

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO.11 OF 2016
&
I.A. NOS.22, 23 AND 58 OF 2016**

Dated: 6th May, 2016.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**HARYANA VIDYUT PRASARAN)
NIGAM LIMITED,)
Through its Authorised)
Representative Shakti Bhawan,)
Sector-6, Panchkula, Haryana – 134)
112.) ... **Appellant****

AND

1. **HARYANA ELECTRICITY)
REGULATORY COMMISSION,)
Bays Nos.33-36, Sector-4,)
Panchkula – 134 112, Haryana,)
India.)**
2. **JHAJJAR KT TRANSCO)
PRIVATE LIMITED,)
101, Part III, GIDC Estate, Sector)
28, Gandhinagar – 382 028,)
Gujarat, India.) ... **Respondents****

Counsel for the Appellant(s) Mr. Varun Pathak,
Counsel for Respondent(s) Mr. A.K. Rampal (Rep.) of **R-1**.
Mr. Akhil Sibal for **R-2**.

J U D G M E N T

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

1. In this appeal, Order dated 16/12/2015 passed by Haryana Electricity Regulatory Commission (“**the State Commission**”) is challenged.

2. It is necessary to set out facts leading to this appeal. CLP India Pvt. Ltd. was setting up a 2 x 660 MW thermal power plant at Jhajjar under Case-2 competitive bidding guidelines issued by the Ministry of Power, Government of India. Power from this power plant was to be purchased by Uttar Haryana Bijli Vitran Nigam Limited (“**UHBVNL**”) and Dakshin Haryana Bijli Vitran Nigam Limited (“**DHBVNL**”), the distribution licensees. Haryana Power Purchase Centre (“**HPPC**”) is the Nodal Agency for both the distribution

licensees. In this connection, HPPC signed an agreement with CLP India Pvt. Ltd. on behalf of UHBVNL and DHBVNL. The tariff for this purchase was adopted by the State Commission in accordance with Section 63 of the Electricity Act, 2003 (“**the said Act**”).

3. The Appellant is a fully owned company of the Government of Haryana and being the State Transmission Utility, is engaged in the development and promotion of State transmission grid within the State of Haryana. On 13/1/2009, the Appellant issued a tender for inviting persons to design, build, finance, operate and transfer (DBFOT basis) a 400 KV Transmission line between Jharli (Jhajjar) to Kabulpur, Rohtak with capacity to transfer 2430 of MWs of electricity. The format of the Transmission Agreement was attached to the bid.

4. On 11/9/2009, Jhajjar KT Transco Pvt. Ltd. (JKTPL/Respondent No.2) which is a joint venture of

Kalpataru Power Transmission Ltd. and Techno Electric and Engineering Company Limited, made a bid.

5. As the successful bidder required a transmission licence from the State Commission under Section 14 of the said Act for transmission of electricity from 2 x 660 MW thermal power plant at Jhajjar, the Appellant filed a petition in the State Commission seeking amendments to the Haryana Electricity Regulatory Commission (Conditions of Transmission Licence) Regulations, 2008 in order to provide for project specific licence along with area specific transmission licence. A copy of transmission agreement was submitted to the State Commission. The State Commission approved the transmission agreement to be entered into with the successful bidder.

6. On 15/4/2010, the Appellant declared JKTPL as successful bidder because JKTPL had sought the lowest amount of grant. A letter of award was issued in its favour. On 28/5/2010, the Transmission Agreement dated

28/5/2010 (“**the Transmission Agreement**”) was executed between the Appellant and JKTPL.

7. On 17/6/2010, JKTPL filed an application for obtaining Transmission Licence in State Commission under Section 14 of the said Act. On 26/10/2010, the State Commission passed an order granting licence to JKTPL. The order specifically stated that the State Commission had approved the Transmission Agreement. We shall advert to the relevant clauses of the Transmission Licence a little later.

8. It appears that thereafter disputes arose between the Appellant and JKTPL. On 3/2/2012, the Appellant issued a letter to JKTPL for deposit of penalty. The relevant portion thereof reads as under:

“Schedule-G of Transmission Agreement provides five Project Milestones to be complied by the Concessionaire during construction, to ascertain the timely completion of the project. These project

milestones are date bound and are to be governed from Appointed Date.

The date of completion of Project Milestone – V was 5th October, 2011. Independent Engineer vide letter No.LII/GEOE10126/11-12/14 dated 01.02.2012 has certified the date of completion of Project Milestone-V is 15.01.2012 (copy enclosed).

It is therefore requested that the penalty amounting to Rs.7.5 lacs par day from 5th October, 2011 on account of failure to achieve the Project Milestone – V till its completion (i.e. 15.01.2012) in line with clause 12.3.2 of Transmission Agreement including interest as per the provisions of Transmission Agreement be deposited to authority.”

9. On 15/2/2012, JKTPL requested the independent engineer under the Transmission Agreement to issue a provisional certificate, certifying that the entire transmission line had been duly energized and successfully tested.

10. On 9/4/2012, JKTPL submitted its case to the independent engineer for seeking grant of extension of time of

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- a) 90 days on account of scope change;
- b) 68 days on account of stay granted by the High Court;
- c) 108 days on account of civil commotion.

11. On 30/4/2012, JKTPL protested against the decision of the Appellant to levy liquidated damages and wrote a letter to them stating that such a decision was contrary to the terms of the Transmission Agreement.

12. On 25/7/2012, JKTPL made a detailed representation to the Appellant stating that –

- (a) the appointed date may be modified from 9/11/2010 to 9/12/2010;
- (b) the Project Completion Schedule should be suitably modified on account of hindrances faced during execution, including execution of works on a new route; and

- (c) the COD should be considered as 17/2/2012 i.e. 72 hours after system energization since subsequent works came under punch list points.

13. On 13/9/2012, while making payment for the invoices raised by JKTPL, the Appellant deducted about Rs.14 crores from the invoices by referring to Clauses 26.11, 12.3.2, 15.2, 47.4 of the Transmission Agreement.

14. On 2/9/2013, JKTPL requested for a mediation by the independent engineer.

15. By letter dated 9/12/2013, the Appellant refused to revise the appointed date and appropriated Rs.14 crores payable to JKTPL. The Appellant also refused to grant extension of time.

16. By letter dated 5/7/2014, JKTPL invoked Clause 44.2 of the Transmission Agreement and sought conciliation of the claims of JKTPL.

17. Vide its letter dated 26/9/2014, the Appellant refuted all the claims made by JKTPL and the conciliation was rejected on the basis of various clauses of the Transmission Agreement, referred to by it.

18. Upon failure of the conciliation proceedings, JKTPL issued letter dated 9/10/2014 invoking the Arbitration Clause i.e. Clause 44.3 of the Transmission Agreement since the entire dispute raised by the Appellant was on the interpretation of different clauses of the Transmission Agreement and thereby appointed Justice Vasishth as nominee arbitrator.

19. On 3/11/2014, the Appellant appointed Shri S.K. Bansal as its nominee arbitrator without disputing the applicability of the arbitration agreement or even raising the plea that the entire dispute must go to the State Commission for its exclusive adjudication. The two arbitrators appointed Justice

M.R. Agnihotri as the presiding arbitrator. First hearing was scheduled to be held on 13/12/2014.

20. On 7/2/2015, JKTPL filed its statement of claim before the Arbitral Tribunal. The Appellant rejected the claim by its letter dated 26/9/2014.

21. According to JKTPL the Appellant participated in the proceedings and sought for extension of time to file its statement of defence or counter-claim. However, instead of filing its statement of defence or counter-claim on 8/5/2015 the Appellant filed an application under Section 16 of the Arbitration Act in the State Commission challenging its jurisdiction to proceed with the arbitration proceedings. The said application is pending. It is the case of JKTPL that the entire dispute between the parties arises out of the terms of the Transmission Agreement dated 28/5/2010 which has been executed after approval by the State Commission prior to the grant of Transmission licence to JKTPL. According to

JKTPL under clause 10 of the Transmission licence it would only be the Arbitral Tribunal appointed by the State Commission which would have jurisdiction to decide the disputes raised by the Appellant.

22. Since the Appellant raised objection to the jurisdiction of the Arbitral Tribunal on 22/9/2015 JKTPPL filed an application before the State Commission under Section 86 of the said Act with the following prayers:

“It is, therefore, most respectfully and humbly prayed that this Hon’ble Commission may be pleased to :

- a) Accept the instant petition in the present form;*
- b) Allow the Petitioner to place on record such other documents as may be required for the purposes of this petition.*
- c) Clarify (in terms of Paragraph 15 hereinabove) as to whether the disputes raised by the Petitioner before the already constituted Arbitral Tribunal, which arise out of the Agreement*

between the Petitioner and the Respondent be adjudicated upon by this Hon'ble Commission despite Clause 10 of the Transmission Licence issued and granted by this Hon'ble Commission by an earlier order dated 26/10/2010 in proceeding of Case No.HERC/PRO-11 of 2010 as per the provisions of Electricity Act, 2003 or be so adjudicated by the Arbitral Tribunal;

- d) *Pass such other and further order(s) as this Hon'ble Commission may deem fit and proper in the circumstances of the case”.*

23. On 8/10/2015, the Appellant filed its reply to the application of JKTPL. JKTPL filed its rejoinder on 30/10/2015. The State Commission passed the impugned order on 16/12/2015.

24. The State Commission accepted the contention of the Appellant that the private Arbitral Tribunal constituted by parties was illegal. The State Commission directed the parties to start the process of appointing new arbitrators. However, after reproducing the arguments of counsel on the question

that claims made by Respondent No.2 will have to be adjudicated by only the State Commission, it chose not to express any opinion on the said question. The State Commission observed that it shall deal with the said issues as and when they arise. The State Commission observed that the dispute shall be referred for arbitration in line with Section 86(1)(f) and Section 158 of the said Act. The relevant portion of the impugned order reads thus:

“In view of the above, the Commission observes that there is convergence of the views of the opposite parties that the Commission has the powers to either adjudicate itself or refer the matter for adjudication. The Commission, at this stage, is not going into the merits of rival contentions of the parties and not expressing any opinion regarding impact on tariff due to relief, if any, that may be granted to the Petitioner as the tariff was adopted by the Commission under Section 63 of the Electricity Act, 2003. The same shall be dealt by the Commission as and when the issue arises in accordance with the Order / Judgments of the Courts / Tribunal of competent jurisdiction.

The Commission, in line with Section 86(1)(f) and Section 158 of the Electricity Act, 2003, orders that the present dispute shall be referred for arbitration. The Commission further orders that both

the parties i.e. Jhajjar KT Transco Pvt. Ltd. and Haryana Vidyut Prasaran Nigam Ltd. shall, within fifteen days from the date of this order, submit to the Commission along with an Affidavit, their list of two persons each having relevant knowledge and expertise for the Commission to choose one out two persons and appoint it as Arbitrator(s) in the present case. While doing so the parties shall keep in view the provisions of the Ordinance, 2015 on the issue independence / impartiality of the proposed arbitrator(s). The third Arbitrator shall be nominated by the two Arbitrators appointed by the Commission.”

25. We find some substance in the submission of the Appellant that the State Commission’s order should have been more clear and lucid. We would have remanded the matter to the State Commission for that purpose, but that would entail further delay. We, therefore, proceed to deal with the appeal.

26. We must first give the gist of rival contentions. We have heard Mr. Varun Pathak, learned counsel appearing for the Appellant. We have also perused the written submissions filed by him. Gist of the Appellant’s submissions is as under:

a) Impugned order is a non-reasoned order and deserves to be set aside on this ground alone. Reliance is placed on the following judgments.

i) **Assistant Commissioner, Commercial Tax Department Works Contract & Leasing, Kota v. Shukla and Brothers¹.**

ii) **Judgment of this Tribunal in Noida Power Company Ltd v. UPERC & Anr.²**

b) Under Section 86(1)(f) of the said Act the State Commission has the discretion to either adjudicate the matter on its own or refer it to adjudication. But the discretion has to exercised on established parameters with respect to exercise of discretion and such exercise of discretion can be examined by this Tribunal under Section 111 of the said Act (See **Tamil Nadu Generation and Distribution Corporation Ltd., v. PPN Power**

¹ (2010) 4 SCC 785

² Judgment dated 28/5/2015 in Appeal No.88 of 2015

**Generation Company Pvt. Ltd.³, Gujarat Urja Vikas
Nigam Ltd., v. Essar Power Ltd.⁴.**

- c) Clause 10 of the Central Government Guidelines pertaining to adoption of tariff for transmission service provides that any dispute under the Transmission Agreement shall be subject to the jurisdiction of the Appropriate Regulatory Commission in terms of the provisions of the said Act.
- d) Clause 10.1 of the Transmission Licence provides that disputes arising out of any agreement or contract entered into by JKTPL shall be resolved in accordance with the provisions of that agreement. Clause 10.2 provides that all other disputes between the transmission licensee and any other licensee shall be adjudicated upon by the State Commission.

³ (2014) 11 SCC 53

⁴ (2008) 4 SCC 755

- e) Relevant provisions of the Transmission Agreement (Clauses 44.1 to 44.4.2) make it clear that upon failure of conciliatory process the dispute raised between the parties is to be referred for adjudication before the State Commission. If the dispute raised by either of the parties to the Transmission Agreement is not to be adjudicated upon by the State Commission then the matter can be referred to arbitration. The arbitration process contemplated under the Transmission Agreement is of a residuary nature and is applicable in case the State Commission does not or cannot exercise regulatory jurisdiction.
- f) In a case where tariff has been adopted under Section 63 of the said Act, any dispute which has the implication on the tariff so adopted, ought not be referred to arbitration by the State Commission. The State Commission has erroneously kept the said issue open [*For scope of Section 63, see Orders passed by APTEL in **Essar Power Ltd. v.***

**UPERC & Anr.⁵ and Lance Amarkantak Power Pvt. Ltd
v. MPERC & Ors.^{6]}**

- g) Regulations override contracts (**PTC India v. CERC⁷**).
- h) The State Commission has the power to either adjudicate a dispute on its own or refer it to arbitration (**National Insurance Co. Ltd. v. Keshav Bahadur & Ors.⁸**).
- i) If arbitral proceedings are allowed to be commenced then the remedy of the Appellant would be to challenge the same under Section 34 of the Arbitration & Conciliation Act 1996 (“**the Arbitration Act**”) which section is much narrower in scope and ambit than the appeal under Section 111 of the said Act. This has the effect of taking away the Appellant’s right of appeal. (See – **Himachal Pradesh State Electricity Regulatory Commission &**

⁵ 2012 ELR (APTEL) 182

⁶ Order dated 21/10/2008 in Appeal No.71 of 2008 and IA No.102 of 2008

⁷ (2010) 4 SCC 603

⁸ (2004) 2 SCC 370

Anr. v. Himachal Pradesh State Electricity Board⁹,
Videocon International Ltd. v. SEBI¹⁰.

- j) Exercise of discretion is contrary to Law (See – **Bharat Heavy Electrical Ltd. v. M. Chandrashekar Reddy & Ors.¹¹**).
- k) The argument that the Appellant did not object to the arbitration clause in the Transmission Agreement is misplaced, because the intent of the parties was to arbitrate if the State Commission does not have jurisdiction.
- l) Reliance placed on **Gujarat Urja Vikas Nigam Ltd.** is misplaced. The said judgment does not carve out an exception to the statutory jurisdiction of the State Commission.

⁹ (2014) 5 SCC 219

¹⁰ (2015) 4 SCC 33

¹¹ (2005) 2 SCC 481

- m) Section 158 of the said Act does not in any manner restrict the statutory jurisdiction of the State Commission under Section 86(1)(f) of the said Act.
- n) Function of the State Commission under Section 86(1)(f) of the said Act (being akin to the power under Section 11(6) of the Arbitration Act) being a judicial function, in light of Constitution Bench judgment of the Supreme Court in **SBP & Co. v. Patel Engineering Ltd. & Anr.**¹² cannot be delegated by way of a licence issued to Respondent No.2 by the State Commission.
- o) JKTPL had in its application before the State Commission referred to adjudication by the State Commission as one of the legal possibilities. Thus, it had conceded to the adjudication by the State Commission.

27. Ms. Shikha Ohri, learned counsel appearing for the State Commission has supported the impugned order.

¹² (2005) 8 SCC 618

- a) Under Section 86(1)(f) of the said Act, the State Commission is vested with discretion to adjudicate upon disputes between licensees and generating companies or refer such disputes for arbitration. The State Commission has expressed its discretion and referred the matter to arbitration.
- b) The State Commission has kept the issue regarding impact of the arbitral award on the tariff adopted under Section 63 of the said Act open to be decided later.
- c) The State Commission took note of the long pendency of the dispute and decided that an Arbitral Tribunal is better equipped to decide the matter in an expeditious manner. In **Gujarat Urja Vikas Nigam Limited**, the Supreme Court has observed that there are various reasons why the State Commission may not decide the dispute itself and may refer it to arbitration. Examined in that light, it is clear that the State Commission has exercised its

discretion after considering relevant factors. It is a proper exercise of discretion. Hence, the appeal be dismissed.

28. We have heard Mr. Akhil Sibal, learned counsel appearing for Respondent No.2 and perused the written submissions filed by him. Gist of the submissions of Respondent No.2 is as under:

- (a) Clauses 10.1 and 10.2 of the Transmission Licence provide that any disputes arising out of the Transmission Agreement dated 28/5/2010 shall be determined by arbitration in terms of the said Agreement. The Transmission Licence is a statutory licence, to which no challenge is raised by the Appellant. It is an admitted position that the dispute in the present case arises out of the Transmission Agreement. Having actively participated in the process of grant of the project specific Transmission Licence in favour of JKTPL and having not challenged the Transmission Licence conditions, the

Appellant cannot now contend that the dispute in the instant case ought to be adjudicated by the State Commission.

- (b) By providing in Clauses 10.1 and 10.2 of the Transmission Licence that any dispute arising out of the Transmission Agreement dated 28/5/2010 shall be determined by arbitration in terms of the said Agreement, the State Commission has exercised its discretion to incorporate specific conditions in the Transmission Licence providing for arbitration. Therefore, there is no question of exercising discretion under Section 86(1)(f) of the said Act to adjudicate the dispute between licensees to itself or refer it for arbitration.
- (c) It is evident from Clauses 5.1.2 and 5.1.5 of the Transmission Agreement that the Appellant is obligated to strictly observe and follow the terms of the Transmission Licence which is otherwise a requirement of law in terms of the said Act.

- (d) Reliance placed on **Gujarat Urja Vikas Nigam Limited** is misplaced. In that case, agreement in question was not part of any licence under the said Act and there was no licence condition stipulating arbitration in terms of the agreement.
- (e) It is wrong to contend that the impugned order is a non-reasoned order.
- (f) JKTPL has not consented to the State Commission adjudicating the matter itself. In any case, there is no averment in the instant appeal that JKTPL had consented to adjudication of disputes by the State Commission. It merely sought clarification regarding jurisdictional objection raised by the Appellant.
- (g) When JKTPL invoked arbitration vide letter dated 8/10/2014, the Appellant did not protest. It proceeded to appoint its own arbitrator.

(h) In any case and without prejudice to JKTPL's contention that JKTPL did not consent, it is submitted that JKTPL cannot be held bound by the alleged consent. There can be no estoppel against law/statute. Reliance is placed on the following judgments in support of this contention.

1. **Vijay Narayan Thatte & Ors. v. State of Maharashtra & Ors.**¹³ [Relevant page 52 to 53];
2. **Plasmac Machine Manufacturing Co. P. Ltd. v. Collector of Central Excise, Bombay**¹⁴. [Relevant page 57];
3. **State of Rajasthan v. Surendra Mohnot**¹⁵. [Relevant page 66];
4. **P. Nallammal & Ors. Vs. State**¹⁶ [Relevant pages 74 to 75].

(i) Judgments relied upon by the Appellant have no relevance. They are rendered in the context of a party

¹³ (2009) 9 SCC 92 paras 24 to 25

¹⁴ (1991) Supp. 1 SCC 57 para 6

¹⁵ (2014) 14 SCC 77 para 17

¹⁶ (1999) 6 SCC 559 para 7

failing to raise jurisdictional objection at the earliest available opportunity.

- (j) In any event, even with regard to jurisdictional objections, it is only objections to territorial or pecuniary jurisdiction which are required to be raised at the first available opportunity, failing which, the party may be precluded from subsequently raising any such objection, whereas if the jurisdictional objection relates to the subject matter which the concerned legal forum has jurisdiction to deal with, such an objection can be raised at any stage even if not taken at the earliest opportunity. In other words, there can be no estoppel against a party from raising an objection as to lack of subject matter jurisdiction at any stage. In this regard, reliance is placed on the judgment of the Supreme Court in **Harshad Chiman Lal Modi v. DLF Universal & Anr.**¹⁷.

¹⁷ (2005) 7 SCC 791 para 30

- (k) The State Commission has arrived at the correct conclusion by deferring consideration of any potential consequence on tariff as a result of the adjudication by the Arbitral Tribunal, until after such adjudication, when, if at all, the issue of such tariff impact arises and is required to be considered in light of any award that may be passed.
- (l) In any event, assuming that the relief as claimed by JKTPPL is granted, there can be no impact on the tariff under the Transmission Agreement between the parties.
- (m) Having entered into the Transmission Agreement which prescribes arbitration and having actually participated in the grant of the Transmission Licence to JKTPPL which directs arbitration in terms of the Transmission Agreement, the grievance of the Appellant that its right to appeal to the Tribunal is prejudiced by arbitration is misplaced.

(n) The argument of the Appellant that arbitration can be done under the Transmission Agreement only if parties cease to be licensees is a figment of imagination and completely unfounded. Sections 79, 86 and 158 of the said Act indicate that arbitration is neither prohibited nor impossible in disputes between licensees and licensors. It is in fact encouraged where the licence itself mandates an arbitration between the parties. The Appellant, however, is seeking to render Sections 79, 86 and 158 of the said Act nugatory by contending that only after the expiry of the Licence, there can be arbitration between the parties. This argument is liable to be rejected at the outset as being contrary to the plain reading of the said Act.

29. We will have to first go to the relevant clauses of the Transmission Agreement. They read as under:

“44.1 Dispute Resolution.

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer either party may require such Dispute to be referred to Managing Director of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (Seven) day period or the Dispute is not amicably settled within 15(fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2 and is not

required under Applicable laws to be adjudicated or referred to arbitration by the Commission, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Panchkula, and the language of arbitration proceeding shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the “Award”). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by the Commission

44.4.1 In the event a Dispute is required under Applicable Laws to be adjudicated upon by the

Commission such Dispute shall, instead of reference to arbitration with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly.

For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

44.4.2 Where any dispute is referred by the Commission to be settled through arbitration, the procedure specified in Clause 44.3 shall be followed to the extent applicable.”

30. The basic contention of the Appellant is that in light of the relevant provisions of the said Act, the Transmission Agreement and the Transmission Licence and in light of the judgment of the Supreme Court in **Gujarat Urja Vikas Nigam Limited**, the State Commission was duty bound to adjudicate the dispute raised by JKPTL, itself. It should not have referred it to arbitration. Related to this is the contention that in case where tariff has been adopted by the State Commission under Section 63 of the said Act, disputes raised by the licensees having an impact on the tariff so adopted by the State

Commission cannot be adjudicated through arbitration. Such disputes must be adjudicated by the State Commission.

31. The Transmission Licence defines the term “Agreement” as Transmission Agreement dated 28/5/2010. In this connection, Clause 1(5) of the Transmission Licence is relevant, which reads thus:

“1(5) ‘Agreement’ means the “Transmission Agreement”, its Recitals, the Schedules and any amendments thereto made in accordance with the provisions contained in the Transmission Agreement entered into by transmission licensee with Haryana Vidyut Prasaran Nigam Limited, Panchkula (HVPNL) on 28th May, 2010 and referred as agreement in the license.”

32. Clause 10 of the Transmission Licence relates to “Dispute Resolution”. It reads thus:

“10. Dispute resolution.

10.1 The disputes arising out of any agreement or contract shall be resolved in accordance with the provisions of the agreement.

10.2 The Commission shall adjudicate disputes (other than those arising out of agreement) between the transmission licensee and any other licensee or between the transmission licensee and generating companies and refer any dispute for arbitration in pursuance of clause (f) of sub-section (1) of Section 86, read with Section 158 of the Act and as per the HERC (Conduct of Business) Regulations 2014 Regulations No.HERC/06/2004.)”.

33. Thus, as per the Transmission Licence, the disputes arising out of any agreement or contract shall be resolved in accordance with the provisions of the agreement i.e. the Transmission Agreement dated 28/5/2010. But disputes other than those arising out of the Transmission Agreement dated 28/5/2010 between the transmission licensee and generating companies shall be adjudicated by the Commission. The Commission can refer such dispute for arbitration in pursuance of Clause (f) of Sub-section (1) of Section 86 read with Section 158 of the said Act.

34. There is no dispute about the fact that in this case the dispute between the parties arises out of the Transmission

Agreement dated 28/5/2010. Therefore, the present dispute must be resolved in accordance with the provisions of the Transmission Agreement dated 28/5/2010. As we have already noted after the dispute arose on 5/7/2014, JKTPL invoked Clause 44.2 of the Transmission Agreement and sought conciliation of the claims of JKTPL by letter dated 5/4/2014. The Appellant vide its letter dated 26/9/2014 refuted all the claims made by JKTPL. The Appellant rejected conciliation. Thereupon vide its letter dated 9/10/2014, JKTPL invoked Clause 44.3 of the Transmission Agreement and appointed Justice Vasishth as its nominee arbitrator as per Clause 44.3.2. The relevant portion of the said letter reads as under:

“Since the period of conciliation has expired, we are now left with no option but to invoke Clause 44.3 of the Agreement for adjudication of disputes that have been raised by us. Clause 44.3.2 of the Agreement provides that a board of three arbitrators has to be constituted, one to be appointed by each party and the third to be appointed by the two arbitrators, failing which the third arbitrator would be appointed in terms of the Rules of the International Centre for Alternative Dispute Resolution.

We accordingly, appoint Hon'ble Mr. Justice I.P. Vasishth (address: House No.385, Sector 16-A, Faridabad – 121002) as our nominee arbitrator and call upon you to appoint your nominee arbitrator within a period of 30 days from the date of receipt of this mail, failing which we shall be constrained to proceed as advised.”

35. By letter dated 3/11/2014, the Appellant appointed its nominee arbitrator. The Appellant did not dispute the applicability of the arbitration agreement. The Appellant did not raise any plea that the dispute must be adjudicated by the State Commission. The Appellant appointed its nominee arbitrator and the Arbitral Tribunal was constituted. The relevant portion of the said letter reads thus:

“On your aforesaid request, HVPNL appoints Er. S.K. Bansal, Chief Engineer/MM, HVPNL, Panchkula as Arbitrator. The third Arbitrator will be appointed by both the nominee Arbitrators in accordance with the clause 44.3.2 of the Transmission Agreement.”

36. Pertinently, on 13/12/2014, notice of the first meeting of the Arbitral Tribunal was issued and on 18/1/2015 the meeting took place. On 7/2/2015, JKTPL filed its statement of claim before the Arbitral Tribunal raising following claims.

- (i) Wrongful fixation of appointed date (Clause 48 read with Clause 4.1.2 of the Transmission Agreement)
- (ii) Non-fulfillment of conditions and/or force majeure condition leading incurring of extra time and cost referable to Clauses 6, 10, 34 of the Transmission Agreement.
- (iii) Non-extension of projection completion schedule and commercial operation date and unjust levy of liquidated damages referable to Clauses 4, 12 and 15 of the Transmission Agreement.

37. JKTPL through the above statement made a claim of Rs.48 crores approximately against the Appellant.

38. It is only on 8/5/2015 that the Appellant preferred an application under Section 16 of the Arbitration Act before the Arbitral Tribunal questioning the jurisdiction of the Arbitral Tribunal.

39. The above chain of events makes it clear that JKTPL went by Clause 10 of the Transmission Licence. Since the dispute

between the Appellant and JKTPL arises out of the Transmission Agreement as per Clause 10.1 of the Transmission Licence, it invoked Clause 44.2 of the Transmission Agreement which relates to conciliation. When conciliation failed, JKTPL invoked Clause 44.3.2 and the Arbitral Tribunal was constituted to which the Appellant also did not object. Under Clause 44.3.2, if the dispute raised by either of the parties to the Transmission Agreement is not to be adjudicated upon by the State Commission then the matter can be referred to arbitration. Relying on this clause, it is contended by the Appellant that where tariff has been adopted under Section 63 of the said Act, any dispute which has the implication on the tariff so adopted, ought not to be referred to arbitration. It is contended that such a dispute can only be decided by the State Commission. It is strenuously contended by JKTPL that if the relief claimed by JKTPL is granted, it has no impact on the tariff under the Transmission Agreement between the parties. Now whether grant of the relief claimed by the Appellant will impact tariff adopted under Section 63 of the said Act or whether it will have no such impact and

whether if it indeed has such impact, the relief claimed by Respondent No.2 should be granted or not will be decided by the Arbitral Tribunal appointed by the State Commission in terms of the Transmission Agreement. It is possible that the Arbitral Tribunal may refuse to grant any relief to Respondent No.2 if it feels that in law such relief cannot be granted because it impacts tariff adopted under Section 63 of the said Act. Even the State Commission has refrained from expressing any opinion on this issue. It has left it open. We are of the opinion that it is not necessary for us in the facts of this case to trench upon the Arbitral Tribunal's jurisdiction to deal with this issue. At this stage, it is not possible for us to hold that the relief prayed for by Respondent No.2 will impact tariff adopted under Section 63 of the said Act and therefore the dispute between the Appellant and Respondent No.2 is not required to be adjudicated or referred to arbitration by the State Commission as per Clause 44.3.2 of the Transmission Agreement. The Arbitral Tribunal will decide that issue.

40. Reliance is placed by the Appellant on the Supreme Court judgment in **Gujarat Urja Vikas Nigam Limited**. In that case, the Appellant entered into a PPA dated 30/5/1996 with the Gujarat Electricity Board. Under Clause 11 of the PPA, the parties agreed that in the event any dispute arises the same may be resolved by the parties by mutual agreement as envisaged by Clause 11(1) of the PPA. In the event of failure to resolve the dispute by amicable settlement, the parties agreed that such dispute be submitted to arbitration vide Clause 11(2). Disputes arose between the parties in connection with the allocation of power. Effort to settle the disputes amicably failed. The Respondent company called upon the Appellant to refer the disputes to the arbitrator, Mr. Justice Ahmadi, retired Chief Justice of India. The Appellant on the other hand approached the Central Electricity Regulatory Commission under Section 86(1)(f) of the said Act. As the Appellant did not send its approval to the appointment of Justice Ahmadi, the Respondent approached the Gujarat High Court by filing an application under Sections 11(5) and (6) of the Arbitration Act. The Gujarat High Court appointed

Justice Ahmadi as the sole arbitrator for resolving the disputes. The said Order was challenged in the Supreme Court. It was contended on behalf of the Appellant that since the said Act is a special law dealing with arbitrations of disputes between the licensees and the generating companies, Section 11 of the Arbitration Act will not apply. In view of Section 86(1)(f) of the said Act, it is only the State Commission or its nominee which can adjudicate upon the disputes between licensees and generating companies.

41. After considering relevant provisions of the Arbitration Act and the said Act and more particularly Section 158 thereof, the Supreme Court concluded that whenever there is dispute between a licensee and generating companies, only the Central Commission or the State Commission (as the case may be) or arbitrator or arbitrators nominated by it can resolve such a dispute whereas all other disputes (unless there is some other provision in the said Act) would be decided by the Arbitration Act. The Supreme Court again clarified that after 10/6/2003, that is, after coming into force of the said Act,

there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator nominated by it.

42. Relying on this judgment, it is urged by the counsel for the Appellant that the State Commission could not have nominated an Arbitral Tribunal. In this connection, it is necessary to have a look at Section 86(1)(f) of the said Act. It reads thus:

“86. Functions of State Commission. – (1) *The State Commission shall discharge the following functions, namely,*

- | | | | |
|-----|-----|-----|-----|
| (a) | xxx | xxx | xxx |
| (b) | xxx | xxx | xxx |
| (c) | xxx | xxx | xxx |
| (d) | xxx | xxx | xxx |
| (e) | xxx | xxx | xxx |

- (f) *Adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.”*

43. It is also necessary to carefully read Section 158 of the said Act. It reads thus:

“158. Arbitration. - *Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).”*

44. Reading of Section 158 makes it clear that any matter which is by or under the said Act directed to be determined by arbitration, the matter shall be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party. The words “unless it is otherwise provided in the licence of the licensee’ are important. It is an exception to the general rule incorporated in Section 158 that all matters described therein shall be determined by such person or persons as the Appropriate Commission may nominate in that behalf. The exception pertains to the averment made in the licence. It states that if the licence provides otherwise the general rule shall not be applicable. For instance, if the licence says that such dispute

shall be decided by arbitrator nominated by the parties, this rule will not come in operation. The Supreme Court had this in mind. This is evident from the following paragraphs of the judgment.

“27. *In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word “and” between the words “generating companies” and the words “refer any dispute” means “or”, otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word “and” in Section 86(1)(f) means “or”.*

28. *Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.*

29. *This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted above. We may clarify that the agreement dated 30-5-1996 is not a part of the licence of the licensee. An agreement is something prior to the issuance of a licence. Hence any provision for arbitration in the agreement cannot be deemed to be a provision for*

arbitration in the licence. Hence also it is the State Commission which alone has power to arbitrate/adjudicate the dispute either itself or by appointing an arbitrator.”

45. Pertinently, in that case, Agreement dated 30/5/1996 between the Appellant therein and Gujarat Electricity Board was not part of any licence under the said Act. In that case, there was no licence condition stipulating arbitration in terms of Agreement dated 30/5/1996. Facts of **Gujarat Urja Vikas Nigam Limited**, therefore, differ from the facts of this case.

46. The matter can be viewed from another angle. Under Section 86(1)(f), the State Commission has discretion to adjudicate upon the dispute between the licensees and generating companies or refer any dispute to arbitration. In this case, this discretion has already been exercised by the State Commission while granting Transmission Licence to JKTPL. Transmission Licence was issued to JKTPL under Section 14 of the said Act on 26/10/2010 which provide for Clause 10.1 and 10.2. It bears repetition to state that under clause 10.1 dispute such as the one between the Appellant

and Respondent No.2 which arises out of Transmission Agreement dated 28/5/2010 executed between the Appellant and Respondent No.2 has to be determined in terms of the Transmission Agreement. Therefore, the provisions of Article 44.3 thereof were invoked by JKTPL which provide for determination of dispute by arbitration. The Appellant had participated in the proceedings under Section 14 of the said Act and had not raised any objection to such a clause being incorporated in Transmission Licence. Thus, the State Commission by granting a project specific transmission licence has already exercised its discretion under Section 86(1)(f) of the said Act for determination of dispute by arbitration.

47. It is contended by the Appellant that JKTPL in its application referred to adjudication of dispute by the State Commission as one of the legal possibilities. It has also stated that it would not have any issue if (i) the matter is heard by the State Commission; or (ii) is heard by a new Arbitral Tribunal appointed by the State Commission or (iii) the present Arbitral Tribunal is continued with the ratification of

the State Commission and, therefore, it has consented to adjudication by the State Commission. This is denied by JKTPL. We need not dwell on this issue because assuming Respondent No.2 or the Appellant had made any concession on any legal issue that shall not bind them because it is well settled that there is no estoppel against law. Many judgments of the Supreme Court have been cited on this issue. It is not necessary to refer to all of them. Suffice it to refer to **Vijay Narayan Thatte**, which states this principle.

48. We find no substance in the submission of learned counsel for the Appellant that if the dispute is referred to Arbitral Tribunal, the Appellant's right to appeal under Section 111 of the said Act is prejudiced. The Appellant has entered into the Transmission Agreement which prescribes arbitration. The Appellant has participated in the proceedings for the grant of Transmission Licence to JKTPL which provides for arbitration in terms of the Transmission Agreement. It is therefore not open to the Appellant to now contend that its

right to appeal to the Tribunal is prejudiced. We reject this submission.

49. It needs to be clarified that we have upon consideration of the relevant clauses of the Transmission Agreement and Transmission Licence, the relevant provisions of the said Act and the judgment of the Supreme Court in **Gujarat Urja Vikas Nigam Limited**, come to the conclusion that since the dispute between the parties arises out of the Transmission Agreement as per the provisions of the Transmission Licence, the State Commission can refer it to arbitration. Discretion available under Section 86(1)(f) of the said Act is exercised by the State Commission when it granted Transmission Licence to JKTPL. We do not find the said exercise to be improper. However, it is for the Arbitral Tribunal ultimately to consider whether if the relief prayed for by Respondent No.2 is granted, it will have impact on tariff adopted under Section 63 of the said Act and if it is so, whether any relief can be granted to Respondent No.2. We have not considered this issue. Nothing

said by us in this judgment should be treated as expression of our opinion on the said issue.

50. With the above clarification, we dismiss the appeal. Needless to say that the nominee arbitrators, if not appointed, should be appointed within fifteen days from today as suggested by the State Commission in the impugned order dated 16/12/2015 so that the arbitration can proceed.

51. Pronounced in the Open Court on this **6th day of May, 2016.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/~~NON-REPORTABLE~~**