

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

**APPEAL NO. 168 OF 2014 & IA NO. 280 OF 2014**

**Dated: 31<sup>st</sup> August, 2016.**

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

**In the matter of:-**

**PTC INDIA LTD.,** )  
2<sup>nd</sup> Floor, NBCC Tower, )  
15, Bhikaji Cama Place, )  
New Delhi-110066. ) **... Appellant**

AND

1. Uttarakhand Electricity Regulatory )  
Commission, )  
Vidyut Niyamak Bhawan, )  
Near I.S.B.T., P.O. Majra, )  
Dehradun (Uttarakhand)-248171. )
2. Swasti Power Engineering Limited, )  
Plot No.111, Road-72, Jubilee Hills, )  
Hyderabad-500033. )
3. Uttarakhand Power Corporation )  
Limited, )  
No.3 Urja Bhavan, Kanwali Road, )  
Dehradun 248001, Uttarakhand )
4. Punjab State Power Corporation )  
Limited, )  
PSEB Head Office, The Mall, )  
Patiala-147001 ) **... Respondents**

Counsel for the Appellant(s)

Mr. Amit Kapur  
Mr. Apoorva Misra  
Mr. Vishrov Mukherjee  
Mr. Vishal Anand

Counsel for the Respondent(s)

Mr. Buddy A. Ranganadhan &  
Mr. D.V. Raghu Vamsy for **R-1**

Mr. Tarun Johri  
Mr. Ankur Gupta for **R-2**

Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Ishan Mukherjee  
Ms. Akshi Seem for **R-4**

**APPEAL No. 214 OF 2014 & IA No. 334 of 2014**

**In the matter of:-**

**PTC INDIA LTD.,** )  
2<sup>nd</sup> Floor, NBCC Tower )  
15, Bhikaji Cama Place )  
New Delhi-110066. ) ... **Appellant**

AND

1. Punjab State Electricity Regulatory )  
Commission, SCO; 220-221, Sector )  
34-A, Chandigarh. )
2. Swasti Power Engineering Limited )  
Plot No. 111, Road-72, Jubilee Hills, )  
Hyderabad-500033. )
3. Uttarakhand Power Corporation )  
Limited )  
No.3 Urja Bhavan, Kanwali Road, )  
Dehradun 248001, Uttarakhand. )

4. Punjab State Power Corporation )  
Limited )  
PSEB Head Office, The Mall, )  
Patiala-147001. )  
**... Respondents**

Counsel for the Appellant(s) Mr. Amit Kapur  
Mr. Apoorva Misra  
Mr. Vishrov Mukherjee  
Mr. Vishal Anand

Counsel for the Respondent(s) Mr. Sakesh Kumar for **R-1**  
  
Mr. Tarun Johri  
Mr. Ankur Gupta for **R-2**  
  
Mr. Anand K.Ganesan  
Ms. Neha Garg  
Mr. Sandeep for **R-4**

## **J U D G M E N T**

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

1. Though these two Appeals challenge orders passed by two different State Commissions they can be disposed of by a common order because they involve same issues. The Appellant in both these appeals is PTC India Limited ("**PTC**") In Appeal No.168 of 2014 the Uttarakhand Electricity Regulatory Commission ("**the Uttarakhand Commission**") is Respondent No.1. In Appeal No.214 of 2014 the Punjab State Electricity Commission ("**the Punjab Commission**") is Respondent No.1. In

both these appeals Swasti Power Engineering Limited ("**Swasti**") is Respondent No.2, the Uttarakhand Power Corporation Limited ("**UPCL**") is Respondent No.3 and the Punjab State Power Corporation Limited ("**PSPCL**") is Respondent No.4. In Appeal No.168 of 2014 order dated 26/03/2014 passed by the Uttarakhand Commission is under challenge. In Appeal No.214 of 2014 order dated 02/09/2013 passed by the Punjab Commission is under challenge. It is necessary to begin with the facts:-

**2.** PTC is a Public Limited Company which has been granted inter-state power trading license by the Central Electricity Regulatory Commission ("**the Central Commission**"). Swasti has set up a Hydro Power Project in the State of Uttarakhand. UPCL is a distribution licensee within the State of Uttarakhand. PSPCL is the procurer under the Power Purchase Agreement ("**PPA**"). The Government of Uttarakhand issued its policy on hydro power development by the private sector in Uttarakhand. Under that policy the IPP can contract the sale of power to (a) any consumer outside Uttarakhand (b) to UPCL and (c) for the captive

use for the new industrial consumer in Uttarakhand. Clause 4.6 of the said policy reads as under:

*“4.6 Sale of Power*

*The IPP can contact to sell power to any consumer/s outside Uttarakhand, to the Uttarakhand Power Corporation Ltd.(UPCL), or for the captive use of new industrial consumers in Uttarakhand. The UPCL will specify the conditions under which any consumer or group of consumers is deemed to be a captive user. Sales to the UPCL will be mutually negotiated and approved by the ERCU.”*

**3.** On 16/10/2003 Swasti entered into implementation agreement with the Government of Uttarakhand for setting up the Bhilangana Hydroelectric Project having an installed capacity of 22.5 MW (**“the Project”**). As per Article 4.1.1 of the implementation agreement, Swasti had the option to *inter alia* sell the power to consumers outside the State of Uttarakhand.

**4.** On 23/12/2003 Swasti signed a Memorandum of Understanding (**“MoU”**) with PTC for sale of the entire available capacity of the Project to PTC for onward sale to distribution licensee outside the State of Uttarakhand (**“Swasti-PTC MoU”**).

5. Swasti was required to provide a detailed proposal indicating provisional tariff for potential buyers. PTC was to purchase power on the terms and conditions agreed in the PPA and PTC was to enter into a suitable Power Sale Agreement (“**PSA**”) with beneficiary States for purchase of power by them. On 01/04/2004 Swasti wrote to PTC stating that Swasti was in the process of working on a proposal for sale of power to PSEB (Respondent No.4, PSPCL is the successor of PSEB) through PTC on a fixed price tariff. On 21/04/2004 PTC held a meeting with PSEB and apprised PSEB of capped tariff decided between PTC and Swasti in their meeting held on 23/12/2003. On 03/05/2004 Swasti wrote to PTC requesting for a copy of the MoU entered into between PTC and PSEB (“**PSEB-MoU**”) so that Swasti could review the same and work on the tariff proposal as well as the terms of the PPA. On 03/05/2004 Swasti wrote to PTC giving tariff proposal of Rs.2.14 per unit along with necessary documents. On 22/07/2004 Swasti wrote to PTC revising the tariff proposal. In the said letter Swasti requested PTC to provide a copy of the PSEB MoU. On 20/08/2004 Swasti wrote to PTC acknowledging receipt of the PSEB MoU and

providing certain clarifications. On 29/10/2004 PTC wrote to PSEB forwarding the tariff proposal received by PTC from Swasti. Thereafter correspondence was exchanged between PSEB and PTC which indicated broad agreement between the two on the fixed tariff proposal by the PTC. On 24/08/2005 pursuant to the Swasti-PTC MoU and the PSEB MoU and the correspondence exchanged between Swasti, PTC and PSEB, PTC and Swasti entered into a PPA for purchase of contracted capacity of 22.275 MW (net output less royalty power of 18%) with delivery point being the nearest point of interconnection of the State Grid with the CTU transmission system. On 20/09/2005 PTC sent the copy of the PPA between PTC and Swasti to PSEB. PTC also sent draft PSA to be signed between PTC and PSEB. It was proposed that PPA will be a part of PSA in the form of an annexure. On 30/9/2005 Swasti executed power wheeling agreement with Power Transmission Corporation of Uttarakhand Limited ("**PTCUL**") for wheeling of the power from the Project to the delivery point. On 23/03/2006 PTC and PSEB executed a PSA as a back-to-back arrangement with the PPA. The PPA was annexed to the PSA. On 27/03/2006 PTC wrote to Swasti informing that it had signed PSA for onward sale of power in

terms of the PPA and a petition would be filed before the Punjab Commission for approval of the PSA and the tariff. In a meeting held between stakeholders and Government of Uttarakhand, on 26/12/2006 it was proposed that since evacuation facilities relating to 22 kV Ghashali-Chamba line were not ready for operation Swasti would use the existing system of Respondent No.3 UPCL till the said line was completed. On 03/05/2007 PTC submitted an application to Power Grid Corporation of India Limited (“**PGCIL**”) for grant of long term open access on Central Transmission Utility system to deliver the contracted capacity to PSEB. On 25/07/2007 Swasti also submitted an application to PTCUL for long term open access to the inter-state distribution/transmission system. On 12/06/2007 a MoU was signed between Swasti and PTCUL with regard to the use of their system for evacuation of power from the Project to the delivery point. On 31/07/2007 the Punjab Commission approved the PSA executed between PTC and PSEB.

**6.** On 08/07/2009 Swasti wrote to PTC informing PTC of an interim order passed by the Uttarakhand Commission on 10/06/2009 relating to open access to another generating station

wherein the Uttarakhand Commission had raised issues relating to the possibility and validity of sale of power to entities other than consumers/users outside the State of Uttarakhand. Swasti intimated to PTC that on account of interim order Swasti was unable to obtain open access. On 10/06/2009 the Uttarakhand Commission sent a copy of the interim order dated 10/06/2009 to Swasti and sought the details on the status of the purchaser of power from the Project. On 10/08/2009 Swasti filed an application before the Uttarakhand Commission seeking following reliefs:

*“(A) Permit Swasti to sell electricity to PTC consistent with the PPA dated 24/08/2005 entered into by Swasti with PTC;”*

*(B) Direct UPCL and PTCUL to give connectivity and open access on their system for evacuation of power upto CTU grid.*

*(C) Pass any farther order(s) as may be deemed appropriate to give complete relief to Swasti.*

7. On 30/12/2009, the Uttarakhand Commission dismissed the application filed by Swasti thereby denying open access. The order was based on clarification provided by the Government of Uttarakhand that denying the open

access to Swasti was in view of the fact that there was a severe shortage of electricity in the State and the hydro generating companies proposed to sell power to a trading company which did not fall in the category of consumer.

**8.** Against the order dated 30/12/2009 passed by the Uttarakhand Commission PTC filed Appeal No.88 of 2010 before this Tribunal. This Tribunal vide its order dated 11/01/2011 allowed the appeal and set aside the order dated 30/12/2009 passed by the Uttarakhand Commission. Gist of this Tribunal's order needs to be stated. This Tribunal held that PTC signed PPA with Swasti for purchase of entire power output of its hydro power station. PTC is a trading licensee which has been given a license for inter-state trading of electricity by the Central Commission. PTC has signed back-to-back PSA with PSEB for re-sale of the entire power under which it has a legal obligation to supply power. A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case, the generating company proposes to sell power to a trading licensee which has back-to-back arrangement for

re-sale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power purchased from the trading licensee with power purchased from other sources and supply the same to the consumers. Thus the power is ultimately going to be consumed by the consumers outside the State. Taking this view of the matter this Tribunal directed the Uttarkhand Commission to grant open access to the generating companies after they file application for grant of open access on the distribution/transmission system of UPCL/Power Transmission of Uttarakhand Ltd., before the State Commission.

**9.** On 09/03/2011 Swasti issued notice for termination of the PPA entered into by it with PTC. In this notice Swasti also informed PTC that it had entered into a PPA with UPCL on 03/07/2009. PTC vide letter dated 15/03/2011 informed Swasti that this Tribunal by its order dated 11/01/2011 has set aside the Uttarakhand Commission's order and directed the Uttarakhand Commission to grant open access to Swasti. Therefore Swasti cannot claim that it

is an affected party under the *force majeure* event and is as such unable to supply power to PTC. PTC further stated that termination of the PPA was therefore illegal. Since Swasti did not rescind the notice of termination PTC filed Petition being Petition No.30 of 2013 before the Punjab Commission for declaration that termination letter dated 09/03/2011 issued by Swasti is illegal and also for direction to Swasti to specifically perform its obligation under PPA dated 24/08/2005 between Swasti and PTC. It sought direction to Swasti to cancel PPA dated 03/07/2009 entered into with UPCL and also any other agreement with any other utilities for supply of power generated from the Project in derogation of the terms of PPA dated 24/08/2005. The Punjab Commission by order dated 02/09/2013 which is impugned in Appeal No.214 of 2014 dismissed PTC's petition on the ground that it has no jurisdiction. The Punjab Commission held that the real issue involved in this case was inaction on the part of Swasti to implement judgment of this Tribunal in Appeal No.88 of 2010 whereby direction was given to the Uttarakhand Commission to grant open access to Swasti. The Punjab Commission observed that before

filing application dated 10/08/2009 for open access Swasti had already entered into the PPA with UPCL on 03/07/2009. The Punjab Commission observed that it cannot issue any direction with regard to implementation of this Tribunal's direction. It cannot direct the distribution licensee of Uttarakhand i.e. UPCL that it should not enter into a PPA with Swasti for supply of power from its Project which is located in Uttarakhand. The Punjab Commission further observed that PPA dated 03/07/2009 entered into between Swasti and UPCL was under regulatory control of the Uttarakhand Commission. The petition therefore was not maintainable.

**10.** PTC thereafter filed a petition before the Uttarakhand Commission. By order dated 26/3/2014 which is impugned in Appeal No.168 of 2014, the Uttarakhand Commission on perusal of the judgments of the Supreme Court cited before it held that the question of jurisdiction has to be decided on the basis of averments made in the petition and the documents filed by Appellant-PTC (Petitioner before the State Commission) alone. Having regard to the averments

made in the petition, the Uttarakhand Commission concluded that it does not have the jurisdiction to decide the dispute as raised in the petition because as per the averments made in the petition the PPA and the PSA are so inextricably intertwined that one cannot be read without reference to the other and the ultimate beneficiary of the power generated in Uttarakhand by Swasti is the Punjab Discom i.e. Respondent No.3 PSPCL. The Uttarakhand Commission referred to the admission made by Appellant-PTC that the power generated by Swasti was meant to be purchased by Respondent No.3 PSPCL for the benefit of consumers in Punjab; that the PSA between PSPCL and Appellant-PTC refers to the PPA entered into between Appellant-PTC and Swasti; that the PPA between Appellant-PTC and Swasti was annexure to the PSA; that the PSA had been approved by the Punjab Commission; that the entire transaction is meant for the exclusive benefit of PSPCL's consumers and Respondent No.2 UPCL had nothing to do with the dispute; that the PSA and the PPA are back to back arrangements; that the PPA was a part of the PSA approved by the Punjab Commission and the PPA formed an integral

part of the PSA. Referring to the judgment of this Tribunal in **Appeal No.200 of 2009 in Pune Power Development Ltd. v. Karnataka State Commission & Ors** it was held that the location of selling parties is irrelevant. Referring to Section 64(5) of the Electricity Act (“**the said Act**”) it was held that in this case no nexus with the consumers of Uttarakhand exists and thus jurisdiction of the Uttarakhand Commission is not attracted. It was further held that delivery of the power under the PPA was to be at the interconnection of the transmission system of the CTU; hence the same was in fact intended to be beyond the transmission system of the State. Reliance was also placed on the judgments of this Tribunal in **Lanco Power Limited, Gurgaon v. Haryana Electricity Regulatory Commission, Haryana & Ors (Appeal No.15 of 2011) and Chhatisgarh State Power Trading Co. Ltd, Chhattisgarh v. Haryana Electricity Regulatory Commission (Appeal No.52 of 2011)** to come to a conclusion that the State Commission in whose jurisdiction the power is likely to be consumed through the concerned distribution licensee in terms of sub-section 5 of Section 64 of the said Act will have

the jurisdiction. In the circumstances the petition was dismissed as not maintainable. PTC has challenged order dated 02/09/2013 passed by the Punjab Commission in Appeal No.214 of 2014 and order dated 26/03/2014 passed by the Uttarakhand Commission in Appeal No.168 of 2014 as it has been virtually left remediless by these orders.

**11.** We have heard Mr. Amit Kapur learned counsel appearing for PTC. Counsel submitted that in this case nexus to State of Punjab is an important jurisdictional fact. Drawing our attention to several clauses of Swasti-PTC MoU and of the PSA between PTC and PSPCL and also the correspondence between Swasti, PTC and PSEB counsel urged that it is evident that the PPA and PSA are back to back arrangements. They were entered into with complete knowledge and involvement of the three parties and the arrangement made by the parties had a nexus with the State of Punjab. Counsel pointed out that the factum of back to back arrangement between Swasti, PTC and PSEB has been recognised by this Tribunal in its judgment dated 11/01/2011 in Appeal No.88 of 2010. Counsel further submitted that Swasti was aware that power was being supplied by PTC to PSPCL (distribution

licensee in the State of Punjab). Therefore, Punjab Commission has the jurisdiction to entertain the dispute. In support of his submissions counsel relied on **Pune Power Development v. Karnataka Electricity Regulatory Commission & Ors**<sup>1</sup> and **Lanco Power Limited v. Haryana Electricity Regulatory Commission & Ors**<sup>2</sup>. Counsel further submitted that both the Commissions have dismissed the petitions leaving PTC without an appropriate forum. Adjudication of such dispute has to be done within the ambit of the said Act. It is a settled principle that there has to be a remedy/forum for enforcement of legal right. In support of this submission counsel relied on relevant judgments of the Supreme Court and contended that in terms of Section 86 of the said Act, the adjudication of disputes between PTC and Swasti has to be done by an Appropriate Commission and in this case the Appropriate Commission is the Punjab Commission.

**12.** Mr. Ganesan learned counsel for PSPCL submitted that the jurisdiction always flows to such State Commission which regulates the distribution licensee purchasing electricity.

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<sup>1</sup> 2011 ELR (APTEL) 303

<sup>2</sup> 2011 ELR (APTEL) 1714

Counsel submitted that locus of the generator is irrelevant. Counsel drew our attention to Section 64 (5) of the said Act. Counsel further submitted that this Tribunal has taken a consistent view in all the judgments that so long as there is nexus between the first sale and the second sale, the State Commission where the distribution licensee is located would have jurisdiction over the transactions. Counsel further submitted that the clear terms of the PPA and PSA together with contemporaneous correspondence clearly establish that the sale by Swasti to PTC and sale by PTC to PSPCL are clearly interlinked and are back to back arrangements. Counsel relied on **Lanco Power** and judgement of this Tribunal dated 11/01/2011 in **Appeal No.88 of 2010** and submitted that it is only the Punjab Commission which has the jurisdiction.

**13.** We have heard Mr. Johri, learned counsel appearing for Swasti. We have perused the written submissions filed by him.

Gist of his submissions is as under:

- i) The Punjab Commission does not have jurisdiction to adjudicate the disputes between PTC and Swasti for the following reasons:
- a) The PPA between PTC and Swasti was not executed within the State of Punjab and neither the Project is situated within the State of Punjab.
  - b) PTC is not a trading licensee of the Punjab Commission.
  - c) The parties to the PPA are also situated outside the State of Punjab and the delivery point under the PPA of the power generated from the Project is located outside the State of Punjab and is a Pooling Point of CTU in Uttarakhand, namely Roorkee.
  - d) The parties have not envisaged selling of power to PSEB in the PPA.
  - e) The transaction of sale of power under the PPA has concluded within the territorial jurisdiction of the State of Uttarakhand.

- f) Any issue, arising due to delivery/non-delivery of the said power to PTC at delivery point within the State of Uttarakhand would thus, arise within the territorial jurisdiction of the Uttarakhand Commission and thereby, enable the Uttarakhand Commission to adjudicate upon the same.
- g) PTC has raised objections against the execution of the PPA dated 03/07/2009 between Swasti and UPCL, which disputes also squarely fall within the adjudicatory jurisdiction of the Uttarakhand Commission as UPCL is a distribution licensee, whose power procurement process under the said Act is done by the Uttarakhand Commission. PTC has prayed for cancellation of this PPA, which can only be done by the Uttarakhand Commission.
- h) Swasti has no control over PTC under the PPA, in respect of the purchaser or entities, to whom it chooses to sell the power outside the State. The obligation of Swasti to supply power output under the PPA was solely to PTC and not to PSEB.

- i) There has been no assignment of the PPA in favour of PSEB in terms of Article 16.7.1 and 16.7.2 of the PPA. Swasti and PTC have not expressly consented for assignment of the PPA in favour of PSEB.
- j) The PPA in the present case did not have any amendments recognising the right of PTC to assign the PPA in favour of PSEB.
- k) Clause 16.2 of the PPA contains a specific clause that mandated that the PPA was only for the benefit of the parties thereto and shall not create any duty towards any third party.
- l) The clauses pertaining to the termination of the PPA do not envisage creation of any third party rights whatsoever, upon termination of the said PPA by either party thereof.
- m) The PPA dated 24/08/2005 was on principle to principle basis wherein under Article 4.3.2 PTC undertook to offtake the entire capacity of the Project and agreed to tender the tariff of the same,

irrespective of the fact whether it has been able to sell the said capacity to any of the beneficiaries/utilities. There is in fact no mention of PSEB at any place within the PPA or any understanding under the PPA that PTC would sell its power to PSEB only.

- n) Clause 16.6 of the PPA specifically states that the PPA constitutes the entire agreement between the parties and supersedes all earlier arrangements or understandings, including any memorandum of understanding executed between the parties.
- o) Further, the term 'Purchaser' as defined in the PPA, means any entity to whom PTC can sell the power in accordance with the Electricity laws and no specific entity/utility/beneficiary was mentioned as a "Purchaser" much less PSEB as the ultimate beneficiary of the Electricity purchased by PTC.
- p) A perusal of Article 14.2 and 14.4 of the PPA would make it clear that PSEB is not entitled to raise any

dispute under the PPA against the non supply of power by Swasti.

- q) None of the provisions of the PPA create any rights or interests or acknowledge any rights in favour of PSEB with regard to the sale of power from the Project by Swasti to PTC.
- r) The PPA does not make any mention about the fact that PTC was in fact acting as an agent of PSEB while entering into the PPA with Swasti.
- s) Swasti is not a party to the PSA executed between PTC and PSEB. At the time of execution of the PPA, there was no certainty whatsoever that the power would be re-sold by PTC to PSEB.
- t) Swasti was not a party to the proceedings initiated by PSEB for getting approval of the PSA before the Punjab Commission.
- u) Swasti had never approached PSEB with the proposal for sale of power generated from the Project. The intention of Swasti as is evident from the PPA was to sell the power to PTC only.

- v) The identification of purchaser was not reflected in the PPA. The mere identification of the purchaser just prior to the execution of the PSA after the execution of the PPA is not sufficient.
- w) There is no clause within the PPA, wherein PTC is entitled to terminate the PPA on the termination of the PSA meaning thereby, that the termination of the PSA between PTC and PSEB does not automatically render the PPA between PTC and Swasti liable to be terminated.
- x) The tariff proposal was submitted to PTC only in compliance of Swasti's obligation under the MOU to assist PTC to sell the power generated from the Project to the third party.
- y) The issue as to whether the PPA executed between PTC and Swasti and the PSA executed between PTC and PSEB were linked to each other or not, was never in issue in the earlier Appeal No.88 of 2010 filed by PTC against the non-grant of open access by the Uttarakhand Commission to Swasti.

- z) This Tribunal's order dated 20/07/2012 in Appeal No.130/2011 titled **M/s Jaiprakash Power Ventures Ltd Vs. Haryana Electricity Regulatory Commission & Ors.** is completely applicable to the facts and the circumstances of the instant case and thus, there is no nexus between the PPA and the PSA, as alleged and both are two distinct and separate arrangements on a principle to principle basis and the common party namely PTC does not act as an agent of PSEB or Swasti. As such, there is no privity of contract between Swasti and PESB.
- ii) In the circumstances it is the Uttarakhand Commission which has the jurisdiction to adjudicate disputes between PTC and Swasti.

**14.** We have heard Mr. Sakesh Kumar learned counsel appearing for the Punjab Commission. We have carefully perused the written submissions filed by him. The gist of the submissions is as under:

- (a) In the present case the challenge is to the letter of termination. Specific performance of the PPA is sought for. The prayer for specific performance can be made where the contract has taken place as per the law of contract.
- (b) The PPA dated 24/08/2005 does not say that the power needs to be sold to PSPCL. Pertinently the Punjab Commission has granted approval to the transaction between PTC and PSPCL. The MoU is clear that PTC could sell power to anyone.
- (c) The Punjab Commission has found that this was a case of execution of earlier directions passed by this Tribunal in Appeal No.88 of 2010 between PTC and Swasti.
- (d) There is no nexus between the PPA and the PSA.
- (e) **Pune Power** and **Lanco Power** state that the Commission in whose jurisdiction the power is ultimately consumed will have jurisdiction. It needs to be established that the supplier, the trader and the recipient intend to sell the power to a particular recipient. Such is not the case here.
- (f) Judgment of this Tribunal is **M/s Jaiprakash Power Venture Ltd V. HERC & Ors** in **Appeal No.130 of 2011** is applicable to this case.

(g) The Punjab Commission has rightly held that it has no jurisdiction.

**15.** This is a peculiar case where both the State Commissions, that is the Punjab Commission and the Uttarakhand Commission have stated that they have no jurisdiction to adjudicate the dispute related to termination of the PPA between PTC (an inter-State trading licensee and Swasti (a generating company). PTC's petitions *inter alia* raising challenge to the termination of the PPA having been dismissed on the ground of jurisdiction PTC is placed in an unusual situation where it has no remedy to redress its grievance. Orders of both the State Commissions have been challenged by PTC with a request that this Tribunal should determine the Appropriate Commission for adjudication of dispute keeping in view the legal maxim *Ubi Jus Ibi Remedium* i.e. there has to be a remedy/forum for enforcement of every legal right. This submission has a force. We must therefore find out which State Commission can decide the instant dispute. PTC's case however is that the Punjab Commission has jurisdiction.

**16.** It is necessary to recapitulate material facts essential to the determination of the dispute. PTC, an inter-State trading licensee entered into PPA dated 24/08/2005 with Swasti, which is a generator having its Project in Uttarakhand under which PTC was to purchase power from Swasti. PTC entered into PSA dated 23/03/2006 with PSPCL which is successor-in-interest of PSEB to sell the power purchased from Swasti to PSPCL. For deciding which State Commission has jurisdiction, in-depth examination of PPA dated 24/08/2005 and PSA dated 23/03/2006 is necessary to find out whether there is any nexus between the sale to PTC by Swasti under the PPA and the sale by PTC to PSPCL under the PSA. In fact, this issue has been conclusively decided by this Tribunal in several cases. This Tribunal has taken a view that so long as there is nexus between the first sale and the second sale, or they are back to back arrangements, the State Commission where the distribution licensee is located would have jurisdiction over the transactions. In this connection, suffice it to refer to the judgment of this Tribunal in **Lanco Power** where similar issue was involved and similar fact situation was present. Pertinently, PTC was a party in the said appeal.

**17.** In **Lanco Power**, Appellant Lanco Power, a generating company entered into PPA dated 19/10/2005 with PTC(R-3) therein for sale of 273 MW (net power output) from 2<sup>nd</sup> unit of 300 MW from its project at Pathadi, Kobra Chhattisgarh for a period of 25 years. On 14/07/2006 Haryana Commission granted in principle approval for purchase of power from Appellant Lanco Power's project to Haryana Power Generation Corporation Ltd. ("**Haryana Power**" - R-2). On 18/09/2006 after the grant of in principle approval by the Haryana Commission for purchase of power from Appellant Lanco Power's plant through PTC (R-3), Appellant Lanco Power executed an amendment to the PPA recognising the assignment by the PPA to the purchaser of power generated by Appellant Lanco Power's plant. In pursuance of the said amendment agreement dated 18/09/2006 a PSA was executed on 21/09/2006 between Haryana Power (R2) and PTC (R3) for sale of 273 MW power purchased from Appellant Lanco Power under the PPA dated 19/10/2005 to the Haryana Power (R2) for a period of 25 years. On 06/02/2008, the Haryana Commission approved the PSA entered into between Haryana Power (R2) and PTC (R3). On occurrence of certain events it became impossible for Appellant Lanco Power to perform its

obligation under the PPA on existing terms which fact was communicated by Appellant Lanco Power to PTC (R3). On 13/05/2010, PTC (R3) filed a petition before Haryana Commission seeking directions to Haryana Power (R2) to purchase electricity at a tariff calculated in accordance with the Central Commission's Regulations, 2009. Haryana Power (R2) filed a petition before the Haryana Commission seeking a direction against PTC (R3) and Appellant Lanco Power to comply with its obligation under the PSA in favour of Haryana Power (R2) and for the direction to restrain Appellant Lanco Power from selling the contracted capacity to any 3<sup>rd</sup> party. The State Commission entertained the petition and issued notice to the concerned parties including Appellant Lanco Power. Appellant Lanco Power raised objection regarding the Haryana Commission's jurisdiction to entertain the petition. The Haryana Commission heard the parties and reserved the order on 29/10/2010. In the meantime Appellant Lanco Power had entered into an implementation agreement with the Government of Chhattisgarh under which Appellant Lanco Power had to provide 35% of the Net Power generated in its plant at Chhattisgarh at variable charges to any person nominated by the

Government of Chhattisgarh failing which the Government of Chhattisgarh would be constrained to withdraw all facilities and concessions provided to Appellant Lanco Power's plant situated in Chhattisgarh. Under these circumstances, pending order reserved by the Haryana Commission, Appellant Lanco Power terminated the PPA between it and PTC (R3) by the letter dated 11/01/2011, on the reason that PTC (R3) had failed to comply with mandatory condition precedent of the said PPA. Thereupon Appellant Lanco Power executed the PPA with Chhattisgarh Power Trading Company Ltd for supply for 35% of the Net Power generated by Appellant Lanco Power's plant. At this stage the Haryana Commission passed the impugned order dated 02/02//2011 holding that it has got the jurisdiction. It directed Appellant Lanco Power to supply 300 MW power from Unit.2 to Haryana Power (R2) and restrained Appellant Lanco Power from selling the same to Chhattisgarh State Power Trading Company. Aggrieved by this order Lanco Power filed appeal in this Tribunal. It was urged, *inter alia*, on behalf of Appellant Lanco Power, that it is a generating company having its plant in Chhattisgarh and having its Head Office in Hyderabad. PTC (R3), an inter-state trading licensee had its Head Office in New Delhi, which is

outside the jurisdiction of the Haryana Commission. The PPA specifies that the delivery point for the power output is located in the State of Chhattisgarh. The PPA has been executed between Appellant Lanco Power and PTC (R3) in New Delhi. Therefore the transactions of the sale of electricity under the PPA have taken place outside the State of Haryana, hence, the Haryana Commission did not have jurisdiction. This Tribunal rejected this submission. Relevant observations of this Tribunal could be quoted:

*“12. According to the Appellant-Lanco Power Limited, the jurisdiction of the State Commission can be invoked only in respect of the PSA between the PTC (R3) and Haryana Power (R2) and it cannot extend its jurisdiction to the PPA between the Appellant and PTC (R3). In short, the case of the Appellant is that the State Commission has no jurisdiction to adjudicate on the dispute between the Appellant-generating company having its plant in Chhattisgarh and the Third Respondent-PTC which is inter-State trading licensee, especially when there is no nexus or privity in respect of the PPA dated 19<sup>th</sup> October, 2005 entered between the Appellant-Lanco Power Limited, and the PTC (R3) and the PSA dated 21<sup>st</sup> September, 2006 entered into between Haryana Power (R2) and PTC (R3).*

*16. If a generating company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such*

consumers. This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the appropriate commission to exercise jurisdiction. If the sale and purchase of power has a nexus to the State, the concerned State Commission will have jurisdiction, notwithstanding the fact that there is no direct contractual arrangement between the generating company and the distribution licensee.

17. This provision thus clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the appropriate commission. In the present case, it is not disputed that the electricity generated in the State of Chhattisgarh is intended to be transmitted through the inter-State transmission system to the State of Haryana for distribution to the consumers of the State of Haryana by the distribution licensees of the Haryana. Thus, the present case squarely falls within the provision of Section 64(5) of the Act.

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

29. The appropriate commission is, therefore, the State Commission which approves the Tariff for purchase and sale of power by PTC, i.e. the same

*State Commission, and as per definition the State Commission, competent to determine the Tariff for the project. From the perusal of the above clauses, it is apparent that the State Commission which is deciding on the Tariff for the licensee situated in the State of Haryana, i.e. the procurement of power being for the consumers in the state is the appropriate commission for the purposes of matters raised in the present case.*

*77. The next question arises which would be the appropriate commission. The answer to this would be the State Commission in whose jurisdiction the power is likely to be consumed through the concerned distribution licensees in terms of Sub-section 5 of Section 64 of the Act. In the present case, the power purchased by PTC (R3) from the Appellant would be distributed to the consumers through the Haryana Power (R2) in the State of Haryana. Therefore, it is the Haryana Electricity Regulatory Commission who would approve the Tariff for sale of power to the PTC from the Appellant's project.*

*80. Therefore, we hold that the distribution licensees in Haryana are involved in procurement of power in the State through Haryana Power (R2) for distributing the same to the consumers of the State of Haryana and consequently, the Haryana Electricity Regulatory Commission alone will have the jurisdiction under Section 86 (1) (f) to adjudicate upon the dispute.”*

**18.** It is pertinent to note that the above observations were made by this Tribunal after carefully examining the clauses of the PPA dated 19/10/2005 and PSA dated 21/09/2006 and the relevant correspondence. After such examination this Tribunal

came to a conclusion that the PSA and the PPA are back to back arrangements as the PPA between Appellant Lanco Power and PTC (R3) got firmed up with execution of the PSA entered into between Haryana Power (R2) and PTC (R3). This Tribunal noted that the purchaser Haryana Power (R2) had been specifically identified before the execution of the final PSA and the said information was conveyed to Appellant Lanco Power by PTC (R3) through a letter. Only thereafter an amended PPA was executed between PTC (R3) and Appellant Lanco Power. This Tribunal clarified that a trader (PTC) is treated as an intermediary and when the trader deals with the distribution company for re-sale of electricity he does so as a conduit between generating company and the distribution licensee. This Tribunal further noted that when the trader is not functioning as merchant trader i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company. This Tribunal concluded that the State Commission in whose jurisdiction the power is likely to be consumed through

the concerned distribution licensees in terms of Section 64 (5) of the said Act will have jurisdiction in such a situation.

**19.** That, **Lanco Power** completely covers the present case is clear from the correspondence between the parties and the clauses of the PPA and the PSA. It is not possible to reproduce the entire correspondence and all the clauses. Following details of the correspondence and some of the clauses will show how the PSA and the PPA are interlinked.

- (a) Swasti-PTC MoU dated 23/12/2003 stated that PTC will purchase power from the project of Swasti on conditions as stipulated in the PPA to be signed between PTC and Swasti and PTC shall enter into PSA with beneficiary States for purchase of power by them.
- (b) On 01/04/2004 Swasti wrote to PTC stating that it was in the process of working on its proposal to PTC and PSEB for sale of power on a fixed price tariff.
- (c) On 21/04/2004 PTC held a meeting with PSEB apprising them of the capped tariff decided between PTC and Swasti in their meeting held on 23/12/2003.

- (d) On 03/05/2004 Swasti sought a copy of MOU between PTC and PSEB from PTC for study and for taking necessary steps.
- (e) On the same day Swasti communicated to PTC an all-inclusive tariff proposal of Rs2.14 per unit along with the supporting documents.
- (f) On 22/07/2004 Swasti wrote to PTC revising the tariff proposal and requested PTC to provide a copy of the PSEB MoU entered into by PTC for sale of power from the Project.
- (g) On 24/08/2004 Swasti wrote to PTC acknowledging receipt of the PSEB MoU and provided certain clarifications with regard to the tariff proposal.
- (h) On 29/10/2004, PTC forwarded justification for the single part tariff offered by it with a note setting out the methodology for calculating the same to PSEB.
- (i) On 30/11/2004 and 07/01/2005 PTC provided clarifications sought by PSEB, *inter alia* on the tariff for supply of power from the Project.
- (j) On 02/02/2005 PSEB wrote to PTC stating that fixed tariff proposed by PTC is preferable and that it shall convene a meeting to finalize the terms offered.

- (k) On 07/02/2005, PTC wrote to PSEB that it will be structuring the PPA between PTC and Swasti on a single part tariff basis as preferred by PSEB and shall forward the draft of the PSA between PTC and PSEB soon thereafter.

**B. Clauses of the PSA.**

- (a) The PPA was entered into pursuant to detailed negotiations between PTC and Swasti. The following clauses of the PSA would establish that the PPA and the PSA are back to back arrangements:

*“(C) PTC has entered into a PPA on 24/08/2005 with M/s Swasti Power Engineering Limited (the “Company”), a generating company as defined under the Electricity Act, 2003.*

*(D) PTC has offered to sell the above power from the Project to the Purchaser and has accordingly entered into a Memorandum of Understanding on 21<sup>st</sup> April 2004, with the Purchase for sale of the above-said power from the Project for a period of their-five (35) years from the Commercial Operation Date of the Project.*

*(E) Pursuant to such Memorandum of understanding, PTC and the Purchaser hereby enter into this Power Sale Agreement (the “PSA) to record and set out the terms and conditions for sale of power from the Project by PTC to the Purchaser”.*

- (b) In terms of Article 1.1 of the PSA parts of the PPA have been incorporated in the PSA by reference viz
- i) The terms not defined in the PSA will have the meaning assigned to them in the PPA.
  - ii) Tariff means tariff as payable in accordance with Schedule E of the PPA.
  - iii) The PPA forms part of the PSA in terms of Article 4.1(i).
  - iv) As per Article 4.2(i), PSEB undertook to make available any information and documents required by PTC or Swasti for financial closure or any other purpose pursuant to the PPA or the PSA.
  - v) Article 4.4 gives PSEB the right to visit the Project to take stock of the construction, commissioning and operation of the Project.
  - vi) In terms of Article 8.1.2, scheduling and despatch shall be in accordance with Article 8 of the PPA as provided in the PSA.

vii) As per Article 10.2.2(i),(ii) and (iii), the bills raised shall be consistent with the PPA.

**20.** Though we have reproduced the above details to show the nexus between the PPA and the PSA it is not necessary to enter into this debate because the factum of the back to back arrangements between Swasti, PTC and PSEB has been recognised by this Tribunal in the judgment dated 11/01/2011 in Appeal No.88 of 2010. We may quote the relevant observations of this Tribunal.

*“13.PTC India Limited (PTC), the Appellant had signed a Power Purchase Agreement with Swasti Engineering Ltd., Respondent No.2 for purchase of entire power output of its hydro power station. PTC India Limited is a Trading Licensee which has been given license by the Central Commission for inter-state trading of electricity. PTC has also signed back to back Power Sale Agreement with Punjab State Electricity Board for re-sale of the entire power under which it has legal obligation to supply power.*

...

*27. It is argued by the Respondents UPCL/State Government that the Implementation Agreement provides for sale outside the State to only a consumer and the State Commission has rightly held so. In our view, the State Commission has taken restrictive interpretation of clause 4.1 of the Implementation Agreement. Trader is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case the hydro*

*power generating company has proposed to sell power to a Inter-state trading licensee which has back to back agreement for re-sale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power procured from the trading licensee with power procured from other sources and supply the same to its consumers. Thus the power is ultimately going to be consumed by the consumers outside the State of Uttarakhand. This is in accordance with scheme of things and provisions of the Electricity Act, 2003 (emphasis supplied).*

In view of this categorical finding, we need not delve on this issue any further. The PPA and the PSA involved in this case are back to back arrangements. There can be no debate over this. It follows therefore that the Punjab Commission in whose jurisdiction PSPCL, successor of PSEB, the distribution licensee is situated will have jurisdiction to deal with the present dispute.

**21.** We are not impressed by Mr. Johri's submission that judgment of this Tribunal in Appeal No.88 of 2010 is not applicable to this case because in that case whether PPA executed between PTC and Swasti and PSA executed between PTC and PSEB were linked with each other was never an issue. In that case this Tribunal was considering whether restriction imposed by the State Commission on the generating company to

sell power only to a consumer and not to a trader after interpreting clause 4.1 of the implementation agreement was in consonance with the scheme of the said Act. It was the case of PTC that it has signed PPA with Swasti for purchase of power and it had back to back arrangement with PSEB for re-sale of power. While considering whether the view taken by the State Commission was right, the State Commission had to examine PTC's contention that it had back to back arrangements for re-sale of power to distribution licensee outside the State. Observation made by this Tribunal in that case that PTC had back to back arrangements with PSEB was obviously in the context of rival contentions and pleadings of the parties. It was certainly made after considering the contents of the PSA and the PPA. The said observation therefore cannot be ignored by us. We reject this submission of Mr. Johri.

**22.** The reliance placed by Mr. Johri on **M/s Jaiprakash Power Ventures Ltd.**, is also misplaced. Judgement of this Tribunal in that case turns on its own facts. There on facts this Tribunal had come to a conclusion that there was no nexus between the PPA entered into between Appellant - M/s. Jaiprakash Power

Ventures Ltd. and PTC, and the PSA entered into between PTC and Haryana Power. Hence, it was held that Haryana State Commission had no jurisdiction. Pertinently this Tribunal in the said judgment distinguished its judgment in **Pune Power** and **Lanco Power** from the facts of the said case. Therefore, on the basis of **M/s Jaiprakash Power Ventures Ltd.**, it is not possible to urge that there is no nexus between the PSA and the PPA involved in this case particularly when this Tribunal in its judgment in Appeal No.88 of 2010 rendered between the same parties has given a categorical finding that there is nexus between the PPA and the PSA involved in this case. Mr. Johri learned counsel appearing for Swasti and Mr. Sakesh Kumar, learned counsel appearing for Punjab Commission made great efforts to convince us that the facts of the present case are similar to the facts of **M/s Jaiprakash Power Ventures Ltd.** We are unable to agree with them. We reject the said submission.

**23.** In the circumstances we hold that the Punjab Electricity Regulatory Commission has jurisdiction to decide the present dispute. In view of this conclusion we allow Appeal No.214 of 2014 by setting aside impugned order dated 02/09/2013 passed

by the Punjab Electricity Regulatory Commission. We dismiss Appeal No.168 of 2014 as the Uttarakhand Commission has taken a correct view in the impugned order dated 26/03/2014 that it has no jurisdiction. Needless to say that in view of the above the IAs do not survive and are dismissed as such.

**24. Pronounced in the Open Court on this 31<sup>st</sup> day of August, 2016.**

**(I.J. Kapoor)  
Technical Member**

**(Justice Ranjana P. Desai)  
Chairperson**

✓ **REPORTABLE / NON-REPORTABLE**