhile, the Respondent No.2-PSPCL had approached the State Commission for approval of the procurement of electricity from the Appellant but, the State Commission, vide order, dated 19.1.2011, did not approve the said PSA or the procurement of electricity. Thus, the PSA was never signed. The PSA was specifically agreed to be executed and signed only after the approval from the State Commission. In our view, in any event by operation of law, the PSA could not have been signed and enforced without the specific approval of the State Commission, which is the Electricity Regulatory Authority in the State. Consequently, the legal effect of the power procurement not being approved and the non-execution and non-signing of the PSA is that there are no rights or obligations vested in the parties to continue purchase of electricity. The aforesaid procurement was agreed only on the short term open access day-ahead basis in the meanwhile. The Respondent No. 2 had continued to draw electricity on day-ahead basis from the Appellant w.e.f. 1.4.2009 to 8.6.2011. The Respondent No.2, vide its communication, dated 8.6.2011, informed the Appellant that it shall not be purchasing electricity for future period. The electricity being procured on day-ahead basis, the contract between the parties was only when the electricity was to be procured for the following day. There is no vested right whatsoever in the Appellant to claim continued purchase of electricity by the Respondent No.2-PSPCL or for payment of compensation on failure to purchase electricity.

18. We are unable to accept the Appellant's contention that in view of the Minutes of the Meeting, dated 26.3.2009, and the Letter of Intent, dated 31.3.2009, issued by the Respondent No.2, there was a contract between the parties by conduct and, therefore, the Respondent No.2-PSPCL is liable to pay the compensation for breach of the contract. We may mention here that the PSA between the Appellant and the Respondent No.2 expressly states that purchase of power will be on day-ahead basis and long-term contract was to be executed only after the approval of the State

Commission, which did not happen. In these circumstances, there appears to be no dispute of the fact that the long-term contract did not come into force or existence between the parties, as the PSA was not approved by the State Commission and was never signed by the parties i.e. the Appellant and the Respondent No.2-PSPCL.

19. We further note that with regard to the short-term day-ahead contract, the Respondent No.2 has fulfilled its obligations for payment of the agreed tariff for the electricity procured. The decision on contract by conduct and payment of consideration thereof as relied on by the Appellant, would have application only if the Respondent No.2 had refused to pay the consideration for the electricity procured. The Respondent No.2-PSPCL having paid the agreed consideration for the day ahead basis electricity drawn, there can be no claim for any implied contract or contract by conduct as claimed by the Appellant so as to give any right to the Appellant to claim compensation for non-procurement of electricity by the Respondent No.2-PSPCL in future. Since, the contract between the parties was only on day-ahead basis, the decision for execution of long-term PSA was not fulfilled hence; there is no question of any claim for compensation by the Appellant for non-procurement of electricity by the Respondent No.2-PSPCL from the Appellant.

20. We further observe that the State Commission, in the impugned order, has legally and correctly appreciated that there was no contract for supply of 100 MW of electricity between the Appellant and the Respondent No.2 for a period of 12 years. Merely affirming the contents of the PSA agreed between the Appellant and the Respondent No.2-PSPCL and the terms and conditions of the said PSA which was subsequently confirmed in the Minutes of the Meeting, dated 26.3.2009, and the Letter of Intent, dated 31.3.2009, issued by the Respondent No.2 does not constitute legal agreement, which could not be approved by the State Commission and which could not be signed by the parties i.e. Appellant and the Respondent No.2-PSPCL. The said PSA was for purchase of power on day-ahead basis,

which cannot be termed as an arrangement for sale of purchase of power on long term basis for the period of 12 years. The parties agreed to the arrangement of day-ahead basis power purchase and they continued for more than 2 years to transact the business at the rate provided in the Minutes of the Meeting and the Letter of Intent. The Respondent No.2 has tried its best for approval of the said PSA from the State Commission by way of filing the Petition No. 15 of 2009 but the said PSA was not approved by the State Commission rather, it vide its order, dated 19.1.2011, suggested the Respondent No.2 to initiate the process for competitive bidding and then in the suitable situation to approach the State Commission again for approval of the said PSA which did not happen. It is evident that the Respondent No.2-PSPCL has made all the outstanding payments to the Appellant and all the claims made by the Appellant in the impugned Petition No. 15 of 2013 cannot be said to be justified and the State Commission has rightly rejected all the claims prayed for by the Appellant in the said petition being Petition No. 15 of 2013.

21. The Dresser Rand S.A. vs. Bindal Agro Chem Ltd. reported in (2006) 1 SCC 751 relating to the Sale of Goods Act, 1930 and also dealing with the provisions of Contract Act resulting into a valid and legally enforceable contract cited by the Appellant is of no help to the Appellant as the facts of the reported case are totally different from the facts of the instant Appeal before us. The present Appeal is not that of the case of Sale of Goods Act. Also Rajasthan Cooperative Dairy Federation Ltd. vs. Maha Laxmi Mingrate Marketing Service Pvt. Ltd. and Others reported in (1996) 10 SCC 405 relating to Government Contract and Letter of intent and non-fulfillment of the conditions precedent stated therein cited by the Appellant cannot enure to the benefit of the Appellant, being the facts totally different. In the same way, Delhi Cloth & General Mills Ltd. vs. Union of India reported in (1988) 1 SCC 86 relating to the promissory estoppels cited by the Appellant is not applicable to the facts of the instant Appeal.

22. The learned counsel for the Appellant has also cited Century Spinning and Manufacturing Company Ltd. and Another vs. The Ulhasnagar Municipal Council and Another reported in 1970(1) SCC 582 relating to the exercise of High Court's jurisdiction under Article 226 of the Constitution of India and the representation relating to the liability to carry out obligation is not applicable to the facts of the instant case. Further, Maharshi Dayanand University and Another vs. Anand Coop. L/C Society Ltd. and Another reported in (2007) 5 SCC 295 relating to Arbitration and Conciliation Act, 1996 and the formation of contract by deed cited by the Appellant is not applicable to the facts before us because in the instant case, the PSA has never been approved by the State Commission as required under the Electricity Act, 2003 and the State Regulations etc. and, consequently, there could be no execution of PSA/Agreement and the same could not be signed by the parties. The legally concluded contract never came into the existence.

23. In view of the above discussions, we agree to all the findings and conclusions drawn by the State Commission in the impugned order and we do not find any perversity or illegality in the impugned order. Consequently, all the issues are decided against the Appellant and the Appeal is liable to be dismissed.

24. **SUMMARY OF OUR FINDINGS:**

24.1 In case, a Power Sale Agreement (PSA) is agreed between the power trader and the distribution licensee for sale and purchase of electricity on a long term basis for 12 years from the Commercial Operation Date (COD) of the project of some power generator and the condition of the draft PSA is that the said draft PSA shall be initialed after the approval of the concerned State Electricity Board (the predecessor of the distribution licensee) and after the initial of the draft PSA by the State Electricity Board, the petition has to be filed for the approval of the said draft PSA before the State Commission, as per the terms and conditions of the draft PSA, and further, if the PSA is not approved by the State Commission and the PSA

consequently remains unsigned by the parties to it, the draft PSA cannot be said to be a legally binding contract because the draft PSA has not been converted into the legal contract giving rise to the rights and obligations of the parties to the contract.

24.2 The subsequent meeting held on 26.3.2009 between the Appellant/Power Trader and the Respondent No.2/Distribution Licensee regarding sale of power whereby the terms of the said PSA were crystallized and reiterated and reduced to the Minutes of the Meeting (MOM) and signed by the parties and in pursuance thereof, a Letter of Intent/acceptance, dated 31.3.2009, was issued by the distribution licensee to the power trader and in case both the parties acting upon the said minutes of the meeting and the power trader started selling contracted quantum of power to the distribution licensee on Day-Ahead Open Access basis and the distribution licensee procuring the same on day-ahead basis and both continued to act for about 2 years, the said PSA could be said to be converted into a legal and enforceable contract as a result of conduct of the parties. The minutes of the meeting and letter of intent can only be said to be the guiding factor for both the parties. But the said PSA cannot be said to have been converted into an agreement legally enforceable in law. The PSA which is not approved by the State Commission and consequently, not signed by the parties to the PSA is of no legal consequence. The facts of the present case clearly depict that all the outstanding dues relating to procurement of power, as per the minutes of the meeting, have legally and correctly been paid by the Respondent No.2/Distribution Licensee to the Appellant/Power Trader. The claims of the power trader regarding compensation for abruptly discontinuing the purchase of power by the distribution licensee from the power trader cannot be said to be justified. Trading margin has legally been paid by the Respondent No.2/Distribution Licensee to the Appellant/Power Trader. All the claims made by the Appellant have rightly and legally been rejected by the State Commission.

24.3 The State Commission has rightly held that the PSA between the Appellant and the Respondent No.2, the finalization of terms and conditions

of the PSA, signing of the Minutes of the Meeting (MOM), dated 26.3.2009, and subsequently, acceptance of the minutes of the meeting by the Respondent No.2 through its Letter of Intent, dated 31.3.2009, cannot make the said PSA as conclusive and legally binding on the parties.

24.4 The State Commission has also legally and correctly held that the power sold by the Appellant to the Respondent No.2 under the unsigned and unapproved PSA and in terms of the Minutes of the Meeting, dated 26.3.2009, cannot be said to be power purchase on a long term basis because after the framing of regulations by the Central Commission, the matter was further to be discussed between the parties and no such occasion arose for such kind of discussion even after framing of the relevant regulations by the Central Commission.

24.5 The State Commission has rightly concluded that the Appellant is not entitled for any compensation allegedly said to be outstanding payments including trading margin along with interest and water usage charges as prayed in the petition before the State Commission.

25. In view of the above, we do not find any merits in the Appeal and the instant Appeal, being Appeal No. 329 of 2013, is hereby dismissed without any order as to costs. The impugned order, dated 10.10.2013, passed by the State Commission in Petition No. 15 of 2013, is hereby affirmed.

PRONOUNCED IN THE OPEN COURT ON THIS 9TH DAY OF JANUARY, 2015.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/NON-REPORTABLE

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